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October 24, 2008

VIA ECFS

Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45

Dear Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell:

Broadview Networks, Cavalier Communications, NuVox, and XO Communications strongly oppose the adoption of any hybrid universal service contribution mechanism, and urge the Commission to seek comment on the details of any contribution reform the agency may be considering. The stated justifications for reforming the contribution mechanism include:

- Simplification of the contribution mechanism; and
- Reduction in the potential means for arbitrage.

Unfortunately, hybrid mechanisms are, by definition, complicated and susceptible to arbitrage. Moreover, serious questions regarding the limits of the Commission's authority to require contributions based upon the use of a telephone number, including how the contribution mechanisms could be configured to reflect those limits, remain unanswered, as described in more detail below. Therefore, the Commission should publish the details of any reform proposal it is considering and seek further comment from the public regarding those details. The Commission

simply cannot obtain the information it needs to craft effective reform if parties are able to comment only upon general reform ideas.

The Public Has Not Had the Opportunity to Review the Item or Recent Proposals

The universal service proceeding has been pending for over a decade, and yet the Commission is poised to adopt radical reform on November 4 based upon an item that was circulated less than two weeks ago and unavailable to the public for review, as well as proposals that AT&T and Verizon only recently filed.[1] Since the details of the radical reform the Commission is poised to adopt have not been published, the public is forced to rely upon rumor and press reports about the contents of the item and the Commission's plans.[2] We also understand that it is possible that the Commission plans to impose a number-based contribution mechanism for residential customers, but issue a Further Notice of Proposed Rulemaking regarding business customers. Rather than engaging in piecemeal reform that may undermine the stability of the fund, the Commission should issue a Further Notice of Proposed Rulemaking for all types of customers.[3] Rushing to reform under these circumstances is unnecessary, unacceptable and not prudent, particularly in light of the economic crisis the country is currently facing.

Careful review and consideration of the proposed reforms would be difficult to accomplish even under standard comment and reply comment procedures. However, it is

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1 Letter from Mary L. Henze, AT&T Services, Inc., and Kathleen Grillo, Verizon, to Marlene Dortch, WC Docket No. 06-122, CC Docket 96-45 (filed Sep. 30, 2008); Letter from Mary L. Henze, AT&T Services, Inc. and Kathleen Grillo, Verizon, to Marlene Dortch, WC Docket No. 06-122, CC Docket 96-45 (filed Oct. 20, 2008) (*Oct. 20 Joint Proposal*).

2 See "Martin Unveils Intercarrier Comp, Universal Service Reform Plan, TR Daily, October 15, 2008.

3 Letter from Gregory J. Vogt, on behalf of Consolidated Communications, Windstream, Embarq, FairPoint, CenturyTel, Iowa Tel, Frontier, to Marlene Dortch, Secretary, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (filed Oct. 21, 2008); Letter from Daniel Mitchell, NTCA, to Marlene Dortch, Secretary, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (filed Oct. 17, 2008) (urging the Commission to issue a notice and comment on its own ICC and USF proposals); Letter from Marcy C Albert, Comptel, to Marlene Dortch, Secretary, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (filed Oct. 2, 2008).

impossible to provide meaningful feedback without access to the details of the proposed reform, particularly under such a compressed time period.[4] The Commission faces no deadline or crisis that mandates reform of the universal service contribution mechanism by November 4. Therefore, the Commission should publish the details of the contribution reform proposal it is considering and provide the public with a meaningful opportunity to review and provide comment on the specific details of the proposed reform.

Hybrid Contribution Mechanisms Are Unnecessarily Burdensome and Complex

The Commission should reject all numbers/connections and numbers/revenues hybrid mechanism proposals. The purported justification for reforming the contribution mechanism is to provide a simpler, more cost effective means of assessing contributions from providers. However, hybrid contribution mechanisms are more complex and expensive to administer than the current revenues-based contribution mechanism. For instance, the hybrid numbers/revenue-based contribution mechanism reportedly under consideration by the Commission would require providers, at a minimum, to (1) maintain their current revenue tracking system; (2) adopt a means of tracking whether a number is assigned to a residential or business customer, (3) track and report numbering usage for universal service purposes, which is unrelated to the tracking that carriers must do for NRUF reporting purposes, and (4) modify billing, accounting practices, and IT resources to calculate and recover contributions based upon the type of end user. Similarly unacceptably, a hybrid numbers/**connections** contribution mechanism would require carriers, at a minimum, to (1) adopt a means of tracking whether a number is assigned to a residential or business customer, (2) track and report numbering usage for universal service purposes, which is unrelated to the tracking that carriers must do for NRUF reporting purposes, (3) track and report the speed of the connection that provides service to that customer, and (4) modify billing, accounting practices, and IT resources to calculate and recover contributions based upon the type of end user. These requirements would impose unnecessary burdens and expenses on service providers, which would increase the cost of providing service and thus harm consumers.

The complexity and ambiguity of the hybrid proposals increase implementation and compliance burdens, create additional opportunities for arbitrage, and make compliance audits by regulatory authorities much more difficult and expensive, which would far outweigh any benefits they could offer. These same flaws ultimately would make the contribution mechanism less stable and predictable. Accordingly, hybrid mechanisms would cause service

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4 The full notice and comment requirement is the keystone of the Administrative Procedures Act. 5 U.S.C. § 500 *et seq.*

providers to bear the burdens of maintaining both systems without providing any offsetting efficiencies. Therefore, the Commission should focus upon improving the current revenue methodology or developing a pure connections-based methodology rather than adopt any type of hybrid methodology.

The Latest AT&T/Verizon Proposal Would Have A Disparate Impact on Small Businesses

The hybrid numbers/connections proposal that AT&T and Verizon filed on October 20 would disproportionately impact small businesses, because it treats relatively small connections identically to much larger ones.[5] Specifically, under the *Oct. 20 Joint Proposal*, a small business paying $150/month for a DS1 would see the USF line item on its monthly bill double, from approximately $17/month to $35/month.[6] However, a large business using a connection three times faster (or more) and making much greater use of the network might see its USF line item decrease, because the same $35/connection charge applies despite its much greater use of the network. As such, their proposal would disproportionately shift the burden of funding the universal service program from carriers that serve large enterprise customers to carriers that serve small business customers. This is in direct contraction of section 254(g) of the Act that requires carriers to contribute "on an equitable and nondiscriminatory" basis.[7] The Commission should be particularly careful about taking any action that might harm small businesses or the carriers that serve them during the current period of economic upheaval.

The FCC Must Address Serious Questions Regarding the Limits of Its Authority

The Act limits the authority of the Commission to require contributions to the federal universal service fund. Under the Act, the Commission must collect contributions from "[e]very telecommunications carrier that provides interstate telecommunications services."[8] The Commission may also require "[a]ny other provider of interstate telecommunications" to contribute to universal service, ***but only to the extent that the Commission determines the "public interest so requires."***[9] Before the Commission can exercise this "permissive authority"

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5 *AT&T/Verizon Oct. 20 Joint Proposal* at 2 (proposing carriers be required to contribute $0.85/month for each telephone number, $5.00/month for each dedicated connection up to 64 kbps, and $35/month for each dedicated connection over 64 kbps).

6 Using the current contribution factor of 11.4%.

7 47 U.S.C. § 254.

8 47 U.S.C. § 254(d).

9 *Id.* (emphasis added); *see also Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538 (2006) (*Interconnected VoIP USF Order*).

to require contributions by "other providers of interstate telecommunications, it must apply the three-part test set forth in the *Interconnected VoIP USF Order*. Specifically, the Commission must find: (1) that the "provider furnishes or supplies components of a service;" (2) that the provider offers "telecommunications" that are interstate in nature; and (3) that the public interest **requires** contributions by these providers to the federal universal service fund.[10] The Commission has exercised this "permissive authority" only sparingly.[11]

In light of the limitations on the Commission's authority, the agency must address serious questions about whether a mandatory contribution requirement can be triggered solely by usage of a telephone number or its equivalent. Because telephone numbers are used by many "other providers of telecommunications," including those to which the Commission has never applied the three part "permissive authority" test, implementation of any type of a numbers-based contribution mechanism will likely run afoul of the Act.[12] Furthermore, the test outlined above requires a case-by-case determination for each type of service. Therefore, the Commission cannot make a blanket finding that the public interest "requires" contributions whenever a telephone number is used.[13] Accordingly, the Commission should not adopt a numbers-based contribution mechanism, hybrid or otherwise, until the Commission requests comment regarding which services can be required to contribute and whether any numbers-based contribution scheme that could be consistent with the limits of the Commission's authority would serve the public interest.

The Commission must also address the concerns raised by Verizon Wireless and NuVox that the Commission may lack authority to impose a contribution obligation for numbers associated with purely intrastate services, including those that meet the definition of "telecommunications services."[14] Specifically, section 152(b) of the Act denies the Commission

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10 *Interconnected VoIP USF Order*, 21 FCC Rcd at 7538-40.

11 For instance, the Commission has required contributions from private carriers, payphone aggregators, and providers of interconnected VoIP services.

12 For instance, telephone numbers are used, among other things, for PSTN to PC one-way VoIP services and one-way voice to e-mail applications.

13 *See, e.g.*, *Id.* at 7538-40.

14 *See* Ex Parte Letter from Todd D. Daubert, Counsel for NuVox, to Chairman Kevin J. Martin, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, at 4-6 (filed Oct. 8, 2008) (*NuVox Ex Parte Letter*).; Comments of Verizon Wireless, *Federal State Joint Board on universal Service*, CC Docket No. 96-45 (filed Apr. 22, 2002) (arguing that "any flat rate would represent an impermissible assessment on intrastate revenues" because the

"jurisdiction with respect to … charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communications service."[15] In order to overcome this "statutory presumption" that the Commission lacks authority over intrastate issues is for the agency to point to "unambiguous language showing that the statute [at issue] applies to intrastate matters."[16] However, the language in section 254 only authorizes the Commission to assess contributions from interstate "telecommunications services" providers.[17] Similarly, nothing in section 251 suggests that the Commission has authority over intrastate matters beyond the administration of numbers associated with intrastate services, including the authority to recover the costs of such administration. Therefore, the Commission should not adopt a numbers-based contribution mechanism, hybrid or otherwise, until the Commission requests comment upon the feasibility of identifying and tracking numbers that are used with intrastate services, and whether the public interest would be served by adopting a scheme that would require carriers to do so.

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proposed mechanism "would improperly assess contributions on all … phone connections, whether or not they generate interstate revenue.").

15 47 U.S.C. § 152(b) (emphasis added).

16 *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447-48 (5th Cir. 1999) (citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 380-81 (1999)) (*TOPUC*). The courts have rejected claims that rely upon the Commission's plenary powers or upon statutes that fail to explicitly authorize intrastate action by the Commission. *TOPUC*, 183 F.3d at 447-48; *Qwest v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001); *Vonage v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007).

17 47 U.S.C. § 254(d).

Conclusion

For the reasons set forth in this letter, Broadview Networks, Cavalier Communications, NuVox, and XO Communications urge the Commission to issue a further notice of proposed rulemaking to address the issues raised herein before adopting radical reform of the contribution mechanism.

Sincerely,

Todd D. Daubert
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