

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

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Intercarrier Compensation for ISP-Bound Traffic)	CC Docket No. 99-68
)	
IP-Enabled Services)	WC Docket No. 04-36

COMMENTS OF USA MOBILITY, INC.

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COMMENTS OF USA MOBILITY, INC.

USA Mobility, Inc. (“USA Mobility”) hereby offers the following comments in connection with the above-captioned Further Notice of Proposed Rulemaking.¹

INTRODUCTION AND SUMMARY

USA Mobility strongly opposes the imposition of numbers-based universal service fund (“USF”) assessments on paging carriers. Unlike wireline and wireless voice providers, whose customers would benefit from reduced USF charges or at most face slight increases under such a

¹ See *Universal Service Contribution Methodology*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 06-122, CC Docket No. 96-45 (rel. Nov. 5, 2008) (“*Further Notice*”).

methodology, paging carriers and their customers would be saddled with dramatically higher contribution costs. Those staggering and wholly unjustified increases would violate Section 254(d) and the Administrative Procedure Act (“APA”), because they would be inequitable, discriminatory, and arbitrary and capricious in several respects. Whatever the legal standard employed, it would be grossly unfair for a customer who pays between \$4 and \$8 a month for paging service (and makes minimal use of the PSTN) to pay the very same USF levy as a wireline or wireless voice customer who pays \$50-plus a month, and the courts have confirmed that common-sense proposition.

While the Commission is bound to comply with Section 254(d) and the APA in any case, the stakes of this proceeding are raised as the numbers-based USF charges at issue would threaten to destroy what remains of the paging industry—and thus undercut the important public safety benefits it delivers. Today, USA Mobility contributes less than \$0.10 per subscriber per month to universal service—and for most subscribers, considerably less—based on its very low interstate revenues. A monthly charge of \$1.00 or \$0.85 cannot be passed through to customers who pay between \$4 and \$8 a month in overall service and equipment charges, and neither could paging carriers absorb such costs. Indeed, in freezing paging carriers’ annual regulatory fees, the Commission has already found that they cannot pass through or absorb far smaller cost increases, given the declining state of the industry. Moreover, in the proceedings arising from Hurricane Katrina and elsewhere, the Commission has appropriately sought to promote more widespread use of paging services, in light of their vital role in facilitating emergency communications. The last thing the Commission should do in its effort to reform USF contributions is to undercut that important initiative. Accordingly, if the Commission adopts a numbers-based USF mechanism,

it should ensure that paging carriers remain subject to revenue-based charges or contribute under an alternative mechanism of the sort proposed for prepaid wireless services.

BACKGROUND

USA Mobility is the nation's largest provider of traditional one-way and advanced two-way paging services, which are forms of Commercial Mobile Radio Service ("CMRS") messaging services. USA Mobility has approximately 2.9 million units in service. Its customers are primarily hospitals and other health care institutions; police and fire departments and other local, state, and federal government agencies; and many large and small businesses. Paging services remain vital for these customer segments because of their exceptional reliability and affordability. Because paging networks rely on satellite transmission and have built-in redundancy due to simulcasting, for example, they make minimal use of the PSTN and are far less vulnerable to service outages. Moreover, paging transmitters emit more powerful signals than mobile voice transmitters, significantly improving range and in-building penetration. Most paging devices use AA or AAA batteries, thus avoiding the need for constant re-charging and ensuring continuing functionality during sustained power outages.

Notwithstanding these advantages, the paging industry faces tremendous economic challenges as a result of the migration of mass market consumers to mobile phones, PDAs, and other such devices. While the wireless voice industry has enjoyed remarkable growth, with more than 250 million units in service today,² the paging industry has faced a rapid decline in subscribership, going from 45.3 million units in service in 2000³ to approximately 4.4 million

² See Press Release, CTIA, *U.S. Wireless Subscribership Passes 250 Million Mark* (Nov. 13, 2007), available at <http://www.ctia.org/media/press/body.cfm/prid/1724>.

³ *FCC 2001 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, at 53.

today.⁴ Most of USA Mobility's paging customers generate less than \$8 per month in revenue—and a significant portion generate only about \$4 per month—whereas wireless voice carriers receive approximately \$50 per subscriber per month. The fundamental differences between paging carriers, on the one hand, and wireless or wireline voice carriers, on the other, underscore the need to avoid a one-size-fits-all approach to USF contributions.

DISCUSSION

I. **SUBJECTING PAGING CARRIERS TO DRAMATICALLY INCREASED USF CHARGES WOULD BE UNLAWFUL AND UNSOUND AS A POLICY MATTER**

The numbers-based contribution proposals set forth in the Further Notice are designed to respond to problems that have nothing to do with paging services, yet could (depending on which version were implemented) inflict severe collateral damage on the paging industry. Imposing flat monthly charges of \$1.00 or \$0.85 for each number assigned to a paging subscriber would be grossly inequitable in light of the low revenues generated by paging services. Such an assessment therefore would violate Section 254(d) as well as the APA. Subjecting paging carriers to USF fee hikes of 1,000 percent or more also would undercut the public policy benefits they deliver, as well as the Commission's own interest in promoting more widespread use of paging services by emergency responders. Indeed, as hundreds of health care providers and emergency responders have documented in the record, such disproportionate fee increases would significantly curtail their use of paging services and thereby eliminate the life-saving role they play in emergencies.

⁴ This figure is an estimate by USA Mobility's management. The latest available data from the *2008 FCC Annual Report* identified 6.1 million paging subscribers at the end of 2006. See *FCC 2008 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, at 96. Paging subscriptions have continued to erode at a rapid pace since that time.

A. The Stated Justifications for Reform Have No Application to Paging Services

As an initial matter, the draft orders identify several concerns that purport to require elimination of the revenue-based contribution system, none of which stems from the provision of paging services. Absent a reason for reform, the imposition of onerous fee increases cannot be justified as a matter of administrative law, even apart from the more specific violations of Section 254(d).⁵ First, the draft orders point to the upward pressure on the contribution factor.⁶ But the increases in contribution costs are almost entirely the result of the dramatic growth in USF disbursements: While the draft orders indicate that overall interstate telecommunications revenues declined slightly between 2000 and 2006 (approximately five percent), outlays increased by nearly 50 percent during that period.⁷ And paging carriers bear no responsibility for that growth in disbursements, because they are not even eligible to receive USF support. Indeed, that ineligibility compounds the unfairness of their rising contribution costs, as paging carriers must pay into high-cost and low-income mechanisms that only support voice carriers (including their competitors in the wireless messaging marketplace).

Second, the draft orders assert that “interstate end-user telecommunications service revenues are becoming increasingly difficult to identify as customers migrate to bundled packages of interstate and intrastate telecommunications and non-telecommunications products and services.”⁸ But that concern, too, is inapposite in the paging context. Paging carriers do not offer complex bundles of telecommunications and information services. And while they offer

⁵ See, e.g., *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (“Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking.”).

⁶ See *Further Notice*, Appendix A, ¶ 94; Appendix B, ¶ 41; Appendix C, ¶ 90.

⁷ *Id.*

⁸ *Id.*, Appendix A, ¶ 95; Appendix B, ¶ 42; Appendix C, ¶ 91.

flat-rate plans that combine intrastate and interstate usage, they can easily break out their revenues by jurisdiction or rely on the 12 percent safe harbor allocation established by the Commission.

Finally, the draft orders state that the migration to interconnected VoIP services “complicates the distinctions that serve as the basis for current contribution obligations.”⁹ Now that interconnected VoIP providers contribute directly to USF, and the Commission established a safe harbor allocation for such services, it is unclear what further complications exist. But in any case they have nothing to do with paging services. In short, whatever validity there may be to these general justifications for reform, they do not warrant massively increasing paging carriers’ overall share of the contribution burden.

B. Massively Increasing Paging Carriers’ Contribution Obligations Would Violate Section 254(d) and the APA

The numbers-based proposals rest on the assumption that a \$1.00 per number monthly fee would reduce pass-through charges for most consumers, or at most would result in a “slight” increase.¹⁰ But that is manifestly untrue in the context of paging services. As USA Mobility has previously explained, most of its customers pay monthly service charges of between \$4 and \$8 (with more at the lower end), and those revenues yield USF charges of \$0.04 to \$0.08 in most cases.¹¹ Overall, USA Mobility would face a more than tenfold increase in its total USF costs. Such a drastic increase epitomizes an inequitable levy, whether viewed from the perspective of the consumer or the service provider. It is hardly equitable for a paging customer who pays \$4 a

⁹ *Id.*

¹⁰ *Further Notice*, Appendix A, ¶¶ 112, 143; Appendix B, ¶¶ 59, 91; Appendix C, ¶¶ 108, 138.

¹¹ *See* Letter from Matthew A. Brill, Counsel for USA Mobility, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, CC Docket No. 96-45, Attachment at 8 (filed Oct. 16, 2008) (“USA Mobility Oct. 16 Letter”).

month for service (making only incidental use of the PSTN, if any) to be charged the exact same USF fee as a wireless voice customer who pays \$50-plus a month for service. Moreover, the fact that most industry segments would face lower contribution costs or modest increases only heightens the inequitable and discriminatory nature of the numbers-based charge as applied to paging.

For these reasons, subjecting paging carriers to such draconian fee increases—despite their minimal use of the PSTN and very low interstate revenues—would squarely conflict with the Fifth Circuit’s decision in *Texas Office of Public Utility Counsel v. FCC*. In that case, COMSAT argued that it was inequitable and discriminatory for the Commission to impose contribution obligations on COMSAT that exceeded its total interstate telecommunications revenues. The court found it “obvious[]” that the statutory requirement that the contribution methodology be equitable “refers to the fairness in the allocation of contribution duties,” concluding that there must be a reasonable nexus between the telecommunications revenues that give rise to the USF contribution obligation and the amount of the USF levy itself.¹² The assessment of COMSAT’s international revenues failed that test, because the Commission was unable to justify a regime that forced a class of carriers to “contribute more in universal service payments than they will generate from interstate service.”¹³

That is the precise result that would follow from imposing a numbers-based charge of \$0.85 or \$1.00 on paging carriers. The interstate portion of USA Mobility’s telecommunications

¹² *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 434-35 (5th Cir. 1999).

¹³ *Id.* at 435; see also *AT&T Corp. v. Public Utility Commission of Texas*, 383 F.3d 641, 646 (5th Cir. 2004) (reaffirming the principle that USF charges may not exceed interstate revenues, and finding state contribution requirements unlawful even absent such evidence).

revenues would be significantly less than its USF liability.¹⁴ And the draft orders no more explain such an extreme result than did the order remanded by the Fifth Circuit. In fact, they make no mention of the Fifth Circuit’s analysis at all. The Commission’s conclusory assertion that imposing more proportionate USF assessments would somehow confer unfair advantages on paging carriers cannot pass muster under Section 254(d) or the APA.¹⁵ Indeed, assessing fees on paging carriers in direct proportion to their interstate revenues is the best way to *avoid* conferring unfair advantages or disadvantages.

In addition to violating this bright-line rule that USF charges may not exceed a carrier’s interstate revenues, the imposition of \$0.85 or \$1.00 monthly charges on paging carriers would violate the APA in various other respects. Such a one-size-fits-all solution would ignore critical differences between paging carriers and other telecommunications carriers, including paging carriers’ reliance on satellite transmission, rather than the PSTN, to relay messages.¹⁶ The Commission historically has recognized these clear distinctions in regulating CMRS carriers, such as in exempting paging carriers from E911 requirements and number portability/pooling rules,¹⁷ and the draft orders fail to explain why paging carriers in this context should be lumped together with industry segments that offer very different capabilities and collect far more revenue. It also would be arbitrary and capricious to accommodate the concerns of prepaid wireless carriers—which generally collect significantly more interstate revenue than paging

¹⁴ See USA Mobility Oct. 16 Letter at 3-4, Attachment at 8.

¹⁵ See *Texas Office of Public Utility Counsel*, 183 F.3d at 434-35 (finding the FCC’s analogous approach to assessing international carriers inequitable, discriminatory, and arbitrary and capricious).

¹⁶ See, e.g., *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (holding that an agency must “justify its failure to take account of circumstances that appear to warrant different treatment for different parties”).

carriers, and thus would face less difficulty in passing through their contribution costs—while ignoring the more pressing concerns raised by the paging industry.¹⁸ Moreover, as discussed further below, Commission precedent recognizes that paging carriers (a) cannot pass through increased regulatory fees to their subscribers or absorb increased costs, and (b) deliver important public safety benefits that should be supported, rather than undercut, by regulatory policy.¹⁹ Extending numbers-based charges to paging carriers would ignore such precedent, and the draft orders offer no explanation for doing so, in violation of the APA.²⁰

C. The Threatened Increases Would Harm the Public Interest, Including in Particular the Commission’s Commitment to Public Safety

The Commission has long recognized that the distinct features of the paging industry warrant tailored regulatory solutions. Paging carriers have endured dramatic declines in subscribership, and their narrowband spectrum does not enable them to offer high-value broadband services or to pursue other growth strategies. In light of this reality, the Commission has exempted paging carriers from annual regulatory fee increases every year since 2003, observing that the permanent decline in subscribership and the spectrum-limited, geographically localized, and cost-sensitive nature of the paging industry make it impossible to pass through

¹⁷ See 47 C.F.R. § 20.18(a); *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7634 (2000).

¹⁸ See, e.g., *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”).

¹⁹ See *infra* Section I.C.

²⁰ See *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (“[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.”).

significant cost increases to subscribers and warrant “some measure of relief.”²¹ It would be nonsensical to provide relief from regulatory fee increases of a few cents per subscriber, only to saddle paging carriers with increased USF costs of some 80 to 90 cents per subscriber. As the Commission recognized in its regulatory fee decisions, paging carriers are not be able to sustain such massive increases. USA Mobility’s own economic analysis confirms that such fee increases likely would cripple what remains of the industry.²²

Numbers-based USF charges not only would greatly exacerbate the problems facing the paging industry, but also eviscerate the public interest benefits delivered by paging carriers. Most notably, the Commission has recognized that paging services play a vital role in emergency communications. During Hurricane Katrina and in the storm’s aftermath, USA Mobility’s services enabled police, fire, and emergency medical personnel to communicate when landlines and wireless phones were out of service. As a result of this and similar experiences, the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks recommended that the Commission promote more widespread use of paging devices by first responders, and the Commission agreed and directed its staff to implement that recommendation.²³ Imposing draconian fee increases that the industry cannot sustain would contradict this important policy initiative, while threatening to curtail the availability of paging services in future emergencies.

²¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, Report and Order, 18 FCC Rcd 15985, 15992 (2003).

²² See USA Mobility Oct. 16 Letter & Attachment.

²³ See *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order, 22 FCC Rcd 10541, 10544-45 (2007); see also *Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Report and Recommendations to the FCC, at 10, 24, 32, 37-38, 40 (2006).

In rejecting analogous exemption requests, the draft orders suggest that public safety benefits will drive consumers to disregard increased USF fees.²⁴ As made clear in the hundreds of letters submitted by hospital and emergency response customers of USA Mobility, however, such an assertion ignores basic economic realities: The increased USF charge unquestionably would jeopardize the ability of hospitals and emergency responders to purchase paging services, creating serious public safety concerns. No matter how valuable USA Mobility's services may be, dramatic price increases inevitably would push already-strained budgets past their breaking point.

II. IN LIGHT OF THESE LEGAL AND POLICY CONCERNS, THE COMMISSION SHOULD RETAIN REVENUE-BASED ASSESSMENTS FOR PAGING CARRIERS OR ESTABLISH A CARVE-OUT ALONG THE SAME LINES PROPOSED FOR PREPAID WIRELESS SERVICES

While the imposition of a numbers-based USF assessment of \$1.00 or \$0.85 on paging carriers would cripple what remains of the industry, such harms can be easily averted if the Commission either retains a revenue-based assessment for paging carriers or adopts an alternative mechanism of the sort proposed for prepaid wireless services.

The Chairman's proposal (both in its original and modified form), would subject only residential numbers to a flat monthly charge of \$1.00 per number, as carriers would continue to make revenue-based contributions in connection with business services, pending further consideration of alternative approaches. As USA Mobility has explained, although it believes that it should not be subject to a numbers-based USF assessment of \$1.00 or \$0.85 with respect to any subscribers, this residential-only numbers-based proposal would substantially avert the harms described above, because paging subscribers overwhelmingly consist of businesses and

²⁴ *Further Notice*, Appendix A ¶ 144 n.360; Appendix B, ¶ 92 n.228; Appendix C ¶ 139 n.351.

governmental entities.²⁵ Under such an approach, USA Mobility agrees that paging carriers should be permitted to self-certify how many of their subscribers, if any, are “residential” in nature.²⁶

While the Chairman’s proposals would not inflict significant harm (provided numbers-based charges remained confined to residential numbers), the “narrow” proposal advanced by AT&T and Verizon, as described in Appendix B to the *Further Notice*, would impose a flat \$0.85 charge on *all* telephone numbers, and thus would entail all of the legal defects and policy harms discussed above unless an alternative contribution mechanism were established for paging carriers. If the Commission were to pursue that proposal, USA Mobility proposes that the Commission simply apply a proxy charge for paging carriers that derives from paging carriers’ existing contribution levels. While paging carriers do not have “minutes of use” to compare to some base level, their average interstate revenues or existing contribution levels could be used to develop a flat charge—*e.g.*, \$0.05 per subscriber per month.²⁷ Under such a methodology, paging carriers’ USF charges would remain commensurate with their minimal use of the PSTN, and their very low interstate revenues.

²⁵ See Letter from Matthew A. Brill, Counsel for USA Mobility, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, CC Docket No. 96-45, at 2 (filed Oct. 22, 2008).

²⁶ Further Notice, Appendix A, ¶ 150; Appendix C, ¶ 145.

²⁷ See USA Mobility Oct. 16 Letter at 2 & n.5.

CONCLUSION

For the foregoing reasons, USA Mobility urges the Commission to refrain from imposing a numbers-based contribution methodology on paging carriers. If the Commission does proceed with one of the options set forth in the *Further Notice*, it should adopt one of the two residential-only versions, which would largely exempt paging carriers from the numbers-based charge. Or, if the Commission adopts the “narrow” proposal, it should establish a carve-out for paging carriers to avoid the unlawful and counterproductive imposition of an \$0.85 charge on all numbers assigned to paging subscribers.

Respectfully submitted,

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