

**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

COMMENTS OF ONSTAR CORPORATION

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OnStar Corporation (“OnStar”) hereby comments on the Further Notice of Proposed Rulemaking and the three alternative draft orders in this proceeding, released on November 5, 2008.¹

SUMMARY

OnStar, a wholly-owned subsidiary of General Motors, is a leader in the automotive telematics industry, with over 5.5 million subscribers. OnStar is proud to have assisted subscribers and others on the nation’s roadways in more than 100,000 crash incidents over the past 12 years. OnStar contributes to the universal service fund (“USF”) both indirectly, as an end-user purchaser of wireless telecommunications service for purposes of providing telematics, and directly, in the context of its provision of resold, prepaid wireless service on an optional basis to telematics subscribers.

OnStar respectfully submits that, if the Commission decides to assess USF contribution payments based on phone numbers and/or connections instead of revenues, it should adjust the methodology to ensure equitable payments from telematics companies that avoid harming public safety. The Commission should reject the approach set forth in the proposed draft orders in the

¹ *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-262 WC Docket Nos. 05-337, 96-45, 03-109, 06-122, 99-200, 96-98, 01-92, 99-68, 04-36 (released Nov. 5, 2008) (“FNPRM”).

Appendices to the FNPRM, which ignore the special circumstances of telematics companies, assess contributions far greater than the telecommunications revenues associated with the service, and mistakenly treat telematics companies as telecommunications providers rather than end users. Instead, the Commission should assess USF contributions on services that wireless carriers provide to telematics companies either on a per-minute of use basis, as the draft orders appropriately propose for prepaid wireless services, or based on a percentage of revenues, as the drafts in Appendices A and C propose for services provided to other business customers.

INTRODUCTION AND BACKGROUND

Telematics is an in-vehicle service that “provides public safety information to public safety answering points (PSAPs) using global positioning satellite data to provide location information regarding accidents, airbag deployments, and other emergencies in real time,” as noted in the FNPRM.² Significantly, in-vehicle telematics equipment is always built into the vehicle, and does not use handheld devices, contrary to a statement in the FNPRM.³ In addition to emergency assistance and critical public safety information, OnStar’s telematics service also enables motorists to access real-time vehicle diagnostics and monitoring, roadside assistance, directions, and other information services, as well as remote door-unlock and stolen vehicle location service. OnStar’s basic telematics customers can interface only with the OnStar call centers and cannot access the Public Switched Telephone Network unless they separately purchase bundles of minutes for OnStar’s prepaid calling service, which OnStar makes available as an optional, adjunct service to its core telematics subscribers.⁴

² See FNPRM, App. A ¶144 n.355; App. B ¶92 n.222; App. C ¶139 n.345. Telematics is the only wireless service that can provide location with every call to a PSAP regardless of whether the PSAP is Phase II capable.

³ *Id.*

⁴ The prepaid resold wireless service is available only to telematics subscribers, but OnStar’s telematics subscribers need not purchase the prepaid wireless service. OnStar prices and offers the two services on a separate, unbundled

In order to provide its telematics service to its customers, OnStar purchases mobile wireless telecommunications airtime from facilities-based wireless carriers. Such telecommunications constitutes only a minimal proportion of the total value of the service to core telematics subscribers, which primarily consists of the services and data provided through the call centers, the precise location information provided to first responders via GPS, and most significantly, the peace-of mind security that comes from being assured of rapid and accurate access to emergency assistance in the event of a crash. For the core telematics service, the only “telecommunications” transaction is the wireless carrier’s sale of connectivity and airtime to OnStar. OnStar is the end-user telecommunications customer in this business-to-business transaction. While a phone number is assigned to each vehicle subscribed to OnStar, the telecommunications usage for each vehicle is extremely low, due to the primarily emergency nature of the service: less than 2 minutes per month per phone number.⁵

I. THE COMMISSION SHOULD NOT IMPOSE AN INEQUITABLE PER-PHONE NUMBER CHARGE ON TELEMATICS COMPANIES

A per-phone number monthly USF surcharge on telematics phone numbers, as proposed in all three draft orders, would have a significantly adverse impact and would be grossly unfair to telematics consumers and providers. The proposed draft orders provide no rationale for their position that “providers of these services will be assessed the full per-number charge” other than that “[t]hese services are receiving the benefit of accessing the public network and therefore assessing universal service contributions on these entities is appropriate.”⁶ The drafts fail to address or even consider: (1) the unfairness and unlawfulness of forcing telematics companies to

basis: telematics is sold at flat monthly or annual rates (*e.g.*, \$18.95 per month or \$199.00 per year for the basic Safe and Sound plan), while prepaid calling is sold based on bundles of minutes (*e.g.*, \$39.99 for 100 minutes).

⁵ OnStar provided specific data on the minutes per month in the confidential appendix to its *ex parte* filing dated June 14, 2006 in CC Docket Nos. 96-45, 98-171, 92-237, 99-200, 95-116, and 98-170.

⁶ FNPRM, App. A, ¶ 144; App. B, ¶ 92; App. C, ¶ 139.

pay more in USF contributions than they generate in interstate telecommunications revenues; (2) the resulting harm to public safety; and (3) the lack of any cost-causative or competitive justification for imposing a per-number charge on phone numbers used by telematics companies. The drafts also erroneously classify telematics as a form of “telecommunications” for purposes of USF contributions and reporting requirements, which effectively would subject automotive manufacturers and pure information services that are not substitutes for telecommunications services to Title II telecommunications regulation. And the draft orders in the FNPRM fail to consider alternative, more reasonable means to assess contributions in the telematics context, such as applying the usage-sensitive equivalent approach that the draft orders appropriately propose for assessing prepaid wireless services (an approach that OnStar strongly supports), or retaining the existing revenue-based assessment methodology.

A. A Per-Number Assessment On Telematics Would Substantially Reduce Use of the Service and Would Undermine Public Safety

If a phone number-based system were adopted, and if wireless carriers were to pass through their contribution costs as per-phone number USF surcharges, OnStar and other telematics operators would face a huge increase in USF surcharge payments. The quantity of airtime used per phone number is extremely small – less than 2 minutes per month – by comparison with the average 826 minutes per month per phone used by post-paid wireless customers.⁷ Thus, if OnStar were paying (for example) 10 cents per minute for the wireless airtime, and the average usage per phone number were 2 minutes per month, then a per-phone number USF surcharge of \$0.85 or \$1.00 per month would amount to an over 10,000 percent increase in the USF assessment borne by telematics companies.⁸ Moreover, by comparison with

⁷ FNPRM, App. A, ¶ 138; App. B, ¶ 86; App. C, ¶ 134.

⁸ The arithmetic is as follows: 2 minutes per month x \$0.10 per minute = \$0.20 per month of total telecommunications usage. Using the interstate safe harbor of 37.1 percent, \$0.20 per month x 37.1% = \$0.0742 of

the current USF assessment of 11.4 percent of interstate telecommunications revenue (which on average would remain the same for ordinary telecommunications services), telematics companies would be subject to USF assessments of over 1,000 percent of interstate telecommunications revenue.⁹

In the words of U.S. Supreme Court Chief Justice John Marshall, “the power to tax involves, necessarily, the power to destroy, because there is a limit beyond which no institution and no property can bear taxation.”¹⁰ We find it difficult to believe that the FCC would select a policy that would so adversely affect a highly valuable, life-saving public safety service such as in-vehicle telematics. The Commission has “recognize[d] that telematics systems may offer location capabilities that are either equivalent, or superior, to our E911 rules”¹¹ and that “the public safety benefits of these technical capabilities are enhanced through the call centers that telematics providers have established as the initial emergency contact for their subscribers.”¹² Telematics call centers “offer and dispatch assistance for calls that are not life threatening emergency calls, such as those requesting assistance for typical roadside emergencies,” while “[f]or situations that require extensive or higher level emergency service response from public safety officials or medical emergency personnel, the call center can transfer the caller to the appropriate PSAP.”¹³ “We agree with commenters that such filtering of calls that might otherwise go to the PSAP if 911 were dialed is a valuable service that relieves pressure on

interstate telecommunications per month. $\$0.0742 \times$ the current contribution rate of 11.4% = a current USF contribution payment of \$0.0084588 per month. \$0.85 is over 100 times (10,000 percent) higher than \$0.0084588.

⁹ A \$0.85 USF fee would be 1,146 percent of the \$0.0742 of interstate telecommunications usage per month associated with telematics service.

¹⁰ *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819).

¹¹ See, e.g., *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 25340, ¶ 72 (2003) (“*Telematics E-911 Order*”).

¹² *Id.*, ¶ 73.

¹³ *Id.*, ¶ 74.

PSAPs.”¹⁴ “We find that with such capabilities, telematics services constitute an alternative to E911-capable commercial wireless services that is consistent with the public safety goals” of E911 service, including “sav[ing] lives and property by assisting emergency services personnel in doing their jobs more quickly and efficiently.”¹⁵

OnStar and other telematics companies demonstrated in *ex parte* filings that a substantial increase in the price of telematics service – which would be inevitable if a monthly USF surcharge of \$0.85 to \$1.00 were imposed – would significantly reduce the rate of subscribership to the service.¹⁶ The draft orders offer the unsupported statement that “telematics providers [could] recover the assessment from their end users. Given the public safety benefit to consumers, we find unpersuasive the telematics’ providers assertions that consumers will discontinue use of the service based on an assessment of only \$1.00 per number.”¹⁷ This is wrong and ignores uncontested evidence in the record. Telematics service is highly price sensitive, and economic analysis clearly demonstrates that a significant number of subscribers would opt not to take this life-saving service if the price were to increase by \$0.85 to \$1.00 per month.¹⁸ The cost of telematics service after the first year is not built into the price of the vehicle.

¹⁴ *Id.*, ¶ 75.

¹⁵ *Id.*, ¶ 76. *Accord*, *911 Call Processing Modes*, 15 FCC Rcd 8143, ¶ 5 (Wireless Tel. Bur. 2000) (“[T]he Telematics system should provide several valuable public safety benefits.... The fact that the Telematics system does provide location information, which can be transmitted to the PSAP in an emergency, thus adds a valuable public safety feature. Other features, such as hands-free operation, may also promote public safety.”).

¹⁶ *See, e.g.*, OnStar *ex parte* letter at 3 (filed Oct. 28, 2008); Toyota *ex parte* letter at 2 (filed Oct. 24, 2008); OnStar *ex parte* letter at 5 (June 14, 2006) & confidential attachment.

¹⁷ FNPRM, App. A, ¶ 144 n.360; App. B, ¶ 92 n.228; App. C, ¶ 139 n.351. The proposed draft orders surprisingly refer to “the public safety benefit to consumers” of telematics services (*id.*) – as if these consumers are the only beneficiaries of such public safety services. This runs counter to decades of FCC precedent and Congressional enactments. If consumers who make emergency calls were the only beneficiaries of public safety service, then there would be no reason to require carriers to offer E911 calling free of charge, no reason to allocate spectrum to public safety entities, and no reason even to refer to first responders’ services as “public” safety. Obviously the benefits of public safety service inure to a public that is broader than the subscribers to telematics services. For example, and importantly, a significant number of calls to OnStar call centers are “Good Samaritan” calls to report accidents and other emergencies affecting motorists other than the OnStar subscriber. Moreover, in multi-car crashes, the non-telematics equipped vehicle’s occupants are beneficiaries of the automatic notification as much as the occupants of the telematics subscriber’s vehicle.

¹⁸ OnStar submitted specific price elasticity data in the confidential appendix to its June 14, 2006 *ex parte*.

Rather, vehicle owners must make an affirmative choice to subscribe to OnStar’s telematics after the first year. A major price increase would lead to a significant reduction in telematics subscriptions, resulting in thousands fewer potentially life-saving and other emergency calls being connected to PSAPs.

In sum, a per-phone number USF charge on telematics services would adversely affect public safety and would be contrary to the public interest.

B. Forcing Telematics Companies to Pay More in USF Contributions Than They Generate in Interstate Telecommunications Revenues Would Violate the Act

Section 254(d) of the Act requires USF contributions to be assessed “on an equitable and nondiscriminatory basis.”¹⁹ A USF surcharge that vastly exceeds the amount of telecommunications revenues associated with the service would violate both Section 254 and the Administrative Procedure Act. Like the FCC’s original universal service methodology that was reversed by the Fifth Circuit Court of Appeals in 1999, under a per-telephone number methodology, OnStar and other telematics operators would “be forced to pay more than [they] can generate in interstate revenues.”²⁰

The Commission is compelled by law to take this problem into account in designing its contribution methodology.²¹ Where the FCC adopts a methodology resulting in a “heavy inequity” and “prohibitive costs” on a certain class of service providers, the court held that such an inequity cannot “simply be dismissed by the agency as a consequence of its administrative discretion.”²² The result “violates the equitable language of the statute.... [and] is ‘arbitrary and

¹⁹ 47 U.S.C. § 254(d).

²⁰ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999).

²¹ The proposed draft orders simply ignore this problem and do not even cite the Fifth Circuit case. *See also Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (FCC cannot ignore “circumstances that appear to warrant different treatment for different parties”).

²² 183 F.3d at 434.

capricious and manifestly contrary to the statute.”²³ Reviewing courts also have found similar state regulations to violate Section 254(f)’s “equitable” requirement.²⁴

C. Telematics Is Not a Substitute or Competitive Alternative to Telecommunications Services

The proposed draft orders incongruously assert that special treatment for telematics services “would provide them with an advantage over other services that are required to contribute based on residential telephone numbers.”²⁵ This is premised on the unfounded concept that telematics is a substitute for or competitor to wireless or wireline telecommunications services. In fact, the Commission has already found this to be untrue. “Concerning the third criterion – whether the service examined competes with traditional CMRS or wireline local exchange service, we find that the standard telematics model does not provide competition to those services. Because it does not interconnect with the PSTN ..., the standard telematics model does not offer the same capability for customers to make calls to more than one end user, *i.e.*, the telematics call center. Thus, we agree ... that telematics in its standard form does not resemble CMRS.”²⁶ A modified contribution methodology for telematics would have no impact on competition among telecommunications providers.

The proposed drafts also contend that telematics and other services “are receiving the benefit of accessing the public network and therefore assessing universal service contributions on

²³ 183 F.3d at 434-35, *citing Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

²⁴ *AT&T Corp. v. Public Utility Comm’n of Texas*, 252 F.Supp. 347, 353 (W.D.Tex. 2003) (“the Regulation is unfair because carriers who primarily provide interstate service and generate a very small amount of intrastate revenues are contributing more than their fair share into the TUSF.... Under the Regulation, a carrier who only generated \$10,000 per year in intrastate revenues, but \$1 million per year in interstate revenues, must pay \$36,000 into the TUSF. Because the Regulation provides no exemption or other mechanism by which disproportionately burdened multi-jurisdictional carriers can apply for relief, the Texas assessment is not applied in an equitable manner, and thus the regulation conflicts with Section 254(f) and is preempted.”), *aff’d*, 373 F.3d 641, 646-47 (5th Cir. 2003).

²⁵ FNPRM, App. A, ¶ 144; App. B, ¶ 92; App. C, ¶ 139.

²⁶ *Telematics E-911 Order*, 18 FCC Rcd 25340, ¶ 79.

these entities is appropriate.”²⁷ OnStar believes this misses the issue. OnStar does not take exception to the concept that “[t]hese services are receiving the benefit of accessing the public network and therefore assessing universal service contributions on these entities is appropriate.” And we do not challenge the proposition that “services that benefit from a ubiquitous public network are fairly charged with supporting the network.”²⁸ The question is not whether telematics companies should contribute (indirectly, like other end users of telecommunications services) to support universal service. The question is how. Assessing a disproportionate and excessive per-phone number payment would not “fairly charge”²⁹ telematics providers for supporting the network.

Moreover, a flat-rated monthly charge per phone number does not reflect the manner in which costs are incurred on wireless networks. Unlike wireline copper loops, wireless network facilities such as cell sites, antennas, backhaul, switching, and spectrum are all shared facilities, and incremental costs are incurred on a usage sensitive basis. For example, a single telematics subscriber who uses, on average, two minutes or less per month imposes almost no incremental costs on the underlying wireless network. Wireless carriers’ incremental investments are driven by the quantity of usage over their networks, not by the number of assigned phone numbers. Imposing the same monthly per-number charge on telematics as on applications with much greater usage is comparable to levying the same highway toll, on a monthly basis, on a moped that uses the road once or twice a month as on a fleet of eighteen-wheelers that use the road multiple times every day.

²⁷ FNPRM, App. A, ¶ 144; App. B, ¶ 92; App. C, ¶ 139.

²⁸ *Id.*

²⁹ *Id.*

II. TELEMATICS COMPANIES ARE BUSINESS END-USERS WHEN THEY PURCHASE AIRTIME FROM WIRELESS CARRIERS, AND SHOULD NOT BE TREATED AS TELECOMMUNICATIONS PROVIDERS

The draft orders propose to impose USF contribution and reporting obligations directly on telematics companies, rather than (as at present) requiring wireless telecommunications carriers to file reports and pay contributions, and permitting them to recover the cost from their telematics end-user customers via a pass-through surcharge.³⁰ Imposing Title II telecommunications regulation on automobile manufacturers and other telematics companies would be unprecedented, legally questionable, and contrary to the public interest.

As noted above, the retail telematics service that OnStar sells to motorists is an “information service” and is neither “telecommunications service” nor “telecommunications.” As such, telematics cannot be subject to universal service contribution obligations. In the words of the FNPRM, telematics “provides public safety information” and “provides location information[.]”³¹ In other words, the service “generat[es],” “acquir[es]” and “process[es] such data and makes such “information” available for the benefit of its customers “via telecommunications,” consistent with the definition of “information service” in Section 3(20) of the Act.³² The core telematics service does not afford consumers the capacity for “transmission, between or among points specified by the user, of information of the user’s choosing.”³³

Telematics is sharply distinguishable from interconnected Voice Over Internet Protocol (“VoIP”), which is subject to USF obligations even though its regulatory status has not been firmly resolved. In adopting USF requirements for interconnected VoIP providers, the Commission “emphasize[d] that interconnected VoIP service offers the *capability* for users to

³⁰ FNPRM, App. A, ¶ 103; App. B, ¶ 50; App. C, ¶ 99.

³¹ See FNPRM, App. A ¶ 144 n.355; App. B ¶ 92 n.222; App. C ¶ 139 n.345 (emphasis added).

³² 47 U.S.C. § 153(20).

³³ 47 U.S.C. § 153(43).

receive calls from and terminate calls to the PSTN.”³⁴ The Commission found that “interconnected VoIP providers are ‘providers of interstate telecommunications’ ... because they ‘provide’ “the transmission, between or among points specified by the user, of information of the user’s choosing” – “[i]ndeed, by definition, interconnected VoIP services are those ‘permitting users to receive calls from and terminate calls to the PSTN.’”³⁵ By contrast, the Commission has found that “telematics service cannot transmit and receive commercial wireless calls between the operator of the vehicle and other wireline or wireless end users. The voice and data communications are transmitted only to the telematics call centers.”³⁶ Unlike interconnected VoIP, standard telematics service “does not meet [the criteria for a service that interconnects with the PSTN] because it relies solely on a dedicated link to the call center.”³⁷

Moreover, in imposing USF requirements on VoIP providers, the Commission’s “public interest” rationale was based primarily on the principle of competitive neutrality:

“[In]terconnected VoIP service is increasingly used to replace analog voice service.... The approach we adopt today reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations.”³⁸ By contrast, the Commission has found that telematics “does not provide competition” to traditional CMRS or wireline exchange service.³⁹ And as noted above, even if the Commission had authority to impose USF reporting and direct payment obligations on telematics companies, the public interest in

³⁴ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 36 (2006), *aff’d in part, vacated in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

³⁵ *Id.*, ¶¶ 39, 41.

³⁶ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order, 18 FCC Rcd 21531, ¶¶ 17-18 (2003) (emphasis added) (“*OnStar E-911 Order*”). “Thus, [the] telematics units provided by OnStar that are not capable of providing wireless calling service are not within the [CMRS] definition of Section 20.3, and therefore, not subject to the E911 requirements of section 20.18(g) of the Commission’s rules.” *Id.*

³⁷ *Telematics E-911 Order*, ¶ 71.

³⁸ *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, ¶ 44.

³⁹ *Telematics E-911 Order*, ¶ 79.

supporting this critical life-saving public safety service militates against imposing such an obligation.

The only telecommunications transaction involved in pure telematics service is the wireless telecommunications carrier's sale of airtime and connectivity to the telematics company on a bulk basis. It is that telecommunications transaction – not the telematics company's interactions with its own retail information service subscribers – that is relevant to USF contribution requirements. Telematics companies are business end users. Accordingly, the Commission should reject the proposal in the draft orders to classify telematics as a residential service.⁴⁰ If the Commission adopts different contribution systems for telecommunications services provided to residential vs. business customers, then the services that wireless carriers supply to telematics companies clearly fall within the business category.

III. THE COMMISSION SHOULD EITHER APPLY A USAGE-BASED ASSESSMENT OR RETAIN A REVENUE-BASED SYSTEM FOR WIRELESS SERVICE SOLD TO TELEMATICS COMPANIES

The Commission could adopt several alternative methods to address this concern. First, in the context of a telephone number-based assessment methodology, the Commission could apply assessments to services provided to telematics operators on a per-minute of use basis, derived as an equivalent to the phone number-based charge that applies to other customers. This is precisely the same solution that the draft orders propose to apply to prepaid wireless service – the so-called “USF by the Minute Plan” proposed by TracFone.⁴¹ OnStar strongly supports that proposal for prepaid wireless service, and urges that the same solution be used for telecommunications services sold to telematics companies. As with prepaid wireless providers, the “USF by the Minute Plan” for wireless service sold to telematics providers would impose a

⁴⁰ FNPRM, App. A, ¶ 144 n.360; App. B, ¶ 92 n.228; App. C, ¶ 139 n.351.

⁴¹ FNPRM, App. A, ¶ 138; App. B, ¶ 86; App. C, ¶ 134.

contribution burden that is commensurate with that imposed on conventional postpaid wireless service. This would avoid the manifestly unreasonable imposition of extraordinarily high increases in contribution burdens upon a public safety service like telematics.

In the alternative, the Commission could continue to use a percentage of interstate revenues methodology to assess contributions on telecommunications services sold to telematics companies. For example, under the proposals set forth in the draft orders in Appendices A and C, services sold to telematics companies, like those sold to all other business end-users, would continue to be subject to USF contributions based on a percentage of interstate revenues.⁴²

CONCLUSION

For the reasons stated above, the Commission should reject the proposals in all three of the draft orders attached to the FNPRM and should decline to impose a monthly per-phone number USF assessment on telematics phone numbers. Instead, the Commission should either adopt a usage-based assessment for telecommunications services sold to telematics companies, or retain the existing revenue-based system in the context of telematics.

⁴² FNPRM, App. A, ¶ 133; App. C, ¶ 129.

Respectfully submitted,

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