Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

REPLY COMMENTS OF THE INTERNATIONAL TELCOM, LTD.

International Telcom, Ltd. ("ITL"), by its attorneys, hereby submits these reply comments in the above-captioned proceeding in response to the Further Notice of Proposed Rulemaking issued on November 5, 2008.[1] ITL agrees with the many commenters that believe the Commission's USF contribution proposal fails to address limitations on the Commission's authority to collect contributions from certain types of carriers, that the Commission's arbitrary

[1] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Services; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109; WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 99-68, WC Docket No. 04-36, Order on Remand & Report & Order & Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008).

exemption of some numbers from contribution requirements will skew telecommunications markets, and joins in the concerns raised by many that the costs and burdens associated with implementing the proposed contribution reforms outweigh the resulting benefits.

I. The Commission Lacks Authority To Implement the Proposed USF Contribution Mechanism Without Exemptions For Purely Intrastate Services and Purely International Services

All three of the proposals released by the Commission on November 5, 2008, included nearly identical provisions imposing a contribution requirement on virtually all telephone numbers, regardless of the services with which the numbers are associated, based upon authority granted to the Commission in "section 254(d), Title I, and section 251(e)."[2] Although ITL was pleased that the Commission has proposed to exclude numbers associated with purely intrastate numbers from contribution requirements, ITL is troubled by the Commission's failure to recognize the limitations on its authority.[3] As pointed out by the USA Coalition, RCA, and others, the rationale for the contribution mechanism included in all three proposals fails to recognize that the Commission lacks authority to assess numbers associated with purely intrastate services and numbers associated with purely international services.[4]

With respect to intrastate services, section 152(b) of the Communications Act of 1934, as amended, ("the Act") denies the Commission "jurisdiction with respect to … charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate

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[2] Appendix A ¶ 98; Appendix B ¶ 45; Appendix C ¶ 94.

[3] Appendix A ¶ 104 ("We will only require providers to contribute to universal service based on the Assessable Numbers or connections that are capable of originating or terminating interstate or international communications"); Appendix B ¶ 51(same); Appendix C ¶ 100 (same).

[4] RCA/USA Coalition Comments at 28-31; Broadview Networks, Inc., Cavalier Tel., NuVox, & XO Commc'ns Comments at 49-54 ("Broadview *et al.* Comments").

communications service."[5] As the Fifth Circuit has noted, to overcome this "statutory presumption" that the Commission lacks authority over intrastate issues, the Commission must point to "unambiguous language showing that the statute [at issue] applies to intrastate matters."[6] None of the sections of the Act cited in the proposals provide the Commission with the authority to adopt the proposed contribution methodology reforms.

The Commission first cites to section 254 of the Act, but not only does section 254 not provide jurisdiction over intrastate services or international services, but it includes additional limitations on the Commission's authority to collect universal service contributions. As RCA and the USA Coalition have explained, under section 254, the Commission must require contributions only from providers of "interstate telecommunications services," and may require contributions from "[a]ny other provider of interstate telecommunications," but only to the extent that the "public interest so requires."[7] Although the proposed orders recognize that not every provider which would be subject to the mandatory contribution requirement is a "telecommunications carrier," the proposed orders claim that, "[nonetheless], we have authority to require them to contribute."[8] In support of this claim, the proposed orders state merely that "all of these providers provide – directly or indirectly – some amount of interconnection to the public switched telephone network (PSTN)," which benefits consumers"[9] and that "it is in the

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5 47 U.S.C. § 152(b) (emphasis added).

6 *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).

7 RCA/USA Coalition Comments at 29; 47 U.S.C. § 254(d).

8 Appendix A ¶ 103; Appendix C ¶ 99.

9 *Id.*

public interest . . . . that these providers contribute."[10] This blanket statement is insufficient to demonstrate that every provider of a intrastate or international service that uses a number necessarily provides interstate telecommunications as required by section 254, and it does not constitute a reasonable public interest analysis.[11]

Similarly, as other commenters have pointed out, neither section 251(e) nor Title I provide sufficient authority to overcome section 152(b)'s general denial of authority over intrastate services and section 254's limitations on the USF contribution assessment of "providers of telecommunications" (as opposed to "telecommunications carriers.")[12] Section 251(e) provides the Commission with jurisdiction only to administer the numbering plan itself and to recover costs associated with "administration arrangements."[13] It does not provide any authority to assess charges for other purposes, such as universal service. The Commission's claims to ancillary jurisdiction under Title I are equally ineffective because ancillary jurisdiction cannot be used to expand the Commission's authority into areas where the Commission's authority is otherwise limited, lest the jurisdictional limitations in the Act cease to have any meaning.[14]

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10 *Id.*

11 In order to require contributions from these "other providers of interstate telecommunications," the Commission must make a three part finding that: (1) the "provider furnishes or supplies components of a service"; (2) the provider provides "telecommunications" that are interstate in nature; and (3) the public interest requires contributions by these providers to the federal universal service fund. *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538 (2006) (*Interconnected VoIP USF Order*).

12 Broadview *et al.* Comments at 54; *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).

13 47 U.S.C. § 251(e).

14 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999) ("The Commission could not, for example, regulate any aspect of intrastate communication not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.").

The proposed contribution mechanism also fails to recognize that the Commission lacks authority under the Act to impose contribution requirements upon numbers associated with purely international services. In the *First Report & Order*, the Commission found that carriers that provide only international telecommunications services are not "telecommunications carriers that provide interstate telecommunications services," and, therefore, are exempt from mandatory universal service contribution obligations.[15] One example of such services is international "call-back" services.[16] These services make use of U.S. telephone numbers, but provide purely international services when used to connect calls between end-users not located in the United States.[17] These services lack the interstate element necessary to allow the Commission to include them in assessing universal service contributions. As such, numbers associated with this and other international services should not be considered Assessable Numbers, and the Commission must include an exemption for such numbers in any numbers-based contribution mechanism it adopts.

II. Numbers Associated With Functionally Identical Services Should Receive Identical Treatment Under Any Contribution Reform Proposal Adopted by the Commission

To the extent that the Commission determines that some enhanced services should be exempted, ITL believes that one-way VoIP calling and stand-alone voicemail applications should be included in such exemptions. However, ITL opposes requests by Google, OnStar, and other commenters that the Commission exempt services for which subscribers pay no fees from

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15 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 779 (1997) (*First Report & Order*).

16 *See, e.g., Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-Back Service*, Order, 18 FCC Rcd 6077 (2003) (declining to enforce foreign restrictions on international call-back services).

17 *Id.*

USF contribution requirements.[18] ITL joins Embarq in believing that "if the Commission does adopt a numbers-based contribution mechanism, then … any exemptions should be kept to a minimum."[19] Thus, ITL supports the Chairman's proposals to the extent that the proposals "decline to exempt telematics providers, stand-alone voice mail providers, one-way service providers, and two-way paging services from contributing based on numbers" because "granting exemptions for these services would provide them with an advantage over other services that are required to contribute."[20] However, ITL opposes exclusion from the definition of "Assessable Number" those numbers that are used merely for routing purposes in a network …[when] such numbers are always … provided without charge to the end user, [and] are used for routing only to Assessable Numbers for which a universal service contribution has been paid."[21] This exclusion is problematic because it allows for the use of numbers, contribution free, by service providers offering "no-charge" services (*i.e.*, supported by advertising) despite the fact that the services provided are virtually identical to those provided by service providers that directly charge the customer for such services. This result is neither competitively neutral nor justified in the proposals.

Ultimately, ITL believes that this and other proposed exemptions threaten to undermine the new rules the Commission seeks to adopt as every party subject to contribution

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18 Google Comments at 10 (supporting exemptions for service providers offering free services); OnStar Comments at 10 (seeking exemptions for telematics providers).

19 Embarq Comments at 18.

20 Appendix B ¶ 92; Appendix C ¶ 139; *see also* Appendix A ¶ 144. Appendix A includes an exclusion of stand-alone voice mail providers from contribution requirements. In keeping with its belief that extensions should be minimized, ITL joins Embarq in not supporting such an exemption. Embarq Comments at 19.

21 Appendix A ¶ 119; Appendix B ¶ 71; Appendix C ¶ 115.

requirements will seek an exemption.[22] However, to the extent that the Commission adopts such an exemption for "free services," ITL believes that this concern could be rectified by limiting the exception for "free services" to instances where calls to the exempted number are routed to an end user served by the same entity as the exempted number, thus ensuring that no service provider receives a free pass on USF contributions. Alternatively, to the extent these services are exempted, ITL respectfully submits that functionally identical services should be exempted even if the subscriber chooses to pay the fees for those services directly, because the source of revenue for a service should be irrelevant for universal service purposes. To hold otherwise would provide a unwarranted competitive advantage to services supported in "non-traditional means" (*e.g.*, advertising) *vis-à-vis* traditional end-user supported services.

III. The Proposed Contribution Mechanism Would Be More Complicated And Expensive To Administer Than The Current Revenues-Based Mechanism.

As Verizon has noted, the hybrid contribution methodologies described in the proposed orders would be neither easy to implement nor administer.[23] Rather, the hybrid contribution methodologies described in the proposed orders would be more complex than the current revenues-based methodology because of the numerous distinctions contributors would be required to track as carriers maintain the "old" contribution accounting method for some

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22 *See e.g.*, OnStar Comments at 10 (requesting exemption for telematic companies); TracFone Comments at 2-3 (supporting a USF by the Minute plan); Google Comments at 10 (supporting exemptions for service providers offering free services); AT&T/Verizon Notice of Ex Parte Communication, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (filed Sep. 30, 2008) (proposing exemptions for subscribers purchasing additional numbers on family plans).

23 Comments of Verizon at 32-41.

customers and develop a new contribution accounting method for others.[24] For example, the proposed hybrid contribution methodologies would create the following distinctions, each requiring both contributors and end users to keep extensive records as to whether a particular numbers is:

- assigned to a residential/wireless or business customer;
- assigned to a carrier that is not subject to the Commission's permissive authority under section 254(d); [25]
- assigned to a purely intrastate number, a purely international number, or a number with an interstate component; and
- whether the services provided to a customer "are the functional equivalent of numbers and otherwise meet our definition of Assessable Numbers." [26]

Each of these distinctions increases the complexity and ambiguity associated with the hybrid methodologies described in the proposed orders.

As RCA and the USA Coalition have made clear, "[c]omplexity and ambiguity increase the burdens of compliance, create additional opportunities for arbitrage, and make compliance audits much more difficult, which ultimately would make the contribution mechanism less stable and predictable. Instability harms end users, particularly residential end users who are less likely to be able to take steps to reduce their universal service contribution obligation and who face greater harm from unexpected increases in contribution levels."[27]

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24 Comments of Verizon at 36 ("This proposal would require providers to contribute based on telephone numbers for residential services, but continue to contribute to the USF on revenues from business services.").

25 Appendix B ¶ 65. ITL notes that many contributors would be left attempting to guess whether any particular end user is subject to the Commission's permissive authority under section § 254. This will lead to disputes with customers as to whether the carrier or the customer is responsible for making USF contributions. As part of any final reform plan, the Commission must provide clearer guidance to carriers as to which party bears responsibility for contributing to the universal service fund.

26 Appendix A ¶ 129; Appendix B ¶ 77; Appendix C ¶ 125.

27 RCA/USA Coalition Comments at 32 (citing Appendix A ¶ 106).

Ultimately, the Commission must determine whether imposing new burdens upon contributors during already difficult economic times will benefit consumers. ITL believes that any contribution mechanism will certainly increase costs in the short term during the transition period for carriers, and will likely increase costs to end users in the long term as additional record-keeping costs are passed through to customers. Indeed, additional record keeping requirements may act as a barrier-to-entry for would-be telecommunications market entrants. ITL believes that the costs associated with this new proposal exceed its benefits, and should be rejected. Given the current uncertain economic situation, ITL believes that the proposals to modify the contribution mechanism should be rejected because the costs associated with the new proposals exceed their benefits as they would discourage investment, cost jobs, and require businesses to bear additional costs.

IV. CONCLUSION

For the reasons set forth above, ITL urges the Commission to reject the contribution proposals published in the Order & NPRM, and to carefully consider alternatives that are competitively neutral.

Respectfully submitted,

Todd D. Daubert
J. Isaac Himowitz
Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007-5108
(202) 342-8400
(202) 342-8451 (facsimile)
tdaubert@kelleydrye.com

Counsel for the International Telcom Ltd.