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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***In the Matter of High Cost Universal Service Support; Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service, Ex Parte of the Ad Hoc Coalition of International Telecommunications Companies, WC Docket Nos. 05-337 and 06-122, CC Docket No. 96-45***

Dear Ms. Dortch:

By this letter, the Ad Hoc Coalition of International Telecommunications Companies ("Coalition") responds to the Reply Comments filed by Verizon and Verizon Wireless ("Verizon") in the above-captioned proceedings on November 12, 2009 ("Comments"). In particular, the Coalition clarifies certain mischaracterizations of its position on reporting and contributing to the Universal Service Fund ("USF") based upon prepaid calling card ("PPCC") revenues.

In its Comments, Verizon suggests that the Coalition requests that PPCC providers "pay *nothing at all* on revenue from cards sold through third-party distributors."[1] First, the Coalition clarifies that the issue does not pertain to cards sold "*through*" distributors, but rather cards sold, on a wholesale basis, "*to*" third-party distributors who may private label and resell these cards to the public -- a business arrangement which is very similar to 1+ toll resale. Verizon's

[1] Verizon Reply Comments at 4.

description illustrates its fundamental misunderstanding of the PPCC industry and its unique structure.

Second, contrary to Verizon's understanding, the Coalition does not advocate complete exemption of all PPCC distributor revenues. Instead, the Coalition has explained that under Federal Communications Commission ("FCC" or "Commission") Rules, third-party PPCC distributors do not qualify as "end-users."[2] Therefore, at present, revenues received from sales of PPCCs to third-party distributors should not be reported as retail "end-user" revenues. Nowhere in its comments does the Coalition adopt the position enunciated by Verizon. Rather, as discussed, the Coalition merely cited to its pending Petition for Declaratory Ruling before the FCC in which it asked the Commission to reclassify PPCC providers' distributor revenues in accordance with its Rules.[3]

As discussed in its pending Petition, the FCC's Rules and related orders clearly demonstrate an intent not to assess USF fees at the wholesale level.[4] Further, the common definition of "end-user" excludes wholesale providers.[5] The USF administrator, Universal Service Administrative Company's ("USAC") Instructions to USF reporting worksheet, Form 499-A ("Instructions"), represent the only "rules" that could conceivably require a PPCC provider to report revenues from the sale of PPCCs to third-party distributors as retail "end-user" revenues for USF purposes.[6] However, USAC's Instructions fail to qualify as "rules" because, in adopting the Instructions, USAC neglected to follow the procedures required by the Administrative Procedures Act ("APA"). That is, the comments were neither subject to the requisite Public Notice nor did USAC afford the public an opportunity to comment on the proposed "rules."[7] Verizon, itself, recognizes this fatal flaw in the USAC Form 499 Instructions.[8]

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[2] *In the Matter of the Ad Hoc Coalition of International Telecommunications Companies' Petition for Declaratory Ruling Regarding Universal Service Fund Contributions ("In re Coalition")*, Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings that: (1) Qualifying Downstream Carriers May Choose Either to Accept Supplier Pass-through Surcharges or Pay Universal Service Fees Directly; and (2) Prepaid Calling Card Providers' Distributor Revenues are Not "End-user" Revenues and Allowing Reporting of Actual Receipts Only, or in the Alternative, to Initiate a Rulemaking to Address these Issues, filed Feb. 12, 2009 ("First Petition") at 11-13.

[3] *See* Coalition Comments at 2 ("In its First Petition, the Coalition asked that the Commission declare that PPCC providers' distributor revenues do not qualify as 'end-user' revenues, subject to USF fees.") (citing First Petition at 3).

[4] First Petition at 12.

[5] *Id*. at 12-13.

[6] *See* 2009 Instructions to Federal Communications Commission, Telecommunications Reporting Worksheet, Form 499-A ("Instructions") at 27-28, available at http://www.fcc.gov/Forms/Form499-A/499a-2009.pdf ("All prepaid card revenues are classified as end-user revenues.").

[7] *See* 5 U.S.C. § 551, *et. seq.*

Thus, to the extent USAC's Instructions substantively alter the Commission's USF rules instead of merely interpreting existing law, they fall under the APA and are invalid because they fail its procedural prerequisites.[9]

Rather than dismissing the Coalition's proposal out of hand, as suggested by Verizon's Reply Comments, the Commission should heed the specific request in the Coalition's Petition for Declaratory Ruling by issuing a declaration that existing FCC rules do not support treatment of revenue from third-party distributors as anything other than "wholesale" revenue. As clarified herein, such a declaration –to the extent retroactive only and not prospective—is actually supported by Verizon.

PROSPECTIVE POSITION OF THE COALITION ON USF REFORM

The Coalition is comprised of a wide variety of international long distance service providers, including domestic and non-U.S. corporations, wholesale carriers and retailers, subscribed and pre-paid providers, as well as Internet-based and IP-in-the-Middle providers that facilitate the transmission and routing of international communications over traditional switched networks and advanced, IP-based networks.[10] While some members of the Coalition

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[8] *See In the Matter of High Cost Universal Service Support; Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service*, WC Docket Nos. 05-37 and 06-122, CC Docket No. 96-45, Comments of Verizon and Verizon Wireless at 8, n. 13 ("Regardless of any purported discrepancy between the Form 499-A itself and its Instructions, neither the Commission nor the Bureau on delegated authority can impose substantive requirements through changes to the form itself or its instructions, without adhering to the requirements of the Administrative Procedures Act ("APA")). *See* 5 U.S.C. § 553; *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (finding that a rule that "substantively changes a preexisting legislative rule. . .can be valid only if it satisfies the notice-and-comment requirements of the APA"); Comments of Verizon and Verizon Wireless at 2-3, CC Docket No. 96-45, USAC Audit Report No. CR2005CP007 (FCC filed Oct. 1, 2009) ("Verizon/Verizon Wireless Comments on Global Crossing Bandwidth Request for Review"). As Verizon has explained, "to avoid the confusion and uncertainty that results when the Bureau alters the Form 499-A or its Instructions in a manner that appears to alter substantive contribution requirements, the Commission should annually identify any proposed changes to the form and/or instructions in a 'tracked changes' format, and it should publish those proposed changes for comment before they take effect.").

[9] *See* First Petition at 11; IDT Corporation and IDT Telecom Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed June 30, 2008) ("IDT Request") at 2, 7 ("Since the instructions implement, interpret and prescribe the Commission's policy with respect to the definition of end user revenue and also set forth the rights, duties, and obligations of contributors to the universal support mechanisms, these instructions operate as a substantive rule under the APA."), 8-11.

[10] *See* www.telecomcoalition.com.

are engaged in domestic services, all members are predominantly engaged in the international communications market. The Coalition is committed to seeking fair and equitable treatment of its predominantly international and international only service providers, including, but not limited to PPCC providers and the suppliers they rely upon to provide consumers with international calling opportunities at historically low rates.

Prospectively, the Coalition advocates that any USF support system adopted by the FCC should achieve the objective of ensuring low cost, widely available international long distance. Furthermore, the Coalition believes that funding of any support programs should be consistent with basic concepts of fairness and aligned with existing federal precedent which is illustrative of an appropriate balancing of interests. Existing precedent results in the imposition of greater support burdens on those entities which both: (A) impose burdens on the Public Switched Telephone Network ("PSTN") and (B) derive benefits from an expansive PSTN, while striking an appropriate and equitable balance by minimizing the support burdens on those providers that do not.[11] Beyond just the USF, the Coalition advocates applying these same basic principles of equity and fairness to all other FCC-governed federal funds, including but not limited to the Telecommunications Relay Services ("TRS") Fund. Presently, there is a significant imbalance between the amount of financial support contributed to the TRS Fund by international providers and the volume of international TRS usage.[12] Therefore, to the extent the FCC undertakes comprehensive USF reform, the Coalition urges the Commission to also reform the funding mechanisms associated with the TRS Fund and other programs in a manner which

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[11] *See, e.g., Texas Office of the Public Utility Counsel v. FCC*, 183 F.3d 393, 434-35 (5th Cir. 1995) ("*TOPUC*").

[12] For example, the National Exchange Carrier Association ("NECA") has unlawfully assessed TRS Fund fees on "international only" service providers, apparently justifying the assessments on a 2006 FCC Order. In 2006, the Commission found that carriers whose revenue derives primarily from the provision of "international" communications services should support TRS because their customers can use international TRS. *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, CG Docket No. 03-123 (Rel. May 16, 2006) ("Telco Group Order"). However, the FCC's jurisdiction over "international" services is limited to those with one end-point in the U.S. *In the Matter of Petition of AT&T, Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route*, 2009 WL 1674884 at *7. According to the Act, Congress created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication." 47 U.S.C. § 151. The Act defines "foreign communication" as "communication from or to any place in the United States to or from a foreign country." 47 U.S.C. § 153(17); *see also Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999); 47 U.S.C. § 152(a). That is, wholly international communications- those merely traversing the U.S. but originating or terminating abroad- do not qualify as "international" communications as the term is used by the Commission in the Telco Group Order. *See also In the Matter of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket 98-67, Comments of Teleco Group, Inc.

fairly and equitably applies to predominantly international and international only service providers, consistent with existing federal precedent.

Contrary to Verizon's assertions, the Coalition does not advocate rules that would "so obviously favor one type of business arrangement over another."[13] Rather, the Coalition's objective is to highlight unique distinctions between the markets for international and domestic communications services and to advocate for policies which do not unduly and unfairly burden providers operating in the highly competitive international communications services industry. The Coalition wants to make clear that it does not seek to exclude predominantly international and international only service providers from contributing their fair share of support. However, consistent with existing federal precedent, in determining what constitutes a "fair share," the FCC must take into consideration the largely <u>domestic</u> purposes of the public interest programs for which support is sought.

Over the past 30 years, the FCC's policies have aimed to facilitate low-cost international communications services. These policies have proven wildly successful in lowering the cost of international calling. But, maintaining the historically low rates is proving difficult in light of the increased support burdens and other regulatory impositions, such as the Carrier's Carrier Rule. These regulatory burdens are unabashedly aimed at shoring up support for flagging domestic public interest programs. The Commission must act now to relieve these inequitable burdens and implement reform measures which prevent predominantly international and international only service providers from bearing disproportionate support costs.

The imposition of inflated costs places competitive disadvantages on companies engaged in the international communications marketplaces, particularly vis-à-vis companies offering computer-originated international calling services, which remain wholly exempt from regulatory burdens. While the Coalition is fully supportive of Internet-based communications and, indeed, has members who benefit from the proliferation of these services, the Coalition reminds the Commission that all Americans do not yet have access to a computer. Many Americans, particularly the elderly and those with lower incomes, tend toward the use of traditional forms of communications services, especially when it comes to making international calls. Thus, the very individuals the FCC's policies aim to assist are, more and more, becoming disadvantaged by the Commission's failure to recognize the vast distinctions between the international and domestic communications markets. The Coalition urges the Commission to ensure that any USF reform measures it adopts in the future make affordable international communications services available to all Americans, not just those wealthy enough to afford computers and Internet Access.

In order to ensure continued access to affordable international communications, the Commission must reform the current support and contribution systems, not just for USF, but other public interest programs. The FCC must recognize differences between domestic and

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[13] Verizon Reply Comments at 6.

international services. In fact, if the Commission decides to retain a contribution system that is "revenue-based," the Coalition would advocate establishing rules that treat international services and international revenue *differently* than domestic services and revenue, to ensure fairness and equity. And if the Commission pursues a "numbers-based" or "connections-based" model, as advocated by companies like Verizon, the Coalition would urge the Commission to evaluate the impact of such proposals on predominantly international and international only communications service providers and the market for international communications services. In short, the Coalition urges the Commission to avoid the temptation to view such proposals in a vacuum. By taking into consideration the vast differences between the domestic and international marketplaces and accepting these marketplaces as distinct, the Commission would have the proper framework from which to develop long-lasting, fair and equitable support regulations.

Should you have any questions in this matter, kindly contact the undersigned.

Respectfully,

/s/

Jonathan S. Marashlian