

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Universal Service Contribution Methodology) WC Docket No. 06-122
)
Request for Guidance Filed by the Universal)
Service Administrative Company)

**COMMENTS OF
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

The National Telecommunications Cooperative Association (“NTCA”)¹ hereby submits these comments in response to the Public Notice² issued by the Wireline Competition Bureau in the above-captioned proceeding. The Notice seeks comment on a request for guidance submitted by the Universal Service Administrative Company (“USAC”) with respect to whether text messaging revenues should be reported as telecommunications revenues or non-telecommunications revenues for purposes of universal service fund (“USF”) contribution.

Although the letter transmitted by USAC appears to focus primarily on whether text messaging might constitute “telecommunications” for purposes of USF contribution,³ USAC

¹ NTCA represents more than 570 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service local exchange carriers and many of its members provide wireless, video, broadband Internet, satellite, and/or long distance services to their communities; each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended.

² *Wireline Competition Bureau Seeks Comment on Request for Guidance Filed by the Universal Service Administrative Company*, WC Docket No. 06-122, Public Notice (rel. May 9, 2011) (the “Notice”).

³ Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, Wireline Competition Bureau (filed Apr. 26, 2011) (“USAC Letter”).

also notes that a petition has been pending since December 2007 to seek a declaratory ruling that text messaging is a “telecommunications service.”⁴ Indeed, there is both good cause and ample reason to consider text messaging a “telecommunications service” in the first instance, rather than merely “telecommunications.” In the alternative, however, NTCA urges the Federal Communications Commission (the “Commission”) to confirm that text messaging constitutes “telecommunications” that is subject to USF assessment, and/or *at a minimum*, to exercise its ancillary authority to require continued contributions with respect to revenues derived from text messaging services.

Text Messaging as Telecommunications Service

The Communications Act of 1934, as amended (the “Act”) defines a “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁵ In turn, “telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁶ Text messaging simply permits a consumer to send (or receive) text of his or her choosing in lieu of sending or receiving a comparable communication through audible means. Text messaging does not provide “access to

⁴ *Id.* at 4 (citing *Petition of Public Knowledge et al. for Declaratory Ruling Stating Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules*, WT Docket No. 08-7 (filed Dec. 11, 2007)).

⁵ 47 U.S.C. § 153(46).

⁶ *Id.* at § 153(43). As USAC has noted, the Form 499-A instructions issued by the Commission incorporate this same definition of “telecommunications.” USAC Letter at 2 (citing Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, February 2008, at 4).

the Internet,” does not typically involve a change in the protocol of the message on an end-to-end basis,⁷ and is addressed by reference to telephone numbers that are part and parcel of the public switched telephone network (“PSTN”). Moreover, the mere fact that a carrier’s system may make several attempts to transmit a text message before “giving up” does not equate to some kind of enhanced “store and forward” feature – this is not an enhanced feature, but rather a network management tool to accommodate phones that may be unable to receive text messages at a given time (*e.g.*, where a mobile phone is turned off). Finally, text messaging service is offered for a fee to the public, and is available on nearly every cell phone marketed today with or without a specific “data plan.”⁸ Thus, text messaging fits squarely within the statutory definition of a “telecommunications service,” and revenues derived from such services should therefore continue to be subject to USF contribution pursuant to Section 254 of the Act.⁹

⁷ Even if for the sake of argument there were a “net protocol conversion” in the case of texts that may originate or terminate on a computer or to email services, and even if such a protocol conversion were deemed relevant for purposes of determining the nature of the communication, this does not render *every* text message or the fundamental service provided to the customer “enhanced” in nature. Nor does the fact that text messaging may be used to receive data from electronic databases necessitate classification as an “information” service. For example, a telephone customer can dial an information service and retrieve sports scores or weather updates from an electronic database, but that does not mean the service purchased by the customer is itself an “information service.”

⁸ See, *e.g.*, “Messaging FAQs” (available at: <http://www.wireless.att.com/learn/messaging-internet/messaging/faq.jsp?>) (“**Q. Is my phone ready for Text Messaging?** **A.** Most wireless phones support Text Messaging. If you have an older phone that is no longer sold online, call Customer Care at 1-800-331-0500 or dial 611 from your wireless phone. . . . **Q. What is the pricing for Text Messaging?** **A.** All AT&T customers with Text Messaging-capable phones are pre-activated to send and receive messages at \$0.20 per message with no monthly charge. Or, you can save money and sign up for a Text Messaging package.”).

⁹ 47 U.S.C. § 254(d).

Text Messaging as Telecommunications

If the Commission is not yet prepared on policy grounds or for other reasons to classify text messaging as a “telecommunications service,” there are several other avenues by which it can and should confirm that text messaging revenues are subject to USF contribution. For example, text messaging qualifies also as “telecommunications,” and the public interest dictates that text messaging should therefore be subject to USF contribution pursuant to Section 254.¹⁰

The Commission has recognized that “the heart of ‘telecommunications’ is transmission.”¹¹ As USAC explains, text messaging simply involves the transmittal of short messages to and from handheld wireless devices.¹² There is no change in the format in which such messages are sent or received or the content of the consumer’s communication, as “[p]lain text is sent and plain text is received.”¹³ There could be few more straightforward examples of “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹⁴

Indeed, when one considers what other services have been categorized as “telecommunications,” it would seem illogical to exclude text messaging from this category. For

¹⁰ *See id.* (“Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.”)

¹¹ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Declaratory Ruling, 19 FCC Rcd 3307, 3312 (2004), at ¶ 9.

¹² USAC Letter at 2 (citing Newton’s Telecom Dictionary 1116 (25th ed. 2009); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking, 23 FCC Rcd 11703, 11712 (2008), at ¶ 19).

¹³ USAC Letter at 2.

¹⁴ 47 U.S.C. § 153(43).

example, “wireless telephony, including cellular and personal communications services” is subject to USF contribution as “interstate telecommunications.”¹⁵ Similarly, the Commission has on multiple occasions compared text messaging to paging and messaging service,¹⁶ which in turn is clearly within the scope of “interstate telecommunications” subject to USF contribution. Put another way, the service that enables text messaging and the service that is most comparable to text messaging are both “interstate telecommunications.” In light of the fundamental nature of text messaging as a means of sending plain text from point A to point B, and the way in which comparable services have been categorized, the only logical result is that text messaging likewise should be considered “telecommunications.”

Moreover, it is in the public interest to require providers of text messaging to contribute to universal service based upon the revenues received from end users of such services. Providers of text messaging benefit from use of the PSTN – in fact, text messaging would not exist but for the PSTN, relying upon telephone numbers for the addressing of text messages and upon CMRS wireless networks (a number of which have themselves been constructed through the use of USF support) as the physical vehicle for transmission.¹⁷ To the contrary, to the extent that the

¹⁵ Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, February 2008, at 4.

¹⁶ *See id.* at 2 (citing FCC Second Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services 51, 12 FCC Rcd 11266, 11322; *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 6562, 6571 (2009) , at ¶ 17).

¹⁷ *See, e.g., Universal Service Contribution Methodology*, WC Docket No. 06-122, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *1998 Biennial Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, *Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and*

Commission were to find that text messaging services now should *not* contribute to USF, the public interest would be *harmed*, as this would create artificial incentives for consumers to “text” one another in lieu of placing voice calls, since the former would be exempt whereas the former is subject to USF contribution.¹⁸ Indeed, finding now that text messaging revenues are exempt from contribution would only place greater pressures on the USF at a time when the contribution factor hovers above 14% and no immediate relief is in sight absent long-awaited and much-needed comprehensive contribution reform.¹⁹ Thus, the Commission should confirm that text messaging squarely fits within the definition of “telecommunications” set forth in the Act, and that pursuant to Section 254(d), the public interest can only be served by continuing to assess providers of such telecommunications for USF contributions.

Fund Size, CC Docket No. 92-237, NSD File No. L-00-72, *Number Resource Optimization*, CC Docket No. 99-200, *Telephone Number Portability*, CC Docket No. 95-116, *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, *IP-Enabled Services*, WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541 (2006) (“*VoIP USF Order*”), at ¶ 43 (“The Commission has previously found it in the public interest to extend universal service contribution obligations to classes of providers that benefit from universal service through their interconnection with the PSTN.”)

¹⁸ It is of course fine and appropriate for the market to dictate such conduct and consumer choice, but such conduct should not be driven in any way by the presence or absence of a regulatory fee that is assessed upon one communication option and not upon another comparable/substitutable option.

¹⁹ NTCA has long advocated for comprehensive reform, in addition to seeking specific confirmation of the requirement to contribute to USF based upon text messaging revenues. *See Ex Parte* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 06-122 and 05-337; GN Docket No. 09-51 (filed Dec. 20, 2010), at presentation slide 8 (noting the need to reaffirm the contribution obligation of text messaging providers). Confirming that text messaging revenues are assessable for purposes of USF contribution would represent a necessary and useful step forward in temporarily stemming the tide in further deterioration of the contribution base, but such one-off “band-aids” – as important as they may be – cannot be considered a meaningful substitute for long-term, comprehensive reform that shores up the foundation of universal service.

Ancillary Jurisdiction

Finally, the Commission could further find that text messaging should be subject to USF contribution pursuant to an exercise of its ancillary jurisdiction under Title I of the Act.

Although the Commission must always be careful to seek out a firm and substantive statutory tether in any such exercise of authority, such a link exists here and the exercise of ancillary jurisdiction would be more than appropriate under these circumstances.

Any exercise of ancillary jurisdiction must satisfy a two-prong test: (1) does the Commission have subject matter jurisdiction over the service to be regulated; and (2) is the assertion of jurisdiction “reasonably ancillary” to the Commission’s “effective performance” of its statutory duties?²⁰ As in most other cases involving any potential exercise of ancillary jurisdiction, the first prong of this test is easily satisfied with respect to text messaging. Text messaging is a “communication by radio”²¹ that falls within the Commission’s subject matter jurisdiction under section 2(a) of the Act.²²

With respect to the second prong, Section 254 of the Act provides a clear substantive statutory basis upon which to extend USF contribution obligations to text messaging providers. Section 254 requires the Commission to establish “specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service.”²³ Text messaging is by definition a

²⁰ *Comcast Corp. v. FCC*, 600 F.3d 642, 646-47 (D.C. Cir. 2010).

²¹ *See* 47 U.S.C. § 153(33) (“The term ‘radio communication’ or ‘communication by radio’ means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.”).

²² *Id.* at § 152.

²³ *Id.* at § 254(d).

substitute for consumers calling one another via the same devices, and the wireless industry touts the astounding pace at which text messaging has increased in recent years.²⁴ If consumers migrate from calling one another to texting one another at the current pace, this will almost certainly adversely affect the revenue base that supports USF,²⁵ even as “these providers continue to benefit from their interconnection to the PSTN.”²⁶ Confirmation by the Commission that text messaging revenues are subject to USF contribution would therefore be “reasonably ancillary” to the “effective performance” of the Commission’s responsibilities under Section 254(d).

Conclusion

For the foregoing reasons, the Commission should confirm that text messaging is a “telecommunications service” that has been and remains subject to USF contribution requirements pursuant to Section 254(d) of the Act. Alternatively, the Commission should confirm that text messaging has been and remains “telecommunications,” and that the public interest requires continued contribution to USF based upon text messaging revenues. Finally, to the extent that the Commission cannot reach a decision on either of the preceding points, it should exercise its ancillary jurisdiction and confirm that text messaging has been and remains

²⁴ See, e.g., *CTIA-The Wireless Association® Announces Semi-Annual Wireless Industry Survey Results*, Press Release, dated Mar. 23, 2010 (reporting that **822 billion** text messages – amounting to almost **5 billion messages per day** – were sent and received on networks during the last half of 2009), available at: <http://www.ctia.org/media/press/body.cfm/prid/1936>.

²⁵ Indeed, this dynamic may already be eroding the USF contribution base to the extent that assessable wireless revenues have been declining or remaining relatively constant in recent calendar quarters notwithstanding the substantial growth in wireless services. This would be a clear indication that the self-determination by some providers that text messaging should not be reported as assessable revenues for purposes of USF contribution is already undermining the objectives of universal service.

²⁶ See *VoIP USF Order*, 21 FCC Rcd at 7543, ¶ 48.

subject to USF contribution requirements because to find otherwise would undermine the statutory mandate to “preserve and advance universal service.”

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 06-122, DA 11-583, was served on this 6th day of June 2011 to the following persons:

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