

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

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In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51
	)	
_____	)	

**COMMENTS OF NOBELTEL, LLC**

NobelTel, LLC (“NobelTel”), by its attorneys, hereby submits these comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceedings. NobelTel provides prepaid end-user telecommunications services in the United States. As more than 99% of NobelTel’s revenues are attributable to the provision of international services, NobelTel currently qualifies for the Limited International Revenues Exemption (“LIRE”) under applicable rules. For the reasons stated below, NobelTel submits that the Commission should retain the LIRE, although NobelTel does support establishing an annual exemption threshold to ensure that the LIRE is more effective in achieving its purpose.

***THE FCC SHOULD RETAIN AND EXPAND THE UNIVERSAL SERVICE FUND EXEMPTIONS FOR INTERNATIONAL TELECOMMUNICATIONS REVENUES***

The Commission’s current rules establish two closely-related exemptions for imposing Universal Service Fund (“USF”) contribution obligations on international revenues. The first exemption provides that a carrier providing 100% international services is not required to make USF contributions because it does not qualify as a provider of “interstate telecommunications

services” under section 254(d).<sup>1</sup> The second exemption, known as the LIRE, provides that an entity need not pay USF contributions on its international revenues if its total interstate end-user revenues are less than 12% of total interstate and international end-user revenues.<sup>2</sup>

***A. The 100% International Carrier Exemption.***

As the Commission has recognized, the first exemption is mandated by statute and may not be rescinded or modified by agency action. Section 254(d) provides that the USF contribution obligation applies to “[e]very telecommunications carrier that provides interstate telecommunications services.”<sup>3</sup> In turn, the term “interstate communication” is defined to exclude communications or transmissions that do not both originate and terminate within the United States.<sup>4</sup> The Commission’s permissive authority to expand the coverage of the USF contribution obligation also is limited to “[a]ny other provider of interstate telecommunications.”<sup>5</sup> Hence, a telecommunications carrier providing 100% international services is not, and may not be, subject to the USF contribution obligation under section 254(d).

In its original decision implementing section 254(d), the Commission agreed with this analysis, holding that the USF contribution obligation does not apply to 100% international carriers. The Commission stated: “We find that carriers that provide only international telecommunications services are not required to contribute to universal service support mechanisms because they are not ‘telecommunications carriers that provide interstate

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<sup>1</sup> See 47 U.S.C. § 254(d).

<sup>2</sup> See 47 C.F.R. § 54.706(c).

<sup>3</sup> See 47 U.S.C. § 254(d).

<sup>4</sup> See 47 U.S.C. § 153(22).

<sup>5</sup> See 47 U.S.C. § 254(d).

telecommunications services.”<sup>6</sup> The Commission reiterated: “[T]he statute precludes us from assessing contributions on the revenues of purely international carriers providing service in the United States.”<sup>7</sup> The Commission reported its decision to Congress,<sup>8</sup> and it has consistently recognized and applied this principle for the last 15 years.<sup>9</sup> Therefore, the Commission must continue to exempt international-only carriers from USF contribution obligations.

***B. The LIRE.***

In an effort to minimize the scope of the international-only exemption, and thereby maximize the revenues subject to USF contributions, the Commission held in its original 1997 rulemaking that every telecommunications carrier providing interstate services must pay USF contributions on 100% of its international revenues. In effect, once a carrier provided even one dollar of qualifying interstate service, all of its international revenues would become immediately subject to the USF contribution requirement. This created a situation where carriers providing largely international services could face disproportionate USF contribution burdens based on a minuscule amount of interstate services. Indeed, it created the very real possibility that many carriers would be required to pay USF contributions many times larger than the entirety of their interstate revenues that triggered the USF obligation in the first place.

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<sup>6</sup> *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9174 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11562 (1998) (Report to Congress) (“The Commission found that section 254(d) does not permit us to require carriers that provide only international telecommunications services to contribute because these carriers are not providing ‘interstate telecommunications services’”).

<sup>9</sup> *E.g., In the Matter of Federal-State Joint Board on Universal Service*, 19 FCC Rcd 17763, 17764 (2004) (Chief, Wireline Competition Bureau) (“carriers that provide only international telecommunications services are not ‘telecommunications carriers that provide interstate telecommunications services,’ and, therefore, are exempt from the mandatory universal service contribution obligation”).

Comsat Corporation (“Comsat”) challenged the Commission’s decision before the U.S. Court of Appeals for the 5<sup>th</sup> Circuit in a case that ultimately became *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999) (“*TOPUC*”). Comsat earned roughly \$3.5 million in interstate revenues compared to roughly \$376.5 million in international revenues (roughly equal to 1% of Comsat’s entire revenue base).<sup>10</sup> Further, most of Comsat’s interstate revenues related to exempt wholesale services, so Comsat’s end-user interstate telecommunications revenues subject to USF contributions were approximately \$380,000, or 1/10 of 1% of Comsat’s total revenues.<sup>11</sup> The Commission’s rule required Comsat to pay USF contributions on 100% of its international end-user services even though interstate end-user services constituted the merest sliver of its revenue base. Even at the comparatively low contribution factors applicable at the time, this resulted in Comsat paying roughly \$5 million in USF contributions, which exceeded its entire base of interstate revenues and was more than 13 times larger than its qualifying end-user interstate revenues.

The *TOPUC* Court<sup>12</sup> held that the Commission’s rule plainly violated the statutory requirement that USF contributions must be “equitable and nondiscriminatory.” Citing the “heavy inequity” of requiring Comsat to incur a loss in order to participate in the market for interstate services, the *TOPUC* Court held that whatever discretion the Commission may have when implementing the USF regime cannot extend to such an unfair and discriminatory result.<sup>13</sup>

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<sup>10</sup> See Brief of Petitioner Comsat Corporation, filed Feb. 23, 1998, No. 97-60421, Texas Office of Public Utility Counsel, et al., v. FCC (5<sup>th</sup> Circuit), at pp. 15-18.

<sup>11</sup> *Id.*

<sup>12</sup> 183 F.3d at 433-35.

<sup>13</sup> *Id.* at 434.

The Court went so far as to suggest that if this outcome did not violate the “equitable and nondiscriminatory” standard, it was difficult to imagine anything that would.<sup>14</sup>

In response to the *TOPUC* decision, the Commission in 1999 adopted Section 54.706(c),<sup>15</sup> which provides that a carrier whose interstate end-user telecommunications revenues are less than a certain percentage of its total interstate and international end-user telecommunications revenues is exempt from USF contributions for its international revenues.<sup>16</sup> The percentage was initially established at 8% and raised to 12% in 2002.<sup>17</sup> The purpose of the rule was to prevent the Comsat scenario, namely, a carrier owing more in USF contributions than its entire interstate revenue base. There have been no changes to the threshold percentage since 2002 even though the USF contribution factor has risen steadily.

In the FNPRM<sup>18</sup> the Commission asks whether it should eliminate the LIRE in order to resolve putative competitive distortions caused by the fact that some carriers must pay USF contributions on their international revenues while others who qualify for the LIRE do not. NobelTel strongly opposes eliminating or reducing the LIRE. There is no concrete evidence of any material market problems caused by the LIRE. Hence, it is sheer speculation that terminating the exemption would benefit competition or consumers. Moreover, eliminating the LIRE would not cure the alleged problem. Carriers providing 100% international services will always qualify for a USF contribution exemption because they are not “interstate” carriers within the meaning of Section 254(d). The Commission does not have discretion under the statute to

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<sup>14</sup> *Id.*

<sup>15</sup> 47 C.F.R. § 54.706(c).

<sup>16</sup> *In the Matters of Federal-State Joint Board on Universal Service; Access Charge Reform*, 15 FCC Rcd 1679, 1687-88 (1999).

<sup>17</sup> *In the Matter of Federal-State Joint Board on Universal Service*, 17 FCC Rcd 3752, 3806 (2002).

<sup>18</sup> *See FNPRM* at ¶ 200.

repeal this exemption. Given the speculative nature of any benefits from removing the LIRE, the fact that doing so would affect only a subset of carriers who today pay no USF contributions on their international revenues ensures that removing the LIRE would not achieve the Commission's claimed objective. Indeed, removing the LIRE could well do more harm than good, as it would encourage carriers with small interstate revenues to exit the interstate market entirely in order to qualify as 100% international-only carriers. Viewed in this context, repealing the LIRE would affirmatively harm competition and consumers by erecting a barrier to entry into the market for interstate telecommunications services.

Further, the extent of the benefit conferred by the LIRE to date has been overstated. Some carriers qualifying for the LIRE purchase underlying facilities from U.S. carriers who do not so qualify. These underlying carriers must make USF contributions on the revenues they earn from their wholesale services, and they recoup these contributions via contract from their international carrier customers through USF surcharges.<sup>19</sup> The result is that, in some cases, LIRE-qualifying carriers make indirect USF contributions through the USF surcharges imposed by their wholesale carriers. In light of the diminished measure of the net monetary benefits yielded by the LIRE, there is no basis to conclude that the LIRE has any discernible adverse impact on competition or consumers in the U.S. international telecommunications market.

Moreover, there is a significant disparity between the carriers who qualify for the LIRE and those who do not. The former typically are small carriers, many of them wholly or partially resellers, while the latter are in many cases among the largest carriers in the United States.

Whatever small benefit may be conferred by the LIRE is offset, and more, by the enormous

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<sup>19</sup> It should be noted that the Commission's proposed modifications to the USF exemption certificate language should eliminate any situations where a LIRE-qualifying carrier could avoid paying a contractual USF surcharge based on the USF contributions it makes for its interstate services.

economies of scale and scope enjoyed by the largest integrated carriers. Indeed, the fact that LIRE-qualifying carriers have not grown to dominate the U.S. international market in the 13 years since the LIRE was adopted is mute testimony to the limited competitive advantage, if any, that they receive from this exemption.

In any event, the reasons animating the *TOPUC* decision are still fully applicable today. It is inherently inequitable and discriminatory in violation of section 254(d) to impose USF obligations on a carrier that are greater than its entire interstate revenue base. Indeed, we would suggest it is inequitable and discriminatory to impose USF obligations that comprise a commercially unfair portion of a carrier's interstate revenue base. If a carrier has, say, \$5 million in interstate revenues, there is certainly no basis for requiring it to pay more than \$5 million in USF contributions. Nor is there any basis for requiring it to pay some lesser amount, say, \$2.5 million, that would threaten the carrier's ability to sustain interstate market entry. Put in other words, it is just as inequitable and discriminatory to require a carrier to pay USF contributions of \$4.9 million on an interstate revenue base of \$5 million as it is to require that carrier to pay USF contributions in the amount of \$5 million plus one dollar.

As noted above, NobelTel finds itself in the same position as Comsat did in the late 1990s. Interstate revenues constitute approximately 1% of NobelTel's combined interstate and international end-user revenues. Were the LIRE abolished, NobelTel would either have to pay a horrific penalty in the form of USF contributions greatly in excess of its interstate revenue base, or exit the interstate market. Under the "inequitable and discriminatory" language in Section 254(d), it is unlawful for the Commission to force NobelTel to make that choice.

### ***C. Exempting All International Revenues.***

NobelTel submits that the Commission should combine the two existing international revenue exemptions into a single exemption covering all international revenues. NobelTel submits that this is what Congress intended in section 254(d), and it is the most natural and only plausible reading of the pertinent language. Further, creating a single exemption for all international revenues would remove once and for all any concerns about competitive harm that may be caused when some carriers pay USF contributions on their international revenues while others do not. The only way to address this concern effectively is to exempt all international revenues from USF contributions.

The Commission has said on many occasions that no one has challenged the lawfulness of the LIRE – *i.e.*, the Commission’s authority under the statute to impose a USF contribution obligation on a carrier for its combined interstate and international end-user revenues. While that is true, it is also the case that no court has upheld this authority. NobelTel submits that section 254(d) cannot reasonably be read to cover non-interstate revenues. As even the Commission has recognized over the years, 100%-only international carriers are exempt because they do not provide any interstate service. However, there is no logic, and certainly no authorization, to imposing a USF contribution obligation on international revenues just because the carrier also provides interstate service. It is a carrier’s interstate services that trigger the USF contribution obligation, and that obligation should therefore be limited to the carrier’s interstate revenues. A carrier’s interstate and international revenues are readily segregable, and the USF obligation can readily be imposed solely on the carrier’s interstate revenues.

The Commission’s view appears to be that once a carrier provides interstate service, all the carrier’s revenues from any source may be subject to USF obligations. But this viewpoint

quickly leads to an untenable outcome. For example, if a carrier provided interstate service and manufactured shoes, Congress could not possibly have intended for the Commission to have discretion to impose a USF obligation on the entity's shoe revenues. Yet under section 254(d), there is no difference between international revenues and shoe revenues – neither is “interstate” and hence both are outside the scope of the section.

It is no rejoinder to argue that international carriers somehow “benefit” from the Public Switched Telephone Network (“PSTN”) when they provide international services, and therefore they should be made to pay USF contributions for the PSTN's continued support. As the Commission knows well, many U.S. international carriers provide services primarily or even exclusively to business customers over non-PSTN facilities. As the Commission recognizes throughout the FNPRM, international carriers provide MPLS-based services, international private line services, IP-VPN services, and many other services that do not use the PSTN. These carriers do not “benefit” in any obvious way from the USF subsidies to the PSTN. Further, given the Commission's recent decisions to migrate USF distribution away from the traditional PSTN over time, the force of this policy rationale is even weaker going forward.

The Commission itself has correctly refrained from imposing USF obligations on the settlement and settlement-like revenues earned by U.S. international carriers who terminate traffic from other countries even though foreign carriers clearly benefit from being able to terminate traffic on the PSTN in the United States.<sup>20</sup> Indeed, the U.S. Trade Representative has strongly criticized countries who have imposed USF surcharges on incoming international traffic despite the benefit that U.S. carriers receive from being able to terminate international calls on

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<sup>20</sup> See 2012 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A), at 13 (excluding “[i]nternational settlement and settlement-like receipts for foreign-billed service”).

foreign local networks.<sup>21</sup> The benefits received by U.S. international carriers from the PSTN in the United States are equally marginal and cannot justify the imposition of USF obligations.

***D. Restructuring the LIRE.***

In the event the Commission decides to retain the LIRE, and without conceding that the Commission has authority to levy a USF assessment on any international revenues, NobelTel supports modifying the current rules so that the threshold percentage is calculated in advance on a yearly basis. The current 12% threshold was adopted in 2002 and has not been altered even though the contribution factor has continued rising. In order to effectively ensure against a repeat of the inequitable and discriminatory outcome rejected by the TOPUC court, the Commission should set the threshold percentage annually, and it should do so in advance so that carriers have maximum certainty when conducting their business operations and making quarterly USF payments.

Respectfully Submitted,

**NobelTel, LLC**

By: *Randall W. Sifers*

Robert J. Aamoth  
Randall W. Sifers  
Kelley Drye & Warren LLP  
3050 K Street, NW  
Suite 400  
Washington, D.C. 20007  
Telephone: (202) 342-8400  
Facsimile: (202) 342-8451

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<sup>21</sup> See, e.g., U.S. Trade Representative, Results of the 2010 Section 1377 Review of Telecommunications Trade Agreements, at pp. 6-7 (urging Jamaica to repeal its USF surcharge on incoming international calls and to restructure its USF program so that costs are borne “by the domestic operators who benefit from it”).