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Cable&Wireless Worldwide

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20534
06 July 2012

Re: WC Docket No. 06-122 & GN Docket No. 09-51

Dear Ms. Dortch:

Cable & Wireless Americas Operations, Inc. ("CWAO"), an indirect wholly-owned subsidiary of Cable & Wireless Worldwide plc, hereby submits these comments in response to the *Further Notice of Proposed Rulemaking* ("FNPRM") released by the Commission on April 30, 2012 in the above-referenced rulemaking proceedings. CWAO provides international and domestic telecommunications and information services to non-U.S. based telecommunications carriers as well as to large multi-national business customers with offices in the United States and one or more other countries.[1]

CWAO currently qualifies under the Limited International Revenues Exemption ("LIRE") established by the Commission in 1999 in response to the decision by the U.S. Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*"). In the FNPRM, the Commission has asked for comments on whether it should consider repealing or paring back the LIRE. By this letter, CWAO respectfully urges the Commission to retain the LIRE.

CWAO submits that the LIRE is required on both policy and legal grounds. Section 254(d) of the underlying statute authorizes the imposition of Universal

[1] Pursuant to an agreement between Vodafone Europe B.V. ("Vodafone") and Cable & Wireless Worldwide plc, Vodafone will acquire *de jure* and *de facto* control over CWAO, and its parent company Cable & Wireless Global Network Limited (Ireland), upon consummation of the transaction. *See* FCC Public Notice, Report No. TEL-01566S, rel. June 22, 2012 ("Streamlined International Applications Accepted For Filing").

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Service Fund ("USF") contribution obligations only on providers of "interstate" services. The Commission has correctly recognized previously that the statutory definition of "interstate" (*see* 47 U.S.C. § 153(22)) excludes international services and, therefore, that USF obligations may not be applied to international-only U.S. telecommunications carriers. Under the well-established doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the Commission may not expand the scope of the USF contribution obligation when, as here, Congress has directly spoken on the issue.

While CWAO provides a certain amount of interstate services, and therefore does not qualify as an international-only provider, CWAO submits that the LIRE is a logical, and by virtue of the *TOPUC* decision a lawfully required, outgrowth of the international-only exemption. The earning of a single dollar in "interstate" revenues should not function as a mechanism to subject a carrier's entire international revenue stream to USF contributions. In many cases, this could have the effect of forcing the carrier to pay total USF contributions far in excess of its triggering "interstate" revenues. It was for precisely this reason that the *TOPUC* Court determined that such an outcome would violate the requirement in section 254(d) that USF obligations must be "equitable and nondiscriminatory."

As a practical matter, repealing the LIRE could have the effect of eliminating the segment of the U.S. telecommunications industry in which CWAO and other carriers presently operate. Many carriers offer primarily international telecommunications services to business customers while also providing certain U.S. domestic services on a much smaller scale to meet customer needs. Were the LIRE to be repealed, CWAO and other carriers would probably have to forego offering U.S. domestic services in order to qualify under the international-only exemption. This would require the reassessment of some existing business relationships, as well as the potential reconfiguration of provisioning and serving arrangements. This would cause significant customer inconvenience and hardship while imposing unnecessary costs on customers as they transitioned to new arrangements. In addition, repealing the LIRE would make it more difficult for smaller international carriers to compete effectively against the largest integrated U.S. carriers, who would be able to offer one-stop-shopping arrangements that the smaller international carriers could not offer efficiently.

Should the Commission decide to retain the LIRE, CWAO believes the current rule, including the 12% threshold for eligibility, is adequate to the purpose and complies with the *TOPUC* ruling. At the same time, CWAO would not object to establishing the percentage on a periodic basis, and it submits that doing so annually would be the optimal solution for business and customer planning purposes.

However, CWAO objects to the Commission's suggestion that carriers qualifying for the LIRE should nevertheless pay USF contributions on some portion of their international revenues. This would suffer from the same defect as the original rule which the *TOPUC* Court struck down. Although the amount of the penalty imposed on the U.S. carrier would be reduced compared to the original rule, it would not be eliminated and therefore would continue to violate the statutory requirement that USF obligations be "equitable and nondiscriminatory." Certainly, carriers like CWAO would find it difficult to compete effectively against international-only carriers, whose entire revenue stream would continue to be free from USF contribution obligations.

As a general matter, CWAO urges the Commission to be cautious in considering new USF contribution obligations in connection with IP-VPN and other international services, whether they be telecommunications services or information services. While U.S. industry contracts typically have provisions permitting the seller to pass through regulatory fees and USF payments to the buyer, such contract provisions are far less common outside of the United States, and in certain parts of the world they are almost non-existent. Hence, the ability of a U.S. international carrier, such as CWAO, to pass through any new obligations to its non-U.S. based customers is problematic. Certainly, many existing contracts do not contain pass-through provisions so the burden of this would sit directly with CWAO. Therefore, imposing new USF obligations on international carriers would have a very real potential to make certain services and lines of business unprofitable. At a minimum, the Commission should establish grandfather rules so that any new USF contribution obligations would not apply to pre-existing contracts which do not permit pass-throughs.

With respect to the issue of establishing a value-added USF program, CWAO urges the FCC not to adopt such a program. The U.S. industry does not have the established imputation methodologies, or experience with the value-added approach, necessary for such a program to work smoothly. Further, the administrative and transitional problems of moving to a value-added approach from the current regime would be enormous. It would take years before the Commission, industry and consumers were on the same page about the details of such a program, and the implementation costs would be horrendous. Moreover, there could be material market and competitive dislocations, especially if there were perceived to be loopholes in the new rules and parties aggressively sought to exploit them. In addition, CWAO submits that moving to a value-added program would be far more problematic for the Commission's auditing and enforcement capabilities than a continuation of the current system.

Similarly, CWAO supports continuing with the current revenues-based approach rather than migrating to a new system based on connections (or capacity), numbers, or some combination thereof. The complexity of a completely new approach would almost guarantee that the transitional, administrative, and other implementation costs would be enormous and ongoing. In addition the inevitable ambiguities and inadvertent outcomes with a new methodology would risk creating significant market and competitive distortions.

Lastly, in situations where the carrier is able to negotiate a contract authorizing the pass-through of USF payments, CWAO supports the current approach of permitting a separate USF line-item on the invoice. CWAO believes this approach is now working reasonably well, and that customers are familiar with this surcharge and generally understand its purpose and application.

Respectfully submitted,

/s/ Helen Watson

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