

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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 iBASIS, INC.**

iBasis, Inc., (“iBasis”) submits these comments in response to the Federal Communications Commission’s (“Commission”) April 30, 2012, Further Notice of Proposed Rulemaking in the above captioned proceeding.<sup>1</sup> iBasis focuses these comments on two aspects of the *Notice* that relate to potential reforms of the revenue-based system: (1) contribution obligations for international calls; and (2) contribution rules for prepaid calling card providers. Although these comments focus on possible revisions should the Commission retain the revenue-based system in whole or in part, the Commission also should consider utilizing an appropriate connections-based approach where doing so improves efficiency and promotes an equitable and nondiscriminatory contribution methodology.

**I. Introduction and Summary**

iBasis is both a wholesale and retail provider of communications services. By far its largest business is as a wholesale VoIP provider of international voice termination services. The vast majority of its wholesale revenue is derived from international calls. This service relies on public and private IP networks to transport fixed and mobile calls to more than 240 countries. iBasis’s retail service consists of prepaid calling cards and a web-based prepaid calling service

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<sup>1</sup> Universal Service Contribution Methodology, *Further Notice of Proposed Rulemaking*, 27 FCC Rcd 5357 (2012) (“*Notice*”).

named Pingo. As with its wholesale business, iBasis’s retail prepaid traffic is overwhelmingly international. iBasis urges the Commission to take the following actions if it continues to apply the revenue-based methodology:

- Retain the limited international revenues exemption (“LIRE”) so as to preclude predominantly international carriers from having to pay more in Universal Service Fund (“USF” or “fund”) contributions than they earn from interstate services, a result that the Fifth Circuit has held to be a violation of the Act.
- Clarify requirements for prepaid calling card providers by limiting reporting and contribution obligations to the amounts that they directly collect from their customers.

## **II. The Commission Cannot Lawfully Eliminate the LIRE**

The Commission seeks comment on whether to eliminate the “limited exemption for providers whose revenues are exclusively or predominately international.”<sup>2</sup> It is important to note at the outset that at issue here is not whether international calling should be subject to contribution. It is subject to contribution today and it would be reasonable to continue to include international revenues in the contribution base, but only so long as the carrier also provides some interstate service, as defined by the statute and the Commission. The Commission is statutorily precluded from assessing contributions on carriers that provide no interstate communications.

The Commission also is legally constrained when it comes to assessing contribution requirements on carriers with *de minimis* interstate revenues in relation to their international revenues. The Fifth Circuit has found that it is a *per se* violation of section 254’s “equitable and non-discriminatory” language to require a carrier that provides both interstate and international

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<sup>2</sup> Notice, 27 FCC Rcd at 5428, ¶ 193.

services to pay more in USF contributions than it earns from interstate revenues.<sup>3</sup> The LIRE is designed to preclude that outcome. The Commission’s policy arguments regarding the growth of international traffic cannot overcome these legal barriers.

The Commission here is not writing on a clean slate. It previously found that “the statute precludes us from assessing contributions on the revenues of purely international carriers providing service in the United States, even though we believe that they, too, benefit from our universal service policies.”<sup>4</sup> This conclusion is compelled by statutory definitions. The Commission may only assess mandatory contributions on “interstate telecommunications services” and its discretionary authority is limited to “interstate telecommunications.”<sup>5</sup> The statute defines “interstate communication” as communication or transmission from any state, territory or possession “to any other State, Territory or possession.”<sup>6</sup> Interstate thus excludes a communication between any state and a foreign country. The statute in fact draws a clear distinction between interstate communications and foreign communications. The statute defines a “foreign communication” as “communication or transmission from or to any place in the United States to or from a foreign country.”<sup>7</sup> A carrier that provides only “foreign communication” does not provide interstate service and thus cannot be required to contribute to universal service. Courts have repeatedly held that “[w]here different terms are used in a single

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<sup>3</sup> *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 433-35 (5<sup>th</sup> Cir. 1999) (“*TOPUC*”), sub. history omitted.

<sup>4</sup> Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 9174, ¶ 779 (2007) (“*First Universal Service Order*”), sub. history omitted.

<sup>5</sup> 47 U.S.C. § 254(d).

<sup>6</sup> 47 U.S.C. § 153(22).

<sup>7</sup> 47 U.S.C. § 153(17).

piece of legislation, the court must presume that Congress intended the terms to have different meanings.’”<sup>8</sup>

Having found that it was statutorily precluded from assessing contributions for international-only services, the Commission nonetheless concluded in its initial Universal Service Order that it was statutorily permissible to assess contributions on all of the revenues of a carrier that provides both international and interstate services, even if interstate revenues were a de minimis portion of the company’s overall revenues. It stated, “[w]e believe that it nonetheless equitable and nondiscriminatory, given all of the principles that guide our actions here, to assess contributions, where the statute permits it, on the international revenue of carriers providing service in the United States that benefit from universal service.”<sup>9</sup>

In *TOPUC*, the Fifth Circuit reversed this finding to the extent that it imposed payment obligations in excess of interstate revenues.<sup>10</sup> In relevant part, *TOPUC* involved a challenge to the Commission’s determination to impose a contribution requirement on all international revenues by COMSAT, a predominantly international carrier that derived “such a small portion of its revenues from interstate service that it would end up with universal payment obligations exceeding its interstate revenues.”<sup>11</sup> The Court upheld COMSAT’s argument that this “bizarre outcome” violated section 254(d)’s requirement that contribution obligations be equitable and nondiscriminatory” and that it contravened the Commission’s own principle of competitive neutrality. The Fifth Circuit held that requiring a carrier to contribute more to the USF than it

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<sup>8</sup> *Vonage Holdings Corp.*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) (citing *Transbrasil S.A. Linhas Aereas v. Dep’t of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) (alteration in original) (quoting *Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C. Cir. 1984)).

<sup>9</sup> *First Universal Service Order*, 12 FCC Rcd at 9174, ¶ 779 .

<sup>10</sup> *TOPUC*, 183 F.3d at 433-35.

<sup>11</sup> *Id.* at 433.

collected from interstate revenues “alone violates the equitable language of the statute.”<sup>12</sup> The Court also concluded that the rule violated section 254’s non-discrimination language because a carrier with predominantly international traffic but with *de minimis* interstate revenue would be in a worse position than a carrier with only international revenues, despite the fact that both carriers benefited from a universally supported domestic public telephone network.

The Commission adopted the LIRE to address the Fifth Circuit’s ruling.<sup>13</sup> The Commission revised its rules so that a carrier would not be required to contribute on its international revenues if its interstate revenues constituted less than a fixed percentage of its combined interstate and international end user telecommunications revenues.<sup>14</sup> This percentage was initially set in 1999 at eight percent, which the Commission believed would not be exceeded in the near future.<sup>15</sup> By setting the LIRE at 8%, the Commission concluded that carriers would have reasonable assurance for the foreseeable future of not having to contribute more than they earned in interstate revenue. The principle was sound, but the FCC soon found the LIRE had been set too low. It revised the LIRE upward to 12% in 2002, where it stands today.<sup>16</sup> The Commission reaffirmed the need for the LIRE as recently as 2008, finding it “consistent with the *determination of the Fifth Circuit* that requiring a carrier to pay more universal service

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<sup>12</sup> *Id.* at 434.

<sup>13</sup> Federal-State Joint Board on Universal Service, *Eighth Report and Order*, 15 FCC Rcd 1679 (1999) (“*Fifth Circuit Remand Order*”).

<sup>14</sup> *Fifth Circuit Remand Order*, 15 FCC Rcd at 1687-88, ¶ 19.

<sup>15</sup> *Id.* The Commission proffered an example of a carrier with \$100 in combined interstate and international revenues, of which \$5 was from interstate calling and \$95 from international, and assuming 6% contribution factor. Without the 8% LIRE, the carrier under this scenario would have to contribute \$6, even though it only earned \$5 in interstate revenues. The 8% percent LIRE precluded this result. *Id.* at 1688, ¶ 20.

<sup>16</sup> 47 C.F.R. § 54.706(c).

contributions than it derives from interstate revenues violates the requirement in section 254(d) of the Act that universal service contributions be equitable and non-discriminatory.”<sup>17</sup>

Despite these findings, the *Notice* states that *TOPUC* leaves “significant discretion” for the Commission to revise its international contribution rules, so long as the new rule is equitable and nondiscriminatory.<sup>18</sup> The Court, however, does not leave as much discretion as the NPRM suggests. The Court was clear and emphatic in stating that assessing a carrier more in contributions than it earns in interstate revenues violates the statute.<sup>19</sup> As just noted, the Commission has characterized the Fifth Circuit as making a “determination” that such an assessment is statutorily precluded. There is no room here for a rule that imposes USF contribution obligations that exceed interstate revenues.

The *TOPUC* court also rejected a number of the arguments that the Commission seeks to resurrect in the *Notice*. The Commission, for example, asks whether it could rely on 254(b)’s principles of equity and nondiscrimination to eliminate the LIRE given that international carriers benefit from the USF.<sup>20</sup> The Fifth Circuit rejected this argument as having no reasonable limiting principle. It found that, as it applied to COMSAT and similarly situated carriers, “it is difficult to know what the FCC would consider inequitable, because any carrier could benefit from universal service.” The Court also dismissed the Commission’s argument that it has considerable discretion under 254(b)’s principles, finding that the “heavy inequity the rule places on COMSAT and similarly situated carriers cannot simply be dismissed by the agency as a

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<sup>17</sup> Federal State Joint Board on Universal Service, *Order on Reconsideration*, 23 FCC Rcd 6221, 6225-26, ¶ 11 (2008) (emphasis added).

<sup>18</sup> *Notice*, 27 FCC Rcd at 5431, ¶ 201.

<sup>19</sup> *TOPUC*, 183 F.3d at 434 (forcing a carrier to pay more in contributions than it earns in interstate revenues “*alone* violates the equitable language of the statute.”) (emphasis added).

<sup>20</sup> *Notice*, 27 FCC Rcd at 5431, ¶ 200.

consequence of administrative discretion.”<sup>21</sup> Thus, *TOPUC* leaves the Commission no discretion to impose USF contributions in excess of revenues from interstate services.

This is not to suggest that the Commission cannot modify the LIRE to be more closely aligned with actual contribution factors. The Commission, for example, asks whether it could set the LIRE on a formula rather than a fixed percentage. iBasis agrees that it would be reasonable to adjust the LIRE periodically to reflect changes in the contribution factor. Modifications to the LIRE must, however, hew to the principle that a carrier may not be required to contribute more than it receives in interstate revenues. iBasis has no argument with establishing flexibility for the LIRE, consistent with this fundamental principle.

### **III. Prepaid Calling Card Providers Should Contribute Based on Actual Collected Revenue, Not the Face Value If Sold to Distributors at a Discount**

iBasis supports the suggestion in the NPRM that prepaid calling card providers should only report and contribute on amounts paid by the entity to which the provider directly sells the prepaid service.<sup>22</sup> Thus, where the provider sells directly to the ultimate consumer of the card, the prepaid calling card provider would report the value of prepaid service sold (*e.g.*, \$5 for a card with a \$5 face value). But where the provider sells cards to an unaffiliated distributor or reseller at less than face value, the provider should only have to report and contribute based on the amount actually collected (*e.g.*, if a provider sells a \$5 face value card to distributor for \$4, the provider would report and contribute on the \$4). This approach would be consistent with existing rules that require filers to contribute based on “collected” end-user revenues.<sup>23</sup>

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<sup>21</sup> *TOPUC*, 183 F.3d at 434.

<sup>22</sup> *Notice*, 27 FCC Rcd at 5425, ¶ 185 (seeking comment “on limiting the contribution and reporting requirements of prepaid calling card providers to report amounts paid only by the person or firm to whom the provider directly sells the prepaid card.”).

<sup>23</sup> 47 CFR 54.706(b) (a carrier “shall contribute on the basis of its projected collected interstate and international end user telecommunications revenues.”).

Effectively, under this approach, the distributor or reseller would be treated as the prepaid calling card provider's end user unless the distributor or reseller provided a certificate that it would contribute to the USF on the revenues it collected from the ultimate consumer, in which case the prepaid provider would treat its revenues from the distributor or reseller as carrier's carrier revenues.

Some carriers have previously informed the Commission that they will only contribute on the revenues that they actually receive from distributors or resellers, not on the face value of the card.<sup>24</sup> Codifying this approach would level the playing field among calling card providers, eliminate the existing confusion and controversy surrounding the appropriate payment obligation for prepaid providers, and result in a simple, easily administered contribution rule. iBasis has previously advocated for such a rule and it has had broad support over the past few years.<sup>25</sup>

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<sup>24</sup> See, e.g., Letter from Alan Buzacott, Executive Director Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, *et al.* (April 30, 2010); Letter from Jamie M. (Mike) Tam, Director Federal Regulatory, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket No. 06-122, *et al.* (December 18, 2009).

<sup>25</sup> See, e.g., Comments of iBasis Inc., WC Docket No. 06-122, *et al.*, at 9-12 (filed Nov. 26, 2008); Reply Comments of Verizon and Verizon Wireless, WC Docket No. 06-122, *et al.* (filed Nov. 12 2009); Reply Comments of AT&T, WC Docket No. 06-122, *et al.* (filed November 12, 2009); Comments of STi Prepaid LLC, WC Docket No. 06-122, *et al.* (filed Oct. 28, 2009). See also, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Tamar E. Finn, Douglas D. Orvis, Counsel to IDT Telecom, Inc., CC Docket No. 96-45, *et al.* (Feb. 27, 2006).

