Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY

The current contribution system used to fund the federal Universal Service Fund ("USF") is in need of reform. The contribution system was designed for a very different communications ecosystem, and applying old rules to today's marketplace results in inefficiencies, administrative burdens, and competitive distortions. The current contribution system also is the source of significant confusion and sometimes gamesmanship among universal service contributors. The uncertainty concerning reporting and contribution requirements has resulted in dozens of appeals of contribution decisions made by the Universal Service Administrative Company ("USAC"), various applications to the full Commission for review of Bureau decisions on those appeals, and multiple requests by USAC for guidance from the Commission.

Overall, Verizon supports the Commission's goals of contribution reform – namely, to improve efficiency, ensure fairness, and promote sustainability of the USF.[2] It is indeed time to

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1 The Verizon companies participating in this filing (collectively, "Verizon") are Verizon Wireless and the regulated, wholly owned subsidiaries of Verizon Communications Inc.

2 *Universal Service Contribution Methodology*, Further Notice of Proposed Rulemaking, WC Docket No. 06-122, GN Docket No. 09-51, ¶¶ 23-25 (April 30, 2012) ("*Notice*").

take a fresh look at the contribution system and to take concrete steps to make the system more equitable for customers that ultimately pay for it, as well as contributors that are forced to navigate outdated rules.

In the *Notice*, the Commission puts forth a number of thoughtful reform proposals. Some of these proposals have merit and should be adopted, some should be rejected, and some require further study. These ideas are discussed below in the context of where each fits within the overall USF contribution system. In the near-term, it is especially important for the Commission *to do* at least three things: (1) modernize administration of the contribution system by, for example, posting annual changes to the Form 499 Worksheet Instructions for notice and comment; (2) resolve longstanding issues regarding potential contributions on Multi-Protocol Label Switching ("MPLS")-enabled services; and (3) clean up the reseller exemption process. These changes will benefit consumers and providers alike.

Likewise, it is especially important for the Commission *not to do* at least two things: (1) subject text messaging revenues to USF assessments for the first time; and (2) require Form 499 filers to contribute on their "total revenues." These changes are bad for consumers because they would unfairly increase costs and bad for providers because they would create untenable competitive inequities and marketplace distortions.

More specifically with respect to the things the Commission should do, the Commission should improve the administration of the contribution system by: (1) providing notice and comment before changing the Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q) and related instructions (collectively "Worksheets"); (2) improving the process for seeking guidance from the Commission on USF contribution requirements; (3) eliminating quarterly factor changes and the requirement to project revenues; and (4) adopting a symmetrical limitations period for carrier revisions to the Worksheets, regardless of whether the revision results in an increase or decrease in the required contributions.

Moreover, if the Commission retains the existing revenues-based contribution regime, it should streamline revenue reporting requirements. The Commission can accomplish this in three ways:

- *First*, the Commission should reform the reseller exemption process – a process that currently is rife with problems. However, instead of adopting the proposed "value-added approach" or the enhanced contributor certification proposal – both of which would be administratively burdensome to implement and would not result in a more efficient contribution system – the Commission should direct USAC to establish a searchable database or list of USF contributors that carriers could consult in order to determine whether to classify revenue as "carrier's carrier" or "end user" revenue.
- *Second*, the Commission should reform its interstate safe harbors for wireless and interconnected Voice over Internet Protocol ("VoIP") services. While safe harbors can offer many benefits for carriers, USAC, and the Commission, the current safe harbors are outdated and rarely utilized because they are set at percentages that do not accurately reflect today's mix of traffic. In order to promote the use of safe harbors (and the associated benefits), the Commission should establish a new interstate safe harbor for both wireless and interconnected VoIP in the 20-25 percent range.
- *Third*, the Commission should retain its existing rules governing the apportionment of assessable revenues from bundled offerings. Certainly, the Commission should not adopt a rule that limits carriers to contributing on just one of either (i) the standalone price of the assessable service or (ii) the full price of the bundle. Contributors already

are subject to U.S. Generally Accepted Accounting Principles ("GAAP") that govern apportionment for financial reporting and tax purposes. The Commission should not impose a new approach for USF contribution purposes that would result in one set of apportionment decisions for tax and financial reporting purposes and a different set for USF contributions.

In addition, should the Commission decide to maintain a revenues-based contribution regime, it must take steps to ensure that the system is competitively and technologically neutral. Accordingly, the Commission should adopt the recent proposal submitted by an industry coalition for the treatment of Multi-Protocol Label Switching ("MPLS"), which would establish a consistent and workable framework to address contributions on revenues from MPLS-enabled services going forward. In addition, consistent with principles of competitive neutrality, the Commission should: (1) require both one-way VoIP providers and voice service providers without end-user revenues to contribute to the USF, since these providers offer voice service in competition with providers that currently contribute to the USF; and (2) eliminate the "Limited International Revenue Exemption" ("LIRE"), which distorts competition.

The Commission should not impose contribution requirements on text messaging revenues. Text messaging is an information service – not a telecommunications service – and, therefore, is not subject to mandatory universal service contribution obligations. Furthermore, the Commission should not exercise its permissive authority to assess contributions for text messaging service because doing so would not be in the public interest. Wireless services already are subject to excessive taxes and fees, and assessing USF fees on texting services would only increase the financial harms to consumers. Additionally, it would not be in the public interest to impose contribution obligations on text messaging services when other messaging services – such as email and Internet messaging services – are exempt from contribution requirements.

Assessing broadband services likewise would represent a significant change to the current system and would raise a number of challenges – not the least of which are the definitional issues of how to draw the line between assessable "broadband" services and other applications and services that utilize broadband connections. The Commission would have to create a definition of "broadband Internet access service" that is sufficiently clear for contributors to implement and is competitively neutral. There are serious ramifications to the addition of broadband revenue to the contribution base, and, because of the importance of this issue, it warrants further study by the Commission.

The Commission also should consider carefully the ramifications of departing from the current revenue-based contribution system. The proposed "total revenue" approach – which would assess all revenues reported by contributors on line 418 of the Form 499 (*see Notice* at ¶ 69) – is a non-starter from a competitive standpoint. The revenues reported by contributors on line 418 include revenues from a variety of services that compete with offerings by entities that do not file a Form 499 at all. This proposal, if adopted, would only exacerbate the Commission's concerns with competitive neutrality – putting Form 499 filers at an untenable disadvantage in the marketplace when competing against non-filers.

Similarly, while the alternatives to a revenue-based contribution system outlined in the *Notice* offer potential benefits, they also raise significant questions. In principle, a telephone numbers-based system or a connections-based system could avoid the difficult line-drawing required by a revenue-based system. In the past, Verizon has supported a contribution mechanism based on in-use working telephone numbers. However, perceived shortcomings with that approach generally have led to "hybrid" proposals, such as systems that would assess both numbers or revenues or numbers and connections, which offset the positive attributes. By the same token, although a connections-based contribution methodology also has some merit, it faces two primary challenges that have yet to be overcome: first, the challenge of developing a definition of "connection" that is workable for all technologies and, second, the challenge of developing fair and stable speed or capacity tiers upon which contributions would be based.

Finally, the Commission should not modify its USF contribution recovery rules. Proposals to require more granular disclosures about the amount of the USF contribution or the method by which it is calculated are unnecessary and would only increase compliance costs, contrary to the Commission's goals in this proceeding.

II. THE COMMISSION CAN ACHIEVE SIGNIFICANT REFORM BY IMPROVING ADMINISTRATION OF THE CONTRIBUTION SYSTEM

Regardless of what decisions the Commission ultimately may make regarding who should contribute to the fund and how contributions should be assessed, it can accomplish significant near-term reform of the contribution system by streamlining certain administrative aspects of the system.

A. The Commission Should Provide Notice And Seek Public Comment Before Changing The Worksheets.

Given the complexity of the current contribution system, the Worksheets are critical to the proper administration of the universal service program. As communications technology and services continue to evolve to meet consumer demand, it is imperative that the Worksheets keep pace so that providers have a clear understanding of their contribution obligations. Uncertainty and ambiguity in contribution requirements undermine the system and the Commission's efforts to "limit the overall contribution burden." *Notice* ¶ 3. Furthermore, because the USF contribution factor has risen so significantly, how contributors report their revenues and the specific decisions they make in filling out the Form 499 drive market behavior.

Unfortunately, under the current system, changes are made to the Worksheets without the benefit of industry input, which only adds unnecessary complexity to an already complex system. For example, in 2009, the Commission added a reference to MPLS to the Form 499-A instructions, creating confusion about whether the Commission considered MPLS to be an assessable *service* (it is not a service at all, but rather is a technology).[3] The Commission subsequently had to clarify that the change to the instructions was a non-substantive modification designed to indicate that MPLS-enabled services may be either telecommunications or information services and that MPLS-enabled *telecommunications* services should be included in the USF contribution base.[4] But that clarification came too late to avoid uncertainty regarding the appropriate treatment of revenues for MPLS-enabled services.[5] Such confusion could have been avoided entirely had the Commission provided notice and comment prior to revising the Worksheets to include the reference to MPLS.

Equally unfortunate is that, in the past, the Commission has used changes in the Worksheets to put in place substantive requirements without adherence to the requirements of the Administrative Procedure Act ("APA"). For example, the Worksheet instructions that

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[3] *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, DA 09-454 (Feb. 25, 2009).

[4] Letter from Jennifer McKee, FCC, to Michelle Tilton, USAC, DA 09-748 (April 1, 2009) ("2009 Letter Guidance").

[5] *See, e.g. Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review*, Universal Service Contribution Methodology, et al., WC Docket No. 06-122 (filed March 27, 2009) (requesting USF contribution guidance on MPLS-enabled services); *see also* XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (Dec. 29, 2010).

address the reseller exemption process have been revised multiple times, each time directing carriers to implement more and more complex procedures to segregate “carrier’s carrier” (reseller) revenue from end-user revenue. Compliance with the APA is essential to ensuring judicial review of agency action, and substantive changes to the USF regime adopted without adherence to the APA are invalid.[6]

The solution to this particular problem is simple. Consistent with its commitment to “promote the transparency and clarity of the contribution system,” the Commission should adopt its proposal to implement “a formalized annual process for the Bureau to update and adopt the Telecommunications Reporting Worksheets and their accompanying instructions.” *Notice* ¶¶ 5 & 346. This approach would result in a process for changing the Worksheets similar to that used to modify the E-rate Eligible Services List, which has worked effectively for years.[7]

As proposed in the *Notice*, the Commission should identify, on an annual basis, any proposed changes to the Worksheets, explain the reasons for those changes, and seek comment

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[6] *See* 5 U.S.C. §§ 702, 704 (providing judicial review to persons “suffering legal wrong because of [final] agency action, or adversely affected or aggrieved by [final] agency action within the meaning of a relevant statute”); *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (noting that “the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review”) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984)); *see also* 5 U.S.C. § 706(2)(D) (providing that the court shall “hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law”).

[7] The E-Rate Eligible Services List (ESL) provides guidance on the eligibility of products and services available to schools and libraries each funding year. Under the Commission’s rules, the Universal Service Administrative Company must submit a draft list of eligible services to the Commission by March 30 of each year. The Wireline Competition Bureau then must issue a Public Notice seeking comment on the proposed eligible services list. And, at least 60 days prior to the opening of the window for the following funding year, the final list of services eligible for support is released. 47 C.F.R. § 54.502(b). A similar process should be used for the Worksheets, which would improve USF administration.

on the revised form and instructions each year. The Commission should issue the revised Worksheet resulting from this process sufficiently in advance of the relevant reporting period so that contributors can make changes to their tracking and reporting procedures as may be necessary to comply. *Notice* ¶ 347. Issuing a new worksheet and instructions after the reporting year is over – as the Bureau currently does – only complicates a contributor's ability to report revenues accurately and undermines the Commission's objectives of reducing compliance costs and increasing transparency.

The Commission also should clarify that any changes to the Worksheets will apply only on a going-forward basis. The Supreme Court has made clear that "[r]etroactivity is not favored in the law,"[8] and the Commission is prohibited from adopting retrospective rules under the APA unless it has been authorized to do so by Congress and, even then, not unless it has thoughtfully considered the "harmful, secondarily retroactive effects" of retrospective rules.[9] Given these stringent limitations on retrospective rulemaking and the significant obligations the Worksheets impose on carriers, changes to the Worksheets should not be applied retroactively.

B. <u>The Commission Should Establish A Process For The Industry To Obtain Agency Guidance About Applicable Contribution Requirements.</u>

Contributors should be encouraged to seek and obtain guidance from the Commission regarding their contribution obligations. A system that encourages open communication between USF contributors and the Commission and facilitates clear guidance from the Commission on specific Worksheet questions would improve the functioning of the contribution system. It also

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8 *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

9 *Bergerco Canada v. U.S. Treasury Department*, 129 F.3d 189, 192 (D.C. Cir. 1997). The APA requires that "legislative rules . . . be given future effect only." *Chadmoore Comm'n, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1986); *National Cable & Telecommunications Ass'n v. FCC.*, 567 F.3d 659, 670 (D.C. Cir. 2009).

would prevent any misunderstandings regarding reporting and contribution requirements, which are detrimental to the efficient administration of the contribution mechanism.

Unfortunately, as it now stands, providers that are unclear or have questions about the meaning of the Worksheets and their attendant contribution obligations are in an untenable situation. On one hand, without input from the agency charged with overseeing the USF, providers run the risk of misinterpreting the reporting and contribution requirements, which can result in a costly and time consuming USAC audit and which can increase compliance costs. On the other hand, some providers may fear that requesting guidance from the Commission, even for good faith interpretations of the Worksheets, may result in investigative actions, such as referral to the Enforcement Bureau or a USAC audit.

To address this dilemma, USTelecom has suggested that the Commission adopt an amnesty rule for carriers with questions about the correct interpretation of the Worksheets.[10] This rule, as envisioned by USTelecom, would allow carriers to meet with Commission staff to explain their good faith interpretation of the Worksheets and have the Commission either confirm their interpretation or not. If the Commission disagrees with the carrier's good faith interpretation, there would be no adverse consequence to the carrier. But by allowing carriers to come forward with questions and concerns, the Commission could identify instructions or language in the Worksheets that require clarification or modification in order to eliminate further

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[10] Ex Parte, USTelecom, *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Federal-State Board on Universal Service*, CC Docket 96-45; and *A National Broadband Plan for Our Future*, GN Docket 09-51 (Mar. 28, 2012).

confusion. Of course, as discussed above, the Commission would be required to comply with the APA before making any substantive changes to the Worksheets.[11]

C. **<u>The Commission Should Eliminate Quarterly Factor Changes And The Requirement For Contributors To Project Revenues.</u>**

The Commission correctly identifies the quarterly contribution factor as ripe for reform. *Notice* ¶¶ 350-359. The current system is marked by significant, quarter-to-quarter variations in the USF contribution factor, which burden both consumers and carriers. Even those consumers that have steady month-to-month usage patterns see significant swings in universal service charges. The current system is equally difficult for contributors that must make billing and other administrative adjustments on a quarterly basis each time the contribution factor changes. Incumbent LECs also must make tariff changes every quarter, often with only limited time between the release of the contribution factor public notice and the tariff filing date. Carriers must also respond to customer inquiries about changes to the USF line item on their bills. The difficulties associated with quarterly contribution factor revisions would be avoided if the Commission were to adjust the contribution factor on an annual basis, which is the approach used in funding the Telecommunications Relay Service ("TRS"). [12]

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[11] The Commission has recognized the importance of providing timely guidance about the USF program. *See Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Notice of Inquiry, WC Docket No. 05-195, FCC 08-189, ¶ 30 (rel. Sept. 12, 2008) ("Any party, including USAC and NECA, can file for. . . guidance at any time. Timely guidance would be important to the efficient and effective administration of the USF programs."). However, vexing universal service contribution issues and disputes arise frequently. And, notwithstanding the Commission's commitment to provide timely guidance, in practice, such guidance is rarely forthcoming. As a result, USF contribution matters languish for years.

[12] Under the Commission's rules, contributions to the TRS fund are the product of their revenues subject to contribution for the prior calendar year and a contribution factor determined annually by the Commission. The contribution factor is based on the ratio between expected TRS expenses to the contributors' revenues subject to contribution. In the event the

To the extent the Commission is concerned that a shortfall could occur if the annual factor failed to raise sufficient funds to meet obligations, the Commission could revise its rules to establish a reserve fund, allow for mid-year corrections if a material shortfall appears likely, or permit USAC to borrow against future fund contributions, as permitted under the TRS fund.

If the Commission adopts an annual factor, it could further simplify the contribution process by calculating contributions using historical, rather than projected, quarterly revenues. Under this approach, a carrier's contribution would be determined by multiplying the contribution factor by historical revenues for the previous quarter. By using historical revenues, rather than projected revenues, the Commission would eliminate the need for carriers to develop USF-specific revenue projections every quarter. Basing contributions on historical quarterly revenues would also significantly reduce the size of the true-up that occurs when carriers file their Form 499-As. In recent years, the true-up from projected quarterly revenues to the actual annual revenues reported on the Form 499-A has resulted in a very large prior period adjustment.

D. The Commission Should Adopt A Symmetrical Three-Year Limitations Period For Contributors To Make Changes To Their Form 499.

The Commission should reverse the *Bureau Order* that established an asymmetrical, one-year limit on a contributor to refile its Form 499 to revise its revenues and thereby reduce its required contributions.[13] This decision – which stands in direct contrast to the Commission's view that there is an *unlimited* obligation to correct Form 499 errors when doing so would

(footnote cont'd.)
contributions exceed TRS payments and administrative costs in any year, the contribution factor for the following year is adjusted by the appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such debt secured by future years' contributions. 47 C.F.R. § 64.604(c)(3)(iii)(B).

13 *See, e.g., Federal-State Joint Board on Universal Service*, 20 FCC Rcd 1012, 1016-17, ¶10 (WCB 2004) ("*Bureau Order*").

increase contributions – is both procedurally deficient and substantively arbitrary and capricious. The Commission should grant the pending applications for review of the *Bureau Order* and adopt in this proceeding a *symmetrical* three-year period for refiling Form 499s, whether they increase or decrease required USF contributions.[14]

The one-year deadline set in the *Bureau Order* was beyond the Wireline Competition Bureau's authority and should have been the subject of notice and comment. The Commission delegated authority to the Bureau only to make "changes to the *administrative* aspects of the reporting requirements ... and not to the substance of the programs."[15] The Commission's rules also do not permit the Bureau to engage in rulemaking. 47 C.F.R. § 0.291(e). But adopting a blanket rule that denies carriers the right to recover overpayments after one year, while simultaneously requiring them to correct errors that would result in an increased contribution regardless of how long ago those errors occurred, is not a mere "administrative" detail – it embodies a substantive decision that affects carriers' rights.

Accordingly, the rule should have been the subject of notice and comment, and full Commission review, before it was adopted. The Bureau attempted to rely on the provision in the APA providing that "rules of agency organization, procedure, or practice" are exempt from

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[14] SBC Application for Review of Action Taken Pursuant to Delegate Authority, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005); Qwest Application for Review, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005); Business Discount Plan, Inc. Application for Review, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005); *see also* Sprint Petition for Reconsideration, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005); Comments by Verizon in Support of Applications for Review and Petition for Reconsideration, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 21, 2005).

[15] *Bureau Order* ¶ 9 (emphasis added); *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms et al.*, Order, CC Docket Nos. 96-45 et al., FCC 99-175, ¶¶ 38-39 (rel. July 19, 1999) (Bureau should handle "administrative details" and "administrative tasks").

notice and comment requirements. 5 U.S.C. § 553(b)(A) (1988). But, as the D.C. Circuit has explained, the "critical feature" of the procedural exception "is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency."[16] Here, the asymmetrical one-year limitation on correcting overstatements of revenue clearly alters the "rights or interests" of carriers by denying them the ability to recover universal service contributions they were not in fact required to make. That is all the more true given the Bureau's decision to make the one-year deadline inapplicable to corrections that would *increase* a carrier's contributions, which the Bureau asserts must be made regardless of how long ago they occurred.

These asymmetrical deadlines are also arbitrary and capricious. There often are very good reasons why a carrier cannot meet the deadline for amending its Form 499. For example, government agencies – such as state public service commissions, taxing authorities, and even the Commission itself – and internal and external auditors may make decisions that require restatements of revenues extending beyond one year. Moreover, adopting a one-year deadline for filing changes that would decrease a carrier's USF contributions, while maintaining a limitless obligation to file changes that would increase its contributions could cause a carrier to contribute vastly more to the USF than it actually owes.

The *Bureau Order* failed to reconcile the inequity of this situation – except for a passing reference to a need to create an "incentive to submit accurate revenue information in a timely manner." *Id.* ¶¶ 10-12. The order does not even discuss why, on the one hand, it is appropriate

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[16] *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C.Cir. 1980); *see also JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 327, 328 (D.C. Cir. 1994) (procedural exception "does not apply where the agency 'encodes a substantive value judgment,'" or sets "substantive standards"); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C.Cir. 1987); *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C.Cir. 1984).

to limit USF refunds to one year and, on the other hand, provide no certainty for carriers – or their customers and investors – with a corresponding limit on required re-filings that would increase contributions. These asymmetrical obligations are arbitrary and capricious and violate the section 254 requirement that USF contributions be assessed in "equitable and non-discriminatory" manner. *See* 47 U.S.C. § 254(d); 5 U.S.C. § 706.

For these reasons, the purported one-year limit on re-filing Form 499 to correct errors that overstate revenue (and, therefore, contributions) is invalid. The Commission should repeal this one-year limitation and adopt in this proceeding a symmetrical three-year limitations period for refiling Form 499s – regardless of whether it increases or decreases required USF contributions.

III. IF THE COMMISSION RETAINS THE EXISTING CONTRIBUTION SYSTEM, IT SHOULD STREAMLINE REVENUE REPORTING REQUIREMENTS.

A. The Commission Should Reform The Reseller Exemption Process.

Under the current contribution system, providers contribute to universal service based on "end-user" telecommunications revenues and not on "carrier's carrier" (reseller) revenues.[17] When the Commission established this policy more than 14 years ago, it found that basing contributions on end-user revenues (or retail revenues) "is competitively neutral because it eliminates the problem of counting revenues derived from the same services twice," which,

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[17] *See* 47 C.F.R. § 54.706(b) (requiring that a provider "shall contribute on the basis of its projected collected interstate and international end-user telecommunications revenues. . ."); *Federal-State Joint Board on Universal Service*, Order, 12 FCC Rcd 8776, ¶¶ 842-50 (1997) (establishing that the USF contribution base shall consist of "end-user" revenue or "retail revenues") ("*First Universal Service Order*"); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc. Federal-State Joint Board on Universal Service*, Report and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 18400, ¶ 42 (1997).

according to the Commission, "distorts competition … [by] disadvantage[ing] resellers." *First Universal Service Order* ¶ 844.

Unfortunately, the process used to distinguish retail from reseller revenues has long been a source of frustration, and the Commission should use this opportunity to improve the process. *See Notice* ¶ 148, n.268. The current approach outlined in the Form 499 instructions turns wholesale providers into Commission enforcement agents, while at the same time subjects resellers to a multitude of certification procedures. The situation has been made worse by the fact that there are no binding rules or orders that control the certification process—only guidance that has evolved through changes in the Worksheets without adherence to standard APA notice and comment requirements (which is an issue discussed above).[18]

The process outlined in the Form 499 instructions contemplates that wholesalers will contact all of their customers every year in order to obtain a new certification form. For a carrier such as Verizon, which has thousands of wholesale customers, the annual effort to identify the responsible person for each customer, contact that person, and obtain and process the exemption form, requires considerable time and resources. The process outlined in the Form 499 instructions further contemplates that the contributor will consult the FCC's website to determine whether a customer is still a contributor to the universal service fund. For Verizon, this step requires that Verizon employees check each customer by typing, one at a time, the customer's Filer ID into the appropriate field in the FCC's system. This process is a significant and unnecessary burden and must change.

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[18] *See, e.g.*, Telecommunications Reporting Worksheet, FCC Form 499-A (revised 2010), Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms, http://www.usac.org;/_res/documents/fund-administration/pdf/499/form-499a-FY2010-instructions.pdf, at 19; *Notice* ¶ 165, n.280.

Moreover, even for carriers that follow the process outlined in the Form 499 instructions, the Bureau introduced further uncertainty when it issued an order in 2010 following a USAC audit of Telepacific.[19] The *Telepacific Order* arguably suggested that a wholesaler, even one that had followed the Form 499 instructions exactly, could be required to revise its Form 499 if a customer's certification was later determined to be invalid. In addition, some commenters in that and a related proceeding interpreted the order as indicating that the Bureau believed that resellers are required to provide circuit-by-circuit certifications to underlying providers and/or that resellers somehow allocate the traffic over resold circuits (between assessable and non-assessable service traffic) in their certifications.[20]

To address these uncertainties, the Commission should grant the pending applications for review of the *Telepacific Order* and find that, under existing rules, wholesale providers have no obligation to revise their Form 499 filings if an exemption certificate provided by a customer was later deemed invalid. Likewise, in the *Notice,* the Commission acknowledges that there is no requirement under existing rules for resellers to provide, or wholesalers to request, exemption certificates that allocate on a circuit-by-circuit or percentage basis between assessable and non-

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[19] *Request for Review of a Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific d/b/a TelePacific Communications, Order*, WC Docket No. 06-122, ¶ 16 (rel. April 30, 2010).

[20] Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications, WC Docket No. 06-122, at 10 (July 6, 2010) ("Requiring TelePacific to contribute to USF indirectly on a circuit-by-circuit basis is inconsistent with Commission rules and FCC Form 499 Instructions that classify revenues as wholesale on an entity-by-entity basis. There is nothing in the FCC's universal service orders or rules to even suggest this determination must be made on an individual circuit basis."); Comments of the Coalition for Fairness and Restraint in USAC Fund Administration, WC Docket No. 06-122, at 7 (July 6, 2010) ("Nothing in the FCC's universal service orders or rules requires this determination to be made on an individual service-by-service basis. To the contrary, it would be virtually impossible for wholesale carriers to classify all of their revenues based on the end user services that their reseller customers may choose to provide.").

assessable uses of the wholesale service. *Notice* ¶¶ 148, 170. If the Commission desires to implement a different process going forward, new rules must be clearly defined and providers (wholesalers that receive certifications and resellers that submit them) must be given adequate time to implement the changes.

As for this proceeding, the Commission asks whether it should eliminate the requirement to distinguish between end user revenue and carrier's carrier revenue by adopting a so-called "value-added" approach. It should not. Under this proposal, carriers would be required to contribute on all revenues, including wholesale revenues. *Notice* ¶¶ 149-157. If a wholesale customer is itself a contributor, it can claim a credit on its Form 499 for any telecommunications services or telecommunications purchased from other contributors. For example, if Carrier A sells $100 of special access services to Carrier B, and Carrier B resells those services for $150, (1) Carrier A would contribute on $100 and (2) Carrier B would contribute on $50 – *i.e.*, its retail revenue less a credit for its wholesale purchases ($150-$100).

In principle, the "value-added approach" would streamline the contribution process for the wholesaler (Carrier A in the example above), since it would not need to distinguish between wholesale and retail revenues. However, that would not be the case for a reseller (Carrier B, above), which would have to track and retain records supporting its claimed credit for purchases of services subject to assessment – *i.e.*, interstate telecommunications services or interconnected VoIP services. Thus, this approach would remain administratively burdensome (at least from the reseller's perspective) and does not represent a significantly more efficient process than what exists today.

The Commission's second proposal is similarly flawed. It not only would retain the certification requirement outlined in the current Form 499 instructions, but also require the purchasing carrier to specify on the certificate the percentage of its revenue from the services that incorporate the wholesale service that are subject to assessment. *Notice* ¶¶ 162-174. Rather than simplify the reseller exemption process, the Commission's enhanced contributor certification proposal would make the process even *more* complicated for *both* the reseller and the wholesaler. For a reseller, it would be extremely difficult to determine the percentages to report to each of its wholesale providers. Apparently, in order to provide the requisite certification, the reseller would have to determine *for each of its wholesale suppliers* the percentage of revenues from services that incorporate wholesale inputs from the wholesaler that is assessable. This approach effectively would require the reseller to conduct a circuit-by-circuit examination to allocate the traffic over resold circuits between assessable and non-assessable service traffic, which, if physically possible, would be a costly and burdensome exercise.

Under this approach, the wholesaler would have to implement a mechanism that reflects the percentages reported by all of its reseller customers in both its worksheet filings and in its billing systems. For example, if a reseller reported that 60 percent of its purchases were used in the provision of assessable services, the wholesale provider would have to revise its billing systems in order to be able to recover from the customer USF contributions on the remaining 40 percent of those purchases. For a carrier such as Verizon with thousands of wholesale customers, many of which have multiple accounts and span different billing systems with varying technological limitations, managing such a process would be far more difficult than the already-burdensome process outlined in the existing Form 499-A instructions.

As an alternative to the value-added approach and the enhanced contributor certification proposal, the Commission could maintain the current system by which contributions are assessed based only on "end-user" telecommunications revenues, but adopt a rule that dramatically simplifies the reseller exemption process. Rather than require contributors to obtain certifications from all resellers every year, the Commission could direct USAC to publish a searchable database of “exempt” resellers that contribute directly to the USF and require that a wholesaler consult that database annually in determining “carrier’s carrier” revenues for which the wholesaler is not required to contribute. Such a database could be based on the Commission’s existing carrier locator system, but enhanced to permit contributors to submit batch queries for their entire wholesale customer list. To the extent the Commission is concerned about “leakage,” *Notice* ¶ 170, the Commission could adopt a bright-line rule that a wholesale customer is considered an “exempt” reseller only if its assessable revenues exceed its purchases of assessable telecommunications services or telecommunications. This approach would be administratively easy to implement and would not require the granular analysis and detailed recordkeeping required under either the “value-added approach” or the enhanced contributor certification proposal.

If the Commission adopts a new rule governing the reseller exemption process, it should make clear that contributors that follow the process spelled out in its rules cannot later be found liable for increased contributions if information in the FCC’s database or on customer certifications (assuming the Commission retains its certification requirement) is later determined to be inaccurate.

B. <u>The Commission Should Reform Its Safe Harbors.</u>

Allowing providers to utilize safe harbors in contributing to the USF is reasonable and consistent with the Commission’s desire to “make compliance with and administration of the contribution system more efficient ….” *Notice* ¶ 23. Indeed, in establishing the current safe harbor percentages, the Commission noted the difficulties in determining the interstate or intrastate classification of such traffic.[21]

With the wireless safe harbor, for example, the original purpose was to streamline reporting. But safe harbors that are set too high are not useful as a reporting tool because—for competitive reasons—contributors cannot afford to subject a greater portion of their revenues to universal service assessments than other providers.[22] This is exactly what has occurred with the existing safe harbor for wireless traffic, which is set at an unrealistic 37.1 percent.

The best evidence that the wireless safe harbor of 37.1 percent is outdated is the dearth of carriers that rely upon it for purposes of USF contributions. Appendix C of the *Notice* indicates that contributors reported approximately 23 percent of mobile revenues as interstate in 2011. Given that the average of the traffic studies on file with the Commission is also 23 percent, *Notice* ¶ 124, it appears that few carriers are allocating revenues between jurisdictions using the 37.1 percent safe harbor.

In order to streamline reporting for wireless carriers, the Commission should revise the wireless safe harbor percentage to better reflect market realities. Based on the data provided in the *Notice*, a realistic interstate safe harbor for wireless traffic should be 20-25 percent. This

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21 *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, ¶ 6 (1998) (noting that wireless providers "operate without regard to state boundaries in their service areas" and that wireless calls "originating and terminating in one state may be transported to a switch in another state"); *see also Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 53 (2006) ("*2006 Contribution Methodology Order*") (noting the "difficulty for some interconnected VoIP providers to separate their traffic on a jurisdictional basis").

22 *See 2006 Contribution Methodology Order* ¶ 24 ("By raising the interim wireless safe harbor to reflect more accurately current subscribership and usage levels and other marketplace developments, we ensure that mobile wireless service providers' obligations are on par with carriers offering similar service that must report based on actual interstate end-user telecommunications revenue (*e.g.*, wireline telecommunications providers)").

range is consistent with traffic studies conducted by wireless contributors over the past six years.[23]

The Commission also should revise its rules to allow any safe harbors to be applied to all revenue of the same kind, including "separately stated toll" revenue. For example, the current Form 499-A instructions require carriers to report toll charges for itemized calls appearing on mobile telephone customer bills on a separate line of the Form 499, and do not permit carriers to use the safe harbor for revenues reported on that line.[24] To simplify revenue reporting, the Commission should revise its rules to permit providers of mobile services and interconnected VoIP services to use the applicable safe harbor for all voice revenues, including separately-stated toll.

C. <u>The Commission Should Not Modify Its Bundling Rules.</u>

The Commission should not modify its bundling rules to limit carriers to only two options for apportioning revenue from bundled offerings by eliminating "carrier discretion in determining how to apportion revenues from bundled offerings." *Notice* ¶ 106. This proposed modification is predicated on a mistaken premise and, if adopted, would "create unintended market distortions" by virtue of "treating similar or substitutable services differently," contrary to the Commission's objectives in this proceeding. *Id.* ¶ 23.

The proposed modification to the Commission's bundling rules is premised upon a flawed assumption: namely, that carriers have unbridled discretion in apportioning revenues for bundled offerings. In fact, there already are specific requirements to which carriers must adhere

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[23] The Commission should consider setting the safe harbors for both wireless and interconnected VoIP at the same level. Doing so would simplify fund administration by applying the same rule to a large portion of today's voice service revenue and recognizing that interconnected VoIP service can be provided over both wireless and wireline platforms.

[24] 2012 Form 499-A Instructions at 23.

in apportioning revenues for bundled offerings. Specifically, GAAP provides guidance on how to allocate bundled offerings for revenue recognition purposes.[25] For example, under GAAP, if the delivered services that comprise a bundled offering are available on a standalone basis, the arrangement consideration, including any discounts, is allocated among the services in the bundle based on the vendor-specific standalone selling price or, if not available, market selling price.[26]

A carrier's consistent adherence to established accounting guidance in apportioning revenues for bundled offerings should alleviate any concern on the Commission's part that carriers lack "specific standards" to making apportionment decisions. Moreover, the Commission should refrain from forcing carriers to adopt apportionment methods for USF purposes that differ from – and likely conflict with – GAAP for financial reporting and tax purposes. Not only are those methods reasonable, but a USF-specific apportionment rule would add complexity to both accounting and billing. Absent the ability to apportion bundled revenues in the same manner that apportionment decisions are made for financial reporting and tax purposes, providers would have to devote resources to developing mechanisms to bill one way for tax purposes and a different way for USF contribution purposes.

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[25] *See, e.g.*, Financial Accounting Standards Board, Accounting Standards Update, Revenue Recognition (Topic 605): Multiple-Deliverable Revenue Arrangements, No. 2009-13 (Oct. 2009) (http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175819938544&blobheader=application%2Fpdf).

[26] *Id.* at 10-13.

IV. IF THE COMMISSION RETAINS A REVENUES-BASED CONTRIBUTION SYSTEM, IT MUST TAKE STEPS TO ENSURE THAT THE SYSTEM IS COMPETITIVELY AND TECHNOLOGICALLY NEUTRAL.

A. The Commission Should Adopt The Industry Proposal For The Treatment Of MPLS-Enabled Services.

As the Commission correctly recognizes, IP-based data services, including MPLS-enabled services, are used increasingly by enterprise customers, business consumers, and government entities to replace traditional private line services. *Notice* ¶ 41. However, the Commission has yet to establish a consistent and workable framework for the contribution obligations related to MPLS-enabled services. To solve this problem, the Commission should adopt the Industry Proposal put forth by a diverse group of communications service providers to address MPLS contributions prospectively under the current revenue-based system.[27]

MPLS is a protocol-agnostic processing capability that enables the seamless flow of data packets over a fully integrated network connecting different locations using IP protocol and any Layer 2 access protocol (*e.g.*, ATM, Ethernet, or Frame Relay). MPLS is not itself a service.[28] Rather, it is a technology incorporated into a variety of enterprise data services, which have the attributes of information services—including, for example, protocol processing capabilities, customer-driven security features, and on-demand (and variable) packet prioritization. The relevant question for universal service contribution purposes is whether a *particular* service that

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[27] The proposal was developed by British Telecom, NTT America, Orange Business Services, Sprint Nextel, Verizon, and XO Communications. *See* Ex Parte Letter from Sheba Chacko, Senior Counsel – BT Global Services, Michele Farquhar, Counsel – NTT America, Inc., Ivana Kriznic, Regulatory Counsel – Orange Business Services, Marybeth Banks, Government Affairs Director – Sprint Nextel Corporation, Maggie McCready, Federal Regulatory Vice President – Verizon, and Tiki Gaugler, Senior Attorney – XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed March 29, 2012) ("Industry Proposal").

[28] Johna T. Johnson, "MPLS Explained," *NetworkWorld* (Mar. 29, 2007), *available at* http://www.networkworld.com/research/2007/040207-mpls-migration-explained.html ("The key thing to remember about MPLS is that it's a technique, not a service.").

uses MPLS is a telecommunications service subject to assessment or an information service that is not subject to assessment, which in turn depends on the capabilities that service offers.[29]

The Industry Proposal answers this question by establishing a consistent and verifiable methodology that providers and the Commission can use to determine assessable revenues from MPLS-enabled services. Under the Industry Proposal, the Commission would establish MPLS Assessable Revenue Component ("MARC") proxies for imputation purposes, which would be established and published in a uniform rate schedule based on the access transmission facilities connecting the customer to the provider's MPLS network. Individual providers of MPLS-enabled services would utilize the Commission's MARC proxy schedule to determine the imputed assessable revenues for the access transmission components they use to provide MPLS-

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[29] Many services that employ MPLS, perhaps most, are information services. For example, MPLS-enabled services that provide the seamless flow of traffic among multiple customer locations – each of which may use a different Layer 2 access protocol (e.g., ATM, frame relay, and Ethernet) – involves the capability of a "net protocol conversion" between locations, which is a hallmark of an information service. *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 19*34, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 104 (1996) ("*Non-Accounting Safeguards Order*"); *Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 F.C.C.2d 584, ¶¶ 11, 19 (1983) (classifying as "enhanced" a service where "an otherwise basic packet switched network . . . generate[s] an output to another network in a different protocol than its normal user inputs and outputs"). Similarly, the Supreme Court has recognized that a protocol conversion is the "ability to communicate between networks that employ different data-transmission formats." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2709 (2005) (citation omitted). As its name – *Multi-Protocol* Label Switching – implies, MPLS provides the inherent capability to convert between protocols, and thus many services that use MPLS enable net protocol conversion and are information services. MPLS-enabled services also may be information services by providing consumers with the capability to store, retrieve, acquire, and utilize information and security functions that involve processing packets. *See* 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications ...").

enabled services to their customers, which, in turn, would determine the base for which USF contributions would be made for these services.[30]

The Industry Proposal has significant public interest benefits. First, it would eliminate the uncertainty that currently pervades the USF contribution obligations of providers of MPLS-enabled services. Under the current regime, some providers treat all revenues associated with MPLS-enabled services as information service revenues not subject to USF contributions, while other providers contribute to the USF based on the transmission services provided in conjunction with MPLS-enabled services. By directing that all providers contribute to the USF based on the transmission components of their MPLS-enabled services and by establishing a uniform methodology for making the contribution calculation, the Commission would provide much-needed clarity to the industry.

Second, the Industry Proposal is competitively neutral. It would create a level playing field and eliminate competitive disparities by requiring all providers to use the same uniform set of MARC proxies to impute assessable revenues for the access transmission components of MPLS-enabled services. By establishing consistent ground rules for calculating USF contributions for MPLS-enabled services, the Industry Proposal would benefit providers and consumers alike.

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[30] As described in greater detail in the Industry Proposal, this approach involves three basic steps. First, providers of MPLS-enabled services would identify the quantity and speed of the access transmission components of the MPLS-enabled services they provide to their customers. Second, in determining their USF revenue contribution base, providers would utilize the appropriate MARC proxy for each of the access transmission components of their MPLS-enabled services, which the Commission would establish in a technologically- neutral manner based on publicly-available access rates found in Tariff No. 5 of the National Exchange Carrier Association ("NECA"). Third, after determining the USF contribution base for their MPLS-enabled services, providers would then apply the current USF contribution factor to that base in calculating the amount to contribute to the USF based on their MPLS-enabled services. *See* Industry Proposal at 5-6.

Third, the Industry Proposal is transparent and reasonable. Reliance upon NECA tariff rates in establishing the MARC proxies allows the Commission to utilize a publicly-available data source that contains rates which, by definition, are just and reasonable. As NECA tariff rates change, the Commission can update the MARC proxies accordingly.

Although disputes and requests for guidance regarding the treatment of particular MPLS-enabled services are pending before the Commission, *Notice* ¶ 41, the establishment of an industry-wide methodology for determining USF contributions for MPLS-enabled services can only be accomplished in the context of a rulemaking. The Commission recognized as much in 2004, when it initiated rulemaking proceeding regarding the classification of advanced services, including enterprise data services—a proceeding that remains open and unresolved.[31] Indeed, based on the *IP-Enabled Services NPRM*, the Commission resolved similar uncertainty regarding the contribution obligations of interconnected VoIP providers in its *2006 Contribution Methodology Order*.

There can be no doubt that the issues regarding the treatment of MPLS-enabled services for USF contribution purposes are of industry-wide significance. As enterprise and government customers increasingly move to different types of private IP services, these services generate significant revenues. MPLS is often a critical component of such service offerings, with one source estimating that 84 percent of enterprises use MPLS for their wide area networks.[32] Thus,

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31 *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*IP-Enabled Services NPRM*"). That proceeding is a very broad inquiry into the proper regulatory treatment of all "services and applications" that rely "on the Internet Protocol family" and specifically discussed MPLS-enabled services, describing MPLS as "an application that runs on an IP network's routers, provides switching capability, and gives priority QoS to certain IP packets." *IP-Enabled Services NPRM*, ¶¶ 1 n.1 & 11 n.42.

32 Brad Reed, "What's Next for MPLS," *Network World* (Dec. 21, 2009), *available at* http://www.networkworld.com/news/2009/122109-mpls-future.html ("MPLS has been widely

any determination about whether services using MPLS are subject to universal service contributions would clearly have significant ramifications across the industry.

Given the industry-wide ramifications, this rulemaking proceeding is the ideal forum for providing industry guidance regarding the USF contribution requirements associated with MPLS-enabled services. The Commission should provide such guidance by adopting the Industry Proposal.

B. One-Way VoIP Providers Should Be Required To Contribute To The USF.

No justification exists to continue to exclude one-way VoIP providers from the obligation to contribute to the USF. One-way VoIP services compete directly with other voice services offered by providers that must contribute to the USF. Accordingly, consistent with its commitment to competitive neutrality, the Commission should exercise its permissive authority under section 254(d) to require that providers of one-way VoIP services contribute to the USF with respect to such offerings. *Notice* ¶ 58.

When the Commission extended USF contribution obligations to interconnected VoIP providers, it relied in part upon the principle of competitive neutrality, which, according to the Commission, "means that 'universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.'" *2006 Contribution Methodology Order* ¶ 44 (*quoting First Universal Service Order* ¶ 47). As the Commission reasoned at the time, it was appropriate to require interconnected VoIP providers to contribute to the USF because: (i) they "attract subscribers who previously relied on traditional telephone service" and, "like

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(footnote cont'd.)
adopted by enterprises for their WANs, as the most recent data from Nemertes Research indicates that around 84% of companies are now using MPLS for their WANs").

telecommunications carriers, have built their businesses, or a part of their businesses, on access to the PSTN"; (ii) contribution obligations should not "shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customers or to create opportunities for regulatory arbitrage"; (iii) such an approach "reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations"; and (iv) "inclusion of such providers as contributors to the support mechanisms will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers."[33]

The same reasoning applies with equal force to one-way VoIP providers. First, one-way VoIP providers such as Skype attract subscribers who previously relied on traditional telephone service and have built their business, at least in part, on providing access to the PSTN.[34] Second, allowing Skype and similar providers to escape the obligation to contribute to the USF by virtue of their offering a one-way – as opposed to a two-way – VoIP service creates opportunities for regulatory arbitrage. Third, exempting one-way VoIP providers that offer competing voice services from making USF contributions unfairly penalizes those providers that do contribute (and, ultimately, their customers).[35] Finally, including Skype and similar providers as contributors to the USF would broaden the funding base to the benefit of all consumers.

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33 *2006 Contribution Methodology Order* ¶¶ 44-45; *see also First Universal Service Order* ¶ 797 (finding that payphone aggregators should be required to contribute to universal service support mechanisms "because they directly compete with mandatory contributors to universal service").

34 *See* http://www.skype.com/intl/en-us/features/allfeatures/call-phones-and-mobiles/ ("Call mobiles or landlines, anywhere in the world, from just 2.3¢ per minute with Skype Credit or even cheaper with a subscription").

35 Skype does publicly report some earned revenue and may or may not contribute to the fund on some portion of that revenue. Only recently has Skype been listed in the Commission's

Accordingly, the Commission should exercise its permissive authority under section 254(d) and require one-way VoIP providers to contribute to the USF.

C. **Voice Services Without End-User Revenues Should Be Required To Contribute Based On Proxy.**

Under the existing contribution system, a carrier's contributions are based on its end-user revenues. But the Commission correctly recognizes that some services, including some newer VoIP services, increasingly are marketed as "free" to subscribers and often funded by advertising and sources of revenue other than end-user charges. *Notice* ¶ 86. These services may be "free" in the sense that interstate end-user subscribers are not billed for the entire cost of the service, but there are still revenues and costs associated with these services. *Id*.

For example, Google offers its Google Voice service—a VoIP product—free of charge to end-users. *See* Google, Google Voice, http://www.google.com/googlevoice/about.html; *see also* Communications Daily, Wireless (March 22, 2011) ("Sprint Nextel will offer Google Voice on all of its phones, while allowing customers to port their existing Sprint numbers . . . . Newer Android phones will come preloaded with Google Voice."). By contrast, Magic Jack offers "free" local and long distance calling utilizing VoIP with a paid subscription. *See* http://www.magicjack.com/plus-v05/.

"Free" VoIP services benefit from—and indeed depend upon—the same high-speed, robust network infrastructure as traditional voice services and, therefore, should contribute to the USF. Indeed, these services compete directly with traditional voice services that have associated end-user revenues and already make USF contributions. Allowing competing voice providers to

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(footnote cont'd.)
online Form 499A database as a USF contributor." *See* http://fjallfoss.fcc.gov/cgb/form499/499a.cfm (last visited June 24, 2012).

escape USF contributions because they have no end-user revenue to assess skews the market and unfairly penalizes contributors forced to make up for these lost payments to the fund.

Under a revenue-based system, one way to capture USF contributions on VoIP services that are free to the end-user—or substantially subsidized by revenue from sources other than subscriber charges (*e.g.*, advertising)—is a per-subscriber alternative minimum contribution.[36] This minimum contribution amount – which any provider that offers an assessable service would be required to make – could be established by calculating the amount that contributors typically pay into the USF on a per-subscriber basis and applying this amount for each of the provider's domestic customers. Whether this or some other approach is utilized, however, the Commission must treat all providers of competing services the same – regardless of technology and irrespective of whether the competitor's earned revenues are associated with traditional end-user subscriber charges or some other source. *See Notice* ¶ 24.

D. <u>The Commission Should Eliminate The LIRE.</u>

The Commission should eliminate the LIRE, which is inconsistent with the Commission's contribution reform goals. The exemption is inefficient because it can be manipulated by providers seeking to "game" the system by structuring their operations so as to avoid USF contributions. The exemption also is unfair because it results in providers of predominantly international services being treated differently (and more favorably) than predominantly domestic providers, which harms consumers. And the exemption is inconsistent with preserving the sustainability of the USF. Allowing providers with limited interstate telecommunications revenues to avoid contributing to the USF or minimizing such contributions

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[36] *See, e.g., Contributions to the Telecommunications Relay Services Fund*, CG Docket No. 11-47, Comments of Verizon (filed May 4, 2011) (outlining methodology for the Commission to require contributions to the TRS Fund by free non-interconnected VoIP services).

undermines the Commission's effort to "stabilize the contribution base." *Notice* ¶ 25. Thus, eliminating the LIRE would advance the Commission's goals of creating a contribution system that is more efficient, more fair, and more sustainable than the current approach. *Id.* ¶¶ 23-25.

The Fifth Circuit's *TOPUC* decision does not compel a different result.[37] In *TOPUC* the Fifth Circuit found that requiring providers to "contribute more in universal service payments than they will generate from interstate service" was arbitrary and capricious because the Commission "offered no reasonable explanation of how this outcome … satisfies the statute's 'equitable and nondiscriminatory' language." 183 F.3d at 434. However, as the Commission has explained, the current LIRE is subject to misuse by providers "with a substantial, non-*de minimis* presence in the domestic market," which rely upon the LIRE to avoid USF contributions. *Notice* ¶ 198. By virtue of allowing some domestic providers to limit their USF contributions to the detriment of their domestic competitors, the LIRE exemption is inequitable and discriminatory, contrary to the mandate of section 254. A predominantly international provider with a *de minimis* domestic presence should instead be permitted to avail itself of the *de minimis* exemption as the Commission has proposed, which should more than satisfy the Fifth Circuit's concerns. *Id.* Accordingly, the Commission should eliminate the LIRE consistent with its goal to establish an efficient, fair, and sustainable universal service system.[38]

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[37] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*").

[38] For the same reasons, the Commission also should reexamine the "international only" exemption. Like the LIRE, the "international only" exemption distorts competition and harms consumers. *Notice* ¶ 197. Eliminating this exemption also would put to rest the Fifth Circuit's concern in *TOPUC*, since doing so would result in providers with primarily international telecommunications revenues *as well as* providers with exclusively international telecommunications revenues making USF contributions.

E. <u>The Commission Should Not Assess Text Messaging Revenues.</u>

The Commission asks whether text messaging services should be assessed for USF purposes, either as telecommunications revenues or pursuant to the Commission's permissive authority under section 254(d). *Notice* ¶ 24. Under either approach, the answer should be "no." Text messaging is an information service, not a telecommunications service, and therefore is not subject to mandatory universal service contribution obligations. Furthermore, the Commission should not exercise its permissive authority to assess contributions for text messaging service because doing so would not be in the public interest.

1. Text messaging is an information service.

The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available Information via telecommunications." 47 U.S.C. § 153(20). Text messaging service fits this definition of information service for two reasons. First, it requires the "storing" and "retrieving" of information, both when delivering messages between individual consumer handsets and when allowing subscribers to retrieve information such as news, alerts, or reminders from a content provider's central information database. Second, it involves "transforming" message content, by adding identifying information and undertaking net protocol conversion to transmit a message to other networks or the Internet. These characteristics are integral to the text messaging service and place text messaging squarely within the "information service" category as defined under Commission precedent.[39]

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[39] Services categorized as information services cannot be telecommunications services because "'information service' and 'telecommunications service' are mutually exclusive categories." *Vonage Holdings Corporation v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007).

Storage and Retrieval. The Commission consistently has cited computer-based storage and retrieval as the classic hallmarks of an "information service."[40] Text messaging is effectively a more mobile form of e-mail, and like e-mail, text messages are delivered over a system that uses storage and retrieval.[41] When a subscriber sends a text message, the text is initially routed to a short messaging service center ("SMSC"), where it is stored while the system attempts to locate the intended recipient. The SMSC needs to find where the receiving handset is physically located and therefore stores the message while sending another message over the SS7 network to the Home Location Register ("HLR"), which tracks handsets. If the HLR cannot find the customer (for example, if the phone is turned off or out of the service area), the HLR replies to the SMSC and the message will be stored for redelivery up to five days and then deleted if not successfully delivered. While most messages are delivered quickly, every message is stored for some period of time until the SMSC receives confirmation that the receiving handset is active and ready to retrieve the message. Even after delivery, messages are stored on the server for up to ten days, during which they may be retrieved for purposes such as law enforcement.

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40 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 420 ¶ 95 (1980) ("*Computer II Order*"); *see also Nat'l Cable & Telecomm. Ass 'n v. Brand X Internet Servs*., 125 S. Ct. 2697 (2005) (characterizing "basic" service as involving "a communications path that enable[s] a user to transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network"); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11538-39 ¶ 78 (1998) ("*Stevens Report*').

41 E-mail and text messaging are practically indistinguishable to the user. Indeed, on some mobile devices, e-mail and text messages are displayed in the same "mailbox" screen. While text messaging and e-mail may have originated as distinct services, they have become increasingly intertwined as both technologies have evolved. It is now possible to send e-mail to mobile devices that are not e-mail-capable, and those e-mails are received as text messages. By the same token, it is possible for mobile customers to send text messages to Internet email addresses in the same way they send text messages to other mobile users, and the message is received as e-mail. Thus, the two services have become effectively conjoined.

Messages also can be stored indefinitely on a customer's handset, and the customer can edit the message, forward it to others, reply by text, or even reply by voice by clicking the associated phone number on the message.[42]

Text messaging services also allow subscribers to "retrieve" data in another sense, by querying certain electronic databases. When used in this way, the subscriber sends a text message to retrieve information that has been pre-loaded into a central database, such as automatic alerts, sports scores, weather updates, and other information. In *Talking Yellow Pages*, the Commission found that a similar service involving "customer interaction with stored information" should be classified as enhanced rather than basic service, and therefore not subject to Title II common carrier regulation, even though the Talking Yellow Pages provider was a common carrier for other basic services.[43] Because text messaging similarly allows subscribers to retrieve or make available information via telecommunications, it is properly classified as an information service.

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42 The storage and retrieval associated with text messaging distinguishes the service from basic telecommunications service, such as voice or facsimile transmission. When a sender initiates a telephone call or fax transmission, the sending device transmits only signaling information to confirm that a circuit may be opened to the recipient. Once the circuit is opened, the sender's content is then transmitted from sender directly to recipient. In contrast, a text message is always stored for at least a short period of time – and sometimes for hours or even days – before it is transmitted to its ultimate destination, and subscribers rely upon this storage capability when out of range, traveling by airplane, or otherwise unavailable to receive the message. Even when the receiving handset is active and users can communicate in "close-to-real-time," the essential service is "store-and-forward, and hence asynchronous" because "one can send a message to another person ... without any need for the other person to be available to receive it at that time." *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 ¶ 17 (2009) ("*2010 ESL Order*").

43 *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988 ¶¶ 19-20 (1987) ("*Talking Yellow Pages*") (*citing* 47 C.F.R. § 64.702), *vacated as moot*, 7 FCC Rcd 5644 (1992).

Protocol Conversion. The Commission repeatedly has held that services involving" net protocol conversion "are" enhanced services."[44] Describing its *Computer Inquiry* framework, the Commission has explained that "generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services."[45] Since 1996, the Commission has made clear that services involving net protocol conversion also constitute "information services" under the Act, because such conversion involves the "transforming" of information.[46]

The transmission of text messages often involves net protocol conversion. The Commission has defined "protocol conversion" to refer to "the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks."[47] Different wireless carriers use different text messaging protocols. For this reason,

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[44] *See, e.g., Computer II Order*, 77 FCC 2d at 421-22 ¶ 99. *See also generally* 47 C.F.R. § 64.702 (noting that enhanced services "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information").

[45] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7459 ¶ 4 (2004).

[46] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996) ("*Non-Accounting Safeguards Order*") (concluding that "the differently-worded definitions of 'information services' and 'enhanced services' ... should be interpreted to extend to the same functions"); *id*. at 21956-57 ¶¶ 104-105 (finding that protocol processing services that had qualified as "enhanced" under the *Computer Inquiry* framework should be treated as "information services" under the 1996 Act framework); *Stevens Report*, 13 FCC Rcd at 11543-44 ¶ 88; *id*. at 11527 ¶ 51 (noting that "services employing protocol processing were treated as information services under the MFJ").

[47] The Commission first enunciated this definition in the 1995 *Frame Relay Order*. *See Independent Data Communications Manufacturers Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13717-18 n.5 (1995). The Commission has since employed that

when wireless carriers first deployed text messaging capabilities, customers could send messages only to other customers of the same carrier. Later, carriers and third-party vendors developed techniques to convert messages among the disparate text messaging protocols.

For example, Verizon Wireless may truncate an intercarrier text message if it arrives in 7 -bit rather than 8-bit coding, and also must process it through a message aggregator to adjust for different formats used by different wireless operators (such as the use of foreign language accents or other special characters). When sending to or receiving from the Internet, Verizon Wireless must translate the message between the RFC-822 Internet email protocol and a format or protocol used for text message transmission over wireless networks. As a result, a text message originating from or sent to a non-Verizon Wireless destination could look very different between sending and receipt. These various changes and translations constitute net protocol conversion under Commission precedent.

Even for text messages that stay within the Verizon Wireless network, the company changes the form or content of messages between sending and delivery. For example, Verizon Wireless adds headers, callback numbers, dates, and other information to the message the sender typed before delivering it to the receiving handset. If the sender is listed with a nickname in the recipient's address book, the system will automatically display that nickname as well. As a result, even text messages within the same wireless network nonetheless experience a "change in

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(footnote cont'd.)

definition in several orders. *See, e.g. , Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 n.229; *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket No. 96-115, CC Docket No. 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14435 n.134 (1999).

the form or content of the information as sent and received," again meaning a text messaging service is an information service under the Act.

2. The Commission should not assess text messaging revenues pursuant to its section 254(d) permissive authority.

Section 254(d) provides that the Commission may require "[a]ny other provider of interstate telecommunications . . . to contribute to the preservation and advancement of universal service if the public interest so requires." 47 U.S.C. § 254(d). It would not be in the public interest to subject text messaging to universal service contribution requirements.

Wireless services already are subject to excessive taxes and fees, with wireless taxes currently double or triple the rate of taxes imposed on other goods and services.[48] According to recent studies, the current taxes and fees on wireless services account for over 16 percent of an average wireless consumer's monthly bill, and even exceed 20 percent in some states.[49] It would be contrary to the public interest and detrimental to consumers to burden texting services with even more taxes and fees.

Moreover, subjecting texting services to USF contribution requirements would be contrary to Commission precedent regarding its permissive authority under section 254(d). Specifically, in the *First Universal Service Order*, the Commission exercised its permissive authority to establish universal service contribution requirements for private network operators that lease excess capacity on a non-common carrier basis. *Id.* ¶ 786. The Commission explained that these private network operators, which are not common carriers, should be required to contribute to the USF because they compete against telecommunications carriers in the provision

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48 Scott Mackey, *A Growing Burden: Taxes and Fees on Wireless Service*, Tax Analyst – State Tax Notes, 476-78 (Feb. 14, 2011).

49 *Id.* at 475.

of interstate telecommunications. *Id.* Likewise, the Commission exercised its permissive authority to require entities that provide interstate telecommunications to end-users for a fee and payphone aggregators to contribute to universal service. *Id.* ¶¶ 794-797; *see also* 47 C.F.R. § 54.706. The Commission concluded that these providers, like telecommunications carriers, "have built their businesses or part of their businesses on access to the PSTN, provide telecommunications in competition with common carriers, and their non-common carrier status results solely from the manner in which they have chosen to structure their operations." *Id.* ¶ 796.

Most recently, the Commission required interconnected VoIP providers to contribute to the USF pursuant to its permissive authority under section 254(d). The Commission found that interconnected VoIP service is increasingly used to replace traditional telephone service and that interconnected VoIP providers have built their business, at least in part, on access to the PSTN; thus, according to the Commission, it was inappropriate to exclude interconnected VoIP service from universal service contribution requirements. *2006 Contribution Methodology Order* ¶ 44; *see id.* ¶ 41 (noting that "interconnected VoIP providers may rely on their own facilities or provide access to the PSTN through others").

In contrast to other providers that the Commission has found should contribute to the USF as a matter of public interest, text messaging services neither replace traditional telephone service nor provide access to the PSTN as part of their business. Verizon Wireless offers text messaging as a compliment to its voice service, and texting messaging does not provide, and is not offered as a means to, access the PSTN.[50]

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50 *Cf. Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End*

Requiring text messaging services to contribute to universal service also would be inconsistent with the Commission's "fairness" goal when other communications alternatives that customers may use instead are not subject to a similar contribution requirement. Text messaging bears significant similarity to email, instant messaging ("IM"), or social networking on Facebook or Twitter. In fact, recent data show that Internet-based applications already are beginning to erode wireless providers' text messaging revenues.[51] Imposing a contribution obligation on text messaging, but not on "similar or substitutable" messaging services, "would create unintended market distortions." *Notice* ¶ 24. Before the Commission could determine that text messaging should be subject to contribution obligations, it would have to explain why the public interest would be served by singling text messaging out for this burden, while other, virtually identical communications choices are not subject to the same requirement.

Accordingly, the Commission should decline to assess providers of text messaging services either as telecommunications revenues or pursuant to its permissive authority under section 254(d).

(footnote cont'd.)
User Common Line Charge, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, ¶ 283 (1997) (finding that it would not be in the public interest to require broadcasters to contribute to the USF when they do not compete in any meaningful way with common carriers); *see also Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Errata, DA 98-158 (rel. Jan. 29, 1998) (clarifying that the exemption for broadcasters of video programming extends to all broadcasters).

[51] "Carriers Sweat as Texting Cools Off: New Messaging Apps from Apple, Others May Hit Fees," *Wall Street Journal*, June 9, 2011 (available at http://tinyurl.com/6cxumea); Marguerite Reardon, "New Comcast Services Threaten Wireless Text and Data Revenue", *CNET*, May 12, 2012 (available at http://news.cnet.com/8301-1035_3-57439667-94/new-comcast-services-threaten-wireless-text-and-data-revenue/).

F. **The Commission Should Conduct A Comprehensive Study Before Deciding Whether To Assess Broadband Revenues.**

Some parties urge the Commission to assess USF contributions on broadband revenues. *Notice* ¶ 65. Doing so would indeed expand the size of the contribution base and reduce the contribution factor. *Id.* ¶ 69-72. However, this proposal would mark a significant departure from the current system and raises significant issues that the Commission should carefully study before deciding whether to extend USF assessments to broadband revenue.

At the outset, imposing USF contribution requirements on broadband would run counter to many of the Commission's policy goals, including specifically its goals of achieving increased broadband adoption and promoting broadband deployment.[52] Extending the universal service contribution obligation to include broadband services would increase the contribution burden for households with both voice and broadband service. Although broadband adoption is influenced by several factors other than price, the differential in contribution burden between voice-only and voice/broadband households may affect adoption by some households.[53] Accordingly, the Commission first should understand fully the consequences for customer purchasing decisions if USF contributions were to be imposed on broadband services.

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[52] *See Federal Communications Commission, Connect America: The National Broadband Plan*, at xi ("Like electricity a century ago, broadband is the foundation for economic growth, job creation, global competitiveness and a better way of life") ("National Broadband Plan"); *id.* at 10 (establishing as a goal of the National Broadband Plan that "every American should have affordable access to robust broadband service . . .").

[53] National Broadband Plan at 171 (noting that "some 36 percent of non-adopters cite a financial reason as the main reason they do not have broadband service at home"); S*ee* Pew Internet and American Life Project, Digital Differences, at 6-7 (April 12, 2012) (noting that approximately 21 percent of respondents mention price related reasons for their not using the Internet) (available at http://www.pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf).

If the Commission were to decide to impose a contribution obligation on broadband services, there are many complications that the Commission would have to resolve. For example, it would have to define precisely the services to which the contribution obligation applies. And that is no easy task. In defining the broadband service that is subject to assessment, the Commission must ensure that it adheres to the fairness principle articulated in the *Notice* and not place some providers at a competitive disadvantage by assessing one category of broadband services, without assessing competing services by other providers. Such line-drawing is complicated given the many different broadband platforms (*e.g.,* DSL, cable modem, 4G wireless, satellite) and business models in the marketplace.

Moreover, the Commission would have to ensure that it has clearly articulated the line between assessable broadband service and non-assessable services and applications that use broadband service. In drawing this line, the Commission should again ensure that it is consistent with the fairness principle. A provider of broadband service should not be assessed on revenues from such applications or services (*e.g.,* video downloads or the thousands of free-standing specialized applications now available) that "ride over" a broadband service if a competing provider of such applications and services is not assessed. And, the Commission should articulate as clearly as possible the revenues that are both included in and excluded from the definition of broadband Internet access service. As difficult as it is for contributors under the current system to draw the line between "telecommunications service" revenue and "information service" revenue, that line-drawing is at least informed by many years of Commission precedent. If the Commission adds broadband service revenue to the contribution base, contributors would now be faced with the difficult tasks of interpreting a new definition and drawing a line between the "broadband Internet access service" defined by the Commission and the applications and services that rely on broadband.

If the Commission ultimately decides to assess USF contributions based on broadband revenues, broadband should be treated as 100 percent interstate for contribution purposes. Consistent with Commission decisions finding that broadband Internet access services are inherently interstate, even though they may contain an intrastate component,[54] the Commission should not attempt to apportion broadband revenues between intrastate and interstate jurisdictions. Doing otherwise would only add complexity and cost to the administration of the contribution system, which would be inconsistent with the Commission's overarching goals in this proceeding.

G. The Commission Should Not Adopt A "Total Revenues" Approach.

In the *Notice*, the Commission seeks comment on a proposal by the State Members of the Joint Board to assess all revenues reported by contributors on line 418 of the Form 499. *Notice* at ¶ 69. The Commission cannot adopt this proposal. The revenues reported by contributors on line 418 include revenues from equipment sales and from a wide array of services that directly compete with services provided by entities that do not file a Form 499. For example, line 418 revenues might include revenues from video services, web hosting, cloud services, and IT

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[54] *See, e.g., GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No*. 1148, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 16 (1998), *recon. denied*, 17 FCC Rcd 27409 (1999); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 59 (2002) ("*Cable Modem Broadband Order*"), *aff'd, NCTA v. Brand X*, 545 U.S. 967 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 28 (2007)*; United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶ 11 (2006).

solutions – all of which compete with services provided by entities that do not file a Form 499. The Commission should not place Form 499 filers at a competitive disadvantage by assessing them for all services they provide, when they must compete with other companies that do not have to pay any assessment at all. Assessing Form 499 filers on such revenues would treat "similar or substitutable services differently" and thus "create unintended market distortions." *Notice* at ¶ 24.

Take just one example (among many): Verizon is currently developing a suite of digital health care products as part of Verizon's "Connected Health Care Solutions," a newly formed organization that provides tailored IT solutions for the health care industry.[55] This Verizon organization is working on widespread adoption of electronic medical records that could reduce medical costs by as much as $165 billion a year through efficiencies and improved health outcomes. The same group is also currently developing products to overcome chronic disease management roadblocks, using our 4G LTE network, smartphones, tablets and advanced video technology. These products will enable virtual, any-distance visits between patients and health care providers who will have access to essential patient data. In the healthcare industry Verizon's competitors are not other traditional telecommunications carriers and FCC Form 499 filers. They are manufacturers, specialized software, research and development, and other high-tech companies. Requiring Verizon (but not our competitors) to contribute on its "total revenues" – including revenues from these non-traditional communications segments – would hamper Verizon's ability to compete in the health care solutions marketplace, depriving patients of cutting-edge, lifesaving services.

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55 *See* Verizon, About, Innovative Solutions, Health Care Solutions, http://about.verizon.com/index.php/about/innovative-solutions/health-care-solutions.

The same is true for any number of other, non-telecommunications services – *e.g.*, over the top video services and home security solutions – that may be offered by Form 499 filers. Requiring some providers but not their competitors to contribute to the USF on these services will force contributing providers to pass through additional contributions to their customers or to slash margins – either of which would clearly (and substantially) impact their ability to innovate in new and important market segments. Any assessment on such services offered by providers simply because they are carriers or provide telecommunications is unfair and would skew the marketplace to the detriment of consumers.

H. The Commission Should Not Assess Intrastate Revenues.

The Commission should refrain from seeking to expand the contribution base through assessment of intrastate revenue. Many states already assess intrastate revenues as part of state universal service fund programs. In some cases, the state contribution factor on intrastate revenue is substantial.[56] If the Commission were to assess these revenues as well, it essentially would be double taxing intrastate revenues, which would only increase the existing contribution burdens and lead to further competitive distortions. Accordingly, the Commission should not resort to assessing intrastate revenue.

V. THE COMMISSION SHOULD CAREFULLY CONSIDER OTHER CONTRIBUTION SYSTEMS DISCUSSED IN THE *NOTICE*.

While much of the *Notice* focuses on reforming the existing revenue-based contribution approach, the *Notice* also raises the possibility of adopting alternative contribution approaches – including basing contributions of telephone numbers or connections. There are potential benefits

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[56] *See, e.g.,* Nebraska Universal Service Surcharge – 6.95 percent (available at http://www.psc.state.ne.us/home/NPSC/communication/comm.html); New Mexico Universal Service Charge – 3.3 percent (available at www.nmprc.state.nm.us/consumer-relations/docs/phone-surcharges.pdf).

to both of these alternatives, which the Commission should consider carefully before continuing with the current revenue-based approach. And, of course, in the event it adopts a numbers- or connections-based contribution methodology, the Commission must establish an implementation schedule that gives contributors sufficient time to modify their internal systems and establish new procedures necessary to change from the current revenues-based approach.

A. A Telephone Numbers-Based Contribution System Has Many Positive Attributes.

A contribution mechanism based on in-use working telephone numbers has many potential benefits, which is the reason why Verizon has supported this approach in the past.[57] Specifically, a properly structured, numbers-based mechanism would treat all providers of competing services on the same basis, thereby promoting the Commission's objectives for an equitable, rational system. A proper numbers-based mechanism also has the potential to be more efficient, since it would avoid the need for arbitrary allocations of revenues, as well as the resulting inequities, uncertainties, and disputes. Further, an appropriate numbers-based mechanism can provide a stable foundation for the contribution mechanism, given the continued growth and demand for telephone numbers. *See Notice* ¶ 310, Chart 7.

However, perceived shortcomings with this approach in the past generally have led to "hybrid" proposals that offset many potential benefits of a numbers-based contribution system. For example, contributors and the public would not be well served by "hybrid" proposals that would require USF assessments based on some combination of numbers and some other

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[57] *See, e.g.*, Comments of Verizon and Verizon Wireless, *High-Cost Universal Service Support*, WC Docket No. 05-337, at 32-40 (filed Nov. 26, 2008); Comments of Verizon and Verizon Wireless, *High-Cost Universal Service Support*, WC Docket No. 05-337, at 4-7.

methodology (*i.e.*, connections or revenues).[58] This hybrid approach would require that contributors devote considerable resources to establish two different assessment methods instead of one, which would harm consumers and providers alike by increasing administrative and compliance costs. The benefits of a numbers-based contribution system would be diminished if not lost altogether if the Commission were to follow such a hybrid approach.

B. <u>A Connections-Based Contribution System Is Problematic.</u>

A connections-based approach, like a numbers-based approach, avoids the need for difficult line-drawing between assessable and non-assessable revenues. As the Commission notes, it first proposed adopting such an approach more than a decade ago. *Notice* ¶ 221. However, during the intervening years, no party has been able to offer a workable solution to overcome two fundamental challenges facing a connections-based contribution mechanism: (1) the definition of the connection; and (2) the establishment of fair and stable connection tiers.

Although the *Notice* suggests several options for defining a "connection," each proposal has its shortcomings. *See Notice* ¶¶ 232-237. For example, a facilities-based definition raises inherent implementation challenges "to the extent that the assessment varies based on the speed of the facility, in circumstances where the physical connection provides variable speed on demand." *Id.* ¶ 231. Likewise, a service-based definition would require the Commission and the industry to sort through a myriad of offerings in an attempt to determine which are and which are not assessable for universal service purposes. This task becomes even more overwhelming as

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[58] *See, e.g., High Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6536 (2008) (App. A, ¶ 92), (App. C, ¶ 88) (proposing to assess consumers based on a numbers-based methodology and business customers based on a connections-based methodology).

services are bundled or – as in the case of email and text messaging – become almost indistinguishable.

Second, even assuming a connection could be defined with precision (which is doubtful), most connections-based contribution methodologies are premised upon speed or capacity tiers upon which the contributions would actually be based. *Notice* ¶ 249. However, the establishment of these tiers is inherently arbitrary, and there has been no industry consensus on a tier design that is fair both to providers and consumers. Furthermore, any tiers that are established would become obsolete almost immediately as the speed of connections continues to increase. Establishing a contribution methodology that consistently must be updated is inefficient and would create unnecessary administrative costs that the Commission's reform efforts are intended to eliminate.

Furthermore, the task of designing a workable connections-based methodology has only become more complicated as communications technology has evolved. While ten years ago, most connections were ordinary voice grade connections or fell into a small number of higher-bandwidth wireline categories with relatively uniform pricing, today's wireless and wireline networks support a broad range of services. For example, two wireless connections might have the same bandwidth but one might be used for a low-revenue, low-usage telematics or machine-to-machine service while the other is used for a higher-usage, higher-revenue service. To design a viable connections-based system, the Commission would have to ensure that the per-connection assessment is fair for the range of services that might use a particular type of connection and does not distort the market for low-revenue applications such as some telematics and machine-to-machine services.

VI. THE COMMISSION SHOULD NOT MODIFY ITS CONTRIBUTION RECOVERY RULES.

No need exists to modify the Commission's rules regarding the recovery of universal service contributions from customers, and the *Notice* does not offer any problem that the proposed rules would solve. *Notice* ¶¶ 390-397. The Commission's current rules strike an appropriate balance between protecting consumers, while not overburdening carriers. Unfortunately, the same cannot be said about the alternative proposals in the *Notice.*

Rules mandating detailed billing disclosures about the USF charge are contrary to what consumers tell Verizon they want – namely, concise and straightforward bills. In focus groups conducted by Verizon, consumers repeatedly emphasize their desire for a simple, easy to read, and short bill. Consumers in these focus groups specifically complained that billing information about taxes, fees, and other charges was too long and included too much detail, and Verizon responded to this input by making this section of its bills more consumer friendly.

Verizon has no reason to believe that details regarding the USF contribution factor (which is publicly available information posted on the FCC's website) or the calculations underlying the USF fee on the bill would be of any interest or use to a customer, even if decipherable. Such granularity is not provided for any other taxes and fees the customer is billed each month, and it is hard to understand why customers would want or need such details about their USF charges. Indeed, rather than providing "clarity," a rule requiring providers to identify the portion of the bill subject to USF assessment would likely cause considerable customer confusion.[59]

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[59] In recently declining to require carriers to separately identify services comprising a bundle that were provided by carriers versus non-carriers, the Commission reasoned that doing so "likely would be extremely confusing to consumers, and make it difficult for them to verify

Furthermore, requiring carriers to disclose more information on their bills about the USF line item – including identifying the portions of the bill subject to USF and reflecting the applicable USF contribution factor – would be an enormously complex undertaking. For example, for each of its customers, a carrier would have to distinguish every charge (or portion thereof) on every customer's bill that is subject to USF assessment from those charges that are not. For bundled services, each individual service that comprises the bundle would have to be separately identified, as well as the amounts broken out for those services for which USF charges were assessed. In addition to service charges, carriers would have to separately examine such charges as: (1) subscriber line charges; (2) Access Recovery Charges; (3) one-time charges, such as installation and service charges; (4) overage and usage fees; (5) late fees; and (6) non-primary line charges. The types and amounts of these charges vary from jurisdiction to jurisdiction and from billing cycle to billing cycle, and each would have to be explained in sufficient detail on the bill so that the customer could verify the USF charge.

While implementing the proposed rule for residential customers would be bad enough, it would be even worse (if not impossible as a practical matter) for enterprise customers. It is not unusual for enterprise customers to have hundreds of services and lines, which can change monthly. For enterprise customers purchasing special access circuits subject to the 10 percent interstate jurisdiction rule, the affected circuits would have to be identified on the bill and an explanation of this rule included on the bill as well. The different service permutations that

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(footnote cont'd.)
whether they are being billed the correct price, if they were billed for a bundle as if they were buying each service ala carte." *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (*"*Cramming*"), CG Docket No. 11-116, FCC 12-42 (rel. April 27, 2012). The same would be true if carriers were required to identify separately on the bill those assessable services comprising a bundle so that customers could "determine whether they are being properly charged a USF pass-through charge." *Notice* ¶ 390.

would have to be addressed in an enterprise customer's bill could be voluminous and would only add to the length and complexity of such bills, which already often exceed 100 pages.

For wireless carriers, an additional level of complexity would be involved. For example, wireless carriers that jurisdictionalize traffic based on traffic studies (which are proprietary) presumably would have to explain on the bill how the traffic study relates to the individual charges on the customer's bill for which the USF assessment applies. Likewise, to the extent a wireless carrier relies upon the jurisdictional safe harbor, it apparently would have to explain what the safe harbor is and how it affects the USF charge on the customer's bill.

The burden on carriers and their billing systems to implement such a rule would be daunting. Carriers already are subject to numerous state and federal disclosure requirements, which are reflected in unique billing messages, bill explanations, and bill inserts that vary from jurisdiction to jurisdiction and from billing cycle to billing cycle. These disclosures would have to be expanded to include additional information regarding the USF charge and how it was calculated, which would require significant resources to implement.

Even if it were feasible for a carrier to implement the proposed rule changes from a logistical standpoint, customers would likely be confused by the information the proposed rule would require carriers to provide. The end result of a requirement that carriers publish a separate line item identifying each charge used in calculating the USF line item would only add pages and pages to every bill that customers are unlikely to ever read.[60]

The Commission also should reject proposals to mandate that carriers include the universal service contribution in "the advertised price" of a service or otherwise disclose at the

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[60] It also would run counter to initiatives by carriers, including Verizon, to reduce environmental impacts by developing sustainable business solutions. *See, e.g.*, http://responsibility.verizon.com/sustainability/.

point of sale "the amount of the quoted rate or other assessable units that would be subject to assessment." *Notice* ¶¶ 391-392. As a threshold matter, there is no reason to treat USF differently from a disclosure standpoint than the multitude of other taxes and fees that consumers must pay when buying communications services – the amounts of which are not included in the advertised price. In addition, because advertising campaigns and promotional materials are prepared well in advance of launch and may be used in the market for extended periods of time, requiring that the advertised price of a service include the universal service contribution would require that providers modify their campaigns and materials at least each quarter to incorporate the new quarterly contribution factor. The cost of complying with these requirements would be astronomical – costs ultimately borne by customers in the form of higher prices.

Finally, the Commission should decline any invitation to prohibit providers from "represent[ing] any line item on end-user customer bills as a federal universal service fee." *Notice* ¶ 394. This proposal is inconsistent with the purpose of the Commission's Truth-in-Billing rules and cannot be reconciled with the Commission's desire to "promote transparency." *Id.* ¶ 389.

Furthermore, this proposal violates the First Amendment. In fact, the United States Court of Appeals for the Sixth Circuit struck down on First Amendment grounds a state law that imposed a new tax on the gross revenues of telecommunications providers but prohibited providers from "separately stat[ing] the tax on the bill."[61] According to the court, the prohibition constituted content-based regulation of speech that did not advance any legitimate governmental

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[61] *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008).

interest.[62] The same would be true for any restriction on a provider's ability to identify the USF charge accurately and truthfully as a separate line item on a customer's bill.

VII. CONCLUSION

For the foregoing reasons, the Commission should reform the USF contribution system consistent with Verizon's proposals in this proceeding.

Respectfully submitted,

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[62] *Id.* at 506-510.