

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

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

**COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

These Comments by the United States Telecom Association (USTelecom)¹ are in response to the Further Notice of Proposed Rulemaking in the matter of the Universal Contribution Methodology and A National Broadband Plan for Our Future, released April 30, 2012 (Further Notice).² The Commission is correct that reforming and modernizing how Universal Service Fund (USF) contributions are assessed and recovered is the next logical step in its efforts to modernize its universal service programs to efficiently bring the benefits of 21st century broadband networks, and the economic growth, jobs and opportunities they provide, to all Americans.³ The Commission is also correct that “the communications ecosystem has undergone extensive changes” and that “the Commission’s universal service contribution system

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² See *Further Notice of Proposed Rulemaking, In the Matter of Universal Service Contribution Methodology* (WC Docket No. 06-122), *A National Broadband Plan For Our Future* (GN Docket No. 09-51), released April 30, 2012.

³ *Id* at ¶1.

has not kept pace with some of these changes.”⁴ A fair and equitable system of funding USF is important to accomplishing the Commission’s policy goals. USTelecom is pleased to participate in a careful and thoughtful examination of the USF contribution mechanism, and to assist the effort to constructively develop a system which can ensure stable and equitable universal service funding into the future. The optimal result from such a process would be a clear, consistent, simple approach which could be easily administered by all contributors.

I. Funding USF – Looking Beyond Contributions

As an initial matter, the Commission should consider, more broadly, whether it will be possible to use general revenues as a source of future contributions to the USF. USTelecom specifically recommends that the Commission request federal legislation that would use general revenues to fund its low-income programs, whether those programs apply only to voice or to voice and broadband service. Funding Lifeline services in this manner would be consistent with other federal programs that help low-income individuals or families afford what are considered life’s necessities. Moreover, the current practice of assessing communications providers’ customers for the funding of low-income discount plans is counterproductive, as it effectively raises the price of service, discouraging adoption and usage of communications services.

II. Determining Who Should Contribute

The threshold question that must be answered in order to begin construction of a fair and stable USF contribution system is the determination of who should contribute – or more properly, which providers of products or services should contribute to universal service funding? Once the answer to that question is decided, the Commission can turn to constructing a workable methodology (or methodologies) for collecting contributions from those providers. While the

⁴ *Id* at ¶3.

challenges of successfully constructing a workable methodology should not be underestimated, it makes much more sense to decide the appropriate participants in the contribution system than to develop a contribution mechanism and then see which services and providers it can capture.

With regard to identifying the appropriate contributors, if the Commission decides to extend the contribution obligation to broadband services, it must seriously examine including more participants in the broadband ecosystem, whether that obligation is assessed on a direct or indirect basis, and an appropriate transition to a more broadband-oriented USF contribution plan. As part of that examination, the Commission should determine the answers to the following questions:

- Whether the beneficiaries of a universal broadband network are principally residential end users, or do they include edge providers whose business plans ultimately depend on ubiquitous broadband, as well as the network investment needed to accommodate bandwidth-hungry services to and from residential end users.
- Whether “horizontal” network-layer participants in the broadband ecosystem have the same stake in network ubiquity as “vertical” edge providers mainly residing in the applications layer.
- Whether the point-to-point justification for assessing network provider end users in the world of the legacy voice network applies in the broadband world, which encompasses many services beyond point-to-point communications. In the traditional voice network, the calling party benefits from the network connection of the called party, and vice versa. In the broadband world, where services may be not only point to point, but point to multipoint and many permutations in between, others than those traditionally thought of as end users may benefit.

- Whether, from both a practical and legal standpoint, participants in the broadband ecosystem, beyond network providers, can be assessed, directly or indirectly, and if so, how.

III. Principles to Guide Reform

The current USF contribution system is rife with outdated methods and procedures that create waste, inefficiency and destabilizing competitive discrepancies. Recognizing that reform and the creation of a new system is not likely to happen quickly, the Commission should immediately adopt practical and easily implementable fixes to the current system while developing comprehensive solutions. Regardless of which products and services are assessed, and whether the Commission is addressing short-term solutions or comprehensive reform, there are four principles below that should guide its changes to the USF contribution system.

1. The contribution base should be stable and predictable.
2. All providers should contribute in a competitively and technologically neutral manner. Provider discretion should be minimized.
3. Consumer impacts should be equitably distributed consistent with the public interest benefits of USF.
4. Administrative efficiency should be maximized.

A. The contribution base should be stable and predictable.

Whatever method is eventually selected to assess the chosen products and services, it needs to yield a contribution base that is stable and predictable. Reforming assessment methodologies is a worthwhile goal, but it may involve dislocations that could necessitate transitions. A stable contribution base will diminish the need for additional reform in the near future. Moreover, a stable contribution base will permit the Commission to more easily convert

to a longer-term consumer assessment, instead of the quarterly adjustments used today. This would reduce consumer frustration and ease administrative burdens on providers.

B. All providers should contribute in a competitively and technologically neutral manner. Provider discretion should be minimized.

USF contribution assessments are passed along to consumers as part of the rates charged for whatever products and services are provided by the contributors. As such, the contribution obligation must be competitively and technologically neutral. Assessments should not advantage one provider over another with respect to the pricing of consumer offerings. This does not mean, however, that the methodology for assessing all providers or technologies must necessarily be the same. While a greater degree of uniformity of assessment methodology among various services, technologies and providers is certainly preferable, because of the incredible diversity of products and services in today's communications marketplace, the Commission may find that non-uniform assessment methods may be appropriate in limited instances and promote consistency with the goals of efficiently collecting competitively and technologically neutral contributions. That can be determined after the Commission settles on which services and providers it can and should include as USF contributors.

Whatever services and providers are assessed, and whatever methodologies are used, the Commission should make its best attempt to limit the amount of discretion among the payers as to their obligation to pay and the amount that they owe. The current universal service system has suffered from significant confusion, and sometimes gamesmanship, with respect to the calculation of a provider's universal service contribution obligation. It has produced dozens of appeals of contribution decisions made by the Universal Service Administrative Company (USAC) and requests to the full Commission for review of Wireline Competition Bureau

(Bureau) decisions on those appeals.⁵ Just as an important goal of the Commission's actions in the USF/ICC Transformation Order was to reduce regulatory arbitrage, the same goal should apply to the contributions side of the USF equation.

C. Consumer impacts should be equitably distributed consistent with the public interest benefits of USF.

The Commission should adopt strategies, including a broader contribution base, to ensure that consumer impacts are equitably distributed, consistent with the public interest benefits of USF. If the financing of universal service support must be assessed on such an important economic input as the exchange of communications among users, the impact of that assessment should be minimized as much as possible, consistent with the stable and adequate funding of the USF. And just as the impact on direct contributors should be equitable and neutral with respect to services, technology and competition, so should the impact on the consumers to whom the contributors are permitted to pass through their contribution obligation.

D. Administrative efficiency should be maximized

Both in the short and long term, the Commission should make changes to the USF contributions system that minimizes burdens on providers and maximizes administrative efficiency. Ease of administration would reduce costs on providers that must be passed through to consumers in the form of higher rates. It would also reduce USAC's cost of administering the contribution system.

IV. Problems with the Current System

⁵ See *ex parte* letter, p. 4, of David B. Cohen, Vice President, Policy, USTelecom, re Universal Service Contribution Methodology (WC Docket No. 06-122); Federal-State Board on Universal Service (CC Docket No. 96-45); and A National Broadband Plan for Our Future (GN Docket No. 09-51) (filed March 28, 2012).

There are several common sense solutions that the Commission could and should act on immediately while considering comprehensive and fundamental reform. Such reform will not be adopted and implemented immediately; thus, the current revenues-based system will remain relevant for at least the near term future. Moreover, any elements of the current system that are carried forward to a reformed system should be built on a strong foundation of sensible policies and procedures.

The immediate solutions are practical approaches to problems with the current system that result from the lack of clarity of three fundamental distinctions that must be made under today's USF contribution mechanism. The lack of bright-line rules to make classification distinctions, jurisdictional distinctions and resale/wholesale distinctions create unnecessary ambiguity which lead to inconsistent results and arbitrage. Service providers have the incentive to minimize their contribution obligations by interpreting the rules and administrative instructions in a way that supports that outcome. The current system only captures contributions from a few among many providers that offer competing voice services, which unfairly penalizes traditional voice providers and their customers and artificially skews the market.

A. Classification Distinctions

The first and most basic distinction that must be made under the current system is that between assessable telecommunications revenues and non-assessable non-telecommunications revenues. Unfortunately, this distinction is nearly impossible to make during the transition to an all-IP environment where a wide array of converged services is offered by many competing providers over broadband platforms. The line between telecommunications or telecommunications services on one hand, and information services on the other, is becoming

increasingly blurred.⁶ It is increasingly challenging for the Commission to provide guidance about the contribution obligations for these services through rulemakings or declaratory rulings. During the pendency of such deliberations, such as the more than three years it took to resolve a controversy over the contribution obligations for prepaid calling cards,⁷ there is a lack of certainty among the affected parties, and the potential contribution obligation must be made up by others. Making clear classifications distinctions becomes more difficult with the passage of each day as consumers purchase more and more sophisticated IP-based products, which are frequently bundled with other services and offered for a single price. It is not in the interests of consumers and of fair competition for USF contribution concerns to complicate the roll-out of new and innovative services and service bundles, and for new competitive inequities to be created as competing providers come to different conclusions about their contribution obligations.

B. Jurisdictional Distinctions

The basis for the current system is the historical idea that services are either interstate or intrastate in nature, that providers can readily distinguish revenues associated with each jurisdiction, and that consumers purchase different, jurisdiction-based services. These things are no longer true. Stand-alone wireline IXCs no longer exist, most wireless services are based on national pricing models, and state boundaries are irrelevant to how consumers select and buy

⁶ For example, the current system creates a competitive disparity in areas where rate-of-return ILECs contribute to USF based on their broadband access service revenue, but competing cable companies providing the very same voice and broadband services do not.

⁷ See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WT Docket No. 03-133 (filed May 15, 2003); *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, Order and Notice of Proposed Rulemaking, FCC 05-41 (released Feb. 23, 2005); *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Report and Order, FCC 06-79 (released June 30, 2006).

communications services. Consumers purchase bundles, or even unlimited capacity, of any-distance voice, data, and other services – increasingly over IP platforms. From the financial perspective of most consumers, there is no meaningful difference between a “local” call, “intrastate long-distance call,” and “interstate long distance call”, yet those classifications still form the basis for assessment of USF fees.

C. Resale/Wholesale Distinctions

The processes surrounding wholesale-reseller situations are burdensome and ineffective. The current system effectively makes wholesale providers into enforcement agents of the Commission, requiring them to collect certifications from reseller customers attesting to USF contributions. Service providers therefore become subject to or exempt from contribution obligations based on who has the proper certifications, rather than whether the revenues earned by the service providers in question fit the definition of assessable telecommunications revenues. The Commission has even looked to wholesalers to make up reseller contributions if it turns out that the reseller did not contribute to the fund, despite the wholesaler’s inability to recover those contributions from the reseller. And resellers must navigate the many varying wholesale provider certification procedures.

V. Immediate Administrative Reforms

While working through the larger issues of comprehensive reform, the Commission could and should immediately adopt practical solutions to problems with the current system that result from the lack of clarity of three fundamental distinctions explained above. There are seven measures the Commission could immediately implement that will allow it to stabilize USF contributions and establish a firmer foundation for comprehensive reform.

A. The Commission Should Adopt Notice and Comment on Form 499 Instruction Changes

The Commission should adopt its proposal made in paragraph 346 of the Further Notice to adopt a formalized annual process for the Bureau to update and adopt the Telecommunications Reporting Worksheets and their accompanying instructions. On an annual basis, any proposed changes to the Form 499A or its instructions should be identified, and the Commission should explain the reasons for those changes, and seek comment on the revised form and instructions. Any changes to the instructions should apply only on a going-forward basis. Changes to the Worksheets and accompanying instructions can be substantive and should be subject to notice and comment. Such a process will also help the Commission become aware of any confusion as to the Worksheets and instructions and thus help the revision of such documents with the goal of streamlining administration of contributions for both carriers and USAC.

B. There Should be Amnesty for Good Faith Interpretations of Form 499 Instructions

The Commission should adopt a process in which it would invite providers to meet with Commission staff to explain how they have, in good faith, interpreted certain 499 instructions and ask the Commission to confirm or modify the 499 instructions accordingly. If the Commission disagrees with the provider's interpretation of the instructions, as long as the provider was not acting in bad faith, there would be no adverse consequence to the provider (such as a referral to the Enforcement Bureau or a USAC audit finding). This process would enable staff to identify areas that lacked clarity and make modifications to avoid future confusion. Of course, any resulting modifications would be put out for comment.

C. There Should be Symmetric Contribution Liability and Refund Periods

The Commission should repeal the asymmetrical one-year deadline for providers to re-file their form 499As if form amendments would reduce their contributions. The one-year deadline to seek a refund conflicts with the Bureau-set, open-ended obligation to re-file forms that would increase contributions. The one-year deadline is procedurally defective and wrong as

a matter of policy. There often are very good reasons why a carrier cannot meet the deadline for amending a Form 499A. 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 extending beyond one year. A symmetrical limitations period (such as three years) to restate revenues in either direction would be more equitable to contributors and provide greater certainty for the Commission.

D. The Commission Should Reduce the Volatility of the Contribution Factor

The Commission should reduce the volatility of the contribution factor. This is particularly relevant under today’s revenue based system, but could remain relevant whether or not the Commission retains a revenue-based system. The Further Notice discusses modifying the frequency of changes to the contribution factor and notes that an annual contribution factor “could provide greater predictability to contributors, particularly those that enter into term contracts with their customers.”⁸ An annual factor would also help consumers budget and avoid contributors having to make billing and other administrative adjustments every quarter. The current system of revenue projections and true-ups also unfairly penalizes contributors that are unable to project their revenues with precision.

E. The Reseller Exemption Process Should be Changed

The Commission should eliminate the provider-to-provider certifications in the reseller exemption process in favor of a bright-line rule based on widely accessible information in a Commission-maintained database. The Commission should adopt the proposal for wholesale-reseller confirmation requirements that it makes in the Further Notice.⁹ Once the wholesaler has

⁸ See *Further Notice* at ¶353.

⁹ *Id* at ¶385.

checked the database to ascertain that a reseller has properly registered with the Commission, it should have no further obligations with respect to USF contribution enforcement, and particularly should not be held responsible for non-payment or inadequate payments by the reseller. The Commission should not impose responsibility for such non-payment or inadequate payments on the wholesale provider, as that places the wholesaler in the role of guarantor and collection agent for the Commission for the reseller's obligation.

F. Reporting Safe Harbors Should be Reassessed

The Commission should make better use of reporting safe harbors. It can do this by revising the safe harbor percentages based on the historical data it now has available to it and extending safe harbor reporting to wireline services as well. At present, relatively little USF revenue is assessed based on the jurisdictional safe harbor percentages set by the Commission. The vast majority of wireless revenue is subject to contributor-specific traffic studies that approximate the percentage of revenue that is interstate. 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; those that are too low will make it possible for parties to adopt safe harbors to avoid paying their fair share. The Commission should revisit its original purpose for adoption of safe harbors and reset them at realistic levels and extend them for use by wireline providers. This could substantially relieve administrative burdens associated with the USF contribution system.

G. The Commission Should Adopt Realistic Prepaid Calling Card Reporting Requirements

Prepaid calling cards constitute a not-insignificant portion of the voice business but the reporting requirements associated with them have evolved in a piecemeal fashion by changes to the Form 499 instructions. This has resulted in providers interpreting these requirements

differently. The current requirement that providers must report the ‘face value’ of a card as assessable revenue – not the amount actually paid by the provider’s end-user customer – is particularly unrealistic. Many cards do not have a face value, and in any event contributing providers often do not know and have no control over the retail price of a calling card. The FCC should adopt a reporting mechanism for these services that addresses the unique characteristics of these services.

H. The Commission Should Modify Its *De Minimis* Rules

A simple fix to the current contribution methodology would be to adopt modifications to the Commission’s *de minimis* rules. Per the proposal in the Further Notice,¹⁰ the rules should base changes to determine qualification for *de minimis* treatment based on a provider’s assessable revenues rather than on the amount of its contributions. As noted in the Further Notice, the current system means that some providers cannot project with reasonable certainty whether or not they will qualify as *de minimis* each year until mid-September when the Commission announces the fourth-quarter contribution factor.¹¹ Because of this uncertainty, many providers with a *de minimis* contribution obligation must file the quarterly Telecommunications Reporting Worksheet and contribute on a quarterly basis. Use of assessable revenues instead of the amount of contributions would fix this problem. USTelecom also supports the proposal in the Further Notice to reduce the reporting obligations and regulatory uncertainty for *de minimis* providers with growing revenues by making it optional for such provider to file quarterly Telecommunications Reporting Worksheets for a year after which

¹⁰ See *Further Notice* at ¶209.

¹¹ *Id* at ¶212, n. 358.

the provider qualified as *de minimis*.¹² This would not alter their obligation to file the annual Telecommunications Worksheet or their contribution obligation.

VI. Conclusion

A fair and equitable system of funding USF is important to accomplishing the Commission's policy goals. The optimal result would be a clear, equitable, simple approach, which could be easily administered by all contributors. However, while that process is underway, the current USF contribution system should be immediately reformed. It is rife with outdated methods and procedures that create waste, inefficiency and destabilizing competitive discrepancies. The Commission should immediately adopt practical and easily implementable fixes to the current system while developing comprehensive solutions.

Respectfully submitted,
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¹² *Id* at ¶216.