Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 AT&T

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I. INTRODUCTION AND SUMMARY

As the Commission acknowledges, its current revenues-based contribution regime is dysfunctional, and technological convergence is the main reason. Today's contribution regime rests on various 1990s-era legal distinctions between, for example, "interstate" and "intrastate" services and between "telecommunications services" and mere "telecommunications"[1] that are all but meaningless in the emerging market for converged communications services. Consider a customer who pays an LTE-based mobile provider a single monthly fee of $50 for an all-distance "data" service that seamlessly provides Internet access, text-messaging, and all-you-can-eat voice functionality.[2] Under today's revenue-based scheme, what portion of that $50 should be deemed assessable as an "interstate" service with appropriate "telecommunications" components? Does it matter whether the voice functionality is TDM- or IP-based, or whether the text-messaging component is a downloaded Internet app rather than a conventional SMS service? There are no clear answers, and contribution policy should not turn on such economically irrelevant questions in the first place.

To date, the Commission has responded to new services and new business models by jerry-rigging various fixes to its revenues-based rules.[3] Each time, the Commission has added to

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[1] *See, e.g.*, *Universal Service Contribution Methodology*, Further Notice of Proposed Rulemaking, WC Docket No. 06-122, FCC No. 12-46, ¶¶ 31, 121 (rel. April 30, 2012) (*FNPRM*).

[2] *See, e.g.,* Reinhardt Krause, *Verizon Wireless Data Plans Eye Apple VoIP Move*, Investor's Business Daily (June 26, 2012) (*Verizon Wireless Data Plans*), *available at* http://news.investors.com/article/616126/201206260837/verizon-data-sharing-plan-apple-voip-calls-smartphones.htm.

[3] *See, e.g., Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) (*2006 Contribution Order*) (imposing contribution obligation on two-way interconnected VoIP providers and raising safe harbor for mobile wireless providers), *aff'd in relevant part, Vonage Holdings Corp. v. FCC*, 489 F.3d

the complexity of those rules and the administrative costs they impose on the industry. Gamesmanship is routine: some providers run highly questionable "traffic studies" to minimize their reported "interstate" revenues,[4] and some devise elaborate accounting mechanisms to allocate as many revenues as possible to the non-assessed (or lesser-assessed) services (or equipment) within a retail bundle.[5] Moreover, as business models evolve in Internet time, so do the means of evading contribution obligations, and so do the opportunities for any given provider to obtain arbitrary competitive advantages over its rivals simply by rigging its pricing models to manipulate the revenue-based contribution rules. In short, the radically divergent contribution burdens that emerge from this process are inconsistent with the statutory requirement that providers contribute on an "equitable and nondiscriminatory basis,"[6] and subvert the key objectives that must underlie any sensible contribution regime, including sustainability, competitive neutrality, and ease of administration.[7]

1232 (D.C. Cir. 2007) (*Vonage Holdings Corp.*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (and related proceedings), 17 FCC Rcd 24952 (2002) (*Second Wireless Safe Harbor Order*) (among other things, increasing the safe harbor for mobile wireless providers).

[4] *FNRPM* at ¶ 141 ("We have some concerns that contributors may be using different methodologies in conducting traffic studies, given the broad variation in reported ratios. It is surprising, for instance, that nine wireless providers report no interstate or international revenues at all. Similarly, the fact that 47 VoIP filers report no interstate/international revenues, while some others report ratios relatively close (but slightly under) the current 64.9 percent safe harbor, also suggests that VoIP providers may be classifying their traffic in significantly different ways[.]").

[5] *Id.* at ¶ 19 & n.74 ("Bundling of intrastate and interstate voice calling with data services and equipment has further complicated the Commission's and providers' ability to identify the revenues that should be included in the contribution base" and has encouraged providers "to game the system by allocating the revenue in a manner that reduces contributions burdens.").

[6] 47 U.S.C. § 254(d).

[7] *See FNPRM* at ¶ 8; *see also* Section II.C below (discussing guiding principles for contribution regime).

As discussed below, a long-term solution to these problems will require a departure from today's revenue-focused approach. And if the Commission can no longer rely on revenues – the essential "output" of the communications business – to distribute contribution burdens fairly and efficiently, it must turn instead to the "inputs," such as connectivity, bandwidth, data transmission, and network address resources. The inputs the Commission chooses as the basis for contribution obligations need not be rigidly uniform for all classes of contributors. For example, the Commission could distribute the contribution burden, possibly based on top line revenues, among three major groups: providers of fixed connectivity, providers of mobile connectivity, and providers of over-the-top services. For each group, the Commission could then adopt an appropriate input – such as connections or phone numbers – as the mechanism for assigning contribution obligations to individual providers within that group. Whichever direction the Commission takes, however, it should no longer expect providers to determine at their peril whether or not a particular service triggers contribution obligations. The Commission should itself draw those lines explicitly, clearly, and in advance.

In the near term, there are clear improvements that the Commission can make to its current rules as it considers a non-revenues-based contribution methodology or methodologies. These improvements include altering the existing wholesale/resale regime, clarifying how providers of bundled offerings should report their revenues, establishing wireless and VoIP traffic study methodologies, and implementing long overdue reforms to the Commission's management of the Fund. We discuss these issues, below.

ARGUMENT

As it evaluates what changes to make to its universal service contribution methodology,[8] the Commission is correct to ask first, who should contribute? Once the Commission decides which providers of interstate telecommunications should contribute, it then must determine how those providers should be assessed. AT&T has organized its comments consistent with the organization of the Commission's *FNPRM*. First, we discuss who is a provider of interstate telecommunications. Next, we discuss alternatives to the existing revenues-based contribution methodology, followed by improvements that the Commission could make if it decides to maintain the current methodology. Finally, we discuss administrative changes that should be adopted regardless of the methodology that the Commission ultimately selects.

II. The Commission Should Clearly Identify Any New Categories of Services It Wishes To Add To The Contribution Base, Without Relying On Vaguely Phrased "General Rules" Of Indeterminate Scope.

It is no longer sustainable to impose the lion's share of the contribution burden on traditional "telecommunications carriers," now that consumers have turned increasingly to Internet-based information services to meet their communications needs. The Commission must therefore place far heavier reliance on its permissive authority to assess contributions from "provider[s] of interstate telecommunications,"[9] a much broader category that, as discussed below, encompasses many providers of Internet applications and content.

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[8] For convenience, we refer to the instant proceeding as addressing "universal service contributions" but, to be clear, AT&T urges the Commission to apply whatever new methodology it adopts in this proceeding to its telecommunications relay service, North American Numbering Plan (NANP), and local number portability funds. For reasons we have detailed elsewhere, contributors should not be required to maintain dual contribution methodologies, one for universal service contributions and one for those three other funds. *See, e.g.,* Letter from Mary Henze, AT&T, to Marlene Dortch, FCC, WC Docket No. 06-122, CC Docket Nos. 96-45, 01-92, at 7 (filed Nov. 21, 2008) (AT&T Nov. 21, 2008 *Ex Parte* Letter).

[9] 47 U.S.C. § 254(d); *see FNPRM* at ¶ 31.

The threshold question is whether, in exercising that authority, the Commission should clearly identify the specific service categories that it wishes to subject to contribution obligations or whether, as it proposes, it should "craft a general rule" for that purpose in the hope that "[s]uch a rule could potentially produce a more sustainable contribution system by avoiding the need to continually update a list of specific services subject to assessment." *FNPRM* at ¶ 74. This "general rule" approach may sound attractive in the abstract, but it would raise more questions than it would answer. That point is exemplified by the general rule that the Commission proposes in paragraph 75 of the *FNPRM*, which would sweep in a vast range of over-the-top Internet services in addition to interconnected over-the-top VoIP – an outcome that the Commission gave no indication that it intends. As discussed below, the Commission arguably *should* impose contribution obligations on many over-the-top services besides VoIP as part of any comprehensive reform effort. But unless and until the Commission embraces that step, it should maintain the bottom-up approach it has used all along, making particular service categories (such as "broadband Internet access") assessable only after it concludes that they should be.

A. The *FNPRM*'s Proposed "General Rule" For Identifying Contributors Would Sweep In Far More Internet-Based Services Than The Commission Appears To Realize.

The *FNPRM* proposes the following "general rule": "*Any interstate information service or interstate telecommunications is assessable if the provider also provides the transmission (wired or wireless), directly or indirectly through an affiliate, to end users*." *FNPRM* at ¶ 75. The Commission specifies that this rule is designed to capture providers, such as EarthLink, that lease last-mile broadband links to end users as well as broadband ISPs that own such links. *Id.* at ¶ 76. Nothing in the *FNPRM* suggests that the Commission intended for this rule to capture

cloud-computing services (e.g., Amazon and Google), social networking sites (Facebook and Google+), over-the-top Internet services such as streaming audio and video (e.g., Netflix, YouTube, and Pandora), and interactive legal database services (Westlaw and Lexis). Indeed, in one passage, the Commission assumes that the rule would not capture "video-on-demand services" that are "provided through Internet websites" and thus "require the viewer to bring their own 'telecommunications' (*i.e.*, Internet access)." *Id.* at ¶ 79. In fact, however, the proposed rule would include those very services, as well as the other service categories mentioned above, because all of these services involve the provision of telecommunications "to end users" at some point in any given communication with them, albeit not over the last-mile links closest to them.

In suggesting otherwise, the Commission appears to have overlooked what it found in prior USF contribution orders and elsewhere reaffirms in this *FNPRM* – that an entity can "provide telecommunications" to its users even if it neither owns nor leases *last-mile* transmission functionality so long as it arranges for the provision of transmission functionality at some other point. *See id.* at ¶ 80. For example, dial-up ISPs and over-the-top VoIP providers both "provide telecommunications" to their users even though, in the Commission's words, those end users "bring their own" last-mile transmission to the table by independently procuring it from their LEC or broadband ISP. *Id.* at ¶ 76. This is not a new or controversial conclusion. Indeed, it is the Commission's explicit legal basis for imposing contribution obligations on interconnected over-the-top VoIP providers, which by definition do *not* provide transmission services over the last mile to their own customers. The Commission has "determined that [such] VoIP providers provide 'telecommunications'" to their customers nonetheless because, on the *other* end of those customers' calls, the VoIP providers "generally purchase access to the PSTN

from a telecommunications carrier who accepts outgoing traffic from and delivers incoming traffic to the interconnected VoIP provider's media gateway," and they use that wholesale input to "suppl[y] PSTN transmission itself to end users."[10]

That basic legal conclusion is correct: an entity "provides telecommunications" if, for the benefit of its users, it arranges for the provision of telecommunications between any points in a data exchange, even if the users independently procure transmission functionality in the last mile closest to them. Crucially, however, it makes no difference whether that non-last-mile transmission takes place in TDM format (on the PSTN) or IP format (on the Internet). The term "telecommunications," as defined in the Communications Act, is technology-agnostic, and it is as ubiquitous on the Internet as it is on the PSTN.[11] The *FNPRM* thus misses the point when it asks whether the same rationale that justifies assessments for interconnected VoIP services should be "extend[ed] . . . to other services that provide origination or termination of a

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[10] *2006 Contribution Order* at ¶ 41 (emphasis and footnotes omitted), *aff'd in relevant part, Vonage Holdings Corp.*, 489 F.3d at 1240-41. As the Commission found, a company can "provide telecommunications" to users without "*offering* telecommunications" to them and thus without providing a Title II "telecommunications service" subject to mandatory (rather than permissive) contribution obligations. *See* 47 U.S.C. § 153(53) (defining "telecommunications service" as "the *offering* of telecommunications for a fee directly to the public") (emphasis added); 47 U.S.C. § 254(d) (any "*provider* of interstate telecommunications may be required to contribute" to the USF) (emphasis added). In particular, the verb "provide" is "a different and more inclusive term than 'offer,'" *2006 Contribution Order* at ¶ 40, and thus "may apply to the act of supplying a component of an integrated product," *Vonage Holdings Corp.*, 489 F.3d at 1240.

[11] *See* 47 U.S.C. §153(50) ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."). The Commission would exacerbate rather than resolve the problem if it sought to exclude certain providers by narrowing its interpretation of this statutory definition. *Cf. FNPRM* at ¶¶ 89-92. Such narrowing (to the extent the statutory language permits it) would necessarily limit the Commission's own discretion under section 254(d) to make sensible and administrable policy about which providers *should* contribute to the USF. In many contexts, contribution disputes would turn not on sound policy considerations, but on legalistic statutory debates with deeply unpredictable outcomes. Indeed, the Commission needed *more than three years* simply to decide whether relatively uncomplicated prepaid calling cards qualified as "telecommunications services" subject to mandatory contribution obligations. *See Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290 (2006), *vacated in part*, *Qwest Services Corp. v. FCC*, 509 F.3d 531 (2007). These are rabbit holes the Commission should avoid by maintaining an appropriately broad view of the statutory definition of "telecommunications" and thus of its own section 254(d) authority.

communication *via the PSTN*." *FNPRM* ¶ 80 (emphasis added). Over-the-top VoIP companies like Vonage "provide telecommunications" to consumers not because they must arrange for transmission *over the PSTN* in particular, but because they must arrange *for transmission*, whether over the PSTN or over pure IP networks.

For that same reason, *any* provider of over-the-top Internet services would fall into the same regulatory category so long as it arranges for the provision of transmission between any points through the Internet. For example, Internet-based streaming-video providers are not passive actors in the process of conveying their content to end users. Movie files do not sit passively in Netflix's corporate offices, waiting for Netflix users to pay their own IP networks to reach all the way into those corporate offices to take the movie files out. Instead, Netflix pays Level 3, among other IP networks, to transmit Netflix's content to broadband ISPs whenever the ISPs' end users request it. More generally, Internet content providers either build global content distribution networks themselves (as Google/YouTube and Amazon have done) or they procure the services of enterprise ISPs/backbone providers (such as AT&T or Sprint) or third-party content-delivery networks (such as Level 3 or Limelight):[12]

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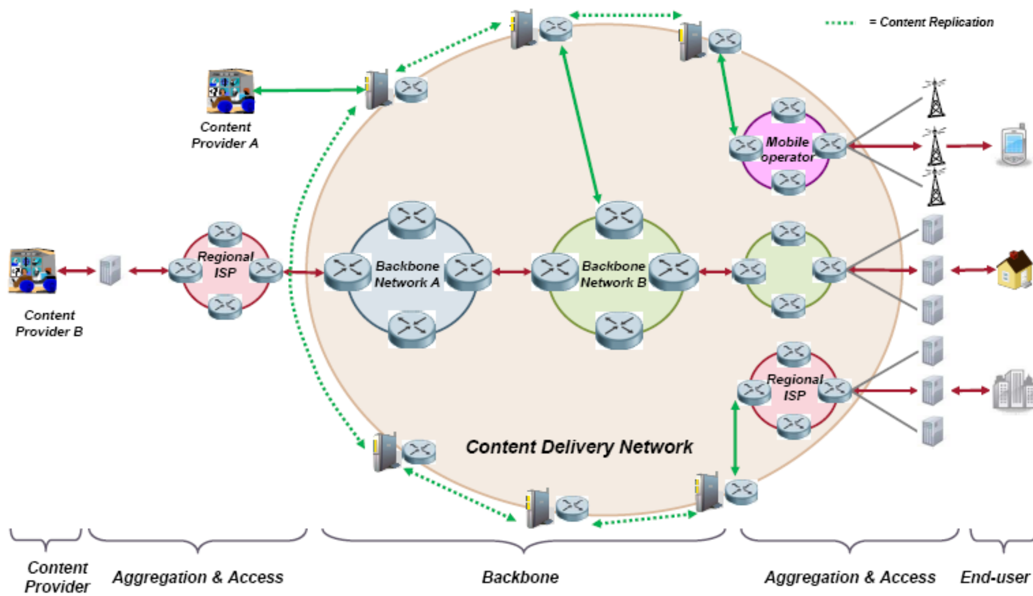
[12] A content delivery network distributes and stores copies of content on servers at multiple locations across the Internet and transmits content from those servers to the ISPs whose customers ask for it. Because of their proximity to end user networks, CDNs enable end users to gain access to content more quickly and reliably than under a conventional "unicast" arrangement, where each end user must communicate directly with a single centralized server many network hops away. Reportedly, some CDNs such as Akamai do not own the transmission pipes they use and instead lease them from third parties, whereas other CDNs such as Level 3 own and use their own transmission networks. Just as a non-facilities-owning VoIP provider "provides telecommunications" to its users by hiring a CLEC to perform that task, a content provider "provides telecommunications" by hiring a CDN to transmit its content to users. In turn, it makes no difference for present purposes whether that CDN arranges for such transmissions over its own facilities or facilities it leases from third parties instead.



In all of these scenarios, the Internet content provider occupies the same legal position as Vonage: it "provides telecommunications" in the form of behind-the-scenes transmission to users who have independently "brought their own" last-mile broadband transmission to the table.

Of course, this is not to say that the Commission *must* subject all Internet-based providers to contribution obligations; it may have policy reasons for exempting many of them. Our main points are these. First, the Commission has the authority to impose contribution obligations on many Internet-based providers that procure transmission services from third parties or build transmission networks themselves. Second, the phrasing of the proposed rule in paragraph 75 would have the effect of *exercising* that authority to require all such providers to contribute. Of course, if it adopted that rule anyway, the Commission could then specifically exempt every category of Internet-based services it does not wish to make assessable. *See FNPRM* at ¶¶ 74, 82. But if the universe of exempted services is larger than the universe of services the Commission does wish to make assessable for the first time, the Commission could accomplish

the same outcome more directly, with less potential for confusion, if it dispensed with any "general rule" and simply identified the new assessable service categories.

B. The Commission Should Not Limit Contribution Obligations for the First Time to "Facilities-Based" Providers.

The Commission could not avoid the conundrums discussed above by "limit[ing]" its proposed general rule "to facilities-based providers." *Id.* ¶ 83. First, even if it were so limited, the general rule proposed in paragraph 75 of the *FNPRM* would still sweep in many Internet-based providers such as Google, Yahoo!, and Amazon that own and operate private transmission networks in order to convey data more efficiently to users.[13]

Second, any contribution rule based on a distinction between "facilities-based" and "non-facilities-based" providers would also raise profound concerns about competitive neutrality. Under such a rule, IP-based video (or voice) services would be subject to assessments if, but only if, the entity providing them is vertically integrated with the entity that physically transmits the relevant video or voice content from source to destination. As the *FNPRM* suggests (¶ 79), that differential treatment would artificially bias the market against vertical integration by raising consumer prices whenever a service provider integrates transmission functionality into its service. That outcome would be nonsensical: a service provider's decisions about whether to vertically integrate or outsource should be driven by considerations of economic efficiency, not by a desire to avoid artificial regulatory consequences.[14] Of course, the Commission could try to

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[13] For example, Google CEO Eric Schmidt acknowledged five years ago that "we have not only data centers, but we have fiber that interconnect[s] those data centers, and connect[s] to the ISPs. At Google, speed is critical. And part of the way we get that speed is with that fiber." Fred Vogelstein, *Text of Wired's Interview with Google CEO Eric Schmidt*, Wired, Apr. 9, 2007, *available at* http://www.wired.com/print/techbiz/people/news/2007/04/mag_schmidt_trans.

[14] *See generally* Ronald Coase, The Firm, The Market, and the Law (1990).

jerry-rig various regulatory fixes for this competitive bias, but the details would be highly controversial and produce yet more regulatory uncertainty.

Third, it is not even clear what "non-facilities-based" would mean in application, and any attempt at precision would simply create industry-disrupting arbitrage schemes. Most providers of transmission functionality, whether on the Internet or the PSTN, assemble their networks through an ever-evolving mix of (1) facilities that they own outright, (2) facilities that they do not own outright but hold under multi-decade "indefeasible rights of use" (IRUs), (3) facilities that they rent from others under shorter but still widely divergent lease terms, and (4) third-party services that they purchase in cash or in kind. Particularly given the extreme variations in that mix from provider to provider and from one point in time to the next, it would be a fool's errand to pinpoint exactly when and where a provider is using "its own" facilities to provide telecommunications. And even if it were feasible to define a bright-line rule on that subject, that rule would simply give providers perverse incentives to avoid the rule's contribution effects by configuring their networks somewhat differently. That outcome would distort the Internet's evolution and subvert its efficiency simply to satisfy regulatory demands.

C. The Commission Should Broaden the Class of Assessable Services on the Basis of Guiding Principles for Contribution Reform: Sustainability, Competitive Neutrality, Ease of Administration, and Equitable Fairness.

As it acknowledges, the Commission will need to make greater use of its discretionary section 254(d) authority to extend contribution obligations to "provider[s] of interstate telecommunications," given how rapidly Internet-based services are eroding contribution revenues derived from traditional "telecommunications *services*." In exercising that discretion, the Commission should follow four basic principles, all of which are rooted in the statutory language, the Commission's precedent, or both.

Section 254(d) directs the Commission to require providers to make contributions, "on an *equitable* and *nondiscriminatory* basis, to . . . specific, *predictable*, and *sufficient* mechanisms to preserve and advance universal service."[15] That statutory language suggests several conclusions. *First*, any contribution regime should be sustainable ("predictable" and "sufficient"), in that it will produce a stable money flow over time. *Second*, it should be competitively neutral ("nondiscriminatory"), in that it will treat like services alike and create no artificial advantages for any provider over its rivals. Following that statutory directive, the Commission has long emphasized that its contribution rules "should be competitively neutral" and should "extend . . . to providers that compete with common carriers, because common carriers are subject to mandatory contributions."[16]

Third, following section 254's emphasis on "predictable" USF mechanisms, the Commission has stressed that contribution obligations should be "easy to comply with and administer."[17] *Fourth*, in line with the statutory mandate for "equitable" allocation of the contribution burden, the Commission should ensure some rough correspondence between USF obligations and benefits. For example, it is appropriate to require interconnected over-the-top VoIP providers to pay into the federal USF not only because they compete with circuit-switched LECs subject to mandatory contribution obligations, but also because such VoIP providers

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[15] 47 U.S.C. § 254(d) (emphasis added).

[16] *See FNPRM* at ¶ 8.

[17] *Id*.

benefit from ubiquitous voice and broadband connectivity, both of which the federal USF now supports.[18]

These central principles—sustainability, competitive neutrality, ease of administration, and equitable fairness—should guide the Commission as it considers new classes of services to include within the contribution base. For example, these principles suggest that retail mass market broadband Internet access should be included, at least within any revenues- or connections-based regime.[19] That service category meets the sustainability and competitive neutrality criteria: broadband Internet access is widespread and commercially successful, and – unlike conventional telecommunications services – it is not facing rapid competitive erosion in the face of market substitutes. Retail mass market broadband Internet access also plainly meets the equitable fairness criterion, now that the Commission's universal service regime focuses largely on supporting new broadband deployment. The more widely broadband is adopted, the more efficient and diverse will be the marketplace for complementary Internet applications and services, and that in turn will increase the value of every provider's broadband platform. Finally, whether these services also meet the "ease of application" principle will depend more broadly on

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[18] *See 2006 Contribution Order* at ¶ 43 ("much of the appeal of [interconnected VoIP] services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms").

[19] If the Commission includes broadband Internet access within the contribution base, it should allocate 100 percent of the revenues for these inseverably interstate services to the interstate jurisdiction. Broadband Internet access typically involves communications with many geographically dispersed servers in the course of a single session—indeed, even the download of a single webpage can involve communications with multiple servers. *See, e.g., GTE DSL Tariff Order*, 13 FCC Rcd 22466, ¶ 22 (1998). The Commission would defy the distance-agnostic ethic of Internet communications, and create countless opportunities for arbitrage, if it made a broadband provider's contribution obligations contingent on the geographic location of the servers that its subscribers communicate with. Moreover, as the Commission has determined, it has ample legal authority to treat any inseverably interstate service "as 100% interstate for USF purposes." *2006 Contribution Order* at ¶ 53.

whatever methodology the Commission adopts for calculating contribution obligations in general.

These guiding principles also suggest that the Commission should not require providers of SMS text messaging services to contribute to the base.[20] Those services are rapidly yielding to (non-contributing) Internet apps that provide the same functionality as SMS text messaging at a price of essentially zero. A message sent via one of these apps—such as Apple's iMessage and BlackBerry's Messenger—is "roughly equivalent to an SMS," but because such an app does not use "a cell phone network's own SMS data channel, and travel[s] instead as simple 3G data," it is "a direct threat to SMS network revenues."[21] As the *New York Times* has observed, "[t]here are now a growing number of ways to bypass text-message charges using an Internet connection—much as Skype allows people to make calls without relying on a traditional telephone line," and these services "could take a big bite out of the profits that text messages generate for wireless carriers."[22] More generally, Fast Company adds, "as we all shift to using more data-only functions—and use smartphones more than ever—then cell phone firms will likely see revenue growth from voice calls and SMS's stutter and possibly fail."[23] In short,

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[20] Contrary to the Commission's inference that AT&T has previously supported expanding the contribution base to include text messaging revenues (*FNPRM* at ¶ 50 & n.150), AT&T has explained on several occasions that SMS is an information service, not subject to mandatory USF assessment. *See, e.g.,* Comments of AT&T, *Request for Guidance on Universal Service Fund Contributor Matter Filed by the Universal Service Administrative Company*, WC Docket No. 06-122 (filed June 6, 2011).

[21] Kit Eaton, *Don't Shoot the iMessager: Why Cell Phone Networks May Soon Have to Shrink Your Bill*, Fast Company (Oct. 11, 2011) (*Don't Shoot the iMessager*), *available at* http://www.fastcompany.com/1786678/ reluctant-revolution-how-cell-phone-charges-have-to-change.

[22] Jenna Wortham, *Free Texts Pose Threat to Carriers*, N.Y. Times (Oct. 9, 2011), http://www.nytimes.com/2011/10/10/technology/paying-to-text-is-becoming-passe-companies-fret.html?_r=2&pagewanted=all.

[23] *Don't Shoot the iMessager*, *supra*.

requiring providers of SMS text messaging to contribute at this late date would generate rapidly diminishing USF revenues and would only hasten the demise of this service category in the face of competition from alternative technologies that currently have no contribution obligations at all.

The guiding principles we have discussed also suggest that retail mass market "one-way" interconnected VoIP services should be subject to contribution obligations, at least under the current revenues-based mechanism. As key providers of such services acknowledge,[24] those services compete directly with two-way interconnected VoIP and traditional circuit-switched voice, both of which, of course, are currently subject to contribution obligations. Indeed, any given retail mass market VoIP customer could easily integrate, onto a single device, *both* "one-way outbound" *and* "one-way inbound" services, thereby essentially creating the basic functionality of two-way interconnected VoIP services while escaping contribution obligations under current rules.[25] In short, extending contribution obligations to retail mass market one-way VoIP may be necessary to preserve both stability and competitive neutrality. And that step would also comport with the equitable fairness criterion as well, for the same reason that it is fair to expect two-way VoIP providers to contribute to a regime that benefits them by expanding both broadband deployment and the voice telephone network.[26]

Finally, applying these principles to "enterprise communications services that include a provision of telecommunications" weighs in favor of including such services in the contribution

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[24] *See Contribution FNPRM* at ¶ 61 (quoting Skype).

[25] Of course, the customer in that context must use different telephone numbers for inbound and outbound calls, but it is unclear why that should matter so long as her contacts know the number she uses for inbound calls.

[26] *See 2006 Contribution Order* at ¶ 43.

base. AT&T's approach to determining whether its complex enterprise services should be reported in its contribution base is consistent with guidance that the Wireline Competition Bureau (Bureau) issued to the Universal Service Administrative Company (USAC) in 2009:

> [C]ontributors should [determine their contribution obligations for a particular service] . . . consistent with the definitions of 'information services' and 'interstate telecommunications' established under the Communications Act of 1934, as amended, and the Commission's rules and orders. For example, contribution obligations must be consistent with Commission precedent concerning the services for basic transmission purposes or transmission inextricably intertwined with information-processing capabilities.[27]

AT&T's analysis of the statutory definitions as interpreted by the Commission has caused it to conclude over the years that certain enterprise services are assessable but others are exempt, at least in part. Relying on providers to make good faith interpretations of arcane Commission precedent to determine whether and to what extent they will incur a 15 percent assessment in the form of a USF contribution has created market distortions and has incented some of AT&T's competitors to adopt aggressive views of what is an information service. For example, it appears that some of AT&T's competitors have concluded that any MPLS-enabled service is an information service without regard to whether the competitor is providing customers with a net protocol conversion or any enhanced features or functionalities. The Wild Wild West atmosphere that has flourished in this market as a result of the Commission's rules and practices is anything but "equitable."

As long as it continues to rely on interstate telecommunications revenues, the challenge for the Commission with respect to this class of services is twofold. First, it must be clear about precisely which services are subject to assessment so that there can be no dispute about whether

[27] Letter from Jennifer McKee, FCC, to Michelle Tilton, FCC, DA 09-748, 1-2 (April 1, 2009) (internal citations omitted).

a given service is in or out of the assessable base. Second, the Commission must establish a basis for contribution that is competitively neutral and the least susceptible to gamesmanship. We offer our recommendations in that regard in Section IV. If the Commission decides to include "enterprise communications services that include a provision of [interstate] telecommunications," its decision should be prospective in effect. That is not to say that the Commission should not apply its existing precedent to resolve pending disputes before it.

III. It Is Time For The Commission To Adopt A Non-Revenues-Based Contribution Methodology Because A Universal Service Fund Based On Interstate Telecommunications Revenues Is Not Sustainable.

The Commission is at a crossroads. It can continue applying regulatory patches in hopes of shoring up its current contribution base or it could break in part or entirely from revenues and adopt a completely different methodology or methodologies based on network addressing resources, connectivity, bandwidth, data transmission, or some combination thereof. If history is any guide, any Commission "fixes" to its revenues methodology will be short-lived. One only needs to look at the size of the current contribution factor and market trends to validate that statement. The Commission's universal service mechanisms now all operate within budget caps or targets but the pool of assessable revenues continues to contract. *See FNPRM* at ¶ 20, Charts 1 and 2 (showing the steady decline in telecommunications revenues). The traditional business model of providing telecommunications services continues to be challenged by models that are based on revenue streams derived from advertisers and content, among other alternative revenue sources. Providers that offer services through the traditional model are adapting to these competitive challenges by restructuring their service offerings. *See, e.g.*, *Verizon Wireless Data Plans*, *supra* n.2. Although these changes are occurring because of market forces and are not

due entirely to the Commission's universal service program, they have clear and predictable consequences to the Fund.

Expanding the pool of contributors and requiring them to contribute on a larger basis of their revenues by tweaking allocation methodologies, as an example, may buy the Commission some time but the market, driven by consumer demand, will continue its march toward business models where an entity's revenue streams will have nothing to do with the provision of interstate telecommunications. And, at some point in the not-so-distant future, the Commission will reach the tipping point, where its original basis, or hook, for assessment – requiring all interstate telecommunications providers to contribute on their interstate telecommunications revenues – will bear little relation to the sources of many contributors' actual revenues.

AT&T and others have expressed these concerns before to the Commission and the Commission itself acknowledged the flaws with assessments based on revenues a decade ago.[28] If the Commission could have predicted in 2002 the profound convergence that was going to occur in the communications industry over the next decade, it certainly would have adopted a contribution methodology based on numbers, connections or some other non-revenues-based methodology. In these comments, AT&T is not proposing a new non-revenues-based methodology. As the Commission knows, AT&T previously submitted a comprehensive telephone numbers proposal along with a numbers and connections proposal. Either one of these

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[28] *Second Wireless Safe Harbor Order* at ¶ 3:

> Although the interim measures we adopt today will improve the current contribution methodology, they do not address our concerns regarding the long-term viability of any revenue-based system. . . [I]nterstate telecommunications revenues are becoming increasingly difficult to identify as customers migrate to bundled packages of interstate and intrastate telecommunications and non-telecommunications products and services. This has increased opportunities to mischaracterize revenues that should be counted for contribution purposes . . . [which] may result in decreases in the assessable revenue base. . . Customers are also migrating to mobile wireless and Internet-based services.

proposals, which were the product of countless hours of study, analysis, and discussions between AT&T and Verizon, would provide the Commission with a good starting point if the Commission is inclined to adopt a telephone numbers or a telephone numbers and connections contribution methodology.

Of course, there are other options that the Commission could consider. For example, the Commission could determine that it simply cannot apply the same basis for assessment across all the diverse types of communications providers. Trying to identify a single "widget" to apply to all providers of interstate telecommunications that is equitable and nondiscriminatory may prove too challenging (which may explain the Commission's paralysis over the past decade). In that event, the Commission could consider dividing interstate telecommunications providers into broad categories, such as fixed location, mobile, and over-the-top providers. Each category of provider would be responsible for contributing a certain amount toward the overall size of the Fund based on the total revenues attributable to each category (e.g., initially 45 percent would be collected by both fixed location and mobile providers and the remaining 10 percent would be collected by over-the-top providers).

Additionally, the Commission could subdivide each main category of provider into subcategories. For example, within the mobile category, there could be subcategories for prepaid wireless, postpaid wireless, machine-to-machine, and connected devices. Within the fixed category, the Commission could divide it, for example, by consumer/small business and enterprise services. Each subcategory could, in turn, be responsible for contributing a certain percentage of the total USF. After determining the amount of the Fund each category and/or subcategory had to contribute, the Commission, with significant input from industry, could then determine what "widget" works best for each category. For example, providers of postpaid

wireless services could contribute based on telephone numbers, as an example, but providers of machine-to-machine services could contribute based on some other widget.

Another approach would be for the Commission to adopt a numbers proposal that is even more streamlined than the plan that AT&T and Verizon filed in 2008. The Commission could decide that only entities that are assigned telephone numbers by the North American Numbering Plan Administrator (NANPA) would contribute to the Fund. Contributions would be based on an entity's number of assigned telephone numbers multiplied by a utilization factor that is sector specific (e.g., ILEC, CLEC, or wireless). One advantage of such a simple numbers system is that, if well designed, it could rely entirely on already existing NANPA recordkeeping and reporting mechanisms and thus could be quickly implemented.

AT&T has detailed the attributes of a contribution methodology based on telephone numbers and/or telephone numbers and connections, as well as responded to critics, in numerous filings made over the past 4 years.[29] While we do not repeat here all of that analysis and we ask the Commission to incorporate by reference those filings, we do summarize some key points.

Benefits of a Telephone Numbers-Based Assessment: Telephone numbers remain a critical telecommunications input and the base of telephone numbers continues to grow (unlike the base of interstate telecommunications revenues). Due to its transparency and ease of

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[29] *See* AT&T Petition for Immediate Commission Act to Reform Its Universal Service Contribution Methodology, WC Docket No. 06-122, 12-18 (filed July 10, 2012) (AT&T Petition); AT&T Nov. 21, 2008 *Ex Parte* Letter; Comments of AT&T, WC Docket No. 05-337, *et al.*, at 47-51 (filed Nov. 26, 2008); Reply Comments of AT&T, WC Docket No. 05-337, *et al.*, at 30-39 (filed Dec. 22, 2008); Letter from Mary L. Henze, AT&T, and Kathleen Grillo, Verizon, to Marlene Dortch, FCC, WC Docket No. 06-122, CC Docket No. 96-45 (filed Sept. 11, 2008); Letter from Mary L. Henze, AT&T, to Marlene Dortch, FCC, WC Docket No. 06-122, CC Docket No. 96-45 (filed Oct. 28, 2008); Letter from Mary L. Henze, AT&T, and Kathleen Grillo, Verizon, to Marlene Dortch, FCC, WC Docket No. 06-122, CC Docket No. 96-45 (filed Oct. 20, 2008).

administration, a telephone numbers-based assessment would stabilize the Fund by assessing all providers and users of services that utilize numbers regardless of technology and making it extremely difficult for them to escape assessment. And because the number of telephone numbers is large and growing, the per telephone number charge will remain low and stable for the foreseeable future, which will redound to the benefit of consumers.

Consumers also would benefit by being able to understand, for the first time, how their universal service fees are calculated and thus to better manage their telecommunications spending. Moreover, because all competing services would contribute on the same basis to the Fund, a numbers-based contribution methodology would ensure that consumers select "the providers and provider types that they want without regard to any artificial distortions that would otherwise be caused by differing contribution charges."[30] In addition, non-business customers, on average, will pay less in universal service fees under a telephone numbers methodology than they do today under the current methodology.[31]

The transparency and simplicity of a telephone numbers-based system eliminates many, if not most, of the competitive distortions inherent in the current methodology. Providers (and their customers) will embrace new services and technologies based on their own merits, not because these new services or technologies will give them a universal service contribution advantage. Furthermore, a telephone numbers-based methodology will make for more efficient and effective contributor audits. Under today's regime, auditors must scrutinize four pages of revenue lines on the Form 499-A, which providers populate based on instructions that are more than 35 single-spaced pages long, to ascertain whether a contributor has reported correctly its

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[30] *See High-Cost Universal Service Support*, WC Docket No. 05-337, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, App. B at ¶ 55 (2008).

[31] *See* AT&T Petition at 15 (providing data supporting this statement).

interstate telecommunications revenues. In performing these audits, auditors must perform the same complicated analyses as contributors as to whether a particular service is a telecommunications or an information service, interstate or intrastate, and, if it is a bundled offering, whether the contributor's telecommunications/information service allocation was reasonable. By contrast, under a telephone numbers proposal, auditors would simply review whether a contributor had accurately calculated its assessable numbers, and paid the correct per-number contribution into the Fund.

Benefits of a Connections-Based Assessment: A connections contribution methodology is potentially more complicated than a simple telephone numbers-based assessment. For example, many providers of interstate telecommunications, particularly those that do not submit FCC Form 477 today, do not currently track their numbers of connections and do not track them by capacity so such providers will require time to modify their systems to begin capturing this information. Additionally, setting the capacity tiers so as not to distort the market will require further industry discussion and input. Nonetheless, a connections-based methodology has its own virtues that are far superior to the Commission maintaining the status quo.

With an assessment based on connections, providers of interstate telecommunications would no longer allocate amounts by regulatory classification or jurisdiction. All providers of interstate telecommunications, including those providers that do not sell interstate telecommunications services, could contribute, further expanding the base of contributors and thereby lowering the per connections assessment. This base should include information service providers that "self-provide" connectivity over internal networks. From the perspective of competitive neutrality and fairness, it is critical that they not gain an additional advantage over their smaller competitors by avoiding USF assessment.

The majority of businesses that provide online services do so by purchasing commercial products like dedicated Internet access and web-hosting. A connections-based contribution mechanism would include these dedicated connections, and thus such businesses are likely to contribute indirectly to the Fund. However, some large online service providers have made significant investments in fiber and server infrastructure. To a great extent, these entities "self-provide" the equivalent of the connections that their smaller competitors purchase. To maintain competitive neutrality, it is critical that any connections-based contribution mechanism include, in one way or another, these self-provided connections.

There are several possible ways to assess self-provided connections in a connections-based contribution mechanism. For example, such providers could be required to estimate, using a standardized methodology, the number and capacity of connections that they would have to purchase to maintain their current level of activity if they were unable to self-provide their connectivity. Alternatively, they could be required to report the actual number and capacity of all connections across which they exchange traffic with other Internet service providers, irrespective of whether those arrangements are "settlement-free" or involve compensation to either party.

Adopting an interstate telecommunications connections-based assessment is consistent with the overall direction of the Fund (i.e., repurposing the high-cost program to require support recipients to offer broadband and creating a Lifeline broadband pilot program) and is a logical choice given the industry's move away from the public-switched telephone network as all interstate telecommunications connections would be captured irrespective of technology.

Regardless of which non-revenues-based contribution methodology the Commission adopts, AT&T looks forward to working collaboratively with others in the industry and at the Commission to ease any implementation issues and to ensure that the new regime will not be subject to the same gamesmanship that exists under today's revenues-based methodology.

IV. While A Revenues-Based Methodology Is Not Sustainable In The Long-Term, If The Commission Disagrees, It Should Adopt Certain Reforms To The Current Methodology.

If the Commission declines to adopt a non-revenues-based contribution methodology or methodologies, there are certain reforms that it should make to minimize the current regime's flaws. We discuss these proposals below. On the other hand, if the Commission agrees with AT&T and others that it should adopt a non-revenues-based methodology, during the transition to the new mechanism, it should consider adopting on an interim basis certain of these proposals can be implemented quickly (e.g., removing any ambiguity about the basis for a prepaid calling card provider's contributions).

A. The Commission Should Provide Greater Clarity As To How Contributors Apportion Revenues From Bundled Services.

The Commission proposes to require providers of bundled services that have an interstate telecommunications component to contribute based on either all revenues from that bundled offering or the revenues associated with the bundle's assessable components, which must be consistent with the price the provider charges for stand-alone offerings of equivalent services or products. *FNPRM* at ¶ 106 (also proposing that any bundling discounts be applied to non-assessable revenues). This is a departure from the framework contained in the Commission's

CPE/Bundling Order, which also permits providers of bundled telecommunications and information service offerings to perform a "reasonable" allocation of assessable revenues.[32]

AT&T supports limiting the unbridled flexibility that contributors have under today's bundling rules to allocate assessable revenue, which many have abused to avoid contributions altogether. Specifically, the Commission could require a contributor to apportion assessable revenue from a bundled offering based on the price that the contributor charges for "stand-alone offerings of equivalent services or products (with any discounts from bundling assumed to be discounts in non-assessable revenues)." *FNPRM* at ¶ 106. In the event that the contributor does not offer the assessable components on a stand-alone basis, the contributor should be permitted to rely on objectively verifiable stand-alone prices of other providers. *Id.* at ¶ 109. Upon request, the Commission could require contributors to submit their analysis to USAC and Commission staff for review to verify that the stand-alone offering that the contributor is relying on is generally available at that price. After reviewing such contributor-supplied information, the Commission will be able to evaluate the effectiveness of its new rule.

If Commission staff or USAC notices an extreme range of quoted prices for equivalent services (analogous to the wireless and VoIP traffic studies that the Commission cites in the *FNPRM*), it should consider imposing additional conditions to deter "sham stand-alone offering[s] [created] to minimize contribution obligations."[33] Although it is premature for the Commission to adopt those conditions now, one option for consideration would be for Commission staff or USAC to establish a range of reasonable prices for equivalent services

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[32] *CPE/Bundling Order*, 16 FCC Rcd 7418, ¶ 53 (2001).

[33] *FNPRM* at ¶ 108.

based on its review of information that contributors have filed and/or publicly available pricing information for equivalent services contained in tariffs or service guides posted on providers' web sites. If the price that a contributor has cited in support for its allocation is not within some percentage of that range of prices, then the Commission could direct that provider to increase its assessable allocation to the lowest price on that range.

The Commission's proposed apportionment rule seems an improvement over the status quo so long as the stand-alone offerings are indeed offered on a stand-alone basis. As explained earlier, consumers and enterprise customers prefer the convenience of bundled offerings, not to mention the discounts that come with most bundles. The industry or, at least, certain segments of the industry may soon reach the point where it makes no sense to offer certain services or products on a stand-alone basis because few, if any, customers desire them. However, these providers might continue to make available these offerings solely for purposes of performing the USF allocation, at which point the Commission should once again reevaluate its apportionment rules to minimize their market distorting effect.

The Commission also requests comment on its proposal to require providers of bundled services that contain interstate telecommunications to contribute based on the full retail revenues of the bundled offering. *Id.* at ¶ 113. This proposal avoids the difficulty of allocating the revenues associated with the assessable components if the contributor does not offer those components on a stand-alone basis. However, if the Commission adopts this proposal, it will be trading in one set of challenges for another: it should expect many contributors to buck the bundling trend by breaking apart their bundles in order to minimize the amount of their contribution assessments. Clearly, consumers prefer bundles but many customers, particularly enterprise customers, might be willing to forgo the convenience of purchasing a bundled service

in order to save, perhaps, a significant amount of money. It is therefore unclear what effect this proposal will have on the contribution base. Additionally, many providers, like AT&T's operating affiliates, have established systems designed to assign bundled service revenues to various underlying components. This assignment of revenues is used not only for USF purposes but for taxes and other regulatory charges. Undoing these systems will be extremely costly and time consuming, and may require providers to maintain separate records as the new USF reporting is likely to be inconsistent with how providers are required to report these revenues for tax and other regulatory purposes. Consequently, the costs of this proposal seem likely to outweigh its benefits.

B. The Commission Could Apply Its Bundling Apportionment Methodology To Determine The Assessable Revenues Of An Information Service With A Telecommunications Component.

If the Commission decides to expand its contribution base by including information services that provide interstate telecommunications, it should apply its bundling apportionment methodology to determine what portion of the revenues from such services should be included in a provider's contribution base. An information service provider should not be penalized via a relatively larger contribution assessment because it offers customers a more feature rich information service than its competitors. To address this concern, the Commission should reject its proposal to require such providers to contribute based on their entire retail revenue and, instead, it should limit these providers' assessable revenues to amounts associated with the interstate telecommunications component. *See id.* at ¶ 116. To the extent that the contributor provides the telecommunications input on a stand-alone basis, it could contribute based on the price of that stand-alone offering. If a contributor does not offer the transmission component on a stand-alone basis, the contributor would follow the same process that the Commission adopts

for its apportionment rule to determine how much the provider should contribute for the telecommunications input. The Commission notes that a group of providers submitted a proposal for how the Commission could assess MPLS-enabled services using proxies for the transmission. *Id.* AT&T has no objection to the Commission establishing a proxy that providers could use at their election.

C. For Services That Require Contributors To Make "Good Faith Estimates" When Allocating Interstate Telecommunications Revenues, The Commission Could Consider Requiring Contributors Instead To Apply A Fixed Percentage To Allocate Interstate Revenues; If The Commission Permits Contributors To Use Traffic Studies, The Commission Should Require Such Contributors To Adhere To A Commission-Prescribed Methodology.

Under today's rules, contributors allocate revenues by jurisdiction. For many services, this allocation requires interstate telecommunications providers to perform traffic studies or rely on one of the Commission's safe harbors. For these services, AT&T agrees that the Commission could establish a specific percentage that providers would use to report their revenues as interstate. *Id.* at ¶¶ 132, 136. The services that would be subject to this fixed allocation include any-distance voice offerings, where the provider does not distinguish between local and long distance calls for purposes of billing the end user. This Commission-mandated percentage should not apply to services that are deemed 100 percent interstate or intrastate under the Commission's current rules (e.g., special access lines that are subject to the Commission's 10 percent rule) because doing so would be too disruptive to the market and too costly for service providers to implement.

If the Commission-established percentage would be interim in nature, used only during the transition to a non-revenues-based methodology, the Commission could set this percentage at 50 percent. There is no need for the Commission to perform any special study of filed traffic

studies, for example, to derive this percentage. We agree with the Commission that, for any-distance voice offerings, jurisdictional distinctions are irrelevant from the consumer's perspective (*see id.* at ¶ 121) and the idea that providers of these any-distance offerings are calculating their end users' interstate charges based on some precise customer-specific jurisdictional analysis is unrealistic. For that reason, the Commission could select a number like 50 percent and require providers of any-distance voice service to use that percentage on an interim basis.

In the alternative, and if the Commission declines to adopt a non-revenues-based contribution methodology, it should require contributors that use traffic studies to comply with a Commission-prescribed methodology. It is clear from the Commission's review of filed traffic studies that many contributors have devised traffic study methodologies that provide anything but "good faith estimates" of their customers' interstate/intrastate traffic. *See id.* at ¶¶ 124-25, 141 (describing the wide intrastate/interstate allocation variance among traffic study filers and noting that over fifty wireless and VoIP providers report no interstate revenues). AT&T recommends that the Commission review the filed traffic studies, propose a methodology based on a best-practices traffic study, and seek comment on its proposal. After reviewing the record and making appropriate changes based on commenters' suggestions, the Commission should issue the methodology that contributors must use if they wish to continue relying on a traffic study to jurisdictionalize their any-distance voice revenues.

D. The Commission Should Dramatically Simplify Its Existing Wholesale/Resale Regime, And Not Further Complicate Its Already Burdensome And Ineffectual Reseller Certification Process.

1. Background On The Current Wholesale/Resale Regime.

When the Commission established its current wholesale/resale contribution regime in 1997 it seemed a simple and elegant solution to determining which carriers have direct contribution obligations: resellers are required to contribute directly to the Fund on their end-user interstate telecommunications revenues and wholesale providers are required to treat each customer of interstate telecommunications, including a carrier customer, as an end-user customer unless the carrier customer informed the wholesale provider that it was exempt from assessment. This regime may have worked well in the initial years after 1997, when the contribution factor was reasonably low and before many carriers began offering complex bundles of telecommunications and information services in an increasingly competitive marketplace. In these early years, resellers likely had little incentive to minimize their USF contribution by providing anything less than completely accurate information to their wholesale providers. Fifteen years later, however, the landscape has irreversibly changed. Complex bundled offerings and a contribution factor that is north of fifteen percent are the norm. The consequence of these changes, as the Commission recognizes, is that otherwise assessable revenue is not being included in the Commission's USF contribution base. For reasons we explain below, an appropriate response could be for the Commission to adopt a modified value-added approach, and not for it to impose further conditions on the already unworkable reseller certification process.

AT&T's experience as both a wholesale provider and a reseller provides a stark example of how burdensome yet ineffective the reseller certification process has become. As one of the largest, if not the largest, wholesale providers of interstate telecommunications, AT&T has

significant experience working with resellers and handling USF reseller certifications. For calendar year 2011, AT&T managed over 1,100 reseller certification forms. Managing this volume of certification forms requires a team of employees. Among other things, AT&T's employees: mail reseller certification forms every fourth quarter to resellers to complete for the upcoming calendar year, track the reseller responses, follow up with non-responding resellers, check the Commission's web site to verify whether responding resellers are listed as current USF contributors, and ensure that the information contained in the completed reseller certification forms is reflected in the resellers' accounts (i.e., including or suppressing the USF line-item charge, where appropriate). Although AT&T asks its resellers to provide a completed recertification form by the end of January each year so that the reseller's USF status can be established prior to services being rendered, many resellers ignore this request and, instead, provide AT&T with the form at the end of the calendar year. This delay can trigger expensive manual adjustments to the resellers' accounts, including back-billing and credits, which obviously affect AT&T's own contribution obligations. The time and costs of administering this process are simply enormous and they will only increase if the Commission requires information service providers to contribute based on the interstate telecommunications component of their information service offering as hundreds, if not more, of ISPs obtain transmission facilities from AT&T's operating affiliates.

In addition to the burden of mailing and receiving (or not receiving) reseller certification forms, the content of the form itself has proven contentious. Many resellers refuse to use the form that AT&T provides them or refuse to provide the level of detail requested by AT&T. Although AT&T requests detailed information about the facilities that are exempt (or not exempt) from USF assessment, many (if not most) resellers simply state that every facility that

they purchase from AT&T is exempt from AT&T's USF fees. As the Commission knows, there is no way for a wholesale provider to verify the accuracy of a reseller's assertion and, there is no basis for it to dispute the reseller's certification if the reseller is listed as a current USF contributor on the Commission's web site. In addition, for years, AT&T's forms have required the reseller to notify AT&T of any changes to the reseller's information (including information about the exempt status of facilities that the reseller is ordering from AT&T) within thirty calendar days. In the many years that AT&T has had this requirement in its certification forms, it is fair to say that it is uncommon for a reseller to update its forms to change the exempt status of a facility.

AT&T also acts as a reseller, obtaining facilities from unaffiliated providers. As a customer, AT&T's largest reselling affiliate, AT&T Corp., identifies which of its purchased facilities are exempt/not exempt from the wholesale provider's USF fees on a circuit-specific basis. Over the years, a number of wholesale providers have complained about AT&T providing them with this level of detail. Instead, these wholesale providers would have preferred that AT&T provide them with a certification form stating that every circuit is exempt from USF assessment, at least at the so-called Access Carrier Name Abbreviation (ACNA) level, because adjusting (possibly manually) the exempt/non-exempt status on a circuit-specific basis for thousands of circuits can be extremely time-consuming.

2. The Commission Should Consider Requiring All Providers Of Interstate Telecommunications To Contribute Based On The Commission's Proposed Value-Added Approach.

If the Commission decides to retain its revenues-based contribution methodology, which it should not except on a transitional basis, the current wholesale/resale regime must be

significantly altered, such as by adopting a modified value-added approach to replace its existing wholesale/resale regime. *See id.* at ¶¶ 149-52. We provide our thoughts on this approach below.

Under the Commission's value-added approach, every wholesale provider of interstate telecommunications would treat every customer as its end user. A wholesale provider would report its revenues from selling interstate telecommunications to its customers – including carrier customers – in its federal USF contribution base and it would be permitted to recover those contribution costs from its customers in the form of a USF line-item charge. Customers that are reselling the wholesale provider's interstate telecommunications offering would contribute directly to the USF based on the positive difference, if any, between the reseller's revenues from reselling that interstate telecommunications and what the wholesale provider charged the reseller. To the extent that the reseller is not reselling interstate telecommunications or is reselling the interstate telecommunications component for some amount less than what the wholesale provider charged it, the reseller would have no direct USF contribution obligation with respect to that interstate telecommunications component. Under this approach, wholesale providers would no longer obtain reseller certifications from their resellers, and resellers would be permitted to recover both their direct and indirect USF contribution payments from their end users via a USF line-item charge.

Is this response the perfect solution to the current problems with the Commission's wholesale/resale regime? No. Among other things, this approach may prompt resellers to re-price their offerings so that the interstate telecommunications component of a service offering is identical to the price assessed by the wholesale provider in order to avoid a direct contribution obligation on that component. Many of these resellers would then seek to make their profit only on the non-assessable components of their service offerings. But, even in that case, the value-

added approach would be better than the status quo because it would reduce the amount of reseller revenues that improperly escape the contribution base.

If the Commission adopts a value-added approach, it should reject its proposal to offer credits to resellers that do not resell the interstate telecommunications component as an assessable service or that resell this component at some price less than what they are charged by the wholesale provider, which, in the words of the Commission, could "effectively subsidize[] certain offerings of [some] contributors."[34] Instead, the Commission could permit resellers to recover their indirect contribution costs from their end users via a pass-through USF line-item charge if the reseller does not resell the wholesale provider's service as an interstate telecommunications service. In this instance, the pass-through charge should not exceed the USF line-item charge assessed by the wholesale provider.[35] On the other hand, to the extent that a reseller is simply reselling an interstate telecommunications service, it should contribute directly to the Fund based on the positive difference in price between what it was charged by its wholesale provider and what the reseller charged its customer. In this scenario, the reseller would be recovering both its direct and indirect contribution costs from its end-user customer via a USF line-item charge.[36]

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[34] *See id.* at ¶ 155 (describing the scenario where a reseller that qualifies for the Commission's LIRE exemption could obtain a USF subsidy in the form of credits).

[35] For example, Reseller buys $100,000 in interstate telecommunications services from Wholesale provider. Wholesale provider charges Reseller $10,000 in FUSF fees ($100,000 x .10 contribution factor) and Wholesale provider contributes $10,000 to the Fund. Reseller incorporates Wholesale provider's telecommunications input in an information service offering from which the Reseller derives $1 million in revenues. Reseller records some amount less than $100,000 (e.g., $50,000) as interstate telecommunications revenue. Despite not having a direct USF contribution obligation, the Commission could permit the Reseller to recover its indirect contribution costs via a USF line-item charge to the end-user customer. However, this line-item amount could not exceed $10,000 (i.e., the amount that the Reseller paid the Wholesale provider in FUSF fees).

[36] In this example, Reseller buys $100,000 in interstate telecommunications services from Wholesale provider. Wholesale provider charges Reseller $10,000 in FUSF fees ($100,000 x .10 contribution factor)

This approach would be simpler to implement than the Commission's reseller certification proposal, discussed below, and is auditable. After some transition that is long enough to enable carriers to modify billing and accounting systems – AT&T suggests 18 months – a wholesale provider would begin treating every customer as an end-user customer by reporting its interstate telecommunications revenue in its contribution base. The wholesale provider would no longer obtain reseller certification forms from its carrier customers and would no longer have any responsibility whatsoever for knowing or monitoring its carrier customers' contribution status. Whether and to what extent the reseller has a direct contribution obligation also is clear cut: if it is reselling the wholesale provider's telecommunications service at some amount above what the wholesale provider charged it, it contributes directly on the difference. To determine whether resellers contributed the correct amount, auditors could review the resellers' general ledgers and underlying subsidiary records detail to identify the resellers' expenses incurred from purchasing interstate telecommunications from their wholesale providers as well as identify the resellers' revenues from their sale of interstate telecommunications to end-user customers. As an additional check, auditors could direct the reseller to produce sample invoices from the reseller's wholesale providers and trace those amounts to the reseller's general ledger. An auditor also could obtain sample customer bills to verify that any USF line-item charge does not exceed the reseller's direct and indirect contribution costs.

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and Wholesale provider contributes $10,000 to the Fund. Reseller uses Wholesale provider's telecommunications service in its resold offering and derives $1 million in interstate telecommunications revenues. Reseller reports $900,000 in its assessable base (and would contribute $90,000 to the Fund). Reseller's USF line-item charge to the customer is $100,000 (based on assessing the customer $1 million in interstate telecommunications service charges). In this way, the Reseller is being made whole in terms of its USF line-item recovery: it paid $10,000 to the Wholesale provider and $90,000 directly to the Fund and it recovered $100,000 from its end user.

3. The Commission's Reseller Certification Form Proposals Are Unworkable.

The Commission's value-added approach to assessing contributions is far superior to the Commission's proposals for modifying reseller certification forms by requiring resellers to include additional Commission-mandated statements. However sensible these new certifications may sound, a number of them could not be implemented by either wholesale providers or resellers. For example, the Commission seeks comment on a proposal to require a reseller to inform its wholesale provider of the percentage of its revenues on which it contributes by reselling the wholesale provider's interstate telecommunications. *FNPRM* at ¶ 169. It appears that the Commission intends that, if such percentage is something less than 100 percent (e.g., 75 percent), the wholesale provider should treat that reseller as its end-user customer for that remaining percentage (e.g., 25 percent). *See also id.* at ¶ 170 (proposing to require a reseller to provide sufficient information to its wholesale provider so that the wholesaler may allocate its revenues between carrier's carrier and end-user revenues). It is likely that this percentage will vary by circuit so that a reseller may have to provide this information for thousands of circuits. Even then, as the Commission acknowledges, this circuit-specific percentage may not be static. The percentage could change in the event that the reseller's end-user customer opts to add or drop a feature or service. *Id*. Even if a reseller could provide this level of detail (and commit to maintaining its accuracy by updating its wholesale provider on a timely basis), a wholesale provider's billing systems likely could not adjust the USF fee that it charges the reseller in any mechanized way. Having to make manual billing adjustments to hundreds of thousands of circuits would be cost prohibitive for a large wholesale provider like AT&T.

The Commission seeks comment on requiring all reseller certification forms to include a certification that the reseller will inform its wholesale provider of any changes to the information

contained in the form within thirty or sixty days. As noted above, AT&T includes similar language in its certification form that it provides its resellers. But resellers rarely provide updates during the calendar year. And, unless the reseller is seeking credits for USF fees going back more than thirty or sixty days (i.e., whatever the interval the Commission selects), a wholesale provider has no ability to verify that the reseller has updated its information within that interval. If the Commission requires all resellers to include this certification in their forms, would the Commission require a wholesale provider to reject reseller requests for retroactive credits extending beyond one or two months? For example, if a reseller provides an updated certification form to its wholesale provider on August 1, changing the status of a circuit from non-exempt to exempt, and asks the wholesale provider to provide USF fee credits going back to January 1, is the wholesale provider required to reject the reseller's request and instead provide credits going back only one or two months (depending on whether the Commission selects thirty or sixty days)? Unfortunately, it is not uncommon for resellers to threaten to file a complaint against AT&T because of AT&T's refusal to provide USF credits to these resellers that extend beyond the period of time in which AT&T is permitted to obtain a refund from USAC when these resellers neglected to provide AT&T with timely and accurate reseller certification forms.[37] These threats will increase exponentially unless the Commission is clear about the practical effect of a reseller not complying with such a requirement.[38]

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[37] The typical scenario is: Reseller provides AT&T with a 2010 reseller certification form on July 1, 2012, exempting for the first time several circuits from USF assessment. Because the reseller failed to provide this information to AT&T prior to July 1, 2012, AT&T explains to Reseller that, under the Commission's current rules, it is unable to obtain a refund from USAC for the amounts that it (AT&T) contributed to the fund based on its revenues from selling these circuits to Reseller. Because AT&T is unable to obtain a refund from USAC, AT&T informs Reseller that it must deny Reseller's request for USF credits for 2010.

[38] Another popular area for reseller threats involves resellers claiming to be exempt from AT&T's USF fees because they are *de minimis* and thus exempt from contributing directly to the Fund. Despite AT&T's efforts to educate these resellers that they are not exempt from *AT&T's* USF fees, it is not

E. The Commission Should Confirm That, Like Other USF Contributors, Prepaid Calling Card Providers Should Contribute On The Basis Of *Their* Projected Collected Revenues.

The prepaid calling card industry is an industry in decline. AT&T has seen its prepaid calling card revenues drop precipitously over the past decade to the point where these revenues are a fraction (and a very small fraction at that) of what they were ten years ago. For AT&T, the steep decline is attributable to both market and regulatory factors. The market for prepaid calling cards is in decline due to ubiquitous wireless service (including prepaid wireless service), where any-distance calling plans are the norm, as well as free or inexpensive over-the-top IP-based calling offerings (like Skype). The regulatory factors include prepaid calling card competitors that gain an unfair competitive advantage by ignoring the Commission's universal service contribution and access charge rules, as well as state legislation that has limited the distribution of prepaid calling cards in response to deceptive pricing practices by the same prepaid calling card providers that ignore the Commission's rules. The market trends are irreversible and the Commission's goal in this proceeding with respect to the prepaid calling card industry should be to avoid action that would hasten the decline of this industry as a whole. On the other hand, the Commission should not permit prepaid calling card providers to evade existing USF contribution requirements. Acting on long-pending prepaid calling card contributor audit appeals would be a good first step toward the Commission enforcing its rules.

Until such time as the Commission adopts a non-revenues-based contribution methodology, the Commission should continue to permit prepaid calling card providers to contribute to the Fund on the basis of their own revenues. The Commission should therefore

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uncommon for such resellers to threaten to file a complaint because they have been told by USAC personnel that they are indeed exempt from AT&T's USF fees. AT&T recommends that the Commission either train USAC personnel tasked with answering contributor questions or direct USAC personnel not to advise inquiring contributors about their contribution obligations.

reject its proposal to require prepaid calling card providers to contribute on the basis of some other entity's revenues. *FNPRM* at ¶ 186. Such a proposal is contrary to the Commission's "fairness" goal[39] and would only speed the demise of this industry as a whole as competing industries (wireless and over-the-top providers) contribute on the basis of their own revenues. As long as the Commission retains its revenues-based contribution methodology, it should apply the same contribution rules to prepaid calling card providers.

Currently, a contributor is obligated to contribute to the universal service mechanisms on the basis of "*its* projected collected end-user interstate and international telecommunications revenues."[40] Where a prepaid calling card service provider sells a prepaid calling card to a retail outlet that sets the price for the card and resells it to the end-user consumer, the original selling carrier has not collected any revenues from an end user, and, indeed, may well have no idea how much revenue the reseller collected from the sale of that card. In that event, as AT&T has explained elsewhere, it is the reseller that is obligated under the Commission's rules to contribute to the Fund.[41] But, where the wholesale prepaid calling card service provider has no reasonable basis to believe the reseller is contributing directly to the Fund, that wholesale provider is required to treat the reseller as an end-user customer for revenue reporting and universal service contribution purposes, and thus to report *its* revenue from providing prepaid calling cards to the reseller on its FCC Form 499-A. During the audit period subject to AT&T's 2006 appeal, that is

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[39] *FNPRM* at ¶ 24 ("By treating similar or substitutable services differently, our contribution rules may create unintended market distortions. . . . Accordingly, we propose that a second goal for reform should be ensuring fairness and competitive neutrality in the contribution system.").

[40] 47 C.F.R. § 54.706(b)) (emphasis added).

[41] *See, e.g.*, Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, CC Docket No. 96-45, 13-18 (filed Oct. 10, 2006) (AT&T Appeal).

exactly what AT&T did with respect to its non-contributing prepaid calling card resellers.[42] USAC's auditors, based on the muddled FCC Form 499-A Instructions applicable to prepaid calling card services, turned the Commission's rules requiring a contributor to report *its* interstate and international telecommunications revenues on its head by requiring wholesale providers to contribute on the basis of their non-contributing resellers' prepaid calling card revenues.[43]

In lieu of requiring every wholesale prepaid calling card provider to obtain its resellers' actual revenues for USF reporting purposes, the Commission seeks comment on whether it should adopt a prepaid calling card safe harbor: if a prepaid calling card provider does not know what its non-contributing resellers' revenues are, it may assume that the resellers' revenues are some percentage higher than its revenues. The Commission points to the record compiled almost three years ago in support of this proposal. *FNPRM* at ¶ 189 (noting that AT&T stated that prepaid calling card mark-ups are about 50 percent, and other carriers stating that these mark-ups can be as high as 100 percent). Since 2009, the prepaid calling card industry has continued to contract, with margins decreasing so much that many prepaid calling card providers – including AT&T – would have difficulty continuing to provide service if they had to contribute based on 150-200 percent of their actual revenues. For that reason, AT&T would oppose any requirement that it contribute based on its non-contributing resellers' actual revenues or some percentage (e.g., 150 percent) that is in excess of "*its* projected collected" prepaid calling card revenues. 47 C.F.R. § 54.706(b) (emphasis added).

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[42] *Id.* at 15-17.

[43] *Id.* at 13-14.

As this industry continues to wind down and until the Commission adopts a non-revenues-based contribution methodology, the Commission should clean up its FCC Form 499 instructions by removing any ambiguity regarding the basis for a prepaid calling card provider's contributions. A prepaid calling card provider should never have any obligation to contribute to the Fund based on anything other than *its* own revenues. Also, if the Commission adopts its value-added approach to contributions, the Commission should consider exempting prepaid calling card retailer resellers from contributing directly to the Fund. As the Commission recognizes, applying its value-added approach to assessing contributions will require any "retailer [of prepaid calling cards] to report and make contributions . . . for the first time." *FNPRM* at ¶ 192. It is not administratively feasible to require all prepaid calling card retailers to contribute directly to the Fund. Moreover, if told by their prepaid calling card wholesale providers or intermediate distributors that they must file 499 forms and begin paying USAC invoices, the Commission should expect most, if not all, retailers to cease selling prepaid calling cards.

V. Administrative Reforms That The Commission Should Make Irrespective Of Its USF Contribution Methodology.

A. Procedures For Revising the Form 499 Instructions.

The Bureau typically releases updated instructions for completing Form 499-A a month or two prior to the April 1 Form 499-A due date. As the Commission notes, these instructions apply to revenue from the prior calendar year (*id.* at ¶ 347) and thus any change to the instructions is retroactive. While the Commission claims that the Bureau's changes to the 499 instructions and form are "non-substantive," that is not always true. In 2007, for example, the Bureau required contributors to obtain reseller certifications on an annual basis for the first time. Given that these instructions purport to have a retroactive application, that meant that wholesale

providers were to have collected reseller certifications from all of their resellers covering calendar year 2006 – an impossibility given that this was a new requirement and these reseller certification forms were to include Commission-mandated language that no carrier obviously saw until March 2007, two weeks before the Form 499-A was due.

The Commission should make clear that any changes to the 499 forms and instructions only have a prospective effect. The Bureau should seek comment on any changes in the third quarter of each year so that the final version will be released prior to December 1 of each year. To facilitate contributors' review of the proposed changes, the Commission should publish a redline as it has done for the E-rate Eligible Services List (ESL).[44] Giving contributors one month before any changes become effective will allow them to be prepared to report their revenues in accordance with the Commission's requirements at the beginning of the calendar year (e.g., by making any necessary IT changes) so that they will not have to scramble to account retroactively for any such change. Moreover, by seeking comment from the industry on proposed changes, the Bureau can avoid the well-documented flaws that plague, among other classes of providers, prepaid calling card providers.[45] Of course, to the extent that the Commission makes significant reforms to its 499 instructions, it must allow contributors more

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[44] *See, e.g.*, *Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program*, Public Notice, DA 11-1096 (rel. June 24, 2011) (attaching a redline of the proposed changes from the prior year's list), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1096A2.pdf.

[45] *See* AT&T Appeal at 13-19 (detailing the internal inconsistencies with the 499 instructions that apply to prepaid calling card providers). AT&T has the equivalent of 11 people working full-time on just Form 499 regulatory accounting matters (i.e., this figure excludes IT and Legal personnel, among others, involved with AT&T's USF contributions). Collectively, this amounts to 21,120 hours spent on the Form 499 filings on behalf of 17 AT&T affiliates that file the Form 499. On average, this amounts to 1,242 hours spent per affiliate, per year on regulatory accounting matters related to the Form 499. As such, in AT&T's experience, the actual amount of burden is over 2200% higher than the 53.5 hours of burden estimated by the Commission.

than one month prior to commencement of the calendar year to implement such changes, especially if IT work is required in order for contributors to recover their contribution costs from their end users beginning January 1.

B. The Commission Should Establish An Annual Contribution Factor/Assessment Amount.

AT&T supports the proposal to establish an annual contribution factor or assessment amount (the latter is applicable if the Commission adopts a non-revenues-based methodology). *FNPRM* at ¶¶ 353-55. The volatility in the quarterly contribution factor is confusing to consumers, expensive to carriers, and unnecessary. Consumers have no chance of making sense of the ever-changing USF line-item charge on their bills and, for consumers with limited means, it is challenging for them to budget their communications expenses when the contribution factor fluctuates by several percentage points between quarters. Such wild fluctuations are not only anti-consumer, they impose unnecessary costs on carriers. When the contribution factor changes each quarter, AT&T's operating affiliates have to modify tariffs and service guides, adjust billing systems, and, in some cases, notify customers. AT&T estimates that its wireline affiliates alone spend over 500 hours per year managing quarterly contribution factor changes. Finally, with the Commission's budget caps and targets that now apply across all universal service support mechanisms, it is unnecessary to re-establish the contribution factor every quarter. The Commission could direct USAC to supply quarterly (or semi-annual) demand and contribution base filings and contributors to provide quarterly projections.[46] To assist USAC in developing

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[46] Even if the factor is set annually, maintaining these quarterly reporting obligations would allow the Commission to gauge whether there is a need for a mid-year adjustment of the factor. Moreover, this quarter-specific data would allow the Commission to impute a quarterly contribution factor that can be used for true-up purposes, to the extent that the Commission remained concerned that contributors may attempt to game the system by significantly under-projecting revenues (or numbers of telephone numbers and/or connections).

its annual factor, the Commission could direct filers to include in their November 1 filings their projected collected *annual* revenues (in addition to their projected collected first quarter revenues). Based on all of these filings, if the Commission projects an upcoming budgetary shortfall of, for example, ten percent or more, it could make a mid-year adjustment to the size of the contribution factor or the assessment amount.[47]

AT&T also supports the Commission's proposal to smooth out prior period adjustments over several quarters. *FNPRM* at ¶¶ 356-59. From a financial reporting perspective, we are unaware of any reason why the Commission and USAC must account for prior period adjustments in a single quarter. For the same reasons as why it makes sense to establish an annual contribution factor or assessment amount, so too does it make sense for the Commission to level out prior period adjustments over several quarters. As demonstrated by Chart 8 in the *FNPRM*, accounting for prior period adjustments over two quarters halved the number of quarterly contribution factors that increased or decreased by more than one percentage point since 2005. *Id.* at ¶ 358. Thus, adopting this practice should assist in further stabilizing the overall size of the contribution base.

C. Adopting a "Pay and Dispute" Rule Is Acceptable Only If The Commission Acts On Contributor Appeals Within The Period Of Time Set Forth In Its Rules.

The Commission's proposes to establish a rule requiring contributors to pay disputed invoices in order to avoid late fees, interest, and penalties. *Id.* at ¶¶ 360-66. This proposal would be reasonable only if the Commission acted on contributor appeals within the time limits

[47] In the case of surplus contributions, the Commission could use them to "buy down" the factor in the following year. However, if these surpluses are significant, the Commission could establish a trigger (e.g., 20 percent or higher) for when the annual contribution factor should be adjusted downward mid-year.

contained in its existing rules, but, as history shows, the Commission generally takes years to resolve such appeals. Section 54.724 of the Commission's rules provides that the Bureau will act on USAC appeals within 90 days, although the Bureau has the authority to extend that review by an additional 90 days. 47 C.F.R. § 54.724(a). If the appeal involves a novel question of fact, law or policy, the Commission is supposed to act on the USAC appeal within 90 days (although the Commission gave itself the authority to extend indefinitely its period of time to review). 47 C.F.R. § 54.724(b). Despite these deadlines, the Bureau has rarely, if ever, acted on an appeal within 90 days, and, if anything, the Commission's record is worse. In fact, as we have noted elsewhere, AT&T affiliates have contributor appeals of USAC audits that have been pending for over six years at the Commission, with no apparent resolution in sight.[48]

It would be anything but fair for the Commission to impose a "pay and dispute" rule on a contributor but then delay action on the contributor's appeal for years. *See FNPRM* at ¶ 24 (explaining that a contribution reform goal should be "fairness" and noting that section 254(d) "is grounded on the principle that the contribution system should be fair for contributors"). And it would be unconscionable for the Commission to apply such a rule to a contributor that made an obvious scrivener's error and then fail to act on the contributor's appeal within 90 days. A number of contributors have filed appeals at the Commission because they mistakenly reported their annual revenue, not projected collected quarterly revenue, in a FCC Form 499-Q filing or otherwise inadvertently increased their revenues by some significant amount. Requiring these contributors to "pay and dispute" could create a real financial hardship for them, even if the Bureau acts on their pending appeals within 90 days. For this reason, the Commission should

[48] *See* AT&T Appeal; Cingular Interactive Application for Review, CC Docket No. 96-45 (filed Jan. 30, 2004); Cingular Wireless LLC Request for Review of Decisions by Universal Service Administrator, CC Docket Nos. 96-45, 97-21 (filed March 21, 2006).

consider exempting contributors that have made obvious data entry errors, as determined by USAC or the Commission, from any such rule.

If the Commission adopts its proposed rule but it or the Bureau is unable to act on a pending contributor appeal within the time periods set forth in section 54.724, it should refund the disputed amount to the contributor while the appeal is pending. Even though this rule permits the Commission to extend its review indefinitely (*see* 47 C.F.R. § 54.724(b)), the Commission should be required to return the disputed amount to the appealing contributor if it fails to act on the contributor's appeal within 90 days. If the Bureau or the Commission eventually upholds USAC's decision, then it could direct USAC to reclaim that disputed amount. Under this proposal, no late fees, interest, or penalties would apply because the contributor followed the Commission's pay and dispute rule. Such a rule would be fair because it would be through the Commission's own inaction that the disputed amount was returned (albeit temporarily if the Commission upholds USAC's decision) to the contributor. It also would provide the Commission with the needed incentive to act on appeals of USAC's decisions within the time frames contained in its rules.

D. The Commission Should Reverse The Bureau's Unlawful Asymmetrical 499 Revision Deadline.

As part of its clean-up of contribution-related administrative matters, the Commission should finally act to grant legacy SBC Communications Inc.'s (SBC) long-pending appeal of the Bureau's unlawful deadline for revisions to previously submitted Form 499-A filings when such revisions would result in a decreased contribution.[49] The Commission previously sought and

[49] SBC Communications Inc. Application for Review of Action Taken Pursuant to Delegated Authority, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005) (SBC Application for Review).

received comment on SBC's appeal so no further notice is required to satisfy the Commission's obligations under the Administrative Procedure Act (APA).[50] In January 2005, SBC Communications Inc. filed an application for review, requesting that the Commission reverse the Bureau's *Form 499-A Modification Order*, in which the Bureau established a deadline for filing revisions to Form 499-A filings if the result of the revision would be a reduction in the provider's contribution (i.e., a refund of a previously made contribution).[51] This deadline only applied, however, to decreases in contributions, not increases. Under the Bureau's *Form 499-A Modification Order*, a contributor could, at any time, file a revision that increased its prior year contributions, even if that revision was to a Form 499-A filing made many years earlier. The Bureau concluded that establishing a hard deadline for only those revisions that would decrease a provider's contributions "will help ensure the stability and sufficiency of the federal universal service fund . . . [and] a firm deadline for revised [Form 499-A filings] will improve the integrity of the universal service contribution methodology and promote efficiency in administration of the universal service support mechanisms, consistent with the Commission's rules and policies."[52] Nowhere in this decision did the Bureau explain why this same rationale did not apply when a provider's Form 499-A revision resulted in an *upward adjustment* to a contribution it made years earlier.

As SBC explained in its 2005 application for review, which remains pending before the Commission, the Bureau's decision to approve some revisions but not others plainly "encodes a

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[50] *See Parties Are Invited to Comment on Applications for Review and Petition for Reconsideration of Order Revising Instructions for Form 499-A*, CC Docket Nos. 96-45, 98-171, 97-21, Public Notice, DA 05-691 (rel. March 16, 2005).

[51] *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45 *et al*., 20 FCC Rcd 1012 (WCB 2004) (*Form 499-A Modification Order*).

[52] *Id.* at ¶ 10.

substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."[53] As such, the Bureau had no authority to establish this asymmetrical deadline because the Commission only granted the Bureau the authority "to mak[e] changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs."[54] Denying contributors the ability to recover overpayments after a certain period of time but simultaneously *requiring* them to file revisions if it would result in an increased contribution, regardless of how long ago the original contribution was made,[55] is clearly a decisional rule that could only be promulgated by the Commission after it complied with section 553 of the APA.[56]

Over seven and a half years later, the Commission has yet to act on SBC's application for review of the Bureau's unauthorized (and thus unlawful) and inappropriately decided *Form 499-A Modification Order*. In fact, its inertia has only compounded the significance of the Bureau's 2004 order. Since that time, the Bureau has rejected almost a dozen petitions, including two by AT&T affiliates, based on its invalid deadline. In addition to granting SBC's 2005 application for review and until the Commission issues final rules on this subject – after notice and comment – it should direct USAC to accept all Form 499-A revisions that providers might file, which

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[53] SBC Application for Review at 9 (quoting *American Hospital Ass'n. v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

[54] *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.*, CC Docket Nos. 96-45 *et al*., FCC 99-175, ¶ 39 (rel. July 19, 1999) (explaining that such "administrative aspects" include "where and when worksheets are filed").

[55] *Compare* 2012 FCC Form 499-A Instructions at 7 ("Filers must also submit revised Worksheets if they discover an error in their revenue data.") *with* 8 ("Filers shall submit any revised Worksheet that would result in decreased contributions by March 31 of the year after the original filing due date.") (emphases in original).

[56] SBC Application for Review at 7-10.

comply with the standard that pre-dated the Bureau's unlawful *Form 499-A Modification Order*, regardless of whether the providers made their original Form 499-A filings more than one year earlier.[57]

E. Miscellaneous Matters

1. Before The Commission Imposes Paper Filing Fees, USAC Should Improve Its E-Filing System.

A number of AT&T's operating affiliates continue to submit paper annual and quarterly worksheets because of certain limitations with USAC's E-File system. Most importantly, filers are unable to upload data to E-File. Instead, filers must manually enter revenue information, creating a risk of data entry errors. If USAC were to modify its E-File system to accept pre-populated annual and quarterly forms, all of AT&T's reporting affiliates would use E-File, if they could. However, contributors cannot use E-File if there is a change in the contributor's information, such as a change of address or a change in the identity of the officer signing the form. Thus, AT&T recommends that USAC modify E-File to permit electronic filings even when a filer has a change of information. AT&T is prepared to work with USAC and other contributors to improve E-File.

2. A Number Of The Commission's USF Line-Item Charge Proposals Are Unworkable And Should Not Be Adopted.

The Commission proposes several measures purportedly designed "to improve transparency relating to the amount of universal service contribution charges that are being passed through by the carriers to their customers." *FNPRM* at ¶ 389. These suggestions include

[57] *See* 2004 Form 499-A Instructions at 11 (explaining that revisions filed after December 1 of the same filing year "must be accompanied by an explanation of the cause for the change along with complete documentation showing how the revised figures derive from corporate financial records").

requiring contributors to list the contribution factor in the USF line-item charge on customer bills and identify the specific charges that are included in the provider's USF line-item charge calculation. *Id.* at ¶ 390. These proposals would be extraordinarily disruptive to carriers' billing systems and would require a long lead time to implement. For example, it is not uncommon for large enterprise customers to have bills that run hundreds of pages long. If the Commission adopts its proposals, these customers' carriers would have to reorganize their bills, which would entail changes to billing systems, in order to group interstate telecommunications together. Additionally, providers may not currently have space on their bills to list on the USF line item the relevant contribution factor and, in the case of wireless and interconnected VoIP providers, the percentage of interstate revenues. If a wireless or interconnected VoIP provider uses a traffic study to estimate its interstate revenues, the Commission's proposal likely would require the provider to publish on customers' bills proprietary information regarding the traffic carried on its network.

Such proposals would be unnecessary if the Commission adopts a non-revenues-based contribution methodology. Consumers would easily understand a $1/month per telephone number charge or a $1/month per connection charge, for example. Additionally, these proposals would be unnecessary even under the current methodology if the Commission dispenses with quarterly contribution factors in favor of an annual factor, as AT&T recommends. Any consumer confusion over today's USF line-item charge almost certainly stems from the unpredictable swings in the quarterly contribution factor, and not over what charges are included in that line-item calculation.

Finally, AT&T opposes the Commission's proposals to require contributors to alter marketing materials by including the anticipated USF line-item charge amount in the "advertised

price" for a service (*id.* at ¶ 391), as well as present the anticipated amount of the USF charge at the time of service initiation. *Id.* at ¶ 392. These proposals are overly burdensome and completely unnecessary. If the Commission adopted its first proposal, a national wireless provider, like AT&T Mobility, would have to modify its nationwide advertisements each quarter to reflect different advertised rates. These rate changes most likely would have nothing to do with the underlying cost of service and everything to do with the ever-changing quarterly contribution factor. The costs of creating new television, radio, and print advertisements each quarter because of the contribution factor change plainly outweigh any purported benefit. In fact, AT&T can discern no benefit to the proposal as it is more likely to confuse consumers than to educate them. Consumers would have no idea why a provider's advertised price for a service is, for example, $35.51 in January, $36.03 in April, and $35.07 in July. As for the second proposal (mandating that providers of interstate telecommunications provide the "amount of the quoted rate" for the USF charge at service initiation), it is inappropriate for the Commission to act here with respect to USF charges when it has an open proceeding seeking comment more generally on whether to mandate such disclosures for all "non-mandated line items" as well as "government mandated surcharges."[58] The record in that broader proceeding is fully developed and if the Commission wishes to take any action in that regard, it should do so based on the record developed in the *Truth-in-Billing Format* proceeding.

3. The Commission Should Exempt Certain Filers From Its Proposal To Require Contributors To Place USF Line-Item Charge Revenues In A Trust Account.

The Commission proposes to create a new rule requiring interstate telecommunications providers that recover their contribution costs from their end users via a USF line-item charge to

[58] *FNPRM* at n.614 (quoting *Truth-in-Billing Format*, 20 FCC Rcd 6448, ¶¶ 55-56 (2005)).

place their revenues from USF line-item charges in "dedicated trust accounts for the sole benefit of the USF." *FNPRM* at ¶ 400. The Commission's concern about its ability to recover USF line-item charge revenues collected by carriers that file for bankruptcy is understandable. *Id.* at ¶ 398. However, such an overbroad proposal is wholly unnecessary for a carrier like AT&T (and, probably, for most in the industry). The proposal adds a new layer of operating expense, resource burden, reporting, accounting requirements, account maintenance, and administrative overhead on every contributor so as to protect the Fund from a few. Instead, the Commission's (and USAC's) focus should be on proactively collecting from delinquent contributors. After all, USAC's invoices are due and payable monthly, and USAC's systems should provide it (and the Commission) with real-time information about the status of specific filers. The added layer of significant expense that this proposal would impose on every filer certainly outweighs the benefit and should be avoided. However, if the Commission adopts this proposal, it should exempt providers that have an investment grade rating by at least one or more of the three ratings agencies (Standard and Poor's, Moody's or Fitch). Absent such an exemption, AT&T opposes this proposal.

VI. CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission focus its efforts on adopting a non-revenues-based contribution methodology. In the event that the Commission decides to maintain its current contribution regime, AT&T recommends that it act quickly to correct the flaws that have plagued USF contributions for years and have resulted in

USF contributions that are anything but "equitable and nondiscriminatory." 47 U.S.C. § 254(d). Finally, there are long-overdue fixes that the Commission should make to its administration of the Fund, regardless of the contribution methodology.

Respectfully Submitted,

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