

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF PACNET SERVICES CORPORATION LIMITED

Pacnet Services Corporation Limited (“Pacnet”), by its attorneys, hereby submits its comments responding to the Federal Communications Commission’s (“Commission’s”) Further Notice of Proposed Rulemaking (“FNPRM”) in the above-referenced proceedings.¹ Pacnet is a leading communications provider delivering integrated high-performance data delivery and hosting services on a unified platform throughout much of Asia. Pacnet also offers enterprise customers and other large users a comprehensive portfolio of advanced IP, data, voice and managed information services and telecommunications solutions to connect North America with Asia. Pacnet is headquartered in Hong Kong and Singapore, with offices in key markets in Asia and North America. Although Pacnet’s revenues attributable to telecommunications offered within the United States or to foreign customers with needs in the United States, among other locations, is predominantly international in nature, Pacnet does have some interstate telecommunications revenues.² But Pacnet’s interstate end user telecommunications revenues

¹ *Universal Service Contribution Methodology*, WC Docket No. 06-122; GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. April 30, 2012).

² Although Pacnet is a provider of *telecommunications* in the United States, Pacnet does not provide “telecommunications *services*,” as that term is defined in the

consistently have been less than five percent (5%) of its combined interstate and intrastate end user telecommunications revenues.

As amplified below, Pacnet advocates that USF contributions should not be assessed on any international telecommunications. In the alternative, the Commission should retain the Limited Interstate Revenue Exemption (“LIRE”), for which Pacnet qualifies, in addition to the statutorily mandated international-services-only exemption. Retention of the LIRE, at a minimum, would be necessary to ensure that the universal regulatory regime remains both equitable and nondiscriminatory among those providers that either exclusively or predominantly provide international services. Because the federal Universal Service Fund (“USF”) contribution factor may vary over time, Pacnet does not object to the periodic establishment, on an annual basis, of the LIRE qualifying percentage.

I. THE COMMUNICATIONS ACT REQUIRES THE COMMISSION TO RETAIN AN EXEMPTION UNDER THE USF PROGRAM FOR INTERNATIONAL TELECOMMUNICATIONS PROVIDERS

Section 254(d) of the Act obligates “[e]very telecommunications carrier that provides interstate telecommunications services” to contribute to the USF.³ The statute defines “interstate communication” so as to exclude telecommunications that do not both originate and terminate within the United States.⁴ Although the Commission possesses statutory discretion to extend USF contribution obligations to entities other than providers of *telecommunications services*, that discretion is limited, on the face of the statute, to extending the obligation to “[a]ny other provider of interstate telecommunications.”⁵ For this reason, any entity providing no interstate

Communications Act of 1934, as amended, (the “Act”) within the United States or to/from United States points to international locations. *See* 47 U.S.C. § 153(46).

³ *Id.* § 254(d).

⁴ *Id.* § 153(22).

⁵ *See id.* § 254(d).

telecommunications, including any provider of telecommunications that offers only international telecommunications, may not be subjected to a USF contribution obligation under section 254(d). Indeed, the Commission, from the outset, has agreed “that carriers that provide only international telecommunications services are not required to contribute to universal service support mechanisms because they are not ‘telecommunications carriers that provide interstate telecommunications services.’”⁶ For the fifteen years since it reached this conclusion, the Commission has applied this result without variation.⁷ Therefore, the Commission must continue to exempt providers offering only international telecommunications from USF contribution obligations.

II. THE LIRE WAS ADOPTED TO ENSURE EQUITABLE TREATMENT AMONG PROVIDERS OF TELECOMMUNICATIONS

Initially, in 1997, the Commission held that telecommunications carriers with interstate revenues must pay USF contributions *on all of their end user telecommunications revenues*.⁸ This decision created the potential that providers with relatively small percentages of interstate revenues would be obligated to contribute amounts to the USF that are greater, perhaps several times greater, than their total interstate revenues.

Two years later, following a challenge to the Commission’s decision by Comsat Corporation, whose interstate revenues were less than one percent of its combined interstate and international revenues, the U.S. Court of Appeals for the Fifth Circuit found the Commission’s

⁶ *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9174 (1997) *subsequent history omitted*.

⁷ *See e.g., In the Matter of Federal-State Joint Board on Universal Service*, 19 FCC Rcd 17763, 17764 (2004) (Chief, Wireline Competition Bureau) (“carriers that provide only international telecommunications services are not ‘telecommunications carriers that provide interstate telecommunications services,’ and, therefore, are exempt from the mandatory universal service contribution obligation”).

⁸ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd at 9176 (“we include the revenues of interstate carriers from international services in the assessment base”).

decision violated the Act’s requirement that USF contributions be “equitable and nondiscriminatory.”⁹ The Court held that the Commission’s discretion under Section 254(d) is insufficient to sanction an USF regulatory framework under which Comsat, in order to participate in the market for interstate services, would be required to make USF contributions ensuring that Comsat incurs a net loss against its interstate revenues.¹⁰

In response to the *TOPUC* opinion, the Commission promptly adopted the LIRE by which providers whose interstate end user telecommunications revenues are less than a certain percentage of their total interstate and international end user telecommunications revenues – originally set at eight percent (8%) – contribute solely based on their *interstate revenues*.¹¹ The LIRE was last changed a decade ago, when it was increased to twelve percent (12%),. Since then, the USF contribution factor has risen steadily, exceeding the LIRE percentage trigger today as it has for many consecutive quarters preceding the current period.

III. USF CONTRIBUTIONS SHOULD NOT BE ASSESSED ON ANY INTERNATIONAL REVENUES; IN THE ALTERNATIVE, THE COMMISSION SHOULD RETAIN THE LIRE WITH CERTAIN MODIFICATIONS

The *FNPRM* seeks comment on whether the Commission should eliminate the LIRE.¹² The Commission expresses a potential concern because the LIRE exempts some providers from USF contributions on their international revenues while others – namely, those that do not qualify for the LIRE – must include those revenues in their contribution base. However, because Section 254(d) of the Act and the *TOPUC* decision remain the law, Pacnet submits that the LIRE cannot simply be eliminated. In other words, it remains as inherently inequitable and

⁹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (“TOPUC”).

¹⁰ *Id.* at 434.

¹¹ *In the Matters of Federal-State Joint Board on Universal Service; Access Charge Reform*, 15 FCC Rcd 1679 (1999). See 47 C.F.R. § 54.706(c).

¹² *FNPRM* at ¶ 200.

discriminatory as it was in 1997 to impose USF contribution obligations on a provider in an amount that would exceed its total interstate revenues.

Moreover, the *FNPRM* presents no data or studies demonstrating market problems caused by the LIRE's existence, and Pacnet is unaware of any such evidence. Without such evidence, there can be no basis for serious consideration of eliminating the LIRE, even assuming *TOPUC* somehow could be ignored, which it cannot.

Indeed, because international-only providers are exempt under the statute, elimination of the LIRE would have the opposite effect, resulting in inequities that would tend to undermine competition. Eliminating the LIRE could well incentivize providers with small volumes of interstate telecommunications revenues (relative to their international telecommunications revenues) to stop providing interstate telecommunications to qualify for the statutory exemption available to international-only providers. Some providers that qualify for the LIRE, such as Pacnet, offer primarily international telecommunications to business customers; while they provide certain U.S. domestic telecommunications, they do so on a smaller scale and often to meet the needs of customers to whom they also provide international telecommunications. Without the LIRE, these smaller providers would likely find it difficult to compete with larger integrated competitors for such customers.

In Pacnet's case, because its international revenues are many times larger than its interstate revenues, elimination of the LIRE would make it extremely difficult for it to remain in the interstate market and might even affect its ability to compete for customers that have both international and domestic telecommunications requirements. Pacnet suspects that other providers that qualify under the LIRE would face a similar situation. Were such providers to leave the interstate market entirely due to these inequities, it would weaken competition and

cause disruption to customers and impose additional costs on them unnecessarily. By forcing providers such as Pacnet that currently qualify for the LIRE to make such a choice, elimination of the LIRE would violate Section 254(d) of the Act.

The LIRE was established, generally speaking, as noted above, in response to the Fifth Circuit's *TOPUC* decision. The Commission's immediate goal was to prevent a provider from paying more in USF contributions than it earned from interstate telecommunications. In this, the LIRE largely has succeeded, despite the increases in the contribution factor over time. Nevertheless, the fact remains that there is no statutorily-based justification to impose an USF contribution obligation on *any* international revenues. The *TOPUC* decision did not, and indeed no court has, condone the imposition of a contribution obligation imposed on international revenues, even if a carrier does provide interstate revenues. The provision of *interstate* services, *not international* services, triggers an USF contribution obligation under Section 254. As a result, an interstate provider's contribution obligation should be tied to its interstate offerings alone.¹³ Section 254 reflects a Congressional decision to limit the basis for the USF contribution obligation to interstate services. Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Commission may not expand the scope of a statutory category when Congress has directly spoken on the issue, as it did in Section 254.¹⁴ Pacnet submits that not only should an exemption for contributions based on international revenues be retained for certain providers, but an exemption should exist that

¹³ International providers do not necessarily "benefit" from the Public Switched Telephone Network ("PSTN") when they provide international services. Pacnet is among many international providers that provide no, or a small volume of, service that relies on the PSTN. Pacnet and other such predominantly international providers offer international private lines and IP-VPN services, among other offerings, that do not use the PSTN.

¹⁴ Notably, the Commission's Form 499 presumes that interstate and international revenues are segregable. Therefore, there is no obstacle for the Commission to limit the contribution obligation to providers' interstate revenues as Congress intended.

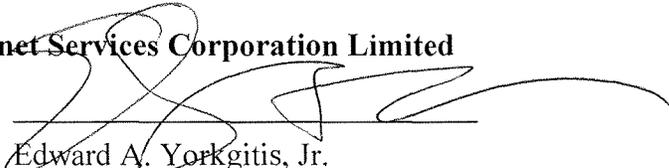
applies to *all providers' international revenues* regardless of the percentage of the providers' total interstate and international end user telecommunications revenues represented by the interstate portion.

Should the Commission conclude that the LIRE be retained, however, in lieu of the entire elimination of contributions based on international offerings, the Commission should change its USF regulatory regime by calculating the LIRE percentage on a yearly basis to reflect the current level of the contribution factor. Otherwise the original objective of the LIRE may not be satisfied, resulting potentially in inequitable and discriminatory outcomes. The annual LIRE percentage should be set sufficiently in advance to give providers as much notice as possible so that they could make business decisions with as much information as possible about whether they will be subject to a contribution on their international revenues.

Respectfully Submitted,

Pacnet Services Corporation Limited

By: _____


Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
3050 K Street, NW Ste 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

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