

**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 TIME WARNER CABLE INC.

Steven N. Teplitz
Terri Natoli
TIME WARNER CABLE INC.
901 F Street, NW
Suite 800
Washington, DC 20004

Matthew A. Brill
Brian W. Murray
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Julie P. Laine
TIME WARNER CABLE INC.
60 Columbus Circle
New York, NY 10023

Its Attorneys

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Time Warner Cable Inc. (“TWC”) hereby submits its opening comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceedings.¹

INTRODUCTION AND SUMMARY

The FNPRM renews the Commission’s examination of how contributions to the universal service fund (“USF”) should be assessed and recovered, building on the reforms that the Commission recently adopted in connection with the distribution of such support.² TWC commends the Commission for its efforts to reform and modernize universal service in ways that will promote the availability and use of affordable communications services. As a significant contributor to universal service in connection with its interconnected voice over Internet Protocol (“VoIP”) services and other retail and wholesale telecommunications offerings, TWC has gained extensive experience with the ambiguities and complexities of the current approach to USF contributions. In fact, TWC consistently contributes to universal service based on revenues associated with its commercial telecommunications offerings, even though many of its competitors do not. Drawing from this experience, TWC has long argued that establishing a

¹ *Universal Service Contribution Methodology*, Further Notice of Proposed Rulemaking, WC Docket No. 06-122 *et al.* (rel. Apr. 30, 2012) (“FNPRM”).

² *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“CAF Order”).

more stable and transparent contribution methodology is critical to preserving and advancing universal service.³

Although parties may reasonably differ on the appropriate size of the universal service program, there is a widespread consensus that the Commission should broaden the contribution base.⁴ Indeed, the FNPRM properly acknowledges that the shrinking contribution base and the substantial complexity associated with the current system are placing considerable and increasing pressure on universal service,⁵ and the ever-escalating contribution factor is shifting more and more of the burden to purchasers of a relatively narrow range of covered services.⁶ TWC believes that several proposals in the FNPRM represent straightforward and effective means of spreading the funding burdens more equitably. In particular, TWC supports prompt Commission action to clarify which enterprise services are “telecommunications services” or private carrier “telecommunications” offerings subject to existing contribution requirements. TWC also supports the Commission’s reliance on its permissive authority to clarify or amend its rules to ensure that text messaging services and one-way VoIP services contribute to universal service. These steps would increase available funding in a practical and technologically neutral manner while reducing the ambiguities and competitive distortions that plague the current

³ See, e.g., Comments of Time Warner Cable, CC Docket No. 01-92, at 27-28 (filed Oct. 25, 2006).

⁴ See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan* at 149 (2010) (noting an “emerging consensus” about the need to broaden the contribution base).

⁵ See, e.g., FNPRM ¶ 4.

⁶ Public Notice, *Proposed Third Quarter 2012 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 12-917 (rel. June 11, 2012) (announcing contribution factor of 15.7 percent).

system—all of which is consistent with the FNPRM’s goals that the contribution system be fair and sufficiently dynamic to keep pace with changes in the marketplace and with technology.⁷

In contrast, it would be premature to impose contribution mandates on broadband Internet access services. As the FNPRM recognizes, saddling broadband Internet access services with the costs of USF contributions would present significant disadvantages and complexities that may well outweigh the intended benefits. Most notably, imposing such costs would risk undermining the Commission’s concerted efforts to promote increased broadband adoption and further infrastructure investment (including in both unserved and underserved areas).

With respect to the methodology for assessing contributions, TWC believes that the existing revenue-based system or an appropriately crafted numbers- or connections-based system is capable of meeting the Commission’s objectives, provided the Commission takes pains to promote greater transparency and administrability. Particularly if the Commission retains the existing revenue-based system, the Commission should simplify its reporting and contribution rules by adopting additional safe harbors and considering fixed revenue allocations that would eliminate existing uncertainty and streamline compliance burdens for contributors.

DISCUSSION

I. THE COMMISSION SHOULD TAKE DISCRETE AND MEASURED STEPS TO EXPAND THE CONTRIBUTION BASE

The FNPRM seeks comment on whether the Commission should subject several categories of services to universal service contribution requirements.⁸ Section 254(d) provides the Commission with two paths for doing so. First, all providers of “telecommunications

⁷ FNPRM ¶¶ 24-25.

⁸ *Id.* ¶¶ 36-64.

services” are required to contribute to universal service.⁹ Alternatively, the Commission is authorized to require “[a]ny . . . provider of interstate telecommunications” to contribute to universal service “if the public interest so requires.”¹⁰ The Commission has relied on its permissive authority to extend USF contribution requirements to providers of telecommunications (but not telecommunications services) that compete with mandatory contributors.¹¹ Most recently, the Commission invoked its permissive authority to require providers of interconnected VoIP services to contribute to USF, finding both that such entities provide telecommunications and that extending USF contribution requirements to them was in the public interest given that they benefit from interconnection with the public switched telephone network (“PSTN”) and compete with other USF contributors.¹² The Commission can rely on these provisions to clarify contribution obligations and expand the base in three key ways.

First, the Commission should promptly clarify which enterprise services are “telecommunications services” or private carrier offerings of “telecommunications” subject to existing contribution requirements. Enterprise services—which historically have consisted primarily of telecommunications offerings¹³—have always been important to maintaining universal service, and in fact benefit from universal service in that they often make use of USF-

⁹ 47 U.S.C. § 254(d).

¹⁰ *Id.*

¹¹ *See, e.g., Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 ¶ 797 (1997) (“[W]e find that because payphone aggregators are connected to the PSTN and because they directly compete with mandatory contributors to universal service the public interest requires payphone providers to contribute to the support mechanisms.”).

¹² *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶¶ 38-45 (2006).

¹³ FNPRM ¶ 41.

supported facilities and infrastructure. But as the FNPRM describes, the migration of enterprise services to IP-based and other advanced technologies has generated substantial uncertainty concerning the extent to which contribution requirements continue to apply,¹⁴ which has been compounded by the Commission’s reluctance to classify at least some of these services.¹⁵ Providers thus have been forced to determine on their own whether their services trigger contribution obligations—often taking divergent interpretations of the same rules. TWC, for instance, generally has resolved this uncertainty in favor of making contributions based on revenues from its enterprise data services that it believes are properly classified as telecommunications. But according to audits conducted by the Universal Service Administrative Company (“USAC”), some of TWC’s competitors appear to have reached different conclusions and have not contributed—prompting USAC to ask the Commission to provide guidance as to what the current rules actually require.¹⁶ Whether these different practices result from good-faith efforts to comply with the rules or reflect attempts to game the system,¹⁷ the result is not only a higher-than-necessary contribution factor, but a distinct competitive disadvantage for those providers that take a more conservative view of their obligations. Such providers must incur

¹⁴ *Id.*

¹⁵ *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 ¶ 31 n.129 (2002) (declining to classify VPN services and “other Internet-based services” offered by cable operators); FNPRM ¶ 44 (noting that the Commission has “not formally addressed” VPNs, Dedicated IP, and similar network services).

¹⁶ *See Public Notice, Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company*, WC Docket No. 05-337 *et al.*, DA 09-2117 (rel. Sept. 28, 2009); *see also* Letter from Richard A. Belden, USAC, to Julie Veach, Wireline Competition Bureau, FCC, WC Docket Nos. 06-122, 05-337, at 2-3 (filed Aug. 19, 2009) (noting “potential underreporting of revenues subject to USF contributions” based on audits in connection with ATM and Frame Relay services, Virtual Private Network, and Dedicated Internet Protocol services).

¹⁷ FNPRM ¶ 42.

additional costs that may be passed onto their customers, even apart from bearing compliance burdens.

By clarifying which enterprise services are telecommunications offerings subject to existing contribution obligations, the Commission would not only supplement the fund but also avoid these competitive distortions and address a lingering source of uncertainty that is part of a pending—and longstanding—request for guidance from USAC. For instance, the Commission should consider publishing a list of enterprise services that are subject to USF contribution requirements, similar to its practice in connection with the E-Rate program. In doing so, the Commission also should confirm that an enterprise service may qualify as an offering of telecommunications regardless of the technology it uses. Otherwise, providers could seek to utilize particular technologies (such as MPLS¹⁸) to avoid their contribution obligations and thereby obtain a competitive advantage, contrary to the goal that USF be technology neutral.

The Commission also should rely on its Section 254(d) authority to ensure contributions by providers of text messaging and one-way VoIP. As the FNPRM describes, providers of text messaging services have faced uncertainty concerning whether or not their services are assessable—prompting USAC to seek guidance from the Commission just as it did in connection with the various enterprise services noted above.¹⁹ By making clear that such services are subject to contribution obligations, the Commission would again broaden the base and eliminate ambiguity. These services—which are usually bundled with voice services—indisputably include a telecommunications component, bringing them within the scope of the Commission’s permissive authority under Section 254(d). And SMS services increasingly compete with

¹⁸ *Id.* ¶ 42.

¹⁹ *Id.* ¶ 49; *see also id.* ¶ 38 & n.124.

wireless voice services that are subject to assessment, creating the potential for regulatory arbitrage to the extent SMS revenues are not subject to assessment.

In addition, TWC agrees with the FNPRM’s proposal that “one-way” VoIP services should be required to contribute to universal service.²⁰ Although the Commission typically has differentiated between interconnected VoIP and one-way VoIP services—generally exempting the latter from regulatory obligations such as USF contribution requirements²¹—that distinction is increasingly untenable, especially in this context. One-way VoIP services—which enable customers to place calls to *or* receive calls from the PSTN (but not both)—use the same infrastructure as interconnected VoIP services. Yet providers of such services are not required to contribute to USF, despite the fact that they compete directly with (and increasingly serve as substitutes for) interconnected VoIP and traditional telephone services.²²

The lines have become even more blurred as providers of one-way (outbound and inbound) VoIP services often combine the two offerings in various respects, for example by allowing a customer to debit her account balance relating to an “inbound-only” service when placing an outbound call to the PSTN via an ostensibly separate “outbound-only” service. The

²⁰ *Id.* ¶¶ 57-64.

²¹ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 58 (2005) (seeking comment on whether to extend E911 requirements to one-way VoIP services, and “tentatively concluding” that providers that offer a VoIP service that permits calls to be made to the PSTN and separately provides a VoIP service that permits the receipt of such calls should be subject to the E911 rules).

²² FNPRM ¶ 61 (noting concessions by both one-way and two-way VoIP providers that they compete with each other); *see also Amending the Definition of Interconnected VoIP service in Section 9.3 of the Commission’s Rules*, Notice of Proposed Rulemaking, 26 FCC Rcd 10074 ¶ 46 (2011) (stating that there are now “well over 4.2 million subscribers to one-way interconnected VoIP services, the same number of subscribers to two-way interconnected VoIP services when the Commission adopted the original interconnected VoIP rules in 2005”).

functional integration that results from such marketplace practices can make so-called “one-way” services indistinguishable from many services that are characterized as “two-way” in nature. Consistent with that reality, providers of one-way VoIP services—*i.e.*, “non-interconnected VoIP services”—must now contribute to the Telecommunications Relay Services fund and file a Form 499A,²³ in addition to complying with various other rules.²⁴ By contrast, to continue fencing off such services from USF requirements would only perpetuate existing competitive distortions while short-changing the fund.

Nor is there any persuasive legal justification for maintaining a distinction between one-way and two-way VoIP services for USF contribution purposes. The Commission already has found that providers of one-way services offer a telecommunications component, just as it previously found in connection with two-way VoIP services, meaning that the Commission has resolved a key prerequisite to exercising its permissive authority in this context.²⁵ And as explained above, the public interest at this point favors a more comprehensive and competitively neutral approach to the assessment of VoIP services. Accordingly, there is no legal obstacle to the Commission’s extending USF contribution requirements to one-way VoIP services, just as it did for interconnected VoIP. In fact, given the prevalence of such services in the marketplace, any failure to do so would likely be deemed arbitrary and thus unlawful.

²³ *Contributions to the Telecommunications Relay Services Fund*, Report and Order, 26 FCC Rcd 14532 (2011); *see also* FNPRM ¶ 68.

²⁴ *See CAF Order* ¶ 974 & n.2043 (prohibiting blocking of voice traffic by both interconnected VoIP providers and providers of one-way VoIP services, citing both the Commission’s ancillary authority and the potential classification of these services as telecommunications services); *id.* ¶¶ 1399-1402 (seeking comment on extending call signaling rules to one-way VoIP services).

²⁵ *Id.* ¶ 954 (noting that one-way VoIP services, like interconnected VoIP services, include the provision of telecommunications).

Ensuring that these three categories of services are assessable offers a practical and straightforward means of shoring up the USF program. Clarifying the scope of contribution obligations would spare providers the guesswork to which they must frequently resort today, reducing the complexity associated with compliance under the current regime. Moreover, such action would obviate many of the competitive distortions that the FNPRM appropriately seeks to eliminate, by ensuring that the same contribution obligations apply to similar services.²⁶ In short, including these services in the contribution base offers a straightforward path to achieving the goals of efficiency, fairness, and sustainability that should guide this inquiry.²⁷

II. THE COMMISSION SHOULD DEFER CONSIDERATION OF WHETHER TO INCLUDE BROADBAND INTERNET ACCESS SERVICE IN THE CONTRIBUTION BASE

While broadening the contribution base to include the above services would be sound as a matter of both law and policy, requiring assessments for broadband Internet access services as the FNPRM proposes would be far more complex and might well prove counterproductive.²⁸ Although broadband Internet access services have been found to include a telecommunications component and could be subject to assessment on that basis,²⁹ there are significant harms associated with such an approach that likely would cause it to fail the “public interest” prong of the Commission’s permissive authority under Section 254(d).

The FNPRM properly acknowledges concerns that imposing contribution requirements on providers of these services would raise costs for consumers and thereby suppress broadband

²⁶ See, e.g., FNPRM ¶¶ 4, 24,

²⁷ *Id.* ¶¶ 23-25.

²⁸ *Id.* ¶¶ 65-72.

²⁹ *Id.* ¶ 66.

adoption—one of the Commission’s paramount policy objectives.³⁰ Increasing the cost of broadband Internet access also could slow broadband deployment in unserved and underserved areas by altering consumer demand and thus harming the business case for investment. These consequences of a broadband Internet access assessment would negate providers’ active and ongoing efforts—described at length in other dockets—to reduce prices and increase speeds and other aspects of performance.

In addition, whereas broadening the contribution base to more clearly encompass the services discussed above would resolve prevailing ambiguities that are already pending before the Commission and reduce the competitive distortions and uncertainty that have resulted, imposing contribution mandates in connection with broadband Internet access services—whether residential or commercial offerings—risks disrupting the broadband marketplace. Aside from the increased costs that end-user customers likely would experience, it is not clear whether or how such a regime would apply to the application, content, and service providers that rely on broadband infrastructure. At a minimum, the Commission would need to consider subsidiary questions such as whether and to what extent these entities should contribute directly to USF or indirectly via the broadband providers from which they obtain service, taking into account the fact that some of these entities are themselves facilities-based while others are not. If the Commission were to require only those participants in the broadband ecosystem that maintain their own facilities to contribute to USF (leaving non-facilities-based providers off the hook), it would be creating the very sort of competitive distortions that the FNPRM seeks to eliminate in other contexts.

³⁰ *Id.* ¶¶ 67-68.

All of these harms counsel against subjecting any broadband Internet access service to USF contribution requirements under any circumstances, but particularly so if the Commission takes the other steps described above to broaden the contribution base. Requiring contributions in connection with those services should have a significant impact on the quarterly contribution factor. For example, the FNPRM references estimates that enterprise services and text messaging services had industry-wide 2011 revenues of \$41 billion and \$19 billion, respectively.³¹ The reforms discussed above thus could bolster the contribution base significantly, reducing the need to seek out other sources of funding. If nothing else, the Commission would be advised to hold off on addressing assessments on broadband Internet access until it has more information about the financial impact of the more straightforward reforms discussed above.

III. ANY REFORM OF THE CONTRIBUTION METHODOLOGY SHOULD BE FOCUSED ON MAXIMIZING SIMPLICITY AND EASE OF ADMINISTRATION

To date, the question of how to reform USF contributions has centered on the Commission's choice of methodology. While the Commission should broaden the contribution base and address key flaws in the current regime, TWC is open to various approaches to doing so. TWC has previously expressed its support for a numbers-based methodology, on the ground that such an approach would be easy to administer.³² However, TWC is not opposed to retaining the current revenue-based approach, provided that it can be simplified and clarified.

³¹ *Id.* ¶¶ 48, 54.

³² *See, e.g.*, Comments of Time Warner Inc., WC Docket No. 06-122, at 3-6 (filed Aug. 9, 2006).

To that end, if the Commission retains the revenue-based methodology,³³ it should focus its efforts on maximizing simplicity and alleviating compliance burdens. For instance, one of the primary challenges associated with the current approach is the need to allocate revenues between the interstate and intrastate jurisdictions. This issue, however, can be substantially mitigated through the use of additional safe harbors or fixed jurisdictional allocations for specific categories of services.³⁴ Experience and data collected over the past several years should enable the Commission to adopt safe harbors that more accurately reflect the portion of revenues attributable to the interstate jurisdiction. For instance, TWC has long maintained that the current safe harbor for interconnected VoIP of 64.9 percent—a figure that is now six years old—is a highly inflated proxy for interstate revenues,³⁵ as the FNPRM appears to recognize.³⁶

The adoption of such safe harbors or fixed allocations need not be the exclusive means by which providers determine their contribution obligations. For example, interconnected VoIP providers should continue to be permitted to rely on traffic studies or other tools, if they choose to undertake the burdens of doing so. But expanding the available bright-line options will make compliance more straightforward and far less complicated than it currently is, which is one of the FNPRM's key reform goals.³⁷

³³ FNPRM ¶ 99.

³⁴ *Id.* ¶ 100.

³⁵ Comments of Time Warner Inc., WC Docket No. 06-122, at 13-16 (filed Aug. 9, 2006).

³⁶ FNPRM ¶ 125 (noting that traffic studies on file reflect a far lesser amount of interstate traffic than the current safe harbor).

³⁷ *Id.* ¶ 23.

CONCLUSION

Reform of the Commission’s approach to USF contributions is overdue, yet it can be accomplished in the near-term through targeted steps that would reduce the ambiguities and inequities that have plagued the current system.

Respectfully submitted,

TIME WARNER CABLE INC.

/s/ Matthew A. Brill

Steven N. Teplitz
Terri Natoli
TIME WARNER CABLE INC.
901 F Street, NW
Suite 800
Washington, DC 20004

Matthew A. Brill
Brian W. Murray
LATHAM & WATKINS LLP
555 Eleventh Street, NW
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