

**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 THE INDEPENDENT TELEPHONE
& TELECOMMUNICATIONS ALLIANCE**

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Table of Contents

I.	INTRODUCTION AND SUMMARY	1
II.	THE CURRENT USF CONTRIBUTION SYSTEM IS OUTDATED AND IN NEED OF REFORM	5
III.	THE NEW CONTRIBUTION MECHANISM SHOULD CONFORM TO PRINCIPLES OF FAIRNESS, PREDICTABILITY, FLEXIBILITY, AND ACCOUNTABILITY	11
	A. Competitive Neutrality.....	12
	B. Flexibility	12
	C. Predictability	13
	D. Regulatory Parity	13
	E. Scalability	14
	F. Administrative Ease, Simplicity, and Accountability.....	15
IV.	THE COMMISSION HAS LEGAL AUTHORITY TO ADOPT A NUMBERS, CONNECTIONS, OR HYBRID CONTRIBUTION MECHANISM	17
V.	A HYBRID NUMBERS/CONNECTIONS APPROACH TO THE COLLECTION OF USF CONTRIBUTIONS SHOULD BE CAREFULLY CONSIDERED BY THE COMMISSION	19
	A. Numbers-Based Contribution Component.....	21
	B. Connections-Based Contribution Component	24
VI.	CONCLUSION.....	26

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The Independent Telephone and Telecommunications Alliance (“ITTA”) hereby submits its initial comments in response to the *Further Notice of Proposed Rulemaking* (“FNPRM”) issued on April 30, 2012 by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceedings.¹

I. INTRODUCTION AND SUMMARY

Reform of the federal Universal Service Fund (“USF”) contributions methodology is long overdue. The dramatic and fundamental changes to the telecommunications industry that have occurred since the current contributions mechanism was implemented fifteen years ago have rendered the system unworkable.

Over the past fifteen years, the industry has witnessed the phenomenal growth in popularity of mobile wireless services. At the same time, Americans have embraced interconnected Voice over Internet Protocol (“VoIP”) services. Moreover, with their broad based entry, incumbent cable providers have helped upend the traditional voice

¹ *In the Matter of Universal Service Contribution Methodology; A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, WC Docket Nos. 06-122, GN Docket No. 09-51 (rel. April 30, 2012).

telecommunications market. Consumers have continued to adopt broadband and, increasingly, broadband and voice services are being provided to consumers with video in triple-play bundles. In short, a proliferation of new technologies, services, and service providers that were not anticipated when the current contributions methodology was adopted exist today. Unfortunately, the current contribution system has not kept pace and does not reflect these widespread and fundamental changes.

The lack of clear guidance under the current system as to when and upon whom the contribution obligation applies have incentivized certain providers to interpret the Commission's rules to minimize their contribution obligations. This has increased the contribution burden on traditional services and providers, putting them at a competitive disadvantage relative to other services and providers that have managed to avoid sharing in the contribution burden. The Commission should expeditiously adopt new rules that reflect the new marketplace realities.

To be successful, the FCC's reforms must be guided by the following basic principles: competitive neutrality, flexibility, predictability, regulatory parity, scalability, administrative ease, simplicity, and accountability. These principles ensure that like services are regulated in a similar manner, that the contribution system can flexibly accommodate innovation and changes in technology, and that all entities that benefit from the federal universal service system share in the contribution obligation. A system based on these principles can accommodate various levels of contributions, can expand or contract to match the size of the overall budget for universal service support, and would consist of rules that are straightforward, non-burdensome, and more easily enforced. These principles also would ensure that service providers are afforded the regulatory certainty they need in order to formulate business plans and make reasoned investment decisions.

ITTA proposes a contribution methodology that encapsulates these principles and provides a workable, sustainable contribution framework. Specifically, ITTA proposes a hybrid numbers/connections-based approach that assesses contributions on the following basis: a flat monthly fee for each working residential and business number, and a tiered flat monthly charge for each connection to all assessable services.

Under the numbers-based component of ITTA's suggested approach, all numbers that are operating to provide service would be assessed the flat per-number charge. The Commission would set the per-number charge before setting the per-connection charge and would calculate the per-connection charge to collect the amount of total annual USF revenue requirement estimated to remain after collection of all per-number charges. In establishing the per-number charge, the Commission should take care that the level of the charge does not encourage end users to abandon their stand-alone voice service. The per-number rate could be reduced or eliminated over time as more end users migrate to IP-based broadband services.

The connections-based component would consist of a tiered flat monthly charge for each connection to all assessable services. The Commission should ensure that the per-connection charge is assessed on all entities that have the ability to pass the charge on to their customers, including wholesale providers, to avoid the challenges associated with determining whether a customer is an end user or reseller for purposes of its contribution obligation. Given the increasing difficulty in determining physical end points of a facility or the actual traffic carried on a particular circuit, the definition should avoid jurisdictional considerations or the need to distinguish between telecommunications and non-telecommunications services. Further, the connection charge should reflect a tiered structure that accounts for varying speeds and

capacities and the tiered structure should be updated on a regular basis as new technologies and services develop.

The hybrid numbers/connections-based approach ITTA proposes has several advantages over a straight revenues-based or numbers-based contribution system. Among other things, ITTA's proposal decreases opportunities for arbitrage by eliminating the arbitrary self-categorization of services by providers. It promotes competitive neutrality by ensuring that consumers pay a similar flat rate for similar services. It provides for greater predictability and stability of providers' contributions since providers know or can easily identify how many numbers and connections they have in operation at any given time. It also advances regulatory parity by enabling the Commission to impose USF contributions on all services and service providers that directly or indirectly utilize and derive benefit from the nation's broadband networks.

The FCC has broad, permissive authority under Section 254 of the Act to implement a hybrid numbers/connections-based contribution system and to expand the base of services and providers that are subject to contribution obligations. The significant industry developments that have occurred over the past fifteen years mandate changes to the rules, and the Commission should rely on its permissive authority to expeditiously adopt new rules to reflect the current marketplace.

II. THE CURRENT USF CONTRIBUTION SYSTEM IS OUTDATED AND IN NEED OF REFORM

It has been fifteen years since the current methodology for assessing and collecting federal universal service contributions was developed² and five years since it has been modified in any appreciable way.³ In that time, the telecommunications marketplace has undergone dramatic and fundamental changes. Technological innovations and network convergence have combined to transform the telecommunications industry in ways that were not (and could not have been) anticipated when the current system was adopted in 1997. These changes have placed tremendous pressure on the current contribution framework that the framework has not been robust or flexible enough to accommodate. In short, the current system has become unworkable.

Since implementation of the current system after passage of the 1996 Telecom Act,⁴ the mobile wireless industry has experienced phenomenal growth. In 1996, there were slightly more than 44 million cellular subscribers and annual cellular revenues were estimated to be approximately \$15 billion.⁵ While thirteen percent of Americans in 1996 were using wireless telephony as a complement to wireline communications, mobile telephony was not viewed as a

² See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (“*Universal Service First Report and Order*”) (subsequent history omitted).

³ In 2006, the Commission exercised its permissive authority to extend the universal service contribution obligation to providers of interconnected VoIP services. See *Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122, *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541, ¶ 44 (2006) (“*2006 Contribution Methodology Order*”).

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“*1996 Telecom Act*”).

⁵ *Second Annual Report and Analysis of Competitive Market Conditions With Respect To Commercial Mobile Services*, Federal Communications Commission (rel. Mar. 25, 1997), at Table 1, available at <http://wireless.fcc.gov/auctions/data/papersAndStudies/fc9775.pdf>.

substitute for wireline telecommunications.⁶ In contrast, in 2009 (the most recent year for which annual data is available), there were more wireless than wireline connections with approximately 290 million mobile wireless connections and 275 million mobile telephone subscribers.⁷ Total industry revenues for 2009, including voice, data, and text messaging, exceeded \$154 billion.⁸ Moreover, a steadily increasing number of Americans are “cutting the cord” and substituting wireless service for their wireline voice connection. In the first six months of 2011, more than 3 of every 10 American households (31.6%) had only wireless telephones.⁹

Voice over Internet Protocol (“VoIP”) services were initiated and have grown rapidly in even less time. Although they had been in some use for a number of years, Internet Protocol (“IP”)-enabled services remained sufficiently nascent that they were first described by the Commission in 2004.¹⁰ Since that date, American consumers have embraced them, resulting in the widespread adoption of VoIP by millions of consumers. Consumers increasingly use interconnected VoIP service as a replacement for traditional voice service as a means of connecting to the Public Switched Telephone Network (“PSTN”), leading the Commission to impose various consumer protection and public safety requirements on interconnected VoIP

⁶ *Id.*, at 53.

⁷ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect To Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report (rel. Jun. 27, 2011), at 9.

⁸ *Id.*, at 14.

⁹ See Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January – June 2011*, National Center for Health Statistics, Centers for Disease Control and Prevention, at 1, available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201112.pdf>.

¹⁰ In the *IP-Enabled Services Notice*, the Commission sought comment on numerous issues, including whether to extend certain consumer protection obligations to any class of IP-enabled service provider. See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4910, ¶ 72 (2004).

services.¹¹ According to data recently released by the Commission, in June 2011 there were 34 million interconnected VoIP subscriptions in the United States.¹² This represented an increase in interconnected VoIP subscriptions of 17 percent from June 2010.¹³ In the same time period, retail circuit-switched access lines fell by 8 percent, from 122 million to 112 million.¹⁴ The migration from traditional voice services to VoIP service shows no signs of abating. Indeed, the trend is continuing as service providers continue their transition to IP technology.¹⁵

A significant portion of the increase in VoIP subscribership over the past six years is attributable to incumbent cable providers' provision of telephony and their use of IP switching technology in the build-out of their voice capabilities. In June 2006, interconnected VoIP connections that terminated on coaxial cable at the end user's premises represented slightly more than 20 percent of total switched access lines and VoIP subscriptions for non-ILEC providers.¹⁶ By June 2011, that number had increased to 50.4 percent.¹⁷ With their broad based entry, cable companies have helped upend the traditional voice telecommunications market.

¹¹ See, e.g., *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (*subsequent history omitted*); *Universal Service Contribution Methodology*, WC Docket No. 06-122, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, NSD File No. L-00-72, CC Docket Nos. 99-200, 95-116, 98-170, WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (*subsequent history omitted*).

¹² See Local Telephone Competition: Status as of June 30, 2011, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC (June 2012) ("*June 2011 Local Competition Report*"), at 1-2.

¹³ *Id.*, at 2.

¹⁴ *Id.*

¹⁵ VoIP's share of total end user switched access lines and VoIP subscriptions was 13.4% in December 2008, 17.0% in December 2009, 21.3% in December 2010, and 23.1% in June 2011. *June 2011 Local Competition Report*, Chart 3.

¹⁶ *June 2011 Local Competition Report*, Table 6.

¹⁷ *Id.*

Cable providers' provision of voice services is part of a larger story. The broadband services market overall is continuing to grow and traditional cable companies have become leading participants in the broadband services market. There were 3 million net additional high-speed Internet subscribers acquired by the eighteen largest providers in the U.S. in 2011.¹⁸ Cable providers added 2.3 million of those subscribers, which accounted for 75 percent of broadband additions by the top providers last year.¹⁹

Increasingly, the broadband and voice services being provided to subscribers by wireline providers and cable operators are bundled with video in a triple-play package.²⁰ This comes as no surprise since consumers have shown they are attracted to the convenience of one bill and the potentially lower monthly price of a bundled service offering. The selling of triple play bundles thus has become an important marketing and sales focus of both wireline providers and cable operators. This is reflected in the fact that voice, data, and video package sales for a significant number of service providers continued to grow in 2011.²¹

The changes outlined above have complicated the current process for assessing USF contributions tremendously. The system in place today assesses contribution obligations on the basis of interstate and international end user telecommunications revenues.²² However, most of today's consumers no longer purchase interstate telecommunications service separately from

¹⁸ "3 Million Added Broadband from Top Cable and Telephone Companies in 2011," Press Release, Leichtman Research Group (Mar. 16, 2012), *available at* <http://www.leichtmanresearch.com/press/031412release.html>.

¹⁹ *Id.*

²⁰ Some providers offer a quadruple or quintuple bundle which includes mobile voice and broadband service.

²¹ See "In Detail: Unraveling the Triple Play Bundle," Fierce Telecom (Mar. 28, 2012), *available at* <http://www.fiercetelecom.com/special-reports/detail-unraveling-triple-play-bundle>.

²² 47 C.F.R. § 54.706(b).

intrastate toll and local service. Similarly, as noted above, many consumers today subscribe to a bundled package which charges a single price for (intrastate and interstate) voice, Internet access and video services. In this environment, service providers must make increasingly subjective judgments regarding the amount of their interstate end user telecommunications revenues. It is no secret that the current system incents service providers to exercise those judgments in favor of categorizing revenues as other than qualifying interstate end user telecommunications revenues, which minimizes their contribution burden.

The current system incents service providers to self-categorize their offerings to consumers as information services rather than telecommunications services since by doing so they can avoid a universal service contribution obligation with respect to those services. As the *National Broadband Plan* acknowledges: “assessing only telecommunications services revenues provides incentives for companies to characterize their offerings as ‘information services’ to reduce contributions to the fund.”²³ The fact that the Commission has not ruled to date on whether certain widely offered (and popular) offerings are information services or telecommunications services has exacerbated this problem significantly.²⁴ In the absence of definitive rulings that the contribution obligation applies to certain services, the natural inclination of providers has been to avoid contributing by unilaterally opting-out of the contribution scheme.

As a result of the marketplace changes and regulatory anomalies outlined above, assessable long-distance voice revenues have continued to steadily decline over the past decade

²³ Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 149 (rel. Mar. 16, 2010) (“*National Broadband Plan*”).

²⁴ See, e.g., *FNPRM*, at ¶ 38.

even though total communications market revenues have continued to grow.²⁵ This has resulted in traditional contributing services being forced to shoulder an increasing contribution burden.²⁶ During the first two quarters of 2012, customers of contributing companies experienced near-18 percent contribution factors and although the third quarter contribution factor decreased to 15.7 percent,²⁷ a near-16 percent contribution factor is hardly good news. As Commissioner Pai has pointed out, “the bad news is that the contribution factor has increased more than 65% since the first quarter of 2009.”²⁸ ITTA agrees with Commissioner Pai that the current level of the contribution factor is a “stark reminder that the Commission must take swift action to reform the outdated universal service contribution mechanism.”²⁹

The dramatically increased contribution burden being shouldered today by interstate telecommunications services is particularly disconcerting because it puts the providers of these services at a distinct competitive disadvantage vis-à-vis those service providers that have managed – for whatever reason – to avoid sharing in the contribution burden. At the current contribution factor level, legacy interstate service contributors are being priced out of the market. The competitive scales are heavily weighted in favor of those services that have avoided regulatory classification and those service providers clever or wise enough to self-classify their services so as to avoid contribution requirements and to avert detection.

²⁵ *FNPRM*, at ¶ 20.

²⁶ As the *FNPRM* acknowledges, “nearly three-quarters of USF contributions come from five companies: AT&T, CenturyLink, Sprint Nextel Corporation, T-Mobile USA, and Verizon Communications, Inc.” *FNPRM*, at ¶ 9.

²⁷ Proposed Third Quarter 2012 Universal Service Contribution Factor, CC Docket No. 96-45, DA-12-917 (rel. June 11, 2012).

²⁸ Statement of Commissioner Ajit Pai on the Proposed Third Quarter 2012 Universal Service Contribution Factor, News Release (June 11, 2012).

²⁹ *Id.*

Recognizing many of the marketplace changes and incentives discussed above, the Commission has contemplated reform of the current contribution methodology several times during the past ten years.³⁰ Although over the years it has made some adjustments to the existing contribution framework,³¹ comprehensive reform to date has eluded the Commission. Now is the time to push comprehensive reform of the federal USF contribution methodology over the finish line.³²

III. THE NEW CONTRIBUTION MECHANISM SHOULD CONFORM TO PRINCIPLES OF FAIRNESS, PREDICTABILITY, FLEXIBILITY, AND ACCOUNTABILITY

Regardless of the specific methodology ultimately adopted by the Commission, the new USF contribution assessment system should conform to each of the important principles outlined below.³³ Adherence to these principles will help guarantee that the new framework meets the

³⁰ See *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45 *et al.*, Notice of Proposed Rulemaking, 16 FCC Rcd 9892, 9905-06, ¶¶ 25-30 (2001); *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45 *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 3766-89, ¶¶ 31, 34-83 (2002) (“*Second Contribution Methodology Order*”); *Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies*, CC Docket No. 96-45 *et al.*, Public Notice, 18 FCC Rcd 3006 (2003); *High Cost Universal Service Support, et al.*, CC Docket No. 96-45 *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6536-64, ¶¶ 92-156 (2008) (“*2008 USF Reform Order*”).

³¹ See, e.g., *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45 *et al.*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21258-59, ¶¶ 13-15 (1998); *Second Contribution Methodology Order*, 17 FCC Rcd at 24983-95, ¶¶ 66-95; *Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7531-38, ¶¶ 23-37 (2006) (“*2006 Contribution Methodology Order*”).

³² As was acknowledged in 2008, “[t]he current systems of contributions to the universal service fund is broken. The Commission has repeatedly patched the current system to accommodate decreasing interstate revenues, a trend toward ‘all-you-can-eat’ services that make distinguishing interstate from other revenues difficult if not impossible and changes in technology.” *2008 USF Reform Order*, at A-42.

³³ The *FNPRM* specifically seeks comment on proposed goals for reforming the contribution methodology. *FNPRM*, at ¶ 22.

Commission's goals of "ensuring that robust and affordable voice and broadband services are available to Americans across the nation."³⁴

A. Competitive Neutrality.

As the Commission acknowledges, Section 254(d) requires that contributions be made on "an equitable and nondiscriminatory basis."³⁵ Thus, it is essential that the new contribution framework adopted by the Commission be competitively neutral. Stated differently, the contribution obligation should not act as a factor in a consumer's choice in purchasing services from among competing providers. Competitive distortions similar to those that have arisen under and threaten the current system will occur again if the Commission adopts a contribution methodology that treats similar or substitutable services differently for contribution purposes. Neither the technology used to provide a service, the type of provider involved, nor the extent to which a service may be bundled with other services should have any bearing on the contribution obligation.

B. Flexibility.

Perhaps the most significant shortcoming of the current contribution methodology is its inability to accommodate the vast amount of innovation and tremendous advances in technology that have taken place in the communications industry over the past decade. The communications industry will no doubt continue to experience similar levels of innovation and advances in technology in the coming years. In order to avoid a situation like the one we face today, the Commission should adopt a contribution mechanism that is flexible enough to accommodate the dynamic nature of the communications marketplace. The Commission should heed the *National Broadband Plan's* recommendation that the new USF contribution system operate "to minimize

³⁴ *Id.*

³⁵ See *FNPRM*, at ¶ 24, citing 47 U.S.C. § 254(d).

opportunities for arbitrage as new products and services are developed and remove the need to continuously update regulation to catch up with technology and the market.”³⁶

C. Predictability.

An important consideration for service providers in any USF contribution mechanism is its predictability. The rules governing the contribution system must be stable and the level of the contribution obligation sufficiently constant to afford service providers the certainty they need in order to plan and run their businesses. Regulatory uncertainty suppresses network expansion and innovation by impeding providers’ ability to forecast consumer pricing and demand. It is exceedingly difficult, for example, for companies to develop and implement decisions such as whether to roll-out or expand their service offerings, deploy capital, or enter additional geographic or product markets if they cannot know with a high degree of certainty what their regulatory obligations will be and whether or not the market will bear the prices necessary to accommodate those decisions. The Commission should avoid repeating recent past experience (where the USF contribution factor increased over 65 percent in less than four years) and it should instead adopt a new contribution scheme that includes a firmly established set of rules that provide for a stable contribution level.

D. Regulatory Parity.

A fundamental principle related to the concept of competitive neutrality is regulatory parity. Regulatory parity ensures that all entities that benefit from the federal universal service system share in the contribution obligation. The current system falls short in that some entities that utilize (and in some cases depend on) the broadband networks made possible through the federal universal service program do not contribute to the fund. By forcing a funding obligation

³⁶ *National Broadband Plan*, at 149.

on some competitors but not others, the current system skews competition. No entity that enjoys the benefits of the USF regime should be granted a free ride under the new mechanism adopted by the Commission.

E. Scalability.

The new contribution mechanism must be scalable such that it has the ability to accommodate varying contribution levels for different services that are not substitutable.³⁷ Different services place unequal levels of demand on broadband networks and, consequently, derive varying degrees of benefit from those networks. Therefore, a sustainable and efficient contribution system should reflect these facts and assess different contribution levels on different services. The Commission and various interested parties have incorporated the scalability concept into previous contribution reform proposals by suggesting various assessment tiers.³⁸ Indeed, as noted in the *FNPRM*, “in the past, the Commission’s proposals have assumed a connections-based methodology would classify connections into various tiers, and each connection within a tier would be assessed the same flat fee.”³⁹ ITTA endorses this concept and urges the Commission to craft a system that incorporates different contribution levels for different services based on their demands on and benefits derived from broadband networks.

The contribution system adopted by the Commission also should be scalable to the overall universal service fund size. Although the Commission recently established a firm budget

³⁷ Of course, as explained herein, the concept of competitive neutrality requires that the same or similar services be assessed the same contribution obligation regardless of the technology used to provide the service or the type of provider.

³⁸ “Over the years, the Commission and the industry have proposed various tiers to calculate assessments for multi-line business connections, with no one approach emerging as the preferred alternative.” *FNPRM*, at ¶ 257.

³⁹ *FNPRM*, at ¶ 249 (footnote omitted).

of \$4.5 billion/year for the high-cost programs within USF⁴⁰ and has taken other steps designed to keep the overall fund at or near its current \$8.1 billion/year level,⁴¹ the contribution system the Commission adopts should be able to accommodate a future determination that a larger fund or, for that matter, a smaller one is in the public interest.

F. Administrative Ease, Simplicity and Accountability.

It is imperative that the new contribution rules be easy for contributors to understand and comply with. The current contribution rules are hardly a model of clarity. Contributors have been compelled to seek clarification from USAC or the Commission and, when that clarification has not been forthcoming, make judgments that may not in all cases have been consistent with the Commission's USF goals. The lack of clarity also has made it difficult for the Commission to police compliance. The important auditing and enforcement functions the Commission is responsible for have been made far more difficult by the lack of straightforward rules. This reform proceeding is an opportunity for the Commission to put in place straightforward, easy to understand rules that can serve the interests of both the industry and the Commission.

At the same time, the new rules must not be unreasonably expensive or burdensome for contributors to comply with. Small and medium-size carriers have limited internal resources and limited funds that can be devoted to obtaining outside assistance in complying with regulatory

⁴⁰ *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, WT Docket No. 10-208, FCC 11-161, Report and Order and Further Notice of Proposed Rulemaking, at ¶ 18 (rel. Nov. 18, 2011) (“*USF/ICC Transformation Order*”).

⁴¹ In January 2012, the Commission adopted various reforms of the low-income components of the fund that set a savings target of \$200 million for 2012 for the Lifeline program. *Lifeline and Link Up Reform and Modernization Order et al.*, WC Docket No. 11-42, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012) (“*Lifeline Reform Order*”).

obligations. The universal service and intercarrier compensation reforms adopted by the Commission late last year,⁴² the changes to the federal Lifeline and Link Up programs adopted this January,⁴³ and the new cramming rules issued in April⁴⁴ each contain multiple significant new compliance and recordkeeping obligations that must be implemented and administered on an ongoing basis by carriers. These new and revised obligations have created significant challenges for small and medium-size carriers. The Commission should take this into account when devising the rules for its new contribution mechanism and should endeavor to limit the compliance burden on small and medium-size carriers as much as possible.⁴⁵

Finally, wherever possible, the Commission should adopt rules that “close loopholes” and “limit undue provider discretion.”⁴⁶ As discussed above, the current rules allow providers significant discretion to self-determine their contribution obligation. This has resulted in competitive distortions that need to be avoided in the new system. Going forward, the Commission should create bright-line rules that specify which services are subject to the contribution obligation, the basis on which contributions are required, and the level of their contribution obligation.

⁴² See *USF/ICC Transformation Order*.

⁴³ See *Lifeline Reform Order*.

⁴⁴ *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, CG Docket Nos. 11-116, 09-158, CC Docket No. 98-170 (rel. April 27, 2012).

⁴⁵ The Commission should consider whether the new rules should be phased in over time to ensure that the compliance burden is manageable for small and medium-size carriers.

⁴⁶ *FNPRM*, at ¶ 23 (footnote omitted).

IV. THE COMMISSION HAS LEGAL AUTHORITY TO ADOPT A NUMBERS, CONNECTIONS, OR HYBRID CONTRIBUTION MECHANISM

The Commission's authority to require contributions to the federal universal service program derives from Section 254(d) of the Act, which states in part that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."⁴⁷ This mandatory contribution provision requires every provider of interstate telecommunications services to contribute to the fund, although the Commission may exempt a carrier or class of carriers if their contributions would be *de minimis*.⁴⁸

The Commission's authority does not stop there however. Section 254(d) extends the Commission's authority by granting it permission to require "[a]ny other provider of interstate telecommunications" to contribute to universal service, "if the public interest so requires."⁴⁹ The Commission has exercised this permissive authority on several occasions to extend contribution obligations to various providers of "telecommunications"⁵⁰ that do not necessarily provide "telecommunications service."⁵¹ In 2006, the Commission required interconnected VoIP service providers to contribute even though the Commission has not ruled that they are

⁴⁷47 U.S.C. § 254(d).

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰ "Telecommunications" is defined in the Act as "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." 47 U.S.C. 153(43).

⁵¹ "Telecommunications service" is defined in the Act as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46).

telecommunications carriers.⁵² In exercising its permissive authority under Section 254(d), the Commission noted that interconnected VoIP operators “provide” telecommunications to their end user customers.⁵³

The Commission concluded that public interest considerations compelled it to impose universal service contribution obligations on interconnected VoIP providers.⁵⁴ As the Fifth Circuit has held, “Congress designed the universal service scheme to exact payments from those companies benefitting from the provision of universal service.”⁵⁵ Because interconnected VoIP providers, like other contributors to the federal universal service fund, are “dependent on the widespread telecommunications network for the maintenance and expansion of their business,” they “directly benefit[] from a larger and larger network.”⁵⁶ It therefore was consistent with the statute, case law, and Commission precedent to impose USF obligations on interconnected VoIP providers that corresponded with the benefits they already enjoyed.⁵⁷

The Commission’s decision to extend contribution obligations to interconnected VoIP providers also was grounded in an awareness of changes in the marketplace and the need to update Commission rules to maintain competitive neutrality among service providers.⁵⁸ The Commission rightly concluded that universal service obligations should not shape decisions

⁵² *2006 Contribution Methodology Order*, 21 FCC Rcd at 7538-40, ¶¶ 39-41.

⁵³ *Id.*

⁵⁴ *Id.*, at ¶ 43.

⁵⁵ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 428 (5th Cir. 1999).

⁵⁶ *Id.*

⁵⁷ *2006 Contribution Methodology Order*, at ¶ 43.

⁵⁸ *Id.*, at ¶ 44. Competitive neutrality means that “universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.” *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶ 47 (1997).

regarding the technology used to offer communications services to subscribers or create opportunities for regulatory arbitrage and it wanted to avoid situations where providers with universal service obligations would compete directly with providers without such obligations.⁵⁹ Given the continued growth and evolution of the marketplace, the Commission concluded that it no longer made sense to exclude interconnected VoIP providers from the assessment of universal service contributions.⁶⁰

This precedent and the marketplace considerations underlying it provide ample legal basis for the Commission to exercise its permissive authority under Section 254(d) and to adopt ITTA's proposed hybrid numbers/connections-based methodology as described herein.

V. A HYBRID NUMBERS/CONNECTIONS APPROACH TO THE COLLECTION OF USF CONTRIBUTIONS SHOULD BE CAREFULLY CONSIDERED BY THE COMMISSION

ITTA believes that a numbers/connections-based methodology structured in the specific manner described below could meet each of the policy goals guiding the Commission's consideration of a new USF contribution methodology. Importantly, however, any hybrid numbers/connections-based contribution methodology adopted by the Commission must incorporate each of the principles outlined in Section III above – specifically, competitive neutrality, flexibility, predictability, regulatory parity, scalability, administrative ease, simplicity, and accountability.

A hybrid numbers/connections-based contribution methodology may be preferable to any one-dimensional (*i.e.*, revenues, numbers, connections) approach for several reasons. Among other things, a straight revenues-based system invites continued arbitrage. A revenues-based system necessarily relies on the classification of services and revenues by providers and

⁵⁹ *2006 Contribution Methodology Order*, at ¶ 44.

⁶⁰ *Id.*

providers always will have the incentive to classify their services and revenues in a manner that minimizes their contribution obligation. It is difficult to conjure a revenues-based approach that eliminates all of the provider discretion that necessarily breeds arbitrage incentives and opportunities.

Adopting a straight numbers-based system also would present problems, particularly as the Universal Service Fund increasingly supports broadband. Such an approach may not be equitable and nondiscriminatory as required by Section 254 in that it would limit the contribution obligation to PSTN-connected voice services while increasingly distributing support to broadband services, many of which may not include or provide connectivity for voice services to an appreciable degree. As the marginal price charged to consumers for voice communications increasingly approaches zero, there is nothing unfair about users contributing on an equal basis for each number, but the overall contribution mechanism must reflect differing levels of broadband usage, which renders problematic a pure numbers-based methodology. Therefore, the Commission is right in noting in the *FNPRM* that a straight numbers-based approach may be “inherently unfair” even as the Commission may be incorrect in reasoning that this is “because it does not take into account the fact that some people make many more interstate and international calls, while others make few calls in a given month, yet all users . . . would be subject to the same flat monthly assessment amount.”⁶¹

A hybrid numbers/connections-based approach is preferable because it would permit the Commission to incorporate all services and service providers that directly or indirectly utilize and derive benefit from the nation’s broadband networks. ITTA proposes that the Commission consider a hybrid numbers/connections-based system that assesses contributions on the following

⁶¹ *FNPRM*, at ¶ 287 (footnote omitted).

basis: a flat monthly fee for each working residential and business telephone number regardless of the technology used to provide the service, and a tiered, flat monthly charge for each connection to all assessable services. Each component is addressed separately and in more detail below.

A. Numbers-Based Contribution Component.

The numbers-based component of the methodology presented for consideration by ITTA would consist of a flat monthly fee for each working residential and business number. Including a numbers-based component in the hybrid approach would serve several valuable purposes. It would enhance the predictability of providers' contributions since providers know (or can fairly easily identify) how many numbers they have in operation at any given point in time. In addition, it would eliminate the regulatory gaming that results today from providers having to categorize information and telecommunications service revenues and interstate and intrastate traffic. Moreover, a numbers-based charge is competitively neutral in that providers will charge consumers the same flat-rate fee regardless of the technology used to provide their voice service.

All numbers that are working to provide voice service should be assessed under the numbers-based component of ITTA's suggested methodology. In this context, a "working" number should exclude numbers used for network administration and other purposes not related to providing end user voice services. Assessing all working numbers would promote equity and fairness because it would ensure that all numbers that are used to access the network (subject to certain exceptions outlined below) contribute to supporting the network. Cyclical numbers should only be assessed when they are operating to provide service.⁶² While it is appropriate to

⁶² The *FNPRM* defines cyclical numbers as numbers designated for use that are typically working or in use by the end user for regular intervals of time, such as summer home telephone numbers that are in service for six months out of the year. *FNPRM*, at ¶ 301.

assess cyclical numbers when they are in use by the end user, they should be exempted from the numbers-based charge when they are not in operation.

Numbers assigned to Lifeline subscribers also should be excluded from the contribution base. In prior Commission proceedings, both industry and consumer groups have expressed strong support for an exemption for numbers provided to Lifeline subscribers.⁶³ Passing through these costs to low-income consumers is counterproductive because it effectively raises the price of service, discouraging the adoption and use of communications services by low-income Americans. Excluding numbers provided to Lifeline subscribers from contribution obligations is wholly consistent with the purpose of the Lifeline program to ensure universal access to affordable communications services for low-income consumers.

On the other hand, all numbers that are used for mobile wireless family plans should be assessed equally. As the Commission previously has concluded, “each number associated with a family plan obtains the full benefits of accessing the network,” and adopting “an exemption for additional family plan handsets... would advantage wireless family plan consumers over other residential service consumers.”⁶⁴ The Commission should count equally all numbers that are used for mobile wireless family plans, consistent with policy goals of competitive neutrality, predictability, simplicity and the other contribution reform principles ITTA outlined above.

Likewise, numbers assigned to free or nearly free services (*e.g.*, conferencing services, stand-alone voicemail access) should not be exempt from the per-number contribution obligation. To exempt these numbers would create a new arbitrage opportunity for providers to

⁶³ See, *e.g.*, CTIA Aug. 9, 2006 Comments at 5; Reply Comments of Consumers Union, *et al.*, WC Docket No. 05-337, CC Docket No. 96-45, at 58 (filed June 2, 2008); Letter from James S. Blaszak, Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 4 (filed Nov. 19, 2007); AT&T and Verizon Sept. 11, 2008 *Ex Parte* Letter, Attach. 1 at 5.

⁶⁴ 2008 *USF Reform Order*, 24 FCC Rcd 6475, App. A, ¶ 145.

market services as free or nearly free to avoid contribution obligations. The fact that providers of free or nearly free services typically generate revenue in other ways, such as through advertising or other paid product or service offerings, does not provide a legitimate basis for their exemption from contribution obligations. Such services benefit from access to the network and should fairly be charged with supporting the network.⁶⁵

Conceptually, the obligation to pay the per-number charge should apply to the service provider with the retail relationship with the end user. This rule is practical and should lead to the most accurate assessment since typically providers of retail services have access to the most accurate and up-to-date information on how many numbers are in use (*i.e.*, providing service to end users) at any given point in time.

Finally, several principles should govern the level at which the per-number charge is set under ITTA's suggested hybrid numbers/connections approach. First, the Commission should set the amount of the flat per-number charge before setting the tiered, per-connection charge. The per-connection charges should be calculated to collect the amount of the total annual USF revenue requirement estimated to remain after collection of all per-number charges. Second, the per-number charge should not be set at so high a level so as to incent end users to abandon stand-alone voice service. Consumers of basic voice services that are subject to the current USF contribution methodology should be no worse off when assessed a per-number charge under ITTA's proposed methodology. There is no valid policy justification for the Commission to adopt a charge that drives consumers otherwise satisfied with their voice service to abandon that service. Third, the Commission should consider reducing the level of the per-number charge

⁶⁵ See 2008 USF Reform Order, at ¶ 144, App. B, ¶ 91, & App. C, ¶ 139.

over time (or perhaps eliminating it altogether) as more end users migrate to IP-based broadband services.

B. Connections-Based Contribution Component

The connections-based component of ITTA's proposed hybrid numbers/connections-based approach would consist of a tiered flat monthly charge for each connection to all assessable services. As with the numbers-based component, the connections-based component introduces stability into the system because the number of connections has historically been more stable than end-user interstate telecommunications revenues. It also eliminates the increasingly complicated and arbitrary requirement that contributors differentiate between interstate and intrastate traffic and telecommunications and information services. Most importantly, coupling the connections-based component with the numbers-based component furthers the requirement of Section 254(d) that contributions be equitable and non-discriminatory by ensuring that all services and service providers that utilize the network and derive benefit from the federal universal service system contribute to the fund.

Several principles should apply to the composition of the connections-based component of ITTA's proposed methodology. First, the Commission asks whether the definition of connection should be limited to connections to end users.⁶⁶ ITTA agrees and suggests that the Commission not exclude entities that purchase wholesale inputs. This proposed definition would avoid perpetuating the difficulty under the current revenues-based system of having to determine whether a customer is an end user or a reseller of specific services in order to identify contribution obligations.

⁶⁶ *FNPRM*, at ¶ 241.

Second, the Commission should adopt a tiered structure for the connection charge, with each connection within a tier assessed the same flat fee.⁶⁷ There is long-standing general consensus that the classification of connections into various tiers (*i.e.*, lower for standard services and higher for higher speed or capacity connections) is justified from a public policy perspective since the varying charges that would result would reflect the varying demands on and benefits derived from the network.⁶⁸

Third, the tiers should be updated on a regular basis (perhaps every year) as new technologies and services develop. This approach would allow the Commission to respond to marketplace developments as new and advanced service offerings become available. Finally, the Commission should define a connection for contribution assessment purposes without regard to jurisdictional considerations or the need to distinguish between telecommunications and non-telecommunications. In that way, the Commission can avoid increasingly difficult (and competitively sensitive) questions regarding the physical end points of a facility or the actual traffic carried on a particular circuit.

⁶⁷ ITTA is in the process of developing a specific set of proposed tiers.

⁶⁸ See *FNPRM*, at ¶ 249.

VI. CONCLUSION

For all of the foregoing reasons, the Commission should expeditiously adopt the proposals for reform of the federal USF contribution system specified in these comments.

Respectfully submitted,

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