

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

In the Matter of

Universal Service Contribution Methodology

A National Broadband Plan for Our Future

WC Docket No. 06-122

GN Docket No. 09-51

**REPLY COMMENTS OF
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

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The Massachusetts Department of Telecommunications and Cable (MDTC)¹ respectfully submits these reply comments in response to the July 9, 2012, initial comments filed responding to the Further Notice of Proposed Rulemaking (FNPRM) released by the Federal Communications Commission (FCC) on April 30, 2012, in the above-referenced dockets.²

I. SUMMARY

Through the FNPRM, the FCC seeks comment on reforming the Universal Service Fund (USF or Fund) contributions methodology. Among other questions, the FCC asks who should contribute to the USF; how contributions should be assessed; how the administration of the contribution system can be improved; and whether and how to modify aspects of contributions recovery from consumers by providers.³ As noted in its initial comments, due to limited data and the unknown impacts on Massachusetts consumers, the MDTC does not endorse a particular

¹ The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts. MASS. GEN. LAWS ch. 25C, § 1. Silence on any matter not addressed in these reply comments does not connote agreement or opposition by the MDTC.

² *In the Matter of Universal Service Contribution Methodology; A National Broadband Plan for Our Future*, WC Docket No. 06-122 and GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. Apr. 30, 2012) (FNPRM).

³ *Id.* at ¶¶ 1, 5.

long-term federal contributions methodology or more comprehensive reform at this time. The July 9th initial comments further demonstrate that every contributions methodology – revenues-based, numbers-based, connections-based, or a hybrid approach – has drawbacks, and that a major shift to a new methodology requires additional data. If the Fund supports broadband, then broadband should support the Fund, yet questions still remain involving implementation and consumer impact. The FCC can, however, apply certain immediate, near-term strategies to improve the existing contributions assessment scheme, namely: 1) protect consumers from harsh bill impacts; 2) review the assessment mechanism periodically to adapt to changes in the industry; 3) retain a service-specific approach to contributions in the near term to ensure predictability and regulatory certainty; and 4) maintain a flexible approach to reflect a fluctuating Fund.

II. THE COMMENTS REVEAL SHORTCOMINGS OF EACH CONTRIBUTIONS METHODOLOGY AND THE NEED FOR ADDITIONAL DATA.

The FCC’s adoption of a contributions methodology going forward will, no matter which methodology is selected, face fairness, classification, and jurisdictional challenges. Further, comments show that each contribution methodology contemplated by the FCC has shortcomings and reflect the need for additional data. Moreover, most agree that the base needs to be expanded but disagree on the services that should be included. In light of these concerns, the MDTC urges the FCC to carefully adopt contributions reform that is supported by adequate data reflecting the impact on different states, businesses, and consumers.

A. Fairness, Classification, and Jurisdictional Issues Will Arise No Matter Which Underlying Methodology the FCC Selects.

Fairness, classification, and jurisdictional issues will arise no matter the underlying methodology ultimately adopted by the FCC. Some commenters appear to overlook this fact,

arguing that adopting a numbers-based or connections-based approach would be simpler to administer, would ease carrier compliance, and would rely less on regulatory distinctions (e.g., information services versus telecommunications services; interstate versus intrastate concerns).⁴ As US Telecom observes, however, classification and jurisdictional distinctions play a key role in many of the underlying issues in the current system and create incentives for providers “to minimize their contribution obligations by interpreting the rules and administrative instructions in a way that supports that outcome.”⁵ Short of Congressional action or FCC reliance on an entirely new legal authority, the FCC will need to address classification and jurisdictional issues in any methodology that it adopts.⁶

The FCC’s legal authority, which is tied to classification and jurisdictional distinctions, requires that a link exist between the underlying services that the entity provides and any methodology and provider contribution obligations. The FCC relies on Section 254(d) of the Act as primary authority to impose contributions obligations, which requires involvement of “interstate telecommunications,”⁷ and the FCC limits its legal authority considerations in the

⁴ AT&T Comments at 18 (urging adoption of a non-revenues-based system, in part arguing that “revenue streams will have nothing to do with the provision of interstate telecommunications” in the near future); CTIA Comments at 9 (asserting that “approaches based on numbers and connections may have the advantage of not relying on artificial regulatory distinctions that are not relevant in the marketplace”); Microsoft Comments at 15 (stating that “[a] connections-based approach [] is less likely [than a revenues-based approach] to leave in place distinctions between different types of networks and various protocols for data transmission”).

⁵ US Telecom Comments at 7-9.

⁶ Verizon Comments at 47 (pointing out that use of a service-based, connections-based system “would require the Commission and the industry to sort through a myriad of offerings in an attempt to determine which are and which are not assessable for universal service purposes”); XO Comments at 35 (asserting that “numbering resources are being used on services other than telecommunications [] Therefore, there is little nexus between assignment of telephone numbers and usage of interstate telecommunications”); Comcast Comments at 18 (adoption of a connections-based system “would not eliminate entirely the need to identify and classify the services delivered over a connection”).

⁷ 47 U.S.C. § 254(d). Section 254(d) mandates that “[e]very telecommunications carrier that provides interstate telecommunications services” contribute to the Fund. *Id.* Section 254(d) also grants to the Commission its so-called “permissive authority” to expand the contributions base to “[a]ny other provider of interstate telecommunications” if the Commission determines that it is in the public interest. *Id.* See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, at ¶¶ 111-120 (1998) (discussing the mandatory contributions requirement versus its permissive authority under section 254) (“1998

FNPRM to this statutory provision.⁸ As the FCC recognizes, statutory requirements involving the underlying services do not disappear with the adoption of a new methodology.⁹ Indeed, the FCC must consider the underlying services and address potential carrier gamesmanship,¹⁰ no matter which methodology it adopts.¹¹

Report to Congress”); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) (“*First USF Order*”) (subsequent history omitted) at ¶¶ 772-800 (discussing criteria for mandatory contributions versus other providers of interstate telecommunications); *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007) (“*Vonage*”) (referencing mandatory contributions versus contributions imposed by the Commission under its permissive authority pursuant to section 254(d)). In both instances, an entity with contribution obligations must provide “telecommunications” that are “interstate” to some degree. In 1997, the Commission determined:

[T]hat mandatory contributors under section 254(d) of the Act would meet the following three criteria: (1) a telecommunications carrier must offer “interstate” “telecommunications;” (2) those interstate telecommunications must be offered “for a fee;” and (3) those interstate telecommunications must be offered “directly to the public, or to such classes of users as to be effectively available to the public.”

See Request for Review by Waterway Communication System, LLC and Mobex Network Services, LLC of a Decision of the Universal Service Administrator, WC Docket No. 06-122, Order, DA 08-1971 (rel. Aug. 26, 2008) at ¶ 3 (citations omitted), *recon. den.*, *Request for Review by Waterway Communication System, LLC and Mobex Network Services, LLC of a Decision of the Universal Service Administrator*, WC Docket No. 06-122, Order, DA 10-1013 (rel. Jun. 4, 2010). To date, the Commission’s use of its permissive authority has been limited to only three (3) particular services/providers: (1) private network operators that lease excess capacity on a non-common carrier basis for interstate transmissions; (2) payphone service aggregators; and (3) most recently in 2006, interconnected VoIP (an as yet unclassified service). *See First USF Order* at ¶¶ 786, 794, 796-798; *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. Jun. 27, 2006) (“*VoIP Contributions Order*”) (subsequent history omitted) at ¶¶ 38-45; FNPRM at ¶ 9.

⁸ The Commission would be relying on this permissive authority if/when it expands the contributions base to include additional services. *See* FNPRM at ¶¶ 28-35, ¶¶ 43-44 (for broadening the base to include enterprise services, which, like interconnected VoIP, are as yet unclassified), ¶ 51 (for text messaging services, also unclassified), ¶¶ 58-60 (for one-way VoIP, unclassified), and ¶ 72 (for broadband Internet access services, classified as an information service with a “telecommunications” component). The Commission would also be relying on this authority for any non-revenues-based system that it may adopt. *Id.* at ¶¶ 223-225 (inquiring how a connections-based methodology would satisfy Section 254(d)) and ¶¶ 290-293 (inquiring how a numbers-based methodology would satisfy Section 254(d)).

⁹ *Id.* at ¶ 28 (“Even if we were to shift from a revenues-based approach to an alternative approach [] we would still need to determine which providers and services are appropriate to assess”).

¹⁰ *Id.* at ¶ 23 (acknowledging that “[c]learer, simpler rules that can be applied in new situations could deter gaming of the system and save consumers, companies, and the government money”) and ¶ 277 (observing that any new methodology “must be auditable in order to ensure that contributors are reporting accurately, and that the system operates in an equitable and nondiscriminatory manner, maintains stability in the contribution base, and *minimizes market distortions and gamesmanship*”) (emphasis added).

¹¹ ITTA Comments at 12 (asserting that “[c]ompetitive 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”).

1. Carriers have difficulty reporting their revenues appropriately under the existing revenues-based methodology.

Commenters indicate that carriers have difficulty reporting their revenues appropriately under the existing revenue-based methodology, unfairly burdening many carriers.¹² Indeed, some commenters agree that jurisdictional and classification issues, as well as certain reporting flexibility,¹³ create ambiguities in revenue reporting requirements.¹⁴ These ambiguities create difficulties for parties that make good-faith efforts to report their information correctly.¹⁵ They also provide incentives for some parties to allocate revenues inappropriately to reduce their contribution obligations, thereby further burdening other carriers and consumers.¹⁶ While certain commenters do not endorse future long-term use of a revenues-based system, most agree that the FCC can and should make near-term reforms to minimize ambiguities under the existing

¹² Comcast Comments at 9-10, n.26; Time Warner Comments at 12; AT&T Comments at 30-32; Verizon Comments at 9-11; XO Comments at 9; Level 3 Comments at 3; Sprint Comments at 40-41; CTIA Comments at 10-11.

¹³ FNPRM at ¶¶ 105, 126; AT&T Comments at 25; US Telecom Comments at 5, 7-9; XO Comments at 5; COMPTTEL Comments at 22-24.

¹⁴ The Commission's reporting instructions summarize the method by which carriers must report and allocate their revenues as follows:

First, the filer must assign its gross billed revenues to reporting categories, which includes allocating revenues from bundled services between their telecommunications and non-telecommunications components. Second, the filer must attribute telecommunications revenues derived from sales to contributing resellers or from sales to end users. Third, the filer must apportion its telecommunications revenues between the intrastate, interstate, and international jurisdictions. Gross billed revenues include revenues from all sources, including non-regulated telecommunications offerings, information services, and other non-telecommunications services. Gross revenues consist of total revenues billed to customers during the filing period with no allowances for uncollectibles, settlements, or out-of-period adjustments.

2012 Telecommunications Reporting Worksheet Instructions, FCC Form 499-A (Mar. 2012) at 12-13.

¹⁵ Comcast Comments at 9-10, n.26; AT&T Comments at 30-32; Time Warner Comments at 5; CTIA Comments at 8.

¹⁶ FNPRM at ¶¶ 105, 126; Joint Comments of Earthlink, Integre, and tw Telecom (Joint CLEC Comments) at 8; NTCA, OPASTCO, and WTA Joint Comments (Joint Rural Comments) at 27. A substantial amount of money is involved. The most recent quarterly assessment on carriers' assessable interstate and international revenues stands at 15.7%, based on the assumption that 3rd Quarter 2012 revenues will be \$16.70 billion and anticipated Fund demands for the quarter will be \$2.24 billion. *Proposed Third Quarter 2012 Universal Service Contribution Factor*, Public Notice, DA 12-917 (rel. Jun. 11, 2012) at 2-3.

methodology.¹⁷ Others would support long-term retention of a revenues-based system if the FCC is capable of “maximizing simplicity and alleviating compliance burdens.”¹⁸ Commenters urge the FCC to address or resolve issues arising from: (1) allocating revenues for bundled services;¹⁹ (2) expanding the base to minimize competitive distortions;²⁰ (3) revisiting appropriate safe harbors and/or allocation of revenues between interstate and intrastate services;²¹ (4) treatment of Multi-Protocol Label Switching services;²² and (5) wholesale carrier reporting obligations.²³ The MDTC supports FCC resolution of these issues in the near-term to resolve reporting ambiguities and competitive distortions but, due to insufficient data on potential impacts on Massachusetts carriers and consumers, cannot endorse particular recommendations at this time.²⁴

¹⁷ Verizon Comments at 6-45; AT&T Comments at 24-41.

¹⁸ Time Warner Comments at 12. *See also* Comcast Comments at 29 (specifying that “[i]rrespective of the contribution methodology adopted, the Commission should strive to implement administrative reforms that will increase transparency, facilitate understanding of the contribution requirements, and minimize compliance burdens”); CTIA Comments at 8 (“CTIA is open to considering a range of contribution methodologies, as long as they address the fundamental problems in the current regime, and provide for a fair, efficient, and simple contribution mechanism”).

¹⁹ COMPTTEL Comments at 22-24; US Cellular Comments at 38-40; Joint Rural Comments at 39-41; Joint CLEC Comments at 8-9; AT&T Comments at 24-27.

²⁰ Frontier Comments at 4-5; COMPTTEL Comments at 7-18; Joint Rural Comments at 9-26; US Cellular Comments at 6-31; MetroPCS Comments at 8-21; XO Comments at 14-31; Joint CLEC Comments at 5-7; Verizon Comments at 28-31; NASUCA Comments at 4-9; CA PUC Comments at 4-7; State Member Comments (May 2, 2011) at 117-121.

²¹ Joint Rural Comments at 41-44; CTIA Comments at 10-11; Joint CLEC Comments at 11-13; Verizon Comments at 20-22; DC PSC Comments at 4; KS Corporation Commission Comments at 4-7; State Member Comments (May 2, 2011) at 121-124.

²² CenturyLink Comments at 6; Sprint Comments at 40-44; XO Comments at 8-11, 23-24; Joint CLEC Comments at 9-11; Verizon Comments at 24-28.

²³ CTIA Comments at 11-12; XO Comments at 7-8; Joint CLEC Comments at 13-16; Verizon Comments at 15-20; AT&T Comments at 30-38.

²⁴ However, based on the existing record, a long-term revenues-based approach currently appears to be the most competitively neutral, forward-looking methodology. In particular, a revenues-based system could encompass any communications system or facility, current or future, and the burden can be spread equitably among providers of competing services that benefit from the system. *See* CA PUC Comments at 8-9; Joint Rural Comments at 35-38; XO Comments at 33-38.

2. A pure numbers-based methodology would violate the fairness and competitive neutrality principles.

The FCC should not adopt a pure numbers-based system, since such a system would violate the fairness and competitive neutrality principles required under the Act.²⁵ For example, such a system would exempt many broadband-related and non-voice services from assessment requirements, since these services do not rely on telephone numbers. Commenters agree.²⁶ Under a numbers-based methodology, voice and other basic service subscribers would shoulder an unfair contributions burden, especially given the FCC’s decision to shift the Fund to make it more broadband-centric.

3. A pure connections-based methodology may also violate the fairness and competitive neutrality principles.

A pure connections-based methodology poses several concerns, and the MDTC agrees with commenters that the lack of specificity in the FCC’s connections-based approach makes meaningful comment on the approach difficult at this time.²⁷ Verizon observes that there are “two fundamental challenges facing a connections-based contribution mechanism: (1) the definition of a connection; and [should the FCC adopt a tiered connection assessment] (2) the establishment of fair and stable connection tiers.”²⁸ XO points out that, of the FCC’s two proposed “connection” definitions, both “would lead to inequitable assessment on providers of

²⁵ 47 U.S.C. § 254(b)(4) and § 254(d); *First USF Order* at ¶¶ 21, 43, 46-52 (adopting the competitive neutrality principle recommended by the Joint Board). *See also* Joint Rural Comments at 36-37; XO Comments at 35.

²⁶ XO, for example, observes that a numbers-based approach “does not account for the myriad non-traditional uses of numbering resources made by service providers today and in the future,” including number use by non-telecommunications services, and fails to account for telecommunications services that do not utilize numbers. XO Comments at 33-34. *See also* CA PUC Comments at 10; COMPTTEL Comments at 34-35; Sprint Comments at 25.

²⁷ COMPTTEL Comments at 21 (indicating that “[t]he lack of specificity in the Commission’s connections-based approach makes meaningful comment impossible”).

²⁸ Verizon Comments at 47. *See also* CA PUC Comments at 12 (stating that “[t]he definition of an assessable “connection” is [] integral to any connections-based proposal”).

comparable services.”²⁹ In addition, the MDTC shares the view of several industry commenters that establishing tiers at this stage would be “arbitrary,” “would become obsolete almost immediately” and would need to be designed “to ensure that the per-connection assessment is fair for the range of services that might use a particular type of connection and does not distort the market for low-revenue applications.”³⁰

The current lack of data makes providing a definition and establishing tiers to avoid any adverse impact on Massachusetts consumers (whether residential or business) nearly impossible. As the FCC recognizes, a “connection” is not a universally-recognized or tracked unit, especially for other government purposes (such as for the IRS or the SEC).³¹ In addition, the connections data that the FCC currently requires through FCC Form 477 reporting mainly tracks residential connections, and thus does not capture many connections provided to businesses, governmental entities, and other large institutions.³² Moreover, many companies do not track the capacity of their connections.³³ Without sufficient data or current tracking systems in place, it would be premature for the FCC to adopt a connections-based system.

²⁹ XO Comments at 36. *See also* FNPRM at ¶¶ 227, 231-240 (contemplating facilities-based versus service-based definitions for a “connection”); Comcast Comments at 23 (specifying that “[a] service-based definition could lead to inequitable double assessments”).

³⁰ Verizon Comments at 48. *See also* AT&T Comments at 22 (“setting the capacity tiers so as not to distort the market will require further industry discussion and input”); Joint CLEC Comments at 18 (“the differentials between the tiers are likely to be arbitrary and it is unclear how the Commission could design the tiers in a way that is ‘future-proof’”); NTCA, OPASTCO, and WTA Joint Comments (Joint Rural Comments) at 38 (the Commission would “need to determine whether capacity or other metrics would be inherent in the definition depending on the type of service in question”); Comcast Comments at 20 (a connections-based system “has the potential to cause significant competitive distortions and consumer harms, particularly if improperly designed speed or capacity tiers are utilized”).

³¹ FNPRM at ¶ 226.

³² *Id.* at ¶ 246.

³³ Joint CLEC Comments at 18; XO Comments at 37; U.S. Cellular Comments at 34-35.

4. A hybrid numbers-connections methodology needs more data support and reflects the same issues as each individual system.

The adoption by the FCC of a hybrid numbers-connection system presents problems similar to the numbers-based and connections-based methodologies, due to lack of data or specificity in the FCC's proposals.³⁴ Verizon discourages the FCC from adopting a hybrid approach because it would require contributors to create "two different assessment methods instead of one, which would harm consumers and providers alike by increasing administrative and compliance costs."³⁵ NASUCA opposes a hybrid system because "the same problems would be present with a hybrid mechanism" as under a connections-based or revenues-based system, "but would be more complex."³⁶ Consequently, the hybrid approach to contributions assessment poses distinct concerns for providers and consumers, and the existing record does not contain enough information to define the effort required to create the hybrid methodology.

B. Most Agree That the FCC Should Expand the Contributions Base, But Questions Remain Regarding Potential Implementation and Impacts.

Commenters reach a general consensus that the FCC should expand the contributions base to include additional services,³⁷ but disagree as to which services the FCC should assess.³⁸

³⁴ FNPRM at ¶ 322 (seeking "specific comment" on a hybrid numbers-connections methodology). *See also* NASUCA Comments at 21 ("the continued carping about the current mechanism has not [] produced any record of specific costs for a numbers-based or connections-based mechanism; there have only been vague and generic assertions about those costs").

³⁵ Verizon Comments at 47.

³⁶ NASUCA Comments at 9 (citations omitted). *See also* CA PUC Comments at 14 (a hybrid system "poses all of the same concerns as each system individually and also would place a greater burden on providers who would have to track both numbers and connections in order to make contributions").

³⁷ State Member Comments (May 2, 2011) at 117-121; NASUCA Comments at 4-9; Verizon Comments at 24-32; XO Comments at 14-13; Joint CLEC Comments at 5-7; MetroPCS Comments at 8-20.

³⁸ *Compare* COMPTTEL Comments at 7-17 (supporting assessments on text messaging, one-way VoIP, broadband Internet access, and certain enterprise services); Joint Rural Comments at 8-26 (supporting assessments on text messaging, non-interconnected VoIP, retail broadband Internet access, and certain enterprise services); US Cellular Comments at 21-31 (supporting assessments on broadband Internet access, one-way VoIP, and certain enterprise services); XO Comments at 23-31 (supporting assessments on text messaging, one-way VoIP, broadband Internet access, and certain enterprise services); Verizon Comments at 24-42 (supporting assessments on MPLS-enabled and one-way VoIP services and on voice services without end-user revenues; opposing assessments on text messaging

In principle, the MDTC agrees that the FCC should include broadband Internet access services in the list of those assessable services due to the current burden imposed unfairly on voice consumers. However, questions remain regarding the potential implementation and impact on Massachusetts of expanding the base to include broadband services. No commenter provides sufficient data on the potential impact of the expansion, other than to note that expansion will reallocate the base and reduce the contributions factor.³⁹ In addition, the uncertainty of which long-term contributions methodology the FCC will use creates further ambiguities of those potential impacts.

If the Fund supports broadband, then broadband should support the Fund.⁴⁰ Equitability and fairness require that the FCC expand the contributions base to include broadband Internet access services. As the MDTC observed in its initial comments, voice services and a subset of data services have subsidized the deployment of and access to broadband and other advanced services through high-cost support for nearly a decade.⁴¹ If the FCC does not expand the contributions base, this uneven burden will grow due to the FCC's recent reforms last year,

services; urging the FCC to conduct a comprehensive study before deciding whether to assess broadband revenues). *See also* CTIA Comments at 22-26 (opposing assessments on text messaging services); Microsoft Comments at 5-13 (opposing assessments on “over-the-top” services, including one-way VoIP).

³⁹ *See, e.g.*, XO Comments at 20 (noting that a “[r]elatively modest expansion[] in the assessable revenue contribution base can quickly result in a substantial reduction in the USF contribution factor and a return to a more equitable apportionment of the obligation to support universal service”).

⁴⁰ NASUCA Comments at 7 (“Those who benefit from a ubiquitous national network should contribute to the Fund [] This leads to the conclusion that, if the USF is to support broadband, then broadband must support the USF”); Joint Rural Comments at 19 (“[I]t would be self-defeating and ironically anomalous to fund a USF that has been modified to explicitly support broadband-capable networks and promote the universal availability of broadband service primarily through revenues from voice-grade and other ‘basic’ services”).

⁴¹ MDTC Comments at n.27, *citing In the Matter of Connect America Fund*, WC Docket No. 10-90 et al., *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, FCC 11-13 (rel. Feb. 9, 2011) at ¶ 52 (pointing out that certain smaller carriers in rural areas had been able “to largely finance [telephone] network upgrades to provide high speed Internet access and, increasingly, video services, in many communities” through the Commission’s “no barriers to advanced services policy”) (citation omitted).

which refocused a large portion of USF funding from voice to universal broadband access.⁴² The FCC should not put the burden of supporting the Fund on the shoulders of voice consumers when the Fund has been repurposed predominately for broadband support. A broad range of commenters, including state commissions, consumer advocates, and providers, acknowledge this disparity and urge the FCC to expand the base to include broadband Internet access and certain other broadband-related services.⁴³

Despite this consensus, certain commenters discourage immediate expansion due, in part, to concerns about the effect on broadband adoption by consumers.⁴⁴ These arguments are unpersuasive. The FCC, while inquiring about broadband adoption, failed to ask “whether continuing to assess voice customers at ever increasing double digit rates in order to subsidize broadband service could discourage consumers from subscribing to voice services.”⁴⁵ In addition, commenters discouraging expansion failed to provide the “empirical data” requested by the FCC⁴⁶ in order to quantify their arguments.⁴⁷ To the extent that the FCC needs to counter

⁴² MDTC Comments at n.27, citing *In the Matter of Connect America Fund*, WC Docket No. 10-90, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161 (re. Nov. 18, 2011). Since 3rd Quarter 2002, the carrier contribution assessment has increased from 5.54% of carriers’ assessable interstate revenues to as much as 17.4% for 2nd Quarter 2012. Compare Public Notice, *Proposed Third Quarter 2000 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 00-1272 (Jun. 9, 2000) with Public Notice, *Proposed Second Quarter 2012 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 12-396 (Mar. 13, 2012). See also FCC Webpage, “Contribution Factor & Quarterly Filings - Universal Service Fund (USF) Management Support,” available at: <http://www.fcc.gov/encyclopedia/contribution-factor-quarterly-filings-universal-service-fund-usf-management-support> (last viewed Jun. 22, 2012).

⁴³ XO Comments at 20, 28-31; Joint CLEC Comments at 5-7; CenturyLink Comments at 9-11; COMPTTEL Comments at 14-17; Joint Rural Comments at 15-24; NASUCA Comments at 4-9; CA PUC Comments at 3-5; DC PSC Comments at 2. See also State Member Comments (May 2, 2011) at 119 (recommending that “broadband and services closely associated with the delivery of broadband [such as DSL, Cable Modems, and wireless broadband] should make a contribution”).

⁴⁴ Verizon Comments at 41; Time Warner Comments at 9-10.

⁴⁵ COMPTTEL Comments at 16.

⁴⁶ FNPRM at ¶ 67.

⁴⁷ See e.g., Verizon Comments at 41 (stating that “imposing USF requirements on broadband would run counter to many of the Commission’s policy goals, including specifically its goals of achieving increased broadband adoption and promoting broadband deployment” and “the differential in contribution burden [] may affect adoption by some households”).

broadband adoption concerns, it should review the effects on consumer adoption of interconnected VoIP services after the FCC expanded the base to include those services.⁴⁸ The FCC's own data shows that extending contributions obligations onto interconnected VoIP service providers in 2006 did not have an adverse effect on the adoption of those services.⁴⁹ In fact, nationwide residential VoIP subscriptions between December 2008 and June 2011 increased approximately 49 percent.⁵⁰

If the FCC is concerned that expanding the contributions base will impact broadband adoption by low-income consumers, then the FCC should act to limit the amount of contributions imposed on this particular group of consumers. The FCC has already addressed this issue, in part, through recent reforms of the Fund's Lifeline program.⁵¹ Further, the FCC could adopt the MDTC's recommendation to exempt all Lifeline consumers from contributions obligations to further negate the adverse impacts experienced by low-income consumers from expansion of the contributions base.⁵²

Although commenters agree that the FCC should expand the base to include broadband services, certain commenters raise valid concerns that the FCC needs to consider.⁵³ First, the FCC needs to assess the impacts on different customer classes, both residential and business, as

⁴⁸ Joint Rural Comments 23 (citations omitted).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See generally *In the Matter of Lifeline and Link Up Reform and Modernization*, 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*"). The Commission expressly permitted eligible telecommunications carriers to apply the federal Lifeline discount on bundled services with a voice component, and the Commission is currently contemplating ways to further expand the Lifeline program to include broadband as a supported service. *Id.* at ¶¶ 315-320.

⁵² MDTC Comments at 14-15 (supporting the Commission's proposal to expand its rule to prohibit all ETCs from recovering contribution costs from Lifeline subscribers on Lifeline-eligible services); NASUCA Comments at 23-24 (urging the Commission to exempt Lifeline consumers from paying an assessment).

⁵³ Verizon Comments at 42 (pointing out that the Commission needs to resolve several issues if it expands the base to include broadband services).

well as for consumers of different services and the effects on consumers and carriers operating in different states such as Massachusetts. The MDTC agrees with the National Cable & Telecommunications Association (NCTA) that the FCC should ensure that it does not place “an undue burden on any particular class of customers, either residential or business,”⁵⁴ because the MDTC is particularly concerned with any unintended consequence that would expand the contributions burden on Massachusetts consumers and carriers.⁵⁵ Ensuring that no undue burden exists aligns with the requirement that contributions be “[e]quitable and nondiscriminatory.”⁵⁶ NCTA observes that “[t]he greater the assessment on any particular class of customers, the greater the incentive will be for some companies to attempt to evade the contribution requirement” by gaming the system.⁵⁷ In addition, a larger number of customers may experience multiple assessments based on the different services to which they subscribe,⁵⁸ and consumers subscribing to different tiers of broadband service may be subject to different contributions assessments.⁵⁹ The FCC needs to avoid creating further inequities in the contributions system, especially for states like Massachusetts.⁶⁰ The FCC can accomplish this by amending its current data collection requirements.⁶¹

⁵⁴ NCTA Comments at 5.

⁵⁵ MDTC Comments at 8-11 (discussing concerns that comprehensive reform will be conducted without sufficient, concrete data, and through a rushed process that unfairly benefits or burdens a subset of particular providers, services, or states such as Massachusetts).

⁵⁶ 47 U.S.C. § 254(b)(4).

⁵⁷ NCTA Comments at 5.

⁵⁸ While NCTA correctly observes that spreading the base may impose multiple assessments on customers already paying into the system, many customers already experience this outcome due to subscription to multiple voice services (wireline and wireless) or to subscription to voice and certain data services.

⁵⁹ FNPRM at ¶¶ 249-263 (contemplating different assessments based on different tiers); CA PUC Comments at 13 (pointing out the additional issue of variability between actual measured speeds versus advertised speeds of service).

⁶⁰ MDTC Comments at 8-11 (discussing why certain reform efforts may further unfairly burden Massachusetts businesses and consumers).

⁶¹ *Id.* at 3-11 (recommending data collection reform prior to comprehensive contributions reform).

Second, the FCC should define clearly the broadband services that would be accessible.⁶² Verizon urges the FCC to adhere to the fairness principle⁶³ and not place some providers at a competitive disadvantage by assessing one category of broadband services without assessing competing services by other providers (i.e., broadband Internet access service provided over different platforms, such as by DSL versus cable modem).⁶⁴ As a result, any base expansion to include broadband Internet access providers should apply to all broadband Internet access providers, regardless of the underlying platform.⁶⁵ However, as Verizon and other commenters point out, it is often difficult to draw lines between different broadband services.⁶⁶ The FCC needs to proceed cautiously if it contemplates expansion to non-access broadband services, such as application and/or content service providers that use broadband to deliver their service.⁶⁷

The FCC could use as a starting point in providing definitions for assessable broadband services its Eligible Services List (ESL), established annually for the Fund's Schools and Libraries Mechanism (E-Rate).⁶⁸ The ESL provides definitions and explanations of services both eligible and ineligible for E-Rate support.⁶⁹ Current eligible services under this mechanism include digital transmission services and Internet access services.⁷⁰ The Wireline Bureau

⁶² Verizon Comments at 42-43; State Member Comments (May 2, 2011) at 119.

⁶³ 47 U.S.C. § 254(b)(4).

⁶⁴ Verizon Comments at 42. *See also* CTIA Comments at 6 (urging the Commission to not impose unequal burdens on different providers of similar or substitutable services or on particular segments of the communications industry).

⁶⁵ State Member Comments (May 2, 2011) at 119.

⁶⁶ Verizon Comments at 42-43; State Member Comments (May 2, 2011) at 119.

⁶⁷ Verizon Comments at 42-43; State Member Comments (May 2, 2011) at 119.

⁶⁸ *See* USAC Schools and Libraries (E-Rate) Webpage, "Eligible Services List" *available at*: <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx> (last viewed Jul. 16, 2012)

⁶⁹ *See* Schools and Libraries Universal Service Support Mechanism Eligible Services List for Funding Year 2012, CC Docket No. 02-6; GN Docket No. 09-51, *available at*: http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList-2012.pdf (last viewed Jul. 16, 2012).

⁷⁰ *Id.*

updates and seeks comments on the ESL annually, which permits interested entities to provide input on a regular basis.⁷¹

Finally, the uncertainty of the determination of which long-term contributions methodology the FCC will use in the future creates further ambiguities on the potential impacts of expanding the base to include broadband Internet access (or other) services.⁷² If the FCC intends to expand the base appropriately, then it will need to factor in those services when it considers revising the existing methodology or adopting a new methodology.

III. AS COMMENTERS OBSERVE, THE FCC SHOULD ADHERE TO CERTAIN STRATEGIES LOOKING FORWARD.

Notwithstanding the difficulties presented above, the FCC can take some immediate actions and observe some forward-looking strategies that will improve the contributions system while it considers more comprehensive reform.

A. Consumers Should Be Protected From Excessive Increases to Their Bills.

The FCC should not adopt a methodology that subjects Massachusetts consumers to an excessive increase in their contributions assessment, as reflected on their bills. The FCC and several commenters point out that broadening the base will reduce the contributions factor under the current revenues-based system, thereby decreasing the overall burden on individual consumers.⁷³ Traditional voice-only consumers, for example, could experience a decrease in

⁷¹ 47 C.F.R. § 54.502 (detailing the procedures for seeking comment on a draft ESL for the E-rate program for the upcoming funding year); *Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program*, CC Docket No. 02-6; GN Docket No. 09-51, Public Notice, DA 12-1052 (rel. July 5, 2012).

⁷² Citing efficiency concerns, some commenters urge the Commission to delay expansion of the base to certain services until after the Commission reforms the methodology. Sprint Comments at 33. The Commission should not be persuaded by these arguments, however, because the Commission has expanded the base several times since 1997 despite the ongoing open question of methodology reform. The need to stabilize the Fund due to dwindling assessable telecommunications revenues outweighed the need for the Commission to refocus its efforts on methodology reform. *VoIP Contributions Order* at ¶¶ 17-22.

⁷³ FNPRM at ¶¶ 25, 29-30; Joint Rural Comments at 16-18; Joint CLEC Comments at 5; CA PUC Comments at 4-5; State Member Comments (May 2, 2011) at 118-119.

their assessment obligations.⁷⁴ However, depending on the services assessed in the future, consumers that subscribe to multiple services may experience an overall increase in their assessments.⁷⁵ The FCC should ensure that the redistribution is equitable and does not result in excessive increases to assessments passed onto consumers by their service providers.⁷⁶

Similarly, the FCC should ensure that quarterly or annual changes to assessments borne by Massachusetts consumers are equitable and nondiscriminatory, and it should delay adopting an annual adjustment to the contributions factor until it implements and can analyze the effects of other contributions reforms.⁷⁷ For instance, in support of an annual factor revision, AT&T argues that “[t]he volatility in the quarterly contribution factor is confusing to consumers, expensive to carriers, and unnecessary.”⁷⁸ AT&T states that “[c]onsumers 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.”⁷⁹ In contrast, Comcast observes that:

Annual modifications to the contribution factor could result in larger incremental changes with each adjustment, which would lead to larger fluctuations in the amount that customers are billed. Consistent with the long-standing goals of the Commission in this proceeding [] the negative consequences of “sticker shock” for consumers in the event of a significant increase in the factor outweigh the operational benefit to providers from a reduction in the frequency of adjustments.⁸⁰

⁷⁴ Joint Rural Comments at 16-19, 23.

⁷⁵ NCTA Comments at 5.

⁷⁶ Discussed *supra* at 12-13.

⁷⁷ The FCC contemplates an annual rather than a quarterly contributions factor adjustment. FNPRM at ¶¶ 350-359. Many commenters support the Commission’s proposal to adjust the contributions factor on an annual rather than quarterly basis, endorsing the lightened carrier burden and administrative efficiencies that would result. *See* DC PSC Comments at 6; CA PUC Comments at 15; Verizon Comments at 11-12; AT&T Comments at 43-44.

⁷⁸ AT&T Comments at 43.

⁷⁹ *Id.*

⁸⁰ Comcast Comments at 31.

Both carriers make sound arguments. Due to the uncertainties involved with the FCC's anticipated reforms, as well as consistent fluctuations in the contributions factor, the FCC should defer this issue to a later date. At that time, the FCC should be able to better assess the potential impacts on consumer bills against the needs of the Fund.

To the extent that Massachusetts' or any state's consumers may experience increases in their assessments due to adoption of reforms, or due to fluctuations in the contributions factor, then consumers should receive sufficient notice of the changes. Comprehensive reforms will require substantial outreach by all parties, including the FCC, state commissions like the MDTC, and entities with contribution obligations in order to ensure that consumers are educated about changes to their bills. Further, any rate increase to a consumer's bill should be preceded by a notice provided by the carrier in an earlier billing statement advising the consumer of the increase. As a result, the FCC should impose a rule that requires carriers to notify customers of any pending rate increases stemming from changes to contributions reform or to fluctuations in the contributions factor.

B. No Matter the Ultimate Approach, the FCC Should Revisit Contributions Periodically.

Industry commenters indicate that FCC inaction on contributions issues has resulted in many of the current system's uncertainties and deficiencies. These uncertainties and deficiencies potentially adversely impact Massachusetts businesses and consumers by increasing the administrative costs of carrier compliance. The FCC should resolve its history of inaction by revisiting contributions issues on a regular basis. Numerous appeals and guidance requests have lagged for several years, resulting in noted ambiguities in and disputed interpretations of the

contributions reporting requirements.⁸¹ To counter this record, the FCC should resolve USAC and Bureau appeals, as well as USAC and carrier requests for guidance, in a timely manner. To accommodate the constant evolution of the communications marketplace and to minimize future requests for clarification or appeals, the FCC should also implement a process that requires periodic, mandatory review of assessable services.⁸² The process could be similar to the procedure already utilized for eligible services under the Fund’s E-Rate program.⁸³ If the FCC takes these discrete measures, then it should help to alleviate many deficiencies and uncertainties of the system going forward.⁸⁴

C. The FCC Should Retain the Service-Specific Approach in the Near Term to Ensure Predictability and Regulatory Certainty.

Since the Act’s passage, the FCC has expanded or clarified contribution obligations on a service-specific basis.⁸⁵ The FCC seeks comment on whether to retain this approach or to adopt a broader definitional approach without enumerating the specific services subject to assessment.⁸⁶ The MDTC agrees with commenters that the FCC should retain its service-specific approach, at least in the near term, in order to ensure predictability and regulatory certainty.⁸⁷ Otherwise, as Comcast points out, a definitional approach would still likely require

⁸¹ FNPRM at ¶¶ 38, 41, 49 (citations omitted); T-Mobile Comments at 12-13; AT&T Comments at 45; XO Comments at 5-6.

⁸² COMPTTEL Comments at 17-18 (supporting annual review of a list of assessable services); NTCA Comments at 8 (urging “frequent and regular updating” of a list of assessable services “as uncertainties and disputes arise as a result of new market developments and business strategies”).

⁸³ Discussed *supra* at 14-15. *See also* COMPTTEL Comments at 17-18.

⁸⁴ Level 3 Comments at 11 (pointing out that the main problem with the Commission’s service-specific approach “has been an absence of speed in any determinations”).

⁸⁵ FNPRM at ¶ 36; *supra* at n.7. Section 54.706 of the Commission’s rules sets forth a non-exhaustive list of services that are currently included in the contributions base. FNPRM at ¶ 73; 47 C.F.R. § 54.706.

⁸⁶ FNPRM at ¶¶ 37, 74-94.

⁸⁷ Level 3 Comments at 6-13 (opposing a general definitional approach); XO Comments at 22 (supporting the service-specific approach); AT&T Comments at 4-16 (arguing, in part, that a general definitional rule would be too broad and inadvertently encompass non-assessable services). *Contrast* CA PUC Comments at 4 (endorsing a

the FCC “to issue frequent clarifications as questions arise about the applicability of the definition to particular services.”⁸⁸ If the FCC adopts a broader definitional approach, then it should continue to provide a non-exhaustive list of services subject to assessment.⁸⁹ In either case, the FCC should update the list periodically.⁹⁰

D. The Contributions Methodology Must Accommodate a Fluctuating Contributions Factor and Fund Size.

No matter the ultimate contributions methodology adopted by the FCC, it needs to ensure that the methodology sufficiently accommodates a fluctuating contributions factor and Fund size. Utilizing USAC projections and adjustments, the FCC revises the current contributions factor on a quarterly basis and contemplates changing this to an annual revision.⁹¹ The FCC observes that fluctuations in the contributions factor relate to changes in Fund program demand and changes to prior period adjustments made by USAC.⁹² Since the Fund is not currently subject to a hard cap, the contributions requirements will continue to fluctuate.⁹³ Any methodology will need to account for these fluctuations.

general definitional approach); U.S. Cellular Comments at 14 (asserting that a general definitional approach “would enable the Commission to act more quickly in deciding whether a new type of service or technology will be treated as assessable”); Joint CLEC Comments (supporting a broader definitional approach).

⁸⁸ Comcast Comments at 8.

⁸⁹ COMPTTEL Comments at 18, 20; NASUCA Comments at 6 (urging adoption of a general definition “that will be more future-proof as the marketplace continues to evolve” and that is supported by “a non-exhaustive service-by-service list of particular services and providers that are required to contribute”); NTCA Comments at 9 (“A general rule, coupled with an evolving list of specific examples of assessed and non-assessed services, constitutes the most effective, efficient and equitable way to administer a contribution mechanism in a changing marketplace with a minimum of uncertainty and litigation”).

⁹⁰ *Supra* at 17-18.

⁹¹ FNPRM at ¶¶ 353-355.

⁹² *Id.* ¶¶ 351-352.

⁹³ *Id.* ¶¶ 2-3, 253, 354; *Lifeline Reform Order* at ¶ 359 (deferring establishment of a budget for the Lifeline program). The only mechanism not subject to a budget is the low-income program, which in 2011 accounted for at least \$1.75 billion of the total Fund size of \$8.1 billion. See Universal Service Administrative Company, *2011 USAC Annual Report* at 1 (based on year-end disbursements), available at: <http://www.usac.org/res/documents/about/pdf/annual-reports/usac-annual-report-2011.pdf> (last viewed July 30, 2012). Between 2000-2010, the low-income program’s Lifeline mechanism grew from approximately \$489 million

IV. CONCLUSION

Due to limited data and the unknown impacts on Massachusetts consumers, the MDTC does not endorse a particular long-term federal contributions methodology at this time. The July 9th initial comments further demonstrate that every contributions methodology – revenues-based, numbers-based, connections-based, or a hybrid approach – has drawbacks, and that a major shift to a new methodology requires additional data. Further, while the MDTC agrees with most commenters that the contributions base should be expanded, questions remain involving implementation and consumer impact. Despite these ambiguities, the FCC can apply certain immediate, near-term strategies to improve the existing contributions assessment schematic: 1) protect consumers from harsh bill impacts; 2) review the assessment mechanism periodically to adapt to changes in the industry; 3) retain a service-specific approach to contributions in the near term to ensure predictability and regulatory certainty; and 4) maintain a flexible approach to reflect a fluctuating Fund.

Respectfully submitted,

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to \$1.24 billion. See Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report 2011*, CC Docket Nos. 98-202, 96-45 (rel. Dec. 2011), at Table 2.2, page 2-4.