

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**REPLY COMMENTS
of
UNITED STATES CELLULAR CORPORATION**

Grant B. Spellmeyer
Executive Director – Federal Affairs &
Public Policy

David A. LaFuria
John Cimko

UNITED STATES CELLULAR CORPORATION
8410 West Bryn Mawr
Chicago, Illinois 60631
(773) 399-4280

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8678

August 6, 2012

TABLE OF CONTENTS

| | |
|--|-----|
| SUMMARY | iii |
| I. INTRODUCTION | 1 |
| II. THE RECORD REFLECTS SUBSTANTIAL SUPPORT FOR COMMISSION ACTION TO EXPAND THE USF CONTRIBUTION BASE. | 4 |
| A. Numerous Commenters Agree with U.S. Cellular That the Current System Is Broken, That Repair Work by the Commission Is Long Overdue, and That This Work Should Focus on Expanding the Contribution Base..... | 6 |
| B. There Is Widespread Agreement Among Commenters That the Commission’s Policies Would Be Advanced by Adopting a General Definition of Assessable Providers..... | 12 |
| C. The Record Presents a Strong Case for Making Broadband Internet Access Service Assessable..... | 17 |
| 1. Consumers, Competitive Neutrality, and the Sufficiency and Sustainability of the Fund Would All Be Served by Making Broadband Assessable..... | 17 |
| 2. The Record Provides Substantial Evidence That There Is No Basis for Concerns That Assessing Broadband Would Depress Broadband Adoption..... | 23 |
| 3. In Addition to Broadband Providers, Several Other Types of Telecommunications Providers Also Should Contribute to the Fund..... | 28 |
| III. NUMEROUS STAKEHOLDERS HAVE EXPRESSED SUPPORT FOR USING A REFORMED REVENUES-BASED SYSTEM TO ASSESS CONTRIBUTIONS..... | 32 |
| A. There Is Considerable Agreement in the Record That a Reformed Revenues-Based Methodology Would Advance the Commission’s Universal Service and Broadband Goals. | 33 |
| B. The Record Provides a Strong Basis for Treating Revenues from Broadband Internet Access Services as 100% Interstate for USF Contribution Purposes..... | 44 |
| C. Numerous Commenters Agree with U.S. Cellular That a “Safe Harbor” Test Should Govern the Allocation of Revenues from Bundled Services. | 46 |
| D. The Commission Should Address Several Other Issues Related to Its Selection of a Contribution Methodology. | 51 |
| 1. If the Commission Retains a Revenues-Based System, It Should Adjust the Wireless Carrier Jurisdictional Safe Harbor to a More Reasonable Level..... | 51 |

| | | |
|-----|---|----|
| 2. | The Reformed Revenues-Based System Should Not Use a “Total Revenues” Approach for Making Assessments. | 52 |
| 3. | If the Commission Adopts a Numbers-Based Methodology, It Should Take a Reasonable Approach to the Treatment of Wireless Family Plans. | 53 |
| IV. | THERE IS WIDESPREAD SUPPORT FOR THE ADOPTION OF RULES AND POLICIES TO IMPROVE THE ADMINISTRATION OF THE USF CONTRIBUTION MECHANISM. | 54 |
| A. | Numerous Parties Agree with U.S. Cellular That the Commission Should Establish an Annual Notice-and-Comment Process for Revising and Updating Contribution Reporting Requirements. | 54 |
| B. | The Record Supports U.S. Cellular’s View That the Period During Which Prior Period Adjustments May Be Made Should Be Extended. | 56 |
| C. | Commenters Join U.S. Cellular in Suggesting that the Commission Take Steps To Improve the Auditing Process. | 58 |
| D. | U.S. Cellular Supports the Recommendation That the Commission Should Establish a System for Providing Guidance Regarding Contribution Requirements. | 59 |
| E. | U.S. Cellular Agrees with Commenters Suggesting That the Commission Should Adopt Symmetrical Time Periods for Resubmitting Form 499 Filings. | 60 |
| F. | U.S. Cellular Endorses the Position That the Commission Should Not Adopt Its Proposed “Pay and Dispute” Rule. | 61 |
| V. | SEVERAL COMMENTERS MIRROR U.S. CELLULAR’S CONCERNS REGARDING PROPOSALS TO MODIFY RULES FOR THE RECOVERY OF USF CONTRIBUTIONS FROM END-USER CUSTOMERS. | 62 |
| A. | The Record Reflects a Strong Consensus That Existing Rules and Mechanisms Sufficiently Protect Customers’ Interests. | 63 |
| B. | A Wide Cross-Section of Stakeholders Opposes Any Prohibition of Contributors’ Recovering Contributions Through Line Items on Customers’ Bills. | 66 |
| VI. | CONCLUSION. | 67 |

SUMMARY

The record in response to the Commission's universal service contribution reform *Further Notice* delivers a strong message on several key issues:

First, the Commission must act quickly to expand the contribution base, especially by making broadband Internet access service assessable. *Second*, the Commission should retain the existing revenues-based contribution methodology, but should revise it in several ways to improve its operation. *Third*, several steps should be taken by the Commission to improve the administration of the contribution system. And, *fourth*, the Commission should tread carefully in considering changes to rules governing the recovery of contributions from end-user customers.

MAKING ADDITIONAL SERVICES AND PROVIDERS ASSESSABLE

A substantial cross-section of commenters agrees with U.S. Cellular that the current crisis posed by the rapidly shrinking level of contributions is a product of the Commission's failure to adjust its contribution requirements to reflect marketplace changes that have dried up sources of contribution revenues under the current rules. Numerous parties agree that this predicament can be addressed by taking three critical steps.

Most importantly, the Commission should make broadband assessable. The record provides a strong basis for taking this step, with many commenters pointing to the equity and fairness of assessing broadband now that the Commission has transformed its universal service program into a mechanism to support broadband deployment. Commenters also agree with U.S. Cellular that bringing broadband into the contribution base will immediately help to arrest the shrinkage in contributions that has threatened the sustainability of the Universal Service Fund.

Next, the Commission should further expand the contribution base by making additional services and providers assessable. Numerous commenters support action by the Commission to bring one-way Voice over Internet Protocol service, various enterprise communications services, non-facilities-based providers, and systems integrators into the base. Taking this step would not only expand the size of the base, but, in many cases, would also promote competitive neutrality and benefit consumers by equalizing the contribution obligations of competing service providers.

In addition, on a going-forward basis the Commission should adopt a general definition of assessable providers—instead of relying on additions to a list of assessable services and providers—because doing so would provide a “future-proof” and timely means of expanding the base to include services to which customers have migrated but that are not currently included in the base.

RETAINING THE REVENUES-BASED CONTRIBUTION METHODOLOGY

There is widespread support in the record for U.S. Cellular’s view that the revenues-based system—improved by several proposed revisions and modifications—is the best vehicle for protecting the sustainability of the Fund and ensuring the fairness of contribution obligations established by the Commission.

Advantages of the Revenues-Based System

Commenters make a strong case in favor of the Commission’s reliance on a reformed revenues-based methodology, demonstrating that it is more equitable than any alternative approach, it provides definitional clarity and transparency in enforcement, it is inherently non-discriminatory, and it is not regressive. Unlike a numbers- or connections-based system, the revenues-based methodology is directly based on network usage, linking the contribution assessment with communications expenditures made by consumers.

A revenues-based methodology also is technologically neutral. Contribution obligations reflect the value that consumers place on competing services without regard to the specific technology used to deliver the service. Given the fact that the revenues-based methodology is driven by the choice made by consumers among different service offerings, the application of the methodology remains the same—and produces the same contribution obligations—regardless of the underlying technologies used to provide services selected by consumers.

The record also demonstrates that a revenues-based system has various administrative advantages, including the fact that the unambiguous definition of “revenues” minimizes any difficulties relating to the tracking of providers’ contribution obligations. In addition, given the fact that a revenues-based methodology is already in place, the operation of a reformed revenues-based system would not impose any significant burdens on contributors, especially since they already have billing systems in operation that accommodate revenues-based assessments.

In contrast, if the Commission were to jettison the revenues-based system, and start from scratch with a new connections- or numbers-based methodology, the necessary start-up adjustments would likely impose substantial burdens on contributors and their customers. Various commenters point out not only that the complexities of defining “numbers” and “connections” would be difficult to resolve, but also that the Commission would likely be forced to design and implement new data collection systems, and contributors would face the substantial burden of redesigning their billing systems to meet the requirements of the new contribution system.

Reforming the Revenues-Based System

Although many commenters observe that the current dilemma faced by the Commission’s contribution system cannot be blamed on the revenues-based methodology, but instead has been caused by the “death spiral” of repeated shrinkage in the contribution base and attendant increas-

es in the contribution factor, there also is widespread agreement in the record that the Commission should adopt reforms to the revenues-based system to ensure its effective operation going forward.

One step for the Commission to take would be to treat all assessable broadband revenues as 100% interstate. This action would be consistent with Commission precedent, and would also enhance the sustainability of the Fund and advance its efficient administration. Any attempt to apportion broadband revenues between intrastate and interstate jurisdictions would be ill-considered because it would unduly complicate the administration of the contribution system.

The record also presents a convincing case that the Commission should adopt a “safe harbor” approach to provide for the reasonable and equitable allocation of revenues from bundled offerings that include both assessable and non-assessable services. A safe harbor mechanism would be transparent, enhancing the Commission’s ability to administer and enforce the safe harbor rule. Numerous commenters agree that a safe harbor rule is preferable to permitting providers to make individualized showings of their assessable revenues, and also would work better than a bright-line test (under which contributors would be required to treat all bundled revenues as telecommunications service revenues for purposes of determining contribution obligations).

U.S. Cellular also agrees with several commenters who suggest that the Commission’s own data demonstrates that the Commission should act expeditiously to reduce the wireless jurisdictional safe harbor percentage to a more reasonable and realistic level. In addition, the Commission should reject a “total revenues” approach for making contribution assessments, because treating all revenues reported by contributors as assessable would have anti-competitive effects.

MAKING THE CONTRIBUTION SYSTEM WORK BETTER

Many parties have joined U.S. Cellular in commending the Commission for making numerous proposals for improving the administration of the contribution system. Several specific proposals have garnered considerable support in the record.

Numerous commenters support the Commission's inauguration of an annual notice-and-comment process for the adoption of revisions to Form 499 Worksheets and instructions. The Commission should, however, avoid elevating the instructions to the status of binding rules. In addition, revisions to the Worksheets or instructions should take effect at the beginning of the reporting year, and any changes to the Worksheets should apply only prospectively.

The period of time during which prior period adjustments are taken into account by the Universal Service Administrative Company, for subsequent adjustments to the contribution factor, should be extended from one quarter to two quarters, because doing so would be effective in reducing volatility in fluctuations of the quarterly contribution factor.

Several parties agree that USAC should be required to develop an updated audit plan reflecting the Commission's contribution reforms, and that the Commission should provide interested parties with an opportunity to comment on the proposed plan. The Commission also should adopt new procedures designed to increase the prospect that appeals of USAC contributor audits are resolved by the Commission in a timely manner.

There is support for the Commission's development of a system that would enable it to provide clear guidance in response to questions concerning the Form 499 Worksheets and instructions. One approach would be for the Commission to adapt the Internal Revenue Service's private letter ruling mechanism, which applies provisions of the Internal Revenue Code to the specific facts of a taxpayer's case. This action or similar steps could be effective in providing an

opportunity for contributors to make “risk free” requests for guidance on the interpretation of the Form 499 Worksheets and instructions.

Parties also suggest that the Commission should fix a particularly onerous and unfair component of the current USF contribution regime. Under the existing practice, a contributor seeking to refile its Form 499, to revise its revenues and reduce its required contributions, faces a one-year deadline, but a contributor has an unlimited obligation to correct Form 499 errors when doing so would increase contributions. The Commission should adopt a new policy providing for a symmetrical three-year limitations period for any Form 499 refiling.

Finally, the Commission should not adopt its proposed “pay and dispute” rule, which would impose late fees, interest charges, and penalties if a contributor fails to make payments by the applicable due dates—even if the contributor has filed an appeal with the Commission disputing the payment obligation. The proposed requirement would impose unwarranted and significant financial burdens on contributors.

AVOIDING UNNECESSARY RULES REGARDING RECOVERY OF USF CONTRIBUTIONS

There is a strong negative reaction in the record to several proposals advanced by the Commission involving the recovery of Fund contributions from end-user customers. Several commenters object to the Commission’s proposal to require that a provider’s advertised price must include the Fund contribution, pointing out, for example, that it would be difficult and burdensome to recalibrate the USF charge, and then to reflect it in a contributor’s advertised rates, every time there is a change in the contribution factor.

The record also reflects opposition to the Commission’s proposal to require contributors to identify on their bills the portions and amounts of service offerings that are subject to Fund assessments. Showing how the contribution pass-through is calculated for different portions and

amounts on the bill would be difficult for contributors to accomplish and would be confusing for their customers. The task would be even more complicated for wireless carriers that use traffic studies to apportion their revenues between intrastate and interstate jurisdictions.

Numerous commenters support U.S. Cellular's position that the Commission should not adopt its proposal to prohibit Fund contributors from recovering contributions from end users through a line-item or "surcharge" on end-user bills. There is no indication that line-item surcharges harm consumers. In fact, contributors that choose to make the surcharges transparent through line-item entries are providing relevant information to their customers.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**REPLY COMMENTS
of
UNITED STATES CELLULAR CORPORATION**

United States Cellular Corporation (“U.S. Cellular”), by counsel, hereby submits these Reply Comments, pursuant to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION.

More than four years ago, in attempting to justify its decision to impose an interim cap on high-cost support received by wireless eligible telecommunications carriers (“ETCs”), the Commission determined that the Universal Service Fund (“USF” or “Fund”) was in “dire jeopar-

¹ *Universal Service Contribution Methodology*, WC Docket No. 06-122, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357 (2012) (“*Further Notice*”). Reply comments are due August 6, 2012. *Wireline Competition Bureau Announces Deadlines for Comments on Universal Service Contribution Methodology Further Notice of Proposed Rulemaking*, WC Docket No. 06-122, GN Docket No. 09-51, Public Notice, DA 12-905 (rel. June 7, 2012), Erratum (rel. June 13, 2012). A motion for an extension of the deadline for reply comments was denied by the Wireline Competition Bureau. *Universal Service Contribution Methodology*, WC Docket No. 06-122, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Order, DA 12-1188 (rel. July 25, 2012).

dy[.]”² with its sustainability hanging in the balance,³ and the Commission expressed concern regarding “excessive (and ever growing) contributions from consumers”⁴ At the time the Commission made this diagnosis regarding the health of the Fund, the contribution factor was set at 11.3%.⁵ Today—even with legacy high-cost support for competitive ETCs now frozen⁶—the contribution factor is 15.7%,⁷ an increase of 38.9% in four years.

While the Commission in the *Interim Cap Order* focused its attention on the “explosive growth” in high-cost support,⁸ we now know—as many parties observed during the time prior to adoption of the *Interim Cap Order*⁹—that the Commission had its eye on the wrong ball. The erosion of the contribution base—not support disbursements—poses the principal threat to the sustainability of the Fund. This erosion, fueled in large part by the migration of many consumers from wireline telephone service to communications services that are not assessable under the

² *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, 8837 (para. 6) (2008) (“*Interim Cap Order*”), *aff’d*, *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

³ *Id.* at 8837 (para. 5).

⁴ *Id.* at 8837 (para 6).

⁵ *Id.* at 8838 (para. 6 n.27).

⁶ *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17832 (para. 519) (2011) (“*CAF Order*”), *pets. for review pending sub nom. Direct Commc’ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases).

⁷ *Proposed Third Quarter 2012 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 12-917 (rel. June 11, 2012).

⁸ *Interim Cap Order*, 23 FCC Rcd at 8834 (para. 1).

⁹ *See, e.g.*, U.S. Cellular & Rural Cellular Corporation Comments, WC Docket No. 05-337, CC Docket No. 96-45, filed June 6, 2007, at 8-9 (arguing that the Fund was not experiencing “explosive” growth as a result of high-cost disbursements to competitive ETCs).

Commission's current rules, drives the urgent need for the Commission to press ahead with contribution reform.

U.S. Cellular therefore commends the Commission for taking the initiative to explore in the *Further Notice* numerous issues that have been pending for more than a decade, but that must be resolved in order for the Commission to move forward with salvaging the sustainability of the Fund, reforming its USF contribution system, and adapting the system to a communications marketplace that has undergone a dramatic transformation since the Commission first prescribed the current USF contribution methodology.

The Commission now has before it an extensive record submitted in response to the *Further Notice*, which, in many respects, provides clear and persuasive guidance regarding the direction in which the Commission should move along the path to reform. This guidance is outlined in the following paragraphs.

- To remedy the alarming collapse of contribution revenues, the Commission should act promptly to expand the contribution base. The record demonstrates that this step is a reasonable and effective prescription for addressing the dire jeopardy currently faced by the Fund. While several categories of services and providers can be brought into the contribution base, the most important is broadband Internet access service. Numerous commenters document the salutary effect this will have on the contribution base, and the record provides no convincing evidence that the rate of adoption of broadband services would be adversely affected by making broadband assessable.

- The Commission should concentrate on adopting several reforms to its revenues-based methodology, and should retain this methodology going forward. The record demonstrates that many problems attributed to the revenues-based system actually have their origin in the precipit-

ous and ongoing shrinkage of the contribution base. Once the Commission adopts measures to address this decrease in contribution revenues, any risks to the viability of the revenues-based methodology will be removed. Other shortcomings discussed in the record relating to the operation of the revenues-based methodology can be cured by the adoption of reforms, and commenters provide ample guidance regarding the contours of these reforms.

- Over the years that the contribution system has been in place, various problems have emerged regarding the administration of the system. These problems—which relate, for example, to matters such as reporting requirements, the audit process, adjustments to the contribution factor, and the process for appealing Universal Service Administrative Company (“USAC”) decisions to the Commission—have created burdens for contributors as well as for USAC and the Commission. The *Further Notice* takes an important step in laying the groundwork for addressing many of these administrative problems, and commenters have responded with useful information and insights to inform the Commission’s decisions.

- The record underscores that one area of the contribution system is not in need of any Commission action. Numerous commenters demonstrate that the Commission’s various proposals to revise rules governing the recovery of USF contributions from end users are unnecessary and ill-considered, would impose unwarranted burdens on contributors, and would not likely provide any clear-cut benefits to end-user customers.

II. THE RECORD REFLECTS SUBSTANTIAL SUPPORT FOR COMMISSION ACTION TO EXPAND THE USF CONTRIBUTION BASE.

Three key issues raised by the Commission in the *Further Notice* involve whether the Commission should focus its efforts on expanding the USF contribution base, whether it should

develop a general definition of assessable services and providers, and whether broadband Internet access service should be brought into the contribution base.

The record provides significant support for the positions advocated by U.S. Cellular regarding each of these issues. As discussed in the following sections, numerous parties agree that it is critically important to expand the contribution base in order to protect the interests of consumers, promote competitive neutrality, and enhance the sustainability of the Fund. There also is widespread agreement among commenters that a general definition of assessable services and providers would work more effectively than a service-by-service and provider-by-provider list as a means of “future-proofing” the Commission’s contribution base and ensuring that the Commission’s rules for assessable services and providers are able to adapt seamlessly to changing market conditions and the advent of new technologies and services.

A diverse cross-section of stakeholders has also endorsed in their comments the Commission’s proposal to treat broadband as an assessable service, agreeing with U.S. Cellular that taking such a step in the near term would serve the Commission’s universal service and broadband deployment policies, and that bringing broadband into the contribution base would not likely have any significant adverse effect on the adoption of broadband services.

[Remainder of page intentionally left blank.]

//
//
//
//
//
//

A. Numerous Commenters Agree with U.S. Cellular That the Current System Is Broken, That Repair Work by the Commission Is Long Overdue, and That This Work Should Focus on Expanding the Contribution Base.

U.S. Cellular has stressed in its Comments that the time is past due for the Commission to shift its focus to USF contribution reform, especially since this reform should have been addressed as part of the *CAF Order*,¹⁰ which adopted new support distribution rules.¹¹

Numerous parties indicate in their comments that the Commission's past failure to seize the day by successfully pursuing contribution reform has increased the importance of moving forward with reforms now.¹² The Commission began this journey toward reform eleven years ago,¹³ the *Further Notice* represents the seventh round of comments during that period, and the *Further Notice* "essentially asks the same questions posed in the earlier six comment cycles."¹⁴

Many commenters agree with U.S. Cellular that a major component of reform should be the expansion of the contribution base.¹⁵ Reasons supporting this position can be grouped into three principal areas, which are discussed in the following paragraphs.

¹⁰ *CAF Order*, 26 FCC Rcd at 17738 (para. 194) (footnote omitted) (referencing the need for reforms to ensure equitable and non-discriminatory contributions "such that support is 'sufficient' to meet the purposes of section 254 of the Act").

¹¹ U.S. Cellular Comments at 2-3, 9. (All references to comments are to those filed in response to the *Further Notice*, unless otherwise noted.) See Ad Hoc Telecommunications Users Committee ("Ad Hoc") Comments at 4-5; XO Communications Services, LLC ("XO"), Comments at 19 (observing that "the current universal service contribution system is broken and cries out for reform").

¹² See Ad Hoc Comments at 8 (emphasis in original) (noting that "the Commission needs to implement [contribution] reform quickly and develop a system that can *accommodate* changes in the marketplace").

¹³ Sprint Nextel Corporation ("Sprint") Comments at 10.

¹⁴ *Id.* at 11.

¹⁵ See, e.g., Cincinnati Bell Inc. ("CBI") Comments at 2 (arguing that "the USF assessment rate can only realistically be reduced by broadening the USF contribution base"); Frontier Communications Corporation ("Frontier") Comments at 3 (indicating that "the current base of contributors cannot support the Commission's broadband deployment goals and expansion is necessary for the continued viability of the USF program. Frontier supports expanding the base of contributing providers and technologies as widely as possible in order to minimize the burden on any one service."); MetroPCS Communications, Inc. ("MetroPCS"), Comments at 8 (emphasis in original) (arguing that "the contribution base must include *all*

First, numerous commenters agree with U.S. Cellular’s observation that expanding the contribution base will enhance the sustainability of the Fund.¹⁶ Ad Hoc, for example, explains the USF “death spiral” caused by repeated shrinkage in the contribution base and attendant increases in the contribution factor, and points out that this pattern will continue unless the Commission “dramatically expands the base of assessable services to create a level playing field among end-users and services”¹⁷

CenturyLink points out that the Fund can be transformed into “a reliable—and continuing—source of the funding needed to meet the Commission’s goal of universal broadband access”¹⁸ if the “the broadest possible array of growing services [are included] in the contribution base”¹⁹ RCA echoes this view, explaining that “[t]he Commission should broaden the con-

service providers who benefit from universal connectivity, irrespective of whether the service is voice or data and regardless of the technology employed, whether located at the edge, in the middle, or the on-ramp to the Internet”); XO Comments at 14-15 (emphasis in original) (arguing that “[t]he clear intention of Congress was to spread the burden of contributing to universal service subsidy support broadly, both to ensure that the contribution base is sufficiently large to provide funding adequate to achieve the purposes of the universal service fund program *and* to avoid unfairly burdening any particular set of services or service providers”).

¹⁶ U.S. Cellular Comments at 4.

¹⁷ Ad Hoc Comments at 4. *See* Rural Telecommunications Group, Inc. (“RTG”), Comments at 2, 3; XO Comments at 18-19 (arguing that the substitution of non-assessable products for assessable products “creates a sort of negative feedback loop in which ever higher universal service contribution factors cause more customers to substitute non-assessable services, which in turn further reduces the base of assessable revenue and requires the contribution factor be adjusted further upward”). Ad Hoc also argues that fundamental reform of the basis for assessing USF contributions could also avert further collapse down the USF death spiral. Ad Hoc Comments at 4. *See* MetroPCS Comments at 4-5 (arguing that “[t]he Commission simply must ensure that USF contribution obligations keep pace as communications increasingly moves away from the traditional silos of telecommunications services towards new and innovative communications models that likewise benefit from universal connectivity. Otherwise, as consumers gravitate towards these new, currently non-assessable services, the very viability of the USF program may be in jeopardy.”); *id.* at 10.

¹⁸ CenturyLink Comments at 10.

¹⁹ *Id.* *See* GVNW Consulting, Inc. (“GVNW”), Comments at 10 (arguing that the public interest requires expanding the contribution base “to ensure long-term sustainability”).

tribution base to provide a more stable source of funding for the future”²⁰ T-Mobile agrees, encouraging the Commission to “broaden the base of contributors to the greatest extent possible in order to reduce the contribution factor[.]”²¹ which would enhance the sustainability of the Fund.

Second, U.S. Cellular has observed in its Comments that considerations of equity compel expansion of the contribution base.²² This view has many adherents in the record. NASUCA, for example, argues that equity demands expansion of the contribution base, concluding that “[t]he public interest requires the broadest lawful class of contributors to the USF: Those who benefit from a ubiquitous national network should contribute to the Fund, with as few exceptions as feasible.”²³ XO agrees with this position, stating that:

The need to spread the contribution burden as broadly as reasonably possible is fundamental to ensuring that the telecommunications market is not artificially distorted by saddling one set of telecommunications services with hefty universal service funding obligations while conferring an artificial regulatory advantage on competing services that are not required to provide universal service support.²⁴

²⁰ RCA—The Competitive Carriers Association (“RCA”) Comments at 4.

²¹ T-Mobile USA, Inc. (T-Mobile”), Comments at 2.

²² *See, e.g.*, U.S. Cellular Comments at 4.

²³ National Association of State Utility Consumer Advocates (“NASUCA”) Comments at 6. *See* Alexicon Telecommunications Consulting (“Alexicon”) Comments at 2-3; AT&T Comments at 12 (arguing that, “in line with the statutory mandate for ‘equitable’ allocation of the contribution burden, the Commission should ensure some rough correspondence between USF obligations and benefits”); MetroPCS Comments at 3-4; Massachusetts Department of Telecommunications and Cable (“Massachusetts DTC”) Comments at 9 & n.25 (footnote omitted) (indicating that it “agrees that the contribution base needs to be expanded, because the current system disproportionately and unfairly burdens a subset of consumers. . . . Specifically, 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, and this uneven burden will grow due to the Commission’s recent reforms refocusing much of USF funding to broadband access.”).

²⁴ XO Comments at 15. *See* Public Service Commission of the District of Columbia (“DC PSC”) Comments at 2 (indicating that “many newer services are performing similar functions as traditional voice service, so they should be included in the USF contribution base. Providers of these new services also benefit from having a greater number of end users, who are supported by universal service funding, available

CenturyLink agrees, arguing that the Commission must “address the flaw at the core of the Universal Service framework: the fundamental mismatch between the subset of services that contribute to the Universal Service Fund and the full range of services that rely on and benefit from the network that everyone uses.”²⁵ U.S. Cellular agrees with the equitable solution identified by CenturyLink: “Permissive authority can and should be used [by the Commission] to ensure that all types of services that rely on broadband networks contribute their fair share toward the cost of maintaining them where USF support is necessary.”²⁶

And, *third*, expanding the contribution base would be particularly beneficial for consumers of mobile wireless telecommunications and broadband services.²⁷ CTIA cogently describes the current problem:

to purchase these services.”); Universal Service for America Coalition (“USA Coalition”) Comments at 6 (arguing that the Commission should expand the contribution base to cover as many types of voice and data service providers as possible, and simplify its rules to ensure that service providers cannot gain a competitive advantage over each other, or avoid the universal service contribution obligations, by using regulatory distinctions with no relevance to the market”).

²⁵ CenturyLink Comments at 9. *See id.* at 9 (noting that, “[u]nder a reformed system, the number of services and providers included in the assessment base should be as broad as possible consistent with the range of services being supported”); AT&T Comments at 4 (explaining that “[i]t is no longer sustainable to impose the lion’s share of the contribution burden on traditional ‘telecommunications carriers,’” and the Commission therefore must place greater reliance on its permissive authority to assess contributions from providers of interstate telecommunications).

²⁶ CenturyLink Comments at 11. *See* CompTel Comments at 6 (arguing that, “at the very least, the public interest requires that any telecommunications provider that benefits from access to the public switched telephone network in delivering or receiving services should be subject to contribution”); *id.* at 7 (explaining that “[i]n order to distribute the burden of supporting universal service more equitably, the Commission must expand the pool of services and providers that are subject to contribution to incorporate new technologies and service offerings that more accurately reflect the way that individuals and businesses communicate in today’s world”); MetroPCS Comments at 11-12. U.S. Cellular has argued that, “[i]n deciding whether and to what extent it should exercise its permissive authority pursuant to Section 254(d), the Commission’s policy should be that the public interest will be served by expanding as much as possible the range of telecommunications providers that are made subject to contribution requirements.” U.S. Cellular Comments at 11.

²⁷ U.S. Cellular has explained in its Comments that:

The wireless industry in particular has shouldered an increasing share of the burden of funding the USF program, even as the Commission has implemented policies that reduce the support available for the deployment of wireless networks in rural and high-cost areas. . . . [W]ireless carriers and their customers now bear 44 percent of the nine billion dollar USF contribution burden. That is, wireless carriers and their customers collect and contribute nearly \$4 billion per year.²⁸

T-Mobile has explained that wireless carriers currently are required to pay a sizeable and disproportionate amount of contributions into USF, even though, at the same time, the Commission has acted to increase incumbent local exchange carrier (“LEC”) support.²⁹ This discrepancy between contributions paid by, and Fund support received by, incumbent LECs and wireless carriers “thwarts USF goals, distorts competition, and is unfair to consumers. Under the existing system

Expansion of the contribution base is especially important for consumers of wireless services, because it is inequitable for wireless consumers to continue to fund the lion’s share of the USF, while at the same time the Commission has acted to significantly reduce universal service funding for mobile wireless eligible telecommunications carriers. Contribution reforms that expand the contribution base can help to correct this imbalance, augmenting efforts by wireless carriers to bring 4G mobile broadband services to rural consumers.

U.S. Cellular Comments at iii. *See* MetroPCS Comments at 10 (indicating that a broadened USF contribution base “will reduce the relative impact of the USF contribution methodology on competitive services”).

²⁸ CTIA–The Wireless Association[®] (“CTIA”) Comments at 6-7. *See* Sprint Comments at 34-35 (footnotes omitted) (noting that, “[l]ast year, the wireless sector contributed more than one-third of all funds used in the USF. Meanwhile, the CAF earmarks just 11 percent of all disbursements for wireless providers.”).

²⁹ T-Mobile Comments at 2. T-Mobile documents this point:

[H]igh-cost funding [for wireless ETCs) will be] phased down to zero by 2016 pursuant to the Transformation Order and replaced by Mobility Fund Phase II support for wireless carriers’ [*sic*] that will be a mere one-sixth of the current contributions. By contrast, ILECs received just under three billion dollars in high-cost support in 2011, but will see their support increase to 3.8 billion dollars under the Transformation Order. . . . Thus, in four years, mobile wireless carriers will receive a total of only 500 million dollars while still paying out three billion dollars annually if the contribution mechanism is not meaningfully reformed.

Id. at 4 (footnotes omitted) (emphasis in original).

wireless carriers effectively are asked to fund their wireline competitors—despite consumers’ overwhelming demonstrated preference for mobile wireless services.”³⁰

In U.S. Cellular’s view, the Commission’s unwarranted budget decisions in the *CAF Order*—which, for example, will enable “rate-of-return carriers . . . to receive five times as much funding as mobile broadband providers”³¹—have moved the Commission’s support distribution policies in the wrong direction, toward increasingly disproportional support for aging infrastructure and services that are being abandoned by consumers, and away from aiding the deployment of wireless networks that could respond to consumer demand in rural America by providing mobile broadband services comparable to those available in urban areas.

The adverse effects of these budget decisions will only be compounded if the Commission fails to act to expand the contribution base and, in doing so, correct the disproportionate funding burden currently being borne by wireless carriers. Because of this, U.S. Cellular cannot agree with Sprint’s suggestion that expansion of the contribution base should be delayed until the Commission has replaced the revenues-based contribution system with a different mechanism.³²

In U.S. Cellular’s view, the issue raised by Sprint is moot because the most advisable policy for the Commission is to retain the current revenues-based methodology, modified by suitable reforms.³³ In any event, the next step for the Commission should be to take actions—based

³⁰ *Id.* at 5 (emphasis added).

³¹ U.S. Cellular Comments, WC Docket 10-90, *et al.*, filed Jan. 18, 2012 (“U.S. Cellular CAF Comments”) at 52 (emphasis in original), *quoted in* U.S. Cellular Comments at 14.

³² *See* Sprint Comments at 35-37.

³³ U.S. Cellular discusses this issue in Section III, *infra*. It also is important to note that the sustainability of the Fund would be placed at risk by Sprint’s suggestion. As XO explains, the current contribution factor “is unsustainable even in the short term[,]” XO Comments at 32, and, while an expansion of the contribution base and imposition of assessments by the existing revenues-based mechanism could be accomplished “with relative ease during 2013[,] . . . implementing a new numbers- or connections-based system would require extensive additional rulemaking, creation of entirely new forms and reporting systems, and

on the existing record in this proceeding—that both decide upon the contribution methodology that will be used going forward, and expand the contribution base. Any approach by the Commission that involves further delays in expansion of the base would only exacerbate a circumstance that already is untenable.

B. There Is Widespread Agreement Among Commenters That the Commission’s Policies Would Be Advanced by Adopting a General Definition of Assessable Providers.

U.S. Cellular has documented in its Comments numerous advantages to be gained by the use of a general definition to determine telecommunications services and providers’ USF contribution obligations.³⁴ There is strong support for this approach in the record.

Ad Hoc succinctly states the goal the Commission should pursue, arguing that “the Commission should focus on a simply stated rule that broadly includes revenues from those services that will materially reduce the contribution factor.”³⁵ The record identifies several advantages of this approach.

The California PUC explains that the use of a general definition “would allow the FCC to include [additional] services in the future without continually updating a list of services subject to assessment. Furthermore, this approach would allow the FCC to make certain exclusions in

extensive modification of carrier billing systems to permit recovery from customers—changes that could take years to devise and implement.” *Id.* at 32-33.

³⁴ See U.S. Cellular Comments at 13-20.

³⁵ Ad Hoc Comments at 40. See American Association of Retired Persons (“AARP”) Comments at 30; DC PCS Comments at 2; National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance (“Rural Associations”) Comments at 31.

the future if it finds that it is in the public interest to do so.”³⁶ CenturyLink argues that “the base should be designed to expand as new services and technologies are developed and mature.”³⁷

U.S. Cellular agrees with CenturyLink that a general definitional approach is preferable because it would “rely on generally applicable principles that allow the specific contribution requirements to evolve naturally with the market.”³⁸ This approach would address the “especially important”³⁹ need “to develop ‘future-proof’ rules that include the services to which customers have migrated”⁴⁰ and that currently are not assessable. U.S. Cellular agrees with Comcast that the Commission “should take steps to minimize 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.”⁴¹

The record also identifies numerous problems with any ongoing use of a service-by-service approach for determining assessable providers. *First*, such an approach would not adequately accommodate changes in the industry. As CTIA explains, “the communications marketplace is constantly evolving, and new services, technologies and business practices are introduced regularly.”⁴² Unfortunately, efforts by the Wireline Competition Bureau (“Bureau”) “to

³⁶ California Public Utilities Commission and the People of the State of California (“California PUC”) Comments at 4.

³⁷ CenturyLink Comments at 9-10.

³⁸ *Id.* at 12-13.

³⁹ NASUCA Comments at 5.

⁴⁰ *Id.*

⁴¹ Comcast Corporation (“Comcast”) Comments at 4-5 (internal quotation marks omitted) (quoting Omnibus Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) (“Broadband Plan”), at 149).

⁴² CTIA Comments at 14. Google Inc. (“Google”) argues that adopting a connections-based contribution methodology would, in effect, “future proof” the contribution system because, “[b]y assessing contribution obligations on underlying network connections rather than on the services used over a network, the FCC (and service providers) will not be required to review every new service introduced into the market-

‘clarify’ the contribution obligations that apply to new services and technologies (particularly since the Commission usually has not formally addressed the issues) have led to confusion and errors. In some cases the revisions appear to conflict with industry practice or prior Commission rules or guidance.”⁴³

Second, “[a]d-hoc, service-by-service determinations will only perpetuate a patchwork system that promotes uncertainty and facilitates arbitrage.”⁴⁴ Broadening the contributions base, and utilizing a mechanism that enables expansion of the base as new services and technologies are developed, would reduce opportunities and incentives for providers to game the system “by designing their services in ways that provide the same functionality as contributing services but skirt the technical definitions of assessable services.”⁴⁵

And, *third*, a case-by-case approach would not enable the Commission to act expeditiously to expand the contribution base in response to marketplace changes. U.S. Cellular has explained in its Comments that a case-by-case approach would force the Commission to act on a *de novo* basis through its notice-and-comment processes each time it sought to address the issue of whether a particular service or technology should be subject to contribution obligations.⁴⁶

place to determine whether or not an additional contribution may be owed.” Google Comments at 6-7. In U.S. Cellular’s view, however, adopting a general definition of services and providers would achieve the same result, and would also avoid the various disadvantages of a connections-based methodology. These disadvantages are discussed in Section III.A., *infra*.

⁴³ CTIA Comments at 14 (footnotes omitted).

⁴⁴ CenturyLink Comments at 4.

⁴⁵ *Id.* at 10.

⁴⁶ U.S. Cellular Comments at 16-17. *See* CenturyLink Comments at 4 (warning that “[r]elying on the Commission to respond to future developments on a reactive, ad-hoc basis simply will reintroduce the same uncertainty, arbitrage, administrative complexity and market distortions facing the contribution system today”).

CompTel’s discussion of text messaging provides a case study of this problem. A Petition for Declaratory Ruling was filed five years ago asking the Commission whether text messaging is a telecommunications service or an information service, and USAC filed a request with the Commission more than a year ago asking for guidance on how carriers should report text messaging for contribution purposes.⁴⁷ “The Commission has yet to provide clarification or guidance.”⁴⁸

Some parties have suggested that the Commission should consider using a general definition of assessable providers in conjunction with the publication of a list of specific types of providers that are assessable.⁴⁹ NASUCA argues that the two approaches are not mutually exclusive and should be combined. “The Commission should adopt a general definition that will be more future-proof as the marketplace continues to evolve; *and* that general definition should be supported by a non-exhaustive service-by-service list of particular services and providers that are required to contribute to the fund.”⁵⁰ This combinatorial approach may be worth consideration by the Commission, but U.S. Cellular would suggest that the best function for a service-by-service list, under such an approach, would be to serve as a “scorecard” reflecting the outcome of applying the Commission’s general definition to previously unclassified services and providers.

Finally, there is no merit to the various criticisms of a general definition raised in the record. AT&T, for example, is concerned that the Commission’s proposed definition is too broad

⁴⁷ CompTel Comments at 11.

⁴⁸ *Id.* See MetroPCS Comments at 22.

⁴⁹ See, e.g., CBI Comments at 6-7.

⁵⁰ NASUCA Comments at 6 (emphasis in original) (footnote omitted). See CompTel Comments at 18; Rural Associations Comments at 9 (arguing that “[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”).

and would apply to over-the-top Internet services (*e.g.*, cloud-computing services, social networking sites, streaming video, and interactive legal database services) that the Commission may not intend to cover.⁵¹ AT&T indicates that these over-the-top services would be treated as assessable by the general definition “because all of these services involve the provision of telecommunications ‘to end users’ at some point in any given communication with them, albeit not over the last-mile links closest to them.”⁵² The Commission, in fact, may determine that these types of services should be assessable. If, however, it determines that they should not be, then it could make a public interest determination under Section 254(d) of the Communications Act of 1934 (“Act”)⁵³ that telecommunications components of over-the-top services will not be treated as assessable.

Comcast argues that a general definition would likely “require the Commission to issue frequent clarifications as questions arise about the applicability of the definition to particular services.”⁵⁴ There would be grounds for Comcast’s concerns, to some extent, regardless of the mechanism the Commission selects to determine whether services and providers are assessable, given the virtual impossibility of designing a definition or other mechanism that answers every question and anticipates every eventuality.

Nonetheless, Comcast may overstate the problems that would occur if the Commission chooses to use a general definition. Under the Commission’s proposed definition, determining whether a provider is assessable involves identifying (1) whether the provider is offering an interstate information service or is providing interstate telecommunications; and (2) whether the

⁵¹ AT&T Comments at 5-6.

⁵² *Id.* at 6.

⁵³ 47 U.S.C. § 254(d).

⁵⁴ Comcast Comments at 8.

provider is directly or indirectly providing wired or wireless transmission. It is not unreasonable to expect that this analysis would be sufficiently straightforward to resolve most cases without the need for extensive deliberations and clarifications by the Commission.

C. The Record Presents a Strong Case for Making Broadband Internet Access Service Assessable.

Numerous commenters urge the Commission to bring broadband into the USF contribution base, because doing so will benefit consumers, help to protect the sustainability of the Fund, promote competitive neutrality, and provide for a more equitable distribution of the contribution obligation among providers. In addition, the record reflects the fact that there is no convincing case that broadband should remain exempt from contributions because requiring broadband assessments would reduce the level of broadband adoption. These issues are discussed in the following sections.

1. Consumers, Competitive Neutrality, and the Sufficiency and Sustainability of the Fund Would All Be Served by Making Broadband Assessable.

U.S. Cellular has advocated in its Comments that the Commission treat all forms of broadband Internet access service as assessable, since doing so would provide symmetry with the Commission's decision to make USF support available for broadband deployment, would contribute to advancing the sufficiency and sustainability of the Fund, and would benefit consumers.⁵⁵ Numerous parties support this view.

NASUCA sums up the position of many commenters by arguing that "if the USF is to support broadband, then broadband must support the USF."⁵⁶ NASUCA explains that, otherwise,

⁵⁵ U.S. Cellular Comments at 21-25.

⁵⁶ NASUCA Comments at 7. *See* DC PSC Comments at 2 (explaining that "the FCC has expanded the types of services that will be funded by the USF, particularly broadband services, to take into account

“broadband service will be supported by traditional voice service, which, according to the Commission, will eventually no longer receive support. Requiring voice service to be the sole support of a fund supporting broadband service would not only be unreasonable from a public policy perspective, but it would be financially unsustainable.”⁵⁷

AT&T agrees that broadband should be assessable, arguing that such an approach would be equitable and fair, “now that the Commission’s universal service regime focuses largely on

changing communications needs. If new services are to be supported by federal universal service, then providers of these services should be assessed for universal service contributions.”); Frontier Comments at 2-3 (arguing that “the Commission’s 21st Century goals are being pinned to the backs of 20th Century concepts in the communications market[,]” and that the Commission should expand the contribution base as widely as possible, “including broadband Internet access service for the first time”); *id.* at 3 (footnote omitted) (stating that, “[n]ow that the Commission has concluded that explicit broadband support is appropriate under its Universal Service rules, it is only logical that customers of that service should contribute to the funding [of] broadband expansion”); XO Comments at 28 (indicating that “[t]he single most glaring loophole in the current universal service contribution system is the blanket exemption afforded to the providers of broadband Internet access services”).

⁵⁷ NASUCA Comments at 2 (footnote omitted). *See* AARP Comments at 7 (contending that “the contribution base should be expanded to ensure that both consumers and businesses who will benefit from the expansion of supported broadband facilities contribute to the universal service fund”); *id.* at 11 (noting that, “[n]ow that the FCC is attempting to reform universal service funding so that support for broadband services will be the primary orientation of the program, it is all the more critical that broadband services be assessed”); California PUC Comments at 7 (arguing that, “[s]ince broadband Internet access service providers will now benefit from USF contributions, it would be only equitable that they also contribute to the Fund”); CBI Comments at 2; CompTel Comments at 15-16; GVNW Comments at 6; Rural Associations Comments at 19 (arguing that, given the fact all ETCs are now required to offer broadband service, “there is no question that it is consistent with the public interest to require providers of all broadband Internet access services to contribute to the USF, since providers will benefit directly from the ‘network effect’ that results from the expansion of broadband networks and subscribership nationwide, which the High-Cost program now explicitly seeks to achieve”); RTG Comments at 4 (arguing that, “[n]ow that universal service supports broadband, many broadband providers that have not had to contribute in the past must be required to do so”); Sprint Comments at 9 (encouraging the Commission, in redesigning the contribution methodology, to “adopt an approach that encompasses all of the services and service providers that benefit from a broadband-centric universal service program”); *id.* at 13 (noting that, “[s]ince the explicit purpose of the CAF is broadband and the primary recipients of support will be incumbent LECs, it makes no sense for the broadband services of the incumbents to be exempted from assessment”); XO Comments at 30 (footnote omitted) (arguing that “the [broadband] exemption has been made completely inequitable by the Commission’s recent decision to redirect universal service support to fund the provision of broadband Internet access services. It is nonsensical to deploy scarce universal service funds to subsidize expansion of broadband Internet access services while simultaneously giving the providers of broadband universal Internet access services a ‘free pass’ on contributing any financial support to the universal service program.”).

supporting new broadband deployment[.]”⁵⁸ and explaining that “[t]he more widely broadband is adopted, the more efficient and diverse will be the marketplace for complementary Internet applications and services, and that in turn will increase the value of every provider’s broadband platform.”⁵⁹

In addition to the equitable imperative to make broadband assessable, several commenters argue that doing so would serve the Commission’s principle of competitive neutrality. The Rural Associations, for example, argue that “all competing telecommunications carriers and ‘providers of telecommunications’ should be required to contribute in a substantially equivalent manner to existing and future universal service mechanisms.”⁶⁰ NASUCA agrees with this view, pointing out that, “if the FCC does not assess broadband to provide support for broadband services, that means that other services (including the supposedly ‘dying’ POTS [“plain old telephone service”]), will be assessed to support broadband services. That is *not* competitive neutrality!”⁶¹

Consumers also would benefit from treating broadband as assessable. Sprint explains “[o]ne of the most glaring incongruities in the current system”⁶² by noting that, “while incumbent LECs claim they use USF proceeds to support their broadband networks, none of the revenue they generate from their broadband network capabilities is assessed.”⁶³ The effect of this is

⁵⁸ AT&T Comments at 13.

⁵⁹ *Id.*

⁶⁰ Rural Associations Comments at 6. *See* California PUC Comments at 5 (internal quotation marks omitted) (footnote omitted) (arguing that making broadband assessable “would be consistent with past FCC precedent where it exercised its permissive authority to extend USF contribution requirements to providers of telecommunications that are competing directly with common carriers”).

⁶¹ NASUCA Comments at 8 (emphasis in original).

⁶² Sprint Comments at 13.

⁶³ *Id.*

that “wireless and other voice service providers and their customers, who derive no benefit from, for example, the video entertainment services an ILEC offers over its supported network, end up shouldering the funding burden, while an ILEC’s own video entertainment customers contribute nothing to the fund.”⁶⁴

The Rural Associations also identify the consumer benefits to be derived from assessing broadband, indicating that such a step “would . . . immediately lower and stabilize the contribution factor, thereby relieving the pass-through amount on every assessed service and more equitably distributing the cost of the USF among consumers of telecommunications and information services.”⁶⁵ Making broadband assessable is necessary to correct the inequities imposed upon consumers by the current system. As AARP explains, “[t]he narrow scope of the contribution base associated with the Commission’s current approach is necessarily distortionary and inconsistent with the public interest. Consumers of assessed telecommunications services are implicitly providing support for broadband services.”⁶⁶

The record also provides strong support for the view that requiring broadband providers to contribute to the Fund would enhance the sustainability of the Fund and further other Commission goals.⁶⁷ CenturyLink indicates that including broadband in the contribution base “is especially important because . . . as broadband evolves, it may become the primary or exclusive

⁶⁴ *Id.*

⁶⁵ Rural Associations Comments at 18. *See* Ad Hoc Comments at 38; Alexicon Comments at 3-4.

⁶⁶ AARP Comments at 16. AARP also observes that, “[a]s the FCC attempts to direct the support explicitly to broadband, unless the contribution base is appropriately broadened, older Americans will bear an unreasonable burden supporting a service that they have yet to fully embrace.” *Id.* at 4.

⁶⁷ XO also points out that, because broadband currently is exempt from assessments, “it is estimated that over \$130 billion in broadband Internet access service revenues will totally avoid universal service assessment this year.” XO Comments at 29 (footnote omitted) (citing *Further Notice*, 27 FCC Rcd at 5391 (para. 71)).

basis for assessment.”⁶⁸ Other commenters argue that a failure to assess broadband would compromise the Commission’s broadband deployment goals,⁶⁹ and would jeopardize the Commission’s ability to “meet its statutory obligation to preserve and advance universal service.”⁷⁰

There is some concern expressed in the record regarding the imposition of contribution requirements on broadband providers, but these concerns are either unfounded or can readily be addressed. ADTRAN expresses a potential concern that the contribution obligation imposed on broadband providers could be disproportionately high.⁷¹ ADTRAN explains that “a significant ‘per connection’ fee assessed on broadband connections would adversely affect demand, thus negating the Commission’s goals of expanding broadband deployment and adoption.”⁷² Any such problem can be avoided through the use of a reformed revenues-based system,⁷³ which would ensure the establishment of an equitable level of contributions for broadband providers.

Both RCA and Verizon suggest that the Commission should defer any decision regarding whether broadband should be assessable. RCA argues that the Commission should defer its consideration of whether to include broadband in the contribution base until judicial review of the *CAF Order* has been concluded.⁷⁴ Given the fact that the Commission is pressing ahead with its

⁶⁸ CenturyLink Comments at 51. *See* Google Comments at 5-6 (stating that, “by expanding the base of USF contributors to include broadband access connections, the Commission will alleviate pressures on the USF created by technology and marketplace changes”); NASUCA Comments at 16 (arguing that “contributions [from broadband providers] are ultimately essential to advance the Commission’s goals of USF sustainability”).

⁶⁹ AARP Comments at 25.

⁷⁰ Rural Associations Comments at 19-20 (footnote omitted).

⁷¹ ADTRAN, Inc. (“ADTRAN”), Comments at 6.

⁷² *Id.*

⁷³ *See* Section III, *infra*, in which U.S. Cellular discusses the extensive support in the record for the continued use of a revenues-based methodology, modified by the adoption of several reform measures.

⁷⁴ RCA Comments at 8-9. RCA also suggests that the Commission should defer its consideration of the broadband issue because, although “[i]ncluding broadband Internet access in the contribution base would

implementation of its recently adopted USF distribution mechanisms, even as many of these mechanisms are awaiting review by the Tenth Circuit U.S. Court of Appeals, it would be sensible for the Commission to move forward with a systemic approach to reforming the entire contribution ecosystem. There is little merit in any decision to adopt these reforms in a piecemeal fashion and to defer action on whether broadband should be assessable, which is one of the key issues presented in the *Further Notice*.

Verizon argues for delay because the proposal to assess broadband “would mark a significant departure from the current system and raises significant issues that the Commission should carefully study before deciding whether to extend USF assessments to broadband revenue.”⁷⁵ Verizon suggests that deferring the issue to provide time for a comprehensive study would enable the Commission to solve difficult issues associated with bringing broadband into the contribution base.⁷⁶

Verizon’s concerns are not well founded. The Commission’s thoughtful assessment in the *Further Notice* of the issues involved in making broadband assessable⁷⁷ demonstrate that—aided by the record in this proceeding—the Commission is well prepared to make decisions on this critical issue. Moreover, any further delay would exacerbate problems that currently are eroding the sustainability of the Fund.

significantly strengthen the base and thus promote sustainability of universal service funding,” *id.* at 8, such inclusion “could have an adverse impact on broadband adoption (and, in turn, deployment)” *Id.* The issue of broadband adoption is discussed in Section II.C.2., *infra*.

⁷⁵ Verizon Comments at 41.

⁷⁶ *Id.* at 42-43 (discussing the need to precisely define the services to which the contribution obligation would apply).

⁷⁷ See *Further Notice*, 27 FCC Rcd at 5389-92 (paras. 65-72).

2. The Record Provides Substantial Evidence That There Is No Basis for Concerns That Assessing Broadband Would Depress Broadband Adoption.

U.S. Cellular has suggested in its Comments that, in light of the fact that bringing broadband into the contribution base would further the Commission’s policy goals, parties seeking to exclude broadband from the contribution base should have the burden of showing that “requiring USF contributions from broadband providers would create the high likelihood that the overall level of broadband adoption would be reduced.”⁷⁸ While U.S. Cellular agrees that it is important for the Commission to pursue contribution policies that do not hinder either broadband deployment or broadband adoption,⁷⁹ the record demonstrates that no showing can be made that requiring broadband to be assessable would have such an effect.

There is considerable skepticism in the record that broadband adoption rates would be adversely affected by making broadband assessable. AARP, for example, indicates that “evidence indicates that the impact of assessment will be negligible. The Commission should be more concerned about the lack of competition in residential broadband access markets, which has resulted in ongoing price increases for broadband services.”⁸⁰ The Rural Associations hold a similar view, arguing that “a nominal USF assessment imposed on the service will not lead existing customers to drop the service or dissuade potential new customers from adopting it.”⁸¹

⁷⁸ U.S. Cellular Comments at 27.

⁷⁹ ADRAN, for example, explains that “[a] contribution methodology that discourages broadband adoption would also reduce carriers’ incentives to deploy broadband—the corollary to ‘if you build it they will come’ is that you will *not* build it if you know they are not going to come.” ADRAN Comments at 4 (emphasis in original).

⁸⁰ AARP Comments at 25.

⁸¹ Rural Associations Comments at 22. *See* Frontier Comments at 5 (arguing that opponents of making broadband assessable, because doing so could negatively affect adoption rates, “underestimate the crumbling base of contributors to the Connect America Fund—the very fund that fuels the broadband deployment necessary for consumers to adopt broadband in the first place. While much work remains to con-

The Rural Associations support their position by explaining that broadband demand should be considered price inelastic because broadband services have become an essential service for many consumers:

Broadband Internet access service is no longer in its infancy and is no longer considered a mere luxury by most Americans. It is widely considered an essential service, which is precisely why the FCC “transformed” the High-Cost program and conditioned support on recipients making broadband service available in their supported areas.⁸²

AARP presents information demonstrating the inelasticity of broadband demand, indicating that “recent experience with rate increases illustrates a pattern of pricing that is entirely consistent with monopoly or duopoly practice.”⁸³ AARP concludes that “[r]ate increases of [the] magnitude [shown in its Comments] indicate that broadband service providers are confident that broadband demand is price inelastic.”⁸⁴

Another factor suggesting that assessing broadband would not decrease broadband adoption rates is that, as the California PUC indicates, “the inclusion of more services and service providers into the Fund would result in a reduction of the percentage contribution required from each subscriber”⁸⁵ This decrease in the level of the contribution factor would ease the bur-

vince all Americans of the benefits of broadband, there is an undeniable trend of increasing broadband subscribership.”).

⁸² *Id.* (footnote omitted). The Rural Associations also present figures showing that the Commission’s making interconnected Voice over Internet Protocol (“VoIP”) service assessable did not suppress subscription rates, even though the contribution factor was increasing at the time. *Id.* at 23.

⁸³ AARP Comments at 26. It is also significant to note evidence suggesting that, for many consumers who have decided not to subscribe to broadband services, the price of the service did not appear to play a significant role in their decision. *See* Verizon Comments at 41 n.53 (citing Pew Internet and American Life Project, “Digital Differences,” (Apr. 12, 2012), at 6-7, which reported that only approximately 21% of respondents mentioned price-related reasons for their decision not to use Internet services). Other studies suggest somewhat higher percentages. *See id.* (citing Broadband Plan at 171).

⁸⁴ AARP Comments at 27.

⁸⁵ California PUC Comments at 5. The California PUC also observes that, “[a]ssuming the FCC is able to constrain growth in the Fund, State Members of the Joint Board have opined that expanding the revenue

den of contribution flow-through surcharges, thus lessening the likelihood that assessing broadband would negatively impact broadband adoption.⁸⁶

In addition, as AARP explains, any possible decrease in broadband adoption resulting from broadband assessments “will also be offset by expanded subscription due to expanded broadband availability. Those consumers for whom broadband becomes available for the first time will begin to subscribe to broadband services.”⁸⁷

Those parties seeking to defend the notion that assessing broadband would adversely affect broadband adoption do not make a convincing case. Comcast, for example, reaches the conclusion that, since a revenues-based model “essentially results in usage-based fees[,]”⁸⁸ if broadband is made assessable and broadband providers make contributions pursuant to such a model, then “the Commission’s USF contribution regime would create an economic disincentive for consumers to subscribe to broadband services and also deter them from purchasing higher-speed offerings that are more expensive.”⁸⁹ But, at least for residential consumers, Comcast attempts to

base to include broadband could reduce the contribution rate to as little as 2 percent.” *Id.* (footnote omitted).

⁸⁶ See AARP Comments at 28; Rural Associations Comments at 23:

[T]here is an inversely proportional obligation that arises when the responsibility to support USF is broadened: the more services that are subject to a USF contribution obligation, the smaller the assessment that will be imposed on each service. This, in turn, makes it highly unlikely that the assessment will bear negatively on a consumer’s decision to adopt or retain a service, particularly one as essential as broadband Internet access.

⁸⁷ AARP Comments at 28-29 (footnote omitted). U.S. Cellular has made a similar argument, noting that “making broadband Internet access service assessable would also *enable and promote* broadband adoption in rural and high-cost areas, by making USF more sustainable and helping to ensure the sufficiency of funding.” U.S. Cellular Comments at 27 (emphasis in original).

⁸⁸ Comcast Comments at 16.

⁸⁹ *Id.* See Fiber-to-the-Home Council (“FTTH”) Comments at 2-3. FTTH is concerned that “[t]here is a clear broadband adoption divide based on household income[,]” and that this is a basis for the Commission to refrain from making broadband assessable at this time. *Id.* at 4. U.S. Cellular, however, has sug-

build its case around its assertion that, for such consumers, demand for broadband services is likely quite elastic.”⁹⁰ While Comcast cites a study to support its assertion regarding the elasticity of broadband demand in urban markets,⁹¹ other commenters (as discussed above) present pricing information that supports a different conclusion regarding elasticity.

American Cable Association (“ACA”) suggests that consumers could be inhibited from subscribing to higher speed or capacity broadband services if broadband contribution assessments were based on speed or capacity.⁹² As U.S. Cellular has indicated, however, such an outcome—which is speculative in any event—could be avoided by the use of a revenues-based contribution system instead of a connections-based methodology augmented by a tiered structure.⁹³

gested steps that could address such a problem without foregoing broadband assessments. U.S. Cellular Comments at 27-28 & n.66. *See* RTG Comments at 4.

⁹⁰ Comcast Comments at 16 (footnote omitted).

⁹¹ *Id.* at 17 n.47 (citing Austan Goolsbee, *The Value of Broadband and the Deadweight Loss of Taxing New Technology*, 5 B.E. J. ECON. ANALYSIS & POLICY 1505 (2006) (“Goolsbee Article”). *See* FTTH Comments at 5. The analysis presented by Goolsbee may not be particularly probative with regard to the issue of broadband adoption raised in the *Further Notice*. The survey upon which Goolsbee relies was conducted from late 1998 to early 1999, Goolsbee Article at 3 (unpaginated PDF version, accessed at <<http://faculty.chicago-booth.edu/austan.goolsbee/research/broadb.pdf>>), and examined “the market for broadband Internet access when it first began to spread widely” *Id.* at 2. The broadband market, of course, is much different now than it was 13 years ago. The broadband subscriber base was approximately 750,000 in mid-1999. *Id.* at 5. In June 2010, there were approximately 218,344,000 wireless and wireline broadband subscriptions in the United States. Organization for Economic Co-Operation and Development, *Broadband Statistics*, accessed at http://www.oecd.org/document/0,3746,en_2649_201185_464627_59_1_1_1_1,00.html. It is reasonable to make the general point that another chief difference is that the expansion of services such as social networking have had a favorable impact on consumers’ perceptions regarding the value of Internet use and broadband subscribership. In addition, the Goolsbee Article focused on “the impact that taxes would have had on broadband Internet access at an early stage of its diffusion around the country” Goolsbee Article at 1 (Abstract). That impact might be considerably different than the impact of a USF surcharge applied in a more mature broadband market with widely deployed network infrastructure.

⁹² ACA Comments at 10.

⁹³ *See* Section II.C.1., *supra* (discussing ADTRAN’s concerns that a contribution obligation imposed on broadband providers could be disproportionately high).

ACA also contends in a footnote that using a revenues-based assessment would have a similar effect,⁹⁴ but U.S. Cellular does not find this unexplained assertion persuasive. ACA presumably is concerned that higher speed or capacity broadband services would be priced higher than other services, and therefore would be subject to higher USF surcharges that, in turn, would depress adoption levels. Other commenters, however, present analyses (which U.S. Cellular has discussed earlier in this section) demonstrating that numerous countervailing effects of making broadband assessable would likely mitigate upward pressure on contribution surcharges, thus casting doubt on ACA's assumptions regarding adverse effects on adoption levels.

Verizon, in addressing the issue of any relationship between assessing broadband and broadband adoption, returns to its suggestion that the Commission should postpone any decision to bring broadband into the contribution base so that the Commission is able to study the issue in order to “understand fully the consequences for customer purchasing decisions if USF contributions were to be imposed on broadband services.”⁹⁵

U.S. Cellular disagrees that such delay is necessary. Such a step would not be prudent in light of the pressing need to take action to expand the contribution base. U.S. Cellular renews the suggestion made in its Comments, namely, that the Commission should adopt a broadband contribution obligation, with the intention of revisiting this decision if any actual evidence emerges that “the contribution obligation is linked to end users’ decisions not to adopt broadband. If such evidence materializes, then the Commission could consider remedial actions to the extent necessary or appropriate.”⁹⁶

⁹⁴ ACA Comments at 10 n.18.

⁹⁵ Verizon Comments at 41.

⁹⁶ U.S. Cellular Comments at 28.

3. In Addition to Broadband Providers, Several Other Types of Telecommunications Providers Also Should Contribute to the Fund.

The record supports action by the Commission to add several other types of services and providers, in addition to broadband providers, to the contribution base.

One-Way VoIP.—Numerous commenters agree with U.S. Cellular’s position that one-way VoIP services should be assessable because “the current exemption for one-way VoIP causes competitive disparities and creates a significant artificial cost advantage for non-assessable one-way VoIP services.”⁹⁷

RCA, for example, argues that one-way VoIP services should be assessable because they “make use of the same USF-funded infrastructure as other services that currently are assessed, and they compete directly with such services.”⁹⁸ In addition, “[c]larifying the status of enterprise and one-way VoIP services will immediately help shore up the funding sources for USF and promote its long-term viability, while simultaneously promoting competitive neutrality.”⁹⁹ The California PUC reaches the same conclusion, noting that, increasingly, consumers are using one-way VoIP services instead of traditional voice telephony, and “some VoIP service providers market their voice telephony service as a substitute for traditional voice telephony.”¹⁰⁰

⁹⁷ *Id.* at 31 (footnote omitted).

⁹⁸ RCA Comments at 2. *See* XO Comments at 27 (arguing that “[o]ne-way interconnected VoIP services benefit from access to the PSTN in the same way that two-way interconnected VoIP services do; *i.e.*, outbound one-way interconnected VoIP is dependent on routing through the PSTN on the terminating end of the call, and inbound one-way interconnected VoIP relies upon use of the PSTN on the originating end of the call. Indeed, the reason that telephone numbers are assigned to customers of these services is to facilitate the routing through the PSTN. Similarly, one-way interconnected VoIP services compete with traditional voice telephony services in the same manner that two-way interconnected VoIP services do.”).

⁹⁹ RCA Comments at 2.

¹⁰⁰ California PUC Comments at 6. *See* AARP Comments at 24; AT&T Comments at 15; CompTel Comments at 13-14; GVNW Comments at 8; MetroPCS Comments at 18 (footnote omitted) (arguing that, “[a]lthough two-way VoIP services are interconnected services and may be subject to USF contribution under the current rules, the Commission must ensure that the competitive playing field remains level

Enterprise Communications Services.—U.S. Cellular has advocated the inclusion of enterprise communications services in the contribution base because doing so would increase the size of the base, aid in the achievement of the Commission’s broadband deployment goals, and reduce opportunities for anti-competitive practices.¹⁰¹

There is widespread support in the record for this approach. CompTel, for example, argues that providers of integrated enterprise network services should be required to contribute based on revenues from the transmission components of these services. Taking such an action would end the current uncertainty, which is providing an unfair advantage to enterprise communications service providers that have chosen not to make any contributions.¹⁰² AARP argues that enterprise communications services should be assessable because they “benefit from the expanded network effects associated with supporting broadband.”¹⁰³

Non-Facilities-Based Providers.—U.S. Cellular has endorsed in its Comments the inclusion of non-facilities-based providers in the contribution base, in part “because it is likely that

between these traditional two-way VoIP providers and those providers of one-way VoIP. Providers of one-way VoIP, like Skype, are collecting substantial revenues as replacements for traditional telephone service.”); RTG Comments at 6 (indicating that “one-way VoIP provides consumers with the ability to make a voice call similar to a call using a traditional phone line, and should be subject to USF contributions”); Rural Associations Comments at 12-15; Sprint Comments at 31-32; United States Telecom Association (“USTelecom”) Comments at 7 (arguing generally that “[t]he current system only captures contributions from a few among many providers that offer competing voice services, which unfairly penalizes traditional voice providers and their customers and artificially skews the market”); Verizon Comments at 28-30.

¹⁰¹ U.S. Cellular Comments at 30.

¹⁰² CompTel Comments at 8. *See* MetroPCS Comments at 20 (explaining that “[e]nterprise services also are a morass of USF contribution inconsistency. As enterprise service providers have begun to offer more IP-based services, there is significant uncertainty as to which of these services qualify for inclusion in the USF contribution base. As a result, in many instances one provider will be contributing for a certain enterprise service while another provider may not be.”).

¹⁰³ AARP Comments at 18. *See* AT&T Comments at 18-20; CenturyLink Comments at 6-7; GVNW Comments at 8-9; RCA Comments at 5-6; Rural Associations Comments at 24-26; XO Comments at 23-24.

they would be providing services in competition with carriers that are obligated to make contributions[.]” and their inclusion would help to ensure the sustainability of USF.¹⁰⁴ U.S. Cellular’s view finds support in the record.

AT&T, for example, argues that the Commission should not limit contribution obligations to facilities-based providers, pointing out that “any contribution rule based on a distinction between ‘facilities-based’ and ‘non-facilities-based’ providers would . . . raise profound concerns about competitive neutrality.”¹⁰⁵ The Rural Associations agree, arguing that “[b]oth facilities-based and non-facilities based providers should be treated the same, so as not to give one group of providers an unfair competitive advantage over the other.”¹⁰⁶ In addition, U.S. Cellular is concerned that an exception from assessments for non-facilities-based providers could create gaming problems. For example, companies could attempt to structure their arrangements for the delivery of network services in ways designed to take advantage of the non-facilities-based provider exception and avoid contribution obligations.

Systems Integrators.—U.S. Cellular has argued that the sustainability of the Fund would be enhanced if the Commission acts to eliminate the current contribution exemption for systems integrators.¹⁰⁷

The Rural Associations agree that the exemption should be eliminated, arguing that the exemption is overly broad and “fails to take account of the size of the system integrator.”¹⁰⁸ In addition, the Rural Associations explain that “equity dictates revoking this exemption, as retain-

¹⁰⁴ U.S. Cellular Comments at 20-21.

¹⁰⁵ AT&T Comments at 10.

¹⁰⁶ Rural Associations Comments at 21.

¹⁰⁷ U.S. Cellular Comments at 30.

¹⁰⁸ Rural Associations Comments at 27.

ing it for ‘systems integrators’ but otherwise applying contribution requirements to other providers of broadband Internet access and enterprise communications services would tip the competitive scales to the detriment of those providers of functionally equivalent services that contribute directly to the USF.’¹⁰⁹

Ad Hoc disagrees with these analyses, arguing that “the provision of telecommunications is only incidental to the core business of systems integrators[,]”¹¹⁰ systems integrators do not compete significantly with common carriers, the exemption applies only to systems integrators with *de minimis* revenues from telecommunications services, and “the compliance costs that would otherwise be imposed on exempt [systems integrators] outweigh the limited dollar benefits of including them as contributors”¹¹¹

U.S. Cellular disagrees with the arguments advanced by Ad Hoc because, in U.S. Cellular’s view, the public interest is best served by the Commission’s placing emphasis on expanding the contribution base. Doing so “will distribute contribution obligations more equitably and will enhance the sustainability of the Universal Service Fund”¹¹² In this regard, the Rural Associations have pinpointed the problem with the current exemption, explaining that, “if a firm’s systems integration revenues were \$6 billion but its telecommunications revenues a penny under \$300 million, that firm has no direct contribution obligation [under the existing exemption] not-

¹⁰⁹ *Id.* at 28. *See* CompTel Comments at 10-11; GVNW Comments at 9-10.

¹¹⁰ Ad Hoc Comments at 41.

¹¹¹ *Id.* at 42.

¹¹² U.S. Cellular Comments at 4.

withstanding that it is a significant provider of interstate telecommunications as an absolute matter.”¹¹³

III. NUMEROUS STAKEHOLDERS HAVE EXPRESSED SUPPORT FOR USING A REFORMED REVENUES-BASED SYSTEM TO ASSESS CONTRIBUTIONS.

The Commission now has before it a record that presents an exhaustive and well-informed comparison of the strengths and disadvantages of the various mechanisms that the Commission is considering for use in imposing contribution requirements on assessable services and providers.

As U.S. Cellular discusses in the following sections, those commenters who agree with U.S. Cellular that the Commission’s policies would be best served by retaining the current revenues-based system have made a strong case for taking this action. The revenues-based methodology, enhanced by certain reforms advocated in the record, would provide a solid basis for maintaining the efficient and effective operation of the Fund’s contribution system well into the future.

U.S. Cellular will also focus in the following sections on several key reforms that have received strong endorsement in the record, including treating broadband Internet access service revenues as 100% interstate and adopting a “safe harbor” test for the allocation of assessable and non-assessable revenues from bundled service offerings.

¹¹³ Rural Associations Comments at 27. While Ad Hoc observes, that, without the exemption, systems integrators would make contributions only on their mark-up of telecommunications they receive from their underlying carriers, Ad Hoc Comments at 42, it nonetheless would be equitable, and would enhance the sustainability of the Fund, for the Commission to require contributions based on the mark-up revenues.

A. There Is Considerable Agreement in the Record That a Reformed Revenues-Based Methodology Would Advance the Commission’s Universal Service and Broadband Goals.

A central component of the recommendations made by U.S. Cellular in its Comments is that the Commission should retain its revenues-based contribution system, enhanced by certain reforms the Commission should adopt in this proceeding, because the reformed system would work effectively to promote the Commission’s universal service and broadband deployment policies.¹¹⁴ The record provides strong support for U.S. Cellular’s suggested approach.

As a general matter, a reformed revenues-based system has gained considerable support among commenters because it is more equitable than any alternative approach,¹¹⁵ it “enjoys advantages in terms of definitional clarity and transparency in enforcement[.]”¹¹⁶ and it is “inherently . . . non-discriminatory”¹¹⁷ These and other advantages of a reformed revenues-based system are discussed in the following paragraphs, and are also contrasted with the shortcomings of alternative contribution methodologies.¹¹⁸

First, the fairness and equity of a reformed revenues-based system is not matched by alternative methodologies. AARP explains this advantage succinctly, indicating that “[a]ssessment based on revenues will logically link the purchases made by consumers with the assessment, and will generate a more equitable outcome as those consumers who can afford to purchase more ex-

¹¹⁴ U.S. Cellular Comments at 32-35.

¹¹⁵ California PUC Comments at 8.

¹¹⁶ GVNW Comments at 10.

¹¹⁷ RCA Comments at 3.

¹¹⁸ U.S. Cellular also notes that it agrees with the following comparative test suggested by CBI for evaluating the revenues-based methodology and alternative systems: “[B]efore abandoning the current revenue-based system for an entirely new approach, the Commission must have clear, compelling evidence that the new system would substantially better meet each of the [Commission’s] established goals. Otherwise the presumption should be to retain the existing system with appropriate adjustments.” CBI Comments at 2.

pensive services will contribute more than those consumers who cannot.”¹¹⁹ NASUCA makes this same point from a similar perspective, noting that “the current mechanism, which bases USF contribution[s] on carriers’ revenues . . . *works*, especially *as a gauge of how the network is used*.”¹²⁰

Alternative methodologies for assessing contributions do not share these advantages that are inherent in a reformed revenues-based system. For example, as Verizon points out, most connections-based proposals involve the use of speed or capacity tiers, but “the establishment of these tiers is inherently arbitrary,”¹²¹ resulting in unfairness in the application of the methodology.¹²² Comcast expresses a similar view, arguing that “[a] connections-based system . . . has the potential to cause significant competitive distortions and consumer harms, particularly if impro-

¹¹⁹ AARP Comments at 33. *See* Coalition for Rational Universal Service Reform and Intercarrier Reform (“Coalition for Reform”) Comments at 1 (stating that “[a] fee, like a tax, is fairest when it exercises the least structural influence on prices. A revenue-based approach meets that criterion.”).

¹²⁰ NASUCA Comments at 1 (emphasis in original) (footnote omitted). *See* RCA Comments at 9 (concluding that “[t]he existing revenue-based system has the advantage of being inherently equitable and non-discriminatory, because it assesses contributions in an amount directly proportional to revenues—and, by extension, usage of the network. Lower-revenue services pay less under a revenue-based model, thus avoiding the inequities that have plagued the various flat-rate contribution proposals that parties have advanced in recent years.”).

¹²¹ Verizon Comments at 48.

¹²² XO explains that “there is little correlation between connection capacity or speeds and usage of telecommunications services. The capacity or speed of a particular circuit merely identifies the amount of bandwidth that may be available for usage[,]” and that “assessing USF based on available bandwidth improperly taxes spare capacity and could lead to poor network management practices.” XO Comments at 36. In contrast, Google claims that “[a] connections-based mechanism is also equitable and nondiscriminatory, as required by the Act. All network technologies are treated the same under a connections-based system, and no discriminatory assessments are placed on certain access connections over others.” Google Comments at 9 (footnote omitted). This claim, however, does not take into account the prospect of using speed or capacity tiers as part of a connections-based methodology, which could result in discriminatory assessments.

perly designed speed or capacity tiers are utilized or a service-based definition of ‘connection’ is adopted.”¹²³

A numbers-based system also would present inherent problems affecting its ability to make assessments in a fair and equitable manner.¹²⁴ As Comcast explains, a numbers-based methodology “would shift the burden of funding universal service programs entirely to consumers that use services that require North American Numbering Plan numbers, particularly residential consumers. Services that rely on ‘un-numbered’ connections, such as private line and special access links that enterprise customers employ, would not be assessed.”¹²⁵

¹²³ Comcast Comments at 20 (footnote omitted). *See* AARP Comments at 43 (arguing that “a connections-based approach is patently regressive and unfair, is inconsistent with the evolution of technology, and inconsistent with the Commission’s overall objectives of supporting a converged and integrated broadband platform”); RTG Comments at 9 (contending that “a pure connections-based methodology will allow certain services to dodge contribution obligations. Certain services, such as one-way/non-interconnected VoIP, would not be assessed because they do not provide a connection, but ride on top of a connection. Accordingly, a connection-based methodology would be inequitable and short change the contribution base.”); T-Mobile Comments at 6 (expressing concern that “a connections-based approach . . . would need to distinguish between different capacity tiers so that a low use prepaid wireless phone, for example, is not contributing the same amount as a high-capacity T-1 line into an office building”). In addition, CompTel is critical of the Commission’s presentation of a connections-based system in the *Further Notice*:

The Commission provides no specifics on what the contribution factor might be for each connection but states that there might be one factor for individuals and higher factors for higher speed or capacity connections provided to enterprise customers. With no information on the magnitude of the charge to be assessed per connection or the mechanics of how a tiered system might be implemented for higher speed and capacity connections, it is impossible to evaluate whether a connections based approach would be equitable and nondiscriminatory as required by Section 254.

CompTel Comments at 32 (footnote omitted).

¹²⁴ CBI, for example, observes that “[a] numbers-based mechanism sounds very simple on the surface, however, in reality it could be complicated if the Commission is urged to create exceptions for various types of numbers and/or categories of customers.” CBI Comments at 20. CBI also expresses concern that, although a uniformly applied numbers-based system “would be competitively neutral, efficient, and predictable in the short term[,] . . . many of these positive attributes of a numbers-based system may be lost as the system is adjusted to address perceived inequities that numerous parties will raise.” *Id.* at 21.

¹²⁵ Comcast Comments at 28. *See* AARP Comments at 47-49; RTG Comments at 8-9; XO Comments at 35. USA Coalition suggests that, for example:

The California PUC expresses concern that it would be difficult for a numbers-based system to define “assessable” numbers, and any attempts at such a definition could omit large blocks of numbers from assessment, and a numbers-based approach could offer many opportunities for service providers to avoid their equitable contributions to USF.¹²⁶ Significantly, “a numbers-based system could disproportionately affect both low-income end users and small users of interstate telecommunications who have many numbers, but low usage. This would include government agencies, military bases, universities, and hospitals.”¹²⁷

In addition, contribution-based and numbers-based methodologies have numerous additional drawbacks in common. For example, the California PUC cites a study showing that a switch by the Commission to a numbers- or connections-based system would adversely affect low income, elderly, disabled, and rural Americans.¹²⁸ Moreover, the Coalition for Reform explains:

[E]nterprise customers could consider moving to PBX-style extensions using a single telephone number, rather than NANPA-assigned telephone numbers (*i.e.*, DIDs), in order to reduce their contribution obligation. . . . This type of arbitrage is particularly problematic because the largest consumers of telecommunications—*e.g.*, large business, call centers, etc.—would be best positioned to make these types of changes. In contrast, residential consumers and wireless consumers will not have these options available to them. Instead, these consumers would remain subject to the full USF assessment requirement

USA Coalition Comments at 10.

¹²⁶ California PUC Comments at 10-12.

¹²⁷ *Id.* at 11 (footnote omitted). *See* Rural Associations Comments at 36-37 (arguing that a numbers-based system would “likely have a regressive impact, potentially placing a relatively greater burden on consumers (many of whom have multiple telephone numbers) than on large enterprise users that procure ‘big pipes’ for data transmission”); T-Mobile Comments at 6 (indicating that “fairness concerns arise [with a numbers-based methodology] if low-usage and high-usage numbers are required to contribute the same amount”).

¹²⁸ California PUC Comments at 8-9 (citing Ex Parte Letter from Maureen A. Thompson, Executive Director, Keep USF Fair Coalition, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 96-45, filed Mar. 27, 2006).

Any approach that departs from revenues as the basis of the fee necessarily increases the rate paid by some types of payers and decreases the rate paid by others. This leads to distortions in the marketplace, encourages some kinds of behavior while discouraging others, and favors some market players while disfavoring others. These alternative proposals are thus anticompetitive and would in fact be counterproductive.¹²⁹

RCA argues that any numbers- or connections-based system would likely require many exceptions and carve-outs in order to be viable. RCA explains that, “because any flat-rate contribution system is inherently regressive, low-volume services that currently make only modest contributions would likely need to be shielded from massive increases under any flat-rate contribution scheme.”¹³⁰ CBI draws attention to another problem that would be posed by the alternative methodologies, arguing that “[n]o system is impervious to gaming and CBI is concerned that if either a connections or numbers-based methodology is adopted, would-be contributors will find new loopholes and complexities will quickly present themselves that may take years to ferret out and correct.”¹³¹

Second, a revenues-based system is technologically neutral.¹³² As the Rural Associations explain, “it best captures the value that consumers place on competing services that use underlying telecommunications networks without regard to the specific technology used to deliver the

¹²⁹ Coalition for Reform Comments at 1. *See* AARP Comments at 11 (arguing that “a connections-based or numbers-based approach in a broadband world will . . . be unfair to consumers who rely on the supported broadband platform to receive only voice services provided by the broadband platform owner”); RCA Comments at 9 (footnote omitted) (indicating that both “numbers-based and connections-based proposals raise substantial concerns about their compliance with the Commission’s obligations to ensure equitable and non-discriminatory treatment under Section 254(d)” of the Act).

¹³⁰ RCA Comments at 11.

¹³¹ CBI Comments at 8.

¹³² *See, e.g.*, Twilio Inc. (“Twilio”) Comments at 4 (stating that “[a] revenue-based system is technology neutral and does not presume to choose among technologies like a numbers-based or connections-based system would do. . . . Those alternative contribution methods would favor technologies that do not rely on telephone numbers to provide telecommunications or rely on few connections.”).

service.”¹³³ In addition, a revenues-based system “is effectively immune to changes in technologies or services that may arise from time-to-time.”¹³⁴ U.S. Cellular agrees with the Rural Associations’ conclusion that a revenues-based system is the most equitable methodology for allocating contribution responsibility among network users, in part because “[r]evenues reflect the balance that consumers strike between different service offerings and the evolution of consumer preference.”¹³⁵

And, *third*, U.S. Cellular also agrees with the Rural Associations that “the Commission should focus primarily on a revenues-based model for contributions as the foundation from which to build [because a] revenues-based model provides clarity in definition, transparency in enforcement, and predictability by removing the ambiguity that may attend other proposed bases of contribution.”¹³⁶ The Rural Associations explain that “revenues” have a standard and unambiguous definition, and this simplifies the task of tracking providers’ contribution obligations.¹³⁷ In addition, the continuation of a revenues-based system, modified through the adoption of reforms, “confers the benefit of rapid implementation, and with little burden to providers or the industry since existing billing systems are already designed for revenues-based assessments.”¹³⁸

In contrast, untested “numbers or connections based regimes . . . would likely demand some sort of ‘new data collection and reporting requirements, necessitating changes to billing and reporting systems.’ Threshold questions arise regarding the definition of ‘numbers’ or ‘con-

¹³³ Rural Associations Comments at 37.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 36.

¹³⁷ *Id.*

¹³⁸ *Id.* at 37.

nections.”¹³⁹ The fact that connections to communications networks currently are not tracked would mean that a connections-based system would likely be difficult to administer and would likely produce numerous requests for exemption.¹⁴⁰ In addition, developing a definition of connections “could be problematic because connections can be defined based on facilities or services, each of which raises difficulties in implementation.”¹⁴¹

A connections-based system would be complex and would increase administrative costs.¹⁴² According to Ad Hoc, “[i]mplementation of a connections-based approach will require the Commission to collect substantial amounts of data related to connection counts that is not currently collected in a comprehensive and useful manner.”¹⁴³ Ad Hoc also explains that a signif-

¹³⁹ *Id.* at 38 (footnote omitted) (quoting *Further Notice*, 27 FCC Rcd at 5437 (para. 222)). See Alexicon Comments at 4-5. Google disagrees with this analysis, at least with respect to a connections-based system, arguing that such a system “has the added benefit of reducing administrative costs and compliance burdens, long-time problems that have plagued the current system. Leveraging existing FCC data collections in Form 477 could reduce compliance costs and aid in the administrative simplicity of the mechanism.” Google Comments at 7-8 (footnote omitted). It is not clear, however, to what extent current Form 477 data could in fact be leveraged for use in applying a connection-based methodology, especially if the current definition of “connections” for Form 477 purposes is not synchronized with the definition or definitions that would be used for USF contribution purposes.

¹⁴⁰ California PUC Comments at 14. See XO Comments at 37 (explaining that “implementation [of a connections-based system] would require significant expense and modification to billing systems to properly track circuit capacity by customer and bill for recovery of USF contributions”).

¹⁴¹ California PUC Comments at 12 (footnote omitted). See XO Comments at 36-37.

¹⁴² See, e.g., RTG Comments at 9-10. CBI points out that, “[i]f the Commission proceeds with a connection-based mechanism, it is imperative that it also update the TRS, NANP, LNP and regulatory fees assessment mechanisms to conform to the USF system. It makes no sense to maintain two separate systems.” CBI Comments at 19.

¹⁴³ Ad Hoc Comments at 29. The Massachusetts DTC argues that it would be premature for the Commission “to overhaul USF contributions before it reforms its mandatory data reporting requirements,” and that the Commission should amend these requirements “to include connections-based and numbers-based reporting for a finite period, in order to have more uniform, reliable data on which to consider possible changes to the current revenues-based methodology.” Massachusetts DTC Comments at 3; see *id.* at 6-8. U.S. Cellular opposes any further delays in the adoption of comprehensive reform, since these reforms have now been pending for more than a decade. The concerns raised by the Massachusetts DTC, however, draw attention to the practical implementation problems that would be posed by any shift to reliance on a connections- or numbers-based methodology.

icant amount of data collection would have to be undertaken by numerous parties. “Establishing the systems to collect such data, and imposing revised reporting obligations on carriers and others to provide connections-based data will require a significant amount of time and effort on the part of the Commission and the expenditure of substantial resources.”¹⁴⁴

Some parties raise concerns regarding the continuation of a revenues-based system, even if reforms to the system are adopted. Although these concerns merit consideration, the issues they raise, in U.S. Cellular’s view, are not sufficient to warrant selection of an alternative methodology. Ad Hoc, for example, discounts the potential effectiveness of reforms to the revenues-based system, arguing that they “cannot solve the inherent flaws of a revenues-based system.”¹⁴⁵ Ad Hoc points to four problems as a basis for its conclusion that the revenues-based system should be replaced by an alternative methodology.

The first issue is that drawing lines “between assessable and non-assessable services” is a difficult task that would need to be revisited to adjust for market conditions.¹⁴⁶ As a general matter, the task of determining which services are assessable and which are not is not unique to the revenues-based system, in that analogous lines would need to be drawn in the case of a numbers-based methodology (*i.e.*, which numbers are counted and which are not), and, as previously discussed, lines would need to be drawn to determine what types of connections are counted and what types are not,¹⁴⁷ and to determine the structure of speed and capacity tiers. While it is true that line-drawing issues are raised with regard to the treatment of revenues generated by bundles

¹⁴⁴ Ad Hoc Comments at 30.

¹⁴⁵ *Id.* at 37.

¹⁴⁶ *Id.*

¹⁴⁷ *See* California PUC Comments at 12; XO Comments at 34.

of assessable and non-assessable services,¹⁴⁸ the Commission has proposed a mechanism that, in the view of U.S. Cellular and numerous other commenters, sufficiently addresses this issue.¹⁴⁹

Ad Hoc is also concerned that retaining a revenues-based system would perpetuate what Ad Hoc considers to be the subjective process of revenue reporting that would require ongoing monitoring and auditing by the Commission.¹⁵⁰ U.S. Cellular notes, however, that an objective of the Commission's reforms would be to reduce as much as practicable the subjectivity and uncertainty associated with revenue reporting. Much of this subjectivity and uncertainty has to do with the Commission's own need to clarify the contribution assessment status of various types of services. In addition, as discussed previously in this section, substituting a different contribution methodology for a revenues-based system likely would not bring an end to problems related to the subjectivity and uncertainty of the reporting process.¹⁵¹

The next concern raised by Ad Hoc is that the stability and sustainability of the USF system would be threatened by the fact that a revenues-based system would retain "[i]ncentives for arbitrage and migration to services that are not assessable"¹⁵² The stability and sustainability of USF, however, is currently being threatened by the Commission's prolonged failure to expand the contribution base. Once it remedies this problem as part of the reforms it adopts in this proceeding, the current threats to stability and sustainability should be significantly mitigated.

¹⁴⁸ See CenturyLink Comments at 17-18.

¹⁴⁹ This issue is discussed in Section III.C., *infra*.

¹⁵⁰ Ad Hoc Comments at 37.

¹⁵¹ Ad Hoc itself, for example, has pointed to issues related to the need for extensive data collections as part of administering a connections-based system. See *id.* at 30. A connections-based system could become plagued with subjectivity and uncertainty if effective mechanisms are not adopted to ensure the necessary data collections.

¹⁵² *Id.* at 37. See Independent Telephone & Telecommunications Alliance ("ITTA") Comments at 9, 19-20; Sprint Comments at 11.

Moreover, the Commission is proposing methods in this rulemaking (*e.g.*, a definitional approach to provide a “future-proof” way to resolve whether particular services and providers are subject to assessment) that would be designed to address the incentives that Ad Hoc discusses. Further, it must be remembered that the revenues-based system is not unique in being subject to these incentives. Any attempt to adopt and implement a numbers- or connections-based system would bring with it attempts by various stakeholders to obtain exemptions, clarifications, and special treatment in order to fall outside the contribution assessment net.¹⁵³ The Commission will have the responsibility of addressing these issues regardless of the assessment system it selects.

Ad Hoc also contends that a revenues-based system is “the least efficient” of the assessment alternatives “because it requires significantly greater oversight and hands-on management”¹⁵⁴ This criticism of the existing revenues-based system, although overstating the relative inefficiency of the system, is not completely without merit, but, again, to the extent that the Commission is successful in resolving current problems (*e.g.*, the treatment of bundles containing assessable and non-assessable services), the criticism will have less force regarding the continued use of a revenues-based system. It is also important to keep in mind that, as previously noted, switching to a numbers- or connections-based system would likely impose considerable administrative start-up costs on both the Commission and providers, which would be avoided if a revenues-based methodology is retained.¹⁵⁵

¹⁵³ *See, e.g.*, Twilio Comments at 6 (arguing that “a numbers-based system would incentivize companies to avoid using telephone numbers thereby reducing the effectiveness of the contribution model”).

¹⁵⁴ Ad Hoc Comments at 37. *See* Google Comments at 4; Sprint Comments at 12.

¹⁵⁵ *See* RTG Comments at 8 (arguing that “[m]oving to a new system could pose complex problems and would likely take significant time to implement[,] delaying the public interest benefits associated with USF contribution reform. The added burdens of switching to a new system could bog down the overall

Finally, some parties express the view that the revenues-based system is so structurally flawed that “any Commission ‘fixes’ to its revenues methodology will be short-lived.”¹⁵⁶ AT&T maintains that the current level of the contribution factor, coupled with the prospect that “the market, driven by consumer demand, will continue its march toward business models where an entity’s revenue streams will have nothing to do with the provision of interstate telecommunications[,]”¹⁵⁷ support its claim that a revenues-based methodology is not sustainable.¹⁵⁸

U.S. Cellular adheres to the more optimistic view expressed by the California PUC, that current pressures on the Fund—reflected by increases in the contribution factor—have been caused, at least in part, “by consumers’ substituting competing technologies that are not currently contributing to the Fund[,]”¹⁵⁹ and that this problem can be cured by the Commission’s bringing

USF/ICC reform process.”); Rural Associations Comments at 37; XO Comments at 31 (explaining that “[r]eplacing the existing revenues-based system with a vastly different contribution mechanism would require all contributors to start over, and . . . the hardship would fall most acutely on smaller companies who cannot readily afford to revamp billing systems or retrain staff simply to comply with changing regulatory requirements”).

¹⁵⁶ AT&T Comments at 17. *See* Ad Hoc Comments at 37; Google Comments at 11.

¹⁵⁷ AT&T Comments at 18.

¹⁵⁸ *Id.* *See* Sprint Comments at 13. Google also expresses skepticism that the existing revenues-based mechanism, even if reformed by the Commission, would have any long-term viability. Google suggests that the Commission should turn away from the revenues-based mechanism and instead “focus scarce and valuable agency and industry resources on creating a comprehensive, sustainable long-term solution.” Google Comments at 11. Google notes that, “[w]hile industry discussions regarding a comprehensive proposal for reform are ongoing, there has been significant progress and collaboration that Google expects will soon come to fruition.” *Id.* U.S. Cellular disagrees. Google’s suggestion is a recipe for further delay, uncertainty, and erosion of a contribution base that is in urgent need of expansion. Further, as U.S. Cellular and numerous other commenters have shown, the current revenues-based system has significant advantages, and can be reformed and augmented in ways that will enhance the sustainability of the Fund, preserve competitive and technological neutrality, equitably distribute contribution assessment burdens, and benefit consumers.

¹⁵⁹ California PUC Comments at 8. *See* Frontier Comments at 4 (observing that “[t]echnology has advanced so that voice communications is merely one application that customers use over their broadband networks. This is reflected in the fact that voice access line subscribership has annually declined sharply, a trend that Frontier has also experienced.”); U.S. Cellular Comments at 35; USTelecom Comments at 1-2; XO Comments at 20 (noting that “[t]he problem with the current USF contribution system is not the

these technologies into the contribution base.¹⁶⁰ The *Further Notice* presents numerous options for achieving this result, and U.S. Cellular is confident that acting on these options will have positive effects for a term that proves to be longer than suggested by AT&T's pessimistic assessment. Moreover, AT&T's concerns, at bottom, may require a statutory solution, since the current statute requires that there be some nexus between the imposition of contribution obligations and the provision of telecommunications services or telecommunications.¹⁶¹ The current statute thus may negate any attempts to address, for USF contribution purposes, business models where a provider's revenue streams have nothing to do with the provision of interstate telecommunications services.

B. The Record Provides a Strong Basis for Treating Revenues from Broadband Internet Access Services as 100% Interstate for USF Contribution Purposes.

U.S. Cellular has argued in its Comments that, if the Commission decides to make broadband assessable, then broadband revenue should be treated as 100% interstate because this would enhance the sustainability of the Fund, would advance the efficient administration of the Fund, and would be consistent with Commission precedent.¹⁶²

U.S. Cellular's views find support in the record. For example, Verizon argues that any attempt to apportion broadband revenues between intrastate and interstate jurisdictions "would only add complexity and cost to the administration of the contribution system, which would be

revenues-based assessment *per se*; rather, it is that growth of assessable revenues has not kept pace with the increasing need for USF funding").

¹⁶⁰ California PUC Comments at 8. *See* RTG Comments at 10 (arguing that "[r]etaining the existing revenues-based system is the best solution as long as the Commission increases the contribution base"); XO Comments at 20 (observing that "[r]elatively modest expansions 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").

¹⁶¹ 47 U.S.C. § 254(d).

¹⁶² U.S. Cellular Comments at 35-37.

inconsistent with the Commission’s overarching goals in this proceeding.”¹⁶³ Verizon also explains that treating broadband revenues as 100% interstate would be “[c]onsistent with Commission decisions finding that broadband Internet access services are inherently interstate, even though they may contain an intrastate component”¹⁶⁴

AARP cautions that treating broadband service as 100% interstate may not accurately reflect current trends in the manner in which broadband service is being delivered. AARP argues that, because content providers are using content delivery networks to push content closer to end users, “it is reasonable to conclude that the share of data that is downloaded over broadband connections will have a substantial and growing intrastate component.”¹⁶⁵

In U.S. Cellular’s view, AARP’s discussion of broadband content delivery does not warrant any revisiting of the Commission’s rationale for treating broadband traffic as 100% interstate. This rationale is that the traffic is jurisdictionally mixed, and cannot be separated into the respective intrastate and interstate jurisdictions. The Commission has found, for example, that “[t]he jurisdictional analysis rests on an end-to-end analysis, in this case on an examination of the location of the points among which cable modem service communications travel. These points are often in different states and countries.”¹⁶⁶ AARP’s speculation regarding the possible jurisdictional shift in broadband traffic does not provide a basis for a determination that the

¹⁶³ Verizon Comments at 43.

¹⁶⁴ *Id.* (footnote omitted). See Sprint Comments at 19.

¹⁶⁵ AARP Comments at 42.

¹⁶⁶ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *et al.*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4832 (para. 59) (2002). See *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded but not vacated by WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

Commission’s precedent should not control, or that a portion of broadband traffic now should be considered intrastate for USF contribution purposes.

C. Numerous Commenters Agree with U.S. Cellular That a “Safe Harbor” Test Should Govern the Allocation of Revenues from Bundled Services.

A key reform that is necessary to improve the ongoing performance and administration of the revenues-based contribution methodology involves devising rules and policies for the reasonable and equitable allocation of revenues from bundled offerings that include both assessable and non-assessable services. U.S. Cellular has indicated that it generally favors the safe harbor approach proposed by the Commission in the *Further Notice*, in part because it would give contributing carriers the option of ensuring that their contribution obligation is limited to revenues from their provision of assessable telecommunications.¹⁶⁷ Numerous other parties agree with U.S. Cellular that the Commission should adopt the approach proposed in the *Further Notice*.

The Commission’s proposed safe harbor would be transparent, since revenues from the bundled service could be readily determined, and this would also be true for revenues allocated based on prices charged for stand-alone offerings. This transparency, in turn, would enhance the ability of the Commission to administer and enforce the safe harbor rule. In supporting the proposed approach, the Rural Associations note that “[c]ompliance is best achieved when expectations and requirements are defined at the outset.”¹⁶⁸

In addition, as CompTel observes, the Commission’s proposed safe harbor approach would be more effective than permitting providers to make individualized showings of their assessable revenues, thus “promot[ing] stability in the universal service fund and curtail[ing] op-

¹⁶⁷ U.S. Cellular Comments at 38.

¹⁶⁸ Rural Associations Comments at 39.

portunities for providers to minimize their contribution obligations through their allocation methods.”¹⁶⁹

A safe harbor rule also would work better than the bright-line test discussed by the Commission.¹⁷⁰ Comcast explains, for example, that the Commission’s alternative proposal that contributors be required to treat *all* bundled revenues as telecommunications service revenues for purposes of determining their universal service contribution obligations is problematic. “A fundamental flaw of this proposal is that it could result in assessments on services or products that are beyond the scope of the Commission’s statutory authority to assess under section 254 of the Act.”¹⁷¹ For this reason, proposals made in the record for the adoption of a bright-line test should be rejected.¹⁷²

If the Commission adopts its proposed safe harbor rule, two components of the rule will need to be resolved. One issue involves how allocations should be made if the contributor does not offer or provide the assessable components of the bundled package on a stand-alone basis. The answer implied by the proposed rule is that, if the assessable component is not offered on a stand-alone basis, then the entire bundle would be treated as assessable.¹⁷³ AT&T presents what

¹⁶⁹ CompTel Comments at 23. *See* Rural Associations Comments at 39 (arguing that the proposed rule is preferable to permitting contributors to use “any reasonable method” to apportion revenues between assessable and non-assessable services in a bundle).

¹⁷⁰ *Further Notice*, 27 FCC Rcd at 5403 (para. 113).

¹⁷¹ Comcast Comments at 10. *See* U.S. Cellular Comments at 39-40 (emphasis in original) (arguing that “[a] bright-line test that *requires* contributions based on non-assessable revenues would exceed the scope of the Commission’s statutory authority”).

¹⁷² *See* AARP Comments at 34 (proposing a service “contamination” rule); Sprint Comments at 16-17.

¹⁷³ The Commission asks for comment regarding how the safe harbor rule would be applied if the contributor does not offer stand-alone equivalent services. *Further Notice*, 27 FCC Rcd at 5402 (para. 107). CompTel observes, however, that the proposed rule specifically addresses this situation by indicating that, “[i]f a provider does not offer stand alone equivalent services that are separately priced, it would have to treat all revenues for the bundle as assessable.” CompTel Comments at 23.

U.S. Cellular considers to be a more reasonable alternative, suggesting that “[i]n the event that the contributor does not offer the assessable components on a stand-alone basis, the contributor should be permitted to rely on objectively verifiable stand-alone prices of other providers.”¹⁷⁴

The other issue relates to the treatment of discounts included as part of the bundled offering. The Commission’s proposed rule would attribute the entire amount of any discounts to non-assessable revenues.¹⁷⁵ U.S. Cellular has criticized this approach as being arbitrary and unreasonable.¹⁷⁶ U.S. Cellular agrees with Comcast’s suggestion that, instead of adopting its proposed rule, the Commission should attribute a portion of the discount to assessable services because, “if part of the bundled discount were attributed to prices for the assessable services in the bundle, the consumer would benefit from the corresponding reduction in USF fees.”¹⁷⁷

Comcast also discusses another concern regarding the proposed safe harbor rule, arguing that the rule “could introduce economic distortions by encouraging providers to alter the components that are included in a bundle in response to the contribution mechanism rather than offering the package of services that consumers desire.”¹⁷⁸

¹⁷⁴ AT&T Comments at 25. *See* CBI Comments at 9-10. AT&T notes that the Commission has asked for comment on whether such an approach should be taken. AT&T Comments at 25 (citing *Further Notice*, 27 FCC Rcd at 5402 (para. 109)).

¹⁷⁵ *Further Notice*, 27 FCC Rcd at 5402 (para. 106).

¹⁷⁶ U.S. Cellular Comments at 39.

¹⁷⁷ Comcast Comments at 12. AARP expresses concern that a degree of arbitrariness would attach to any attempt to allocate discounts because “bundle prices do not present any consistent method to ‘reverse engineer’ the discounts that are implicitly associated with any specific service that is contained within the bundle.” AARP Comments at 36. *See* ADTRAN Comments at 9. U.S. Cellular acknowledges that the Commission would be faced with the task of determining a reasonable basis for allocating the portion of discounts treated as assessable and the portion treated as non-assessable. In U.S. Cellular’s view, however, it would be more arbitrary for the Commission not to make any such allocation and instead require that the entire discount must be associated with non-assessable components of the bundle. *See* U.S. Cellular Comments at 39.

¹⁷⁸ Comcast Comments at 11.

U.S. Cellular does not disagree that the proposed rule may pose such a potential risk, but the risk could be mitigated not only by market forces (which would drive contributors to be responsive to consumer preferences relating to service bundles), but also more directly by the Commission's ability to tighten the terms and administration of the safe harbor rule. For example, the Commission, as it suggests, could require that a stand-alone offering would not qualify as a basis for allocating bundled revenues unless the stand-alone offering is "generally available and actually subscribed to by a minimum number of end users" ¹⁷⁹

Comcast also is worried that the "stand-alone" option included as part of the Commission's safe harbor proposal could cause administrative problems because contributors' existing billing systems may not be capable of applying a percentage assessment "to an amount (the stand-alone price) that does not appear on a customer's bill without significant and costly upgrades." ¹⁸⁰ Under the proposed rule, however, contributors would have the option of either treating all revenue from bundled services (including revenue from non-assessable components of the bundle) as assessable, or allocating revenues based on the stand-alone offerings. ¹⁸¹ Thus, contributors would have the discretion to decide whether their billing systems are able to accommodate revenue allocations, enabling them to utilize that option pursuant to the Commission's rules.

Sprint favors a rule that would make the entire bundle assessable because this would eliminate competitive disparities, claiming that, under the stand-alone option, one triple-play provider may charge \$22 for voice while its competitor may charge only \$10 for voice, thereby enabling it to pay less than half the USF assessments paid by its competitor for bundled servic-

¹⁷⁹ *Further Notice*, 27 FCC Rcd at 5402 (para. 108). *See* Rural Associations Comments at 40.

¹⁸⁰ Comcast Comments at 13.

¹⁸¹ *Further Notice*, 27 FCC Rcd at 5402 (para. 106).

es.¹⁸² The problem described by Sprint might materialize if the Commission were to permit open-ended apportionments based upon individualized showings, but such a problem would be mitigated by the proposed requirement that revenues from a bundled offering must be allocated based on stand-alone offerings. Thus, in Sprint’s example, the competitor would be permitted to allocate \$10 to the voice service component of its bundle *only if* it could show that it offers voice service for \$10 as a stand-alone service.

Finally, Verizon suggests that the Commission does not need to adopt any rule to address the treatment of bundled services for USF contribution purposes. Verizon argues that a rule is not necessary because carriers currently do not have unbridled discretion in apportioning revenues for bundled offerings. Instead, they are required to follow Generally Accepted Accounting Principles (“GAAP”) applicable to the allocation of bundled offerings “for revenue recognition purposes.”¹⁸³ Verizon represents that, under GAAP, if services in a bundle are also provided on a stand-alone basis, then revenues (including any discounted revenues) are allocated among the services in the bundle based on the “vendor-specific” stand-alone selling price “or, if not available, [the] market selling price.”¹⁸⁴

While U.S. Cellular finds Verizon’s suggested approach intriguing, it is reluctant to endorse the approach, since, in U.S. Cellular’s view, it would be more advisable for the Commission to craft a safe harbor rule that is precisely tailored to resolve specific issues and problems that are likely to be unique to the administration and enforcement of the USF contribution mechanism.

¹⁸² Sprint Comments at 16-17 (citing *Further Notice*, 27 FCC Rcd at 5402 (para. 107 n.234)).

¹⁸³ Verizon Comments at 23 (footnote omitted).

¹⁸⁴ *Id.* at 23 (citing Financial Accounting Standards Board, Accounting Standards Update, Revenue Recognition (Topic 605): Multiple-Deliverable Revenue Arrangements, No. 2009-13 (Oct. 2009)).

D. The Commission Should Address Several Other Issues Related to Its Selection of a Contribution Methodology.

In addition to the reforms of the existing revenues-based contribution system that are discussed in the previous sections and are strongly supported in the record, commenters also have demonstrated a substantial basis for additional steps the Commission should take to improve the administration and further enhance the equities of the revenues-based methodology, as well as steps it should avoid.

Specifically, as discussed in the following sections, the Commission should lower the jurisdictional safe harbor percentage for wireless carriers so that the safe harbor more accurately approximates the split between intrastate and interstate wireless traffic. The Commission should not, however, adopt a “total revenues” approach for the calculation of assessable revenues, because this would unfairly penalize common carriers required to report all their revenues on their FCC Form 499 filings. In addition, if the Commission decides to prescribe a numbers-based contribution methodology, it should develop a fair and reasonable test for counting only a portion of the numbers associated with wireless family plans.

1. If the Commission Retains a Revenues-Based System, It Should Adjust the Wireless Carrier Jurisdictional Safe Harbor to a More Reasonable Level.

U.S. Cellular agrees with CTIA that an important step the Commission should take to simplify its administration of the current revenues-based contribution methodology “would be to lower the wireless safe harbor to a more realistic level so that more mobile wireless filers can avail themselves of it.”¹⁸⁵ CTIA explains that assigning a jurisdiction to mobile wireless traffic is done solely for regulatory purposes, and that “neither the consumer nor the carrier is likely to

¹⁸⁵ CTIA Comments at 10. *See* RCA Comments at 10-11; USA Coalition Comments at 7-8.

know whether a call originates and terminates in the same state.”¹⁸⁶ In these circumstances, it makes sense for the Commission to prescribe a more realistic safe harbor for cellular and broadband PCS telecommunications revenues.

As CTIA explains, the need to do so is underscored by the fact that the current safe harbor is set at 37%, “and yet the Commission’s data show that over three-quarters of wireless carriers filing traffic studies demonstrate that only 10 percent to 29 percent of their traffic is interstate.”¹⁸⁷ U.S. Cellular supports CTIA’s view that “[m]ore fact-based wireless safe harbors would reduce burdens on carriers because they would no longer have to conduct and document traffic studies, as well as on USAC and the Commission because they would no longer need to review them.”¹⁸⁸

2. The Reformed Revenues-Based System Should Not Use a “Total Revenues” Approach for Making Assessments.

U.S. Cellular joins with Verizon in opposing a proposal made by the State Members of the Federal-State Universal Service Joint Board to bring into the contribution base all revenues reported by contributors on line 418 of Form 499, which includes “revenues from equipment sales and from a wide array of services that directly compete with services provided by entities that do not file a Form 499[,]”¹⁸⁹ such as video services, web hosting, and cloud services.¹⁹⁰

Such a step would have anti-competitive results. As Verizon explains, by treating similar or substitutable services differently, the State Members’ proposal would place contributors re-

¹⁸⁶ CTIA Comments at 10.

¹⁸⁷ *Id.* (footnote omitted). *See* Verizon Comments at 21 (noting that evidence supports a safe harbor for wireless traffic of 20-25%).

¹⁸⁸ CTIA Comments at 11.

¹⁸⁹ Verizon Comments at 43.

¹⁹⁰ *Id.*

quired to make Form 499 filings at a competitive disadvantage, thus creating unintended market distortions.¹⁹¹ U.S. Cellular agrees with Verizon’s conclusion that “[a]ny assessment on such services offered by providers simply because they are carriers or provide telecommunications is unfair and would skew the marketplace to the detriment of consumers.”¹⁹²

3. If the Commission Adopts a Numbers-Based Methodology, It Should Take a Reasonable Approach to the Treatment of Wireless Family Plans.

ITTA argues that, if the Commission adopts a numbers-based contribution methodology, it should assess all numbers in a mobile wireless family plan, because any exemption for wireless family plan handsets “would advantage wireless family plan consumers over other residential service consumers.”¹⁹³

U.S. Cellular opposes ITTA’s proposal, because fair treatment of wireless customers would necessitate, at a minimum, providing that wireless family plans would contribute on a discounted basis.¹⁹⁴ U.S. Cellular agrees with CTIA that wireless family plan customers present unique circumstances that justify a modification of any per-number assessment methodology. In a filing made in 2008, CTIA estimated that more than 70 million customers would be affected by a per-number assessment against wireless family plans,¹⁹⁵ and that such a significant rate shock problem should be “managed responsibly.”¹⁹⁶ Moreover, as CTIA explains, establishing dis-

¹⁹¹ *Id.* at 44.

¹⁹² *Id.* at 45.

¹⁹³ ITTA Comments at 22 (internal quotation marks omitted) (quoting *High-Cost Universal Service Support*, WC Docket No. 05-337, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6560, App. A, Draft Order, para. 145). *See* Ad Hoc Comments at 16.

¹⁹⁴ *See* RCA Comments at 11.

¹⁹⁵ CTIA Comments, WC Docket No. 05-337, *et al.*, filed Nov. 26, 2008, at 20 (cited in CTIA Comments at 9 n.12).

¹⁹⁶ *Id.* (footnote omitted).

counted contributions for wireless family plans would be competitively neutral, because “[t]here is no evidence that market pricing structures for wireline second lines would be as drastically affected as wireless family plan lines, nor that the scope of the problem is nearly as significant in the wireline context.”¹⁹⁷

IV. THERE IS WIDESPREAD SUPPORT FOR THE ADOPTION OF RULES AND POLICIES TO IMPROVE THE ADMINISTRATION OF THE USF CONTRIBUTION MECHANISM.

Numerous commenters agree that current problems associated with the administration of the contribution system place burdens on both the Commission and USAC, create confusion and frustration for providers, and, in some cases, lead to inequitable and anti-competitive results that harm both consumers and providers. In the following sections, U.S. Cellular examines several steps that commenters encourage the Commission to take to address and rectify these problems.

A. Numerous Parties Agree with U.S. Cellular That the Commission Should Establish an Annual Notice-and-Comment Process for Revising and Updating Contribution Reporting Requirements.

U.S. Cellular has expressed its agreement with the Commission’s proposal to provide interested parties with an opportunity to review and comment on proposed revisions to Form 499 Worksheets and instructions before the revisions are adopted and implemented.¹⁹⁸ The record provides ample support for this approach.

The Commission’s proposal addresses a significant problem that has persisted over a long period and that causes difficulties for both contributors and the Commission. U.S. Cellular agrees with T-Mobile that, for example, annual revisions to the Worksheets and instructions “often effect substantive changes to reporting, and contributing obligations, materially affecting filers’

¹⁹⁷ *Id.* (footnote omitted).

¹⁹⁸ U.S. Cellular Comments at 41.

contribution obligations.”¹⁹⁹ CenturyLink makes a persuasive case that the Commission should step in to ensure that “changes to Form 499-A worksheet and instructions are clear from the start and consider the full range of potential ramifications they may engender.”²⁰⁰ U.S. Cellular agrees with CenturyLink’s assertion that the Commission’s best option for achieving this outcome is “through a notice-and-comment process *before* changes are made, rather than waiting until Form 499-A vagaries are raised by carriers in their appeals of USAC decisions thereafter.”²⁰¹

Although an annual notice-and-comment process would produce valuable results for contributors, as well as for USAC and the Commission, by providing a forum in which any uncertainties or ambiguities created by the Form 499 Worksheets and instructions could be addressed and resolved, U.S. Cellular agrees with XO that “the Commission should not convert the Instructions’ guidance into binding FCC rules.”²⁰² XO explains that, by limiting the Bureau to modifying the administrative aspects of the USF reporting requirements and by not giving the Bureau any authority to make substantive changes affecting the Commission’s Orders, “it will be clear to USAC that it cannot apply the Instructions as if they were rules[, and that] the underlying FCC orders are the only applicable source of binding requirements.”²⁰³ U.S. Cellular agrees with XO that any other approach would result in “binding rules that fail to capture the entirety of the FCC

¹⁹⁹ T-Mobile Comments at 9. *See* AT&T Comments at 41-42; Comcast Comments at 30; USTelecom Comments at 10 (arguing that, “[o]n an annual basis, any proposed changes to the Form 499A or its instructions should be identified, and the Commission should explain the reasons for those changes, and seek comment on the revised form and instructions”); Verizon Comments at 7.

²⁰⁰ CenturyLink Comments at 7-8. *See* USA Coalition Comments at 4-5.

²⁰¹ *Id.* at 8 (emphasis in original). *See* Comcast Comments at 30 (arguing that, “[g]iven the importance of the instructions to the industry and to fair application of whatever contribution methodology the Commission ultimately adopts, the Commission annually should identify any proposed changes to the instructions, explain the reasons for those proposed changes, and seek comment on the revised form and instructions”); Verizon Comments at 8.

²⁰² XO Comments at 39.

²⁰³ *Id.* at 42.

orders or the entire process would rapidly become a quagmire as interested parties re-fight battles decided in separate proceedings.”²⁰⁴

U.S. Cellular also supports suggestions in the record that any revisions to the Worksheets or instructions should take effect at the beginning of the reporting year, and that any changes to the Worksheets should apply only prospectively. T-Mobile, for example, argues that it makes little sense to clarify reporting requirements *after* a reporting year has already passed.²⁰⁵ Instead, “because Form 499 and instructions have such a significant impact on contributors’ obligations, including record-keeping and pass-through requirements, the reporting requirements should be clear at the beginning of the reporting year, so that contributors understand their obligations throughout the reporting period.”²⁰⁶

Verizon, pointing to judicial precedent, advocates that the Commission “should clarify that any changes to the Worksheets will apply only on a going-forward basis.”²⁰⁷ T-Mobile explains that such a clarification would halt the USAC practice of “attempt[ing] to apply requirements that were added to the form instructions in audits of periods prior to the year that the relevant requirements were added to the form.”²⁰⁸

B. The Record Supports U.S. Cellular’s View That the Period During Which Prior Period Adjustments May Be Made Should Be Extended.

In its Comments, U.S. Cellular has argued that extending the period of time during which prior period adjustments are taken into account by USAC for subsequent adjustments to the con-

²⁰⁴ *Id.* at 41-42.

²⁰⁵ T-Mobile Comments at 10. *See* USTelecom Comments at 10.

²⁰⁶ *Id.* (footnote omitted). *See* USA Coalition Comments at 5.

²⁰⁷ Verizon Comments at 9 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). *See* AT&T Comments at 42.

²⁰⁸ T-Mobile Comments at 10 (footnote omitted).

tribution factor, by leveling adjustments over a period of two subsequent quarters, would be effective in reducing volatility in fluctuations of the quarterly contribution factor.²⁰⁹ Several other parties agree with this suggestion.

AT&T argues that doubling the current adjustment period should assist in stabilizing the overall size of the contribution base,²¹⁰ and further points out that, “[f]rom a financial reporting perspective, we are unaware of any reason why the Commission and USAC must account for prior period adjustments in a single quarter.”²¹¹ CTIA argues that doubling the adjustment period would result in “a more stable contribution factor over the long term[,]”²¹² pointing out that an analysis undertaken by the Commission demonstrates that, over the last seven years, “increasing the adjustment period from one to two quarters would have reduced the amount and severity of the fluctuations from one period to the next.”²¹³

Comcast raises objections to the proposal for doubling the adjustment period, arguing that it would create additional administrative complexity in order to achieve an insufficient potential incremental benefit.²¹⁴ Comcast asserts that the proposal would “introduce yet another set of calculations[,]”²¹⁵ but it is not clear why this would be so. Prior period adjustments are already taken into account, and, under the proposal, these adjustment would apply to the following two quarters rather than only one quarter. If Comcast is suggesting that adjustments for the second quarter should be viewed as a new set of adjustments, there does not seem to be any basis for

²⁰⁹ U.S. Cellular Comments at 44-45.

²¹⁰ AT&T Comments at 44. *See* California PUC Comments at 15.

²¹¹ AT&T Comments at 44.

²¹² CTIA Comments at 18.

²¹³ *Id.* (footnote omitted) (citing *Further Notice*, 27 FCC Rcd at 5481-82 (paras. 357-358)).

²¹⁴ Comcast Comments at 31.

²¹⁵ *Id.*

concluding that the calculation of these adjustments would materially increase the complexity and burdensome nature of the adjustment process.

While Comcast is correct that extending the period of time over which adjustments are made would not eliminate the potential for consumer sticker shock,²¹⁶ the Commission's analysis demonstrates that it would reduce volatility in the contribution factor, which would benefit both consumers and contributors. As AT&T explains, the Commission's analysis shows that "accounting for prior period adjustments over two quarters halved the number of quarterly contribution factors that increased or decreased by more than one percentage point since 2005."²¹⁷

C. Commenters Join U.S. Cellular in Suggesting that the Commission Take Steps To Improve the Auditing Process.

Agreeing with the Commission that "[n]o system is fair when some telecommunications providers play by the rules and others do not[.]"²¹⁸ U.S. Cellular has advocated in its Comments that the Commission should require USAC to develop and adopt an updated audit plan reflecting the Commission's contribution reforms.²¹⁹

CTIA agrees that the Commission should require USAC to update the Beneficiary/Contributor Compliance Audit Program "to help ensure that audits reflect the contribution reforms adopted by the Commission" in this proceeding.²²⁰ U.S. Cellular supports CTIA's further suggestion that "[t]he Commission should put the proposed plan out for public comment because . . . feedback from interested parties could help improve the audit process."²²¹

²¹⁶ *Id.*

²¹⁷ AT&T Comments at 44 (citing *Further Notice*, 27 FCC Rcd at 5481 (para. 357, Chart 8)).

²¹⁸ *Further Notice*, 27 FCC Rcd at 5484 (para. 368), *quoted in* U.S. Cellular Comments at 42.

²¹⁹ U.S. Cellular Comments at 42.

²²⁰ CTIA Comments at 19 (footnote omitted).

²²¹ *Id.*

U.S. Cellular also agrees with T-Mobile’s suggestion that the Commission should adopt new procedures “to ensure that appeals of USAC contributor audits are resolved in a timely fashion.”²²² Doing so, T-Mobile explains, would provide a timely, definitive answer to the affected contributor, and also would provide clarity to other contributors facing similar issues and questions.²²³ T-Mobile also makes a specific proposal: “[T]he Commission should impose a reasonable deadline (such as six months) [for acting on audit appeals] and provide that appeals pending after that time are resolved in favor of the contributor.”²²⁴ U.S. Cellular urges the Commission to consider this approach, since it could cure an ongoing problem involving the frequent inability of the Commission to act on pending audit appeals within a reasonable period of time. Any such consideration should include an examination of whether any precedential effect should be ascribed to resolving issues in favor of the contributor in cases in which the Commission fails to meet the deadline for decision.

D. U.S. Cellular Supports the Recommendation That the Commission Should Establish a System for Providing Guidance Regarding Contribution Requirements.

As discussed above,²²⁵ numerous parties support the establishment of a notice-and-comment process for the proposal, consideration, and adoption of annual revisions to Form 499 Worksheets and instructions. U.S. Cellular also supports a further step suggested by Verizon as a means of improving the contribution reporting process.

Specifically, Verizon suggests that the Commission should develop and implement a system “that encourages open communication between USF contributors and the Commission and

²²² T-Mobile Comments at 13 (footnote omitted).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See Section IV.A., *supra*.

facilitates clear guidance from the Commission on specific Worksheet questions”²²⁶ U.S. Cellular agrees that such a system would help to solve the current dilemma, in which contributors risk misinterpreting the reporting and contribution requirements if they do not seek to obtain guidance from the Commission, but contributors also fear that requesting such guidance, “even for good faith interpretations of the Worksheets, may result in investigative actions”²²⁷

T-Mobile makes a similar proposal, advocating that the Commission should follow an Internal Revenue Service practice, which involves providing private letter rulings to taxpayers that apply provisions of the Internal Revenue Code to the specific facts of a taxpayer’s case.²²⁸ U.S. Cellular encourages the Commission to consider this proposal and also explore other steps that could be taken to provide an opportunity for contributors to make “risk free” requests for guidance on the interpretation of the Form 499 Worksheets and on steps that the contributors must take to ensure compliance with the Commission’s various reporting and contribution rules.

E. U.S. Cellular Agrees with Commenters Suggesting That the Commission Should Adopt Symmetrical Time Periods for Resubmitting Form 499 Filings.

Verizon and other commenters have shed light on a troubling aspect of current policies for the administration of the Commission’s USF contribution regime, which should be addressed as part of the Commission’s contribution reforms. Verizon explains that, on the one hand, if a contributor wishes to refile its Form 499 to revise its revenues and reduce its required contributions, it faces a one-year deadline to make such a filing.²²⁹ On the other hand, a contributor has

²²⁶ Verizon Comments at 9. *See* USTelecom Comments at 10.

²²⁷ Verizon Comments at 10.

²²⁸ T-Mobile Comments at 13. *See* MetroPCS Comments at 6-7, 21 (arguing that “fairness and sustainability will be best achieved if the Commission manages the USF system based upon the model applied by the government to the U.S. federal tax system”).

²²⁹ Verizon Comments at 12.

an *unlimited* obligation—with no “statute of limitations”—“to correct Form 499 errors when doing so would *increase* contributions”²³⁰ U.S. Cellular agrees with Verizon’s observation that this dichotomy “is both procedurally deficient and substantively arbitrary and capricious.”²³¹

Verizon makes its case that these asymmetrical filing obligations are arbitrary and capricious “and violate the section 254 requirement that USF contributions be assessed in [an] ‘equitable and non-discriminatory’ manner[.]”²³² and then suggests that, as a remedy, “[t]he Commission should repeal [the] one-year limitation and adopt in this proceeding a symmetrical three-year limitations period for refileing Form 499s—regardless of whether it increases or decreases required USF contributions.”²³³ U.S. Cellular supports this approach, which is necessary to ensure that the administration of the Commission’s contribution system adheres to principles of fundamental fairness.

F. U.S. Cellular Endorses the Position That the Commission Should Not Adopt Its Proposed “Pay and Dispute” Rule.

The Commission proposes to adopt a “pay-and-dispute” rule that would impose late fees, interest charges, and penalties for failure by a contributor to make payments by the applicable due dates “regardless of whether the obligation to pay that amount is appealed or otherwise disputed” unless the charges “are the result of a clear error” by the USAC Administrator.²³⁴ Thus, a contributor could actually prevail in its appeal to the Commission, but still be required to pay late

²³⁰ *Id.* at 12-13 (emphasis in original).

²³¹ *Id.* at 13. *See* CenturyLink Comments at 8; MetroPCS Comments at 22; XO Comments at 12-14.

²³² Verizon Comments at 15. Verizon notes, for example, that there often are very good reasons preventing a carrier from meeting the one-year filing deadline, and that the asymmetrical filing requirements “could cause a carrier to contribute vastly more to the USF than it actually owes.” *Id.* at 14.

²³³ *Id.* at 15. *See* USTelecom Comments at 10-11.

²³⁴ *Further Notice*, 27 FCC Rcd at 5483 (para. 363).

fees, interest, and penalties, unless the Commission determines that USAC's payment requirement was clearly an error.

U.S. Cellular joins other commenters in opposing this proposed rule. U.S. Cellular agrees with AT&T and XO that the proposed pay and dispute rule would impose unwarranted and significant financial hardships on contributors.²³⁵ XO argues persuasively that forcing contributors to pay disputed amounts even as they seek to appeal USAC's decision with the Commission "shifts too much of the burden to contributors."²³⁶ The up-front contribution payments that contributors would be required to make, under the proposed rule, in order to pursue an appeal "could run in the millions of dollars even for small carriers."²³⁷ U.S. Cellular agrees with XO that a better approach would be not to require the payment of disputed amounts while a contributor's appeal is pending.²³⁸ If the appeal is denied, then "the contributor may be liable for the disputed amount, plus any interest or penalties applicable to the unpaid amount."²³⁹

V. SEVERAL COMMENTERS MIRROR U.S. CELLULAR'S CONCERNS REGARDING PROPOSALS TO MODIFY RULES FOR THE RECOVERY OF USF CONTRIBUTIONS FROM END-USER CUSTOMERS.

The Commission's proposals to overhaul its rules governing the manner in which contributors may flow through their USF contributions from their end-user customers have not gar-

²³⁵ AT&T Comments at 45; XO Comments at 43.

²³⁶ XO Comments at 43.

²³⁷ *Id.*

²³⁸ AT&T notes that appeals of USAC decisions have seldom been resolved in a timely manner:

[T]he Bureau has rarely, if ever, acted on an appeal within 90 days, and, if anything, the Commission's record is worse. In fact, . . . AT&T affiliates have contributor appeals of USAC audits that have been pending for over six years at the Commission, with no apparent resolution in sight.

AT&T Comments at 45 (footnote omitted).

²³⁹ XO Comments at 44.

nered significant support in the record. Instead, commenters argue that the current rules are not broken, and that the Commission's suggested remedies would do more harm than good. These issues are discussed in the following sections.

A. The Record Reflects a Strong Consensus That Existing Rules and Mechanisms Sufficiently Protect Customers' Interests.

U.S. Cellular has taken the position in its Comments that, while the Commission's desire to improve the transparency of USF contribution charges is commendable, its proposals appear to be solutions in search of a problem.²⁴⁰ This view finds considerable support in the record.

As a general matter, Verizon concludes that “[n]o need exists to modify the Commission's rules regarding the recovery of universal service contributions from customers, and the *Notice* does not offer any problem that the proposed rules would solve.”²⁴¹ This view is also expressed by other parties in the context of a number of specific proposals made by the Commission in the *Further Notice*.

First, ACA opposes the Commission's proposal to require that a provider's advertised price must include the USF contribution.²⁴² ACA argues that it would be administratively difficult for providers to comply with such a requirement, since “it would be impossible today to quantify each customer's USF obligation in advance because it can vary based upon usage, such as their volume of international toll calls.”²⁴³ The task would be further complicated by the need to recalibrate the USF charge—and then reflect it in advertised rates—every time there is a

²⁴⁰ U.S. Cellular Comments at 45-46.

²⁴¹ Verizon Comments at 49.

²⁴² ACA Comments at 11 (citing *Further Notice*, 27 FCC Rcd at 5490 (para. 391)). See U.S. Cellular Comments at 48.

²⁴³ ACA Comments at 12.

change in the contribution factor.²⁴⁴ Verizon agrees, arguing that “there is no reason to treat USF differently from a disclosure standpoint than the multitude of other taxes and fees that consumers must pay when buying communications services—the amounts of which are not included in the advertised price.”²⁴⁵

Second, contributors’ bills should not be required to identify the portions and amounts of the service offerings that are subject to Fund assessments. U.S. Cellular agrees with CTIA’s concern that “[a]ttempting to identify the portions and amounts of the offerings that are subject to USF charges and explain how the contribution pass-through amounts were calculated would be severely challenging for service providers (if even possible) and very confusing to customers.”²⁴⁶ Moreover, CTIA observes that “[t]he wireless industry has long followed the voluntary standards in the *CTIA Consumer Code for Wireless Services* (“Code”), which requires clear, non-misleading disclosures in customers’ bills.”²⁴⁷ U.S. Cellular, which complies with the provisions of the Code, notes that, as CTIA explains:

Wireless service providers [pursuant to the Code] disclose to customers whether any additional taxes, fees or surcharges may apply and the amount or range of

²⁴⁴ *Id.* See Verizon Comments at 52 (explaining that, “because advertising campaigns and promotional materials are prepared well in advance of launch and may be used in the market for extended periods of time, requiring that the advertised price of a service include the universal service contribution would require that providers modify their campaigns and materials at least each quarter to incorporate the new quarterly contribution factor. The cost of complying with these requirements would be astronomical—costs ultimately borne by customers in the form of higher prices.”); CompTel Comments at 38 (indicating that “[i]ncluding the universal service contribution in the advertised price of a service would make the contribution burden consumers must bear far less transparent and would require service providers to change the advertised prices of their services every time the contribution factor changes”).

²⁴⁵ Verizon Comments at 52.

²⁴⁶ CTIA Comments at 27. See Verizon Comments at 50 (arguing that “requiring carriers to disclose more information on their bills about the USF line item—including identifying the portions of the bill subject to USF and reflecting the applicable USF contribution factor—would be an enormously complex undertaking”).

²⁴⁷ CTIA Comments at 29 (footnote omitted). The Code can be viewed on the CTIA website at http://www.ctia.org/consumer_info/service/index.cfm/AID/10352.

such fees or surcharges that are collected and retained by the carrier. Wireless service providers also distinguish on customers' bills the service charges from any taxes, fees and other charges collected by the carrier and remitted to the government.²⁴⁸

In U.S. Cellular's view, there are strong reasons to conclude that the billing requirement suggested by the Commission would serve no useful regulatory or other purpose, and would cause customer confusion and frustration, rather than providing transparency in customers' bills.

And, *third*, the requirements for billing that the Commission is considering would be particularly problematic for wireless carriers and their customers. For example, as Verizon explains, "wireless carriers that jurisdictionalize traffic based on traffic studies (which are proprietary) presumably would have to explain on the bill how the traffic study relates to the individual charges on the customer's bill for which the USF assessment applies."²⁴⁹

This would be a burdensome undertaking that, in U.S. Cellular's view, would provide little information that the customer would find useful. In fact, U.S. Cellular believes that Verizon's findings regarding customers' billing preferences are typical of the wireless industry as a whole: "Rules mandating detailed billing disclosures about the USF charge are contrary to what consumers tell Verizon they want—namely, concise and straightforward bills."²⁵⁰

²⁴⁸ *Id.*

²⁴⁹ Verizon Comments at 51.

²⁵⁰ *Id.* at 49. Verizon explains that:

In focus groups conducted by Verizon, consumers repeatedly emphasize their desire for a simple, easy to read, and short bill. Consumers in these focus groups specifically complained that billing information about taxes, fees, and other charges was too long and included too much detail, and Verizon responded to this input by making this section of its bills more consumer friendly.

Id. AARP expresses concern that "current practices do not allow consumers to understand the basis for the USF charges appearing on their bills—both the contribution factor and the portion of the bill to which the contribution factor is applied is not evident." AARP Comments at 52. *See* NASUCA Comments at 22 (supporting requirements "that ensure clarity of [the USF surcharge] line item"). Verizon's focus group

B. A Wide Cross-Section of Stakeholders Opposes Any Prohibition of Contributors’ Recovering Contributions Through Line Items on Customers’ Bills.

The Commission has sought comment on prohibiting Fund contributors from recovering contribution assessments from end users through a line-item or “surcharge” on end-user bills,²⁵¹ a prohibition that U.S. Cellular considers to be ill-considered and unnecessary.²⁵² The record provides substantial support for U.S. Cellular’s position.

The California PUC, for example, opposes the proposal because it “contradicts CPUC policies which require transparency of program surcharges on customer bills.”²⁵³ T-Mobile expresses a similar concern, arguing that, since consumers bear the cost of the Fund, it is important that they “understand the cost of universal service.”²⁵⁴ U.S. Cellular agrees with T-Mobile’s assessment that, “[w]hether customers pay for universal service costs through explicit line items or simply through higher bills, they ultimately pay for the cost of the fund. If contributors are required to hide that cost from consumers, it will reduce or eliminate much of the discipline on the size of the fund.”²⁵⁵ U.S. Cellular also agrees with XO’s conclusion that the proposal amounts to an “overreach” because the Commission “does not assert that there is any consumer harm caused

studies suggest, however, that consumers are not demanding this level of detail on their bills, and in fact might very well find such information confusing and unhelpful.

²⁵¹ *Further Notice*, 27 FCC Rcd at 5490-91 (para. 394).

²⁵² U.S. Cellular Comments at 49-51.

²⁵³ California PUC Comments at 16. *See* DC PSC Comments at 5. Verizon also argues that a Commission rule prohibiting a line item surcharge would conflict with the Commission’s desire to promote billing transparency. Verizon Comments at 52. Verizon also suggests that the proposal “is inconsistent with the purpose of the Commission’s Truth-in-Billing rules” *Id.*

²⁵⁴ T-Mobile Comments at 12. *See* CBI Comments at 23 (arguing that “[c]onsumers could . . . be negatively impacted by a prohibition on USF line item charges. If providers’ only option is to include their USF assessment in their prices, consumers would have no idea how much of the price of their service is used to support the advancement of universal service.”).

²⁵⁵ T-Mobile Comments at 12.

by line-item surcharges, nor does it explain the benefit of such a rule. Without any need for or benefit from the rule, the Commission should abandon the proposal.”²⁵⁶

U.S. Cellular finds compelling CTIA’s analysis of the risks inherent in the Commission’s proposal to eliminate transparency by barring a separate USF surcharge line item. “Setting competitive and reasonable rates would become much more difficult in light of the constant and wide fluctuations in the contribution factor[,]” CTIA explains.²⁵⁷ “In fact, requiring service providers to build the USF contribution assessments into their standard service rates would create incentives to game the system to increase revenues and avoid USF contribution obligations.”²⁵⁸

Apart from the substantial policy flaws inherent in the Commission’s proposal, U.S. Cellular agrees with Verizon’s explanation that the prohibition proposed by the Commission violates the First Amendment to the U.S. Constitution,²⁵⁹ amounting to a content-based regulation of speech that would not serve any legitimate governmental interest.²⁶⁰

VI. CONCLUSION.

The production of an extensive record in response to the *Further Notice* has moved the Commission one step closer to implementing long awaited and long overdue USF contribution reform. U.S. Cellular requests the Commission to carefully review the record, and to take into account the widespread and convincing support for a number of principal actions that the Commission should now take, including expansion of the contribution base, the use of a general defi-

²⁵⁶ XO Comments at 50.

²⁵⁷ CTIA Comments at 28.

²⁵⁸ *Id.* at 28-29 (footnote omitted).

²⁵⁹ U.S. CONST. amend. I.

²⁶⁰ Verizon Comments at 52-53. *See* T-Mobile Comments at 12 (footnote omitted) (citing *Further Notice*, 27 FCC Rcd at 5491 (paras. 396-397)) (noting that the proposal raises “significant legal questions about the Commission’s authority to prohibit USF pass-through charges”).

nitiation of assessable services and providers, a determination that revenues from broadband services must be included in the contribution base, and the use a reformed revenues-based system to assess contributions.

In light of the increasingly urgent need for action to help ensure the sustainability of the Fund, U.S. Cellular urges the Commission to act expeditiously in taking the final steps necessary to achieve contribution reform.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION



By: _____

David A. LaFuria
John Cimko

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8678

Grant B. Spellmeyer
Executive Director – Federal Affairs &
Public Policy
UNITED STATES CELLULAR CORPORATION
8410 West Bryn Mawr
Chicago, Illinois 60631
(773) 399-4280

August 6, 2012