**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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|---|---|---|
| In the Matter of | ) | |
| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms | ) | CC Docket No. 98-171 |
| Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990 | ) | CC Docket No. 90-571 |
| Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size | ) | CC Docket No. 92-237<br>NSD File No. L-00-72 |
| Number Resource Optimization | ) | CC Docket No. 99-200 |
| Telephone Number Portability | ) | CC Docket No. 95-116 |
| Truth-in-Billing and Billing Format | ) | CC Docket No. 98-170 |

# COMMENTS OF AT&T CORP.


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## SUMMARY

The Commission's interim modifications to the existing revenues-based universal service contribution mechanism—while helpful—nevertheless are not capable of stabilizing the federal USF system. The "death spiral" that renders the revenues-based scheme ultimately unsustainable and insufficient cannot be reversed by tinkering at the edges.

AT&T continues to believe that a numbers-based mechanism, combined with a capacity-based assessment on interstate special access and private line connections, is the most stable option before the Commission. It will yield a single-line residential assessment of approximately $1.00, but without requiring class-of-service differentiations. And it is vastly simpler than the two other alternatives presented in the Commission's *Second FNPRM*—it requires no equivalency ratios between Centrex and PBX services, and no elaborate justifications for disparate treatment of multiline business versus single-line residential versus one-way paging versus two-way paging versus subscribed non-paging CMRS versus prepaid non-paging CMRS connections.

A numbers-based mechanism is also fully compatible with the anticipated rise of Voice over Internet Protocol ("VoIP") services, because VoIP users who want to make full use of the Public Switched Telephone Network ("PSTN") will continue to require a unique PSTN address—*i.e.*, a telephone number. The entity that provides that telephone number will be assessed just like any other number provider, regardless of the extent to which the service is circuit-switched and/or packet-switched.

The interim revenues-based system, in contrast, remains unsustainable and discriminatory. Fund size continues to increase and interstate end user revenues continue to decrease, leading to higher contribution factors and more pressure on carriers that bundle "all distance" services to allocate revenue away from the interstate portion of the bundle. The bundling "safe harbors" are entirely inadequate to address this problem, and are themselves inherently discriminatory. And the interim rule revisions have not fully addressed the "safe harbor" discrimination that favors wireless carriers over wireline carriers and international carriers over interstate carriers; indeed, the line-item recovery limitations will actually *increase* discrimination against wireline carriers.

The Commission's plenary jurisdiction over numbering resources provides solid authority for AT&T's numbers-based proposal, which is also demonstrably equitable, nondiscriminatory, predictable, sufficient and in all other ways fully consistent with Section 254(d) of the Telecommunications Act. On the other hand, nothing about Section 254(d) requires the Commission to adopt a minimum contribution requirement; the factors listed here are the crucial ones, and there is no public policy benefit to skewing the USF formula and creating discriminatory effects at the margins so that a positive assessment—however negligible—is levied on every telecommunications carrier. If a minimum contribution scheme must exist, it should be a flat rate, and the Commission should minimize competitive distortions by making the scheme temporary and automatically review it every two years to determine whether it remains necessary in light of industry changes.

Finally, the Commission should reject efforts to split a numbers-based (or connections-based) mechanism between connection and transport providers. Such proposals would inherently favor vertically integrated transport providers because of their vastly superior access to timely and accurate end user records—even more so if Lifeline consumers are exempted from the transport portion of the fee, as they should be. Alternative proposals to tie the transport component to a percentage of end user revenues are even worse, as they do not address the fundamental unfairness of the splitting proposals and also suffer from the same flaws as the existing revenues-based system.

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| Truth-in-Billing and Billing Format | ) | CC Docket No. 98-170 |

**COMMENTS OF AT&T**

AT&T files these comments in response to the Commission's *Second Further Notice of Proposed Rulemaking*.[1]

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[1] *In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability,*

The federal universal service fund continues to face a death spiral of dramatically shrinking wireline interstate telecommunications revenues and ever-increasing contribution factors, conditions that will render the system increasingly unsustainable and discriminatory as wireline interstate services continue to lose ground to wireless, Internet, bundled wireline, and other services that are draining funds from the revenues-based assessment system through exemptions, uneconomic "safe harbors," and even creative accounting. To remedy these inequities, in response to the *First FNPRM* in this docket, AT&T, as a member of the Coalition for Sustainable Universal Service ("CoSUS"), proposed a funding mechanism based on the number of connections to the telephone network, and on the capacity of those connections.[2]

During the course of proceedings leading to the Commission's *Interim Order and Second FNPRM,* AT&T and the Ad Hoc Telecommunications Users Committee ("Ad Hoc") proposed basing universal service contributions on assigned telephone numbers, with a connections- and capacity-based assessment for interstate special access/private line connections.[3] AT&T believed at that time that, although a numbers-based mechanism and a connections-based mechanism both addressed the "death spiral" facing the revenues-based universal service contribution mechanism, a numbers-based mechanism would be even more stable. In the *Interim Order and Second FNPRM*, the Commission elected, on an interim basis, not to make any

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*and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format*, Report & Order & Second Further Notice of Proposed Rulemaking, FCC No. 02-329 (rel. Dec. 13, 2002) ("*Interim Order*," "*Second FNPRM*," or "*Interim Order and Second FNPRM*").

2 *See* CoSUS *FNPRM* Comments at 9-17 (filed Apr. 22, 2002).

fundamental reform to the revenues-based universal service contribution mechanism, and sought further comment on three different alternative contribution mechanisms that would not be predominantly based on interstate and international telecommunications revenues.

Further analysis shows the benefits of a numbers-based mechanism, with a connections- and capacity-based assessment for special access/private line, and the continued need for further, fundamental reform of the universal service contribution mechanism. *First*, the current interim mechanism remains in a "death spiral" that cannot be cured using a revenues-based mechanism. Bundling of interstate telecommunications services with other services and the growth of alternatives to traditional long distance services will continue to erode the revenue-base of interstate and international end user telecommunications revenues, notwithstanding the increase in the wireless safe harbor made by the *Interim Order*. *Second*, a numbers-based mechanism is dramatically simpler than the other alternatives presented in the *Second FNPRM*, while still yielding an assessment for a single residential line of approximately $1.00. There are no equivalency ratios between Centrex and PBX services, no need to justify differences between the treatment of multiline business, on the one hand, and residential, single line business and non-paging CMRS connections on the other. There are no different rates for one-way or two-way pagers. Subscription wireless carriers and prepaid wireless carriers are treated similarly. *Third*, a numbers-based mechanism will be sustainable as Voice over Internet Protocol ("VoIP") becomes more prevalent. VoIP users that wish to be contacted by users of the Public Switched Telephone Network ("PSTN") will still need a unique PSTN address, which is what a telephone number is. The provider of the number to the end user will be assessed, regardless of whether

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[3] Letter from James S. Blaszak, Ad Hoc, to Marlene H. Dortch, Federal Communications Commission, filed Oct. 9, 2002, at 3 ("Ad Hoc *Ex Parte*").

service to that number is provided over a circuit-switched, or packet-switched facility, and regardless of the type of facility used to deliver the service to the end user's telephone number.

The Commission has full authority to adopt such a numbers-based mechanism, both on the basis of Section 254(d) of the Communications Act of 1934 ("Act") and also the Commission's exclusive jurisdiction, pursuant to Section 251(e)(1) of the Act, over those portions of the North American Numbering Plan that pertain to the United States.

## I. AT&T's PROPOSED MODIFIED NUMBERS-BASED CONTRIBUTION MECHANISM IS STRAIGHTFORWARD.

AT&T hereby expands[4] on its previous proposal[5] for a modified telephone numbers-based USF contribution mechanism. This proposal is a hybrid that would assess contribution for services that use telephone numbers based on the number of assigned telephone numbers provided by that provider to end users, while assessing contribution for special access and private line services, which are connections for which no telephone number is assigned, under a connection- and capacity-based approach similar to that in the CoSUS proposal. As with the CoSUS proposal, when services are provided by a reseller, contribution would be assessed on the provider having the relationship with the end user customer. AT&T's modified numbers-based proposal is, however, simpler and more straightforward.

### A. A Numbers-Based Mechanism Systematically Assesses Switched Services.

The portion of the contribution mechanism based on telephone numbers would impose a flat-rate assessment on each assigned telephone number that maps to a unique end user's service that enables the end user to make or receive calls via the PSTN. In essence, this is imposing a

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[4] The rule revisions necessary to implement AT&T's proposal are in Exhibit 1, attached.

[5] *See* Letter from Robert W. Quinn, Jr., AT&T, to Marlene Dortch, Federal Communications Commission, filed Nov. 8, 2002 (announcing AT&T support for a numbers-based USF assessment mechanism and describing how such a mechanism should work).

universal assessment based on the fact that a provider is giving a customer a unique address that can be reached from the PSTN, from anywhere in the United States or around the world. The assessment would be levied against the provider that has the customer relationship with the end user, and that assigns the number to the end user.[6] Thus, a carrier that provides a number to a reseller that then provides the number to the end user would not be assessed on the basis of that number, but the reseller of the number would be assessed regardless of whether the reseller of the number resold the exactly same service it received from the underlying carrier, or altered that service in some way.

Each assigned number would be assessed the same per unit charge, without any distinction between numbers serving residences, CMRS, businesses, PBX-based service or Centrex services. The only assigned numbers excluded from assessment would be numbers that are not uniquely assigned to a specific end user customer, and numbers assigned to end users for Lifeline-supported service. The first of these exclusions is purely one of administrative convenience, so that fractional assessments need not be recovered from end users. The second exclusion carries forward the Commission's policy of protecting Lifeline customers, who are by definition very-low-income consumers, from USF recovery fees.[7]

The FCC's number utilization reporting regulations define an "assigned number" as a number that is "working in the Public Switched Telephone Network under an agreement such as a contract or tariff at the request of specific end users or customers for their use, or numbers not yet working but having a customer service order pending."[8] For universal service contribution purposes, this would include 500, 900, toll-free and distinctive-ring numbers that providers

[6] *See id.*

[7] *See Second FNPRM*, at ¶ 62.

[8] 47 C.F.R. § 52.15(f)(iii).

assign for use by customers. However, AT&T's proposal would not assess those numbers that are not uniquely associated with an individual end-user's service. Thus, toll-free numbers and pager numbers that are shared by multiple end users through the use of a PIN code would not be included. DID numbers that carriers provide for PBX-based service would be assessed, as would all individual Centrex extensions. Moreover, certain non-working numbers, such as DID or Centrex numbers set aside for use by a particular customer, and numbers assigned to lines with intermittent or cyclical use but that are working for a minimum of 90 days per year, also are "assigned numbers" for the purposes of the FCC's number resource utilization reporting, and would therefore be subject to USF assessment.[9]

Because the assessments would be made upon the provider that provides the number to the end user, and thus has a relationship with the end user customer, some USF assessments would be made against providers that do not report certain numbers as "assigned" numbers today pursuant to the FCC's number utilization reporting mechanism. For example, ported numbers are reported by the porting carrier as an assigned number, and are not reported by the carrier to whom the number is ported.[10] Similarly, the FCC has required the carrier providing a number to a reseller to report the telephone number as an assigned number, and the reseller does not report the number.[11] However, for universal service contribution purposes, it should be the provider to whom a number is ported and the reseller—the entities that provide numbers to end user

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[9] *In re Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Telephone Number Portability*, Third Report & Order & Second Order on Reconsideration in CC Docket No. 96-98 & CC Docket No. 99-200, 17 FCC Rcd 252, 304 (¶ 122) (2001).

[10] *See* 47 C.F.R. § 52.15(f)(v).

[11] *In re Numbering Resource Optimization*, Report & Order & Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7587 (¶ 21) (2000); *see also* North American Numbering Plan Numbering Resource Utilization/Forecast (NRUF) Report, Form 502, JOB AID, § II (Resold Services) (revised June 1, 2002).

customers—that are assessed universal service contribution, as they are in the best position to recover that assessment from the end user most efficiently.

The numbers-based assessment would be an equal amount per assigned telephone number. With the exception of numbers assigned for Lifeline service, which are exempted so that the Lifeline customer will not be charged a recovery fee, there is no need to treat numbers for one service or customer class, such as numbers for paging or for residential service numbers, differently than numbers for other services or customer classes. Centrex numbers and DID numbers for use with a PBX would also bear the same assessment. All of these numbers provide the same function—a unique PSTN address at which the subscriber can be reached—and all assessed numbers are unique addresses held for the benefit of a unique user.

Finally, the process for determining the assessment rate would be quite similar to the existing process. Instead of reporting projected collected revenues, carriers would report their average monthly projected assigned numbers, end user interstate and international special access or private line connections, and uncollectibles. Providers would file a quarterly 499-Q, as they do now, making these projections. Each quarter, USAC would use the 499-Q filings as the basis for projecting the total number of assessable numbers and special access/private line connections for the upcoming quarter industrywide, adjusting for uncollectibles. On this basis, USAC would propose, and the Commission would set, the per number or special access/private line connection assessment rate. The Commission and USAC could then implement a true-up, as under the current mechanism, to reconcile projections with actual carrier results.

### B. Connections-Based Assessments Will Cover Special Access and Private Line Services.

Special access and private line services are not associated with telephone numbers. When these services are used to provide an end user connection to public networks, they would be assessed based on the capacity of their end user connections, as both CoSUS[12] and the Commission[13] have already proposed. AT&T believes that the four-tiered capacity structure for special access and private line connections described in the *Second FNPRM* would be adequate and delineates the four main groups of capacities (DS-0, DS-1, DS-3 and OC-x) for special access/private line services.[14]

A DS-0 special access/private line connection would be assessed the same universal service contribution as an assigned telephone number, and again the assessment would be made on the telecommunications provider with the relationship with the end user customer. Each of the other capacity tiers would be assigned a weight, such as 16x for the DS-1 tier, 224x for the DS-3 tier, and 336x for the OC-x tier, as suggested by the Commission. AT&T believes that the weights proposed by the Commission would be sufficient and would not be unduly market distortive provided that the DS-0 tier has an assessment of approximately $1.00. If the DS-0 assessment were to be in the range of $3 or $4, however, these FCC proposed tier weights would likely substantially distort the market relationship between the prices for DS-0, DS-1, DS-3 and OC-x facilities.

There will be some instances in which the facility used to provide a special access or private line service will be used, in part, to deliver a switched service for which a telephone number is assigned in addition to the special access or private line service. In these situations, both the special access/private line capacity-based connection assessment and the telephone number assessment will be applied. For example, ISP modem banks typically require both switched and special access services. Under AT&T's proposal, the carrier that provides

[12] *See* CoSUS *FNPRM* Comments at 13-14.

[13] *Second FNPRM* at ¶ 98.

[14] *See id.* at ¶ 81.

telephone numbers to the modem bank would be assessed for those numbers, and the carrier that provides a special access connection to enable the ISP to communicate to or between servers would be assessed on that connection's capacity.

### C. AT&T's Modified Numbers-Based Proposal Will Have a Minimal Impact on Consumers.

AT&T estimates that its modified numbers-based contribution mechanism would yield a per-number or DS-0 special access/private line connection rate of less than $1.00 (approximately $0.99) per unit per month.[15] For a residential customer with one line, this would mean that a carrier could impose a universal service recovery line-item of less than $1.00 per month. Centrex, PBX and CMRS providers would all be assessed the same per number rate, and consequently their customers would have this amount passed on to them. Special access and private line connections would be assessed as follows: approximately $16 per month for a DS-1 (16 times $0.99), $222 per month for a DS-3 (224 times $0.99), and $333 per month for an OC-x (336 times $0.99). This is generally consistent with the results initially projected by Ad Hoc, once the difference between the tier weights for special access and private line connections used in the CoSUS proposal and the tier weights used in the *Second FNPRM* are taken into account.

The modified numbers-based contribution mechanism will be robust, and will give the Commission greater leeway as it addresses other universal service issues. For example, even if the USF grows to more than $6.6 billion for Fiscal Year 2004, and assigned telephone numbers and special access/private line connections remain constant, the per number assessment would

[15] *See* Exhibit 2, attached. Using the Administration's $6.6 billion USF projection, these calculations yielded an estimated per number assessment rate of approximately $0.99 for FY 2004 (which begins Oct 1, 2003). The actual assessment rate, however, will be based on the number of assigned numbers and special access or private line connections actually projected by contributors.

remain less than $1.00.[16] As the chart below shows, as assigned numbers and special access/private line connections increase, USF can also increase proportionately without increasing the assessment rate:

| | | **Annual % Change in Assigned Telephone Numbers & Special Access Capacities (Starting with Current Estimates)** | | | | | |
|---|---|---|---|---|---|---|---|
| | | **-2.0%** | **0.0%** | **2.0%** | **4.0%** | **6.0%** | **8.0%** |
| **Annual % Change in FUSF Program Costs (Beginning FY2004)** | **0%** | $1.05 | $0.99 | $0.93 | $0.88 | $0.83 | $0.78 |
| | **2%** | $1.11 | $1.05 | $0.99 | $0.93 | $0.88 | $0.83 |
| | **4%** | $1.18 | $1.11 | $1.05 | $0.99 | $0.93 | $0.88 |
| | **6%** | $1.25 | $1.18 | $1.11 | $1.05 | $0.99 | $0.93 |
| | **8%** | $1.32 | $1.24 | $1.17 | $1.11 | $1.04 | $0.99 |
| | **10%** | $1.40 | $1.31 | $1.24 | $1.17 | $1.10 | $1.04 |

## II. THE INTERIM USF CONTRIBUTION MECHANISM REMAINS UNSUSTAINABLE AND DISCRIMINATORY.

The Commission's interim decisions to adopt an increased "safe harbor" for wireless services and to switch to a "projected collected" basis for revenue assessments[17] are welcome modifications that will ease some of the anticompetitive effects of the current system. In the longer term, however, these interim modifications are not sufficient to stabilize the USF system; they do not remedy the basic "death spiral" that renders the revenues-based contribution mechanism unsustainable and, therefore, insufficient. Moreover, the interim mechanism continues to be discriminatory.

[16] *See* Exhibit 2.

[17] *See Interim Order* at ¶ 1; 47 C.F.R. § 54.709, as amended by the *Interim Order*.

### A. The Interim Revenues-Based Mechanism Will Not Halt the USF Contribution "Death Spiral."

Although the Commission took steps in its interim contribution order to expand the revenue base for universal service contributions by increasing the wireless safe harbor, it did not address the more fundamental underlying trends that are pushing the revenues-based contribution mechanism into a "death spiral" of accelerating factor increases and increased pressure for business users in particular to find ways to avoid USF contribution altogether. Indeed, by adopting a projected, collected revenue approach—which was necessary to address discrimination caused by reporting lags under the prior mechanism—the Commission actually accelerated the speed with which declines in the interstate and international end user telecommunications revenue base will be reflected in increased contribution factors. That change will tend to accelerate the "death spiral."

#### 1. The Contribution Base Will Continue to Decline While The USF Continues to Increase.

There is no doubt that the total USF will continue to increase in the absence of further changes in the structure of the Commission's USF programs, particularly the high cost programs. As CoSUS previously pointed out, with the exception of the Interstate Access USF (*i.e.*, CALLS) support, high cost programs are not subject to hard caps.[18] Each of these programs—especially the rural and non-rural high cost funds and the Interstate Common Line Support ("ICLS")—is growing.[19] Moreover, given the way these programs are structured, as competitive ETCs are certified and win new customers in a given service area, additional support is paid to the CETC, but not deducted from the ILEC, which means that CETC entry further increases the size of the

[18] CoSUS *FNPRM* Comments at 18-19.

[19] *Id*.

USF programs.[20] The Office of Management and Budget has projected that, absent changes in the Universal Service programs, the total USF will grow by $400 million by 2005, and by almost $800 million by 2008.[21]

Moreover, Congress and the Commission continue to consider, and parties continue to propose, other changes to USF programs that could further increase their size even beyond the levels projected by OMB.[22] Congress routinely considers bills to repeal the caps on the high-cost fund.[23] The Joint Board is currently considering whether changes should be made to the Lifeline and Link-up programs. And although the Joint Board has not recommended expanding the definition of supported services to include broadband, parties continue to make such proposals. The Commission continues to review whether the Interstate Access Universal Service Support Fund should be maintained at $650 million, and petitions for reconsideration of the *MAG Order*

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[20] *Id*. According to the Federal-State Joint Board on Universal Service, CETCs received approximately $2 million of $638 million in high cost support in the first quarter of 2001, which grew to $14 million of the total $803 million in high cost support by the third quarter of 2002. *See Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules relating to High-Cost Universal Service Support & the ETC Designation Process*, Public Notice, CC Docket No. 96-45, FCC 03J-1 (rel. Feb. 7, 2003), at 7 (¶ 10).

[21] The President's 2004 Budget projects, on a current services basis, that the USF will be $6.329 billion in FY2003, $6.651 billion in FY2004, $6.733 billion in FY2005, and $7.125 billion in FY2008. Budget of the United States, FY 2004, Analytical Perspectives, Current Services Estimates, Table 15-11: Current Services Budget Authority by Function, Category & Program, at 343. The President's 2004 Budget is available online at www.whitehouse.gov/omb/budget/fy2004.

[22] *See* Letter from Karen Brinkmann, Latham & Watkins, to Marlene H. Dortch, Federal Communications Commission, filed Dec. 23, 2002, at Attachment 1 (proposing to reduce access charges for some carriers to $0.0125 per minute, with the balance supported through additional Interstate Common Line Support).

[23] CoSUS *FNPRM* Comments at 19-20 n.50.

remain pending that would increase the amount of explicit support for service in areas served by rate-of-return LECs.[24]

While pressures continue for the fund to increase, the contribution base of interstate and international end user telecommunications revenues is likely to continue to shrink. Although updating the wireless safe harbor will, to some extent, cause a one-time increase in the contribution base, the magnitude of that increase depends upon the number of wireless carriers that elect the safe harbor as opposed to contributing based on company-specific cost studies and the levels allegedly supporting those cost studies. It will not be surprising if a large number of wireless carriers elect to contribute based on company-specific studies, so that the increase in the contribution base from the increase in the wireless safe harbor will prove to be modest. Moreover, the Commission has not provided rigorous guidance for such studies, nor has it set forth a process to ensure that those studies are reviewed for methodological soundness. This leaves open the possibility that these studies will not accurately or on an updated basis reflect actual wireless revenues attributable to interstate traffic. In addition, this one-time increase in wireless interstate revenues will be offset by a decrease in the wireline interstate revenue base stemming from the switch from use of 6-month-lagged revenues to projected revenues as the basis for USF contribution. The contribution base will also be reduced by the removal of uncollectible amounts, as the interim mechanism will assess collected, rather than billed, revenues. These interim changes to contribution based on projected, collected revenues are sound public policy, and they make the interim contribution mechanism less discriminatory. But

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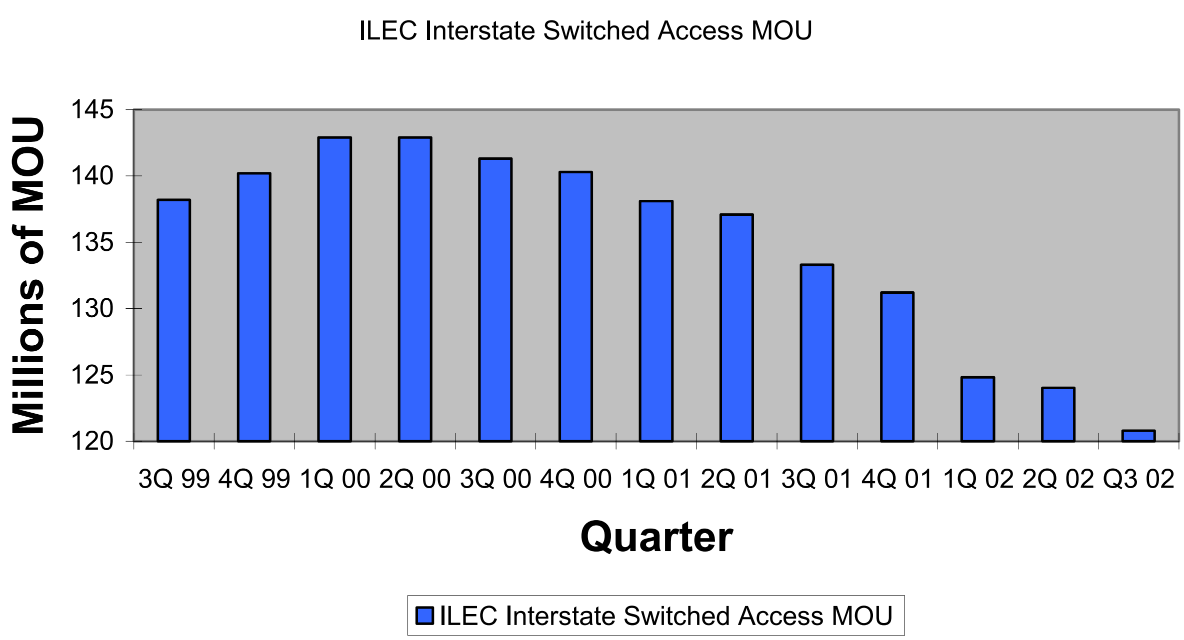
[24] CoSUS *FNPRM* Comments at 20; *In re Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers & Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Rural Consumer Choice Coalition Petition for Reconsideration (filed Dec. 28, 2001).

elimination of the reporting lag and removal of projected uncollectibles from the revenue base will, nevertheless, reduce the revenue base.

Even after these one-time changes from the interim contribution order are taken into account, other trends continue to exist that are likely to lead to further shrinkage of the interstate and international end user telecommunications revenue base. Last fall, NECA released a report projecting that the universal service fund will continue to grow and the revenues base will continue to shrink, causing the contribution factor to rise from 7.62 percent in 2002 to 11.08 percent by 2006.[25] And NECA filings confirm that wireline switched interstate usage continues to fall; the most recent NECA MOU report shows that interstate switched access MOUs fell over 2.5 percent in the third quarter 2002, making it the tenth successive quarter-over-quarter decline:



NECA-reported interstate switched access minutes of use are lower now than at any time since the end of 1996.

### 2. The Bundling "Safe Harbors" Cannot Halt the "Death Spiral" And Remain Inadequate and Discriminatory in Allocating Bundled Revenue to Interstate Telecommunications.

As CoSUS pointed out in its comments in response to the *First Further Notice of Proposed Rulemaking*, the universal service contribution death spiral is fed by the increasing prevalence of bundled service packages that combine interstate, and international telecommunications service, other telecommunications service, information services and CPE. As federal universal service contributions factors increase, so will the incentive for carriers and their customers to structure these packages in a manner that minimizes federal universal service contribution.[26] The FCC has attempted to address this through its bundling safe harbors, but, as CoSUS previously explained, the Commission's bundling safe harbors are both futile and discriminatory.[27]

Any proposed method of identifying interstate telecommunications revenues within a bundled package is arbitrary and administratively unworkable. For example, under the Commission's bundling "safe harbors," a carrier is permitted to allocate revenue to the interstate or international telecommunications component of a bundle using the "standard business" or "tariffed" stand-alone rate for the interstate telecommunications service.[28] Other commenters

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Continued . . .

[25] *See* Trends in Telecommunications Cost Recovery: The Impact on Rural America, National Exchange Carrier Association (Oct. 2002), at 37-46.

[26] CoSUS *FNPRM* Comments at 23.

[27] *Id*. at 25.

[28] *See In re Policy & Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review—Review of Customer Premises Equipment & Enhanced Services*

have proposed revenue allocation according to the lowest stand-alone rate.[29] But under either system, it can be difficult to identify the appropriate stand-alone rate at all. Often, there are multiple stand-alone rates that could serve as potentially appropriate points of reference for the bundled service, and determining which of these offerings is the most appropriate analogue has no easy answer. And while determining the most appropriate cross-reference is difficult for tariffed services, in a detariffed environment it is almost impossible.

Perhaps even more significantly, customers themselves will not be content passively to accept allocation of revenues within the bundle according to the FCC's "safe harbors." Providers will be forced by competition to use other allocation mechanisms that recognize that contract rates are usually below "standard" or "tariffed" rates.[30] Maintaining the revenues-based approach will increasingly place the Commission in the role of "rate police," passing judgment on the inherently arbitrary process of choosing the proper analogue for services within a bundle.[31]

The problem of allocating revenues does not apply only to mixed bundles that include information services and CPE, but also to sales of local exchange and exchange access service. The comments of SBC in response to the *Notice of Proposed Rulemaking* illustrate this point.[32] SBC first argued that, because CLECs are not required to perform jurisdictional separations,

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*Unbundling Rules in the Interexchange, Exchange Access & Local Exchange* Markets, 16 FCC Rcd 7418, 7447 & n.152 (¶ 50), 7448 (¶ 52) (2001) ("*Bundling Order*").

[29] *See, e.g.*, Home Telephone *NPRM* Comments at 9 (filed June 25, 2001).

[30] *Bundling Order*, 16 FCC Rcd at 7448 (¶ 53); *see also* Ad Hoc *NPRM* Comments at 24. The *Bundling Order* expressly permits carriers to use other methods to allocate revenues, provided they are "reasonable." *Bundling Order*, 16 FCC Rcd at 7448 (¶ 53).

[31] *See* AT&T *NPRM* Comments at 12 (filed June 25, 2001); WorldCom *NPRM* Comments at 18-20 (filed June 25, 2001).

[32] SBC *NPRM* Comments at 11-12 (filed June 25, 2001).

there is no way to identify the portion of their revenues that are interstate. As a result, SBC alleged, CLECs could game the system and understate their interstate revenues. SBC therefore proposed that "[t]he Commission could establish a safe harbor interstate allocation percentage for the exchange access component of each access line and give CLECs the option of performing a separations calculation to justify a different interstate allocation percentage."[33] Of course, once incumbent ILECs obtain Phase I pricing flexibility, they also execute contract tariffs and no longer provide services according to rates that have some historical tie to separations. A fundamental inconsistency exists between competition-based deregulation and forced allocation of revenues into interstate and intrastate categories for universal service purposes.

Without an effective and marketplace-consistent means to address the allocation of revenues within a bundled contract, the current end user interstate and international telecommunications revenues-based contribution mechanism leaves the Commission with the unpalatable alternatives of either eliminating bundling and foregoing its benefits to consumers, or simply accepting the universal service "death spiral" that will accelerate as customers seek to minimize their universal service charges.

In light of the inevitability of the USF "death spiral" in the face of bundling, the revenues-based contribution mechanism can no longer meet the statutory requirement that the universal service mechanism be "specific, predictable and sufficient."[34] Although the Commission is currently reconsidering the definition of the term "sufficient," it certainly cannot encompass a contribution mechanism that is unsustainable. If there is no sustainable way to collect universal service contributions, there is simply no way for that mechanism to be

[33] *Id.* at 12.

[34] 47 U.S.C. § 254(d).

"sufficient [to] preserve and enhance universal service."[35] The Commission cannot continue to maintain a contribution system that fails to meet this fundamental statutory requirement.

Maintaining the revenues-based approach, therefore, will increasingly require the Commission to play "rate police" in a never-ending attempt to assess bundled and non-bundled services equitably and nondiscriminatorily.[36] In light of the proven consumer benefits of bundling, plus the inevitability of the "death spiral" of a revenues-based mechanism even after the tinkering of the *Second FNPRM*, the Commission must shift USF away from a contribution base of end user interstate and international telecommunications revenues to a mechanism, such as numbers, that will be "specific, predictable and sufficient."[37]

### 3. Many VoIP Providers May Not Be Included in the Assessment on End User Telecommunications Revenues.

In its 1998 *Report to Congress* on universal service,[38] the Commission engaged in a lengthy examination of VoIP telephony, including whether any or all VoIP services were "telecommunications services" subject to USF assessment. The *Report to Congress* described VoIP as consisting of services that "enable real-time voice transmission using Internet Protocols" that can be "transmitted along with other data on the 'public' Internet, or can be routed through intranets or other private data networks for improved products."[39] It also went on to identify at least three basic ways in which VoIP could be offered: (1) computer-to-computer services in which calls are transmitted end-to-end in IP protocol, with the computers on each end

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[35] *Id.*

[36] *See* AT&T *FNPRM* Comments at 12 (filed Apr. 22, 2002); WorldCom *FNPRM* Comments at 13-17 (filed Apr. 22, 2002).

[37] 47 U.S.C. § 254(d).

[38] *In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) ("*Report to Congress*").

[39] *Id.* at ¶ 84.

performing the protocol conversion from voice to IP and back; (2) services that employ a gateway to perform necessary protocol conversion and thereby allow users to call from their computer to ordinary telephones connected to the public switched network;[40] and (3) services that employed multiple gateways so that there is a "virtual transmission path between points on the public switched network over a packet-switched IP network."[41]

If the Commission decides to maintain the interstate and international end user telecommunications revenues-based USF assessment mechanism even as VoIP matures and becomes a truly viable alternative to traditional circuit-switched long distance service, it will face more directly the issues it preliminarily addressed in its 1998 *Report to Congress* as to whether some forms of VoIP are telecommunications services subject to universal service, and others are not.

A numbers-based assessment mechanism, however, would neatly sidestep these classification problems by simply requiring all providers of assigned telephone numbers—*i.e.*, all providers of a unique PSTN address—to contribute to USF based on their working telephone numbers, irrespective of whether those numbers are used to provide circuit-switched connections or VoIP-based service. A numbers-based mechanism would allow VoIP to continue to develop, without prejudging difficult regulatory classification issues, and would still require VoIP to contribute to universal service when a VoIP user wants to have the ability to be reached from PSTN connections, and therefore to reap the benefits of the PSTN's broad connectivity to users in all regions of the nation and in all income groups.

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[40] *Report to Congress* at ¶ 84.

[41] *Id.* at ¶¶ 84, 89.

### 4. An Increasing Fund and Decreasing Interstate Revenues Base Means that Contribution Factors Will Continue to Increase.

It is axiomatic that an increasing universal service fund and decreasing contribution base of interstate and international end user telecommunications revenues will mean ever-escalating contribution factors. The magnitude of those factors depends on the relative rate of increase in the fund and the relative decrease in the contribution base. The impact of an increase in fund size and a decrease in the contribution base are predictable. The following chart demonstrates that even modest fund growth and modest year-over-year decline in the contribution base will result in high contribution factors: OMB's projections of fund growth for FY2004-FY2007 (averaging 1.74 percent per year), combined with a very modest 2 percent annual decline in the assessable interstate and international end user telecommunications revenues (which have declined an average of more than 8 percent per year in 2001 and 2002), will likely push the contribution factor to well over 10 percent within three years:

| Current Revenues-Based USF Mechanism<br>Assessment Rates at the end of 3 Years (Starting @ 9.3%) | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | **Annual % Change in the Assessable USF Revenue Base** | | | | | |
| | | **-8.0%** | **-6.0%** | **-4.0%** | **-2.0%** | **0.0%** | **2.0%** |
| **Annual % Change in FUSF Program Costs (Starting FY2004)** | **0%** | 11.9% | 11.2% | 10.5% | 9.8% | 9.3% | 8.7% |
| | **2%** | 12.6% | 11.8% | 11.1% | 10.5% | 9.8% | 9.3% |
| | **4%** | 13.4% | 12.6% | 11.8% | 11.1% | 10.4% | 9.8% |
| | **6%** | 14.2% | 13.3% | 12.5% | 11.7% | 11.0% | 10.4% |
| | **8%** | 15.0% | 14.1% | 13.2% | 12.4% | 11.7% | 11.0% |
| | **10%** | 15.8% | 14.9% | 13.9% | 13.1% | 12.3% | 11.6% |

### B. The Interim Rules Do Not Fully Address Discrimination between Wireline and Wireless Service Providers, or between International Carriers.

#### 1. Wireless v. Wireline Providers.

Although the Commission increased the wireless "safe harbor," that action only temporarily reduces—but does not eliminate—the systemic discrimination in favor of wireless carriers over wireline carriers. The Commission's interim universal service contribution mechanism and recovery rules will continue to discriminate against wireline providers of telecommunications services, and particularly of long distance services.

Even with the increased wireless safe harbor in the *Interim Contribution Order*, wireless carriers will pay less in aggregate universal service contributions than wireline carriers for handling the same traffic. In the first instance, residential and single line business subscribers on wireline networks pay a monthly recurring subscriber line charge of up to $6.00 (increasing to $6.50 in July 2003), which is interstate end user telecommunications revenue. At the current assessment rate of 7.28 percent, wireline carriers—and their residential customers—pay approximately $0.44 in universal service contributions even without interstate long distance usage. There is no equivalent contribution paid by wireless carriers and their customers because revenue for wireless carriers is allocated between interstate and intrastate on the basis of either company-specific or default measures of the percentage of interstate usage. This plainly discriminates between wireless and wireline carriers.

In addition, even with respect to contributions for revenues from charges for placing actual interstate calls, wireless-based long distance service has a discriminatory advantage based on universal service contributions. First, with the wireless-safe-harbor set at 28.5 percent, any wireless carrier whose actual percentage of interstate traffic exceeds 28.5 percent will simply elect the safe harbor. The safe harbor operates as an absolute cap on wireless contributions that is not available to wireline long distance carriers. Second, for wireless carriers that report interstate usage via company-specific traffic studies, the wireless carrier and the wireline carrier will only contribute proportionately the same amounts to universal service if the wireless carrier traffic studies are periodically updated and take account of projected growth. If, for example, company-specific wireless interstate revenue allocators are established based on two-year-old historical traffic data, and the wireless percentage of interstate use grows by 2 percent per year, the wireless carrier will be allocating too little revenue to interstate and paying less than its actual average percentage of interstate traffic. Unless the Commission takes steps to prevent these studies from becoming grossly out of date and lagged, the current mechanism will continue to be highly discriminatory, even on average across a carrier's entire customer base.[42]

In addition, the interim revenues-based contribution mechanism remains highly discriminatory when analyzed with respect to incremental interstate usage. Even at the safe harbor allocator of 28.5 percent, there remains a substantial universal service contribution-based incentive to shift interstate traffic from wireline service to wireless service.[43] Assume a customer has 200 minutes of long distance usage at 5 cents per minute. If the customer can shift those 200 minutes of interstate usage to her wireless plan, and pay less than \$10 in additional wireless charges, she rationally will do so. This customer would pay \$0.72 in USF with a wireline carrier and no more than \$0.21 USF with a wireless carrier.

The impact of such a move on universal service is dramatic. Rather than the wireline long distance carrier reporting \$10 in end user interstate telecommunications revenue, the wireline long distance carrier reports \$0 in end user interstate telecommunications revenue. The

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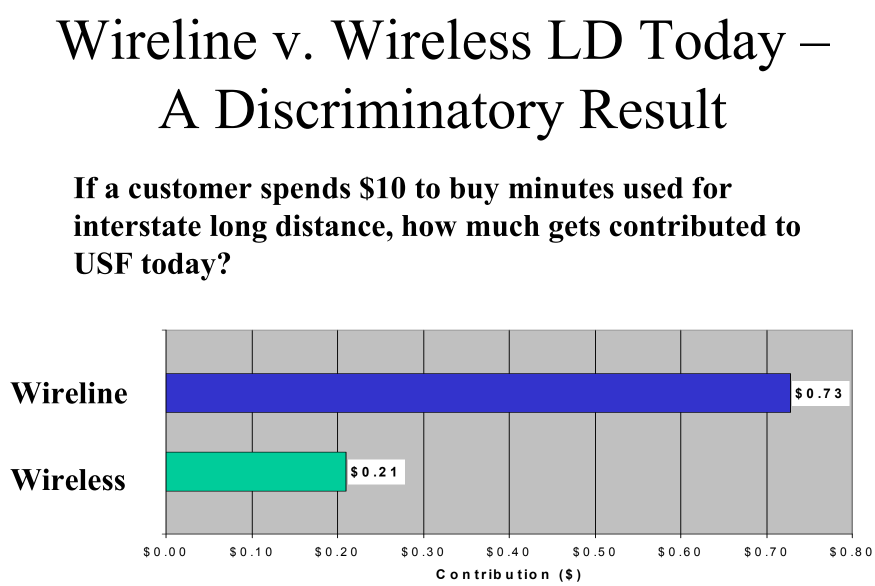
[42] Wireless carriers that use company-specific traffic studies should be required to update those studies at least once a year under the Commission's true-up process.

wireless carrier, even if it gets all $10 as new expenditures, reports a maximum of $2.85 as interstate revenue (28.5 percent of $10), with the balance no longer subject to federal universal service assessment. Even at today's contribution rate of 7.28 percent, as shown in the chart below, this means the wireline carrier pays nearly three and a half times the universal service contribution as the wireless carrier for the same $10 of revenue generated from incremental interstate traffic:




This incremental effect is highly discriminatory and not consistent with Section 254's direction that universal service contributions be "equitable and nondiscriminatory."

In sum, although the changes to the revenues-based mechanism have addressed some of the discrimination in the USF contribution mechanism that favors wireless providers over

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[43] *See* Declaration of Daniel Kelley & David Nugent, appended to CoSUS *FNPRM* Comments as Attachment 4, at ¶¶ 17-18 (filed Apr. 22, 2002).

wireline providers, the interim mechanism remains highly discriminatory. A more permanent change is necessary to meet the Act's requirements.

### 2. International Carriers.

As CoSUS also previously pointed out, the Commission's revenues-based universal service contribution mechanism discriminates against providers of international telecommunications that are affiliated with domestic common carriers, and in favor of "pure play" international service providers.[44] This exemption remains competitively biased, as it exempts from universal service contribution all international revenues for carriers whose interstate end user telecommunications revenues are less than twelve percent of their combined interstate and international end user telecommunications revenues. A provider of international services that does not fall within this exemption must still pay universal service contribution based on all its international end user telecommunications revenues. This skews international competition in favor of "pure play" providers, and this discrimination only intensifies as the contribution factor increases.[45]

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[44] CoSUS *FNPRM* Comments at 34-35.

[45] When the Commission initiated the international exemption at 8 percent, the contribution factor was only 5.8995 percent, and interstate and international revenues were growing. *See In re Federal-State Joint Board on Universal Service; Access Charge Reform*, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report & Order in CC Docket No. 96-45, & Sixth Report & Order in CC Docket No. 96-262, 15 FCC Rcd 1679 (¶ 19) (1999); *In re Proposed Fourth Quarter 1999 Universal Service Contribution Factor for Nov. & Dec. 1999*, Public Notice, 1999 FCC LEXIS 5026, at *9 (rel. Oct. 8, 1999). Indeed, when the Commission raised the international exemption to 12 percent, the contribution factor was 6.8086 percent. *See In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, & Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan & North American Numbering Plan Cost Recovery Contribution Factor & Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing & Billing Form*, Further Notice of Proposed Rulemaking & Report

There are only two ways to eliminate this bias in favor of "pure play" international carriers: either exclude all international end user telecommunications revenues from the contribution base, or shift to a contribution base that does not rely on end user telecommunications revenues.

**3. Line-Item Recovery Limitations Are Discriminatory.**

The interim USF contribution and recovery mechanisms are also discriminatory because of the manner in which the Commission has discriminatorily limited AT&T's options to recover universal service assessments. First, the Commission, especially through its *Order on Reconsideration*, discriminatorily and uniquely allows wireless carriers to average their universal service line-item recovery across all customers, irrespective of that customer's actual interstate usage.[46] Wireline carriers, in sharp contrast, can only bill a universal service line-item that reflects the actual interstate charges to *that customer* times the contribution factor. This means that a long distance customer that uses its wireless phone to make a greater than average proportion of interstate long distance calls will pay a much lower effective universal service line-item if it makes those calls using a wireless carrier's service, rather than a wireline carrier's service.

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& Order, 17 FCC Rcd 3752, 3761 (¶ 21) (2002); *In re Proposed First Quarter 2002 Universal Service Contribution Factor*, Public Notice, 16 FCC Rcd 21334 (2001).

[46] *See In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format*, Order & Order on Reconsideration, 2003 FCC LEXIS 443, FCC No. 03-20 (rel. Jan. 30, 2003), at ¶ 8.

Second, in ruling that a carrier such as AT&T cannot increase its USF line-item to other customers to average the recovery of unbillable USF contributions across AT&T's entire customer base,[47] the Commission assumed (without record support) that AT&T could recover its unbillable contributions in those areas by combining its service-related and USF recovery charges in a single charge.[48] However, even assuming such a single charge would be preferable, it would take some time for AT&T to be able to implement the rate structures that the Commission assumed would be a ready option. Averaging recovery of these unbillable contributions is more consistent with the averaging permitted for wireless carriers. In effect, this new limitation against averaging the collection of unbillable USF contributions will deny AT&T a reasonable opportunity to recover the USF contributions associated with unbillable accounts.

Although these discriminatory aspects of the interim mechanism are caused by the USF line-item recovery limits rather than the initial carrier assessment mechanism, they relate directly to the issue of what the permanent USF contribution assessment mechanism should look like. If the Commission were to adopt a numbers-based contribution mechanism along the lines of that proposed by AT&T, wireless carriers and wireline carriers would be assessed in exactly the same manner, and wireless carriers would not have a preferential benefit of being able to average their USF assessments and recovery across all customers. Similarly, the "unbillables" issues would be eliminated. In essence, picking the right assessment mechanism will reduce discrimination and implementation problems that plague the Commission's new rules limiting cost-recovery through universal service line-items.

[47] *Second FNPRM* at ¶ 56-58.

[48] *Id.*

## III. A NUMBERS-BASED APPROACH WOULD BE SUSTAINABLE, EQUITABLE, AND NONDISCRIMINATORY.

### A. A Numbers-Based Approach Would Be Sustainable.

A numbers-based mechanism will be sustainable and will avoid the "death spiral" because the pool of working telephone numbers is stable and steadily growing, and can easily be counted and assessed using existing reporting requirements.[49] Equally important, a numbers-based contribution mechanism would avoid entirely the need to distinguish interstate and international revenues from other revenues that will continue to plague the modified interim revenues-based mechanism, and will be much less vulnerable to the rise of VoIP services.

#### 1. Unlike Revenues, Numbers Are Not Threatened by the Rise of Bundling/"All-Distance" Services.

In contrast to the revenues-based assessment mechanism, a numbers-based mechanism cannot easily be thwarted by carriers and customers working together to avoid carrier assessments and end user USF charges by constructing contracts to allocate more revenue within a bundled offering to services other than interstate or international telecommunications. No user can be called from ordinary telephones on the PSTN without having a telephone number: a number is a user's unique, PSTN address.[50] Indeed, many users have more than one unique PSTN address. Bundling interstate and international telecommunications with other telecommunications, CPE, information services or management services does not change the number of unique PSTN addresses that the user is being provided. With a numbers-based mechanism, the Commission will be freed of the "rate police" task of continually analyzing and passing judgment on the allocation of revenues within bundled contracts. This alone makes a

[49] *Id.* at ¶ 99.

[50] A user may, of course, have more than one unique PSTN address, even for a single connection to the PSTN.

numbers-based assessment far more "specific, predictable and sufficient"[51] than the modified revenues-based mechanism.

### 2. Unlike Revenues, Numbers Are Not Threatened by the Rise of VoIP Services.

As explained in Part II.B.2 above, a numbers-based mechanism will simply assess universal service contribution based on the number of unique telephone numbers that a particular provider provides to end users, regardless of the regulatory character of the service for which the telephone number is used. This encompasses VoIP services that use NANP telephone numbers. Although VoIP subscribers may be able to reach each other or to place calls to a phone on the PSTN without being assigned a unique ten-digit telephone number, a VoIP subscriber will not be able to be reached from an ordinary circuit-switched telephone unless the VoIP subscriber has its own 10-digit telephone number that the circuit-switched network can recognize for call routing. This suggests that even when VoIP provides services that substitute for PSTN connections, VoIP subscribers will still demand that their VoIP provider assign them unique 10-digit telephone numbers.

Marketplace behavior, even in the nascent VoIP marketplace, confirms the continuing importance of 10 digit telephone numbers. VoIP providers appear to be configuring their services with the assumption that their customers will be receiving calls and therefore will need 10-digit telephone numbers to receive calls from the PSTN. For example, Vonage appears expressly to contemplate that the subscriber will receive as well as originate calls, with offerings including features such as call waiting and caller ID, and the customer being given the option to retain her existing number or be given a new number (even in a different area code).

[51] 47 U.S.C. § 254(d).

A numbers-based mechanism would collect universal service assessments from these VoIP providers that provide numbers to end users (or alternatively from the carriers that supply the VoIP providers with numbers) regardless of whether these new VoIP services, many of which necessarily involve net protocol conversions from circuit switching to IP, are characterized as information services or telecommunications services. Migration to a numbers-based contribution mechanism will ensure that universal service continues to be supported even as VoIP grows.

#### 3. Numbers and Special Access Connections Are Likely to Continue to Grow.

Telephone numbers and special access connections are also likely to continue to grow. As service providers develop more and more devices that need to be uniquely addressed with the capability of being reached by any other device on the PSTN, more numbers will be needed. Moreover, as companies have developed products such as e-fax, demand for numbers has continued to grow. As numbers grow, a numbers-based mechanism reduces automatically the amount of contribution that must be collected for each assigned number. Alternatively, additional fund growth can be accommodated without increasing the total USF recovery charge to end users.

### B. A Numbers-Based Approach Would Be Competitively Neutral.

The AT&T proposal for a modified numbers-based assessment mechanism contains no bias against any particular provider or any technology. Allowing carriers to recover all costs associated with the collection of assessments will avoid the possibility of cost-based disparities. And, as is explained in the examples below, equivalent services are treated in an equitable and nondiscriminatory manner.

### 1. Local v. Local.

The AT&T proposal would not discriminate between incumbent LECs and competitive LECs. Each LEC would face the same assessment for providing the same services to a customer. For example, whether an incumbent LEC or a competitive LEC provided basic switched local residential or business line service and the ability to connect to a long distance carrier to a customer, the customer's provider would be assessed the same per-number amount. Moreover, there is no structural reason for implementation costs to vary among carriers with different LEC business plans. A carrier that bundles local and long distance service is assessed the same USF contribution fee as the carrier that does not bundle.

In addition, each carrier can calculate its USF contributions based on its own data from serving its own customer. This proposal does not require information sharing among carriers, and it does not—as SBC/BellSouth would—automatically disadvantage non-vertically integrated carriers by imposing upon them information acquisition costs that are not borne by integrated providers.

AT&T's proposal would terminate the discriminatory feature of the current system that allows some competitive LECs, and some incumbent LECs with pricing flexibility, to lower their assessments via the self-help method of adjusting the amount of revenue assigned to interstate services on a customer-by-customer, contract basis. AT&T's proposal will more reliably ensure that the customers of these LECs are paying their fair share of the burden of supporting universal service, and that universal service avoidance cannot be used as a competitive advantage.

### 2. Vertically Integrated Long Distance v. Other Long Distance.

As with LECs, competing IXCs will pay the same amount for any equivalent services they provide to end users, regardless of whether the IXC is a standalone long distance provider or a vertically integrated telecommunications company. For example, any long distance carrier that provides an end user customer with a toll-free number dedicated to that customer's use would be assessed a per number contribution assessment, regardless of whether or not the carrier was vertically integrated.[52]

Also, as with LECs, the implementation costs of competing IXCs will be indistinguishable, regardless of whether any given IXC is standalone or vertically integrated. In contrast, the SBC/BellSouth-type "split-the-fee" proposals discussed in Part III.E.1 below would favor vertically integrated providers with lower implementation costs as well as lower ongoing transactional costs.

**3. Wireline v. Wireless.**

As discussed above, under the current system, if the Commission does not require wireless carriers to keep their traffic studies up to date and to take account of prospective growth in the percentage of interstate use, on average long distance minutes provided over a CMRS network will pay far less in USF contributions than equivalent long distance minutes provided over wireline long distance facilities—even accounting for the recent increase in the interim wireless "safe harbor" percentage.[53] In addition, the wireline local connection is assessed for USF under the current mechanism based on the SLC charge, with wireline interstate usage assessed in addition, while wireless is assessed according the wireless carrier's average percentage of interstate usage, as determined by its traffic study. These different formulae assure that wireless carriers and wireline carriers are assessed different amounts for providing the same service to a customer—the ability to connect to the network, and to place local and long distance calls.

[52] The only exception to this rule would be whatever distortive payments may be required by a minimum contribution system, if any; the numbers-based mechanism itself would be fully competitively neutral.

The AT&T proposal, in contrast, would establish a level playing field between wireline- and wireless-based long distance and local services, treating equivalent offerings in the same manner by assessing only the provision of the telephone number. Wireless and wireline interstate MOUs would not themselves be assessed, and certainly not at a differential rate, as they are under the current system.

#### 4. Subscription CMRS v. Prepaid CMRS.

Providers of prepaid wireless service objected to a connection-based assessment mechanism claiming it would be difficult to determine in which months a prepaid carrier was providing a "connection," as the use of their service is casual and not subject to a monthly recurring subscription agreement. Although the Commission may have been able to address those concerns by using some kind of "rule of thumb" to determine the assessment, a numbers-based contribution mechanism faces no such difficulties.

Prepaid wireless carriers, like subscription wireless carriers, assign their handsets a unique PSTN address in the form of a telephone number. These numbers meet Section 52.15(f)(1)(iii)'s definition of assigned numbers, and consume numbering resources. Under a numbers-based mechanism, both the prepaid wireless carrier and the subscription wireless carrier would be assessed a universal service assessment each month for each assigned number. They are treated exactly the same.

It will, of course, be up to the prepaid wireless carrier to determine how it recovers the numbers-based universal service assessment. Nothing in the FCC's rules, however, precludes recovery through per minute rates or through debiting a customer's prepaid account by a certain amount at each use or in each month of use.

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[53] *See* Section II.B.1, supra.

The prepaid wireless carrier will also determine for how long it will continue to assign a number of an unused handset before it will reclaim the number and allow it to be reassigned. The prepaid wireless carrier will have an economic incentive to reclaim these numbers. Consequently, a numbers-based universal service contribution mechanism will actually promote efficient number utilization by the prepaid wireless carrier – an incentive that may not otherwise exist.

#### 5. Centrex v. PBX.

A USF contribution mechanism based on assigned telephone numbers also treats Centrex services and PBX-based services in a similar manner. Both Centrex and PBX-based services interconnect a number of stations within a single user—such as a business or college or university. The individual stations can dial one another within the user's network, but they can also dial outside to the PSTN and be dialed from the PSTN. In the case of Centrex services, the switching among users and to or from the PSTN occurs in the LEC central office, with each station assigned a separate number associated with the line from the central office. In a PBX system, all calls to and from the PSTN are routed from the LEC central office to the PBX, which then switches calls to or from the appropriate station. Stations on a PBX system are usually assigned unique Direct Inward Dial (DID) numbers that allow a PSTN call to be routed directly to the appropriate station, without operator intervention.

Under the modified numbers-based mechanism, both Centrex and PBX-served stations would be assessed to the extent they are uniquely addressable from the PSTN by means of an assigned telephone number. It is this unique addressing that consumes the public resource of a telephone number, and a twenty-five line Centrex service will consume the same amount of numbers and pay the same universal service assessment as a PBX system with twenty-five DID numbers that allow its twenty-five stations to be dialed directly. In short, a customer seeking to connect twenty-five stations to the PSTN will pay the same USF contribution regardless of whether it selects a Centrex or a PBX-based service configuration. There is no need for a conversion factor to maintain competitive neutrality between Centrex and PBX services.

#### 6. VoIP v. Circuit-Switched.

AT&T's modified numbers-based contribution mechanism would also treat VoIP and traditional circuit-switched services in a nondiscriminatory manner, irrespective of whether the VoIP services are classified as information services or telecommunications services. In the first instance, a numbers-based mechanism would capture the same amount of universal service contribution from service to a VoIP subscriber with a unique phone number as from service to a subscriber that used circuit-switched services with a unique phone number. In each case, the provider's universal service assessment is based simply on the assignment of unique telephone numbers to each subscriber. This is nondiscriminatory as between IP and circuit-switched voice services.

Subscribers, particularly large businesses, that use outbound-only VoIP are not likely to be able to avoid universal service assessments. For example, an enterprise customer that uses outbound-only VoIP services, perhaps from an IP PBX, will still use a special access or private line connection. As discussed further below, that connection itself will be assessed according to the capacity of the special access/private line connection.

### C. By Assessing Special Access and Private Line Connections, a Modified Numbers-Based Approach Would Avoid Skewing Traffic Away from Switched Services.

AT&T shares the Commission's concern that special access and private line services that are not associated with telephone numbers be assessed in an equitable and nondiscriminatory manner.[54] To that end, AT&T believes that a tiered approach to such services is both rational and necessary to avoid skewing traffic away from traditional switched services that use numbers.

AT&T continues to support the three-tiered approach for special access and private line services first advocated by CoSUS, and supported in connection with a numbers-based contribution mechanism by Ad Hoc in its ex parte letter of October 3, 2002.[55] That three-tiered system generally captured the major branches of connection capacity—DS-0, DS-1 and DS-3 or greater. Moreover, the tier weights included in the CoSUS proposal were designed so as not to skew market-purchase decisions between the capacity tiers.[56]

At the same time, the four-tiered capacity divisions proposed by the Commission in the *Second FNPRM* also appear to be workable.[57] The Commission's proposed tiers group comparable services together in the center ranges of each tier, and are therefore competitively neutral and unlikely to skew end user choices or carrier offerings. Designing the tiers so that they are centered on the principal capacity levels will likely help prevent "gaming," at least with respect to the most common tiers of services. AT&T does not object to the establishment of a fourth tier for OC-x service offerings.

The tier weights proposed by the Commission in the *Second FNPRM* also appear to be workable, provided that the DS-0 assessment rate is approximately $1.00 or less, rather than the $3.50-4.00 DS-0 rate likely to result under the connections-based proposal outlined by the Commission in the *Second FNPRM*.[58] With a base assessment rate of $1.00 or less, AT&T

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[54] *Second FNPRM* at ¶ 98.

[55] *See* Ad Hoc *Ex Parte*.

[56] CoSUS *FNPRM* Comments at 66; CoSUS *FNPRM* Reply Comments at 44-47.

[57] *Second FNPRM* at ¶¶ 81, 98.

[58] There are significant notable changes in the Commission's proposal from the proposal outlined by CoSUS, including potentially placing all increases in the USF on business customers.

believes that the resulting contribution amounts at the DS-1 and DS-3 tiers (respectively, less than $16 and less than $224) will not significantly alter procurement decisions, given that a typical DS-1 special access is generally priced between approximately $380 and $740, while the average price for a typical DS-3 is in the range of $2700 to $6600.[59]

The differences between the CoSUS tier weights and the Commission's proposed tier weights would, however, become significant if the Commission's proposed tier weights were to be applied to a DS-0 base assessment of approximately $4.00. At that base rate, the DS-1 and DS-3 universal service assessments become substantial (respectively, $64 for a DS-1 and $896 for a DS-3) when compared with the retail charges for these facilities. At those levels, there is a high likelihood that universal service contributions would significantly depress demand for these higher capacity services.

A voice grade equivalent (VGE) approach, previously suggested by some commenters, would simply make matters worse and thus continues to be inappropriate, as the Commission has recognized.[60] With a DS-1 at 24 VGEs, a DS-3 at 672 VGEs, and an OC-3 at 2016 VGEs, assessments based on VGEs would likely distort procurement of higher capacity facilities, and could lead to the situation in which the USF assessment actually nears or even exceeds the price of the underlying facility.

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[59] *See* Exhibit 3, attached. SBC/BellSouth previously estimated a DS-1 special access connection to be priced at $225, and a DS-3 at $2911. *See* Letter from Jamie M. (Mike) Tan to Marlene Dortch, Federal Communications Commission, filed Oct. 10, 2002. WorldCom stated that ILEC tariffed DS-3 channel termination rates are approximately $1000-$1500 per month, but a channel termination is only a portion of the charge for a special access connection. *See* WorldCom *NPRM* Comments at 24. Under the CoSUS proposal, assuming a DS-0 rate of $4, these connections would have been assessed $20 for a DS-1 and $160 for a DS-3.

[60] *Second FNPRM* at ¶ 82.

### D. The Commission Has Jurisdiction to Adopt a Numbers-Based Mechanism.

Arguments that Sections 254(d) and 2(b) of the Act bar the Commission from adopting a flat-rate assessment mechanism based on numbers and/or connections are mistaken. Nothing in the Act mandates a revenues-based mechanism, and nothing in the Act forbids a numbers-based mechanism, which in fact is far more consistent with the Act's policy goals than the interim revenues-based system.

#### 1. The Commission's Jurisdiction Over Numbering Resources Provides Plenary Authority to Adopt a Numbers-Based Approach.

The Act provides that "[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[61] Thus, any arguments that assessments on assigned telephone numbers would be beyond the Commission's jurisdiction simply do not apply. Moreover, as the Commission fights "the rapid depletion of numbering resources nationwide and the potential it creates for NANP exhaust,"[62] a numbers-based USF assessment mechanism would further encourage carriers and end users to avoid wasting numbering resources. At the same time, the continuing necessity of telephone numbers in interstate telecommunications, combined with the fact that AT&T's proposal will also assess alternatives such as private line and special access services, will ensure that AT&T's numbers-based assessment mechanism will not drive end users away from the use of telephone numbers.

#### 2. A Numbers-Based Approach Is Equitable, Nondiscriminatory, and Otherwise Consistent with Section 254(d).

The plain meaning of the "equitable and nondiscriminatory" language of Section 254(d) must include a requirement that the universal service contribution mechanism be competitively

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[61] 47 U.S.C. § 251(e)(1).

[62] *In re Numbering Resource Optimization*, First Report & Order & Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7578 (¶ 3) (2000).

neutral. Indeed, when the Commission adopted competitive neutrality as a principle for determining universal service support, it noted that "competitive neutrality is consistent with ... the explicit requirement of equitable and nondiscriminatory contributions."[63] Likewise, in adopting the initial version of the current contribution mechanism, the Commission noted that it "agree[d] with the Joint Board's recommendation that we must assess contributions in a manner that...is competitively neutral and is easy to administer."[64] And in *Texas Office of Public Utility Counsel v. FCC*,[65] the court noted that the "equitable and nondiscriminatory" requirement "also refers to the fairness in the allocation of contribution duties," and held that the Commission had erred by imposing "prohibitive" costs on COMSAT in a "discriminatory" manner.[66] In sum, a contribution mechanism must be competitively neutral in order to be "equitable and nondiscriminatory."

As described above, the numbers-based proposal is competitively neutral. It treats similar, potentially substitutable services equally, eliminates the discriminatory and distortive effects of the wireless "safe harbor" and the partial international exemption, and establishes an assessment base that is stable, growing, and not subject to attack on jurisdictional grounds. By contrast, even the newly modified revenues-based mechanism contains significant competitive inequities due to the wireless safe harbor and the partial international exemption, and competitive imbalances between carriers that sell bundles and those that do not. In short, the current revenues-based mechanism is no longer "equitable and nondiscriminatory" and thus violates Section 254(d).

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[63] *In re Federal-State Joint Board on Universal Service*, Report & Order, 12 FCC Rcd 8776, 8801 (¶ 48) (1997).

[64] *Id.* at 9206 (¶ 843).

[65] 183 F.3d 393 (5th Cir. 1999).

Parties that support splitting USF assessments between access providers and transport providers have wrongly argued that vague and standardless notions of "fairness" somehow override the requirement that the contribution mechanism be competitively neutral. Moreover, the very concept of "fairness" must also consider the difficulties and transaction costs that would be incurred in implementing any given proposal. All transactions and administrative costs ultimately are borne by consumers, whether through surcharges or service rates. It therefore would harm consumers, and be fundamentally irrational, to artificially rearrange contributions in ways that generate substantial administrative and transaction costs simply to redistribute contributions in the first instance among different carrier groups.

In addition, neither Section 254(d) nor anything in administrative law requires that "fairness" be determined by comparison to the current distribution of contribution assessments among carriers. Nor is there a requirement that an "equitable" mechanism be defined in terms of a revenues-based mechanism—particularly in light of the fact that even the modified revenues-based mechanism remains highly flawed and not competitively neutral.

The argument that Section 254(d) mandates a contribution from every single interstate carrier is likewise mistaken. Of course, the vast majority of telecommunications carriers—including historical long distance carriers such as AT&T, WorldCom, and Sprint, as well as next-generation providers such as Level 3—provide services utilizing telephone numbers or private line and special access connections that would be assessed under the AT&T proposal. Indeed, the universe of carriers that would be required to contribute under the modified numbers-based proposal is larger than the universe of carriers that would have contributed under the CoSUS connections-based proposal. Many long distance resellers, for example, provide no end

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[66] *Id.* at 434-35.

user connections, but do provide numbers—such as personal toll-free numbers—to their long distance customers. It may be only a standalone dial-around carrier that would not incur some universal service contribution obligation under a numbers-based contribution mechanism.

The argument that Section 254(d) requires a contribution from each and every such carrier, however, "confuses 'plain meaning' with literalism."[67] Words in a statute must be construed in light of their context,[68] and interpreted so as not to render other statutory terms superfluous.[69] The first sentence of Section 254(d) cannot be read literally to require that every carrier contribute, because the second sentence makes clear that carriers need not contribute if "the level of such carrier's contribution" would be "*de minimis*."[70] Clearly, Congress envisioned that some carriers providing interstate telecommunications would not contribute to the federal USF.

The literalists read Section 254(d) as mandating a contribution mechanism that would result in some positive assessment on each and every carrier, with a *de minimis* exception that would merely waive payment of the smallest assessments. This interpretation, however, is completely at odds with the Commission's implementation of Section 254(d) to date. The current mechanism, focused as it is on "end user" revenues, completely exempts carriers' carriers from contributing, even though they indisputably provide interstate telecommunications services.

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[67] *Bell Atlantic v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997).

[68] *See, e.g., Tyler v. Chin*, 533 U.S. 656, 662 (2001).

[69] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001).

[70] 47 U.S.C. § 254(d). Notably, the statute exempts *de minimis* contributions, and not *de minimis* activities. As Congress noted in adopting the *de minimis* standard, "[w]here the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier would otherwise have to make *under the formula for contributions selected by the Commission*." H.R. Rep. No. 104-458 at 131 (1996) (emphasis added). The Commission, therefore, can assess those activities that it chooses to assess, so long as the overall mechanism is equitable and nondiscriminatory and results in a sustainable fund.

The literalist interpretation, in contrast, would require use of a gross revenues assessment for universal service contribution formula. No other formula, whether based on end user retail revenues, numbers, profits, or connections, can assure that every telecommunications carrier would always be subject to an assessment obligation prior to application of the *de minimis* exemption.

Nothing in the statute or its legislative history suggests Congressional intent to limit the Commission to assessing contributions based on gross revenues. In fact, the legislative history shows that Congress intended the "every carrier" language in the first sentence of Section 254(d) to prevent the Commission from attempting to spur competition by exempting new entrants from contribution requirements.[71] Congress explained that that requirement "includes carriers that concentrate their marketing of services or network capacity to particular market segments, such as high volume business users."[72] There is no evidence whatsoever of Congressional intent to preclude the use of a numbers-based assessment mechanism, or to require the creation of formalistic minimum assessments that could then be exempted under *de minimis* authority. And no meaningful difference exists between formulas that might yield an assessment of zero for some carriers and formulas that must yield a positive number that the Commission could then reduce to zero for some carriers.

To the contrary, the first sentence of Section 254(d) essentially prescribes a process, not a payment result. In other words, it requires each "carrier that provides interstate telecommunications services" to contribute the amount called for by formula established by the Commission's rules. That formula—in the case of the AT&T proposal, a numbers-based formula—must be applied to every carrier, and it must provide for "equitable and

[71] S. Rep. No. 104-23 (1995).

nondiscriminatory" contributions that will create "specific, predictable, and sufficient mechanisms" to support universal service. In some circumstances—such as for carriers' carriers that have no retail revenues under the current rules and for those few carriers that provide no numbers, private lines, or special access connections under the AT&T proposal—the equitable and nondiscriminatory formula called for in the Commission's rules may result in no contribution assessment payment by a particular carrier. In other cases, the formula would result in a very small contribution being assessed, which could be waived as *de minimis*.

Unlike the literalist interpretation, AT&T's commonsense approach reads the statute as a whole to recognize that Congress granted the Commission substantial latitude in determining an appropriate contribution mechanism, as long as contributions were made on an equitable and nondiscriminatory basis. According to the basic universal service principles announced by Congress, it is of paramount importance that contributions be "equitable and nondiscriminatory,"[73] and that there be "specific, predictable, and sufficient Federal and state mechanisms to preserve and advance universal service."[74] It is *not* of paramount importance that the USF formula results in a positive assessment on every telecommunications carrier, however negligible it may be.

Finally, the Commission should take full account of the fact that an alternative minimum contribution mechanism, such as a flat rate or percentage of interstate telecommunications revenues, will blunt some of the public policy benefits of moving away from a revenues-based mechanism. In order to determine whether a carrier is subject to the minimum contribution

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[72] *Id.*

[73] 47 U.S.C. § 254(b)(4).

[74] *Id.* § 254(b)(5).

payment, and to calculate the payment, it will still be necessary to distinguish interstate telecommunications revenues from other types of revenues. A minimum contribution requirement is not a cost-free alternative, and therefore should only be adopted if the Commission is convinced that no other alternative satisfies the statutory requirements.

### 3. A Transitional Minimum Contribution Requirement Would Be Sufficient to Meet Even the Literalist Interpretation of Section 254(d).

Even if the Commission were inclined toward a literalist interpretation of the first sentence of Section 254(d)—rather than reading that sentence in the context of the remainder of Section 254(d)—a transitional minimum contribution requirement would be sufficient. Such a transitional system should minimize discriminatory competitive inequities. Because such a minimum contribution mechanism will necessarily be discriminatory at the margins, however, any such mechanism should be transitional, lasting only until all-distance service packages have become predominant in the marketplace.

In the *Second FNPRM,* the Commission sought comment on a range of different alternative minimum contribution systems. To minimize competitive distortions, such a minimum contribution mechanism should be truly "minimal." This amount should be a flat rate, not usage or volume sensitive, so as not to inefficiently suppress incremental demand or to create a disincentive to use of the minimum contributor's services by higher volume customers.

If the Commission is inclined not only toward a minimum contribution scheme but particularly a scheme that will increase contributions based on increases in revenues, it should assess only a small percentage—such as the 1 percent suggested in the *Second FNPRM*—and not try to establish a tiered framework with assessment rates increasing with revenues. Such tiers would only maximize the inefficiencies of an already unnecessary system of alternative minimum contributions while simultaneously creating competitive-neutrality and discrimination issues at the boundaries between tiers. If concerns about the equity of a flat-rate assessment mean that a minimum contribution based on revenues must exist, a uniform flat percentage approach would satisfy those concerns, because the actual nominal amount of the contribution would increase as interstate telecommunications revenues increased. If a minimum contribution system is used at all, it should be kept as simple and non-distortive as possible.

The *de minimis* threshold should be set in conjunction with the minimum contribution requirement so as not to require carriers with only small amounts of interstate telecommunications revenues to be subject to extensive reporting, assessment and recovery obligations over what would be a very small dollar amount in universal service contribution. Accordingly, if the Commission adopts a 1 percent minimum contribution, it should exclude all carriers with annual interstate telecommunications revenues of less than $1,000,000, unless that carrier has more than 850 assigned telephone numbers that it provides to end users. In this way, no carrier would have to be burdened with reporting, assessment and recovery obligations for less than approximately $10,000 in annual universal service contributions.

Finally, if the Commission establishes an alternative minimum contribution mechanism, it should only do so on an interim basis, and every two years it should review whether an alternative minimum contribution mechanism remains in the public interest. It is quite likely that the rise of all-distance plans, and the vertical integration of all providers into local and long distance service, will eliminate any perceived need for a minimum contribution mechanism.

### 4. A Numbers-Based Approach Would Not Violate Section 2(b).

Arguments that a numbers-based proposal is a *de facto* assessment on intrastate services or revenues are both factually inaccurate and contrary to the D.C. Circuit's decision in *NARUC* v. *FCC*.[75]

In *NARUC*, the D.C. Circuit affirmed the FCC's power to assess a flat-rated charge on a connection merely because it is capable of providing interstate service, and held that such a charge does not need to be correlated with actual interstate usage. The charges applied equally to all subscribers, including those "who neither make nor receive interstate calls in the billing period…."[76] But the Court squarely rejected arguments that such charges impermissibly burdened "intrastate service," holding instead that "[t]he same loop that connects a telephone subscriber to the local exchange necessarily connects that subscriber into the interstate network as well. … The FCC may properly order recovery, through charges imposed on telephone subscribers, of the portion of those costs that, in accordance with *Smith [v. Illinois Bell]*, have been placed in the interstate jurisdiction."[77]

This reasoning applies equally to AT&T's proposal. Nothing in Section 2(b) precludes the FCC from assessing, and permitting carriers to recover, universal service contributions based on connections capable of providing interstate service, regardless of whether the connection is actually used for interstate service.

Moreover, the Fifth Circuit's decision in *TOPUC I* [78] is not at odds with the AT&T proposal. In *TOPUC I,* the Fifth Circuit held that Section 2(b) precludes the FCC from assessing

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[75] 737 F.2d 1095 (D.C. Cir. 1984).

[76] *Id.* at 1113.

[77] *Id.* at 1113-14.

[78] *TOPUC I,* 183 F.3d at 447 n.101.

intrastate telecommunications revenues to support federal universal service goals. The assessment mechanism at issue in that case expressly assessed intrastate services, including vertical features and intrastate measured service or intrastate toll service. The court was concerned that "allowing the FCC to assess contributions based on intrastate revenues could certainly affect carriers' business decisions on how much intrastate service to provide or what kind it can afford to provide."[79]

The AT&T proposal is not comparable to the contribution mechanism invalidated in *TOPUC I*. It does not vary federal USF contribution with the amount of intrastate revenue. Instead, it ties universal service contributions to the number of assigned telephone numbers that are capable of originating or terminating interstate or international telecommunications. Such numbers, of course, are capable of being used to send or receive interstate in addition to intrastate telecommunications; even a number that does not have a presubscribed interexchange carrier can receive interstate calls, as well as originate calls using dial around or calling card services. Thus, like the SLC, the AT&T-proposed USF assessment is a charge on interstate, not intrastate, service.

For the foregoing reasons, a numbers-based connection mechanism is consistent with Sections 254(d) and 2(b), and further supported by the Commission's jurisdiction over numbering resources.

### E. Proposals to Split a Numbers- or Connections-Based Contribution Between Connection and Transport Providers Are Discriminatory and Unworkable.

The Commission has sought further comment on proposals, such as those by SBC and BellSouth, to split a connection-based assessment scheme between a carrier that provides the end user connection (typically a LEC) and a carrier that provides transport (typically an IXC). In all

[79] *Id.*

forms, these proposals are highly inefficient and would impose transaction costs without serving a reasonable purpose. Because IXCs will not be able to identify Lifeline end users within the general pool of end users, these proposals also would force the Commission to either direct IXCs to assess Lifeline customers and thereby discourage participation in the Lifeline program, or require IXCs to separate out Lifeline subscribers by seeking and relying on still more information that can be provided only by LECs.

### 1. The Proposals to Split Universal Service Contribution between Access and Interstate Transport Providers Systemically Favor Vertically Integrated Transport Providers and Discriminate Against Non-Vertically Integrated Transport Providers.

All the proposals to "split" the USF connection assessment between the exchange access provider and the interstate long distance carrier, including all the variations suggested by SBC/BellSouth, are structured blatantly to favor carriers, such as the RBOCs, that predominantly provide their own end user connections in addition to long distance service. All these "connection-splitting" proposals create significant costs for non-vertically integrated IXCs to obtain information regarding the number of connections served by their presubscribed customers—costs that are not borne by a vertically integrated IXC that has access to all such connection information because of the exchange access service being provided by the vertically integrated IXC's local operations. In addition, the non-vertically integrated IXC must bear the costs of billing zero-volume subscribers, causing the non-vertically integrated IXC to incur billing costs it would not otherwise incur. In addition, these proposals create problems of discrimination between presubscribed long distance carriers and non-presubscribed long distance carriers.

In the original form as proposed by SBC/BellSouth and others, a uniform per connection assessment would be split among what was termed the "access" provider—*i.e.*, the provider of the connection between the end user and the PSTN—and the "transport" provider—*i.e.*, the provider of the interstate service that actually carried the call across state lines. Revenues-based assessments would only be applied to IXCs that do not provide the transport portion of a switched connection on a presubscribed basis, such as through dial-around or calling cards.[80] Although simple in its articulation, this approach has raised a host of practical problems.

First, not all lines have presubscribed interexchange carriers. As SBC and BellSouth recognized, to maintain some semblance of competitive neutrality between presubscribed long distance providers and non-presubscribed providers, it is necessary to place some contribution requirement on the non-presubscribed long distance providers.[81] As the Commission recognized in the *Second FNPRM*, however, it is difficult to establish a percent of revenue assessment for non-presubscribed long distance carriers that, when compared with what the presubscribed carriers would pay, is not either too low for low-volume customers or too high for high-volume customers.[82]

Second, unlike vertically integrated carriers, non-vertically integrated long distance carriers do not have access to a reliable database of customers' presubscription status in order report and implement a "split-the-fee" contribution mechanism. AT&T does not use PIC status as a criterion for billing purposes, and it does not have reliable counts of presubscribed lines. AT&T relies on ILECs and CLECs to supply it with information on customer PIC status (*i.e.*, whether a customer is presubscribed to AT&T).

It is important to recognize that the information asymmetry between vertically integrated and non-vertically integrated carriers with respect to their access to reliable data on

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[80] *Second FNRPM* at ¶ 89.

[81] SBC *FNPRM* Comments at 11.

[82] *See Second FNPRM* at ¶ 89.

presubscribed lines flows directly from the way the PIC-change process is administered. When an IXC submits a PIC-change request for a customer, it is a submitting carrier.[83] The carrier that actually carries out the PIC change and makes the change in its switch is the LEC, which is the executing carrier with respect to long distance PIC changes.[84] The long distance carrier cannot execute its own PIC changes because the PIC must be reflected in the LEC switch. Thus, the only entity with the absolutely up-to-date and accurate database of PIC status is the LEC. And only a long distance carrier affiliated with a LEC will be able to accurately determine its PIC line counts by accessing the LEC database, at least with respect to customers to whom that vertically integrated carrier provides both local and long distance service.

AT&T's own database of its presubscribed lines is therefore only as good as the information supplied to AT&T by each of the executing carriers with whom AT&T deals—which includes all 1400 ILECs and most CLECs. For AT&T and other long distance carriers with a significant number of customers not receiving a bundled local and long distance service, flaws in the timeliness, accuracy or completeness of information provided by LECs, both incumbents and competitors, will translate directly into inaccuracies in AT&T's count of its presubscribed lines. Although the Alliance for Telecommunications Industry Solutions' Subscription Committee, Ordering and Billing Form has established voluntary standards for industry use in the exchange of information between carriers—known as Customer Account Record Exchange ("CARE")—LECs vary in their interpretation of these standards and the records that they support. Even among ILECs, the quality and timing of provision of CARE information varies widely by ILEC. Every month, AT&T discovers record errors that then must be investigated with the LEC. Moreover, only about 100 CLECs out of approximately 1500

[83] *See* 47 C.F.R. § 64.1100(a).

nationwide provide information using CARE arrangements, which means that data on CLEC lines, which now number more than 21 million, is extremely variable.

Moreover, AT&T's database of PIC'd lines, like the database of any other carrier that predominantly provides non-vertically integrated long distance services, will always be somewhat out of date. A customer, for example, may switch to a CLEC and drop AT&T as its presubscribed long distance carrier. However, that line will be carried in AT&T's database as an AT&T PIC'd line until AT&T is notified that the customer has changed its PIC. And AT&T may never get that information if the LEC does not provide it. Moreover, continued usage does not always indicate that a customer has remained presubscribed to AT&T. A customer, for example, can de-PIC AT&T but continue to use AT&T dial-around services. That customer will continue to have usage on her account, and AT&T cannot determine at the time of billing whether the usage was from dial-around or presubscribed services. AT&T's accounts remain live so long as there is usage, and are only closed after 90 days without usage. There are also cases in which AT&T does not receive notification that a customer has PIC'd to AT&T, but AT&T does begin receiving usage for billing for that customer. For these and other reasons, AT&T does not use PIC status to drive charges in its billing systems.

Further complicating any implementation of a "split-the-connection" proposal such as SBC/BellSouth is the fact that IXCs do not have access to information on the type of connection used by an end user to connect to the LEC. For example, an IXC would not ordinarily know that it was receiving traffic from a Centrex line, as opposed to any other line type. Yet in order to implement the "split-the-fee" approach described in the *Second FNPRM*, the IXC would have to know which lines that it served were Centrex lines so that it could apply the appropriate one-

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[84] *See id.* § 64.1100(b).

ninth equivalency ratio. Nor is Centrex the only example. For enterprise users, the long distance carrier may only know that it is expecting to receive a certain volume of traffic at a particular IXC point of presence, particularly when it is providing a POP to PSTN termination service. For that long distance carrier, the capacity and type of connection used to deliver long distance traffic to that POP is immaterial to the service arrangement. For individual residential users, the non-vertically integrated long distance carrier does not know whether or not the subscriber is a Lifeline customer.[85]

In order to have the information necessary to calculate its "split" of a connection-based assessment, a non-vertically integrated long distance provider would need to obtain information regarding each of its customers' connection with its LEC, including the number, capacity and type (*e.g.*, Centrex) of each end user connection with the LEC, and whether the end user was a Lifeline customer. Based on carriers' experience implementing and administering the Presubscribed Interexchange Carrier Charge (PICC), obtaining such detailed information from ILECs in an electronic and auditable form is extremely costly and difficult, even when dealing with only the nation's largest incumbent LECs. In order to keep USF contributions up to date, ILECs would have to provide a non-vertically integrated IXC with monthly data on the nature, type and capacity of each subscriber line. With respect to the PICC, ILECs have generally not provided this information for free to non-affiliated IXCs.[86]

Moreover, the PICC applied only to the large, price-cap LECs, and even in that limited universe the administrative costs of the information exchange needed to bill and recover PICCs ultimately led the Commission to abandon them in the residential and single-line business

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[85] SBC/BellSouth solves this dilemma by assessing the Lifeline customer's transport segment, which presumably would result in the Lifeline customer being assessed a recovery charge.

market.[87] As the Commission noted, eliminating the PICC and collecting line charges only from the end user and not the interstate transport provider "reduce[d] consumers' overall rates[] and simplifie[d] long distance bills."[88] The SBC/BellSouth proposal, on which the Commission has sought comment in the *Second FNPRM*, would require detailed information regarding customer connection types and quantities to be shared by 1300 non-price cap ILECs and by 1500 CLECs as well. This greatly magnifies the difficulty of developing an adequate—and sufficiently timely—information system to share necessary connection and capacity information among carriers.

Finally, all of the "connection-splitting" proposals favor vertically integrated providers of interstate long distance because of the problems of billing and collecting USF recovery fees from customers that have no usage in a given month. For a vertically integrated provider, the zero-volume user presents no problem; it simply bills the entire connection charge (including both the access piece and the transport piece) in advance when it bills its monthly subscription fee. Every month it is sending a bill for its access service, so every month it has a vehicle to collect the recovery fee for both the access and transport USF assessments.

A non-vertically integrated presubscribed long distance provider faces a more difficult problem. The non-vertically integrated provider, which would ordinarily not send a bill to the

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86 *See* CoSUS *FNPRM* Reply Comments at 31 (filed May 13, 2002); Declaration of Alan Lentz and Mark Milota, appended to CoSUS *FNPRM* Reply Comments as Attachment 2, at ¶ 10.

87 *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, Eleventh Report & Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12964 (¶ 2) (2000) ("*CALLS Order*"), *aff'd in part and rev'd in part, on other grounds, Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) ("*TOPUC II*"), *cert. denied sub nom. Natonal Ass'n of Regulatory Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002).

88 *CALLS Order*, 15 FCC Rcd at 12993-94.

subscriber that does not have any usage in that month, must now generate a bill to recover the universal service recovery fee. That forces the non-vertically integrated provider to incur extra billing costs that it would not otherwise incur and that the vertically integrated provider does not ever incur because its local affiliate does its billing. These extra billing costs will likely be higher than the USF recovery charge, and in any event, these additional billing costs cannot be recovered as part of the USF line-item under the Commission's recovery rules. Accordingly, these additional costs must flow into the non-vertically integrated carrier's long distance rates, or other non-USF line-items, placing that carrier at a regulatorily-created competitive disadvantage.

### 2. Assessing the Interstate/International Transport Component Only as a Percentage of End User Interstate Revenues Does Not Address These Problems, and Is Unstable Because It Has the Same Flaws as the Interim Revenues-based System.

SBC/BellSouth's proposed alternatives either do not ameliorate the information-sharing problems, or they create other problems of blatant discrimination. For example, SBC/BellSouth proposed that vertically integrated interstate transport providers be assessed on a split the connection/capacity charge basis, but that non-vertically integrated interstate transport providers be assessed on a revenue basis. It is hard to imagine a more self-serving, discriminatory proposal. Vertically integrated transport providers, like SBC and BellSouth's long distance affiliates would be assessed—and would recover—universal service contributions on a flat-rate, non-traffic sensitive basis, while non-vertically integrated interstate transport providers would be assessed on a volume sensitive basis. This would mean that every high volume long distance user would be better off using an RBOC than procuring long distance from a non-vertically integrated provider. That is blatant discrimination designed to divert high volume customers to the RBOCs.

If all interstate transport providers were assessed on a revenue basis for a portion of the connection/capacity charge, without regard to whether they were vertically integrated, as suggested in the *Second FNPRM*, the new universal service contribution mechanism would then not cure the fundamental discrimination in favor of wireless carriers' long distance services. Wireless carriers would still assert that they need a companywide proxy to determine interstate revenues, and application of that companywide proxy will itself mean that incremental long distance traffic is assessed less when originated on a wireless network than when originated over a wireline network. Any permanent solution must cure this fundamental discrimination in the current system, or it simply will not be lawful.

In short, all of the proposals to "split" assessments between carriers would impose discriminatory and unnecessary additional costs on IXCs and ISPs that are not affiliated with the provider of a specific customer's number. For that reason, such proposals are neither competitively neutral nor equitable and nondiscriminatory.

### 3. Subjecting Lifeline Consumers to USF Contributions Would Exacerbate Subscribership Problems, but Eliminating the Lifeline Fee on Transport Service Would Require Additional Information-Sharing Between LECs and IXCs.

Under a fee-splitting approach, unaffiliated ISPs and IXCs will have no direct means of identifying Lifeline consumers and exempting them from the "transport" share of the USF assessment. As a result, the Commission would face an unappealing choice. On one hand, it could simply decide to subject all Lifeline consumers to the transport share of the USF assessment, and thereby undermine the Lifeline program—and the entire goal of universal service—by imposing USF fees on those who can least afford to pay them. On the other hand, the Commission could order Lifeline consumers exempt from the "transport" portion of the assessment. Affiliated IXCs and ISPs will generally have no difficulties gathering identifying information on Lifeline subscribers from their affiliated LECs. Standalone ISPs and IXCs, on the other hand, do not typically possess the information necessary to determine whether any given end user is a Lifeline subscriber, creating yet another layer of information that they must seek to obtain from LECs that have few incentives to provide the information in a timely, efficient, or cost-effective manner.

## IV. CONCLUSION.

The Commission should continue to move forward by adopting an equitable, sustainable, and nondiscriminatory numbers-based assessment mechanism.

Respectfully submitted,

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