

**TESTIMONY OF
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**BEFORE THE
U.S. SENATE
SUBCOMMITTEE ON COMMUNICATIONS**

**Hearing on the Future of Universal Service: Ensuring the Sufficiency
and Stability of the Fund**

June 19, 2002

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before you today. I am Michael F. Altschul, Senior Vice President and General Counsel of the Cellular Telecommunications & Internet Association (CTIA) representing all categories of commercial wireless telecommunications carriers, including cellular and personal communications services (PCS).¹

CTIA and the wireless industry recognize that telephone service provides a vital link to

¹ CTIA is the international organization which represents all elements of the Commercial Mobile Radio Service (CMRS) industry, including cellular, enhanced specialized mobile radio, personal communications services and wireless data. CTIA has over 750 total members including domestic and international carriers, resellers, and manufacturers of wireless telecommunications equipment. CTIA's members provide services in all 734 cellular markets in the United States and personal communications services in all 50 major trading areas, which together cover 95% of the U.S. population.

all Americans. We believe, as Congress directed in the 1996 Telecommunications Act, that all carriers that provide interstate service, including wireless carriers, have a role in promoting the availability of nationwide telecommunications service through the Federal Universal Service Fund. Wireless carriers support Universal Service and are willing to pay their fair share of the Universal Service Fund “on an equitable and nondiscriminatory basis” as Congress has directed.

Prior to the 1996 Act, only long distance companies paid fees to support the Federal Universal Service Fund. In 1996, Congress passed a law that expanded the types of companies contributing to Universal Service. Currently, all telecommunications companies that provide service between states, including long distance companies, local telephone companies, wireless telephone companies, paging companies, and payphone providers, are required to contribute to the Federal Universal Service Fund. Under FCC rules, telecommunications companies must pay a specific percentage of their interstate and international revenues into the Universal Service Fund. This percentage is called the Contribution Factor. The Contribution Factor changes each quarter of the year, depending on the needs of the Universal Service Fund and the consumers it is designed to help. Because the Contribution Factor will increase or decrease, depending upon the projected needs of the Universal Service Fund, the amount owed to the Fund by each affected telecommunications company will also increase or decrease accordingly.

Recently, the Federal Communications Commission sought comment on a proposal that would radically change the universal service contribution mechanism by assessing contributions based on the number and capacity of connections provided by a carrier instead of on the basis

of the carrier's interstate revenue. Under this proposal, residential, single-line business, and mobile wireless connections (excluding pagers) would be assessed a flat amount of \$1.00 per connection per month. Paging connections would be assessed \$0.25 per connection, and the remaining universal service funding needs would be recovered through capacity-based assessments on multi-line business connections.

CTIA believes that this proposal is unlawful, unfair, and unnecessary. In the alternative, CTIA supports the current revenues-based funding formula for Universal Service, including the "safe harbor" for CMRS carriers.

The Commission is bound by the statutory mandate set forth in Section 254(d) of the Communications Act, as amended. The connection-based universal service funding proposal must be rejected by the FCC because it would exclude interexchange carriers ("IXCs") with billions of dollars of interstate telecommunications activities from the obligation to fund universal service. This would violate the plain meaning of what Congress passed into law in Section 254(d) – which requires that:

*Every carrier that provides interstate telecommunications service shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable; and sufficient mechanism established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.*²

² Section 254(d) Communications Act, as amended, (emphasis added). 47 U.S.C. §254(d).

Section 254(d) imposes a universal service funding requirement on *all carriers*, and the sole exception to this mandate applies only to carriers whose *interstate telecommunications activities* are so limited that the carrier's contribution to the universal service fund would be de minimis. The connection-based universal service funding proposal must be rejected because the exclusion of billions of dollars of interstate revenue generated by the telecommunications activities of interexchange carriers cannot be made to pass through the eye of the "de minimis" needle.

The connection-based universal service funding proposal also fails the legal requirements established by the U.S. Court of Appeals for the Fifth Circuit. In *Texas Office of Public Utilities Counsel v. FCC*, the Court ruled that Section 2(b) of the Communications Act, read in conjunction with Section 254(d), prohibits the Commission from adopting a contribution mechanism that includes intrastate revenues in the calculation of universal service contributions.³ The Fifth Circuit stated that Section 2(b) denies the FCC "jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service...."⁴ In perfectly clear terms, the Court explained that "the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a charge ... in connection with intrastate communication service."⁵

A connection-based assessment is just as much of a "charge" as the revenue-based

³ *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999).

⁴ *Id.*

⁵ *Id.*

charge addressed by the Fifth Circuit. To the extent the services provided over the connections are intrastate, the charge is “in connection with intrastate communication service” and thus is subject to the jurisdictional restriction of Section 2(b). This would require the Commission to assume “jurisdiction over intrastate matters stemming from the agency’s plenary powers.” In so doing, the Commission would again overstep its jurisdiction and violate Section 2(b).

The connections-based funding approach also violates the requirement in Section 254(d) that every carrier “shall contribute, on an equitable and non-discriminatory basis.” At the present time, contributions from interexchange carriers constitute 63% of the federal universal service fund assessments, reflecting the fact that the interexchange carriers are, by far, the largest providers of interstate telecommunications services. Excluding these carriers’ provision of interexchange services from the contribution base is neither equitable nor is it non-discriminatory.

But even if Sections 2(b) and 254(d) did not present a complete bar to the connection-based funding proposal, the proposal would still have to be rejected as bad public policy. A connection-based flat-fee acts, in effect, as a regressive tax that places a disproportional funding burden on low-volume users (often low income individuals and small businesses) in order to subsidize the largest (and often richest) consumers of telecommunications services. CTIA agrees with the consumer advocates and state commissions who submitted comments to the FCC that the connections-based proposal is neither equitable nor nondiscriminatory. As Consumers Union observed in its Comments to the FCC, “both average-use and low-use residential customers utilizing any of the 13 calling plans of carriers studied would pay more per

month under the Commission's proposed connection-based fee system than they do under the current revenue-based system."⁶

The proposal is particularly problematic to prepaid wireless customers and to the millions of customers who subscribe to the "peace of mind" tier of wireless service offerings primarily for occasional or emergency use. These customers pay a low monthly fee – \$19.99 per month for 400 minutes, for example – or subscribe on a prepaid basis (i.e., purchasing minutes in advance of their use.) Adding a flat-fee of even \$1 would represent a significant addition to these bills – potentially discouraging the use of these important services. The universal service fund, a system designed to advance the ubiquitous provision of telecommunications services, should not discourage consumers from purchasing these essential services.

It also is clear from the comments to the Commission that the proposed connections-based funding system will create a new set of additional administrative burdens and uncertainties. Rather than simplifying the current contribution mechanism, the proposed connections-based funding system will impose a monthly reporting obligation on all carriers and require the creation of an entirely new system of complex allocations to implement the capacity-based charges to be recovered from multi-line business connections. Indeed, this portion of the proposal raises difficult administrative issues that may far exceed the problems the Commission has identified with a revenue-based assessment mechanism.

The difficulty stems from the proposal to base the residual multi-line business

⁶ Comments filed by Consumer Union, et al. at 11.

assessment on the maximum capacity of the connections, and using bandwidth instead of lines to avoid the need to establish voice-grade equivalency ratios for these connections. However, rapidly evolving wireline and wireless broadband technologies promise to make high bandwidth applications available to all subscribers. The complexities of dealing with capacity-based or bandwidth-based assessment mechanisms (especially in light of section 254(d)'s command that the contribution mechanism be "equitable and non-discriminatory" as technologies and services rapidly evolve) may far exceed the problems the Commission has identified with the current revenue-based assessment mechanism.

Not only is the connection-based funding proposal unlawful and unfair, it is also unnecessary. As many of the comments to the FCC observed, the predicate for making such a dramatic change in the current universal service funding mechanism is lacking. Contrary to the implicit assumption that changes in the interstate telecommunications market mandate a fundamental change in the universal service funding mechanism, the overall size of the interstate telecommunications market has been remarkably stable. Indeed, interstate end-user telecommunications revenues increased 6 percent in the past three years – from \$74 billion in 1998 to \$79.4 billion in 2001.⁷

We note that the specific allocation of these revenues among telecommunications providers is changing. For example, the entry of ILECs into the interstate long distance telecommunications market has now been approved in several states. And, wireless interstate

⁷ See *Universal Service Monitoring Report*, Table 1.1. (Dec. 1999), and the Commission's Quarterly Contributions Factor *Public Notices*.

revenues are keeping pace with the overall growth of wireless revenues. In other words, the interstate telecommunications revenue “pie” remains constant, even growing, even though the “slices” of that pie among different telecommunications providers may be shifting. Since the universal service funding mechanism is dependent on the size of the interstate “pie,” the distribution of the individual slices is not particularly significant.

I also want to note that wireless’ contribution to the universal service fund is on the rise. With the rise in wireless revenues, wireless universal service surcharges are increasing as a result, fairly and appropriately according to the existing contribution methodology.

CTIA supports continuation of the wireless “safe harbor.” The FCC established this fifteen percent proxy for a wireless carriers’ contribution based on the Commission’s own data, and in recognition of the difficulty wireless carriers face separating their interstate revenues for Universal Service funding purposes. Simply put, radio waves do not stop at a state boundary, wireless users are very mobile customers, and the FCC licensed CMRS carriers without respect to state boundaries. This makes it impossible for a wireless carrier to precisely identify the percentage of its revenues that are attributable to interstate communications. Washington, D.C. provides a perfect example. First, the CMRS licenses serving Washington, D.C. include the District of Columbia, Virginia, Maryland, and even part of West Virginia and Pennsylvania. Within this market, wireless customers can be assigned phone numbers from area codes associated with any one of these jurisdictions, and can access the wireless network from anywhere in the market. Thus, I can have a “202” area code for my wireless phone, be in Virginia, and have my wireless carrier connect my call to the Public Switched Telephone

Network from a switch in Maryland. Moreover, I can be driving along the Whitehurst Freeway in Georgetown, and if I use my wireless phone, the signal will be transmitted to and from an antenna located across the Potomac River in Rosslyn, Virginia. Under these circumstances, a proxy is required as an alternative to the jurisdictional separations performed by wireline carriers using the area code of the calling and called parties. While CTIA would not oppose review of the safe harbor percentage, to assure that it continues to reflect the Commission's best data on the actual interstate usage of CMRS service, CTIA believes that a safe harbor is still the best approach to dealing with jurisdictional complexities of CMRS traffic.

For the foregoing reasons, CTIA believes that the connections-based proposal is unlawful, unfair, and unnecessary. The current system, even if not perfect, more closely follows the Congressional mandate to fund Universal Service on an equitable and nondiscriminatory basis.

In the view of the wireless industry, there are, however, significant challenges facing the universal service fund in the immediate future. First, to the extent there is a funding "crisis" it has been triggered by the expansion of the *demand* for universal service funding, not by a reduction in the *supply* of support funds generated by the current system. During the past three years, while revenues remained stable, the federal Universal Service Fund disbursements soared from \$3.6 billion in 1998 to \$5.5 billion in 2001.⁸ Changing the contribution mechanism will do nothing to address this fundamental imbalance. Indeed, rather than proposing to exclude the single largest source of interstate telecommunications revenues from the obligation to fund its

⁸ *Id.*, Table 3.7 (Oct. 2001).

universal service programs, the Commission should be seeking to expand the base of contributors.

Will the disbursements from the federal Universal Service Fund continue to grow at their present rate? This is the key question. If so, there may be a need for significant changes in contribution methodologies. If not, the continuing stability of the interstate telecommunications revenues will serve to meet funding needs. Many have suggested that the implementation of the “schools and libraries” program has been largely accomplished and the on-going charges for maintaining the program should not require significant increases in funding demands. But, this is not an area of expertise for CTIA and we leave this to others to provide definitive judgment.

A second challenge is whether other carriers will contribute to the support of Universal Service, as Congress intended when it passed the 1996 Telecommunications Act. For example, the Commission under its discretion can extend universal service obligations to providers that *use* telecommunications who are *not* telecommunications carriers (who must contribute to universal service). This indicates Congress recognized classes of services, other than telecommunications service that may have to be reached by Commission discretion, rather than mandatory application under the statute. Similarly, the schools and libraries provisions make specific reference to information services as being covered by the provision, entitling schools and libraries to discounted service. The FCC now has a proceeding that is looking at these issues.

Third, will the current definition of supported basic services be expanded to include broadband services. Increasing universal service funds to support deployment of broadband

capabilities would involve government in selecting, for the first time, which of many possible advanced broadband services would be given preference (and thus depressing demand for – and investment in – other broadband services.) Technology neutrality and funding support portability will ensure that competition is not precluded in rural America.

A fourth challenge involves the determination of Eligible Telecommunications Carrier (or, ETC) status. The wireless industry supports a policy of competitive neutrality in this determination – federal guidelines should not be biased against new entrants. A few wireless carriers have gained ETC status in a handful of states and on a few Indian Reservations. Consumers benefit from competition, gaining new services and improvements to existing ones. CTIA further a system that subsidizes a few, can only discourage competition and, ultimately, rob the consumer.

CTIA and the wireless industry appreciate the opportunity to testify before the Subcommittee. I look forward to answering any questions you may have. Thank you.