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

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

COMMENTS OF THE

SATELLITE INDUSTRY ASSOCIATION

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July 9, 2012

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The Satellite Industry Association ("SIA") hereby submits these comments in response to the Federal Communications Commission's Further Notice of Proposed Rulemaking considering reforms to the Universal Service Fund ("USF") contribution system.[1]

I. INTRODUCTION AND SUMMARY

SIA is a U.S.-based trade association providing worldwide representation of the leading satellite operators, service providers, manufacturers, launch services providers, and ground equipment suppliers.[2] Since its creation more than fifteen years ago, SIA has become the unified voice of the U.S. satellite industry on policy, regulatory, and legislative issues affecting the satellite business. SIA is uniquely situated with respect to the USF contribution system, as its

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1 *In the Matter of Universal Service Contribution Methodology, A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, WC Docket No. 06-122, GC Docket No. 09-51, FCC 12-46 (rel. Apr. 30, 2012) ("Further Notice").

2 For the purposes of this filing, the SIA Executive Members include: Artel, Inc.; The Boeing Company; The DIRECTV Group; EchoStar Satellite Services LLC; Harris CapRock Communications; Hughes Network Systems, LLC; Intelsat, S.A.; Iridium Communications Inc.; Kratos Defense & Security Solutions; LightSquared; Lockheed Martin Corporation.; Northrop Grumman Corporation; Rockwell Collins Government Systems; SES S.A.; and Space Systems/Loral. SIA Associate Members include: ATK Inc.; Cisco; Cobham SATCOM Land Systems; Comtech EF Data Corp.; DRS Technologies, Inc.; Eutelsat, Inc.; GE Satellite; Globecomm Systems, Inc.; Glowlink Communications Technology, Inc.; iDirect Government Technologies; Inmarsat, Inc.; Marshall Communications Corporation.; MTN Government Services; NewSat America, Inc.; Orbital Sciences Corporation; Panasonic Avionics Corporation; Spacecom, Ltd.; Spacenet Inc.; TeleCommunication Systems, Inc.; Telesat Canada; Ultisat, Inc.; and XTAR, LLC. Additional information about SIA can be found at www.sia.org.

membership represents every level of the satellite service chain, from wholesalers to satellite network services providers to end-users, and includes providers of both international and domestic telecommunications.

The Further Notice sets out the goals of contribution reform – namely, to promote efficiency, fairness, and sustainability in the USF contribution system.[3] SIA agrees that these goals should guide the Commission's actions in this proceeding. In particular, consistent with the principle of competitive neutrality, the Commission should ensure that any reforms adopted do not favor one level of the distribution chain or type of entity over another. Additionally, the Commission should take care that all reforms are consistent with the agency's statutory authority, legal precedent, and the long-established policy goals and foundations of the USF system.

To achieve these goals, SIA urges the Commission to take the following steps. First, it should retain the carrier's carrier revenue exclusion, which ensures that all telecommunications revenues are only assessed for USF contribution once by distinguishing between wholesale and end-user revenues. However, to promote compliance, the agency should establish a standard certification form for use by all "resellers,"[4] satellite network services providers, and wholesalers. The Commission also could enhance transparency by improving the public database identifying USF contributors.

Second, the Commission should preserve the exemption for entities with only international telecommunications revenues. This exemption is mandated by the plain language

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[3] Further Notice, ¶¶ 22-27.

[4] SIA notes that the term "reseller" has become an antiquated term. Within the satellite industry such entities historically referred to as "resellers" now go by the term network solution providers. The term network solution provider more accurately represents the breadth of communications services provided by such organizations, as opposed ot the more limiting term reseller. SIA recommends that the Commission take note of this change in terminology within the satellite industry. For purposes of consistency with the Further Notice of Proposed Rulemaking, SIA will continue to use the term "reseller."

of Section 254(d), which only authorizes the imposition of a universal service contribution obligation on a telecommunications carrier or other entity providing "interstate telecommunications." As defined by Congress, this term "interstate telecommunications" would not include an entity that only provides international telecommunications services. Accordingly, the Commission is legally prohibited from eliminating the "international-only" exemption.

Third, the Commission should maintain the limited international revenue exemption (known as "LIRE") in its current form. The Commission should not modify the LIRE because doing so would disadvantage providers with predominantly international revenues severely as compared to their wholly-international competitors. Such a change could have the perverse results of reducing competition in interstate telecommunications and further limiting the size of the contribution base, which would only increase the burden on all remaining contributors.

Finally, there is no demonstrable need to modify the Commission's bundled offering rules in the manner proposed. The Commission's proposal to require bundling discounts to be apportioned in their entirety to non-assessable components of a bundle will not improve the Commission's ability to detect or stop potential abuses of its apportionment rules. Rather, it would artificially discourage businesses from offering bundled discounts that could benefit consumers. If anything, the Commission should clarify its existing rules to encourage pro-consumer bundling by allowing such discounts to be apportioned proportionately among the assessable and non-assessable components of the bundle.

II. THE COMMISSION SHOULD RETAIN THE CARRIER'S CARRIER REVENUE EXCLUSION AND ADDRESS INEFFICIENCY IN THE SYSTEM BY STANDARDIZING THE CONTRIBUTION OBLIGATIONS OF WHOLESALERS AND THEIR CUSTOMERS.

To best achieve efficiency, fairness and sustainability, SIA urges the Commission to preserve the current distinction between carrier's carrier and end-user revenues. This distinction is one of the foundational policies that supports fair and competitively neutral USF contributions. To the extent that the Commission is concerned about the efficacy of the current system, the Commission should standardize what is referred to in the Further Notice as the "reseller" certification process to ensure that contributions are made consistent with applicable law. In contrast, the Commission's proposal to assess contributions based on a value-added approach would be overly complex, increase inefficiency, and create additional loopholes.

A. The Commission Should Preserve the Distinction Between "Carrier's Carrier" and "End-User" Revenues.

The Commission should preserve its current policy of distinguishing between wholesale and end-user revenues for the purpose of USF contributions. This distinction has been in place since the USF was created 14 years ago and remains equally valid today. The same policy goals that motivated the Commission's adoption of the distinction continue to apply today. Specifically, the assessment of end-user revenues ensures that relevant telecommunications offerings are assessed only once, which advances the Commission's goal of administering a fair and competitively neutral contribution system.

The Commission adopted the distinction between carrier's carrier and end-user revenues based on the principle of competitive neutrality. Under the current rules, wholesale carriers "do not contribute on sales to their customers that contribute to the Fund (carrier's carrier revenues), but may be required to contribute on sales to customers that do not contribute to the Fund (end-user revenues)."[5] The Commission adopted this policy in the first Universal Service Report and Order, finding that this method would "eliminate the double payment problem" resulting from

[5] Further Notice, ¶ 144.

the assessment of both wholesale and resale revenue.[6] By eliminating the potential for revenues derived from the same services to be counted twice, the Commission avoids disadvantaging "resellers" and network services providers and distorting competition as a result.[7]

Fairness and competitive neutrality should continue to guide the Commission's actions in this proceeding. As the Further Notice recognizes, the Commission's obligation to ensure a fair contribution system derives from the Communications Act itself. The statute requires that contributions to the Universal Service Fund be made on an "equitable and nondiscriminatory basis,"[8] which the Commission has interpreted as requiring the contribution system to be "fair for contributors."[9] In addition, the Further Notice reiterates the Commission's commitment to a competitively neutral universal service contribution system.[10]

While market dynamics have changed the composition of the USF contributor base,[11] nothing has occurred in the market to alleviate the Commission's concern about the adverse competitive consequences that result from the "double payment problem." In reforming the USF contribution system, the Commission still must confront this very real problem, which requires distinguishing between end-user and wholesale revenues to ensure that telecommunications revenues are only assessed once at the end user level. Accordingly, SIA recommends that the Commission preserve this important distinction between carrier's carrier and end-user revenues.

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6 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9206-07 ¶¶ 843-47 (1997) ("Universal Service First Report and Order").

7 *Id*. at 9207, ¶ 845.

8 47 U.S.C. § 254(d).

9 Further Notice, ¶ 24 (citing 47 U.S.C. § 254(d)).

10 Further Notice, ¶ 24 (citing Universal Service First Report and Order at 9207, ¶ 847).

11 Further Notice, ¶ 20.

B. The Commission Should Bring Uniformity to the "Reseller" Certification System.

SIA supports the Commission's goals of improving the efficiency, fairness, and sustainability of the USF system. One appropriate mechanism by which the Commission might further these goals would be through standardizing the "reseller" certification process. By bringing uniformity to such certifications, the Commission will remedy an inefficiency impacting the contribution system. Currently, there is no uniformity in the certification forms exchanged between wholesale providers and "resellers" (also known in the satellite industry as "network services providers") for the purpose of USF contributions. Each of SIA's wholesaler members use a different form, developed over time, to seek the needed certification from their "resellers." For SIA's "reseller" members, this means that each year they must complete multiple different forms to provide what should be the same information to each of their business partners. This situation results in an unnecessary burden on both sides of the wholesaler-"reseller" relationship. Additionally, the lack of standardization increases the possibility that the end-user and carrier's carrier revenues are not being determined appropriately.

To accurately capture revenues that are currently escaping assessment and ensure that the carrier's carrier/end-user revenue distinction is properly applied, the Commission should adopt a standardized certification process. The Commission should require "resellers" to file their certifications at the Commission and ensure their certifications remain current. The Commission also should consider other mechanisms to bring uniformity and transparency to the certification process, for example improving, publicizing, and ensuring the completeness and accuracy of the searchable online database of USF contributors,[12] would enable all interested parties to verify a

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[12] *See* Federal Communications Commission, "FCC Form 499 Filer Database", http://gullfoss2.fcc.gov/cib/form499/499a.cfm (last visited July 5, 2012).

company's contribution status. Such simple policy changes will avoid industry-wide confusion associated with a significant rule change and achieve the Commission's goal of improving administrative efficiency.

C. The Commission Should Not Adopt a "Value-added" Approach to Assessing Contributions.

SIA does not support adoption of a "value-added" approach to assessing contributions.[13] This rule change would not meet the Commission's goal of ensuring efficiency or fairness[14] because it would inject substantial complexity and uncertainty into the Universal Service contribution process and distort competition. The value-added proposal seeks to assess each telecommunications provider in a service value chain based on the value the provider adds to the service.[15] This rule change would signal a shift from an assessment method based on a single, easily determinable value – end-user revenues – to a complex method relying upon separate assessments from multiple entities in a service chain in order to make up the entire contribution. Expanding the number of moving parts – while simultaneously trying to tie these moving parts together as the value-added approach seeks to do – would only make an already complicated contribution system even more complicated, and in so doing, potentially disrupt or delay telecommunications business transactions in the U.S. and elsewhere.

The value-added proposal also would not serve the Commission's policy goals of fairness and competitive neutrality because it would distort competition between vertically-integrated providers of end-user services and resellers.[16] Whereas a competitive reseller will have to

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13 *See* Further Notice, ¶ 152.

14 *See* Further Notice, ¶ 153.

15 Further Notice, ¶ 149.

16 In the Universal Service First Report and Order, the Commission explicitly sought to "avoid a contribution assessment methodology that distorts how carriers choose to structure their

incorporate into its offering the costs of USF pass-through charges from every provider higher in the service chain, a vertically-integrated service provider may be able to offer a lower price to end-users by virtue of the absence of up-the-chain USF charges. This proposal would reduce competition in the provision of services, ultimately increasing costs to the end-users. The Commission should avoid adopting a Universal Service contribution rule that would favor one competitor or business model over another.

In addition to being problematic for existing contributors, a value-added system would increase the total administrative burden of operating the fund. It also would exponentially increase the resources required to determine whether the value credits claimed by entities that are new contributors to the USF were calculated consistent with the facts and the law, which could in turn stress the resources of USAC and the Commission.

III. THE COMMISSION MUST PRESERVE THE INTERNATIONAL REVENUE EXEMPTIONS.

The Commission's proposals to eliminate or significantly limit the international revenue exemptions are outside its statutory authority and inconsistent with binding legal precedent. The Commission is prohibited by the Communications Act from assessing USF contributions on providers of only international telecommunications. Additionally, controlling Court of Appeals precedent prevents the Commission from substantially abrogating its exception for the international revenues of providers with only limited interstate revenues. Nothing has changed to call into question the continuing validity of these restrictions on the Commission's authority.

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businesses or the types of services that they provide." Universal Service First Report and Order at 9207, ¶ 846.

A. Section 254(d) of the Communications Act Does Not Authorize the Commission to Assess USF Contributions on International-Only Providers.

The Commission lacks statutory authority to eliminate the USF contribution exemption for international-only providers, as it suggests in the Further Notice.[17] The agency is required to assess USF contributions on "[e]very telecommunications carrier *that provides interstate telecommunications services*" and is authorized to impose a contribution obligation on providers of "interstate telecommunications" if consistent with the public interest.[18] However, as defined in the Communications Act, the term "interstate telecommunications" plainly does not include international telecommunications.

The Communications Act explicitly distinguishes "interstate" from "foreign" communications.

The Act defines "interstate communication" as communication:

> [F]rom any State . . . to any other State . . . [or] from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or . . . between points within the United States but through a foreign country.[19]

The Act separately defines "foreign communication" as:

> [C]ommunication or transmission from or to any place in the United States to or from a foreign country.[20]

There is no overlap between these two definitions. The Commission cannot interpret the word "interstate" in Section 254 to encompass "foreign" communication because that interpretation directly contradicts the separate, mutually exclusive definition of "foreign" in

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17 Further Notice, ¶ 200.

18 47 U.S.C. § 254(d) (emphasis added).

19 47 U.S.C. § 153.

20 *Id.*

Section 153. By definition, international-only providers do not provide any "interstate communication" service; they only provide "foreign communication" service. Thus, because international-only providers do not provide "interstate telecommunications" service, there are not required under the mandatory language of Section 254 to contribute the USF, nor could the Commission lawfully exercise its permissive authority under this statute to compel international-only providers to make such contributions.[21]

The Commission purports to read Section 254(b)(4)'s "equitable and nondiscriminatory" principle as an avenue through which it can require international-only providers to make USF contributions.[22] But this reading is misguided, as it takes Section 254(b) entirely out of context. Congress limited the Commission's authority under Section 254 to providers *that provide interstate service*.[23] Because the Commission lacks the legal authority over international-only providers under Section 254, Section 254(b)(4)'s "equitable and nondiscriminatory" requirement *must* be read to apply only to providers of interstate communications, as that term is defined in the Act. As such, neither this provision, nor any other, provides sufficient legal basis for the Commission to remove the exemption from USF contributions for international-only providers.

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[21] Even if the Act admitted some ambiguity—which it does not—the Commission has not proposed a reasonable construction of the statute. The agency claims in the Further Notice that "Section 254's reference to interstate telecommunications is better viewed as drawing a jurisdictional line between the authority of states . . . and the authority of the Commission." Further Notice, ¶ 200. But the Commission itself found that Congress drew a "distinction between . . . interstate and international communications" when drafting Section 254. *See* Universal Service First Report and Order at 9174-75, ¶ 779 (1997) (interpreting 47 U.S.C. § 254(d)). That interpretation follows from the plain language of the statute and remains valid.

[22] Further Notice, ¶ 200; 47 U.S.C. § 254(b)(4).

[23] 47 U.S.C. § 254(d).

B. *TOPUC* Bars the Commission from Eliminating the Limited International Revenues Exemption ("LIRE").

Elimination of the USF contribution exemption for the international revenues of mostly-international providers (the so-called "limited international revenues exemption" or "LIRE") is barred by court precedent.[24] The Commission previously required USF contributions from mostly-international providers but not from international-only providers, and the U.S. Court of Appeals for the Fifth Circuit in *TOPUC* found that policy to conflict with the "equitable and nondiscriminatory" requirement of Section 254.[25] The court found the rule inequitable because it forced some international providers (*i.e.*, those with limited interstate revenues) to contribute more to the USF than they could generate in interstate revenues.[26] The court also found the rule discriminatory because it harmed some international providers more than others.[27] The Commission responded by creating the LIRE exemption to prevent both the inequitable and discriminatory results.[28]

Eliminating the LIRE exemption would result in a new rule by which: 1) some international providers would contribute more to USF than they can generate in interstate revenues; and 2) some international providers would be harmed by USF more than other providers. The proposed scheme thus reverts back to the old rule, which *TOPUC* struck down as

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24 Further Notice, ¶ 200-01

25 *Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 433-35 (5th Cir. 1999) ("*TOPUC*").

26 *Id.* at 434.

27 *Id.* at 435.

28 *See Federal-State Joint Board on Universal Service*, *Access Charge Reform*, Eighth Report and Order, 15 FCC Rcd 1679 (1999) ("Eighth Report and Order").

inequitable and discriminatory. The Commission's proposed rule therefore contravenes Fifth Circuit precedent.

Here, the court's interpretation governs because the Fifth Circuit's decision leaves no room for the Commission to change its interpretation of "equitable and nondiscriminatory" to require contributions from mostly-international providers on their international revenues. *TOPUC* foreclosed that interpretation under *Chevron* step one because it was "*manifestly contrary to the statute*."[29] The agency must adhere to that ruling; the U.S. Supreme Court in *Brand X* held that a previous judicial construction of a statute trumps an agency construction when the judicial construction left no room for agency discretion.[30] *TOPUC*'s holding leaves no room for agency discretion—the court read "equitable and nondiscriminatory" under Section 254(d) to *require* an exemption for the international revenues of mostly-international providers. Because the Fifth Circuit "has already interpreted the statute, and there is no longer any different construction that is consistent with [*TOPUC*] and available for adoption by the agency," the Commission is barred from eliminating the LIRE exemption.[31]

IV. THE COMMISSION SHOULD NOT MODIFY THE *LIRE* BECAUSE IT WOULD DISADVANTAGE "MOSTLY-INTERNATIONAL" PROVIDERS VIS-À-VIS "INTERNATIONAL-ONLY" PROVIDERS.

In the Further Notice, the Commission proposes to modify the LIRE. The LIRE was designed to protect providers of international telecommunications that offer a limited amount of ancillary domestic service.[32] To qualify, a provider's interstate revenues must be less than 12

29 *TOPUC*, 183 F.3d at 434-35 (emphasis added).

30 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *see also United States v. Home Concrete & Supply LLC*, 132 S. Ct. 1836, 1843 (2012).

31 *Home Concrete*, 132 S. Ct. at 1843.

32 Eighth Report and Order at 1689, ¶ 23 (citing *TOPUC*, 183 F.3d at 435).

percent of its combined interstate and international revenue.[33] A LIRE-qualifying provider contributes to the USF only on its interstate revenues.[34] The Commission's proposed modification to the LIRE would require a mostly-international provider[35] to contribute on its interstate revenue and an equal amount of its international revenue.[36] The effect would be to require mostly-international providers to contribute twice as much to USF under the new LIRE than they would contribute under the current LIRE, assuming they still qualify for the exception to begin with.[37]

The Commission should not adopt this proposed LIRE modification because it would place mostly-international providers at a competitive disadvantage in both the provision of domestic and global telecommunications. It would also create an incentive for mostly-international providers to cease providing limited domestic telecommunications, which would harm competition in the United States and potentially reduce overall USF contributions. To avoid distorting competition and disadvantaging U.S. providers of mostly-international telecommunications, SIA urges the Commission to preserve the current LIRE.

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33 *Id.*

34 *Id.*

35 The term "mostly-international" provider is used to describe a provider whose interstate telecommunications services are merely ancillary to their international operations.

36 Further Notice, ¶ 205.

37 The new LIRE proposal would also add substantial uncertainty about which entities will qualify for the exception. By being keyed to the contribution factor, and therefore dynamic, the body of qualifying service providers could change substantially from year-to-year. This could create unnecessarily punitive results should the Commission be successful in its efforts to reduce the contribution factor, because companies for whom interstate services make up only a small portion of their overall business could still find themselves exceeding the newly-lowered LIRE cutoff and therefore be required to contribute based upon all of their revenues, in contravention of *TOPUC's* binding interpretation of Section 254(d).

A. The Proposed LIRE Would Create a Pricing Disadvantage for Mostly-International Providers Vis-à-Vis International-Only Providers.

In the Further Notice, the Commission suggests that LIRE-qualifying providers have an advantage over their competitors as a result of the LIRE.[38] The Commission points out that LIRE-qualifying providers "compete against non-qualifying providers that must include *all* of their international revenues in calculating their contribution base."[39] By the proposed modification, the Commission purports to eliminate this perceived advantage. In doing so, however, the FCC ignores the more serious competitive advantage it would confer on international-only providers vis-à-vis mostly-international providers under the proposed LIRE.

In today's global marketplace, mostly-international providers compete directly with international-only providers in their primary business of providing international telecommunications.[40] Yet, because, as discussed above, the Commission lacks authority to require international-only providers to contribute to USF, international-only providers will continue to be exempt from USF contribution. Confronted with at least a doubling of the required contribution amount, LIRE-qualifying providers may have to pass on this amount to customers by increasing prices for their international services. If international-only providers are

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38 Further Notice, ¶ 204 ("If we nonetheless retain the LIRE, modifying it may be appropriate to limit the advantage that LIRE-qualifying providers have over their competitors… .")

39 Further Notice, ¶ 206. The Commission previously stated that "as direct beneficiaries of an expanded domestic network, [providers whose interstate telecommunications services are not merely ancillary to their provision of international telecommunications services] should be required to contribute to universal service based on their combined interstate and international revenues." Eighth Report and Order at 1689, ¶ 22.

40 The LIRE contemplates the relationship between international-only and mostly-international providers, not mostly-international providers and interstate providers. Indeed, one of the original purposes behind the LIRE was to ensure that "providers whose interstate telecommunications services are merely ancillary to their international operations will not be in a worse position than providers that, by their very status as exclusively international providers, are not subject to the universal service contribution requirements." Eighth Report and Order at 1689, ¶ 23 (citing *TOPUC*, 183 F.3d at 435).

able to offer lower prices than mostly-international providers by virtue of having no USF contribution costs, mostly-international providers will lose business to international-only providers. And, if the mostly-international provider does not increase prices then it will still be disadvantaged because it would need to assume this additional cost into its business operations.

B. The Proposed LIRE Would Competitively Disadvantage U.S. Companies in Favor of Non-U.S. Companies.

The proposed LIRE also would competitively disadvantage U.S. providers vis-a-vis non-U.S. providers. By their very nature, non-U.S. providers are less likely than U.S. providers to provide interstate telecommunications. As a result, non-U.S. providers are less likely to have USF contribution obligations. Under the proposed modified LIRE, however, U.S.-based providers that already contribute to USF for their interstate telecommunications would now be required to pay USF on some of their international telecommunications revenue. If these costs are passed through to consumers, U.S.-based mostly-international providers will lose contracts to non-U.S. companies.

Indeed, the LIRE perhaps is even more important to preserving competition now than when it was adopted. Historically, international telecommunications were offered on a half-circuit basis, meaning that a U.S. company offered the half portion of an international circuit to and from the United States and a non-U.S. partner provided the foreign half. Today, however, the vast majority of international telecommunications is provided on a whole circuit basis. Instead of sharing international revenue with a non-U.S. company, U.S. companies now compete directly with non-U.S. companies for all of the revenue. As such, the proposed requirement for U.S. companies to pay USF on some of their international revenue will discriminate against U.S. companies by impairing their ability to price competitively with non-U.S. companies. Indeed, to the extent such competition prevents mostly-international U.S. providers from passing increased

USF costs on to their customers, such funds will have to be drawn from retained earnings or net income. At best, this would force such providers to divert resources that otherwise might have been used to develop new and innovative services and expand coverage. At worst, this may drive some mostly-international providers out of business, reducing consumer choice.

C. The Proposed LIRE Could Harm Competition in the Provision of Interstate Communications and Reduce Overall USF Contributions.

The Commission's proposal to modify the LIRE could have the unintended consequence of reducing competition in the U.S. telecommunications industry.[41] By assessing USF on the international revenues of mostly-international providers that offer some limited domestic interstate services, the Commission's proposal creates an incentive for mostly-international providers to abandon the domestic market in order to become international-only providers and thereby avoid a USF contribution obligation. Up to this point, the burden of USF contribution did not outweigh the benefit of providing limited interstate service in the U.S. Adoption of the proposed LIRE may be the tipping point for mostly-international providers. The flight of mostly-international providers from the domestic telecommunications market to avoid USF contribution could significantly harm competition. The result could be a loss of competition and jobs within the U.S. telecommunications industry, which would be contrary to the public interest.

Moreover, the Commission's proposal could have the exact opposite of its intended effect. With fewer providers offering domestic service to avoid Commission assessment of international revenue, the overall number of contributors to USF could decrease. The result could be, ironically, a reduction in overall contributions rather than the increase the Commission seeks.

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[41] *See, e.g.*, *Strategic Plan of the FCC*, FCC Encyclopedia, http://www.fcc.gov/encyclopedia/strategic-plan-fcc (last visited Jun. 26, 2012) (identifying an FCC objective to "[f]oster sustainable competition across the entire telecommunications sector").

D. The Proposed LIRE Would Disrupt Established Business Expectations of LIRE-Qualifying Providers.

Adoption of the proposed-LIRE would also distort and destroy established business expectations of mostly-international providers. For more than a decade, mostly international providers have relied on the current formulation of the LIRE.[42] Other than a single increase in the qualifying factor,[43] the LIRE has remained substantively unchanged since its adoption in 1999. Providers that regularly qualify for the LIRE take into account the impact that new business opportunities and contracts may have on their eligibility for the exemption.

By way of example, satellite providers often enter into long-term contracts. In negotiating and designing the terms of these contracts, satellite providers have relied on the existence and qualification factors of the current LIRE. Changing the LIRE now could severely disadvantage providers locked in to long-term contracts vis-à-vis their international-only competitors.

Moreover, adoption of the proposed LIRE could impair the ability of mostly-international providers to make future long-term business decisions. As the Commission found previously, a fixed-percentage is more predictable than a qualifying factor that fluctuates with the contribution factor.[44] To avoid harming LIRE-qualifying providers that rely on the LIRE in making long-term business decisions, the Commission should decline to adopt its proposed modification.

If the Commission were to consider modifying the LIRE, notwithstanding the compelling reasons to maintain it in its current form, then it must do so in a way consistent with *TOPUC*. In

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42 *See* Eighth Report and Order at 1687, ¶ 19.

43 *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 *et al.*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, 3806, ¶ 125 (2002).

44 *See* Eighth Report and Order at 1690, ¶ 25.

addition to ensuring that the long-run business expectations of mostly-international carriers are not disrupted, the Commission must adhere to *TOPUC*'s core finding, namely that it is inequitable to require mostly-international providers to pay more in USF contributions than they generate in interstate revenues. Thus, to the extent that the reforms contemplated cause the USF contribution factor to fall back to 2002 levels, the 12% LIRE that has been in force for the last decade provides adequate margin to ensure that such inequity would never arise. However, if the USF contribution factor were to persist above 12% despite the Commission's reform efforts, then the Commission has an affirmative duty under *TOPUC* to take steps (*e.g.* by raising the LIRE) to prevent mostly international carriers from having to pay more than its interstate revenues in USF contributions.

V. THE COMMISSION SHOULD NOT MODIFY ITS BUNDLED OFFERING RULES IN THE MANNER PROPOSED.

In the Further Notice, the Commission proposes to modify its rules on bundled offerings to require any discounts from bundling to be apportioned in their entirety to the non-assessable components of the bundles.[45] This proposed modification is intended to address the potential for service providers to unreasonably apportion revenues from bundled offerings in order to reduce their contribution obligations. However, there seems to be no demonstrable need for such a rule modification. It is unclear from the comments cited by the Commission whether the potential for "gaming" of its apportionment rules stems from inherent uncertainties in the classification of services or the lack of adequate understanding of the apportionment rules themselves.[46]

[45] *Id.*, ¶ 106.

[46] The comments cited in the Further Notice at ¶ 105 n.233, appear to be focused on uncertainties in the classification of services. Additional guidance concerning the current rules would cause less confusion in the industry than the proposed rule modifications and likely provide the necessary clarification.

In any event, the Commission's proposed rule is unlikely to help the Commission deter, detect, or stop any "gaming" of its apportionment rules. The Commission would gain no more insight into how assessable and non-assessable services are priced and/or how discounts are applied under the revised rule. The adoption of the modified rule would also artificially discourage or limit businesses from offering bundled discounts that would otherwise benefit consumers.

For all of these reasons, the Commission should not modify its bundled offering rules in the manner proposed. Instead of modifying the rules the Commission should encourage pro-consumer bundling by clarifying that under the existing rules a "safe harbor" applies if bundling discounts are apportioned proportionally among assessable and non-assessable components in a bundle.

VI. CONCLUSION

In pursuing reform in this proceeding, the Commission should keep in mind the goals of promoting efficiency, fairness, and sustainability in the Universal Service system, while also acting within the confines of its statutory authority, binding legal precedent, and established policy principles. As such, the Commission should preserve the distinction between wholesale and end-user revenues, seek to promote uniformity and transparency in the "reseller" certification process, retain its existing exemption for international-only service providers and the LIRE exception, and refrain from modifying the bundled offering rules.

Respectfully submitted,

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July 9, 2012