Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In The Matter of	
Request for Review by Sprint Spectrum, L.P. of Decision of Universal Service Administrator	WC Docket No. 06-122

REQUEST FOR REVIEW OF A DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

December 14, 2018

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Pursuant to 47 C.F.R. § 54.719(b), Sprint Spectrum, L.P. ("Sprint" or "Appellant") hereby seeks review by the Wireline Competition Bureau ("Bureau") of audit findings made by the Universal Service Administration Company ("USAC") in the course of an audit of Appellant's 2016 Form 499-A.

SUMMARY

This appeal presents two legal questions for the Bureau. The first is whether USAC may impose the 100 percent telecommunications safe harbor method as a penalty for a carrier's alleged failure to retain documentation where the carrier produced other evidence that its allocations for the bundle in question were reasonable. Here, despite Sprint's presentation of evidence supporting the reasonableness of its allocation of bundled revenue, USAC improperly concluded that Sprint's reported allocation was unreasonable. It compounded that error by treating *all* revenue from the relevant bundle as assessable rather than applying other, more reasonable approaches. Because USAC disregarded Sprint's evidence of reasonableness and

exceeded its authority in imposing a remedy not called for under the law, Sprint respectfully requests that the Bureau reverse USAC's findings and accept as reasonable Sprint's existing revenue allocation.

The second question is whether USAC may retroactively find that a carrier's traffic studies are insufficient to justify the carrier's reported revenues where the carrier had consistently filed and relied upon such traffic studies without objection from USAC. Here, Sprint has long relied upon traffic studies in making jurisdictional allocations and has regularly filed these studies alongside its 499-Qs. Neither USAC nor the Commission have previously objected to the traffic studies or to Sprint's jurisdictional calculations, or suggested that Sprint's documentation was in any way inadequate. Moreover, USAC has not explained *why* Sprint's traffic studies are inadequate or pointed to any criteria by which the sufficiency of traffic studies or other documentation is determined. This retroactive rejection of Sprint's traffic studies is an improper attempt to enforce a new policy of which Sprint did not have notice. Because USAC exceeded its authority by retroactively enforcing new policy, Sprint respectfully requests that the Bureau reverse USAC's findings and vacate its instructions for amending Sprint's 2016 499-A filing.

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I. BACKGROUND

Appellant Sprint Spectrum, L.P. is a wholly-owned subsidiary of Sprint Corporation that provides wireless communications products and services in the United States and internationally. On September 21, 2016, USAC announced that it would conduct an audit of Appellant's 2016 499-A filing. Appellant cooperated fully with USAC during the audit process. In November 2017, USAC's Internal Audit Division ("IAD") provided Appellant with a series of Draft Audit Findings and requested that Appellant respond and provide certain additional information. Appellant did so. On March 12, 2018, after reviewing the information provided by Appellant, USAC issued a Final Audit Report[1] containing IAD's findings and recommendations, Appellant's responses to the findings, and USAC management's concurrence with IAD's findings.

On May 11, 2018, Appellant filed an appeal of that Final Audit Report with USAC, challenging IAD's findings in two respects.[2] On October 15, 2018, USAC issued a decision denying the Appeal as to both issues.[3] Appellant now challenges that decision.

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[1] Sprint Spectrum, L.P. Performance Audit on Compliance with Federal Universal Service Fund Contributor Rules (USAC Audit No. CR2016CP022) (Dec. 1, 2017) ("Final Audit Report"), attached herein as Attachment A. Although the Final Audit Report is dated December 1, 2017, Sprint was not provided with formal notice of the report until March 12, 2018. *See* Letter from IAD Supervisor Matthew Stayton to Jay Franklin (March 12, 2018), attached herein as Attachment B.

[2] Letter from Brita Strandberg to Universal Service Administrative Co., Appeal of Final Audit Report issued on March 12, 2018 of Sprint Spectrum, L.P. (Filer ID 811754), attached herein as Attachment C.

[3] Letter from USAC to Brita Strandberg (Oct. 15, 2018) ("USAC Appeal Response"), attached herein as Attachment D.

II. QUESTIONS PRESENTED FOR REVIEW

This appeal presents the following questions. *First*, whether USAC erred when, in assessing the allocation of revenue for one prepaid bundled offering, it improperly applied the 100 percent telecommunications safe harbor method. *Second*, whether USAC erred when it retroactively created and enforced new rules regarding the sufficiency of jurisdictional documentation of which Sprint did not have notice.

III. ARGUMENT

A. USAC IMPROPERLY APPLIED THE 100 PERCENT TELECOMMUNICATIONS SAFE HARBOR TO A BUNDLED OFFERING.

USAC set out to review Sprint's allocation of telecommunications and information services revenue for bundled offerings by requesting supporting documentation for fifteen pre- and postpaid bundled offerings.[4] Such documentation would show voice, text, and data usage and would support Sprint's allocations of telecommunications and information services revenue for each bundle.

Sprint provided the requested documentation for fourteen of the bundles. For one prepaid bundle, however, Sprint had not retained the requested documentation.[5] At the conclusion of the audit, USAC decided that, because Sprint was unable to provide the requested documentation, the bundle in question would be assessed as 100 percent telecommunications revenue per one of two safe harbor methods.[6] This assessment is unreasonable and exceeds USAC's authority.

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4 Final Audit Report at 15.

5 *Id.* at 8–9.

6 *Id.* at 14–15. *See also Policy and Rules Concerning the Interstate, Interexchange Marketplace, et al.*, Report and Order, 16 FCC Rcd. 7418, ¶ 51 (2001) ("Bundling Order") (describing safe harbor method); 2016 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A) at 33–34 (2016) (same) ("2016 499-A Instructions").

1. USAC Failed to Consider Whether Sprint's Reported Allocation is Reasonable.

A filer's allocation of revenues need only be "reasonable."[7] The Commission has designated two safe harbor methods as presumptively reasonable: allocation based on the unbundled service offering prices and 100 percent allocation as telecommunications revenue.[8] Other methodologies, while not entitled to the same presumption of reasonableness, may nevertheless be reasonable and, therefore, acceptable. In the event of an audit, carriers must provide "evidence" that their reported allocations comply with the applicable rules.[9] In determining whether an alternative method is reasonable, USAC must "apply the standards underlying the safe harbors described above."[10] In particular, the Commission's "overriding intent is to maintain stability and predictability" in universal support funding.[11]

With regard to the bundle in question, Sprint had reported telecommunications revenue at 70 percent, with a voice/text/data split of 70/15/15. Although Sprint was unable to provide the specific usage documentation for this allocation that USAC requested, it did nevertheless provide documentation supporting its reported numbers.[12] Furthermore, Sprint provided USAC with persuasive evidence that its allocation approach was reasonable. First, USAC concluded that revenue from each of the other fourteen bundles it examined was properly allocated, which

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7 Bundling Order at ¶ 53.

8 *Id.* at ¶¶ 50–51.

9 *Id.* at ¶ 53

10 *Id.*

11 *Id.* at ¶ 49.

12 *See, e.g.*, "PBC 34 - Prepaid SOC Splits," attached to Memorandum from Andrew Lancaster to USAC Re: Responses to 050917 Status Meeting (May 23, 2017) (showing 70/15/15 split for bundle in question, MUCL1340), attached herein as Attachment E.

shows that Sprint's approach to allocation was consistently reasonable.[13] Second, the particular bundle in question had a relatively high percentage of assessable revenue. USAC itself acknowledged that the 70 percent allocation was "on the higher end" of assessable allocations[14]; indeed, the *highest* assessable allocation among bundles that included voice, text, and data services was 75 percent.[15] The record as a whole thus demonstrated that Sprint's allocation was reasonable.

USAC was obligated to make a determination of reasonableness based on the evidence. Instead, it disregarded the evidence Sprint provided, focusing only on the absence of the specific supporting documentation USAC requested. When Sprint was unable to produce that documentation, USAC improperly concluded that the reported allocation must be *per se* unreasonable and imposed the 100 percent safe harbor method as a penalty.

2. USAC's Imposition of the 100 Percent Safe Harbor Method is Improper.

USAC's actions and correspondence make clear that its application of the 100 percent safe harbor method is punitive and unreasonable. First, upon learning that Sprint had not retained the specific requested documentation, USAC immediately assumed that Sprint's reported allocation must be *per se* unreasonable and indicated it would move directly to imposition of the safe harbor method: "[I]f there is no documentation to support the current

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[13] Final Audit Report at 15 (deeming all supported bundle allocation methodologies "reasonable").

[14] Final Audit Report at 15.

[15] This information was contained in the file "PBC 11 - Bundled Revenue Support SSLP_2015.xlsx," which showed splits for all prepaid bundles in 2015. This file was sent to USAC by Andrew Lancaster on March 8, 2017. *See* E-mail from Andrew Lancaster to USAC Re: USAC Audit - Sprint Spectrum - Status Call Items (Mar. 8, 2017) (showing splits for all prepaid bundles in 2015), attached herein as Attachment F.

allocation estimate or a revised allocation calculation available, IAD intends to reclassify 100 percent of the non-telecommunications portion of these plans to telecommunications as assessable revenue."[16] USAC took this approach despite the documentation Sprint had already provided and made clear that it would not consider other relevant factors, such as Sprint's demonstrated compliance with regard to the other bundles and whether Sprint's record deficiency was excusable or otherwise in good faith. Instead, it immediately imposed the highest assessment available.

Second, USAC imposed the 100 percent safe harbor method without considering whether other assessments would also be reasonable. It not only rejected the 70 percent allocation proposed by Sprint and supported by the evidence, but declined even to use a 75 or 90 percent allocation. As noted above, 75 percent was the highest assessable percentage among bundles like the one in question—that is, prepaid bundles including voice, text, and data services—and USAC itself acknowledges that among *all* of Sprint's bundled offerings, the highest assessable percentage was 90 percent.[17] In light of this fact, USAC could reasonably have imposed a 75 percent allocation on the bundle in question, and there is certainly no basis for concluding that anything more than a 90 percent allocation is appropriate. Instead, despite the existence of evidence supporting an allocation to the contrary, USAC assessed at 100 percent.

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[16] Memorandum from Andrew Lancaster to USAC re: Responses to Invoice Population Requests & PBCs 44 and 45, at 2 (July 20, 2017), attached herein as Attachment G.

[17] *Id.*

3. USAC May Not Wield the Safe Harbor Method as a Penalty.

The 100 percent safe harbor method was not intended to be wielded as a penalty, but rather to help create a "framework" for universal service contributions.[18] The *Bundling Order*, which established the retention requirement USAC now seeks to enforce, is notably silent as to any penalty for a carrier's failure to retain documentation. It states only that "carriers will need to provide evidence" in the event "an audit or enforcement proceeding [is] initiated."[19]

USAC is an entity of limited authority and may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."[20] Here, USAC's decision to use a tool of convenience as a penalty for an administrative deficiency exceeds its authority; USAC may not read into the *Bundling Order* or 499-A Instructions a penalty that simply does not exist. By imposing a 100 percent telecommunications allocation as a penalty for Sprint's failure to retain paperwork, despite evidence that a lower allocation would be reasonable, USAC improperly exceeded its authority.

USAC's imposition of the 100 percent allocation is particularly improper in light of Section 54.709(d), which provides that where a carrier *fails to file its 499 entirely*, USAC is to bill the carrier "based on whatever relevant data the Administrator has available."[21] The penalty for a failure to retain documentation supporting a telecommunications allocation—particularly where, as here, the carrier retained sufficient documentation for all other bundles—should not be harsher than the penalty for failing to file a 499 at all. But that is the effect here, where Sprint

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[18] *See* Bundling Order at ¶ 49.

[19] *Id.* at ¶ 53.

[20] 47 C.F.R. § 54.702(c).

[21] 47 C.F.R. § 54.709(d).

provided USAC with relevant data to support allocations well below the 100 percent allocation USAC imposed and USAC declined to assess Sprint based on that data.

Finally, use of the 100 percent safe harbor method as a penalty for a one-off failure to retain documentation is contrary to the clear policy underlying the universal service mechanisms. Section 254(b) provides that carriers' contributions should be "equitable" and that the mechanisms supporting universal service should be "specific" and "predictable."[22] The *Bundling Order* reiterated this intent to "maintain stability and predictability."[23] Consistent with this intent, the 100 percent safe harbor method was created as a means of streamlining both carriers' revenue reporting calculations and the audit process.[24] Use of this method as a penalty, where all available information indicates that a 100 percent telecommunications allocation is not reasonable, is neither specific nor predictable, and is certainly not equitable. Accordingly, Sprint respectfully requests that the Bureau reverse USAC's findings and accept Sprint's allocation of the relevant bundle as 70 percent telecommunications revenue.

B. USAC Improperly Created and Enforced New Policy Regarding Documentation for Jurisdictional Calculations.

USAC also reviewed Sprint's reported intra- and interstate mobile service revenues and improperly rejected Sprint's jurisdictional allocations. To report the jurisdiction of its mobile service revenues, Sprint relied on traffic studies by which Sprint classified all minutes to intrastate, interstate, or "unknown" jurisdiction categories. Sprint relied on these traffic studies in calculating its intra- and interstate revenues. USAC, however, found that Sprint could not

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22 47 U.S.C. § 254(b)(4) & (5).

23 Bundling Order at ¶ 49.

24 *Id.* at ¶ 51.

"provide sufficient documentation to support this classification" and removed the "unknown" minutes from the study, recalculating the intra- and interstate percentages based only on known intra- and interstate minutes.[25] This increased the percentage of interstate minutes, thereby greatly increasing Sprint's contribution liability. These actions are inequitable and improperly exceed USAC's authority.

Sprint's jurisdictional calculations were based on traffic studies that conformed to the requirements laid out in the 2016 499-A Instructions and the *Contribution Methodology Reform Order*.[26] USAC received these traffic studies with each of Sprint's 499-Q filings for the audit period, and neither USAC nor the Commission objected to Sprint's jurisdictional calculations at the time of filing or suggested that the studies were insufficient to support those calculations. USAC has had ample opportunity to examine these studies and has never suggested that they may be incorrect or otherwise deficient for the purposes for which Sprint offered them.

USAC has failed to explain *why* Sprint's traffic studies are insufficient. It has not pointed to any existing Commission Rule or Order that provides adequate notice of what documentation is (or is not) sufficient to support jurisdictional calculations. Likewise, USAC has not cited any Commission Rule or Order that would require the treatment of "unknown" minutes USAC would impose here. Because USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress,"[27] it has exceeded that authority.

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[25] Final Audit Report at 9.

[26] 2016 499-A Instructions at 41; *Universal Service Contribution Methodology, et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 32 (2006) ("Contribution Methodology Reform Order").

[27] 47 C.F.R. § 54.702(c).

Moreover, USAC can neither hold providers to requirements adopted after a filing is made[28] nor penalize them for violating rules of which they did not have fair notice.[29] But that is precisely what it has done in this case. Sprint complied with all applicable rules regarding the use of traffic studies: its traffic studies conformed to the governing rules laid out in the 499-A Instructions and *Contribution Methodology Reform Order*, and it filed the studies in a consistent and timely manner. Any finding that Sprint's traffic studies are insufficient to support its jurisdictional calculations, or that Sprint's reliance on those studies constitutes some other perceived "violation" of the rules, arises from USAC's own new policies of which Sprint did not have notice.

While Sprint is more than willing to make the recommended changes going forward, USAC cannot retroactively change the rules. Its rejection of Sprint's previously-approved traffic studies will impose substantial liability that Sprint will be unable to pass through to its customers. This post hoc policy change is in excess of USAC's authority. Accordingly, Sprint respectfully requests that the Bureau reverse USAC's findings and vacate its instructions for amending Sprint's 2016 499-A filing to remove the "unknown" minutes.

IV. CONCLUSION

For the foregoing reasons, the Bureau should reverse USAC's finding that Sprint's reported allocation of 70 percent telecommunications revenue for the bundle in question was unreasonable and vacate its instruction that Sprint amend its 2016 499-A to assess that bundle at 100 percent. It should likewise reverse USAC's finding that Sprint's traffic studies are

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[28] *Requests for Review of the Decisions of the Universal Service Administrator by Academia Discipulos de Cristo Bayamon, Puerto Rico, et al.*, 21 FCC Rcd. 9210, ¶ 9 (2006).

[29] *SNR Wireless License Co., LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017).

insufficient to justify its jurisdictional calculations and vacate its instruction that Sprint amend its 2016 499-A to remove "unknown" minutes from the report entirely.

Respectfully submitted,

December 14, 2018

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1919 M Street NW
Washington, DC 20036
Counsel for Sprint Spectrum, L.P.

Exhibit A
Redacted in Entirety

Universal Service Administrative Co.

March 12, 2018

Jay Franklin, Assistant Controller
Sprint Spectrum, L.P.
6391 Sprint Parkway
MS: KSOPHT0101-Z2400
Overland Park, KS 66251

RE: Final USAC Audit Report for Sprint Spectrum, L.P. (Filer ID 811754)

Dear Mr. Franklin,

Please find enclosed a copy of the final audit report for Sprint Spectrum, L.P. The final audit report constitutes a final decision of the federal Universal Service Administrator (Administrator) for purposes of seeking review in accordance with 47 C.F.R. § 54.719. This letter constitutes the first formal notice to Sprint Spectrum, L.P. that the audit report has been finalized.

The filing deadline for requesting review of the Administrator decision is set forth in 47 C.F.R § 54.720 and provides that requests for review must be filed within sixty (60) days of "issuance" of the decision from which review is sought. The date of this letter shall constitute the date of issuance of the final audit report for purposes of seeking review.

Please contact me if you have any questions.

Sincerely,

Matthew Stayton
Supervisor of Internal Audit

Enclosures (1)

Cc Andrew Lancaster, Manager – Regulatory Reporting (Sprint Spectrum, L.P.)
Chang-Hua Chen, Senior Financial Analyst of Contributions (USAC)
Nikki-Blair Carpenter, Director of Internal Audit (USAC)
Jennifer Crowe, Manager of Internal Audit (USAC)
Rebecca Knutti, Supervisor of Internal Audit (USAC)

Attachment C

HWG | HARRIS, WILTSHIRE & GRANNIS LLP

REDACTED—FOR PUBLIC INSPECTION

May 11, 2018

BY ELECTRONIC MAIL AND HAND DELIVERY

Universal Service Administrative Co.
Billing, Collections, and Disbursements
Attn: Letter of Appeal
700 12th Street, NW, Suite 900
Washington, DC 20005

ContributorAppeals@usac.org

Re: Appeal of Final Audit Report issued on March 12, 2018 of Sprint Spectrum, L.P. (Filer ID 811754).

Dear Sir or Madam:

Pursuant to 47 C.F.R. § 54.719, Sprint Spectrum, L.P. (Sprint or Appellant) hereby appeals the attached Final Audit Report issued by the Administrator on March 12, 2018.

Appellant challenges USAC's conclusions in two respects. *First,* USAC improperly reclassified certain bundled revenue as 100% telecommunications. USAC acknowledges that the bundle in question includes services that are not assessable. Further, in the initial audit report, USAC did not assert that Sprint's allocation of revenues was unreasonable or in bad faith; rather, USAC rejected Sprint's allocation based solely on Sprint's supposed failure to maintain sufficient records to support the allocation. USAC now purports to clarify that it did determine that Sprint's allocation was unreasonable.

In doing so, USAC rejected evidence provided by Sprint that demonstrates that its bundling allocations *are* reasonable. As USAC notes, it examined a sample of fifteen bundled offerings, and concluded that fourteen were reasonable. For the fifteenth – the bundle at issue here – USAC only concluded that Sprint had not provided supporting documentation, an error that Sprint acknowledges. That failure to retain paperwork should not trigger the punitive outcome here of treating *all* revenue from the bundle – even revenue that USAC acknowledges *is not telecommunications revenue* – as assessable. Given the evidence before USAC that Sprint had acted reasonably with respect to all other bundles and that this bundle was one that had a relatively high percentage of telecommunications revenue, USAC should have inferred that the allocation of revenue from this bundle was reasonable.

Second, USAC improperly directs Sprint to refile past revenues in a manner inconsistent with traffic studies that Sprint provided to USAC and to which USAC did not object. Having

received, without objection, Sprint's documented support for its calculation with each Form 499-Q for the audit period, USAC should not now be permitted to reject that support and mandate additional contributions, years later and after Sprint has lost the opportunity to recover those contributions from its customers.

In each of these cases, USAC has acted contrary to FCC rules and orders, and has exceeded its carefully prescribed authority.[1] For all of these reasons, as well as the reasons contained in Sprint's response to the Draft Audit Findings, USAC should reverse its Final Audit Reports to the extent explained above.[2]

Sincerely,

Brita D. Strandberg
Counsel for Sprint

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1 47 C.F.R. Sec. 54.702(c).

2 Appellants incorporate by reference their arguments in response to USAC's Draft Audit Findings, which are themselves incorporated in the Final Audit Reports.

Exhibits D-G
Redacted in Entirety