

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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
)	
Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.)	CC Docket No. 97-21
)	

APPLICATION FOR REVIEW

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SUMMARY

On December 9, 2004, without any notice or opportunity for comment, the Wireline Competition Bureau (“Bureau”) adopted a dramatic change to the rules governing the revision of Form 499-A Worksheets, which are used to report a carrier’s revenues that are subject to universal service contributions and other regulatory assessments. The *Form 499-A Revision Order* eliminated a Federal Communications Commission (“Commission”) rule that had allowed universal service contributors to demonstrate good cause for untimely revisions to their Form 499-A Worksheets, regardless of whether a revision would increase or decrease the carrier’s universal service contribution. The Bureau replaced this procedural safeguard with a “one-way ratchet” that allows, and actually requires, contributors *indefinitely* to file revisions that would *increase* their universal service contributions, but bars revisions that would *decrease* their contributions, if a revision is filed more than one year after the original filing of the Worksheet.

The Bureau’s adoption of this substantive rule without notice and comment violates the Administrative Procedure Act. This action also exceeds the Bureau’s delegated authority, because the rule adopted in the *Form 499-A Revision Order* extends far beyond the Commission’s delegation of authority for the Bureau to modify “reporting requirements” relating to the universal service support mechanisms.

The *Form 499-A Revision Order* also contains a number of substantive defects. The rule adopted in the *Order* conflicts with section 254 of the Communications Act of 1934, as amended (“Act”), which requires that universal service contributions be “equitable,” and section 2(b) of the Act, which prohibits the assessment of universal service contributions on *intrastate* telecommunications services. The new rule is also arbitrary and capricious. It violates basic notions of fairness by adopting completely different standards for *upward* revisions (*i.e.*,

revisions that will increase a carrier's universal service contribution) and *downward* revisions (*i.e.*, revisions that will decrease that contribution) of 499-A Worksheets. The *Order* establishes no statute of limitations for upward revisions, but then allows only one year for downward revisions. The inadequacy of the one-year revision window is demonstrated by the numerous petitions to revise 499-A Worksheets that are pending before the Commission and the Universal Service Administrative Company ("USAC"). Under the new rule adopted by the Bureau, all of these petitions would be denied, regardless of whether the party could establish good cause for the proposed revision and how much the contributor had "overcontributed."

The *Order* also relies on erroneous findings of important and material facts, makes erroneous determinations regarding the benefits and burdens of the new rule, and ignores other much less burdensome alternatives that could have accomplished the stated objectives of the *Order*. It is likely that proper notice and comment would have revealed these inadequacies and led to a more reasonable and fair rule.

Given these procedural and substantive flaws, the Commission should set aside the *Form 499-A Revision Order* and reinstate the rules that the *Order* modified. As set forth in a separate filing before the Commission, the Commission also should stay the effectiveness of the *Order* while it considers this Application for Review.

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APPLICATION FOR REVIEW

Pursuant to section 1.115 of the Federal Communications Commission’s (“Commission” or “FCC”) rules, Qwest Communications International Inc. (“Qwest”) hereby submits this Application for Review of the Wireline Competition Bureau’s (“Bureau”) *Order* modifying the rules for updating the annual Telecommunications Reporting Worksheet (“499-A Worksheet” or “Form 499-A”).¹

In the *Order*, the Bureau adopted a new rule prohibiting the revision of 499-A Worksheets more than twelve months after the due date of the original filing if the revision would decrease

¹ *In the Matter of 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; Changes to the Board of Directors of the National Exchange Carrier Associations, Inc., Order*, CC Docket Nos. 96-45, 98-171, 97-21, DA 04-3669 (rel. Dec. 9, 2004) (“*Form 499-A Revision Order*” or “*Order*”). As a contributor that has previously sought revisions of 499-A Worksheets, Qwest is clearly aggrieved by the Bureau’s *Order*. Since the Bureau did not seek comment before issuing the *Order*, or provide notice that it was going to change the rules regarding the Worksheet, it was not possible for Qwest to participate in the Bureau’s proceeding. See 47 C.F.R. § 1.115(a).

the universal service contribution or regulatory fees owed by the contributor. This rule is procedurally defective, and therefore must be set aside. In adopting this new rule, the Bureau failed to undertake the notice and comment required by the Administrative Procedure Act (“APA”) for a rule such as this, that eliminates the right of contributors to demonstrate good cause for untimely revisions that would decrease the amount of their universal service contribution for the period in question. In addition, the Bureau exceeded the authority delegated to it by the Commission.

The rule also conflicts with section 254 of the Communications Act of 1934, as amended (“Act”), which requires that universal service contributions be “equitable,” and section 152(b) of the Act, which prohibits the assessment of universal service contributions on *intrastate* telecommunications services.

The new rule is also arbitrary and capricious in a number of respects. The rule relies on erroneous findings of important and material facts, and makes erroneous determinations regarding the benefits and burdens of the new rule. Furthermore, the new rule imposes a penalty in the form of a forfeiture on contributors that have overstated their revenues in their original 499-A Worksheet—a penalty that bears no relationship to the gravity of the contributor’s error—while continuing to require contributors indefinitely to revise their Worksheet to correct past understatements of revenue. Finally, the *Order* ignores other much less burdensome alternatives that could have accomplished the stated objectives of the *Order*. Given these procedural and substantive flaws, the Commission should set aside the *Order* and reinstate the rules that the *Order* modified.²

² Qwest is also filing concurrently a Petition for Stay of the *Order*.

I. THE ORDER IS PROCEDURALLY DEFECTIVE

Without regard to the substantive merits of the *Order*, the Commission must review and set aside the *Order* because it is procedurally defective. In particular, in adopting the *Order*, the Bureau failed to engage in the notice and comment that is required under the APA for the adoption of a substantive rule, such as the rule adopted in the *Order*. The Bureau also exceeded its delegated authority.

A. The APA Requires Notice And Comment Before Adopting A Rule Limiting Downward Revisions Of 499-A Worksheets

As a threshold matter, the Bureau failed to engage in the notice and comment that is required under section 553 of the APA.³ The Bureau suggests that notice and comment is not required because the changes adopted in the *Order* are “procedural, non-substantive changes to the administrative aspects of the reporting requirements.”⁴ This is incorrect. The *Order* does not simply add or modify “administrative aspects” of the reporting requirements.⁵ The *Order* changes the substantive standards, established by the Commission, that govern the Universal Service Administrative Company’s (“USAC”) review of revisions to 499-A Worksheets. The prior rule governing Worksheet revisions, included a “safety valve” that allowed the filer of an untimely 499-A Worksheet revision to make a good cause showing for a revision that decreases the filer’s universal service contribution liability. Under this Commission rule, USAC was required to accept a revised 499-A Worksheet filed after December 1 of the filing year, as long

³ 5 U.S.C. § 553.

⁴ *Order* ¶ 10 n.31. The D.C. Circuit has held that the APA’s procedural rule exception is to be construed “very narrowly.” *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989).

⁵ See *In the Matter of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 14 FCC Rcd 16602, 16621 ¶ 39 (1999) (“*Form Consolidation Order*”).

as the contributor demonstrated “good cause” for the revision and provided appropriate documentation. No distinction was drawn between “downward revisions” (*i.e.*, 499-A Worksheet revisions that would decrease a carrier’s universal service contribution) and “upward revisions” (*i.e.*, revisions that would increase the carrier’s contribution).⁶

Under the new rule adopted in the *Order*, upward revisions will continue to be required indefinitely, but downward revisions filed more than twelve months after the original filing will not be accepted, even if there is “good cause” for the revision.⁷ This elimination of the “safety valve” for untimely downward revisions cannot be classified as merely a “procedural” or “administrative” change. The *Order* therefore cannot be lawfully adopted without notice and comment.

The changes adopted in the *Order* are distinguishable from the rules at issue in *JEM Broadcasting*.⁸ In that case, the Commission had established “hard look” rules, which required an application for an FM broadcasting license to be complete within a fixed filing window. Applications that were incomplete upon the close of the window were returned without opportunity to file a curative amendment.⁹ In concluding that the “hard look” rules were exempt from the notice and comment requirement, the D.C. Circuit found that the “critical fact” in that case was that the new rules “did not change the *substantive standards* by which the FCC

⁶ See *id.* at 16666-96 (Appendix D, Telecommunications Reporting Worksheet).

⁷ *Order* ¶ 10.

⁸ See *JEM Broadcasting Company, Inc. v. Federal Communications Commission*, 22 F.3d 320 (D.C. Cir. 1994).

⁹ *Id.* at 322.

evaluates license applications[.]”¹⁰ Indeed, “the Commission always has required applications to be complete in all critical respects by *some* date or suffer dismissal[.]”¹¹

In contrast, the *Form 499-A Revision Order* marks a complete change in the substantive standards by which revised 499-A Worksheets are to be evaluated by USAC. Prior to the *Order*, there was no deadline for correcting a 499-A Worksheet, as long as the filer could demonstrate good cause for revising the Worksheet outside of the nine-month window for unlimited revisions. In the *Order*, the Bureau removed this safeguard that had protected carriers from making unmerited contributions to the federal universal service program, by replacing the “good cause” test adopted by the Commission with a standard that considers only one thing—whether the amendment will result in an increased, or decreased, contribution amount. In adopting this new standard, the Bureau imposed a “substantive value judgment” that 499-A Worksheet revisions that will increase a carrier’s contribution amount should be permitted (and required) indefinitely, but revisions that will decrease that amount should be prohibited beyond a one-year window.¹² Unlike the rules at issue in *JEM Broadcasting* and *Public Citizen*, which were “agency housekeeping” rules, embodying “a judgment about what mechanics and processes are most efficient,”¹³ the rule adopted in the *Order* changed the underlying standards for evaluating a proposed revision to a 499-A Worksheet and therefore triggered the notice and comment requirements of the APA.

This case presents a particularly compelling case for notice and comment, because it would have likely led to the promulgation of a different rule. As the D.C. Circuit has observed,

¹⁰ *Id.* at 327.

¹¹ *Id.*

¹² *See Public Citizen v. Department of State*, 276 F.3d 634, 640 (D.C. Cir. 2002); *Reeder*, 865 F.2d at 1305.

¹³ *JEM Broadcasting*, 22 F.3d at 328.

the “notice requirement of the APA does not simply erect arbitrary hoops through which federal agencies must jump without reason. Rather, the notice requirement ‘improves the quality of agency rulemaking’ by exposing regulations “‘to diverse public comment,’” ensures “‘fairness to affected parties,’” and provides a well-developed record that ‘enhances the quality of judicial review.’”¹⁴ Here, notice and comment would have revealed the basic unfairness of a rule that allows carriers only one year to correct mistakes in a Worksheet that will lead to a refund of overpayments, but holds them forever liable for errors that resulted in an underpayment of universal service contributions. That this policy fails to comport with basic notions of fairness is illustrated by reference to the Internal Revenue Code, which includes the same three-year general statute of limitations period for both underpayments and overpayments.¹⁵

If the Bureau had sought comment, parties also would have had the opportunity to point out the flaws and misconceptions that underlie the Bureau’s reasoning in the *Order*. For example, commenters could have shown that one year is not adequate time for “diligent” contributors to discover errors, as illustrated by the numerous petitions pending before the Commission and USAC demonstrating good cause for correcting such errors outside of the one-year window. Parties also could have demonstrated that the new rule would not result in significant improvements in the administrative efficiency, certainty, and integrity of the contribution system, and that other less burdensome alternatives exist that would better serve those objectives. Finally, notice and comment would have allowed contributors to explain how they would be affected by this dramatic change in the standard governing Worksheet revisions.

¹⁴ *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (quoting *Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (citations omitted)).

¹⁵ 26 U.S.C. § 6501 (three-year limitation period, with exceptions for fraudulent returns and other special circumstances).

In light of the Bureau's failure to follow these procedural requirements, and the result of that shortcoming, the Commission should vacate the *Order* and reinstate the previous rule for revisions to 499-A Worksheets. If the Commission desires to modify this rule, it must do so pursuant to the notice and comments processes set out in the APA.

B. The Bureau Lacks Authority To Adopt A New Rule Prohibiting The Downward Revision Of Worksheets Outside Of The One-Year Window

The action taken in the *Order* also exceeded the Bureau's delegated authority. The Bureau suggests that adoption of the new rule is encompassed within the Bureau's authority to "waive, reduce, modify, or eliminate reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms."¹⁶ However, as just discussed, the *Order* does not simply add or modify "administrative aspects" of the reporting requirements.¹⁷ The Bureau's adoption of different standards for upward and downward revisions of a Worksheet, and its elimination of the "good cause" standard previously adopted by the Commission, are substantive changes to the Commission's universal service contribution rules. As the Commission has held, such issues regarding "the substance of the underlying programs" must be addressed by the Commission, and fall outside the scope of the authority delegated to the Bureau.¹⁸ The rule also raises substantial issues of compliance with the requirements of the Act. As described in detail below, it is Qwest's view that this new policy violates the statutory

¹⁶ *Order* ¶ 9 (quoting 47 C.F.R. § 54.711(c)). The Bureau does not contend that this action falls within the authority generally delegated to the Bureau, nor could it, given that the *Order* addresses novel questions of fact, law or policy that cannot be resolved under existing precedents and guidelines. See 47 C.F.R. § 0.291(a)(2).

¹⁷ *Form Consolidation Order*, 14 FCC Rcd at 16621 ¶ 39.

¹⁸ See *id.*

requirements that universal service contributions be “equitable”¹⁹ and not be assessed on *intrastate* telecommunications services. Given the magnitude of these issues, they must be dealt with by the Commission rather than the Bureau.

II. THE ORDER CONFLICTS WITH SECTIONS 254(d) AND 2(b) OF THE ACT

Aside from the procedural flaws identified above, the *Order* is inconsistent with fundamental requirements of the Act. Section 254(d) requires carriers that provide interstate telecommunications services to contribute to universal service on an “equitable and nondiscriminatory basis.”²⁰ As the Bureau has previously found, prohibiting a carrier from correcting its revenues reported on a worksheet, so that the carrier contributes “an erroneous amount to support universal service[,] . . . would be inconsistent with the requirement that contributions be equitable.”²¹

In the *Order*, the Bureau did not simply bar contributors from correcting their Worksheets (and universal service contributions) outside of the twelve-month window. The Bureau created a “one-way ratchet” whereby Worksheet corrections outside the twelve-month window continue to be required if they will increase the contribution obligation for the contributor, but are prohibited if they would reduce the contributor’s contribution obligation. This same rule will apply whether the contributor’s overpayment was \$200 or \$200 million, and regardless of the circumstances regarding the overpayment. For example, one contributor’s

¹⁹ 47 U.S.C. § 254(d). This argument is discussed in more detail in Section III of this Application for Review.

²⁰ 47 U.S.C. § 254(d).

²¹ *In the Matter of Request for Review by ABC Cellular Corporation Page Now, Inc./ABC Paging, Inc.; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.*, Order, 17 FCC Rcd 25192, 25196 ¶ 10 (2002) (“*ABC Cellular*”). The Bureau does not even attempt to explain how the *Order* squares with *ABC Cellular*.

reporting error resulted in a universal service contribution that was more than 400 times than that required by the Commission's rules.²² Despite the clear equity in allowing a contributor to revise its 499-A Worksheet under such circumstances, the new rule would bar such revisions if they occurred more than twelve months after the original Worksheet was filed.

As the *Order* acknowledges, there are numerous petitions for revision pending before both the Commission and USAC. In 2003, USAC refused to accept downward revisions to 499-A Worksheets filed by certain non-incumbent local exchange carrier ("ILEC") Qwest affiliates. In the course of a USAC audit, Qwest discovered that hundreds of millions of dollars of revenues had been erroneously reported by the wrong non-ILEC Qwest affiliate in 2000. Qwest therefore revised its 499-A Worksheets for that year to assign the revenues to the correct non-ILEC affiliate and remove them from the Worksheet for the other non-ILEC affiliate. USAC accepted the Worksheet revisions that assigned the revenues to the correct affiliate, but rejected the revisions that removed the revenues from the incorrect affiliate. By doing so, USAC essentially "double taxed" those revenues. Qwest has filed a petition asking USAC to accept all of the revised Worksheets, and is confident that it can demonstrate good cause for these revisions.²³ However, if Qwest or any other carrier discovers such an error in the future, the Bureau's new rule will preclude such corrections, and thereby result in inequitable contributions to universal service, in violation of section 254(d). The new rule also would bar petitions such as that

²² See Letter from Marjorie G. Spivak, counsel for Crown Communication Inc. ("Crown"), to Robert Haga, USAC (dated Jan. 15, 2002), Exhibit 2 to Crown's request for review (carrier reported erroneously reported assessable revenue of \$24 million, instead of correct amount of \$56,000).

²³ Qwest has also asked USAC to accept other revisions to certain of its 499-A revisions for 2000 and 2001.

submitted by SES Americom, even though such rejections would result in the assessment of non-telecommunications revenues, in violation of section 254(d).²⁴

The Bureau's new rule also exceeds the Commission's statutory jurisdiction, because it will result in the assessment of intrastate telecommunications services. Several contributors have filed petitions for review with the Commission asserting that they erroneously contributed on their intrastate revenues.²⁵ Each of these requests for revision would be rejected under the new rule if they occurred outside the twelve-month window. In *TOPUC*, the Fifth Circuit found that the Commission's decision to assess intrastate revenues went beyond the agency's statutory jurisdiction, in violation of section 152(b) of the Act.²⁶ By prohibiting carriers from correcting their universal service contributions to reflect only the *interstate* telecommunications services provided by that company, the *Order* will in effect assess any *intrastate* services provided by the company, in clear violation of *TOPUC*. The only way to correct this jurisdictional error is to reinstate the current rule and allow carriers to revise their 499-A Worksheets to reflect their true interstate telecommunications revenues.

III. THE ORDER'S "ONE-WAY RATCHET" RULE IS ARBITRARY AND CAPRICIOUS

Given the procedural and substantive flaws discussed above, the Commission has no choice but to reverse the *Order*. Such a result is also supported by a review of the analysis underlying the Bureau's decision. The Bureau asserts that its new rule will improve the "administrative efficiency and certainty" of the contribution system, help ensure the "stability

²⁴ See Request for Review by SES Americom, Inc. and Americom Government Services, Inc. of Decision of Universal Service Administrator (Oct. 27, 2003).

²⁵ See, e.g., Appeal of a Decision of the Universal Service Administrative Company Concerning GE Business Productivity Solutions, Inc.'s Revision to FCC Form 499-A (July 3, 2002); Letter of Appeal of Morris Communications, Inc. (July 12, 2002); Appeal of Cooperative Communications, Inc. (Oct. 1, 2002); Appeal of Eagle Communications, Inc. (Nov. 24, 2003).

²⁶ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999).

and sufficiency” of that system, and improve the “integrity” of the universal service contribution methodology.²⁷ Conversely, the Bureau suggests that the one-way ratchet rule will impose a limited burden on contributors, because twelve months is sufficient time to discover errors in a 499-A Worksheet. Each of these conclusions is fundamentally flawed and warrants reversal of the *Order*.

The Bureau’s analysis vastly overstates the benefits of prohibiting downward revisions outside of the twelve-month window, and largely ignores the tremendous harm that the rule will cause. In doing so, the Bureau blinds itself to the history of the Commission’s universal service mechanism, whereby contributors have frequently, and for legitimate reasons, discovered errors in their 499-A Worksheets more than a year after the original filing. The *Order* also disregards the fact that the Commission’s previous rule regarding 499-A Worksheet revisions already substantially accomplished the policy objectives identified in the *Order*. Finally, the Bureau ignores other much less burdensome, but more effective, changes to the Worksheet revision rule that would accomplish these policy objectives in a more reasonable manner.

A. Any Benefit Of The Limitation On Downward Revisions Is Completely Outweighed By The Tremendous Harm Resulting From The Rule

The purported benefits of the rule adopted in the *Order* fall far short of justifying that rule, particularly in light of the substantial burdens it will place on universal service contributors. The Bureau’s justification of its one-way ratchet rule consists of a few sentences citing vague policy objectives regarding the administrative efficiency, certainty, and integrity of the Commission’s contribution system. The theory behind the new rule appears to be that prohibiting the downward revision of a 499-A Worksheet outside of a one-year window will:

(1) decrease the number of revised Worksheets and potential true-ups that USAC has to process,

²⁷ *Order* ¶ 10.

resulting in increased efficiency for the organization; (2) limit the number of “credits” that USAC has to process as the result of a Worksheet revision, which will substantially reduce the need for adjustments regarding a given contribution year and thereby provide contributors more certainty regarding the amount of their universal service contributions; and (3) provide incentives for carriers to submit accurate revenue information in a timely manner, thus improving the integrity of the contribution system.

Each of these “improvements” is vastly overstated.

Administrative Efficiency. The *Order*’s limitation on downward revisions will have at most a minimal impact on USAC’s administrative efficiency. Each year, USAC processes four quarterly 499-Q worksheets plus the 499-A Worksheet for each of the more than 2,000 carriers that contribute to universal service.²⁸ The 499-A Worksheet requires USAC, for each of these contributors, to true-up the revenues they reported in quarterly worksheets. In addition, USAC must handle revisions to 499-Q worksheets that are filed within 90 days of the original deadline, and, under the Bureau’s new rule, will have to process downward revisions of 499-A Worksheets that are filed within the twelve-month window, and all upward revisions of 499-A Worksheets, regardless of when they are filed.

Elimination of the limited number of downward revisions of 499-A Worksheets that are filed outside the twelve-month window will have little impact on USAC’s workload. According to the *Order*, 19 petitioners have sought review of USAC rejection of revised 499-A Worksheet revisions as untimely. It is unclear from the *Order* how many requests to revise 499-A Worksheets are pending before USAC, but it is likely only a tiny fraction of the number of 499-Q and 499-A worksheets that USAC processes each year. Moreover, the *Order*’s allowance of

²⁸ See Universal Service Administrative Company, Federal Universal Service Support Mechanisms Quarterly Contribution Base for the First Quarter 2005, dated Dec. 2, 2004.

upward revisions indefinitely conflicts with the Bureau's goal of promoting administrative efficiency, since such revisions need to be processed by USAC as well.

Certainty. The Bureau's new rule is also unlikely to provide any additional certainty with regard to the amount a carrier will contribute in a given quarter or year. Under the current methodology, the Commission changes the contribution factor every quarter. In the past, that factor has sometimes changed substantially from quarter to quarter. Between this and the last quarter, the contribution factor rose from 8.9 percent to 10.7 percent, resulting in a 20 percent increase in each carrier's contribution amount, assuming its revenues were the same both quarters. The amount the contribution factor will change in an upcoming quarter—and the corresponding level of a filer's contributions—is completely unknown to carriers from quarter to quarter.

Fluctuations in the contribution factor generally have resulted from changes in the size of the contribution base, due to a variety of factors including rising wireless and Internet usage (and falling usage on wireline networks), declining long distance rates, and the offering of new service packages. If anything, such trends will accelerate in the upcoming years, thus requiring the Commission to continue to make frequent adjustments to the contribution factor, and USAC to make corresponding changes in a carrier's universal service invoices in a given contribution year. Given this inherent uncertainty and instability in the contribution system, there is no basis for the *Order's* conclusion that the new limitation on downward revisions will increase a carrier's certainty about how much it will have to contribute to universal service.

To the extent the *Order* implies that the need for adjustments to the contribution factor have been caused by contributors' revisions of their Worksheets outside the one-year window, this would be surprising given that USAC has for years maintained a policy of prohibiting

downward revisions that are submitted more than one year after the original filing.²⁹

Furthermore, to the extent the Commission is concerned with fluctuations in the amount of contributions, the Commission would have to prohibit upward revisions of 499-A Worksheets, as well as downward revisions, since either is equally likely to have an impact on the contribution factor.³⁰

Incentives for Accuracy. Remarkably, the *Order* attempts to create additional incentives only where they are not needed—to ensure that carriers do not *overstate* their revenue in their original 499-A Worksheet. The Bureau’s new rule has no effect on the incentive for carriers to avoid *understating* their revenues, because it allows upward revisions indefinitely, without additional penalty.³¹ The Bureau instead attempts to disincent carriers from overstating their revenues, by limiting their ability to make downward revisions of their revenues. But carriers already have substantial incentives to ensure they do not *overstate* their revenues. Naturally, carriers have a strong incentive to avoid contributing more than they are required, and this incentive is increased by the fact that USAC does not pay any interest on overpayments when they ultimately are refunded. Thus it is very unlikely that the rule will improve the “integrity” of the contribution system. If anything, the rule will undermine the integrity of that system,

²⁹ *Order* ¶ 7.

³⁰ Such an approach also would tend to mitigate the impact of revisions, because, on average, carriers’ downward and upward revisions should roughly cancel out.

³¹ Arguably the way in which USAC processes upward revisions constitutes a penalty, but the impact is relatively small. When it processes an upward revision, USAC computes the additional contribution owed by using the average of the two highest contribution factors for the original contribution year, which can result in the contributor making a somewhat larger contribution than it would have made if it had reported the proper revenue amount in the original 499-A Worksheet. See *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24972 ¶ 36 (2002).

because it will require carriers to contribute more than required under the Commission's contribution methodology.³²

In addition to overstating the benefits of the new rule, the *Order* also ignores the tremendous burden it places on contributors to universal service. The *Order*'s conclusion that twelve months is "ample time for a diligent filer to determine what revenues it earned the prior year"³³ has no basis. Before referring them to USAC, there were 19 petitions pending before the Commission seeking to revise 499-A Worksheets, from contributors of various sizes. There also are additional requests pending at USAC. This is not surprising given the incredible complexity of the contribution rules. Despite a filer's diligent efforts, occasional revisions are inevitable, and it is not always possible to discover the need for a revision within twelve months of the original Worksheet. The filing of a 499-A Worksheet is not simply a matter of "determin[ing] what revenues [the] carrier earned the prior year."³⁴ In particular, the carrier must determine which services are subject to assessment, based on whether the services are interstate or intrastate, telecommunications services or information services, and retail or wholesale. Each of these questions is potentially highly complicated, with the result turning on complex technical distinctions between services and arcane legal classifications. In some cases, even after considering such technical and legal matters, it is still unclear which category a service falls into; in others, the answer may change over time based on decisions of the Commission or USAC. It is also possible for one portion of a service or package of services to be subject to assessment, and another not. Such situations raise difficult questions regarding the appropriate

³² As noted below, there are other steps that the Commission could take to increase incentives for carriers to avoid underpayment, such as imposing interest or penalties on such payments.

³³ *Order* ¶ 11.

³⁴ *Id.*

apportionment of services as assessable or non-assessable. In this environment, it is no wonder that there are numerous petitions pending before the Commission and USAC.

These petitions vividly illustrate the types of issues that can arise given the complexity of the contribution rules and the myriad services provided by telecommunications carriers. One carrier determined that it had incorrectly made universal service contributions for two services that did not constitute “telecommunications,” but USAC disallowed a revision to the company’s 499-A Worksheet that would exclude the revenues for these services, because the revision occurred outside the revision window established by USAC.³⁵ Another contributor discovered that it had overstated its revenues for certain years, in part based on its erroneous inclusion of “carrier” late payment charges as interstate end-user revenues. USAC denied the company’s credits of nearly \$2 million because the errors were identified outside the one-year window.³⁶

For large carriers, which may offer hundreds or even thousands of different services, it is very difficult to avoid errors in determining their revenues for a reporting period. Small companies face their own problems. For small companies, which generally do not maintain a large staff “knowledgeable in [the] many facets of regulatory reporting,” reporting errors occur, and sometimes are not discovered within a year, despite “every reasonable effort to remain cognizant of these requirements and comply fully with them.”³⁷

Given these difficulties, the prohibition on downward revisions (outside the twelve-month window) that was adopted in the *Order* is completely unreasonable. This prohibition

³⁵ Letter from Mara Yoelson, SES Americom, to Marlene H. Dortch, FCC, CC Docket Nos. 96-45 and 98-171 (Oct. 27, 2003).

³⁶ Appeal of Decisions of the Universal Service Administrative Company Concerning SBC Communications Revision to Form 499-A and Application of Charges, CC Docket Nos. 96-45, 97-21 (dated Nov. 9, 2004).

³⁷ Letter from Laurie Hensley, New Hope Telephone Company, to Marlene H. Dortch, FCC (July 3, 2004).

amounts to a forfeiture of a carrier's overpayment, regardless of the amount of that overpayment and the cause of the overpayment. Furthermore, there is no relationship between the amount of this penalty and the infraction that forms the basis for the penalty. If a carrier over-contributes \$200, and fails to discover the error within a year, its penalty for the error is \$200. If another carrier fails to discover a \$200 million overpayment based on the same type of error, its penalty is \$200 million. This failure of the Bureau to "fit the punishment to the crime" alone renders the rule arbitrary and capricious.

In this respect it is useful to compare the Bureau's rule to the income tax rules. For federal income tax purposes, the same general statute of limitations period applies to both underpayments and overpayments.³⁸ In addition, the Internal Revenue Code permits the netting of overpayments and underpayment if all the applicable years are open under the statute of limitations,³⁹ which would generally occur through a waiver of the limitations period in the event of an audit.

B. The *Order* Unreasonably Ignores Other Less Burdensome, And More Effective, Means Of Accomplishing The Bureau's Policy Objectives

The *Order* also unreasonably ignores alternatives that would accomplish the Bureau's policy objectives without imposing such dramatic burdens on universal service contributors. For example, to the extent the Commission is concerned that downward revisions of carriers' reported revenues could cause spikes in the contribution factor, the Commission could spread the credits resulting from such revisions over two quarters, instead of one. Alternatively, the Commission could apply the credits through the annual true-up process. This approach might also help to relieve any administrative burdens on USAC from applying credits outside of the

³⁸ 26 U.S.C. § 6501.

³⁹ 26 U.S.C. § 6402.

annual true-up. To the extent the Commission pursues either of these approaches, it should apply the same approach to upward revisions that are filed outside of the twelve-month window. Doing so will create the same benefits as for downward revisions, and will also be more equitable than applying one timeline for upward revisions and another for downward revisions.

If the Commission is most concerned about creating incentives for carriers to file accurate revenues, it might consider some type of penalty for carriers that initially underreport their revenues. For example, the Commission could impose a penalty of a certain percentage per month if a carrier revises its Worksheet upward outside of the one-year window.⁴⁰ Alternatively, the Commission could charge interest for the late payment, similar to the way in which the Internal Revenue Service handles late payments. The Internal Revenue Service uses both of these approaches to create incentives for taxpayers to avoid underpayments.⁴¹

Each of these alternatives would be vastly superior to the forfeiture imposed by the *Order*'s one-way ratchet rule. There is no evidence in the *Order* that the Bureau considered any of these alternatives or other possibilities that could avoid the substantial burdens imposed on all contributors by the *Order*.

⁴⁰ For example, if a carrier's upward revision of its reported revenue requires an additional \$100,000 contribution, a ten-percent penalty would result in a total contribution of \$110,000.

⁴¹ 26 U.S.C. §§ 6655, 6621.

IV. CONCLUSION

For the reasons discussed above, the Commission should reverse the *Order* and reinstate the Commission's previous policy regarding the revision of 499-A Worksheets.

Respectfully submitted,

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January 10, 2005

Its Attorneys

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **APPLICATION FOR REVIEW** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com, and 3) served via United States First Class mail, postage prepaid, on the Universal Service Administrative Company at the address listed below.

Richard Grozier
Richard Grozier

January 10, 2005

ATTN: Form 499-A Revision Order
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