Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:

Comprehensive Review of Universal Service Fund Management, Administration and Oversight	)	WC Docket No. 05-195
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Schools and Libraries' Universal Service Support Mechanism	)	CC Docket No. 02-6
Rural Health Care Support Mechanism	)	WC Docket No. 02-60
Lifeline and Link-Up	)	WC Docket No. 03-109
Changes to the Board of Directors for the National Exchange Carrier Association, Inc.	)	CC Docket No. 97-21

BUSINESS DISCOUNT PLAN INC.'S COMMENTS

Business Discount Plan, Inc. ("BDP"), by its attorneys, Shughart Thomson & Kilroy, P.C., hereby submits its Comments in connection with the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking ("NPRM"),released June 14, 2005, by the Federal Communications Commission ("FCC") in the above-referenced consolidated dockets.

I. INTRODUCTION

On June 14, 2005, the FCC issued its NPRM pertaining to a comprehensive review of the Universal Service Fund ("USF"), its management, administration and oversight in new docket WC Docket No. 05-195, consolidated with the following prior dockets concerning universal

service: CC Docket No. 96-45, CC Docket No. 02-6, WC Docket No. 02-60, WC Docket No. 03-109, and CC Docket No. 97-21. Among other things, the NPRM contains a detailed and thorough discussion concerning audits and investigations with respect to *recipients* of USF funds, and seeks comment on, *inter alia*, whether a five-year statute of limitations for initiating and concluding audits and investigations is appropriate for *recipients* of funds from high cost, low income, and rural health-care universal service support mechanisms.

The NPRM contains no discussion concerning audits and investigations with respect to *contributors* of USF funds. Nevertheless, the FCC buries in ¶ 88 (pertaining to audits and investigations with respect to *recipients* of USF funds) of its110 paragraph NPRM a very oblique request, made in a single sentence, for comments with respect to whether a five-year limitations period should apply to audits and investigations for *contributors* of USF funds. Specifically, in ¶ 88 of the NPRM, the FCC states "[s]imilarly, we seek comment on whether a five-year period is appropriate for seeking adjustment of a contribution obligation to make the correct contribution amount to the USF." *NPRM*, ¶ 88.

Because the NPRM contains no discussion concerning the proposed five-year limitations period with respect to *contributors*, it is unclear from the FCC's single above-quoted sentence in Paragraph 88 of the NPRM whether the proposed five-year limitations period is reciprocal. Put another way, does the five-year limitations period apply only when the FCC initiates and concludes audits and investigations in order to seek *upward* adjustments of a contributor's obligation to make the correct contribution to the USF, or does it apply to *downward* adjustments as well?

If the five-year limitations period is reciprocal, which the single sentence in Paragraph 88 of the NPRM on its face suggests, BDP takes the position that this five-year period is fair, just

and reasonable and will afford telecommunications carriers, such as BDP, sufficient time to examine in detail their contributions and the bases therefore, and to otherwise discover errors in the detailed annual data required by FCC Form 499-A and _____ to the Universal Service as _____ ("UDAC").

On the other hand, if the five-year limitations period is not reciprocal, BDP takes the position that it is unfair to allow the government to go back five years and conduct audits and investigations of carrier contributors to force upward adjustments, but not to allow contributors to make downward adjustments during this same period. Moreover, BDP submits that the NPRM, which contains no discussion concerning such downward adjustments or, indeed, upward adjustments, is defective under the Administrative Procedures Act, 5 U.S.C. § 552 *et seq.* (the "APA").[1] Incredibly, notwithstanding the fact that the issue of a one-year limitation period for downward adjustments has been vigorously challenged by numerous parties, including BDP, in CC Docket Nos. 96-45, 98-171, and 97-21, including challenges with respect to the unfairness of such a one-sided regime (one-year limitations for downward adjustments *vis-à-vis* unlimited time for upward adjustments), the NPRM inexplicably fails to even mention these dockets or arguments. (See Section III below pertaining to "Procedural History," for a discussion of these dockets).

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[1] BDP takes the position that the NPRM's lack of any discussion concerning downward or upward adjustments, let alone a thorough and detailed analysis, does not render the NPRM defective if the limitations period is reciprocal. If reciprocal, the five-year limitations period is more than sufficient to allow BDP, and other telecommunications carriers, to correct any errors in their respective FCC Form 499-As. Because a five-year limitations period provides ample time to correct such errors, a thorough and detailed discussion concerning the basis for a five-year period is unnecessary. On the other hand, a limitations period substantially less than a five-year period would require a thorough and detailed discussion concerning the basis for such period because such a lessor period may be insufficient to allow telecommunications carriers to correct errors in their respective FCC Form 499-As. Moreover, if the limitations period is not reciprocal, the NPRM must contain a thorough and detailed analysis explaining the absence of reciprocity. Assuming the NPRM is not reciprocal, the absence of any thorough and detailed analysis, let alone any analysis, explaining the absence of reciprocity renders the NPRM defective.

At the very least, the FCC's NPRM and request for comments on the five-year limitations period for seeking contribution adjustments establishes that a limitations period with respect to contributors seeking *downward* adjustments of their contribution obligations is subject to notice and comment rulemaking procedures under the APA. It would be wholly illogical to require notice and comment rulemaking to set a limitations periods with respect to government investigations and audits in connection with upward adjustments of contribution obligations, but not to require the same notice and comment rulemaking to set a limitations period with respect to contributors seeking downward adjustments on contribution obligations.

In any case, the FCC's NPRM and request for comments directly impacts the Wireline Competition Bureau's ("WCB") December 9, 2004 Order ("*December 9 Order*"),[2] adopted without the requisite notice and comment rulemaking, and changing the Form 499-A instructions by establishing a firm 12-month deadline for *contributors* to file revised Form 499-As after their original due date, if the revisions would result in *decreased* contribution amounts to the USF. As BDP has argued before, the *December 9 Order* was adopted without the requisite notice and comment rulemaking, and therefore it is defective and invalid.

II. BDP'S STATEMENT OF INTEREST IN THIS PROCEEDING.

BDP is an interexchange carrier providing both domestic and international long distance service to customers located throughout the United States, and is subject to regulation by the FCC. Pursuant to Section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254, and the FCC's rules and regulations promulgated there under, BDP, as a telecommunications carrier offering interstate telecommunications service, has made, and will continue to make, contributions to USAC

[2] *Federal State Joint Board on Universal Service; 1998 Annual Regulatory Review-Streamlined Contributor Reporting Requirements, Changes to the Board Of Directors of the National Exchange Carrier Association, Inc.*, Order, CC Docket Nos. 96-45, 98-171, 97-21, DA 04-3669 (rel. Dec. 9, 2004).

for the USF. Moreover, BDP has filed with the FCC revised FCC Form 499-A filings seeking refunds for excessive contribution amounts paid to the USF. Notably, the WCB, in its *December 9 Order*, identifies BDP as one of the numerous parties which filed a request for review of decisions by USAC rejecting BDP's revised FCC Form 499-A filings because they were submitted more than 12 months after their original due date.[3]

Accordingly, BDP has a very substantial interest in the fixing of a deadline for filing revisions to FCC Form 499-A.

III. PROCEDURAL HISTORY

For BDP to effectively comment on the FCC's proposed five-year limitations period set forth in the NPRM, the FCC's proposed rule, obscurely located in a single sentence within Paragraph 88 of the 110 paragraph NPRM, must be placed in the appropriate context. Moreover, BDP submits that an understanding of the procedural history concerning the absence of any rule imposing any limitations period in seeking adjustments of Universal Service contribution obligations, whether upward or downward, together with the WCB's attempt to impose, outside the lawfully required rule-making context, a one-year limitation period with respect to downward adjustments, is essential. to the FCC's evaluation of its comments in this Docket.

A. Universal Service Contributions Under § 254 of the Communications Act.

The federal Universal Service Fund is a funding mechanism mandated and expanded under the Communications Act, 47 U.S.C. § 151 *et. seq.* (the "Act" or "Communications Act"). The

[3] In BDP's pending February 28, 2003 appeal of USAC's December 31, 2002 decisions denying BDP's request for refund, which the WCB has remanded to the USAC for consideration in light of the *December 9 Order*, BDP has challenged the USAC's claimed 12-month statute of limitations for filing revised FCC Form 499-As as unlawful because it is a substantive rule and could not be adopted without notice and comment rulemaking to be effective. See BDP's February 28, 2003 Appeal at ¶¶ 21 – 27.

assessment and recovery of contributions to support USF are governed by the statutory framework established by Congress in Sections 201, 202 and 254 of the Act, 47 U.S.C. §201, 202 and 254.[4]

Specifically, Section 254(d) of the Act states that "[e]very telecommunications carrier that provides interstate telecommunications service shall contribute, *on an equitable and nondiscriminatory basis*, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and enhance universal service." *Id.* citing, *inter alia*, 47 U.S.C. § 254(d) (emphasis added); 47 U.S.C. § 254 (b) (4) and (5) (providing that Commission policy on universal service shall be based, in part, on the principles that "*contributions should be equitable and nondiscriminatory*, and support mechanisms should be *specific, predictable, and sufficient*." (Emphasis added).

B. The *Universal Service Order*

In its 1997 *Universal Service Order*,[5] the FCC decided to assess contributions on contributors' gross-billed end-user telecommunications revenues. The FCC concluded that assessments based on end-user telecommunications revenues would be competitively neutral, would be easy to administer, and would eliminate certain economic distortions if associated with an assessment based on gross telecommunications carriers' revenues. *Universal Service Order*, 12 FCC Rcd at 9206-09, ¶¶ 844-50.

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[4] *December 9 Order* at ¶ 4; *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, ("*Contribution Methodology Order and Further Notice*") 17 FCC Rcd 249 52 (2002); *see also* 47 C.F.R. § 54.706.

[5] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9205-07, ¶ ¶ 843-44 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997) and Erratum, 13 FCC Rcd 24493 (1997), aff'd in part, rev'd in part, remanded in part *sub nom*, *Texas Office of Public Utility Counsel v. FCC*, 183 F. 3d 393 (5th Cir. 1999), cert. denied, 530 U.S. 1210 (2000), cert. dismissed, 531 U.S. 975 (2000) (*Universal Service Order*).

C. Second Order on Reconsideration

In its *Second Order on Reconsideration*[6], the FCC set forth the specific method of computing universal service contributions. The FCC also designated the USAC as the neutral entity responsible for administering the universal service support mechanisms, including billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds. *Id.* at 18423-24, ¶ 41; *see also* 47 C.F.R. § 54.701.

The FCC required contributors to report their end-user telecommunications revenues to the USAC on a semi-annual Telecommunications Reporting Worksheet, and base contributions on the reporting of billed end-user telecommunications revenues from the prior year. *Second Order on Reconsideration*, 12 FCC Rcd 18400, at 18424, ¶ 43, 18442, ¶ 80, 18501-02; *see also* 47 C.F.R. § 54.711(a) (providing that "[c]ontributions shall be calculated and filed in accordance with the Telecommunications Reporting Worksheet...").

D. The *Consolidated Reporting Order* and FCC Form 499-A.

Subsequent to its *Second Order on Reconsideration*, in an effort to reduce the administrative burdens on contributors, the FCC decided to consolidate carrier reporting requirements for the USF.[7] Thus, in lieu of making four separate filings to USAC, reporting carriers would simply file one copy of the new FCC Form 499-A on April 1 of 2000 and each following year. *Id.* at ¶ 1.[8] The FCC

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[6] See n. 2, *supra*.

[7] *See 1998 Biennial Regulatory Review-Streamlined Contributory Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number of the Portability, and Universal Service Support Mechanisms*. CC Docket 98-171, Report and Order, 14 FCC Rcd 16602 (1999) (Consolidated Reporting Order); *see also Common Carrier Bureau Announces Release of September Version of Telecommunications Reporting Worksheet (FCC Form 499-S) for Contributions to the Universal Service Support Mechanisms*, CC Docket No. 98-171, Public Notice, DA 99-1520 (rel. July 30, 1999); *Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2000 Filing by All Telecommunications and Carriers*, CC Docket No. 98-1 71, Public Notice, 15 FCC Rcd 16434 (Com. Car. Bur. 2000).

[8] Prior to the FCC's *Consolidated Reporting Order*, FCC rules required telecommunications carriers having interstate revenues to file, at different times throughout the year, a number of contributor reporting worksheets reflecting duplicative reporting requirements. Specifically, such carriers had to file four forms (*viz.*, Form 431, TRS Fund Worksheet; Form 457, Universal Service Worksheet; Form 496, NANPA Funding Worksheet; and Form 487, LNP

emphasized that it was not imposing new reporting requirements on carriers, but instead was "simplifying the requirements to the greatest extent possible while continuing to ensure the efficient administration of the support and cost recovery mechanisms." *Id.* at ¶ 1. Indeed, the FCC noted that, with certain limited exceptions, it was not revisiting, among other things, the substantive requirements of the support and cost recovery mechanisms under the USF. Rather, the *Consolidated Reporting Order* focused on steps to reduce burdens on contributors, and burdens on the administrators to handle the contributions, by improving the data collection process. *Id.* at ¶ 5.[9] Significantly, FCC Form 457, the prior Worksheet pertaining to universal service contributions (see note 6, *supra*), specifically required telecommunications carriers to "file a revised Worksheet if it discover[ed] an error in the data that it reports."[10] Form 457, however, contained no deadline for filing such revisions.

In its *Consolidated Reporting Order*, the FCC also clarified that the new Telecommunications Reporting Worksheet would become effective upon approval by the Office of Management and Budget ("OMB"), but not less than 30 days from publication in the Federal Register. *Id.* at ¶ 32. The FCC delegated authority to make future changes to the Telecommunications Reporting Worksheet to the Chief of the Common Carrier Bureau (now Chief, Wireless Competition Bureau). *Consolidated Reporting Order*, at ¶ 39. The FCC cautioned, however, that "[t]hese delegations extended to administrative aspects of the requirements, *e.g.*, where and when worksheets are filed, incorporating edits to reflect Commission changes to the

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Worksheet) containing revenue and other data on which contributions to support or cost recovery mechanisms were based. *Consolidated Reporting Order*, at ¶ 6.

[9] The FCC noted that, in its September 25, 1998 *Notice of Proposed Rulemaking and Notice of Inquiry to Initiate the Consolidated Reporting Order Proceeding*, it sought comments on ways to streamline the filing requirements associated with the support and cost recovery mechanisms required under the Communications Act. *Id.* at ¶ 7. The FCC, however, never sought comment in this notice (or indeed, in any other rulemaking proceeding of which BDP is aware) on whether to impose a time period within which to file revisions to FCC Form 499-A.

[10] *Second Order on Reconsideration,*, *supra* n. 1, III Appendix A, Universal Service Worksheet Form 457, Specific Instructions, C Block 3: Certification.

substance of the mechanisms, and other similar details." *Id.* at ¶ 39. To ensure that its delegations to the then Common Carrier Bureau were consistent, the FCC stated that it was amending its rules "to grant the Common Carrier Bureau delegated authority, in keeping with the current delegation for universal service purposes, to waive, reduce, modify, or eliminate the contributor reporting requirements for the TRS, LNP, and NANP mechanisms, as necessary to preserve the sound and efficient administration of the support and cost recovery mechanisms." *Id.* at ¶ 40. The FCC "reaffirm[ed] that this delegation extends only to making changes to the administrative aspects of the reporting requirements, *not to the substance* of the underlying programs." *Id.* at ¶ 40 (emphasis added); 47 C.F.R. § 54.711(c.).

The current instructions to FCC Form 499-A (shown in draft released February 26, 2004) require telecommunications carriers to file a revised worksheet if they discover an error in the revenue data that they report. Specifically, the Instructions provide that "[t]elecommunications providers should file revised Form 499-A revenue data by December 1 of the same filing year. Revisions filed after that must be accompanied by an explanation of the cause for the change along with complete documentation showing how the revised figures derived from corporate financial records." *Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms (Draft)* released February 26, 2004. [11]

[11] Earlier published versions of the Instructions to Form 499-A contained language identical to the draft February 2004 Instructions. *See Consolidated Reporting Order* Appendix D -- Telecommunications Reporting Worksheet, at II (E) ("Contributors should file revised Form 499-A worksheet by December 31 of the same calendar year. Revisions filed after that must be accompanied by an explanation of the cause for the change along with documentation showing how the revised figures derive from corporate financial records.").

As referenced above, on February 26, 2004, the WCB announced the release of a draft revised Telecommunications Reporting Worksheet, FCC Form 499-A and accompanying instructions for the reporting year ended 2003.[12]

E. FCC Form 499-Q.

In March 2001, the FCC adopted a rule change providing that Universal Service contributions be based on quarterly Telecommunications Reporting Worksheet filings, with an annual true-up based on an annual Telecommunications Reporting Worksheet. *Federal-State Joint Board on Universal Service; Petition for Reconsideration by AT&T,* CC Docket No. 96-45, FCC 01-85 (rel. March 14, 2001) ("*Federal-State Joint Board on Universal Service Order*" or "*Order*"). In this *Order*, the FCC required such quarterly statements be made on FCC Form 499-Q. Moreover, in this *Order*, the FCC stated that "carriers will be allowed an opportunity to file a revised Form 499-Q prior to the filing date of the next Form 499.

On April 6, 2001, the then-Common Carrier Bureau announced approval of FCC Form 499-Q by the Office of Management and Budget. The FCC did not give prior notice and request public comment on the issue of a deadline for filing revised FCC Form 499-Qs. On April 8, 2002, the WCB announced the release of revised FCC form 499-Q. The Instructions to Telecommunications Reporting Worksheet, FCC Form 499-Q provide that "[a] contributor must file a revised 499-Q worksheet if it discovers an error in the data that it reports, such as would arise if the filer discovered that it omitted or misclassified a major category of revenue. However, revised filings must be made by the filing date for the subsequent 499 filing." *Id.* at ¶ II(E). As stated above, the FCC did not subject this instruction to notice and comment.

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[12] *Wireline Competition Bureau Releases Revised Telecommunications Reporting Worksheet (FCC Form 499-A) for 2003,* CC Docket No. 96-45, Public Notice (rel. February 26, 2004).

F. The FCC's Modification to the Revenue-Based Methodology for Assessing Universal Service Contributions, and its Retention of Forms 499-A and 499-Q.

In December 2002, the FCC adopted several modifications to the revenue-based system to insure the sufficiency and the predictability of universal service. Among other things, the FCC modified the current revenue-based methodology by basing contributions on a percentage of projected collected, instead of historical gross-billed, interstate and international end-user telecommunications revenues reported by contributors on a quarterly basis. *In the Matter of Federal-State Joint Board on Universal Service.* 17 FCC Rcd. 24852 (2002).

In adopting this modification, the FCC noted that contributors will continue to file a Form 499-Q on a quarterly basis and the Form 499-A on an annual basis. *Id.* at ¶ 33. The FCC further noted that, "[s]imilar to existing policies, contributors will have an opportunity to correct their projections up to 45 days after the due date of each Form 499-Q filing and through the annual true-up process." *Id.* (emphasis added). The FCC recognized that USAC would refund or collect from contributors any over-payments or under-payments.

G. The *December 9 Order*

The Wireline Competition Bureau released its *December 9 Order* changing the Form 499-A instructions by establishing a firm 12-month deadline for contributors to file revised Form 499-As after their original due date, if they would result in decreased contribution amounts to the USF. In its *December 9 Order*, the WCB claimed that this change was a "procedural, non-substantive" change to the administrative aspects of the reporting requirements, and that establishment of this deadline is a "rule of agency organization, procedure or practice." (*December 9 Order* at n. 31).

The WCB reasoned that a 12-month deadline was a sufficient period of time for carrier contributors to file revised Form 499-As for the purpose of reducing their contribution obligations. Moreover, the WCB reasoned that the quarterly filed 499-Qs contain information about both

projected revenue for the upcoming quarter and actual revenue for the past quarter and, therefore, provide an opportunity for carriers to report actual revenue information from the prior quarter. Finally, the WCB reasoned that since telecommunications carriers file revenue information for the prior year on April 1 of each year, such a filing represents an opportunity to correct previously filed revenue information.

Moreover, in the *December 9 Order*, the WCB implicitly acknowledged that there is no FCC rule stating that revised FCC Form 499-As must be filed within a specified time period. Thus, in the December 9 Order, the WCB states

> "Adoption of a firm deadline for filing revisions to the Worksheet will help ensure the stability and sufficiency of the federal Universal Service Fund, as contemplated in Section 254(d) of the Communications Act of 1934, as amended (the "Act"). (Footnote omitted) We also find that a firm deadline for revised Worksheets will improve the integrity of the universal service contribution methodology and promote efficiency in the administration of support mechanisms for universal service, interstate Telecommunications Relay Service, the North American Numbering Plan and Local Number Portability, consistent with the Commission's rules and policies."

December 9 Order at ¶2.[13]

H. Applications for Review of the *December 9 Order*

On January 10, 2005, BDP, Qwest Communications International Inc. ("Qwest"), SBC Communications, Inc. ("SBC") and Sprint Corp. (" Sprint") sought review of the WCB's *December*

[13] In the *December 9 Order*, the WCB states that the USAC itself had previously established a deadline of 12 months to allow contributors to file new or revised FCC Form 499-As after the original due date for a period of up to 12 months. In support of this statement, which the WCB characterizes as a "processing guideline," the WCB cites to the minutes of a USAC Board of Directors meeting of July 27, 1999. In these minutes, USAC's Board directed USAC's staff not to accept carrier-initiated changes in revenues beyond 12 months from the initial report of revenues.

Significantly, BDP can find no evidence that the USAC's Board of Directors' minutes of its July 27, 1999, meeting were ever publicly disclosed in an official FCC publication, or indeed ever published in the *Federal Register* as apparently required by Section 552 of the APA. Thus, the WCB cannot legitimately rely on these minutes to claim that there is an existing rule or policy establishing a 12-month deadline for filing revisions to FCC Form 499-A.

9 Order.[14] In their respective pleadings, these parties argued, *inter alia*, that the *December 9 Order's* establishment of the 12-month deadline for filing revisions to FCC Forms 499-A was contrary to the statutory notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. § 553 (the "APA"); that the WCB exceeded its delegated authority in imposing this deadline; and that the WCB's action was arbitrary and capricious, and an abuse of discretion.

I. The FCC Invites Interested Parties to Submit Comments on the Filings Made in Response to the *December 9 Order*

By Public Notice released March 16, 2005 (DA 05-692), the FCC invited comment on the Applications for Review filed by BDP, Qwest and SBC, and the Petition for Reconsideration filed by Sprint, of the WCB's *December 9 Order*. Both BDP and Sprint filed Reply Comments, arguing, among other things, that had the public been permitted to comment on the rule change, the FCC would likely have received comments from interested parties discussing the unfairness of the rule.

Moreover, there would have been a complete record on which the FCC could base a decision to establish a limitations period for filing downward revisions to reporting to the Universal Service Fund. Additionally, both BDP and Sprint argued that the FCC's March 16, 2005 Public Notice did not cure the FCC's failure to establish a notice and comment proceeding under the APA with respect to the one-year limitations period for filing downward revisions to the Universal Service Fund's reporting forms.

J. The FCC's June 14, 2005 NPRM Seeking Comment on, *Inter Alia*, Whether a Five-Year Period Is Appropriate for Seeking Adjustment of a Contribution Obligation to Make the Correct Contribution Amount to the USF

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[14] See *e.g.*, Application for Review filed by BDP, SBC and Qwest, and Petition for Reconsideration filed by Sprint Corp. ("Sprint") in *In the Matter of Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45, 98-171 and 97-21. AT&T Corp. ("AT&T") and US Telecom Association ("USTA") filed reply comments.

On June 14, 2005, the FCC issued its NPRM pertaining to comprehensive review of the USF, its management, administration and oversight, in new docket, WC Docket No. 05-195, and also in reference to prior dockets concerning universal service, including Docket No. 96-45, CC Docket No. 02-6, WC Docket No. 02-60, WC Docket No. 03-109, and CC Docket No. 97-21.

In its NPRM, the FCC seeks comment on, among other things, the establishment of an administrative limitations period in which the FCC or USAC will determine that a violation has occurred among recipients of funds from the high cost, low income, and rural health care Universal server support mechanisms. NPRM, ¶ 86. The FCC believes that establishing a general policy in this area is in the public interest because it would provide these USF support mechanism participants with some certainty of the time within which an audit or for the review of funding occur. NPRM, ¶ 86.

In its NPRM, the FCC observes that in the *Schools and Libraries Fifth Report and Order*, the FCC indicated its preference for a limitation on the timeframe for audits or other investigations "in order to provide beneficiaries with certainty and closure in the E-rate applications and funding processes." [15] The FCC recites that it "established a policy that, for administrative efficiency, the timeframe for such inquiry should match the record retention requirements, and accordingly, [the FCC] announced that any inquiries to determine whether or not statutory or rule violations exist with [sic] be initiated and completed within a five-year period after final delivery of service for a specific funding here." *Id.* The FCC reasons "that conducting inquiries within five years struck an 'appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud and abuse and the

[15] *Id.* at the ¶ 87 citing *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order 19 FCC Rcd 15808, 15818-19, ¶ 32 (2004) ("*Schools and Libraries Fifth Report and Order*").

beneficiaries' need for certainty and closure in their E-rate application processes.'" *NPRM*, at ¶ 87 citing *Schools and Libraries Fifth Report and Order*, at 15819, ¶ 33.

Consistent with this detailed and thorough discussion concerning audits and investigations with respect to recipients of USF funds, the FCC, in its NPRM, thus seeks comment on whether a similar five-year standard for initiating and concluding audits and investigations is appropriate for recipients of funds from the high cost, low income, and rural health care universal service support mechanisms. *NPRM*, ¶ 88.

Notwithstanding that the FCC's NPRM in this regard is entirely in the context of audits and investigations with respect to ***recipients*** of USF funds, and wholly ignoring the above-reference dispute concerning the *December 9 Order* and its progeny, the FCC seeks comment on whether a five-year period is appropriate for seeking adjustment of a contribution obligation to make the correct contribution amount to the USF by its alleged reference to this issue in Paragraph 88. *Id.* Indeed, the FCC devotes only a single sentence of its detailed 110 paragraph NPRM to this significant and controversial limitations issue which, as the foregoing shows, has already been subject to vigorous comment of affected telecommunications carriers. Moreover, this single sentence buried in paragraph 88 of the FCC's 110 paragraph NPRM does not reveal the FCC's reasons supporting this five-year limitations period.

IV. BDP SUBSTANTIVE COMMENTS

A. The Proposed Five-Year Limitations Period Should Be Construed Reciprocally and Apply to Both Upward and Downward Adjustments of Contributor's Obligations

Although the NPRM contains no discussion concerning audits and investigations with respect to *contributors* of USF funds, the FCC nevertheless remotely requests, in a single sentence buried in ¶ 88 of its 110 paragraph NPRM, comments with respect to whether a five-year limitations period should apply to audits and investigations for *contributors* of USF funds.

Specifically, in Paragraph 88 of the NPRM, the FCC states "[s]imilarly, we seek comment on whether a five-year period is appropriate for seeking adjustment of a contribution obligation to make the correct contribution amount to the USF."

This sentence in the NPRM, on its face, suggests that the five-year limitations period is reciprocal. Thus, the FCC seeks comment on whether a five-year period is appropriate for seeking adjustment of "a contribution obligation," and does not differentiate between upward and downward adjustments. The FCC's failure to differentiate between upward and downward adjustments is particularly telling in light of the pending challenges made by numerous parties, including BDP, to the *December 9 Order* which imposes, without the required notice and comment rulemaking, a one-year limitations period for contributors to file revised Form 499-As after their original due date, if the revisions would result in decreased contribution amounts to the USF. Indeed, it is incomprehensible why that the FCC would propose a nonreciprocal five-year limitations period for government audits to require an upward adjustment in GSR contributions without even mentioning in its entire 110 paragraph NPRM the *December 9 Order* and the highly-contested pending litigation surrounding this *Order*. BDP assumes that the FCC's five-year proposal, based upon the single sentence in Paragraph 88 of the NPRM, would be reciprocal. Assuming the FCC intends that the five-year limitations period be reciprocal, BDP takes the position that this five-year period is fair, just and reasonable and will afford telecommunications carriers, such as BDP, sufficient time to examine in detail their contributions, and to otherwise discover errors in the detailed annual data required by FCC Form 499-A.

B. Assuming the Proposed Five-Year Limitations Period Is Not Reciprocal, the NPRM Violates the APA and Is Invalid

Assuming the proposed five-year limitations period is not reciprocal, notwithstanding the FCC's failure to differentiate between upward and downward adjustments in its request for comments, BDP submits that the NPRM violates in this proposal with respect to the APA and is invalid.

The APA imposes notice-and-comment requirements that must be followed before the rule may be issued. *United States Telecom Association and CenturyTel, Inc. v. Federal Communications Commission*, 400 F.3d, 29, 34 (D.C. Cir. 2005). The APA requires that the notice include: "(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) *either the terms or substance of the proposed rule or a description of the subjects and issues involved.*" *Id.* at 40, n.21, citing 5 U.S.C. § 553(b) (emphasis added).

The FCC's NPRM falls woefully short of meeting this third requirement. The NPRM contains no specific terms or substance of the proposed rule. Moreover, the NPRM fails to include an adequate description of the subjects and issues involved. Specifically, the NPRM contains a Section III(B)(3) captioned "Administrative Limitations Period for Audits or Other Investigations by the Commission or USAC of *Recipients of Funds* from the High Cost, Low Income, and Rural Health Care Support Mechanisms." With respect to this Section III(B)(3), the FCC states "[i]n this section, we seek comment on the establishment of an administrative limitations period in which the Commission or USAC will determine that a violation has occurred among *recipients* of funds from the high cost, low income, and rural health care universal service support mechanisms. (NPRM at ¶ 86). The FCC further states that "[w]e believe that establishing a general policy *in this area* is in the public interest because it would

provide *these USF support mechanism participants* with some certainty of the time within which an audit or the review of funding may occur." *Id.*

As noted in the Procedural History (Part III(J)) above, the FCC, after discussing the *Schools and Libraries Fifth Report and Order* and its preference for a limitation on the timeframe for audits or other investigations "in order to provide beneficiaries with certainty and closure in the E-rate applications and funding processes," the FCC found "that conducting inquiries within five years struck an 'appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries' need for certainty and closure in their E-rate application processes.'" *NPRM*, at ¶ 87 citing *Schools and Libraries Fifth Report and Order*, at 15819, ¶ 33. Thus, the FCC, in its NPRM, sought comment on whether a five-year standard for initiating and concluding audits and investigations is appropriate for *recipients* of funds from the high cost, low income, and rural health care universal service support mechanisms. *NPRM*, ¶ 88.

Almost hidden within this detailed and thorough discussion concerning audits and investigations with respect to the *recipients* of USF funds is the FCC's oblique request for comment on whether a five-year period is appropriate for seeking adjustment of a contribution obligation to make the correct contribution amount to the USF. *Id.* Indeed, the FCC devotes only a single sentence of its detailed 110 paragraph NPRM to this significant and controversial limitations issue which, as the Procedural History shows (Part III, above), has already been subject to vigorous comment. Moreover, this single sentence buried in paragraph 88 of the FCC's 110 paragraph NPRM does not disclose any basis for the FCC's proposed five-year limitations period for a government audit as applied to *contributors* of USF funds. The FCC does not provide the reasons why it requires five years to conduct audits of contributions, the

reasons why the same five year period does not apply to audits conducted by *contributors*, or the ramifications of applying five-year limitations to government audits for upward adjustments, but only a one-year limitations period to *contributors* in connection with downward adjustments.

Accordingly, BDP submits that the foregoing deficiencies and utter failure to describe the subjects and issues involved with respect to applying a limitations period for audits to *contributors*, and the FCC's apparent concealment of these issues by making a scant reference to them in a single sentence in ¶ 88 of its NPRM, renders the NPRM fatally defective.

C. A Non-Reciprocal Five-Year Limitations Period Is Unfair, Arbitrary and Capricious and an Abuse of Discretion

As BDP and other parties have already argued in their respective Applications for Review of the *December 9 Order*,[16] a non-reciprocal limitations period, whether one year or five years, is unfair, arbitrary and capricious and abuse of discretion. These same arguments apply with equal force to a five-year non-reciprocal period. First, the NPRM fails to comply with the notice and comment requirements set forth in 5 U.S.C. § 553(b), and fails to provide any basis for the five-year limitation, or adequately differentiate between contributors making upward adjustments from those making downward adjustments.

Moreover, the FCC, in proposing a five-year limitations period with respect to upward adjustments, while apparently leaving downward adjustments subject to a one-year limitations period, is at odds with the statutory requirements for recovering universal service contributions. Under the present statutory regime, the mechanisms for universal service contributions must be *specific*, *predictable* and *sufficient*, and *contributions* to the universal service fund *must be made* on an *equitable* and *non-discriminatory basis*. See 47 U.S.C. § 254(b)(4) and (5). See also *In the*

[16] BDP incorporates by reference its Application for Review of the *December 9 Order* in CC Docket No. 96-45, et al.

Matter of Request for Review by ABC Cellular Corporation, 25 FCC Rcd. at 25192. By subjecting contributing carriers, including BDP, to a 12-month statute of limitations and refusing to allow such carriers to file revised Forms 499-A to correct prior inaccuracies if they are discovered after the 12-month deadline, the FCC is compelling contributing carriers to pay in excess of the amount they lawfully should have contributed to the USF under Section 254 of the Communications Act. As a result, carriers will be forced to make an erroneous and excessive contributions to support universal service, a result wholly inconsistent with the requirement that universal service fund contributions be made on an *equitable and non-discriminatory basis*. *ABC Cellular Corporation*, 17 FCC Rcd. at 25196-97. ("Absent a waiver, ABC Cellular would be required to contribute an erroneous amount to support universal service, which we believe would be inconsistent with the requirement that contributions be equitable.").

Additionally, the FCC's one-sided, proposed five-year limitation, if it is intended to be non-reciprocal, is wholly unfair in that it requires a carrier to revise its Form 499-A, up to five years past the original filing deadline if it would increase that carrier's contribution obligation, while strictly limiting the same carrier's ability to obtain a refund of overpayments to the USF. The FCC cannot in good faith justify a five-year limitations period for revisions that would increase a carrier's contributions yet, at the same time, impose a one-year limitations period for revisions that would decrease a carrier's contributions, on the grounds that a one-year deadline will improve efficiency, help ensure the stability and sufficiency of federal support mechanisms, or provide incentives for carriers to submit accurate revenue information in a timely manner. These same justifications logically apply equally to both upward and downward adjustments to contributions to the USF.

BDP submits that the public interest would be better served by adopting a similar framework established by Congress and applied by the Internal Revenue Service for corporate tax returns. The

Internal Revenue Code and the Internal Revenue Service grant a corporate taxpayer three years from the time its return is filed or two years from the time the taxes are paid, whichever is later, to claim a refund for overpayment of a tax. *See* 26 U.S.C. § 6511. Thus, like the framework established by Congress and applied by the IRS, the FCC should adopt an appropriate limitations period that applies equally to both upward and downward contributor adjustments to the USF.

D. The NPRM at a Minimum Establishes That a Rulemaking Is Required in Imposing Limitations Periods for Downward Adjustments of Contributor's Obligations

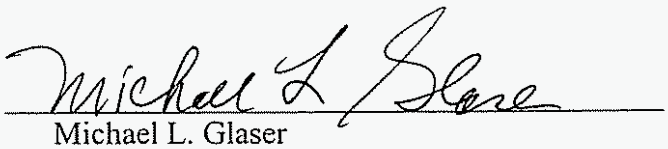
At a minimum, the NPRM proves that a rulemaking is required before the FCC can impose limitations periods for downward adjustments of contributors obligations. By virtue of the NPRM's proposed rule for a five-year limitations period for upward contributor adjustments and request for comment, the FCC has conceded that APA notice and comment rulemaking applies to limitations periods at least with respect to upward contributor adjustments. Logically, if APA notice and comment rulemaking applies to limitations periods with respect to upward contributor adjustments, it applies to limitations periods with respect to downward contributor adjustments.

Thus, by proposing in its NPRM a five-year limitations period for upward contributor adjustments, the FCC has at least tacitly conceded that the *December 9 Order* imposing a one-year limitations period for downward contributor adjustments, without the benefit of the required notice and comment rulemaking, is invalid as running afoul of the APA.

Accordingly, BDP respectfully requests that the FCC vacate the *December 9 Order* and adopt a five-year reciprocal limitation period in the proceeding for a carrier to make a required or downward adjustment to its USF contributions. Alternatively, if the FCC proposes that the five-year proposed limitations period be one-way in favor of the government, BDP requests that the FCC initiate a new NPRM devoted to the subject of limitations periods, on universal service contributions, whether applicable to upward or downward adjustments to USF contributions.

Respectfully submitted this 17th day of October, 2005.

BUSINESS DISCOUNT PLAN, INC.



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