

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition of Oblio Telecom, Inc. for
Declaratory Ruling Regarding Wholesale
Telecommunications Carriers'
Obligation to Honor Reseller
Customer's Proof of Exemption from
Pass-Through Universal Service Fund
Charges

REPLY COMMENTS OF OBLIO TELECOM, INC.

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August 3, 2007

Oblio Telecom, Inc. ("Oblio") respectfully files this Reply to AT&T Inc.'s ("AT&T") Opposition and Verizon Communications Inc.'s ("Verizon") Comments on Oblio's Petition for a Declaratory Ruling regarding a wholesale carrier's obligation to honor its reseller customer's proof of exemption from pass-through Universal Service Fund ("USF") charges ("Petition").

INTRODUCTION

AT&T's Opposition presents a fictional tale that shamelessly distorts the truth about its assessment of USF recovery fees and the meaning and purpose of Oblio's Petition. AT&T's procedural objections reveal its fear that the Commission will act on the merits of the Petition and clarify when a wholesaler must honor its reseller's sufficient and timely request for a refund of USF pass-through charges. AT&T's twisted portrayal of the facts and attempt to create the impression that Oblio requests a factual inquiry is disingenuous and nothing more than a thinly veiled attempt to distract the Commission from the merits of the narrowly pled Petition.

As the Petition aptly illustrates, AT&T's absolute refusal to honor Oblio's USF Exemption Certification in the face of overwhelming evidence of Oblio's direct contributor status confirms the existence of uncertainty as to a wholesaler's legal obligations to its reseller customers under the current regulatory scheme. This uncertainty can only be resolved through the Commission's issuance of a ruling that clarifies the obligations of the parties under the applicable, over-arching Communications laws. Such a ruling is not, however, predicated on the Commission's factual determination of whether or not AT&T actually passed-through USF cost recovery charges or, indeed, in what amount. That is the job of the arbitrator; a duty the arbitrator in the instant dispute between AT&T and Oblio has expressly reserved. AT&T is fully aware of this procedural fact. Therefore, AT&T's presentation of the facts it claims are in dispute is not only misleading, but ultimately has no bearing on the appropriateness of a Commission ruling that clarifies the proper

application of precedent and the over-arching Communications laws to the administrative responsibilities of wholesalers and resellers under the current USF regulatory scheme.

Verizon's Comments present a diatribe of complaints concerning the perceived "unfairness" of the current USF contribution scheme. According to Verizon, compliance with the current rules and procedures unfairly burdens the wholesale carrier, both administratively and financially. The Commission should disregard Verizon's complaints about administrative unfairness because Verizon purposefully overstates the difficulties and costs entailed in the process. As will be explained, compliance with the Commission's rules can be achieved quite easily and cost-effectively while simultaneously avoiding even the faintest appearance of violating Sections 201(b) and 202(a) of the Communications Act. Likewise, the Commission can dismiss Verizon's concern about the financial toll "reseller refunds" will take on wholesale carriers. Such concerns are sheer puffery based entirely on a misread of Oblio's narrowly pled Petition. Indeed, the Petition does not seek a ruling concerning the refunding of amounts that would be paid out of AT&T's, or any wholesale carrier's, own pockets. Instead, the Petition seeks only a ruling that wholesaler carriers *should* issue refunds to the extent they *could* lawfully recover those refunds directly from the USF through the existing "true-up" mechanism by simply filing a downward revision to Form 499-A within the one-year time period allowed by the Commission's Rules. Nowhere in its Petition does Oblio request a declaration that would unfairly penalize a wholesale carrier by forcing the wholesale carrier to issue refunds of USF charges it would not otherwise be permitted to recoup through the existing administrative processes.

ARGUMENT

Oblio's Petition highlights the need for a clarification from the Commission as to when a wholesale carrier must honor its reseller's request for a refund of USF pass-through charges.¹ AT&T's absolute refusal to honor Oblio's USF Exemption Certification in the face of overwhelming evidence of Oblio's direct contributor status with respect to the same revenue confirms the existence of uncertainty as to a wholesaler's legal obligations to its reseller customers under the current regulations. This uncertainty, along with the Commission's directive that a reseller customer seek USF contribution refunds directly from its wholesale carrier, underscores the necessity for a ruling from the Commission that: (a) clarifies the obligations of the parties under the current USF mechanism, and (b) declares the actions (or inactions), such as those taken by AT&T with respect to Oblio, to be violations of Sections 201(b) and 202(a) of the Communications Act.

A. Oblio's Petition Does Not Seek a Ruling on Findings of Fact

AT&T's Opposition first attempts to defeat the Petition on the patently false argument that the Petition is procedurally infirm because it asks the Commission to make findings of fact.² *AT&T Comments* at p. 2. A plain reading of Oblio's narrowly pled Petition demonstrates this simply is not true. Nowhere in its Petition does Oblio seek the Commission's determination that AT&T passed-through USF Charges. Indeed, that issue has been expressly stayed in the pending Arbitration between Oblio and AT&T and that issue will be resolved by the Arbitrator following the Commission's ruling on the discrete questions of law presented in the Petition.³

The Petition explicitly seeks:

¹ See generally Petition at pp. 5-11.

² In particular, AT&T claims the Petition asks the Commission to make a finding that AT&T passed-through the USF charges to Oblio.

³ In granting a stay of Oblio's Arbitration Demand the Arbitrator noted that the Commission's determination of the Petition and issues relating to the USF contribution program will better inform the Arbitrator in deciding the claims and defenses of the parties.

a declaratory ruling to resolve the ripe, on-going controversy regarding AT&T's (a wholesaler's) obligation to honor Oblio's (a reseller's) valid USF Exemption Certification and request for refund of USF Charges. Oblio requests a declaratory ruling that AT&T's refusals are unreasonable practices in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b), and that its selective honoring of valid USF pass-through exemption requests from some resellers, but not other similarly-situated reseller customers, and to selectively refund collected USF Charges to some, but not other resellers, are unjustly and unreasonably discriminatory practices in violation of Section 202(a) of the Act. *Id.* at § 202(a). *Petition* at pp. 4-5.

To rule on Oblio's Petition, the Commission need not determine whether AT&T passed-through USF charges. In fact, whether AT&T passed-through USF is wholly irrelevant to the questions and controversies Oblio asks the Commission to resolve. Instead, what the Petition seeks clarification on are the following questions of law:

- *if* a wholesale carrier is given a reasonable opportunity to true-up its annual contributions to the Fund resulting from the double reporting of retail revenue by two entities – a wholesaler and its reseller,
- after being presented with a valid USF Exemption Certification and other evidence of its reseller's direct contributor status – evidence that is sufficient to support the wholesaler's exercising of the "Carrier's Carrier" requirements,
- by simply filing a revised 499-A within the 1-year statute of limitations, and in so doing, automatically securing a true-up from USAC, then –

(1) Is it unreasonable for a wholesale carrier to refuse to take the simple steps of filing a revised 499-A and issuing refunds to its resellers customer in amounts equal to the reasonably expected true-up?

and

(2) Is it discriminatory if the wholesale carrier takes these simple steps for some reseller customers but not others who've provided similar evidence of direct contributor status as to the same retail revenue?

There is no fact to be decided by the Commission and AT&T's posturing about the Petition's procedural deficiencies must therefore be ignored.

B. Although this "fact" has no bearing on the Commission's Ruling - AT&T Did Pass Through USF Charges to Oblio.

Remarkably, AT&T argues that the Petition seeks resolution of a finding of fact, which it does not, and then presents a lengthy dissertation about how it "does not, nor has it ever assessed"

Oblio USF recovery fees. See *AT&T Comments* at pp. 2-5. As if it were trying to defeat a motion for summary judgment by showing there are “facts in dispute,” AT&T hinges its Opposition on its claim that it did not pass-through the USF charges.

This simply is not true.⁴

Notwithstanding the outrageousness of the misrepresentations set forth in AT&T’s Opposition, as explained above, whether or not AT&T passed-through USF cost recovery charges is completely irrelevant to the clarification sought in the Petition.⁵ Again, if a wholesaler (AT&T)

⁴ AT&T’s Opposition is a weak attempt to divert the Commission from the valid issues in the Petition and avoid a ruling that would forbid AT&T’s ability to unreasonably and discriminatorily treat its reseller customers, in particular, Oblio. As much as it would like to deny it, AT&T knows it passed-through USF Charges to Oblio. But AT&T also knows that Oblio is restrained from revealing certain evidence gained through the parties’ Arbitration due to a Confidentiality Agreement. The Commission should not be distracted by AT&T’s fictional tales. However, if, for whatever reason, the Commission embarks on a factual inquiry into whether or not AT&T passed-through USF Charges, Oblio respectfully reserves the right to present evidence that irrefutably proves AT&T passed-through USF Charges and irrefutably proves that AT&T’s claims to the contrary are outright false.

⁵ Likewise, whether AT&T embedded the USF in the wholesale price paid by Oblio or included it in a separate line item charge is irrelevant to the core issue before the Commission. For the relevant time period, 2005 through Oct. 2006, it is without question that AT&T passed-through USF charges, embedded in the price of the wholesale prepaid cards and Oblio paid those charges to AT&T. First, because AT&T had a lawful obligation to contribute to the fund based on revenue derived from its sales to Oblio following the Commission’s *Enhanced Calling Card Declaratory Ruling*. Second, because it is well-established that USF can be embedded in the cost of the product, whether the product is sold at retail or, in this case, wholesale. See *Vonage Holdings Corp. v FCC*, 3d Cir. (2007), 2007 WL 1574611 (June 1, 2007). In *Vonage* the Court both upheld and remanded certain provisions of the Commission’s Order requiring voice over internet protocol (VoIP) providers to contribute to the USF. Notably, the Court remanded provisions related to the Commission’s suspension of the carrier’s carrier rule – a rule that prevents double payment at the wholesale and retail level. *Id.* at *10, *citing* 47 C.F.R. § 54.706(b). In its discussion, the Court recognizes that the Commission’s suspension of the carrier’s carrier rule “required VoIP providers to make duplicative USF contribution for two quarters: once directly on their own interstate and international revenues and a second time indirectly in the form of higher costs passed along from carriers who sell them telecommunications inputs.” The Commission proposed that the suspension of the carrier’s carrier rule was necessary to avoid a net decrease in the Fund. The Court aptly recognized the flaw in this reasoning and agreed with *Vonage* that the only way there would be a decrease would be if the VoIP providers sold their services “for less than they pay for a single wholesale input – an unlikely business model that ... we are unwilling to assume VoIP providers pursue.” *Id.* AT&T effectively asks the Commission to ignore the fact that telecommunications wholesalers have the same

passed-through the charges, the reseller (Oblio) that timely presents evidence of duplicative reporting is entitled to a refund under the Commission's regulations. To refuse a refund in such an instance would be unreasonable and unjustly discriminatory for the reasons set forth in Oblio's Petition.⁶

C. The Parties' Contract Cannot be Read or Interpreted in a Vacuum.

Finally, AT&T claims that the contract, and only the contract, governs the parties' USF contribution obligations. This position conveniently and impermissibly disregards the fact that AT&T's business relationship with Oblio is not a simple commercial agreement between two non-regulated entities operating in a non-regulated industry. Rather, firms like AT&T and Oblio, who together offer services which are subject to pervasive regulation under the Communications Act, inherently share a relationship that is predicated on the regulatory requirements. The applicable regulations are significant and AT&T's contracts, even "form contracts" and "purchase orders" must take them into account.

The relationship – and the contract – between AT&T and Oblio must be understood within the context of the regulatory structure established by the Commission and cannot be read in a vacuum that that ignores: (a) the regulated environment in which the parties operate, and (b) the fact that in 2005, the Commission's *Enhanced Calling Card Declaratory Ruling* fundamentally altered the relationship of AT&T and Oblio from that of Wholesaler-End User to Wholesaler-Reseller. *See In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket no. 03-133, 20 FCC Rcd. 4826 (2005) (classifying prepaid calling cards as

opportunity to embed USF cost recovery fees in the price of their wholesale telecommunications services as do telecommunications suppliers providing telecommunications inputs to interconnected VoIP providers. This is an absurd proposition. Even more absurd is AT&T's contention that it did not embed and recover USF cost recovery charges in the price of the wholesale services sold to Oblio following the Commission's *Enhanced Calling Card Declaratory Ruling*.

⁶ See Petition at pp. 17-22.

telecommunications services and subject to all of the regulatory requirements governing such services, including reporting of revenue on Form 499 and the payment of USF charges) (“*Enhanced Prepaid Calling Declaratory Ruling*”).

The Communications Act and Commission Orders mandate that Oblio be considered a telecommunications reseller. For AT&T to not treat Oblio as a reseller and to *not* pass-through the charges ignores the directives in the Commission’s *Enhanced Prepaid Calling Declaratory Ruling*.

Moreover, the Commission has made clear that the parties’

obligation to directly contribute [to USAC] **cannot be contracted away** ... As the Supreme Court and the Commission have stated, “[i]f a regulatory statute is otherwise within the powers of Congress ... its application may not be defeated by private contractual provisions.’ Because the Act and the Commission’s rules require resellers to contribute to universal service, resellers cannot, by contract, shift this obligation to a third-party.”

USF Refund Order at ¶. 12 (emphasis added); *Cornolly v Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986)(Finding that “[n]o federal agency can condone the contracting away of rights if they are provided for by federal statutory language.”); *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 19276, 19304, ¶. 45 (1996); *Review of the Commission’s Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 and 87-8, Memorandum and Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1087, ¶. 54 & n. 117 (2001).

Clearly then, AT&T cannot vitiate its status, let alone that of Oblio, merely by entering into a contractual relationship.⁷ And, regardless of the contractual terms, AT&T cannot decide that it is a retailer of telecommunications for purposes of its USF compliance. The Act and Commission

⁷ See *Southwestern Bell Telephone Co. v F.C.C.*, 19 F.3d 1475 (D.C. Cir. 1994); See also, *Woodley & Carolina Telephone & Telegraph Co, NC v Carolina Telephone & Telegraph Co*, 79 S.E. 598, 601 (1913) (finding that “the doctrine of waiver is subject to the control of public policy, and a public service corporation no more by waiver than by contract is allowed to put itself in position which prevents the proper performance of its statutory duties” (citation omitted)).

precedent make it crystal clear that Oblio is a reseller of telecommunications services and, as such, is required to contribute to the USF. 47 U.S.C.A. § 245(b). Tellingly, AT&T does not dispute this fact – neither before the Commission nor in the pending arbitration proceeding. AT&T freely admits that, prior to the *Enhanced Prepaid Calling Declaratory Ruling*, Oblio was a customer of AT&T’s “Wholesale Enhanced Calling” service. AT&T cannot then deny that, following the ruling, Oblio became a customer of AT&T’s “Wholesale Non-Enhanced/Telecommunications Services Calling” services. Since at least 2005, Oblio has irrefutably been a reseller of AT&T’s telecommunications services.

D. Oblio’s Petition Does Not Require AT&T to Pay the Refund Out of its Own Pocket.

Oblio’s Petition is explicitly limited to the 2005 and 2006 revenue years for which AT&T unreasonably refused to honor Oblio’s certification of USF pass-through charge exemption. As a result, Oblio is not seeking refunds from AT&T that AT&T would not lawfully be able to recover from the USF by simply filing revised 499 forms within the twelve-month time period allowed by the FCC’s Rules. The USF contributions passed-through in wholesale charges for the pre-2005 period are not included in, nor are they the basis of, Oblio’s Petition.⁸ Thus, wholesale carriers, such as Verizon, can take comfort in the fact that AT&T will not have to refund its customers from its own pocket. The issues presented in the Petition are narrowly presented and were purposefully limited in scope to the period of time during which AT&T had every reasonable opportunity to easily recover all USF refund payments owed to Oblio directly from the USF.⁹

⁸ Oblio’s claims for USF pass-through refund amounts relating to pre-2005 revenue is a factual matter specifically and intentionally reserved for determination by the arbitrator. *See e.g.*, Petition at fn. 5.

⁹ Nowhere in the Petition does Oblio seek relief for the pre-2005 period and the Commission’s ruling would have absolutely no bearing on the ultimate outcome of the pre-2005 period. Rather, determination of the issue of contributions and refunds for the pre-2005 period is a matter which is wholly within the domain of the Arbitrator.

To the extent the Commission's ruling on the questions of law presented in the Petition might ultimately result in AT&T making a partial refund payment out of its own pocket for the 2005 revenue year, there is absolutely nothing unfair about this outcome, because it was AT&T that chose litigation over the simple and rather routine bookkeeping and administrative steps needed to file a revised 2006 Form 499-A by March 31, 2007, well within the one-year statute of limitations. Indeed, to the extent Verizon has concerns about the unfairness of requiring wholesalers to issue refunds out of their own pockets, its concerns not only have no basis in fact, they are also unfounded because AT&T has 'unclean hands.'

When AT&T requested that Oblio provide it with a signed, completed USF Exemption Certificate in late August 2006 and Oblio presented same in early September, AT&T still had seven full months within which to file its revised 2006 Form 499-A to reflect the movement of Oblio revenue from Block 400 [retail revenue] to Block 300 [carrier's carrier revenue]. AT&T refused to file a revised 2006 Form 499-A. Its refusal, in turn, prompted Oblio's filing of the Demand for Arbitration. For months AT&T continued to refuse to take these actions and issue a fair and reasonable refund. It was because of AT&T's stubborn inaction and this inaction alone that allowed the one-year limitations period to expire. Oblio went to great lengths to ensure that the one-year limitation did not expire and even went so far as to file a Motion for Emergency Relief in the Arbitration to compel AT&T to file a revised 2006 Form 499-A no later than March 31, 2007. Notwithstanding this Emergency Petition, AT&T steadfastly refused and instead assumed full responsibility for paying Oblio a refund in the form of damages, if it loses the arbitration.

Thus, *if* there is any hardship AT&T may face it is due solely to AT&T's steadfast refusal to treat Oblio in a reasonable and non-discriminatory manner and its stubborn disregard of the law. And, *if* there is any hardship faced by AT&T, it is hardship that AT&T willingly accepted. Verizon misses the point entirely. These hardships are unique to AT&T and Oblio's Petition does not ask

the Commission to render a decision that would put any other wholesaler in the position AT&T voluntarily assumed for itself.

Furthermore, Oblio's Petition does not address any pre-2005 contributions. As such, Verizon's concern about the 'unfairness' of requiring untimely refunds is misplaced. Indeed, application of Verizon's comments to the *true facts* at hand actually *support* granting Oblio's Petition. There being no financial burden placed on the wholesaler (AT&T) in requiring it to treat the reseller customer (Oblio) fairly and in accordance with the Rules, there is absolutely no reason why a wholesaler (AT&T) should refuse a timely presented refund request.

E. There is Nothing Unfair in Requiring Wholesale Carriers to Treat Resellers in a Reasonable and Non-discriminatory Manner.

The Commission should disregard Verizon's complaints about how "complicated" and "unfair" the current USF contribution system is to wholesale carriers. The fact that the Commission's rules require wholesale carriers to undertake certain administrative duties and serve as both "the collector and enforcer" lends absolutely no credence or justification to a wholesale carrier's unreasonable and unjustly discriminatory treatment of its reseller customers.

In establishing the current USF contribution system the Commission deliberately designated wholesale carriers as both collectors and enforcers. Reseller customers should not be the ones to suffer because the giant wholesale carriers think it is too much of an administrative "headache" to work under the current regime.

Besides, the current rules and procedures are not nearly as complicated or burdensome as Verizon's complaints portray. The only action the corporate giants AT&T and Verizon, or for that matter any wholesaler, is required to do under the existing scheme is to properly account for revenue on their accounting books. This is a duty that all companies, regulated and unregulated, must do. If a carrier appropriately books revenue throughout the course of a fiscal year, then throughout the year, either in Form 499-A or Form 499-Q, all 499 Filers have countless opportunities to file

revisions to reflect changes in their revenue accounting. Treating resellers in a fair and just manner does not require wholesalers to file revised 499-A forms “every day” as Verizon suggests. Indeed, wholesalers can file an original 499-A at the April 1st deadline, perform routine bookkeeping during the year, and if there are changes to be made, such as those Verizon describes, the wholesaler can wait to file a revised 499-A one-day before the expiration of the one-year statute of limitations. Nothing could be simpler and this is precisely the process envisioned by the Commission when it established the existing system. For Verizon to complain about the administrative burdens involved in issuing a refund to its reseller carrier ignores reality.

Verizon’s complaint also ignores that the Commission does not prohibit wholesale carriers from charging “administrative” fees to customers and, indeed, that AT&T, Verizon and most all USF contributors actually do recoup and even profit from performing their duties as collectors and enforcers by tacking on USF or regulatory administrative fees. If AT&T and Verizon now want to complain about performing their duties under the USF program, then they should both agree to forfeit and refund all administrative fees collected during the past half decade in exchange for such relief.

F. The USF Refund Order Underscores the Need for the Commission’s Guidance on the Refund Obligations of Wholesale Carriers.

In its Comments, Verizon mischaracterizes, or simply misunderstands, the relevance of the *USF Refund Order*¹⁰ to this Petition. See *Verizon Comments* at pp. 6-8. The import of the *USF Refund Order* to this Petition relates to the Commission’s directive that resellers must seek refunds of pass-through charges directly from their wholesalers, not from USAC. See *USF Refund Order* at 5012.

¹⁰ *In the Matter of Federal-State Joint Board on Universal Service, American Telecommunication Systems, Inc., Equisoic, Inc., Eureka Broadband Corporation, Ton Services, Inc. Value-added Refund Order*, 22 FCC Rcd. 5009 (2007).

Oblío did in fact seek its refund from AT&T and in doing so offered proof of its direct contributor status and entitlement to a refund that, on its face, would have been enough evidence to justify AT&T's movement of Oblío revenue from Block 400 [retail revenue] to Block 300 [carrier's carrier revenue].¹¹ As a proximate result of its unreasonable and discriminatory refusal, AT&T forfeited a USAC true-up, the amount of which AT&T should have refunded to Oblío. AT&T's unjustified dismissal of Oblío's proof of exemption along with its unjustified refusal to issue refunds leaves Oblío in a precarious situation. In light of the *USF Refund Order* where is an aggrieved reseller customer to turn for relief when its wholesaler refuses to honor the USF Exemption Certificates and refuses legitimate refund requests?

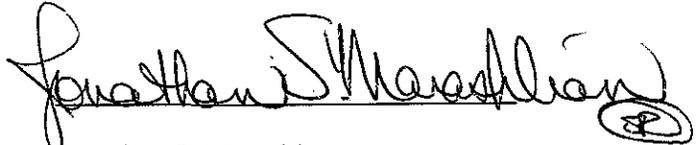
Without clarity on the parties' obligation from the Commission, there is the strong probability that wholesale carriers, such as AT&T, will abuse the contribution process and further embrace unreasonable and discriminatory practices. See e.g., *Brief Comment of AstroTel, Inc.*, (demonstrating that AT&T's treatment toward Oblío is not an isolated incident); see also *Comments of CMI Access, Inc.* at p. 2 (supporting Oblío's Petition because "it presents an opportunity for the Commission to clarify the responsibilities of ALL carriers in the distribution chain and will help avoid situations that could result in duplicative or excessive contributions to the Fund").

¹¹ See Petition at pp. 3-4, 9-11.

CONCLUSION

For the foregoing reasons and those submitted in its Petition, Oblio renews its request that the Commission issue a declaratory ruling that AT&T's refusal to honor Oblio's proof of exemption from USF pass-through charges and refund collected USF Charges are unreasonable practices in violation of Section 201(b). Further, that AT&T's selective honoring of valid USF pass-through exemption requests from some reseller customers, but not other similarly situated customers, and to selectively refund collected USF Charges to some, but not others, constitute unjustly discriminatory practices that violate Section 202(a) of the Act.

Respectfully submitted,



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