

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

In the Matter of)
)
Universal Service Contribution Methodology) WC Docket No. 06-122

COMMENTS OF AT&T INC.

AT&T hereby responds to the petition for clarification, or in the alternative, application for review filed by Masergy Communications Inc. (Masergy) regarding the Wireline Competition Bureau's (Bureau) amendment to the 2009 Instructions to the Telecommunications Report Worksheet, FCC Form 499-A, to include Multi-Protocol Label Switching (MPLS) in the list of telecommunications services subject to Universal Service Fund (USF) contribution.¹

Masergy urges the Commission to provide further clarification of the Bureau's intent in adding MPLS to the list of services subject to contribution in the Form 499-A instructions because, it claims, the reference to MPLS is unclear insofar as MPLS (or some portion thereof) can constitute either a telecommunications service or an information service.² Masergy contends that, to the extent the Bureau sought to treat all MPLS as telecommunications subject to USF contribution obligations, it exceeded its authority and the Administrative Procedure Act by substantively altering Commission policy without notice and comment.³ Masergy further complains that modifying the Form 499-A instructions as a method of clarifying when a new

¹ *Comment Sought on Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review*, Public Notice, WC Docket No. 06-122, DA 09-1021 (rel. May 7, 2009) (Petition); *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, 24 FCC Rcd 2424 (2009).

² Masergy Petition at 2-3.

³ *Id.* at 5.

technology or application might be subject to USF contributions is futile because new technologies and applications are being developed all the time; and it fails to provide service providers sufficient notice regarding their contribution obligations (insofar as the instructions relate to how a carrier should report revenues derived from the prior year) and thus may deprive them the ability to recover such contributions from end-users.⁴

While the Bureau's intent in adding MPLS to the instructions to the revised 2009 FCC Form 499-A may have been unclear when that form first was released, any ambiguity was removed by the Bureau's subsequent letter to USAC clarifying that the addition of MPLS to the list of interstate telecommunications services that could be subject to contribution was entirely non-substantive.⁵ The Bureau noted that, while the instructions provide illustrative examples of services that may be subject to contribution, they "further state, '[f]ilers should consult the Commission's rules and orders to determine whether they must contribute to one or more of the mechanisms.'"⁶ It further explained that, in determining their contribution obligation with respect to a particular service, contributors "should do so consistent with the definitions of 'information services' and 'interstate telecommunications' established under the Communications Act of 1934, as amended, and the Commission's rules and orders," and thus should report their revenues from "MPLS, or other transmission protocols . . . consistent with Commission precedent."⁷

⁴ *Id.* at 8-9.

⁵ Letter of Jennifer K. McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, FCC, to Michelle Tilton, Director of Financial Operations, USAC (Apr. 1, 2009).

⁶ *Id.*

⁷ *Id.* (citations omitted).

In light of the Bureau's letter, it is clear that the addition of MPLS to the list of services that might be subject to contribution did not alter in any way the Commission's rules and policies, or expand in any way carriers' obligation to contribute on revenues derived from MPLS services. Indeed, as Masergy correctly points out, any such amendment to the Commission's rules, or expansion of a carrier's contribution obligations, plainly would exceed the Bureau's authority and thus be unlawful.⁸ Thus, as always has been the case, a carrier is required to include revenues from services that utilize MPLS in its contribution base only when MPLS is used to provide an interstate or international telecommunications service to an end user; to the extent a service provider offers an MPLS-based information service, it need not contribute on the revenue derived from that service. No further clarification or action by the Bureau or Commission is necessary.

However, Masergy's petition does highlight the need for the Commission finally to complete action to reform its contribution methodology. Masergy is correct that routing and transmission technologies are constantly changing and being improved, making it impossible for the Commission to keep up with these changes through modifications to the Instructions to Form 499-A. Moreover, as AT&T has explained elsewhere, rapid changes in the market for communications services have rendered the Commission's existing contribution methodology, based on revenues derived from the provision of interstate and international telecommunications services (and, in some cases, telecommunications) to end users, inherently unstable.

Additionally, as recent developments (including the rapid increase in the contribution factor)

⁸ Masergy Petition at 5. *See also Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, CC Docket Nos. 96-45, 97-21, 12 FCC Rcd 18400 (1997); *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements*, Report and Order, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, 14 FCC Rcd 16602 at ¶ 39 (1999) (clarifying that the Commission's delegation of authority to the Bureau to modify contributor reporting requirements was narrowly circumscribed and "extend[ed] only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs").

demonstrate, continued reliance on a revenues-based methodology threatens to impose a massive shift in the burden of paying for universal service to those continuing to purchase POTS and other traditional telecommunications services – including some of those least able to bear that burden. Consequently, the Commission should promptly complete action in its long-standing contribution reform proceeding and move to a numbers/connections based contribution methodology, as AT&T and others have proposed.

Masergy's petition also highlights the need for Bureau to solicit comment on any proposed modification to FCC Form 499-A or its instructions well in advance of the effective date for such changes to ensure that those changes are clear and unambiguous, and would not result in a substantive, and thus unauthorized, change to carriers' USF contribution obligations, as opposed to a mere clarification of those obligations. While AT&T commends the Bureau for highlighting the revisions made to the 2009 Form 499-A Instructions, rather than forcing carriers to search through the Instructions line-by-line to identify any amendments, AT&T agrees that the Bureau also should provide public notice of such changes well in advance of their effective date. That way, parties could seek, and the Bureau could provide, clarification of the changes well in advance of the due date for reporting revenues on the form. It also would allow parties to challenge any revisions that would result in a substantive change in the rules, and thus exceed the Bureau's delegated authority, before those revisions went into effect. Plainly, doing so would conserve resources for carriers, the Commission and USAC alike insofar as carriers would not be required to submit, and USAC would not have to process, multiple, revised Form 499-A worksheets if a purportedly ministerial revision to the form later turned out to effect a substantive, and thus unlawful, change in carriers' contribution obligations. Moreover, because any revision to the form applies to revenues derived from services sold in the prior 13 to 14

months, as Masergy points out, carriers may be unable to recover from their end user customers any USF fees resulting from revisions to the form, as contemplated by the Commission's rules and orders. Accordingly, the Bureau should publish and solicit comment on any proposed revision to FCC Form 499-A or its instructions well in advance of the effective date for such changes.

Respectfully submitted,

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