

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

In the Matter of	)	
	)	
Universal Service Contribution	)	WC Docket No. 06-122
Methodology	)	
	)	
Masergy Communications Petition	)	
for Clarification, or in the Alternative,	)	
Application for Review	)	

**COMMENTS OF SPRINT NEXTEL CORPORATION**

Sprint Nextel Corporation (“Sprint”) submits these comments in response to the Petition for Clarification, or in the Alternative, Application for Review filed by Masergy Communications Inc. (“Masergy”).<sup>1</sup>

The Commission should vacate the changes to the FCC Form 499 made by the Wireline Telecommunications Bureau (“Bureau”) that would appear to require at least some Multi-Protocol Label Switching (“MPLS”) service providers to contribute into the Universal Service Fund based on the revenues from such services.<sup>2</sup> The imposition of such an obligation is beyond the Bureau’s delegated authority. MPLS services are information services not subject to USF obligations, and the Bureau did not have the authority to

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<sup>1</sup> See Public Notice, *Comment Sought on Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review*, WC Docket No. 06-122, DA 09-1021 (May 7, 2009); Masergy Petition for Clarification, or in the Alternative, Application for Review, WC Docket No. 06-122 (March 30, 2009)(“Masergy Petition”).

<sup>2</sup> While Masergy also asks either the Bureau to clarify the change it made to the Telecommunications Report Worksheet, FCC Form 499-A, or in the alternative, the Commission to review such changes, Sprint focuses these comments on the application for review portion of the Masergy petition because Sprint believes that the Bureau has exceeded its authority in identifying MPLS as a service which should be subject to USF contributions.

determine that MPLS information service providers should be treated otherwise. Imposing a USF obligation required the Bureau to either reverse previous Commission precedent, or to make public interest findings beyond its legal authority. In either case, the Commission cannot impose USF obligations on MPLS services without an appropriate rulemaking and should apply that rulemaking prospectively.

## **I. BACKGROUND AND EXECUTIVE SUMMARY**

Sprint and numerous other firms have deployed networks using the MPLS protocols and technology. MPLS network operators have used these networks to provide larger businesses, or “enterprises,” a wide variety of services and capabilities, such as virtual private networks, broadband Internet/Intranet access, and protocol processing and conversions. The Commission has been aware of MPLS technologies for a decade,<sup>3</sup> and in the past 10 years it has never sought to regulate these services. Nor has the Commission ever required MPLS network operators to contribute to the USF. MPLS services have consistently been treated by the industry as information services, consistent with Commission precedent, and not statutorily subject to USF contributions.

Nevertheless, in a February 25 Public Notice, the Bureau announced that it was adding MPLS to the Form 499-A because of its belief that MPLS is “a substitute for” ATM services, which are subject to USF contributions.<sup>4</sup> Similarly, in the accompanying instructions, the Bureau added MPLS services to the list of services involving “interstate

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<sup>3</sup> See, e.g., *FCC Chairman Kennard Releases Cable Staff Report on the State of the Broadband Industry*, Report No. 99-14, Appendix – Broadband Glossary (Oct. 13, 1999).

<sup>4</sup> See Public Notice, *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, DA 09-454 (Feb. 25, 2009) (“2009 Form 499-A Revision Public Notice”). Later, the Bureau made the same change to the quarterly USF report. See Public Notice, *Wireline Competition Bureau Announces Release of the 2009 FCC Form 499-Q and Accompanying Instructions*, DA 09-817 (April 10, 2009).

telecommunications,” with the instructions further specifying that “telecommunications providers” “must contribute” to the USF.”<sup>5</sup>

The Bureau subsequently sent a letter to the USF administrator advising it of this development, stating that the changes, including the addition of MPLS as an example of “interstate telecommunications” that is subject to Universal Service Fund contributions, were “non-substantive clarifications.”<sup>6</sup> Sprint believes that the inclusion of an information service such as MPLS within the definition of “interstate telecommunications” subject to USF contribution obligations is more than a “non-substantive clarification.”

## **II. THE BUREAU DOES NOT POSSESS THE AUTHORITY TO REQUIRE MPLS NETWORK OPERATORS THAT PROVIDE INFORMATION SERVICES TO CONTRIBUTE TO THE USF**

Through its revisions to the 2009 Form 499-A, the Bureau would impose USF obligations on at least some MPLS networks and services.<sup>7</sup> MPLS services have been consistently treated as information services by the industry. Whether the Bureau was attempting to reclassify MPLS as a telecommunications service, or whether it was attempting to extend USF contribution obligations to an information service, the Bureau does not possess the authority to require MPLS network operators to contribute to the USF.

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<sup>5</sup> See 2009 Instructions at 4-5 and 35 (Figure 3). The Bureau further states, however, that service providers “are instructed to consult the Commission’s rules and orders to determine whether they must contribute” to the USF. *Id.* at 35 n.58.

<sup>6</sup> See Letter from Jennifer McKee, Acting Chief, Telecommunications Access Policy Division, to Michelle Tilton, Director, Universal Service Administrative Company, 24 FCC Rcd 3929 (April 1, 2009)(“McKee Letter”).

<sup>7</sup> The Bureau, in making these revisions, did not acknowledge the many different services and capabilities provided over MPLS networks, nor did it recognize the different types of MPLS technologies (*e.g.*, Layer 2 v. Layer 3).

The Commission has delegated to the Bureau only narrow authority with respect to the USF. Specifically, it has determined that the Bureau’s authority is limited to “administrative” matters, and not to “substantive” matters:

These delegations extend to administrative aspects of the [Reporting Worksheet] requirements, *e.g.*, where and when worksheets are filed, incorporating edits to reflect Commission changes to the substance of the mechanisms, and other similar details. \* \* \* We reaffirm that this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.<sup>8</sup>

The Bureau itself has recognized that its delegated authority is limited to making “procedural, non-substantive changes to the administrative aspects of the reporting requirements.”<sup>9</sup>

Revisions to the 2009 Form 499 that purport to require USF contributions from a set of network operators, based on services that, consistent with Commission precedent, should be excluded can hardly be characterized as an “administrative” function. Nevertheless, the Bureau’s statement – its inclusion of MPLS services in the Form constitutes a “nonsubstantive clarification”<sup>10</sup> – suggests the Bureau is taking the position that its delegated authority includes the power to require MPLS network operators to contribute to the USF.

If the Bureau intends to require MPLS network operators to contribute to the USF, such operators (or their customers) would face a new surcharge on the provision of MPLS

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<sup>8</sup> *1999 Contributor Reporting Requirements Order*, 14 FCC Rcd 16602, 16621 ¶¶ 39-40 (1999). More generally, a bureau operating pursuant to delegated authority may act only on those matters which are “minor or routine or settled in nature.” 47 C.F.R. § 0.5(c). In addition, a bureau “shall not have authority to act on any . . . new or novel questions of law or policy.” *Id.* at § 0.291(a)(2).

<sup>9</sup> *Form 499-A Deadline Stay Denial Order*, 20 FCC Rcd 5167, 5169 ¶ 6 (2005).

<sup>10</sup> *See 2009 Form 499-A Revision Public Notice* at 1. *See also* McKee Letter (“A nonsubstantive modification to the form included adding Multi-Protocol Label Switching (MPLS) as an example of ‘interstate telecommunications.’”).

services – currently set at 11.3 percent of interstate revenues.<sup>11</sup> Likewise, if the Bureau intends to apply this regime retroactively, the Bureau action would result in a reduction of net income realized in 2008. Such a change is not merely an “administrative” matter, but rather constitutes a substantive change of considerable magnitude to the classification of MPLS service. As such, the Bureau’s action under review is well outside the scope of its delegated authority.<sup>12</sup>

### **III. EVEN IF IT POSSESSED DELEGATED AUTHORITY, THE BUREAU STILL CANNOT REQUIRE MPLS NETWORK OPERATORS TO CONTRIBUTE TO THE USF**

Application of USF obligations to all MPLS services would amount to a new legal obligation and accordingly, the Bureau failed to act in compliance with the Administrative Procedures Act (“APA”). Even if the Bureau had complied with the APA, it did not make the statutory findings necessary to impose a USF obligation on a class of services that the Commission has consistently found to be information services not subject to such fees.

#### **A. THE BUREAU’S ACTION IS INVALID UNDER THE ADMINISTRATIVE PROCEDURES ACT**

Courts have recognized that agencies may issue clarifications or an interpretation of a rule at any time, without complying with the notice-and-comment requirements of the APA.<sup>13</sup> An interpretative statement “simply indicates an agency’s reading of a statute or

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<sup>11</sup> See Public Notice, *Proposed Second Quarter 2009 Universal Service Contributions Factor*, 24 FCC Rcd 3038 (March 13, 2009).

<sup>12</sup> See, e.g., *Responsible Accounting Officer Letter 20*, 11 FCC Rcd 2957, 2961 ¶ 25 (1996)(Bureau action imposing requirements that go beyond existing rules cannot be characterized as an “explanation, interpretation, and resolution of accounting matters,” and therefore exceeded the Bureau’s delegated authority).

<sup>13</sup> Indeed, the APA expressly states that these procedural requirements do not apply to “interpretative rules.” See 5 U.S.C. § 553(b).

rule. It does not intend to create new rights or duties, but only remind affected parties of existing duties.”<sup>14</sup>

[A]n interpretative rule merely “supplies crisper and more detailed lines than the authority being interpreted,” or “simply provides a clarification of an existing rule.”<sup>15</sup>

In contrast, a legislative rule “effectively amends the FCC’s previous legislative rule.”<sup>16</sup>

The Supreme Court has held that if an agency adopts “a substantive change in the regulation,” APA notice and comment are required before the modified rule can take effect.<sup>17</sup>

As discussed in greater detail below, MPLS services are information services and as such have not previously been subject to USF obligations. The revisions the Bureau made to the Form 499-A constitute a legislative rule, not a clarification or interpretative rule.

After all, the Bureau is imposing a new legal duty on at least some MPLS services – namely, an obligation to make USF contributions. The law is clear that such a new legal obligation may be imposed only after compliance with the APA’s notice-and-comment requirements. Because the Bureau did not comply with these requirements, the Commission must vacate the Bureau’s action.<sup>18</sup>

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<sup>14</sup> *Parkdale v. U.S.*, 508 F. Supp. 2d 1338, 1356 (Int’l Trade 2007).

<sup>15</sup> *USTA v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005)(supporting citations omitted).

<sup>16</sup> *Id.* at 34.

<sup>17</sup> *See Shalala v. Guernsey Mem’l Hospital*, 514 U.S. 87, 100 (1995). *See also Appalachian Power v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000)(APA notice-and-comment requirements apply before an agency adopts any “major substantive legal additions” to its requirements.).

<sup>18</sup> *See, e.g., USTA v. FCC*, 400 F.3d 29 (D.C. Cir. 2005).

**B. THE BUREAU DID NOT MAKE THE FINDINGS NECESSARY TO REQUIRE MPLS NETWORK OPERATORS TO CONTRIBUTE TO THE USF**

Congress in Section 254(d) of the Act has specified two circumstances in which an entity can be subjected to a USF contributions obligation. The Bureau has not taken the steps necessary to invoke either of these situations.

*1. The Bureau Did Not Find That MPLS Network Operators Provide Telecommunications Services*

Congress has made clear that only providers of “interstate telecommunications services” are required to contribute to the USF. The first sentence of Section 254(d) states in relevant part:

Every telecommunications carrier that provides interstate telecommunications *services* shall contribute . . . to the . . . mechanisms established by the Commission to preserve and advance universal service.<sup>19</sup>

Congress has also made clear that providers of information services are not required to contribute to the USF:

New Section 253(c) does not require providers of information services to contribute to universal service. Information services providers do not “provide” telecommunications services.<sup>20</sup>

As the Commission ruled in implementing the 1996 Act, “information service providers (ISPs) and enhanced service providers are not required to contribute to [USF] support

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<sup>19</sup> 47 U.S.C. § 254(d)(emphasis added).

<sup>20</sup> S. REP. NO. 104-23, at 28 (March 30, 1995). The Conference Committee adopted the Senate bill with modifications, including moving this provision from section 253(c) of the Senate bill to Section 254(d) of the Act. See CONF. REP. NO. 104-458, at 130 (Jan. 31, 1996). Notably, the House had the same view as the Senate, with its bill explicitly excluding information services from the definition of telecommunications services. See H.R. 1555, § 501(a)(5), reprinted in H. Rep. No. 104-204, at 46-47 (July 25, 1995). See also *Universal Service Report to Congress*, 13 FCC Rcd at 11522-23 ¶ 43.

mechanisms to the extent they provide such services.”<sup>21</sup> And as the Commission later explained to Congress, telecommunications services and information services are “mutually exclusive categories.”<sup>22</sup>

While the Bureau concluded that unspecified “MPLS services” involve “interstate telecommunications,”<sup>23</sup> it did *not* find that any of these “MPLS services” constitute a “telecommunications *service*.” Without such a determination, the Bureau cannot impose a USF contribution obligation on MPLS network operators (again, even assuming it has delegated authority to take such action).

2. *The Bureau’s Statement That MPLS Networks Involve “Interstate Telecommunications” Does Not Justify Imposition of a USF Contribution Obligation on MPLS Network Operators*

Information services providers ordinarily are not required to make USF contributions, as discussed above. Nevertheless, Congress has given the Commission the authority to extend such an obligation to information services providers under specified circumstances. The last sentence of Section 254(d), involving the Commission’s so-called “permissive authority,” states:

Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service *if the public interest so requires*.<sup>24</sup>

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<sup>21</sup> *First Universal Service Order*, 12 FCC Rcd 8776, 9179 ¶ 788 (1997). *See also Universal Service Report to Congress*, 13 FCC Rcd at 11524 n.94 (“[I]nformation services providers do not provide telecommunications services; and accordingly the legislation does not require providers of information services to contribute to universal service.”).

<sup>22</sup> *Universal Service Report to Congress*, 13 FCC Rcd 11501, 11523 ¶ 43 (1998).

<sup>23</sup> *See Revised 2009 Form 499-A Instructions at 4-5 (Feb. 25, 2009)* (“[T]he term ‘interstate telecommunications’ includes . . . the following types of services: . . . Multi-Protocol Label Switching (MPLS) services . . .”).

<sup>24</sup> 47 U.S.C. § 254(d)(emphasis added).

To Sprint’s knowledge, the Commission has never exercised this “permissive authority” to impose USF obligations on an information service. While the Commission did impose USF obligations on interconnected VoIP services, it did so because such services were openly marketed as a direct replacement for plain old telephone service.<sup>25</sup> Importantly, the FCC did not resolve whether VoIP services were telecommunications services or information services. MPLS services provide multiple enhancements that involve interaction with stored information, protocol processing and other classic indicators of an information service. Unlike VoIP, they are in no way a direct replacement for telecommunications services, but are the very type of information services that Congress has expressly determined are not subject to USF.

No one can dispute the Bureau’s statement that MPLS networks carry “interstate telecommunications.” Of course, MPLS services include a transmission component – as all information services necessarily include a transmission component.<sup>26</sup> But to subject revenues generated from “interstate telecommunications” to USF contributions, there must first be a finding that “the public interest so requires.”<sup>27</sup> The Bureau, however, has made no such finding. Moreover, such a public interest finding clearly would be well beyond the Bureau’s delegated authority, which is limited to “administrative” matters as discussed in Part II above.

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<sup>25</sup> See *2006 Interim Contribution Methodology Order*, 21 FCC Rcd 7518 (2006), *vacated in part on other grounds Vonage v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

<sup>26</sup> Information services are those services that include the capabilities specified in the Act and that are offered “via telecommunications.” 47 U.S.C. § 153(20).

<sup>27</sup> 47 U.S.C. § 254(d).

#### IV. MPLS SERVICES ARE INFORMATION SERVICES THAT ARE EXEMPT FROM USF CONTRIBUTIONS

MPLS services are not telecommunications services, but are rather information services as defined in §153(20) the Act:

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...

Pursuant to Commission precedent, MPLS services are clearly information services and are similar to wireline broadband Internet access services, which the Commission found to be “a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.”<sup>28</sup> Like broadband Internet access services, MPLS services “inextricably combine[] the offering of powerful computer capabilities with telecommunications,” as they combine “computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications.”<sup>29</sup>

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<sup>28</sup> See *Wireline Broadband Internet Access Order*, 20 FCC Rcd 14853, 14860 ¶ 9 (2005).

<sup>29</sup> *Id.*, ¶¶ 14-15. The core function of MPLS, switching network frames or packets across multiple network layer protocols through the encoding of any particular IP data stream with a short, fixed-length label that facilitates explicit routing through the network, would appear to be squarely within the Commission’s definition of “protocol processing,” *i.e.*, “the use of a computer or computer-like device to process protocol-related symbols appearing either in a subscriber’s transmission or generated within the network for the purpose of intra-network data transport.” *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Supplemental Notice of Proposed Rulemaking, CC Docket No. 85-229, FCC 86-253 at ¶ 16 (June 16, 1986). After extensive Commission deliberation, “protocol processing” was affirmed as an enhanced service. *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Report and Order, Phase II, 2 FCC Rcd 3072, 3078 (1987), *aff’d on reconsideration*, 3 FCC Rcd 1150, 1154 (1988). The Commission has determined that the 1996 Telecommunications Act’s definition of “information services” encompasses all the services included in the Commission’s definition of “enhanced services.” See *Wireline Broadband Internet Access Order*, 20 FCC Rcd at 14871 ¶ 29.

Specifically, Sprint’s Layer 3 MPLS Virtual Private Network (“VPN”) services provide customers with a suite of services and applications that are similar to those offered by providers of wireline broadband Internet service providers, including:

- Multicast/replicate information (*e.g.*, videoconferencing, corporate communications, distance learning, distribution of software updates) on demand;
- Traffic prioritization on the ingress and egress wireline links, which requires configuring the customer’s preference for the number and size of queues for the buffering and delivery of traffic;
- Encryption of the communications session to ensure privacy and security;
- Authentication to identify an individual based on a username and password information for remote access users;
- Authorization to grant or deny a user access to network resources following authentication based on stored customer information for remote access users;
- Verification mechanisms that validate every packet that enters the Provider Edge and provides protection against packet spoofing attacks; and
- Connectivity over multiple protocol types on a single customer Layer 3 VPN.

To be sure, MPLS services include a data transmission component – as all information services necessarily include a transmission component.<sup>30</sup> But as Masergy correctly explains, MPLS services are “a unitary service with multiple components . . . that cannot be separated”:

Because the MPLS port functions clearly provide information services that are inseparable from the intermediate transmission between the ingress and egress points of an MPLS network, MPLS “inextricably intertwines” the information functions contained in the port with the intermediate transmission functions of an MPLS network.<sup>31</sup>

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<sup>30</sup> Information services are those services that include the capabilities specified in the Act and that are offered “via telecommunications.” 47 U.S.C. § 153(20).

<sup>31</sup> Masergy Petition at 3-4.

In light of the regulatory framework the Commission adopted in the *Wireline Broadband Internet Access Order*, the Commission “eliminate[d] the *Computer Inquiry* obligation as applied to facilities-based providers of wireline broadband Internet access service, and, in particular, the obligation to offer the transmission component of wireline broadband Internet access service on a stand-alone common carrier basis.”<sup>32</sup> As an “information service,” wireline broadband Internet access service providers are no longer required to separate out the transmission component of the service. The Commission also addressed “the legal classification of the transmission component underlying facilities-based wireline broadband Internet access service” and determined that the transmission component is “telecommunications,” and not a “telecommunications service” when the transmission component is part of a facilities-based provider’s service offering.<sup>33</sup> Thus, MPLS services are information services and the transmission component of MPLS services is “not a telecommunications service.”<sup>34</sup>

**V. IF THE COMMISSION EXERCISES ITS “PERMISSIVE AUTHORITY” TO APPLY A USF CONTRIBUTION OBLIGATION TO MPLS NETWORK OPERATORS, IT MUST COMPLY WITH THE APA’S NOTICE-AND-COMMENT REQUIREMENTS**

As noted above, the last sentence of Section 254(d) empowers the Commission to extend a USF contributions obligation to information services, such as those provided with MPLS networks – *so long as* the record evidence supports a Commission determination that the “public interest so requires” such action.

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<sup>32</sup> *Wireline Broadband Internet Access Order*, 20 FCC Rcd 14899, ¶86.

<sup>33</sup> *See id.* at 14909-14910 ¶¶ 102-104.

<sup>34</sup> *See id.* at 14857 ¶ 4. *See also id.* at 14910 ¶ 104 (The transmission component of an information service is “mere ‘telecommunications’ and not a ‘telecommunications service.’”).

Imposing a USF obligation on MPLS network operators that provide information services and that have never been subjected to such an obligation obviously would constitute a new legal duty. Accordingly, such a new obligation could be imposed only if the Commission complies with the APA requirements of notice and comment.

**VI. ANY EXTENSION OF USF OBLIGATIONS TO INFORMATION SERVICES SHOULD BE APPLIED PROSPECTIVE ONLY<sup>35</sup>**

Commission rules give USF contributors the right to recover their contribution costs from their customers,<sup>36</sup> and the Commission has recognized that service providers “routinely pass those [USF] costs along to customers, usually in a line item on their bills.”<sup>37</sup> The Bureau’s action in modifying the Form 499-A filed on April 1, 2009, however, which applied to services provided last year (January 1 through December 31, 2008), prevents carriers from recovering these costs. Because services provided in 2008 have already been billed, it may not be possible for MPLS network operators to recover from their customers any additional contribution costs that may result from the Bureau’s unilateral modification of Form 499.

The Commission recently addressed a similar situation when it determined that its extension of a USF contribution obligation to firms that had not previously contributed to the Fund should be applied prospectively only. *See InterCall*, 23 FCC Rcd 10731 (2008). In this case, the Bureau in 2002 revised the Form 499-A to include “toll teleconferencing” as an example of the telecommunications services that are subject to USF contribution,

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<sup>35</sup> If the FCC agrees with Sprint that the Bureau exceeded its delegated authority (*see Part II supra*), then the Bureau action becomes null and void and this retroactivity issue becomes moot.

<sup>36</sup> *See* 47 C.F.R. § 54.712(a). Of course, under this rule, carriers may “not mark up federal universal service line-item amounts above the contribution factor.” *See* Public Notice, *Proposed Second Quarter 2009 Universal Service Contribution Factor*, 24 FCC Rcd 3038, 3041 (2009).

<sup>37</sup> *Universal Service Reconsideration Order*, 23 FCC Rcd 6221, 6222 n.2 (2008).

although the Bureau did not define the term, “toll teleconferencing.”<sup>38</sup> Providers of stand-alone audio bridging services did not believe they were subject to this revision because the Commission had never regulated them as providers of telecommunication services.<sup>39</sup> Five years later, however, the Universal Service Administrative Company (“USAC”) held that the requirements resulting from this Bureau revision were “clear” and that as a result, these audio bridging providers should not only begin making USF contributions in the future, but also pay contributions for the previous five years.<sup>40</sup>

The Commission agreed with the USAC that, based on the particular facts presented, audio bridging providers should begin contributing to the USF on “a going-forward basis.”<sup>41</sup> The Commission, however, reversed that portion of USAC’s decision which required contributions for past periods, on the ground that it was “unclear to InterCall, as well as to the industry, that stand-alone providers of audio bridging services have a direct USF contribution obligation” and that as a result, “prospective application of our decision is warranted”:

We agree with the consensus of the commenters that, in this unique instance, requiring direct contributions on a going-forward basis will best serve the interest of all parties to this proceeding.<sup>42</sup>

The Commission therefore required audio bridging providers to begin making USF contributions as of “the calendar quarter immediately following the next regularly scheduled

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<sup>38</sup> See *InterCall*, 23 FCC Rcd at 10732 ¶ 4.

<sup>39</sup> See *id.* at 10736 ¶ 15.

<sup>40</sup> See *id.* at 10733 ¶ 5.

<sup>41</sup> See *id.* at 10734 ¶ 8. The FCC determined that the features InterCall offered in connection with its bridging services are “not ‘integrated’ and thus do not change a service from telecommunications to an information service.” *Id.* at 10735 ¶ 12.

<sup>42</sup> See *id.* at 10738-39 ¶¶ 23-24.

FCC Form 499-Q filing after the release date of this order” so they and their customers have time to adjust to the new environment.<sup>43</sup>

The same situation is involved here. As in *InterCall*, the MPLS industry has uniformly treated MPLS services as information services that are exempt from USF contributions. As in *InterCall*, the Bureau revised the Form 499-A, this time to include MPLS services without defining the term (*e.g.*, whether it applies to Layer 2 services only or Layer 3 services as well). The principal difference between the two situations is that the MPLS industry has sought clarification of the Bureau’s decision promptly, rather than waiting six years.

Appellate courts have held that agencies may “not retroactively change the rules at will”:

Indeed, that “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly” has been well established for “centuries.”<sup>44</sup>

Congress in the APA has, moreover, specifically limited agency rules to prescriptions of “future effect.”<sup>45</sup>

In summary, based on the *InterCall* precedent, Sprint submits that if the Commission determines that some or all MPLS services should begin making USF contributions, such a ruling should be applied prospectively only. It would be manifestly unjust to impose such a new obligation retroactively because retroactive application would prevent MPLS network operators from exercising their right to recover these costs from their customers.

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<sup>43</sup> See *id.* at 10739 ¶ 24.

<sup>44</sup> *NetworkIP v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008).

<sup>45</sup> See 5 U.S.C. § 551(4).

## VII. CONCLUSION

The Bureau stated it added MPLS services to the Form 499 to “ensure that all contributors are properly reporting revenues and are treating similar revenues uniformly.”<sup>46</sup> The discussion above makes apparent that this Bureau action has created a new uncertainty and controversy rather than providing any clarification of existing requirements. For the foregoing reasons, Sprint respectfully requests that the Commission vacate the Bureau’s decision to add MPLS services to Forms 499-A and 499Q. If the Commission believes that certain MPLS services (a) may be telecommunications services and regulated as such, or (b) should be subjected to USF contributions pursuant to its permissive authority, the Commission should commence a new rulemaking on that subject so a full and complete record can be developed. The APA requires no less.

Respectfully submitted,

**SPRINT NEXTEL CORPORATION**

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<sup>46</sup> See 2009 Form 499-A Revision Public Notice at 1.