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

Universal Service Contribution Methodology	))	WC Docket No. 06-122

COMMENTS OF BT AMERICAS INC. ON BEHALF OF ITSELF AND OTHER BT ENTITIES ON MASERGY COMMUNICATIONS INC. PETITION FOR CLARIFICATION

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BT Americas Inc. and other BT operating entities in the US, by their attorneys, submit the following comments in response to the Petition for Clarification, or in the Alternative, Application for Review (the "Petition")[1] filed by Masergy Communications Inc. ("Masergy") on March 27, 2009, in the above-captioned docket.[2] The Petition seeks clarification or review by the Commission of a Public Notice issued by the Wireline Competition Bureau (the "Bureau") on February 25, 2009.[3] That Public Notice announced rule changes issued as part of the 2009 revised Telecommunications Reporting Worksheet, FCC Form 499-A ("Form 499"), and the revised instructions for that form (the "2009 Instructions"). In the Petition, Masergy sought clarification of an amendment to the 2009 Instructions that for the first time included Multi-Protocol Label Switching ("MPLS") as a type of "interstate telecommunications" for purposes of determining Form 499 contributions.[4]

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[1] See Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review, WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116 (filed March 27, 2009) (the "Petition").

[2] The Public Notice announcing the Petition indicated that comments were to reference only WC Docket No. 06-122. See Comment Sought on Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review, WC Docket No. 06-122, Public Notice, DA 09-1021 (WCB rel. May 7, 2009) (the "Masergy Notice").

[3] Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions, Public Notice, DA 09-454 (WCB rel. Feb. 25, 2009) (the "Public Notice").

[4] See 2009 Instructions at 4-5 ("For purposes of determining whether an entity provides telecommunications, . . . the term 'interstate telecommunications' includes . . . Multi-Protocol Label Switching (MPLS) services[.]"); see also

Introduction and Summary

BT Americas and the other BT operating entities in the US (hereinafter "BT"), which are wholly-owned indirect subsidiaries of BT Group plc, are part of a global network of BT subsidiaries that provide information, communications, and technology services to multinational corporations worldwide. BT supports Masergy's request for clarification or review of the change adding MPLS to the 2009 Instructions, and concurs for the most part with Masergy's characterizations regarding the proper regulatory classification of MPLS-enabled services. BT agrees with the Petition's basic premise: namely, that MPLS is not a type of telecommunications but is in fact a technology used to offer services that constitute information services not subject to Universal Service Fund ("USF") contributions.[5] The Commission's letter of April 1, 2009, to the Universal Service Administrative Company ("USAC")[6] makes clear that Commission precedent continues to apply to MPLS-enabled services, and it is clear from such precedent that MPLS-enabled services are information services. Therefore the reference in the 2009 Instructions characterizing MPLS services as interstate telecommunications should be removed.

Moreover, BT agrees with Masergy that, to the extent the Bureau is attempting to reclassify MPLS network service as telecommunications, the Bureau has exceeded its delegated authority and departed from longstanding Commission policy regarding the treatment of information services.[7] Finally, BT agrees that no such change in Commission policy may be made simply by labeling the amendment as one of several "nonsubstantive clarifications" in the

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Public Notice at 1 (announcing that the Form 499 instructions would be "[a]mended to include Multi-Protocol Label Switching (MPLS), which is an updated technique that efficiently moves messages through an established network path and is a substitute for asynchronous transfer mode (ATM)").

[5] Petition at 2.

[6] See Letter from Jennifer McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, to Michelle Tilton, Director of Financial Operations, Universal Service Administrative Company (April 1, 2009) ("Bureau Letter").

[7] See Petition at 5.

2009 Instructions, and that in this instance the Bureau would have violated the provisions of the Administrative Procedure Act ("APA") by altering Commission policy without an opportunity for notice and comment.[8]

BT does not agree, however, with Masergy's suggestion that the Bureau necessarily should view some MPLS-enabled services as "transmission line" or "local access" services subject to reporting and contribution requirements.[9] For this reason, BT does not concur with Masergy's specific proposal for clarification of the 2009 Instructions.

I. BT's Service Offerings Using MPLS Technology Should not be Classified as Telecommunications

BT's managed MPLS-enabled service offerings for global customers are not telecommunications for the following reasons:

(i) Just as in the case of the ISPs in the Supreme Court's Brand X and the Commission's Wireline Broadband Order decisions,[10] BT's MPLS-enabled services give customers access to information, tools, applications, and communications, either on the corporate network or on the public Internet, that allow for the generation, acquisition, storage, transformation, processing, retrieval, and utilization of such data.

(ii) MPLS-enabled services offer customers the ability to assign different priorities to their traffic by labeling their packets, and this in turn effects net changes in the form or content of the information the user sends. The prioritization capability

[8] See id. The Public Notice described the addition of MPLS to the list of interstate telecommunications as a one of several "nonsubstantive clarifications [made] to ensure that all contributors are properly reporting revenues and are treating similar revenues uniformly." Public Notice at 1.

[9] See Petition at 2, 5.

[10] See National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) ("Brand X"); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("Wireline Broadband Order").

offered to the customer is not for the benefit of BT or any other provider, but it is a benefit offered to and paid for by the customer. Hence MPLS-enabled services cannot be telecommunications and must be classified as information services.[11]

(iii) MPLS-enabled VPN services can allow retrieval or exchange of data between a customer's Local Area Networks ("LANs") or terminals operating in different layer 2 protocols, thereby resulting in a net protocol conversion that again provides enhanced functionality to end users. Hence, as per Commission precedent, MPLS-enabled VPN services must be classified as information services.[12]

1. Like the ISPs in the Brand X and Wireline Broadband Cases, BT's Managed MPLS-based Network Services Offer Customers Access to Information via Telecommunications

BT's managed MPLS-based services offer access to information, tools, applications, and communications on corporate intranets and the public Internet via telecommunications in the same manner that broadband providers offer access to information via telecommunications. Hence these MPLS-enabled services cannot be classified as "interstate telecommunications." BT's baseline MPLS-enabled VPN service offers access to the public Internet via up to five Internet gateways. BT's MPLS-enabled service aggregates data from different client sites into host sites and offers access to Domain Name System ("DNS") lookup services. Applying BT's managed-security services, BT's MPLS-enabled service allows access to a mixture of secure VPN-connected sites and inherently less secure Internet sites.

[11] In this regard, MPLS is readily distinguishable from technologies such as those described in the Commission's IP-in-the-Middle Order, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order, 19 FCC Rcd 7457, ¶ 1 (2004), which is discussed in greater detail in Part I.2 below.

[12] See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384 (1980) ("Computer II") (discussed in greater detail in Part I.2 below).

In Brand X, the Supreme Court upheld the FCC's decision that cable companies providing broadband Internet access via cable modems did not offer stand-alone telecommunications service because of the "integrated character" of the "offering."[13] The Court rejected the notion put forward by the petitioners that Internet access provided by a cable ISP necessarily must be pure telecommunications if subscribers do not utilize any of the information or content provided by the cable ISP. The Court indicated that offering access to a variety of information capabilities and providing access to DNS services was sufficient for the Commission to conclude that Internet access service should be classified as an information service.[14] In the Wireline Broadband Order the Commission used similar reasoning to reach the conclusion that wireline broadband Internet access services should likewise be treated as information services.[15]

The activity on corporate networks closely resembles activity on the Internet, [16] which is after all a network of networks. Amongst other things, corporate users are exchanging e-mails and files, accessing web pages on the corporate intranet or the Internet, and making calls; accessing applications such as financial management or HR systems on the corporate network, on the Internet, or at a third party's site; participating in social networking, blogging, podcasts, wikis and RSS feeds; and using collaboration tools either on the corporate network or the public Internet as permitted and specified by the corporate customer. BT's baseline service supports multiple business and/or Internet applications and multi-party communications in a seamless, integrated, end-to-end service. Hence, the access to the tools, information, and applications on a

[13] Brand X, 545 U.S. at 988.

[14] See id. at 991-92.

[15] See Wireline Broadband Order ¶ 9 ("Wireline broadband Internet access service, like cable modem service, is 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.").

[16] In fact, MPLS is the technology that BT employs in the operation of its IP backbone – the Internet itself.

corporate network enabled by BT's MPLS-based services is no different from the access provided by an ISP to the multitude of activity on the Web. Therefore, as in the Brand X and Wireline Broadband decisions, BT's baseline MPLS-based network service must be an information service.[17]

BT also offers its customers more comprehensive MPLS-enabled solutions which include managed e-mail, instant messaging, information collaboration capabilities, website and data hosting, data caching, and managed applications services – all of which are integrated into customers' VPN solutions. In addition, BT offers extranet services using MPLS technology, allowing member and provider users to form a global community, sending and drawing down information and executing transactions as permitted by a user's authentication profile. For certain customers, BT's managed MPLS-enabled services also permit local caching of data integrated into the services. BT's various MPLS-enabled services offer information services that are inextricably intertwined with telecommunications and therefore must be treated as information services pursuant to controlling Commission precedent.

2. MPLS Inherently Changes the Form or Content of Information as Sent and Received and Therefore Cannot be Telecommunications

MPLS-enabled network services are not telecommunications as defined in the Communications Act or in the Commission rules and precedents because MPLS services act on the format and protocol of the subscriber's transmitted information, thereby providing the subscriber additional, different, or restructured information in the process of delivering functionality that is valued and paid for by the customer.[18] An MPLS-enabled network simultaneously processes and transforms information by attaching uniform labels to different

[17] See, e.g., Wireline Broadband Order ¶ 14.

[18] See 47 U.S.C. § 153(20); 47 C.F.R. § 64.702(a).

types of information sent by a user, assigning higher priorities to some packets, and optimizing routing in real time for different types of traffic.[19] Utilizing MPLS technology, BT enables its customers to prioritize different traffic and application types, and in some cases additional tools enable this prioritization mechanism to be applied dynamically during peak business periods. A customer's video and voice traffic may be given highest priority, with access to hosted applications given medium priority, while the customer's Internet or Intranet-bound traffic may be labeled as the lowest priority. This prioritization capability is an efficiency not for BT's benefit, but for the customer's benefit, and it is paid for expressly by the customer. The Commission long ago concluded that "generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services" and that "'[i]n enhanced services, communications and data processing technologies have become intertwined so thoroughly' that they are distinctly separate from basic services."[20] The net change in format and the re-ordering of layer 2 protocols and priorities that MPLS enables are just such net changes. On the contrary, the Commission's IP-in-the-Middle Order considered an AT&T offering that the Commission found to be telecommunications because it transmitted information that underwent "no net protocol conversion" and thus the service "provide[d] no enhanced functionality to end users due to the provider's use of IP technology."[21]

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[19] See, for example, the technical treatises cited by the Bureau in the Public Notice: Andrew G. Malis, *Converged Services over MPLS*, IEEE COMMUNICATIONS MAGAZINE, Sept. 2006, at 153 ("Malis"); see also Stephen A. Thomas, *IP Switching and Routing Essentials: Understanding RIP, OSPF, BGP, MPLS, CR-LDP, and RSVP-TE* (John Wiley and Sons, Inc. 2001) ("Thomas").

[20] Computer II ¶ 120.

[21] IP-in-the-Middle Order ¶ 1. The order contrasted IP-in-the-middle with an enhanced service that "contains a basic service component but also involves some degree of data processing that changes the form or content of the transmitted information." Id. ¶ 4.

MPLS-enabled services also could allow retrieval and exchange of data between two or more of a customer's Local Area Networks ("LANs") or terminals that operate using different layer 2 protocols, and that otherwise would not be compatible or able to interconnect. For example, a LAN on one end of a customer's global network might utilize Frame Relay protocols to access the MPLS network while another point on the network might use ATM. MPLS technology may be used to translate between protocols and connect two LANs by transforming, reformatting, and restructuring the data sent between them, at the customer's request and for the customer's benefit. MPLS technology thus allows for transformative, "enhanced services" that act on and change the format, code, protocol or similar aspects of transmitted data.[22] This means that "service providers are not required to have the same infrastructure at both ends of the connection. End-to-end connections can be achieved between two customer sites with completely different layer 2 endpoint technologies."[23] While the Commission has explained that routing functions integral to the transmission component remain telecommunications, in the case of MPLS-based services the routing and protocol conversions allow various voice, ATM, Frame Relay, and IP networks to speak a common language and communicate with each other. These protocol conversions are not at the core of any transmission capability provided by a service provider, but are clearly functionality offered for the benefit of a customer.

BT's services utilizing MPLS technology are not "internetworking" conversions as that term is used in the IP-in-the-Middle Order, because the protocol changes in BT's services go beyond processing functions that may be (1) confined to "communications between an end-user and the network itself . . . rather than between or among users"; (2) introduced solely "to maintain compatibility with existing CPE" rather than to allow a net protocol change between

[22] See 47 C.F.R. § 64.702(a).

[23] Malis at 154 (emphasis added); see also Thomas at 232.

distant networks ; or (3) located "solely within the carrier's network" and undertaken "to facilitate provision of a basic network service, [but] that result in no net conversion to the end-user."[24] MPLS technology is part of a service that is chosen by and beneficial to customers that need this type of net protocol conversion in order to prioritize their traffic or link their local networks operating on previously incompatible platforms. Hence, in keeping with Commission precedent, MPLS-enabled services must be classified as information services.

3. BT Does Not Support Masergy's Contention That Some MPLS-Enabled Services Constitute Stand-Alone Transmission

While in agreement with most of the requests and characterizations set forth in the Petition, BT cannot support Masergy's claim that most providers either already do, should, or must treat the access portion of MPLS-enabled services as stand-alone transmission services.[25] BT offers its MPLS-enabled services as end-to-end, seamless, integrated global products, and does not offer any MPLS-enabled access service on a stand-alone basis. Hence, the functionality offered to customers by BT's MPLS-enabled services, including the portion of the network that provides access to BT's MPLS processing cloud, is an integrated end-to-end functionality and must be treated and classified as such for regulatory purposes.[26]

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[24] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 106 (1996), cited in IP-in-the-Middle Order ¶ 12 & n.53.

[25] See Petition at 2 ("Masergy requests that the Bureau issue a clarification of the term 'MPLS' as used in the Instructions to indicate that the MPLS subject to USF contribution is solely the local transmission line features often sold as a portion of the basket of services that are generally referred to as MPLS."); see also id. ("[T]he most common practice in the industry today is for carriers to collect USF surcharges on the underlying [MPLS] transport, primarily local access, but not to collect USF surcharges on [the] MPLS . . . information service."); id. at 6 ("Local access to MPLS networks, however, are more likely telecommunications.").

[26] See, e.g., Wireline Broadband Order ¶ 14 (concluding that "wireline broadband Internet access service provided over a provider's own facilities is appropriately classified as an information service because its providers offer a single, integrated service . . . to end users") (emphasis added); see also Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 2 FCC Rcd 3072, ¶¶ 64-69 (1987) (vacated and remanded on other grounds) (discussing the application of the "enhanced services" designation to any protocol processing taking place during end-to-end communications).

II. BT Supports Masergy's Contention that the Bureau May Not Treat MPLS-Enabled Services as Telecommunications without the Opportunity for Notice and Comment

The Public Notice and the 2009 Instructions asserted for the first time – without any explanation, and without any prior notice or opportunity for public comment – that MPLS "services" are to be considered "interstate telecommunications" for purposes of Form 499. The Bureau Letter then indicated to USAC that the changes to the 2009 Instructions were not meant to require reporting of MPLS-Enabled Information Service revenues on Form 499. However, as discussed in the preceding sections, all MPLS-based services are information services because the information processing and transmission components of such services are inextricably intertwined, and because the net protocol, formatting, and priority changes to a user's information inherent to MPLS-based services are effected for the benefit of the customer. The Commission therefore must provide clarity by removing from its 2009 Instructions the reference to MPLS as "interstate telecommunications."

If the Commission seeks to depart from precedent and re-categorize MPLS-based services as telecommunications, it must proceed via notice and comment as required by the APA. The APA clearly states that such procedures are required for all but "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," unless the Commission expressly finds for good cause that such procedures are unnecessary in a particular case.[27] Appellate courts reviewing and remanding previous Commission attempts to qualify for the interpretative rule exemption have noted consistently that a Commission decision is subject to notice and comment requirements when "it constitutes a substantive change in a prior rule."[28] The D.C. Circuit in particular has considered the question on multiple occasions, and while

[27] 5 U.S.C. § 553(b).

[28] U.S. Telecom Ass'n v. FCC, 400 F. 3d 29, 30 (D.C. Cir. 2005).

listing several different formulations of the test for determining whether a new pronouncement amends a prior rule or makes a substantive change in existing rules, that court has concluded that the underlying principle in the APA "bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule."[29] The Public Notice's citation to two technical papers that provide some information on MPLS technology, without any further discussion of these papers,[30] does not qualify as a substitute for reasoned decision-making on this topic. In fact these papers' description of the capabilities of MPLS-based services call into question the conclusion reached in the 2009 Instructions, as well as the ease with which that conclusion was reached.

Failure to provide clarity via a notice and comment procedure also puts providers in a very difficult situation. Customers understandably would be confused by and resistant to paying any additional USF charges on MPLS-based services, and especially will be resistant to doing so if the Commission is not clear as to the source of this obligation. Failure by the Commission to be clear on which MPLS-enabled services, if any, are telecommunications and why will lead one or more providers (whether a network services-based provider, systems integrator, or other) to leverage the lack of clarity and not pay into the fund. Customers may use this situation to demand that other providers do the same. It is not realistic for one or more providers to charge corporate customers 11-12% more in USF fees on MPLS-enabled services and maintain market share when other providers do not assess their customers for such fees. Hence, clarity from the Commission is essential.

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[29] Id. at 35 (citing Sprint Corp. v. FCC, 315 F.3d 369, 374 (D.C. Cir. 2003); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000); Communications Corp. v. FCC, 128 F.3d 735, 739 (D.C. Cir. 1997); American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)).

[30] See Public Notice at 1.

As a result, the Commission should not adopt changes to Form 499 and its accompanying instructions without first providing adequate notice to the public and seeking comment on such revisions.[31] Any such changes when made by the Commission cost providers significant amounts of time and money to implement. End-customers ultimately bear the brunt of billions of dollars of USF assessments, and therefore are invariably impacted by changes in Form 499 as well. For this reason, the Commission must be rigorous in the clarity, notice, and precision it provides, even in the case of changes it may regard as nonsubstantive. Such transparency and clarity would lend the Commission's "daily decisions the kind of openness that gives true credibility" to its actions.[32]

[31] Others have complained about changes the Commission has made to these forms and instructions, in light of the fact that such changes cost providers and customers significant resources in time and/or money. See, e.g., Letter to Marlene H. Dortch from Jonathan Banks, Senior Vice President and General Counsel, United States Telecom Association, and Paul Garnett, Assistant Vice President, Regulatory Affairs, CTIA – The Wireless Association, CC Docket No. 96-45 (Dec. 12, 2007).

[32] Remarks of Acting Chairman Michael J. Copps to the Federal Communications Commission Staff, Jan. 26, 2009, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-288096A1.pdf.

Conclusion

For the foregoing reasons, the Commission should clarify that MPLS-based services are information services and remove the reference to MPLS as telecommunications in the 2009 Instructions. The Commission also should reject Masergy's contention that local access components to MPLS-enabled services are likely to be telecommunications rather than inextricably intertwined and integrated elements of an end-to-end information service. Finally, to the extent the Commission departs from prior precedent and classifies MPLS-based services as telecommunications, then the Commission may do so only via a notice and comment procedure.

Respectfully submitted,

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