

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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Request for Review of Decision of Universal	)	USAC Audit Report No. CR2005CP007
Service Administrator by Global Crossing	)	
Bandwidth, Inc.	)	

**COMMENTS OF VERIZON<sup>1</sup> AND VERIZON WIRELESS**

The Application for Review of the *Bureau Order*<sup>2</sup> filed by Global Crossing Bandwidth, Inc. (“Global Crossing”)<sup>3</sup> illustrates the continuing problems that result from the informal process surrounding the FCC Form 499-A revenue reporting Instructions (“Instructions”). Verizon takes no position on the underlying facts of Global Crossing’s Application. The Commission, however, should take this opportunity to do three things: (1) implement a new practice of posting proposed changes to Form 499-A and Instructions for notice and comment prior to adopting those changes; (2) clarify that any changes to the Form 499-A and Instructions are only effective on a prospective basis; and (3) make clear that wholesale carriers are not strictly liable for the universal service fund (“USF” or “Fund”) contributions of their resale customers.

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<sup>1</sup> In addition to Verizon Wireless, the Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications, Inc.

<sup>2</sup> *Federal-State Joint Board on Universal Service, Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, Order, 24 FCC Rcd 10824 (2009) (“*Bureau Order*”).

<sup>3</sup> Application for Review of Global Crossing, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Sept. 16, 2009) (“*Application*”).

For years, Verizon and others have raised Administrative Procedure Act (APA) and other concerns with the practice of adopting substantive changes to the Form 499-A and Instructions without the opportunity for notice and comment.<sup>4</sup> The Commission cannot avoid its APA obligations by making substantive rules or imposing material obligations on carriers through changes to the Form 499-A or Instructions. *See* 5 U.S.C. § 553 (requiring that agencies generally afford the public and affected parties with notice and an opportunity to comment on proposed rules.) There is an exception from the general notice and comment requirements in the APA for “rules of agency organization, procedure or practice.” 5 U.S.C. § 553(b)(3)(A). The exception, however, only “covers agency actions that do not themselves alter the rights or interests of parties”; it does not apply when the agency “encodes a substantive value judgment” or sets “substantive standards.” *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326-328 (D.C. Cir. 1994) (citations omitted); *see also United States Telecomm. Ass’n v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (a rule that “substantively changes a preexisting legislative rule ... can be valid only if it satisfies the notice-and-comment requirements of the APA”).

In many instances, the Form 499-A and Instructions indeed set “substantive standards” and impose significant obligations on contributors to the USF. The “carrier’s carrier” reporting rules and reseller certification process at issue in Global Crossing’s Application is a good example. The Instructions were changed in 2007, without notice and comment, making it mandatory that wholesale carriers collect annual certifications, with specific language identified

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<sup>4</sup> *See, e.g.*, Comments of Verizon in Support of Applications for Review by Qwest, Business Discount Plan, and SBC, and Petition for Reconsideration by Sprint, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 98-171, and 97-121 (March 30, 2005); Application for Review of Business Discount Plan, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 98-171, and 97-121, at 12-20 (Jan. 10, 2005) (challenging change to instructions to Form 499 fixing 12-month statute of limitations for filing revised 499-A that would decrease the filer’s fees or contribution that was adopted without the opportunity for notice and comment).

in the Instructions, from their reseller customers.<sup>5</sup> Carriers that failed to obtain these certifications from their reseller customers risked being responsible for “additional universal service assessments.”<sup>6</sup> Obtaining reseller certifications had previously been a voluntary process for wholesale carriers.<sup>7</sup> This change to a mandatory certification process with potentially draconian consequences if that process was not followed set a new, very real “standard” for the Universal Service Administrative Company and its auditors to determine if a wholesale carrier had an “independent reason to know” the carrier’s reseller customer would make its own required contributions to the Fund.<sup>8</sup> With a growing USF and all-time high contribution factors, these and other changes to the Instructions have real world, high-dollar consequences for contributors and the Commission alike, which necessitates a formal process in keeping with the APA.

At a minimum, the Commission should annually identify any proposed changes to the Form 499-A and Instructions in a tracked changes version of these documents and publish those changes for comment prior to their taking effect. In February 2009, the Wireline Competition

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<sup>5</sup> See Telecommunications Reporting Worksheet, FCC Form 499-A (revised 2007), Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms, [http://www.usac.org/\\_res/documents/fund-administration/pdf/499/form-499a-FY2007-instructions.pdf](http://www.usac.org/_res/documents/fund-administration/pdf/499/form-499a-FY2007-instructions.pdf), at 19.

<sup>6</sup> *Id.* (“Filers that do not comply with the above procedures will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users.”)

<sup>7</sup> See Telecommunications Reporting Worksheet, FCC Form 499-A (revised 2006), Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms, [http://www.usac.org/\\_res/documents/fund-administration/pdf/form-499A-fy2006-instructions-IPO-revised.pdf](http://www.usac.org/_res/documents/fund-administration/pdf/form-499A-fy2006-instructions-IPO-revised.pdf), at 18,.

<sup>8</sup> *Id.*

Bureau released a public notice that described the changes to the revised FCC Form 499-A and Instructions. *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, 24 FCC Rcd 2424 (2009). That change in practice was helpful to contributors but still did not provide interested parties with an opportunity for formal comment.

In addition, the effective date of annual changes to the Instructions has always been unclear. The Instructions can be modified at any time, and last year they were changed in February – just a few weeks in advance of the April 1 deadline to submit the Form 499-A, which is the revenue reporting true-up form for carrier revenues earned in the previous calendar year. As a practical matter, a contributor cannot go back in time to implement changes to its processes and procedures after the fact.

The 2007 change in the Instructions to a mandatory reseller certification process is also a good example of the problems with this situation. As Global Crossing's Application underscores, it would be unreasonable and unrealistic (if that was the Commission's expectation) for carriers that did not collect reseller certifications throughout the year to obtain such certifications from all of their reseller customers in the time between the change to the Instructions and the April 1 deadline to submit the Form 499-A. Indeed, presumably for all large carriers with hundreds – or more – reseller customers, complicated and expensive systems changes and new operating procedures that took many months to develop were required whenever they implemented a reseller certification process. The Commission, therefore, should also clarify that changes to the Form 499-A and Instructions are only prospective in nature.

Finally, the Commission should use this proceeding to make clear that wholesale carriers are not strictly liable for the USF contributions of their resale customers. As the Commission

repeatedly has held, resellers have an independent obligation to contribute to the Fund based on their end-user revenues.<sup>9</sup> This obligation exists irrespective of whether the wholesale carrier has obtained the requisite certification from its resale customers or otherwise put in place procedures to identify and report reseller revenues.

It defies common sense – and, as Global Crossing points out, may be a violation of the Communications Act and the Fifth Amendment to the Constitution – to make an underlying wholesale carrier strictly liable for the USF contributions of its resale customers. *See* Application at 22-25. Such a result provides resellers with all the wrong incentives. For example, with literally thousands of annual sales to reseller customers, Verizon relies upon its resale customers to cooperate in completing correctly and returning on a timely basis their exemption certifications; such cooperation may be wanting if a reseller can shift its contribution obligation to the wholesale carrier simply by failing to provide the requisite certificate.

Moreover, making an underlying wholesale carrier strictly liable for the USF contributions of its resale customers creates the very double-recovery problem that the Commission sought to avoid when it “relieve[d] wholesale carriers from contributing directly” to the USF.<sup>10</sup> The Commission, of course, cannot and should not sit by idly when a reseller flouts

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<sup>9</sup> *See* 47 C.F.R. § 54.706(a)(16) (specifically including resellers of interstate services in the definition of providers of interstate telecommunications services that must contribute to the USF); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 846 (1997) (relieving “wholesale carriers from contributing directly to the support mechanisms” because these carrier’s carriers do not earn revenues directly from end-users, and requiring the reseller that provides the service to the end-user and thereby earns end-user revenues to contribute directly to universal service) (“*Universal Service First Report and Order*”), *aff’d in part, rev’d in part, remanded in part sub nom, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000).

<sup>10</sup> *Universal Service First Report and Order* ¶ 847 (“basing contributions on gross telecommunications revenues creates a double-payment problem for resold services and thus is not competitively neutral ...”).

its obligations under federal law in failing to contribute to the USF. But to the extent the Commission pursues an enforcement action against a recalcitrant reseller, it would either be seeking to recover payments for the same contributions for which the wholesale carrier has been made strictly liable or be expected to take steps to avoid double payment, which would be “difficult if not impossible” to do.<sup>11</sup>

A wholesale carrier should generally “have in place documented procedures to ensure that it reports as reseller revenues only revenues from those entities that reasonably would be expected to contribute to support universal service.” *Bureau Order* ¶ 5. When a wholesale carrier does not satisfy this directive, it may fairly be subject to fine or other penalty consistent with the Act and the Commission’s rules. But the range of permissible remedies that the Commission may impose on a person that “willfully” or “repeatedly” violates the Act or the Commission’s rules does not include making a wholesale carrier strictly liable for the USF contributions of its resale customers. *See* 47 U.S.C. §§ 501-504.

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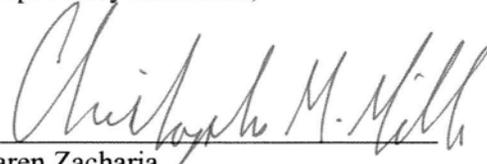
For these reasons, the Commission should: (1) post proposed changes to Form 499-A and Instructions for notice and comment prior to adopting those changes; (2) clarify that any changes to the Form 499-A and Instructions are only effective on a prospective basis; and (3) make clear that wholesale carriers are not strictly liable for the USF contributions of their resale customers.

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<sup>11</sup> *Federal-State Joint Board on Universal Service, American Telecommunication Systems, Inc., Equivoice, Inc., Eureka Broadband Corporation, TON Services, Inc., Value-Added Communications, Inc.*, Order, 22 FCC Rcd 5009, ¶ 7, n.17 (2007) (“For many situations, it is difficult if not impossible for USAC to verify the precise extent of alleged double-payment situations”) (citations omitted), *petition for reconsideration pending*.

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