

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

COMMENTS OF AT&T INC.

Cathy Carpino
Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini

AT&T Services, Inc.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3046 - telephone
(202) 457-3073 - facsimile

Its Attorneys

October 28, 2009

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	DISCUSSION.....	5
	A. USF Contributions: Reporting of Prepaid Telephone Card Revenue on FCC Form 499-A.....	6
	B. USF Contributions: Classification of ATM/Frame Relay Revenue.....	12
	C. USF Contributions: Classification of Virtual Private Network and Dedicated Internet Protocol Revenue.....	20
	D. High-Cost Program: Document Retention Requirements Prior to Rule Change.....	22
	E. High-Cost Program: Applicability of the CETC Industry-Wide Interim Cap to Company Specific Caps for AT&T and Alltel.....	25
	F. Advertising Supported Services.....	27
III.	CONCLUSION.....	30

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

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

COMMENTS OF AT&T INC.

I. INTRODUCTION

AT&T Inc. (AT&T), on behalf of its affiliates, hereby responds to the Commission’s request for comment on two Universal Service Administrative Company (USAC) letters, in which USAC reiterated requests for guidance on various universal service issues that have gone unanswered – in some cases for several years.¹ Two of USAC’s requests were first made during its audit of legacy AT&T Corp. conducted in 2005.² Over the years, AT&T repeatedly has sought action on these requests, as well as on AT&T’s still pending appeal of several USAC

¹ Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45, Public Notice, DA 09-2117 (rel. Sept. 28, 2009); Letter from Richard A. Belden, USAC, to Julie Veach, FCC, WC Docket Nos. 05-337, 06-122 (filed Aug. 24, 2009) (USAC August 19, 2009 Letter); Letter from Richard A. Belden, USAC, to Julie Veach, FCC, WC Docket No. 05-337 (filed Aug. 24, 2009) (USAC August 21, 2009 Letter). Although USAC’s letters were dated August 19 and August 21, neither was filed until August 24, 2009. To minimize confusion when discussing each letter, AT&T will refer to each by its date and not by the date on which the letters were filed.

² Request for Review by AT&T Inc. of Decision of Universal Service Administrator, CC Docket No. 96-45, at n.5 (filed Oct. 10, 2006) (AT&T October 10, 2006 Appeal) (noting that USAC sought guidance from the Commission on the prepaid calling card issue in an October 13, 2005 memorandum and on the frame relay/ATM issue in a November 4, 2005 memorandum).

findings from that audit so that the audit finally can be closed out.³ But, the Commission's inaction to date has left both AT&T and USAC (as well as other parties) hanging. AT&T therefore welcomes the Commission's request for comment, and hopes that it shows the new Commission finally will resolve these old, but nonetheless important and relevant, USAC requests.

USAC's letters highlight the need for renewed coordination between USAC and the Commission on universal service audits and the establishment of a process to ensure timely resolution of audit-related issues.⁴ The lack of such coordination and resolution of audit issues has left auditees like AT&T in regulatory compliance limbo for unacceptably long periods of time.⁵ And, as USAC notes in its August 19, 2009 Letter, they also have led USAC auditors to

³ See, e.g., Letter from Robert W. Quinn, AT&T, to Dana Shaffer, FCC, CC Docket Nos. 96-45, 97-21 (filed Oct. 4, 2007) (AT&T October 4, 2007 *Ex Parte* Letter) (urging the Commission to act quickly on AT&T's two contributor audit appeals that, at the time of this letter, had been pending for over one year, and explaining how Commission inaction has caused these affiliates to incur administrative expenses and has potentially perpetuated pricing disparities among competitors due to carriers' inconsistent interpretations of their contribution requirements). In addition, AT&T met several times with two prior Wireline Competition Bureau (Bureau) chiefs and other senior Commission staff both before and after the date of this letter to urge Commission action.

⁴ While there is a Commission rule that requires the Bureau and the Commission to act on requests for review of USAC's decisions within a set period of time, based on the experience of AT&T's affiliates, neither the Bureau nor the Commission adhere to these deadlines. See 47 C.F.R. § 54.724 (requiring the Bureau to act on such requests within 180 days and stating that the Commission will act on requests involving novel questions of fact, law or policy within 90 days). As noted above, two of AT&T's affiliates, Cingular and AT&T Corp., have appeals of USAC's audit findings that have been pending at the Commission since 2006. See Request for Review by Cingular Wireless LLC of Decisions of Universal Service Administrator, CC Docket Nos. 96-45, 97-21 (filed March 31, 2006); AT&T October 10, 2006 Appeal. Unfortunately, these two appeals are not even the oldest contributor-related appeals that AT&T's affiliates have on file at the Commission. On June 9, 2004, a legacy Cingular affiliate, Cingular Interactive, filed an application for review with the Commission contesting USAC's efforts to require this affiliate to report information service revenues in its assessable base. Cingular Interactive, LP Application for Review of Demand Letters and Dunning Notices Issued May 12, 2004 by the Universal Service Administrative Company, CC Docket No. 96-45 (filed June 9, 2004). Moreover, based on USAC's two August 2009 letters and AT&T's experience, there is obviously no deadline for the Bureau or the Commission to respond to USAC's written requests for guidance.

⁵ See, e.g., AT&T October 4, 2007 *Ex Parte* Letter at 3:

issue the same erroneous findings (possibly against the same party) year after year.⁶ By directing USAC to repeatedly audit certain carriers every year but then failing to provide timely guidance to USAC on issues raised in the carrier's first audit, the Commission (including its Inspector General) is denying the auditee the ability to take remedial action, if necessary, before being audited again. This result seems at odds with the Government Auditing Standards and sound public policy.⁷

To ensure that open issues are resolved promptly, AT&T recommends that the Commission direct the Bureau to respond to USAC requests for guidance within some defined

Delaying action on these appeals, which cover the company's historical 499-A filings, has several consequences. For example, if the Commission were to issue an adverse decision, which it plainly should not, and the company had to make a retroactive payment to the fund, it would have no ability to recover those contributions from its customers that were not previously surcharged. Such an outcome would be particularly unreasonable where, as here, AT&T and Cingular made good faith efforts to apply Commission precedent and if they had only interpreted the Form 499-A instructions differently, and in their view incorrectly, there would be no question about their ability to recover such contributions from their customers.

⁶ See USAC August 19, 2009 Letter at 3-4 (noting that the document retention requirement issue "will also become a common finding in Round 3 of the FCC OIG USF audit program audits"). Absent Bureau or Commission action, such an outcome seems likely to occur with the other Improper Payments and Information Act audit-related finding mentioned in USAC's letters (i.e., obligation to advertise each of the nine supported services). See USAC August 21, 2009 Letter.

⁷ Section 6.09 of the Government Auditing Standards provides,

When planning the engagement, auditors should ask entity management to identify previous audits, attestation engagements, and other studies that directly relate to the subject matter of the attestation engagement being undertaken, *including whether related recommendations have been implemented. Auditors should use this information in assessing risk and determining the nature, timing, and extent of current work*, including determining the extent to which testing the implementation of the corrective actions is applicable to the current engagement objectives.

Government Auditing Standards, Section 6.09 (July 2007 Revision) (emphasis added). See also Letter from Jonathan Banks, USTelecom, and Christopher Guttman-McCabe, CTIA, to Commissioners, FCC, WC Docket No. 05-195, at 5-6 (filed April 24, 2009) (noting the futility of auditing the same carrier in consecutive years and issuing the same erroneous finding regarding the retroactive application of the Commission's document retention rules, which is one of the issues listed in USAC's August 19, 2009 Letter).

period of time (e.g., 45 days). AT&T also suggests that USAC copy the auditee or the interested party on its request so that the contributor or the universal service program participant can supplement USAC's request as it deems appropriate. The Bureau could direct auditees or interested parties to provide their responses, if any, within a short period of time (e.g., 7 days) so as not to delay issuance of the Bureau's guidance. Providing for such input early in the process may prevent unnecessary audit appeals later. Once an appeal is filed, the Commission should require the Bureau to adhere to the deadlines set forth in Commission rule 54.724. As AT&T explained in its October 4, 2007 *Ex Parte* Letter, Bureau or Commission delay not only adversely affects the auditee but also other service providers and USAC itself.⁸ This is particularly true for the contribution-related USAC audit requests and pending appeals of USAC audit findings. Competitors with varying interpretations of the Commission's contribution requirements have distinct competitive pricing advantages or disadvantages in the marketplace. Thus, Commission delay or inaction on contribution-related matters has a harmful impact on the competitive landscape, particularly since the contribution factor is now north of 12 percent and shows no sign of decreasing.

The Commission should also take AT&T up on its suggestion, made in its October 10, 2006 Appeal and repeated in its October 4, 2007 *Ex Parte* Letter, that the Bureau put out for comment each year the FCC Form 499-A Instructions and Form.⁹ The Bureau should request such comment no later than the third quarter of each year so that interested parties have the opportunity to review and provide input on the documents before they are finalized. In addition, the Bureau should make its non-ministerial changes to these documents effective on a

⁸ AT&T October 4, 2007 *Ex Parte* Letter at 1, 3.

⁹ AT&T October 10, 2006 Appeal at 20; AT&T October 4, 2007 *Ex Parte* Letter at 2.

prospective basis only instead of the current practice of retroactively imposing changes on contributors.¹⁰

More importantly, the Commission should complete long-overdue contribution methodology reform by replacing its existing revenues-based methodology with a telephone numbers- or a telephone numbers and connections-based methodology. Indeed, USAC's contribution-related requests for Commission guidance, the perhaps dozens of contributor appeals pending before the Commission, together with the ever-shrinking interstate telecommunications revenues base and growing contribution factor, highlight the inherent complexity and flaws in the existing methodology, and emphasize the need for reform. Simply expanding the contribution base (as some have proposed) to include, for example, information service revenues is not the answer. Doing so would only add to the complexity and uncertainty of the current methodology by adding new questions about where to draw the line between what is in and out of the assessable base and how to assess providers adopting new business models, such as those whose revenues come from, in large part, advertising revenue.

II. DISCUSSION

While USAC presumably provided detailed background information to the Commission when it originally sought guidance,¹¹ its latest request includes only a “non-confidential summary” that provides scant background information on many of the issues, making it difficult for parties to comment and for the Commission to assemble a meaningful record. On those issues in which AT&T was the subject of the audit, however, AT&T can provide additional

¹⁰ This occurs because the Bureau typically releases the revised documents in February yet the documents themselves apply to the prior calendar year's revenues.

¹¹ AT&T says “presumably” because it has never seen any such request, even when it was the auditee. Thus, AT&T never had the opportunity to correct any inadvertently misstated facts or to respond to or refute arguments made by USAC's auditors.

information and thus assist in developing the record. Indeed, three of the issues relate to audit findings against AT&T that it has appealed to the Commission.¹² And there are several other issues identified by USAC in which AT&T has been involved and can elaborate even though its practices have not resulted in an appealable audit finding.¹³

A. USF Contributions: Reporting of Prepaid Telephone Card Revenue on FCC Form 499-A.

During its contributor audit of legacy AT&T Corp., USAC sought guidance from the Commission in a memorandum dated October 13, 2005 on how USAC “should determine the ‘face value’ of [prepaid calling cards] when such cards have no ‘face value.’”¹⁴ As USAC noted in its August 19, 2009 Letter, the FCC Form 499-A requires carriers to report the “face value” of their prepaid calling cards, but some carriers, including AT&T, sell minute-based prepaid calling cards, which obviously have no “face value.”¹⁵ The short answer to USAC’s request for

¹² See, e.g., AT&T October 10, 2006 Appeal (appealing USAC’s prepaid calling card findings, summarized as issue 1 in the USAC August 19, 2009 Letter); Request for Review by AT&T Inc. of Decision of Universal Service Administrator, WC Docket No. 03-109 (filed Aug. 18, 2008) (AT&T August 18, 2008 Appeal) (appealing USAC’s retroactive application of the Commission’s document retention requirement rules, summarized as issue 4 in the USAC August 19, 2009 Letter, and USAC’s conclusion that AT&T was required to separately list each of the nine supported services in its Lifeline advertisements, summarized in the USAC August 21, 2009 Letter). On this latter issue (Advertising Supported Services), AT&T also has reserved its right to appeal any adverse finding that may be made in several of its high-cost audits. Request for Review by AT&T Inc. of Decision of Universal Service Administrator, CC Docket No. 96-45, WC Docket No. 05-337, at 3-4 (filed April 24, 2009) (AT&T April 24, 2009 Appeal).

¹³ See, e.g., USAC August 19, 2009 Letter at Issue 2 (Classification of ATM/Frame Relay Revenue) and Issue 6 (Applicability of the CETC Industry-Wide Interim Cap to Company-Specific Caps for AT&T and Alltel). AT&T has reserved its right to appeal any adverse audit finding for one of these issues (Classification of ATM/Frame Relay Revenue and Advertising Supported Services). See AT&T October 10, 2006 Appeal at n.5. The second issue, implementation of the AT&T and Alltel company-specific caps, is unrelated to an audit.

¹⁴ AT&T October 10, 2006 Appeal at n.45 (quoting USAC’s Final Audit Report at 24 n.44, attached as Appendix A to this appeal).

¹⁵ USAC August 19, 2009 Letter at 2.

guidance on this particular issue (1.b.) is that there is no way to establish the “face value” of a minute-based prepaid calling card because the price is set by the reseller of the card, and can vary from reseller to reseller (and, indeed, any individual reseller can change the price of the card at any time).

In any event, USAC’s request (issue 1.a) assumes, incorrectly, that the “original selling carrier” is required to contribute to the federal universal service fund (USF) based on the revenues derived from sales of minute-based cards to end users by resellers. As AT&T previously has explained,¹⁶ because resellers set the price for minute-based cards, the original selling carrier typically does not know and cannot track the price at which such cards are sold and the total revenue derived from the sale of the cards to end-users. As a consequence, and when the original selling carrier generally does not have a reasonable basis to conclude that its resellers of minute-based prepaid card services have contributed directly to the federal USF fund based on the sale of those services, the original selling carrier is obligated under the existing rules to treat such resellers as end-user customers. In this instance, and consistent with the Commission’s rules, the prepaid calling card wholesale provider should report and contribute to the federal USF based on *its* revenues associated with the sale of this service.¹⁷ AT&T addressed these two issues in its October 10, 2006 Appeal and, while AT&T provides additional information below, we ask that the Commission incorporate by reference AT&T’s appeal in this proceeding.

¹⁶ See AT&T October 10, 2006 Appeal at 13-20 & Appendix A at 24-28.

¹⁷ See, e.g., Telecommunications Reporting Worksheet, FCC Form 499-A (2009) at 19 (directing underlying carriers to “report revenues derived from the provision of telecommunications to exempt carriers and providers . . . on Lines 403-417. . . . Underlying carriers must contribute to the universal service support mechanisms on the basis of such revenues.”).

Unless the Commission compels entities that have the retail relationship with prepaid calling card customers *and* set the price at which these cards are sold, to register with the Commission and contribute directly to the federal USF, the Commission should advise USAC that AT&T's method of reporting its prepaid calling card revenues was correct and grant its October 10, 2006 Appeal. As explained in that appeal, AT&T sells the prepaid calling card services at issue to its customers at wholesale, and those customers, in turn, resell those services to end users.¹⁸ These resellers have complete discretion and control over the price at which they resell the cards to end users. During the audit period, AT&T's wholesale customers generally were not required to inform AT&T of the prices they were charging to end users and, thus, AT&T had no way to determine how much end users actually paid for those services.¹⁹ Nor did it have a reasonable basis to conclude that its prepaid calling card resellers were contributing directly to the federal USF (i.e., these resellers were not listed on the Commission's web site as current contributors and they did not provide AT&T with reseller certifications).²⁰ In these circumstances, it is appropriate for the original selling carrier to treat those resellers as end-user

¹⁸ AT&T October 10, 2006 Appeal at 14.

¹⁹ *Id.* at 15. Since AT&T filed this appeal and after the Commission adopted its *Second Prepaid Calling Card Order*, 21 FCC Rcd 7290 (2006), AT&T renegotiated its contracts with its prepaid calling card customers (including its wholesale customers that are retailers) to require them to provide AT&T, upon its request, with their end-user prepaid calling card revenues. Since that order became effective, AT&T has been contributing to the federal USF based on its prepaid calling card resellers' end user revenues (unless, of course, the reseller provides AT&T with a valid reseller certification and AT&T verifies that the reseller is a current contributor to the federal USF). AT&T is unaware of any other prepaid calling card provider contributing to the federal USF using this methodology. Indeed, AT&T's unilateral and exceedingly cautious decision to contribute on this basis has placed it at a competitive disadvantage, particularly when there remain competitors that are not contributing to the federal USF on the "vast majority" of their prepaid calling card revenue. *See infra* n.21.

²⁰ AT&T October 10, 2006 Appeal at 16.

customers and to report the revenue that *it* derived from the sale of such cards on Line 411.²¹

The FCC Form 499-A Instructions and USAC's own analysis from the other finding that AT&T appealed (concerning reseller certifications) confirm as much, insofar as they provide that, when a reseller must be treated as an end user by its underlying carrier, the underlying carrier is required to include in its contribution base only the revenues it realized from the sale of service to the reseller – not the reseller's revenue from sales to end users.²²

While the first two of the three prepaid calling card issues that USAC listed in its August 19, 2009 Letter (i.e., issues 1.a. and 1.b.) are related to the issues that AT&T addressed in its October 10, 2006 Appeal, the third issue (i.e., when should a carrier recognize and report prepaid calling card revenue) is not one that AT&T appealed because USAC did not issue any finding against AT&T for the year covered by the audit (i.e., calendar year 2004).²³ Nonetheless, to assist the Commission in developing a record on this matter, AT&T provides in its entirety USAC's "condition" and AT&T's response (all contained in USAC's Final Audit Report):

"2. AT&T reported earned revenues for filing years 1998 through 2004 [e.g., 2004 FCC Form 499-A, which covers calendar year 2003 revenues], instead of gross billed revenues. On

²¹ AT&T's action is in sharp contrast with, for example, IDT's practice of reporting the "vast majority" of its prepaid calling card revenue on Line 310 (i.e., as "carrier's carrier" revenue) even though it appears that its customers were not listed as contributors on the Commission's web site and it did not obtain reseller certifications from those customers. *See, e.g.*, AT&T Comments, Request for Review of Decision of the Universal Service Administrator by IDT Corporation, CC Docket No. 96-45 (filed Sept. 5, 2008).

²² *See* AT&T October 10, 2006 Appeal at n.49 & 16 (citing USAC's Final Audit Report at 6 and 2005 FCC Form 499-A Instructions at 18). If the Commission does not direct other prepaid calling card providers to contribute on the basis of their resellers' end user revenues (unless the wholesale provider has a reasonable basis to conclude that the reseller is contributing directly to the federal USF), as AT&T currently does, AT&T will revert to its practice of reporting *its* revenue derived from selling its prepaid calling cards to its wholesale customers since it cannot justify maintaining this self-imposed competitive disparity.

²³ *See* AT&T October 10, 2006 Appeal at n.48 (noting that there was another finding but it related to AT&T's reporting practices prior to 2004 and thus was outside the scope of the audit and AT&T's appeal).

the 2005 Form 499-A, AT&T accurately reported gross billed revenues, but the revenue amount was still not based on end-user sales.”

Carrier’s Response:

2. In Detailed Exception Worksheet #4, the auditors contend that AT&T improperly reported its prepaid card revenues for filing years 1998 through 2004 because it reported earned revenues rather than gross billed revenues. The auditors thus contend that, even though AT&T maintained its books of account on an accrual basis (and thus recorded prepaid card revenue as it is earned), it should have reported its prepaid card revenue for filing years 1998 through 2004 on a cash basis.

Contrary to the auditors’ conclusion, AT&T did not incorrectly report its prepaid card revenues for filing years 1998 to 2004 insofar as AT&T reported earned, rather than gross billed, prepaid card revenues. While the auditors do not specifically cite anything in the Commission’s rules and orders, or the Form 499-A instructions, to support their determination that AT&T should have reported prepaid card revenues on a cash, rather than an accrual, basis for filing years 1998 to 2004, they apparently rely on language in the 2005 Form 499-A instructions, stating that “[f]or purposes of completing this Worksheet, prepaid card revenues should be recognized when end-user customers purchase the cards.” Instructions, § C.4. at 24. But this language appeared for the first time in the instructions to the 2005 Form 499-A. Prior to that date, the instructions did not require carriers to recognize and report prepaid card revenues on a cash basis. Consequently, and as required by the Form 499-A instructions,²⁴ AT&T reported its prepaid card revenues for filing years 1998 to 2004 based on the revenues recorded in its books of account, which AT&T maintained on an accrual basis in accordance with GAAP.

According to GAAP, AT&T could not, and did not, recognize revenues in its books of account until that revenue was earned. Under GAAP, AT&T did not earn its revenue from prepaid card sales at the time its prepaid cards were delivered to, and paid for by, an end user or reseller. At that point in the prepaid card sales transaction, the company incurred a responsibility, or liability, to provide prepaid card services to customers at some time in the future. Consequently, AT&T booked its prepaid card revenues as deferred revenue, and recognized that revenue only when it was earned – that is, at the time the prepaid cards were used. As such, AT&T reported its prepaid card revenues for filing years 1998 through 2004 at the time those revenues were earned, rather than when customers purchased the cards, which complied fully with the instructions to

²⁴ As discussed in AT&T’s response to detailed exception worksheet #2, the instructions to Form 499-A generally require carriers to report revenues based on information in their books of account where possible. *See also* 2005 Form 499-A Instructions, § C.1. at 17, and § C.3. at 20.

Form 499-A in effect for those years.²⁵ Significantly, in prior audits of AT&T's USF contributions, neither Arthur Andersen, nor Deloitte & Touche, nor even the Commission itself, has challenged the way in which AT&T reported its prepaid card revenues for the years in question.

For filing year 2005, the auditors conclude that AT&T accurately reported gross billed revenues, but note that the revenue amount was not based on end-user sales. This issue was addressed in the prior section of detailed exception #4, and AT&T therefore does not address it here.

For the foregoing reasons, USAC should reject the auditors' proposed finding that AT&T improperly reported its prepaid card revenues for filing years 1998 to 2004 by reporting earned rather than gross billed revenues.²⁶

While AT&T continues to recognize and report its prepaid calling card revenues on a cash basis as required since the 2005 FCC Form 499-A Instructions, it believes that its prior practice of reporting these revenues on an accrual basis was correct. As explained above, AT&T maintains its books of account in accordance with GAAP and recognizes prepaid card revenue when earned. This difference between how AT&T captures prepaid card revenue for USF reporting and financial reporting creates an inconsistency with other reported federal USF contribution base revenues reported based on GAAP, requires specialized data collection efforts for both AT&T and its wholesale customers that is unique to USF reporting (increasing the time and data collection requirements), results in added reconciliation steps between booked revenue and federal USF contribution base revenue, and increases the data retention and auditable support requirements on AT&T and other prepaid calling card providers. In addition, the added complexity also increases the investigative burden placed on auditors because the necessary

²⁵ Plainly, the auditors are required to audit AT&T's compliance with the requirements of the Commission's rules and orders in effect during the audit period. Because the language directing carriers to recognize prepaid card revenues at the time end users purchase the cards was not added to the Form 499-A instructions until the 2005 Form 499-A, the auditors cannot apply that reporting requirement retroactively to prior years, when the requirement clearly was not the same.

²⁶ AT&T October 10, 2006 Appeal, Appendix A at 26-27 (USAC's Final Audit Report). The redacted version of AT&T's contributor appeal does not include the appendices, which contain confidential information.

information is not as easily obtained and verified.²⁷ The prior practice of reporting prepaid calling card revenue as it was earned remains consistent with GAAP and would avoid these burdens and inconsistencies. For these reasons, AT&T continues to believe that it is the superior methodology for reporting prepaid calling card revenues. It thus urges the Commission to advise USAC accordingly and to make any necessary revisions to its FCC Form 499-A Instructions.

Finally, as AT&T recommended in its October 10, 2006 Appeal, the Commission should revise the prepaid calling card language contained in the FCC Form 499-A Instructions and the FCC Form 499-A after notice and comment.²⁸ After obtaining comment from providers in the prepaid calling card industry, Commission staff will be able to make informed changes to these documents that reflect how this industry actually operates. Instructions for reporting prepaid calling card revenue that are grounded in reality will provide bright line guidance to all such providers and will remove any ambiguity (legitimate or otherwise) that exists in the current documents.²⁹ Clear reporting requirements also should make a provider's compliance (or noncompliance) with those rules readily apparent to USAC's auditors. More effective audits benefit contributors and their customers, competitors, and, as the steward of the federal USF, the Commission itself.

B. USF Contributions: Classification of ATM/Frame Relay Revenue.

USAC seeks Commission guidance on how contributors should report frame relay (FR) and ATM service revenues. The short answer is, it depends. FR and ATM are different

²⁷ See, e.g., *CPE/Enhanced Services Bundling Order*, 16 FCC 7418, ¶ 52 (2001).

²⁸ AT&T October 10, 2006 Appeal at 20. The internally inconsistent prepaid calling card revenue reporting instructions and the ensuing contributor appeals provide the perfect example of what can go wrong when the Commission does not first seek comment from interested parties.

²⁹ *Id.* at 17-19 (identifying some of the internal inconsistencies within the FCC Form 499-A Instructions and the Form on prepaid calling card revenue reporting).

protocols used in the transmission of data. Where those protocols are used on a stand-alone basis to transmit data (that is, to transport traffic from point A to point B using either FR or ATM, but not both), the service is a telecommunications service subject to USF contributions. This is also the case where points A and B are both served by FR but the ATM protocol is used during the transmission of data between those points, which is analogous to the IP-in-the-middle scenario previously addressed by the Commission.³⁰ But where those protocols are used on an interworked basis to provide a service that converts traffic originally transmitted from point A in FR (for example) for delivery to point B in ATM, and thus entails a net protocol conversion, the service is an information service under long-standing Commission precedent and is not subject to USF contribution. Such interworked services are typically referred to as “FRATM” services. In that instance, the revenues from such services properly are reported on Line 418.

AT&T, like other major providers of telecommunications, offers an enterprise service that enables intercommunication between disparate customer premises equipment. Large businesses purchase custom network configurations from AT&T and other providers that are tailored to the customer’s specific needs and geographic locations. These customers often have many offices in different locations, and they require network configurations for their internal communications that will support greatly varying volumes and types of traffic demand at the different locations. These custom network configurations that interconnect both FR and ATM terminals can only intercommunicate by virtue of the net protocol conversions that AT&T’s service performs. For example, a customer may have one or two large data centers and many small branch offices or stores around the country that need to communicate with the data centers. Such a customer would generally serve the central data centers with higher capacity ATM ports

³⁰*Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd 7457 (2004).

and the branch offices with smaller capacity FR ports. As a result, the traffic carried over these networks involves communications between FR equipment on one end and ATM equipment on the other. This communication requires a net protocol conversion on an end-to-end basis – from FR protocol to ATM protocol, or vice versa.

AT&T has interpreted Commission precedent (explained below) to require it and other FRATM service providers to look at the individual connections within a customer's FRATM service offering to determine whether the transmission provided over each connection (e.g., the connection between point A and point B, and the connection between point A and point C) undergoes a net protocol conversion, versus looking at the service offering on an overall customer network basis. For federal USF contribution purposes, this means that AT&T would not report its FRATM service revenue in its assessable basis if the transmission of data between point A and point B undergoes a net protocol conversion (i.e., point A is served by FR-based facilities and point B is served by ATM-based facilities). It would, however, include in its assessable base its FRATM service revenue associated with the connection between point A (FR) and point C (FR) since no net protocol conversion occurs on that connection. Thus, under AT&T's interpretation of the Commission's requirements, FRATM providers should not exclude from contribution all revenues associated with their FRATM service offering (e.g., revenues associated with the connection between point A and point C) simply because a net protocol conversion occurs somewhere in the customer's network (i.e., between point A and point B). It is possible that AT&T's FRATM service competitors do not share AT&T's interpretation of what is required by the Commission's rules. Thus, AT&T urges the Commission to clarify whether AT&T's view is correct or whether AT&T adopted an unnecessarily restrictive view of the Commission's requirements.

During a 2005 contributor audit of legacy AT&T Corp., USAC auditors requested that AT&T Corp. explain why it classified its interworked FRATM services that entail a net protocol conversion as information services, and thus reported the revenues from such services on Line 418 of FCC Form 499-A. In response, AT&T provided USAC with a five-page memorandum, dated November 1, 2005, explaining the basis for its decision. USAC subsequently sought guidance from the Commission on this issue (in its November 5, 2005 memorandum), and AT&T met with Bureau staff from both the Telecommunications Access Policy Division and the Competition Policy Division to discuss its analysis and provided them with a copy of the November 1, 2005 memorandum. We provide the analysis from that memorandum below.

The Commission has long held that a service that “offer[s]” the “capability” for “processing” information provided by the customer, through a net protocol conversion, “via telecommunications” falls within the statutory definition of an information service. 47 U.S.C. § 153(20). When the Commission first promulgated its “enhanced services” rules in the early 1980s, it established protocol processing, including protocol conversion, as the first of three independent triggers for enhanced service classification. See 47 C.F.R. § 64.702(a) (enhanced services are services that are “offered over common carrier transmission facilities” and that “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information”). The Commission shortly thereafter confirmed that a service that employs protocol processing that results in a net conversion on an end-to-end basis is enhanced, *Protocols Order*, 95 F.C.C.2d 584, ¶ 14 (1983), a ruling it reaffirmed in *Computer III*, 2 FCC Rcd 3072, ¶¶ 64, 68-69 (1987) (net protocol conversion in “end-to-end communications between or among subscribers” is enhanced). Thus, in the mid-1980s, when BOCs that were then required by the Commission’s *Computer II* rules to offer enhanced services through separate affiliates sought to integrate protocol conversion into their basic services, the Commission required them to seek waivers of its rules on the ground that a service that employs net protocol processing is enhanced. *Asynchronous/X.25 Conversion Waiver Order*, 100 F.C.C.2d 1057 (1985).

In the Telecommunications Act of 1996 (1996 Act), Congress adopted a new statutory classification, “information service,” which is defined as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). The Commission has held repeatedly that anything that was an enhanced service under its rules is also an information service under the Act. *Non-Accounting Safeguards*, 11 FCC Rcd 21905, ¶¶ 102-03 (1996); *Universal Service Report to Congress*, 13 FCC Rcd 11501, ¶ 33 (1998) (*Report to Congress*). And the Commission has on numerous occasions specifically reaffirmed that net protocol conversion capabilities warrant information service classification: “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.”³¹

AT&T’s FRATM service clearly offers net protocol conversion capabilities. Customers can and do use the service to deliver FR traffic to AT&T’s network at one customer location and to receive the transmission from AT&T in ATM protocol at another customer location. *See, e.g., Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, 95 F.C.C.2d 584, 590 (1983) (net protocol change measured by “outputs of the network”); *Frame Relay Order*, 10 FCC Rcd 13717, ¶ 10 (1995) (net protocol conversion is measured “between the point where a customer’s data enters public switched network and where it leaves the network”). Indeed, in contrast to AT&T’s “pure” FR and “pure” ATM services, AT&T’s FRATM customers deliver to, and receive from, the network data that undergoes a net protocol conversion on an end-to-end basis. *Compare Frame Relay Order* ¶ 40 (“the vast majority of AT&T’s frame relay customers terminate to, and receive from, the network frame relay data that do not require conversion to frame relay protocol” and “in these cases AT&T’s frame relay service provides a pure transmission capability in a communications path, without any protocol conversion”). Thus, under the most straightforward reading of the Act and the Commission’s rules, AT&T’s FRATM service qualifies as an information service.

In that regard, AT&T’s FRATM service also falls within the Commission’s standard under the statute for when a service should be deemed a single, “hybrid” integrated service combining information and telecommunications components, and thus deemed an “information service.” *Report to Congress*, ¶¶ 56-60. The classification depends on the “nature of the service being offered to customers”: “[a]n offering that constitutes a single service *from the end user’s standpoint* is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components.” *Id.* ¶¶ 58-59 (emphasis added). The issue “is whether, functionally, the consumer is receiving two separate and distinct services.” *Id.* (quoting *Universal Service Fourth Order on Reconsideration*, 13 FCC Rcd 2372, ¶ 282 (1997)).

The Commission has applied this “hybrid” services standard expansively. For example, it held that facilities-based cable broadband services are information services, because those services “offer” the information “capabilities” of “email, newsgroups, the ability to create a webpage . . . and the DNS (domain name service).” *Cable Modem Declaratory Order*, 17 FCC Rcd 4798, ¶¶ 38-39 (2002). Even though end-users did not always use these capabilities, the Commission found that the telecommunications components were “not separable from the data-processing capabilities of the service” and were “part and parcel of cable modem service and integral to its other capabilities.” *Id.* ¶ 39. The Supreme Court expressly upheld this application of the Commission’s test as a permissible interpretation of the statute’s terms. In the Court’s words, the question under the statute “is whether the transmission component of cable modem

³¹ *AT&T Phone-to-Phone Order*, 19 FCC Rcd 7457, ¶ 4 (2004); *Pulver Order*, 19 FCC Rcd 3307, ¶ 11 (2004) (pulver.com service is information service in part because of offering of protocol conversion); *Frame Relay Order* ¶ 12 (“the Commission has traditionally treated carrier provision of protocol conversion (such as asynchronous-to-X.25 conversion as an enhanced, and thus unregulated service”); *BOC Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 13758, ¶ 51 (1995); *Pacific Bell Petition for Waiver*, 5 FCC Rcd 2838, ¶ 2 (1990) (“[e]nhanced services’ includes protocol conversion offerings”).

service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering,” and the Court agreed that it was. *NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2704 (2005). And the Commission applied that expansive test again to hold that wireline facilities-based broadband service is an information service as well. *Wireline Broadband Order*, 20 FCC Rcd 14853, ¶ 15 (2005) (“[b]ecause wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as ‘information services’”). As the Commission held, “[f]rom the end-user’s perspective, an information service is being provided regardless of whether a wireline broadband Internet access provider self-provides the transmission component or provides the service over transmission facilities that it does not own.” *Id.* ¶ 16.³²

For these same reasons, AT&T’s FRATM service constitutes a single, integrated information service. A central purpose of the service is to allow end users using terminals with different protocols (FR and ATM) to send data communications to one another. AT&T imposes no separate charge for the protocol processing that is integral to the service, and, to AT&T’s knowledge, neither do competing FRATM service providers. And the mere fact that the enhanced components of an integrated, finished service arguably *could* be offered separately is irrelevant under the Commission’s test. Non-facilities-based information service providers can and do offer on a stand-alone basis the capabilities bundled into broadband Internet service (such as email), and yet the Commission has consistently found facilities-based broadband Internet service to be a single integrated information service from the end-user’s perspective.

Similarly, non-facilities-based firms have long provided protocol conversion services combined with leased or resold transmission services. Since *Computer II*, the Commission has considered the entire bundle to be enhanced under the “contamination” theory.³³

The *Frame Relay Order* (¶¶ 40-44), which is only a decision by the Common Carrier Bureau, is not to the contrary. Foremost, the *Order* is readily distinguishable on its facts. There, the issue was whether a FR service should be classified as enhanced merely because it included a protocol conversion feature that was *separately* provided to the customer, *separately* charged for

³² For example, in the *Report to Congress* (¶ 79), the Commission noted that “it would be incorrect to conclude that Internet access providers offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have a separate legal status, so that, for example, we might deem electronic mail to be a ‘telecommunications service’ and Web hosting to be an ‘information service.’” See also *id.* ¶ 79 n.163 (affirming this conclusion even though other providers offered email in the market as a stand-alone product). See also *NCTA*, 125 S.Ct. at 2704 (question under the statute is whether the components are “sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering”). In 2006 and 2007, the Commission reiterated these findings in its decisions classifying broadband over power lines (BPL) and wireless broadband Internet access service as information services. *BPL-Enabled Internet Access Services Order*, 21 FCC Rcd 13281 (2006); *Wireless Broadband Order*, 22 FCC Rcd 5901 (2007).

³³ The enhanced protocol conversion service was said to “contaminate” the entire service, and thus render the entire combined service enhanced and outside of Title II regulation. *Computer III*, 2 FCC Rcd 3072, ¶ 18 n.21 (“the enhanced component of [an offering] ‘contaminates’ the basic component and the entire offering is treated as enhanced”).

by AT&T, and actually used by customers only a fraction (less than 10%) of the time. Even if this had been an order of the full Commission that in fact classified the service as basic, the decision could have no applicability to the single FRATM service that has protocol conversion as an integrated feature that customers demand on that basis and without separate usage-based charges.

Further, the Bureau's decision did not purport to classify the service. The Bureau's stated concern was with whether the *Computer II* and *III* unbundling requirements would apply to AT&T's FR service, not with the ultimate regulatory classification of that service. In particular, AT&T there contended that the small amounts of separately provided protocol conversion should render the entire service enhanced under a contamination theory. The Bureau's response was that "[t]he assertion by AT&T and other commenters that the enhanced protocol conversion capabilities associated with AT&T's InterSpan service bring it within the definition of an enhanced service is *beside the point*." *Frame Relay Order* ¶ 41 (emphasis added). That was because "under our *Computer II* and *Computer III* decisions, AT&T must unbundle the basic Frame Relay service, *regardless* of whether the InterSpan offering also provides a combined, enhanced protocol conversion and transport service for those customers who require it." *Id.* (emphasis added). Indeed, the *Frame Relay Order* elsewhere makes clear that its holding was dependent only upon a basic service classification of the FR transport underlying AT&T's InterSpan service, and not on the regulatory classification of the InterSpan service itself. *Id.* ¶ 22 ("we conclude that frame relay service is a basic service. We further find that AT&T's frame relay service in particular, *underlying its InterSpan service*, is a basic service that AT&T must unbundle from its enhanced offering") (emphasis added).

The Bureau's specific discussion of the contamination theory was to the same end. *See id.* ¶¶ 42-44. In particular, the Bureau asserted that "application of the contamination theory to a facilities-based carrier like AT&T would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework," because "AT&T would be able to avoid *Computer II* and *Computer III* unbundling and tariffing requirements for any basic service that it could combine with an enhanced service." *Id.* ¶ 44. This statement demonstrates that the Bureau understood the contamination theory to relate only to unbundling and not to classification. Merely classifying these services as enhanced would not circumvent the *Computer II* framework, because that framework required facilities-based enhanced service providers to unbundle and separately tariff the basic components of the service, as the Bureau itself acknowledged (*id.* ¶ 41).³⁴

Both the Supreme Court and the Commission have reaffirmed that how a service is classified and whether the *Computer II* unbundling requirements apply are two fundamentally different issues. As the Supreme Court explained, "[t]he differential treatment of facilities-based carriers [in *Computer II* and *III*] was . . . a function not of the definitions of 'enhanced-service' and 'basic-service,' but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. The Act's definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which

³⁴ Naturally, AT&T does not offer the unbundled basic components of these services today under *tariff*, because nondominant carriers' services have been detariffed.

that policy choice was based.” *See, e.g., NCTA*, 125 S.Ct. at 2708. Similarly, in the *Wireline Broadband Order* (§ 105), the Commission explained that “the fact that the Commission has, up to now, required facilities-based providers of wireline broadband Internet access to separate out a telecommunications transmission service and make that service available to competitors on a common carrier basis under the *Computer Inquiry* regime *has no bearing* on the nature of the service wireline broadband Internet access service providers offer their end user customers” (emphasis added). In short, the contamination theory was (and remains) applicable to AT&T only with respect to the *Computer II* unbundling requirements, not with respect to whether its integrated offerings qualify as information services. Under longstanding Commission precedent, AT&T’s FRATM service offers a net protocol conversion and therefore qualifies as an information service.

Finally, AT&T’s treatment of FRATM services is fully consistent with the Universal Service Form 499-A. The instructions make clear that information services are *not* included in the universal service contribution base, and that information services includes services “offering a capability for . . . transforming [or] processing . . . information via telecommunications” or services that “employ computer processing applications that act on the . . . protocol . . . of the subscriber’s information.” 2005 Form 499-A Instructions at p. 25.

Since AT&T provided its analysis to USAC and Commission staff in late 2005, the Commission proposed declaring a particular service to be an information service on the sole basis of the net protocol conversion that is inherent in that service. Most recently as late last year, the Commission stated in a proposed order on comprehensive universal service and intercarrier compensation reform that services that originate calls on IP networks and terminate them on circuit-switched networks, or vice versa, are enhanced since they involve a net protocol conversion between end users.³⁵

For the foregoing reasons, AT&T urges the Commission to advise USAC that FRATM is an information service, the revenues from which contributors should report on Line 418. In the event that the Commission disagrees with AT&T’s position, a position that is shared widely and, perhaps, universally by FRATM providers, it must make its decision prospective and applicable to all FRATM providers, not just AT&T. The Commission has been on notice since November 2005 that AT&T was treating its FRATM service as an information service. Since at least

³⁵ *See USF/Intercarrier Compensation Reform FNPRMs*, FCC 08-262, Appendix C at § 204.

December 2005, when AT&T met with Commission staff on this subject, the Commission also had a copy of AT&T's analysis supporting its decision. Nonetheless, the Commission has not yet acted on USAC's request for guidance. It is an understatement to say that it would be inequitable for the Commission – four years later – to require AT&T to revise its FCC Forms 499-A going back to calendar year 2004 to report its FRATM revenue in its contribution base. Indeed, it would be patently unfair, and AT&T would argue unlawful, for the Commission to do so since the Commission's inaction has denied AT&T the opportunity to recover those prior year contribution costs from its customers.³⁶ Moreover, it also would be inappropriate to single out AT&T for such unlawful treatment when the Commission was made aware that others in the industry also considered their FRATM revenues to be enhanced. Targeting just AT&T for any retroactive payment would violate the Commission's universal service competitive neutrality principle, which requires that the Commission's universal service rules and requirements neither unfairly advantage nor disadvantage one provider over another.³⁷

C. USF Contributions: Classification of Virtual Private Network and Dedicated Internet Protocol Revenue.

This is one of the few issues on which USAC has sought guidance that did not involve AT&T as either an auditee or a participant. Thus, the only information AT&T has on this matter is the high-level summary contained in USAC's August 19, 2009 Letter. Unfortunately, it is difficult to discern how exactly the two audited carriers reported their VPN service revenues and, more generally, what type of VPN services were at issue. In addition, AT&T is unable to determine from the little information provided what USAC means by "Dedicated Internet

³⁶ See 47 C.F.R. § 54.712(a) ("Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users.")

³⁷ See *Universal Service First Report and Order*, 12 FCC Rcd 8776, ¶ 47 (1997).

Protocol telecommunications services.”³⁸ Unless either or both of the audited carriers offer more details on “dedicated IP,” AT&T is unable to comment at all on this aspect of USAC’s request.

Similarly, USAC’s reference to “classification of Virtual Private Network (VPN)… Services”³⁹ requires additional clarification before AT&T would be able to comment in a comprehensive fashion. A VPN service, for example, may be provided over a variety of shared-use network infrastructures, not all of which employ the characteristics described by USAC in its request (e.g., including a “encrypt-transmit-decrypt process”).⁴⁰ AT&T, like many other service providers, offers network-based VPN services, premises-based VPN services, and services that combine both aspects of both architectures. AT&T’s network-based VPNs use the AT&T Global MPLS-enabled Network to provide an any-to-any, private network architecture that includes customer-designated class of service to transport data between customer VPN sites. AT&T premises-based VPNs use intelligent devices such as firewalls and router-based encrypted tunneling over either the AT&T Global Network or the Internet to transport data between customer sites on a VPN. These architectures can be combined (primarily via remote access technology) to allow users to gain access to their VPNs from any IP-enabled connection.

While it is unclear to AT&T what VPN services USAC is seeking guidance on, or even whether the VPN service USAC references matches any of the VPN service descriptions AT&T provides above, AT&T can say as a general matter that to the extent a provider includes a telecommunications service component (e.g., the access line) as part of its VPN service, the revenues associated with that telecommunications service component should be included in that

³⁸ USAC August 19, 2009 Letter at 2.

³⁹ *Id.*

⁴⁰ *Id.*

provider's contribution base.⁴¹ VPN services, however, are inherently information services and the revenues derived from them are appropriately reported on Line 418. This approach is consistent with a letter that the Bureau sent USAC earlier this year on how contributors should report revenues derived from MPLS-based services. In that letter, the Bureau explained that, in determining their contribution obligations 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. For example, contribution obligations must be consistent with Commission precedent concerning the services for basic transmission purposes or transmission inextricably intertwined with information-processing capabilities.⁴²

D. High-Cost Program: Document Retention Requirements Prior to Rule Change.

In its August 19, 2009 Letter, USAC sought guidance regarding the retroactive application of document retention requirements to carriers receiving universal service funds. Specifically, it explained that its auditors have issued about 100 high-cost audit reports that include a finding relating to the carriers' inability to produce certain documents that they were not required to maintain during the audit period, but which they now are required to produce upon request.⁴³ While USAC recognizes that the Commission's rule requiring carriers to maintain those documents was not in effect during the audit periods, it requested guidance on what, if any, remedial actions it should initiate against carriers unable to produce such

⁴¹ Some VPN service offerings permit the customer to "bring its own access," in which case that customer's access provider should be reporting this revenue in its contribution base.

⁴² Letter from Jennifer McKee, FCC, to Michelle Tilton, FCC, DA 09-748, 1-2 (April 1, 2009) (internal citations omitted).

⁴³ USAC August 19, 2009 Letter at 3.

documents.⁴⁴ While USAC's request related specifically to the retroactive application of the Commission's document retention requirements for high-cost audits, that request applies equally to the retroactive application of the Commission's document retention requirements with respect to the Lifeline program, and to any audit findings relating to a purported failure to maintain documents prior to the effective date of the Commission's rule adopting those requirements (such as USAC's findings against both AT&T and Qwest in their Lifeline audits). Thus, whatever guidance the Bureau or Commission provides here, it should direct USAC to apply that same guidance to all of its universal service audits, including low-income audits. The Bureau or the Commission also should act quickly to grant AT&T's and Qwest's Lifeline audit appeals, which have been pending for over one year.⁴⁵ Since USAC's auditors have not issued a finding against AT&T related to any failure to maintain certain high-cost documents prior to any requirement to do so, AT&T provides additional background on USAC's erroneous Lifeline audit finding related to document retention requirements.

As AT&T explained in its August 18, 2008 Appeal, in the Commission's 2004 *Lifeline and Link-Up Order and FNRPM*, the Commission clarified its rules to require eligible telecommunications carriers (ETCs) to retain consumer self-certifications regarding eligibility, among other documents, for as long as the consumer receives Lifeline service from the ETC or until the ETC is audited by USAC.⁴⁶ This rule, 54.417(a), became effective May 12, 2005.⁴⁷

⁴⁴ *Id.*

⁴⁵ See, e.g., AT&T August 18, 2008 Appeal; Request for Review by Qwest Communications International, Inc. of Decision of Universal Service Administrator, WC Docket No. 03-109 (filed April 25, 2008) (Qwest Appeal).

⁴⁶ *Lifeline and Link-Up*, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, paras. 37-39 (2004) (*Lifeline and Link-Up Order and FNRPM*). The Commission subsequently modified this rule to delete the reference to "or until audited by [USAC]." See *Universal Service Fund Oversight Order*, 22 FCC Rcd 16372, para. 25 (2007).

The independent auditor retained by USAC to audit AT&T's affiliates' compliance with the federal low-income rules found fault with the affiliates' inability to produce copies of Lifeline subscriber self-certifications for periods that either predated May 2005 or included all of May 2005.⁴⁸ USAC concurred with the auditor's finding, stating that AT&T's affiliates could not "prove that [their] subscribers were eligible for Lifeline during the audit period" and indicating that it will recover support for those subscribers for whom these affiliates could not provide copies of self-certifications during the audited months.⁴⁹

The Bureau or the Commission should reject USAC's erroneous conclusion that carriers were required to retain copies of their Lifeline subscribers' self-certifications prior to May 12, 2005, the effective date of the Commission's document retention rule, 54.417. There can be no question that the Commission clearly intended this rule to be prospective. Indeed, the Commission took over one year from the time that it announced this new requirement (in its April 2004 *Lifeline and Link-Up Order and FNPRM*) before it allowed this rule to go into effect. In order for carriers to comply with the auditor and USAC's demands, they would have had to require all of their Lifeline subscribers who began receiving service prior to May 12, 2005 to re-certify. The Commission's order establishing this rule plainly did not require ETCs to undertake such an endeavor. Moreover, as AT&T explained in its comments in support of Qwest's appeal, such a requirement would clearly confuse affected Lifeline subscribers and, perhaps, many would be reluctant to re-certify under penalty of perjury as to the exact start date of Lifeline

⁴⁷ 70 Fed. Reg. 30110 (2005).

⁴⁸ AT&T August 18, 2008 Appeal at 4.

⁴⁹ *Id.* at Appendix A (explaining that it would recover \$342.00 from AT&T Indiana); Appendix B (explaining that it would recover \$436.00 from AT&T Kansas); and Appendix C (explaining that it would recover \$403.00 from AT&T Oklahoma).

service because of their uncertainty about the precise date in which they commenced their Lifeline service years earlier.

As explained by Qwest in its appeal, it is well-settled that administrative rules are not to be construed to have retroactive effect unless the agency has clearly expressed such an intention and such a result is supported by the relevant statute.⁵⁰ Even applying the most creative interpretation to the Communications Act of 1934, as amended, the Commission could not find support for the assertion that Congress intended it to require ETCs to obtain retroactively Lifeline subscriber self-certifications. If the Commission lacks the authority to make this record retention requirement retroactive, which it does, USAC clearly does too; thus, the Commission should reverse this erroneous USAC finding and direct USAC to refund any reimbursement that USAC recovers from AT&T's affiliates for this issue. The Bureau or the Commission also should direct USAC to apply the Commission's document retention requirements on a prospective basis only, which means that its auditors should not issue findings against auditees for their failure to maintain certain documents prior to the effective date of that particular document retention requirement rule.

E. High-Cost Program: Applicability of the CETC Industry-Wide Interim Cap to Company Specific Caps for AT&T and Alltel.

As USAC notes in its August 19, 2009 Letter, the Commission adopted AT&T's voluntary commitment to cap its wireless competitive ETC (CETC) support in the *AT&T/Dobson*

⁵⁰ Qwest Appeal at 11 (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988) (“[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” (citations omitted))).

Merger Order.⁵¹ Soon after the Commission released that order, AT&T developed and proposed a methodology for implementing AT&T's company-specific cap on its wireless CETC support. Beginning in late December 2007, AT&T held several meetings with Commission staff and USAC personnel to discuss this proposal. By the time that the Commission issued its industry-wide CETC cap order on May 1, 2008, AT&T believed that it had reached agreement with USAC and Commission staff on an acceptable methodology for implementing AT&T's and Alltel's company-specific CETC caps.

On July 9, 2008, USAC sent AT&T a letter informing it that USAC would implement AT&T's company-specific cap, using the agreed-upon methodology, in AT&T's June 2008 support, which USAC disburses at the end of July. According to USAC's August 19, 2009 Letter, however, at the "written direction of Commission staff," USAC did not implement the two carriers' company-specific caps.⁵² AT&T has no firsthand knowledge about why the Commission directed USAC not to implement the company-specific caps.⁵³ Whatever action the Commission takes with respect to the company-specific caps for AT&T and Alltel, it should apply that decision equally to both carriers.⁵⁴ And if the Commission directs USAC to implement the two carriers' company-specific caps, AT&T asks that USAC apply the

⁵¹ USAC August 19, 2009 Letter at 5; *AT&T/Dobson Merger Order*, 22 FCC Rcd 20295, ¶ 72 (2007). About one month earlier, the Commission imposed a cap on Alltel's CETC support in the *Alltel/Atlantis Order*, 22 FCC Rcd 19517 (2007).

⁵² USAC August 19, 2009 Letter at 5.

⁵³ Indeed, AT&T never asked the Commission not to implement its company-specific cap.

⁵⁴ See *CETC Industry-wide Cap Order*, 23 FCC Rcd 8834, n.21 (2008) ("The interim cap adopted in this Order supersedes the interim caps on high-cost, competitive ETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*.").

methodology described in USAC's July 9, 2008 letter. Finally, AT&T urges the Commission to act expeditiously on this USAC request.

F. Advertising Supported Services.

In its August 21, 2009 Letter, USAC requests guidance on whether ETCs “are required to separately list each supported service enumerated in 47 C.F.R. § 54.101 when advertising the availability of such services and the associated charges for each service.”⁵⁵ USAC notes that its high-cost auditors have “consistently” found that ETCs are “neither listing nor advertising each supported service separately.”⁵⁶ Several of AT&T's affiliates have received final audit reports that note an “immaterial violation” of the Commission's high-cost rules because these affiliates do not separately list each of the nine supported services and any associated charge in their advertisements. These seven affiliates have reserved their right to appeal this matter should the Bureau or the Commission agree with USAC's auditors.⁵⁷ AT&T has received the same finding in several Lifeline audits and its appeal of this erroneous finding remains pending at the Commission.⁵⁸ Even though USAC does not appear to have sought Commission guidance when this identical issue has come up in Lifeline audits, AT&T recommends that the Bureau or Commission extend such guidance to both high-cost and low-income audits. Below, AT&T shares the arguments it made on this issue in its Lifeline appeal.

⁵⁵ USAC August 21, 2009 Letter at 1; *see also* 47 C.F.R. §54.201(d)(2).

⁵⁶ USAC August 21, 2009 Letter at 2.

⁵⁷ AT&T April 24, 2009 Appeal at 3-4.

⁵⁸ AT&T August 18, 2008 Appeal at 13-14.

The Commission's rules require ETCs to "[p]ublicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service."⁵⁹ There are a number of benefits associated with Lifeline service, including free toll blocking, waivers of certain taxes and fees, and waiver of the subscriber line charge (SLC). To date, neither the Commission's rules nor orders detail the information that must be included when an ETC publicizes the availability of Lifeline service. The independent auditor reviewing AT&T Kansas and AT&T Oklahoma's compliance with the federal low-income rules found that these two affiliates failed to advertise toll blocking.⁶⁰ USAC concurred with the auditor's finding, stating that ETCs "are required to advertise all services supported under 47 C.F.R. § 54.101(a)."⁶¹

In response, AT&T noted that the Commission's rules do not require ETCs to advertise or otherwise publicize the availability of free toll blocking specifically, or the other services and/or functionalities that must be provided with Lifeline service (e.g., dual tone multi-frequency signaling or its functional equivalent, single-party service or its functional equivalent).⁶² Rather, the rules require only that an ETC "[p]ublicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service."⁶³ The rules thus do not require an ETC to enumerate specifically and/or explain each of the benefits of Lifeline service (such as benefits relating to the SLC, toll restriction, certain taxes and fees, and additional Tier Two discounts) in media of general distribution. As Qwest correctly observed in its comments in

⁵⁹ 47 C.F.R. § 54.405(b).

⁶⁰ AT&T August 18, 2008 Appeal at 5-6.

⁶¹ *Id.* at Appendix B (Kansas First USAC Management Response at 12); Appendix C (Oklahoma First USAC Management Response at 2).

⁶² 47 C.F.R. § 54.101(a).

⁶³ 47 C.F.R. § 54.405(b).

support of AT&T's appeal, it serves no useful purpose for anyone to have ETCs advertise that Lifeline service includes, among other things, "dual tone multi-frequency signaling or its functional equivalent."⁶⁴ Not only would such an advertisement be impractical, it would obviously be meaningless to the vast majority of consumers. Moreover, as a matter of sound policy, it makes no sense to require ETCs to include "dual tone multi-frequency signaling or its functional equivalent" and "single-party service or its functional equivalent" in their advertisements but not mention the more tangible benefits of Lifeline such as the waiver of certain fees and taxes. In its sample outreach letter, even USAC seems to acknowledge the futility of listing all of the supported services or functionalities contained in section 54.101(a) because it makes no attempt to do so.⁶⁵ The Bureau or the Commission should reject USAC's conclusion that ETCs are required to advertise all services supported by section 54.101(a); instead, it should find that AT&T's practice of publicizing the availability of Lifeline service and informing inquiring persons of all of the benefits of Lifeline service, including free toll blocking, was permissible under the Commission's rules.

It would be no less confusing for non-Lifeline customers to see advertisements proclaiming that Carrier XYZ charges \$0.00 for single-party service or its functional equivalent; \$0.00 for dual tone multi-frequency signaling or its functional equivalent; \$0.00 for access to operator services; \$0.00 for access to emergency services; \$0.00 for voice grade access to the public switched network; \$0.00 for access to interexchange services; and \$0.00 for toll limitation for qualifying low-income consumers. By not enumerating each of the nine supported services in advertisements, ETCs have not deprived consumers of any valuable information. Instead,

⁶⁴ Qwest Comments, WC Docket No. 03-109, at 3 (filed Oct. 17, 2008).

⁶⁵ *Id.* at 3-4 (providing the following USAC link: <http://www.usac.org/li/telecom/step05/outreach-letter.aspx>).

these ETCs have saved consumers time that they would have otherwise spent calling Carrier XYZ, for example, to ask what it meant when it advertised that it charged nothing for “dual tone multi-frequency signaling or its functional equivalent” and these ETCs spared consumers the annoyance that they would have otherwise experienced after being told what it is. It would be the epitome of elevating form over substance for the Bureau or the Commission to disagree with AT&T (and, perhaps, every other ETC on this issue) and direct all ETCs to include such gibberish in their advertisements.

III. CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Bureau or the Commission act quickly to provide USAC with its requested guidance and that it do so consistent with AT&T’s recommendations provided above. In the future, to avoid the adverse effects associated with Commission delay on such requests, which are particularly pronounced with respect to USAC’s contributor-related requests, AT&T suggests that the Commission direct the Bureau to act on USAC’s requests for guidance within some reasonable period of time. The Commission also should ensure that the Bureau has the resources it requires to meet the Commission’s deadlines for taking action and issuing written decisions on requests for review of

USAC's decisions so that auditees do not have to wait years before their audits can be properly closed.⁶⁶

Respectfully Submitted,

/s/ Cathy Carpino
Cathy Carpino
Christopher Heimann
Gary Phillips
Paul K. Mancini

AT&T Inc.
1120 20th Street NW
Suite 1000
Washington, D.C. 20036
(202) 457-3046 – phone
(202) 457-3073 – facsimile

Its Attorneys

October 28, 2009

⁶⁶ See 47 C.F.R. § 54.724.