

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

Request for Universal Service Fund)	WC Docket Nos. 05-337, 06-122
Policy Guidance Requested by the)	CC Docket No. 96-45
Universal Service Administrative Company)	

COMMENTS OF MASERGY COMMUNICATIONS INC.

Masergy Communications Inc. (“Masergy”), by undersigned counsel, hereby submits its comments in the above-referenced proceeding. This proceeding originated with a request filed by the Universal Service Administrative Company (“USAC”) with the Federal Communications Commission (“Commission”) in which USAC requested guidance on six separate topics.¹

Specifically, in Item 3 of USAC’s August 19, 2009 letter to the Commission, USAC requested clarification of the classification of Virtual Private Networks (“VPN”).² The letter states in part:

Audit findings for multiple carriers require Commission guidance on the proper classification of Virtual Private Network (VPN) and Dedicated Internet Protocol telecommunications services. VPN service provides the functions and features of a private network without the need for dedicated private lines. Through the use of an encrypt-transmit-decrypt process, the VPN customers have a solution that is the same as dedicated point-to-point connections. Carriers have classified VPN service revenues, as related to circuit charges and flat fee charges, and dedicated Internet Protocol (IP) revenues as non-telecommunications revenue on Line 418 of the FCC Form 499-A.³

Masergy agrees that clarification is needed with regards to the proper regulatory classification of VPN. As part of this review and clarification, the Commission must also

¹ See *Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administration Company*, Public Notice, DA 09-2117 (Sept. 28, 2009).

² See Letter from Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company, to Julie Veach, Acting Chief, Wireline Competition Bureau, Federal Communications Commission, dated August 19, 2009 (“USAC Letter”).

³ *Id.* at 2-3.

evaluate and clarify the status of IP-VPN-based services such as Multi-Protocol Label Switching (“MPLS”). As explained in Masergy’s Petition for Clarification, or in the Alternative, Application for Review (“Petition”),⁴ the classification and proper reporting of MPLS revenue is unclear and recent revisions to the Instructions to the Telecommunications Report Worksheet, FCC Form 499-A (“Instructions”), to include the specific listing of MPLS, have created further confusion. As part of its review and response to Item 3, the Commission must address the proper classification and treatment of all VPN-based services, including MPLS. Furthermore, as discussed below and in Masergy’s Petition, MPLS services sometimes utilize ATM. Thus, any Commission response to Item 2 of USAC’s Letter requesting clarification of the proper classification of revenues from ATM and Frame Relay, must also take into consideration the use of ATM and Frame Relay as part of MPLS services.⁵

I. FCC Should Clarify How Providers and USAC Should Classify MPLS Service

Masergy is an international network service provider that provides mission critical services to large corporate enterprises with multiple locations. It provides services on six continents and offers a wide range of services to increase efficiency and streamline communications. As part of its services, Masergy uses wide area network solutions that include IP VPN-based MPLS services.

What is commonly referred to as “MPLS” is actually a unitary service with multiple components. MPLS includes both software port functions and transmission functions. The software port functions analyze, monitor, track and process traffic sent by the consumer and manipulate the traffic flow and storage based on the latency and quality of service needs of the data in question. In addition, MPLS provides transmission functions that can include ATM,

⁴ See *Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review*, Universal Service Contribution, WC Docket No. 06-122, et al., filed March 27, 2009 (“*Petition*”).

⁵ See *USAC Letter* at 2.

Frame Relay, Ethernet, public Internet or several other non-TDM transmission methods. MPLS also offers access to information using transmission via the public Internet, including the use of DNS naming and resolution and SMTP-based electronic mail. Many varieties of VPN services offer these features, meaning that a disparate treatment of MPLS from other VPN services creates a disparity and competitive disadvantage for carriers offering MPLS, as opposed to other VPN services.

Clearly, at a minimum, the MPLS port functions are information services. These functions offer the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information” without “any capability for the management, control or operation of a telecommunications system.”⁶ The MPLS’s port functions rely on the use of the intertwined intermediate transmission between ports and cannot function separately. As such, MPLS “inextricably intertwines” the information functions contained in the port with the transmission functions of an MPLS network.⁷ To the extent that transmission functions are intertwined with Internet access functions and information services, such as the port functions, the FCC has already determined that such services should be treated as information services.⁸ A similar analysis can clearly be done with many VPN services.

Furthermore, the FCC has stated that contributions to the Universal Service Fund (“USF”) “must be consistent with Commission precedent concerning the services for basic

⁶ 47 U.S.C. § 153(43).

⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 USC §160(c) with Regard to Broadband Services Provided Via Fiber to the Premises*; *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242, *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (“*Wireline Broadband Order*”), at ¶¶9-15.

⁸ *Id.*

transmission purposes or transmission inextricably intertwined with information-processing capabilities.”⁹ Unfortunately, Commission precedent on the proper classification of VPN-based services is not clear and therefore has not been consistently applied by either service providers or USAC. As demonstrated by USAC’s request for guidance, some service providers have reported this revenue as non-telecommunications in Line 418 of the Form 499-A, which is completely reasonable given the Commission’s precedent in the *Computer Inquiries*,¹⁰ and the *Wireline Broadband Order*. Somehow, USAC has either ignored or mis-applied this same precedent and, as part the audit process, has concluded that VPN-based services may be telecommunications services. Additional guidance and clarification are clearly necessary to ensure consistent classification of these intertwined services.

II. FCC Should Alter its Approach to Classifying Services for USF Contribution Purposes

In early 2009, the Instructions to the 2009 FCC Form 499-A were amended to include MPLS in the list of telecommunications services subject to USF contributions. As Masergy asserted in its Petition, this addition occurred for the first time within the 2009 Instructions released by the Wireline Bureau under Delegated Authority.¹¹ Masergy believes this change to the instruction to be misleading and an improper change of policy without authority.

⁹ See Letter from Jennifer K. McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission to Michelle Tilton, Director of Financial Operations, Universal Service Administrative Company, dated April 1, 2009.

¹⁰ See generally *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, CC Docket No. 20828, Final Decision, <http://commreg.pf.com/showSingleDoc.asp?iName=caseIndex&docID=47RR2d669§ion=17> 7 FCC 2d 384 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, Memorandum Opinion and Order on Further Reconsideration, 104 F.C.C. 2d 958 (1986) (collectively, “*Computer Inquiries*”).

¹¹ See *Petition* at 2.

Similarly, as the *USAC Letter* indicates (and can be seen by the number of audit appeals filed at the Commission), carriers are frequently surprised by USAC auditors, when they conclude that services are telecommunications, even though a reasoned review of Commission precedent would indicate that the products constitute an information service.

Masergy respectfully suggests that both the FCC and providers would be better served by giving more deference to carriers when they make reasoned determinations as to the classification of the services, instead of the *ad hoc* addition of services to the Instructions, or the individualized (and possibly secret) determinations in the context of an audit. As the Commission is well aware, new network applications, routing technologies and system management tools are being developed and improved all the time. It would be futile for the FCC to attempt to include every technology, without any definition or description, in the Instructions. In addition, the mere exclusion from the list in the Instructions of a new technology may lead some companies to conclude that USF contributions are not required on revenue from such services, even if the service offered is pure transmission and would otherwise qualify as telecommunications under the Act.

USAC's request for clarification on the treatment of VPN revenue demonstrates that this issue has repeatedly arisen during USAC audits of providers' revenue reporting on the FCC Form 499-A. By its very nature, an audit review by USAC is a retroactive analysis of the provider's reporting and may result in reclassification of revenue. Again, providers are not able to properly plan and adjust their business models to account for additional USF contributions that are applied retroactively based on a revised interpretation of Commission precedent by USAC. Guidance on the proper classification of VPN, including MPLS, must be provided in advance in order to avoid retroactive reclassification of these services by USAC during the audit process.

Due to the different interpretations of FCC precedent and the *ad hoc* inclusion of MPLS in the Instructions, different services have been treated differently by various providers for reporting purposes. Given that USAC itself is seeking further guidance, it is apparent that providers may have classified VPN and MPLS revenue in a variety of fashions, all of which would be reasonable given the lack of an FCC determination on point. Furthermore, any contribution to USF is required to be “equitable and nondiscriminatory” and based upon “predictable and sufficient mechanisms.”¹² Unfortunately, *ad hoc* changes to the Instructions and retroactive applications of Commission orders by USAC auditors are not predictable or equitable. As such, Masergy respectfully suggests that the Commission should give some deference to service providers in their interpretation of Commission precedent and reporting of VPN revenue. When industry participants have not reported a service uniformly and the Commission has never provided guidance on classification of that service, as it did with respect to audio bridging service, the Commission should classify the service in a notice and comment proceeding and apply that classification for USF contribution purposes on a going forward basis only, so as not to create sudden and unexpected changes in the industry.

¹² 47 U.S.C. § 153(d).

III. Conclusion

Masergy respectfully requests the Commission provide to USAC the requested guidance regarding the proper classification of VPN-based services, including MPLS, services, for the purpose of USF contributions. Furthermore, the Commission should clarify the inclusion of MPLS in the Instructions to the 2009 and future versions of the instructions to FCC Form 499-A.

Respectfully submitted,

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