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December 28, 2009

**FILED/ACCEPTED**

**DEC 28 2009**

*Federal Communications Commission  
Office of the Secretary*

**BY HAND DELIVERY**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: Request for Review of Decision of the Universal Service Administrator  
WC Docket No. 06-122 – **Redacted for Public Inspection**

Dear Ms. Dortch:

Grande Communications Networks, LLC, formerly Grande Communications Networks, Inc. ("Grande"), by its attorney and in accordance with sections 1.51 and 54.722 of the Federal Communications Commission's rules, 47 C.F.R. §§ 1.51, 54.722, hereby submits an original and 4 copies of the redacted version of its Request for Review of Decision of the Universal Service Administrator ("Request").

Confidential versions of the Request are being submitted under separate cover.

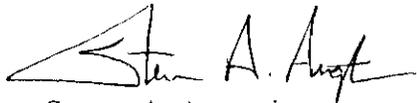
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KELLEY DRYE & WARREN LLP

Ms. Marlene H. Dortch  
December 28, 2009  
Page 2

Please contact the undersigned at (202) 342-8612, if you have any questions regarding this filing. Also enclosed is a duplicate of this filing. Kindly date-stamp the duplicate and return it to the courier.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial 'S' and a trailing flourish.

Steven A. Augustino

*Counsel to Grande Communications Networks,  
LLC, formerly Grande Communications  
Networks, Inc.*

Enclosures

**ORIGINAL**

**PUBLIC VERSION**

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

**FILED/ACCEPTED**

**DEC 28 2009**

**Federal Communications Commission  
Office of the Secretary**

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In the Matter of: )  
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Grande Communications Request for Review )  
of Decision of the Universal Service )  
Administrator )  
\_\_\_\_\_ )

WC Docket No. 06-122

**REQUEST FOR REVIEW OF DECISION OF THE  
UNIVERSAL SERVICE ADMINISTRATOR**

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December 28, 2009

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**SUMMARY{ TC }**

In this appeal, Grande Communications Networks, LLC, formerly Grande Communications Networks, Inc. (“Grande”) seeks *de novo* review of three conclusions reached in a contributor audit conducted by the Universal Service Administrative Company (“USAC”).

First, Grande seeks *de novo* review of the classification of its per-line “customer access charge.” Grande’s per-line charge is a component of Grande’s local exchange service charges and was reported by Grande as intrastate revenue. USAC erroneously seeks to reclassify this intrastate charge as a federal subscriber line charge, even though Grande does not have a federal SLC in its interstate access tariff.

As a CLEC, Grande has significant latitude to structure and assess local service charges to end users. Grande is not obligated to assess a federal SLC under FCC rules, and in fact did not assess a federal SLC under its FCC Tariff. Grande properly treated its customer line charge as monthly local service revenue, and in accordance with the applicable Form 499-A Instructions, reported its revenue as intrastate local exchange revenue on line 404.1. Further, Grande treated this revenue as intrastate for all purposes, including for assessment of the Texas USF fund. Therefore, Grande’s reporting of its monthly end user local revenues was correct.

Second, Grande seeks *de novo* review of the treatment of its DSL-based Internet access revenues prior to August 13, 2006. Although USAC agrees with Grande that its service is a wireline broadband Internet access service, and thus is an information service, USAC nevertheless reclassified 100% of Grande’s revenues prior to August 13, 2006 as interstate telecommunications revenues. Grande’s reporting of the revenues on line 418.3 of FCC Form

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499-A was correct, because Grande's finished service was an information service and Grande did not separately offer to end users a transmission service. Moreover, the *Wireline Broadband Order*, on which USAC relies for its reclassification, does not retroactively alter the classification of DSL services that were offered solely as information services. The *Wireline Broadband Order* required carriers that already were offering a separate transmission component to "continue" to do so, but it did not require carriers that did not offer a separate transmission component to begin reporting their revenues for the transition period.

Finally, even if Grande was required to report a "transmission component" for a portion of this period, USAC grossly overestimates the amount of revenue that should be reported. If the Commission agrees with USAC's classification, Grande should be given the opportunity to calculate the portion of its revenues that are attributable to transmission, while reporting the information service components on line 418 of the Form.

Third, Grande seeks *de novo* review of the classification of its reseller revenue received from other telecommunications carriers. Grande, as is permitted by the FCC, did not utilize the safe harbor verification procedures outlined in the FCC Form 499-A Instructions, and instead relies upon "other reliable proof" to demonstrate that its customers could reasonably be expected to contribute to the USF. Grande seeks a determination that the particular combination of evidence on which it relied – which includes reports from USAC's quarterly list of 499-Q filers – constituted reliable proof supporting Grande's classification of the revenue.

Grande recognizes that some of its reseller customers may not have, in fact, contributed to the FUSF. USAC's interpretation of the rules imposes an unreasonably high burden on Grande. Not only does this burden in effect make Grande a guarantor of its

## **PUBLIC VERSION**

customers' compliance with FCC obligations, but it unlawfully leads to double recovery of USF from the same subject revenues, as Grande has proven in this instance. Grande uncovered evidence that through separate audits USAC was seeking double recovery from both Grande and from one of its reseller customers. Grande submitted this evidence to USAC, but USAC persists in seeking double recovery. USAC's willful blindness to its own inconsistent positions is patently unreasonable and clearly violates Section 254 of the Communications Act. The Commission should grant Grande's appeal in order to stop USAC from pursuing double recovery here, and should take steps to prevent USAC from doing so in the future.

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

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In the Matter of: )  
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)  
Grande Communications Request for Review ) CC Docket No. 96-45  
of Decision of the Universal Service )  
Administrator )  
)  

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**REQUEST FOR REVIEW OF DECISION OF THE  
UNIVERSAL SERVICE ADMINISTRATOR**

Grande Communications Networks, LLC (formerly, Grande Communications Networks, Inc.) (“Grande Networks”), Grande Communications ClearSource, Inc. (“ClearSource”) and Denton Telecom Partners 1, LP (“Denton”) (collectively “Grande”), by its attorneys, and in accordance with sections 54.719(c), 54.720 and 54.721 of the Federal Communications Commission’s (“Commission” or “FCC”) rules, 47 C.F.R. §§ 54.719(c), 54.720 and 54.721, files this Request for Review of an audit report issued by the Universal Service Administrative Company Board of Directors.<sup>1</sup> The USAC Audit was issued to the Company on October 27, 2009.<sup>2</sup> This appeal is filed within 60 days of issuance of the report. 47 C.F.R. §§ 54.720(a); 1.4(j).

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<sup>1</sup> Independent Auditor’s Report on Grande Communication Networks, Grande Communications ClearSource, and Denton Telecom Partners, dated June 8, 2009, adopted by USAC Board of Directors October 22, 2009 (“Audit Report”) (attached as Exhibit 1).

<sup>2</sup> Letter from Colleen Grant, USAC, to Doug Brannagan, Grande, dated Oct. 27, 2009 (attached as Exhibit 2).

In this appeal, Grande seeks review of three questions raised by the USAC Audit. First, Grande seeks review of USAC's reclassification of a per line local exchange fee as a federal interstate subscriber line charge ("SLC"). Second, Grande seeks review of USAC's classification of a Grande DSL-based Internet access service as a telecom service. Third, Grande seeks review of USAC's reclassification of "carrier's carrier" revenues as end user telecommunications revenue. For the reasons discussed herein, the Commission should find that Grande properly classified these revenues under FCC rules.<sup>3</sup>

**I. BACKGROUND**

Grande is a competitive telecommunications carrier operating in Texas. Through its subsidiaries, Grande offers telephone, cable, Internet and security services to retail end users and wholesale telecommunications services to other carriers and information service providers.<sup>4</sup> Grande Networks, ClearSource and Denton provide residential and business customers with DSL high-speed Internet, dial-up access, local and long-distance telephone service and digital cable services.<sup>5</sup> Grande Networks also provides a variety of network services, on a wholesale basis, to Internet Service Providers, CLECs and interexchange carriers for their use in serving other carriers or providing service directly to end user customers. The Grande companies provide

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<sup>3</sup> The remainder of the Audit Report involves findings that do not increase the contribution obligation of Grande, that reduce Grande's contribution obligations or that involve changes that Grande does not contest. Grande does not appeal these findings, and will be filing revised 499-As consistent with these recommendations.

<sup>4</sup> See Declaration of Stephen K. Knouse, attached as Exhibit 4 ("Knouse SLC Declaration").

<sup>5</sup> For the 2005 and 2006 Form 499-As, the companies operated separately and filed separate revenue reports to the FCC. For the 2007 499-A, the companies had merged, with Grande Communications Networks, Inc. as the surviving reporting entity.

these services using a combination of Grande's own network and facilities leased from other carriers in their service area.

**A. The USAC Audit Report**

By letter dated February 25, 2008,<sup>6</sup> USAC's Internal Audit Division initiated an audit of Form 499-As filed by Networks, ClearSource and Denton in 2005, 2006 and 2007, covering 2004, 2005 and 2006 calendar year revenues, respectively. Grande was provided with USAC's draft audit findings in May 2009 and filed a response to the draft audit report. In June, 2009, Grande provided several supplemental responses to USAC requests for additional information. Grande's response and these supplemental responses were included by USAC in the Final Audit Report.<sup>7</sup>

In July 2009, Grande discovered additional information relevant to the draft audit findings. Grande submitted a letter to USAC on July 15, 2009, discussing this additional information. However, it does not appear that this information was presented to the USAC Board of Directors or considered in the Audit Report. For the Commission's benefit, the July 15 Letter is attached as Exhibit 3 and is discussed further below.

On October 27, 2009, USAC notified Grande that its Board had adopted the Final Audit Report that is the subject of this request for review.

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<sup>6</sup> See Audit Report at 18.

<sup>7</sup> See Audit Report at pp. 10-17, 27-30, 54, 57-59 and 62-63. Grande does not provide in Exhibit 1 hereto the attachments to Grande's responses, which were appended to the Final Audit Report. These attachments will be provided to Commission Staff upon request.

**B. The Commission is Required to Conduct a *De Novo* Review of USAC’s Audit Findings**

The Commission’s rules require the Commission to review, *de novo*, any request for review of a decision of the USAC Administrator.<sup>8</sup> Unlike appellate review of FCC decisions, no deference is due to USAC or its conclusions in the underlying audit. The FCC has stated repeatedly that USAC is authorized only to act as an administrator of the USF program. The rules caution that

The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.<sup>9</sup>

As a consequence, in conducting an audit, USAC is not permitted to exercise discretion or resolve issues for which the rules are unclear. It is instead tasked solely with implementing the rules and directives of the FCC. It follows that USAC is not to receive deference regarding its conclusions in the audit. The Supreme Court, for example, held that *Chevron* deference does not apply where “there is no indication that Congress meant to delegate authority [to the agency to issue] rulings with the force of law.”<sup>10</sup> USAC has been given an extremely narrow delegation – one that includes no policymaking authority at all. Consequently, USAC rulings do not have the force of law and are not subject to deference. For that reason, the

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<sup>8</sup> 47 C.F.R. § 54.723.

<sup>9</sup> 47 C.F.R. § 54.702(c).

<sup>10</sup> *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001); *cf.* Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 Admin. L. Rev. 121, 134 (Spring 1990) (courts “need not give any deference to [agency interpretive rulemaking] because no discretion to create binding law on that subject was expressly or impliedly delegated to the agency”).

Commission's rules state that the Commission will review the questions presented *de novo*. No weight should be given to the conclusion reached by USAC in the audit.

Further, this appeal requires the FCC to consider the merits of the questions presented, and not merely to verify that USAC followed appropriate procedures. The Commission has stated that it will not automatically uphold a USAC decision, without review, just because USAC was found to be acting within its authority:

[W]e conclude that USAC decisions, whether considered by the Bureau or the Commission, should be subject to *de novo* review. Accordingly, we decline to adopt USAC's and SLC's recommendation that the Commission uphold USAC decisions without considering the merits of the appeal if the Commission finds that USAC has not exceeded its authority and has acted consistently with the Commission's rules.<sup>11</sup>

Accordingly, it is not sufficient that USAC followed appropriate auditing processes, or that it have considered information that was supplied to it. It also is not sufficient that USAC had authority to conduct an audit or conducted the audit consistently with the Commission's rules. The Commission's review of this appeal requires it to go beyond the procedures used by USAC, and reach the merits of the questions presented. Grande submits, for example, that the review must do more than ask whether USAC examined appropriate information in classifying reseller revenues. Instead, the Commission must conduct its own evaluation of the information Grande submitted, and must independently determine whether that information demonstrates a "reasonable expectation" that the carrier customer is a contributor.

In the sections below, Grande identifies the findings for which it seeks *de novo* review. Each section contains a description of the issue presented for review, the relevant USAC

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<sup>11</sup> *In re: Changes to the Board of Directors of the National Exchange Carrier Assoc., Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ¶ 69 (1998).

findings, a statement of facts, a summary and a detailed argument. These sections provide the information required by 47 C.F.R. § 54.721(b).

II. **ISSUE: DID GRANDE CORRECTLY REPORT PER-LINE LOCAL SERVICE CHARGES TO END USERS AS INTRASTATE REVENUE?**

Grande seeks *de novo* review of USAC findings reclassifying per-line end user local service charges as *federal* subscriber line charges. Specifically, in this section, Grande seeks review of the following amounts reclassified by USAC as federal SLCs:

**Finding No. 2 (Communications 2007 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (p. 25)**

**Finding No. 3 (Networks 2006 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 36, 39)**

**Finding No. 3 (ClearSource 2006 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 37, 40)**

**Finding No. 3 (Denton 2006 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 38, 40)**

**Finding No. 4 (Networks 2005 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 45, 48)**

**Finding No. 4 (ClearSource 2005 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 46, 49)**

**Finding No. 4 (Denton 2005 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 47, 49)**

**Total Amount Reclassified: [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]**

A. **Statement of Facts**

During the relevant time period, Grande, through its subsidiaries, Networks, ClearSource and Denton, provided combinations of cable TV, internet and local exchange telephone services to end users in Texas. Grande billed end users for local exchange telephone

services through at least two charges, a monthly service fee described as a “customer line charge” and one or more charges for services and features provided to the customer.<sup>12</sup> All customers were assessed a “customer line charge” for the cost of providing dialtone services.<sup>13</sup> Service and feature charges were assessed in packages such as “Homeline” or “Homeline Select” that provided local calling plus different packages of features such as Call Waiting, Call Forward, Speed Dial, etc. In addition, customers were assessed separate charges for other optional services, such as expanded calling areas, toll restrictions, non-published numbers and Caller ID services.<sup>14</sup>

Grande’s customer line charge was not a federal charge for interstate access. Unlike incumbent local exchange carriers subject to the separations process, Grande is not obligated to structure its interstate access charges to include a federal SLC. During the audit time period, Grande’s FCC interstate access tariff, Grande Communications Networks Tariff F.C.C. No. 2, did not assess a federal subscriber line charge on end users to compensate the company for the costs of providing interstate access.<sup>15</sup> A copy of the rate pages of Grande’s Tariff F.C.C. No. 2 is attached as Exhibit 5.

The charge that USAC examined is a component of Grande’s local exchange service charges. Grande describes its charges to end users as a “customer line charge.” It does not describe these charges as a *federal* charge in any way. Indeed, Grande’s customer line

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<sup>12</sup> Knouse SLC Declaration, ¶ 5. In some markets, Grande described the fee as a “subscriber line charge.” This difference in terminology did not alter the nature of the customer charge. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, ¶ 6.

<sup>15</sup> *Id.*, ¶ 9.

charge is identified in the “Monthly Charges” section of its invoices, not in the section for taxes and other fees.<sup>16</sup> Grande reports the revenue as intrastate revenue and assesses all intrastate taxes and fees on these revenues, including the Texas USF charges.<sup>17</sup>

**B. Summary of Argument**

As a CLEC, Grande has significant latitude to structure and assess local service charges to end users. Grande is not obligated to assess a federal SLC because the relevant Part 69 regulations only apply to incumbent LECs, not to CLECs such as Grande. Grande properly treated its customer line charge as monthly local service revenue, and in accordance with the applicable Form 499-A Instructions, reported its revenue as intrastate local exchange revenue on line 404.1. Further, Grande treated this revenue as intrastate for all purposes, including for assessment of the Texas USF fund. Therefore, Grande’s reporting of its monthly end user local revenues was correct.

Although the FCC is to conduct a *de novo* review, rather than evaluating the merits of USAC’s actions, Grande believes that USAC reached its erroneous conclusion due to two fundamental errors. First, USAC misinterprets the law to require Grande to assess a federal SLC. As Grande showed to USAC and as will be discussed further below, federal law does not obligate Grande to assess a federal SLC (and Grande in fact did not do so). Second, USAC appears to apply a presumption that a charge is a federal SLC unless the carrier demonstrates otherwise. As a result of this erroneous presumption, USAC classifies Grande’s charge as an

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<sup>16</sup> *Id.*, ¶ 7.

<sup>17</sup> *Id.*, ¶ 8.

interstate charge even though Grande's interstate tariff did not include such a charge and Grande demonstrated that it reports the subject revenues to the state of Texas as an intrastate charge.

Finally, in its response to Grande's comments (which, under USAC audit procedures, is *not* shared with the carrier until after the USAC Board issues a final audit), USAC relies upon informal discussions with "the TXPUC" concerning an intrastate SLC. Grande has no way of knowing what was discussed with the "TXPUC", who was consulted, or on what authority the contact purported to make such a claim. Grande submits that it was improper for USAC to rely upon such statements in its finding. The Commission, in conducting its *de novo* review, should ignore the purported information from the "Texas PUC."

**C. Grande is not Required to Assess and Collect a Federal Subscriber Line Charge**

The Commission does not require CLECs such as Grande to collect a federal SLC. Federal access charge rules are set forth in Part 69 of the Commission's rules. Section 69.104 governs the collection of the end user common line charge (commonly referred to as the "subscriber line charge" or "SLC"). Section 69.104 states that it "is applicable only to incumbent local exchange carriers not subject to price cap regulation."<sup>18</sup> Similarly, Section 69.152 governs the collection of an end user common line charge by price cap carriers.<sup>19</sup> Only dominant local exchange carriers may be subject to price cap regulations.<sup>20</sup> CLECs are not subject to either rule. Indeed, nowhere in the Commission's rules or orders does the FCC *require* CLECs to collect an interstate SLC.

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<sup>18</sup> 47 C.F.R. § 69.104(a).

<sup>19</sup> 47 C.F.R. § 69.152.

<sup>20</sup> 47 C.F.R. §§ 61.3(ee), 61.41(a)(2).

The Commission has confirmed that its SLC rules apply only to incumbent LECs on many occasions. For example, in a 2002 Order, the Commission explained that the interstate SLC is “a flat-rated charge imposed by LECs on end users to recover the interstate-allocated portion of local loop costs.”<sup>21</sup> That Order defined “LECs” as *incumbent* local exchange carriers; competitive LECs were not included in the term as used in the Order.<sup>22</sup>

The Commission repeatedly has stated that CLECs *may*, but are not required, to collect a SLC. In a 1997 Order, the Commission noted that “[c]arriers other than ILECs do not participate in the formal separations process that our rules mandate for ILECs and hence *do not charge SLCs nor distinguish between the interstate and intrastate portion of their charges and costs.*”<sup>23</sup> In a 2002 Order, the Commission again recognized that CLECs may collect a SLC from their subscribers but are not required to do so. Specifically, the Commission stated that “[c]ompetitive LECs also *may* impose SLCs on their end-user customers . . . the Commission has, in many instances, chosen not to regulate the rates charged by competitive LECs.”<sup>24</sup>

In addition to not requiring CLECs to collect an interstate SLC, the Commission acknowledges that all LECs may collect *intrastate* SLCs. In a current FCC Consumer Fact sheet addressing telephone bill charges, the Commission noted that “[i]n some states, a state subscriber

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<sup>21</sup> *In re Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 17 FCC Rcd 10868, ¶ 1 (2002).

<sup>22</sup> *Id.*

<sup>23</sup> *In re: Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 366 (1997) (emphasis added).

<sup>24</sup> *In re Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 17 FCC Rcd 10868, n.8 (2002) (emphasis added).

line charge may appear on customer bills.”<sup>25</sup> Even USAC agrees that carriers are permitted to assess and collect intrastate SLCs. In its audit findings, USAC states that “USAC management agrees with the Carrier that any state SLC revenues are to be reported as intrastate revenues on its Form 499-A.”<sup>26</sup> Accordingly, there is no question that Grande is not required to collect an interstate SLC but that Grande may *choose* to collect an intrastate or interstate SLC.

**D. Grande Properly Reported Customer Line Charge Revenues with other Local Exchange Revenues on its Form 499-As**

For the filing years at issue here, the following FCC Form 499-A instructions are relevant.

Line 303 and Line 404 – Monthly service, local calling, connection charges, vertical features, and other local exchange services should include the basic local service revenues except for local private line revenues, access revenues, and revenues from providing mobile or cellular services. ...

Line 404 should not include subscriber line charges levied under a tariff filed by the reporting entity or placed on customer bills as a pass-through of underlying carrier subscriber line charges. Filers should instead report such revenues on line 405. Note that federal subscriber line charges typically represent the interstate portion of fixed local exchange service. Filers without subscriber line charge revenue must identify the interstate portion of fixed local exchange service revenues in column (d) of line 404. ...

Line 405 – Line 405 should include charges to end users specified in access tariffs, such as tariffed subscriber line charges, and PICC charges levied by a local exchange carrier on customers that are not presubscribed to an interexchange carrier (i.e., a no-PIC customer). ... Telecommunications providers that do not have subscriber line charge or PICC tariffs on file with the Commission

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<sup>25</sup> FCC Consumer Facts: Understanding Your Telephone Bill (dated July 1, 2008) at <http://www.fcc.gov/cgb/consumerfacts/understanding.html> (visited Dec. 7, 2009).

<sup>26</sup> Audit Report at 32.

or with a state utility commission or who are not reselling such tariffed charges, should report \$0 on Line 405.<sup>27</sup>

For each of the years in question, the Grande filing entities reported monthly local exchange revenues on line 404 (specifically, line 404.1). Per the instructions, this line includes “the basic local service revenues” collected by Grande, excluding the non-local services identified in the Instructions. Grande thus included within its basic local service revenues Customer Line Charge revenues along with service or feature packages, such as Homeline. Further, consistent with its reporting for Texas USF purposes, Grande classified its Customer Line Charge as an intrastate charge and allocated those revenues solely to column (a) on the form (total revenues).<sup>28</sup>

Grande was not required to report any revenues on line 405 of the Form 499-A. As the Instructions state, line 405 is to include only “line charges to end users specified in access tariffs.” Because Grande did not have a federally tariffed subscriber line charge for this time period, it had no such revenues to report on this line. Grande therefore followed the express instruction that filers without *tariffed* federal subscriber line charges “should report \$0 on Line 405.” Grande’s reporting of the Customer Line Charge thus was proper.

Because this is a *de novo* review, USAC’s classification is not entitled to any deference. Nevertheless, USAC clearly erred in several respects. First, USAC erred in concluding that Grande’s Customer Line Charge is a *federal* SLC. Despite acknowledging that

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<sup>27</sup> 2005 Form 499-A Instructions at 22-23; 2006 Form 499-A Instructions at 21-22; 2007 Form 499-A Instructions at 24-25.

<sup>28</sup> See Knouse SLC Declaration, ¶ 8.

CLECs may assess and collect an intrastate SLC<sup>29</sup> and in the face of consistent Commission precedent stating CLECs do not have to collect an interstate SLC, USAC classified Grande's Customer Line Charge as 100% interstate.<sup>30</sup> USAC claimed that the federal SLC "was instituted in 1984 by the FCC and is a [sic] FCC regulated charge."<sup>31</sup> But this statement does not prove anything: being "FCC regulated" and "FCC-mandated" are two different things. As shown above, the FCC does not require CLECs to assess a SLC. Moreover, Grande chose not to assess a federal SLC on its end users during the audit time period. Its federal access tariff, Grande Tariff F.C.C. No. 2, does not contain a subscriber line charge rate element. Grande's per-line end user charge is a part of its local exchange charges and thus is an intrastate fee. Further, USAC's finding contradicts the clear language of the FCC Instructions, which state that carriers without a *tariffed* subscriber line charge "should report \$0 on Line 405." There simply is no basis for USAC to conclude that Grande should report federal SLC revenues on Line 405.<sup>32</sup>

Second, USAC compounded its error by misinterpreting FCC statements regarding intrastate subscriber line charges. Grande pointed out in its response that its charge

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<sup>29</sup> Audit Report at 32 ("USAC management agrees with the Carrier that any state SLC revenues are to be reported as intrastate revenues on its FCC Form 499-A").

<sup>30</sup> The Final Audit Report first moves the revenues from line 404.1 to line 405 and then classifies the revenue as 100% interstate on line 405. *See, e.g.*, Audit Report at 36, 39.

<sup>31</sup> Audit Report at 32.

<sup>32</sup> This is not the first time that USAC has sought to recover intrastate revenues as SLC charges. Grande notes that NextGen Telephone appealed a similar ruling by USAC in August 2008. *See* Letter from Timothy K. Bachert, CFO, NextGen Telephone, to FCC, Office of the Secretary, WC Docket No. 06-122 (August 21, 2008). The FCC sought comment on the NextGen appeal in October and November 2008. Public Notice, Comment Sought on NextGen Telephone Request for Review of a Decision by the Universal Service Administrative Company, DA 08-2104 (rel. Sept. 17, 2008). On December 8, 2009, NextGen withdrew its appeal, prior to a decision by the Commission. *See* Letter from Timothy K. Bachert, NextGen, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (December 8, 2009).

was an intrastate charge – specifically, a local exchange charge – for which Grande contributed to the Texas USF.<sup>33</sup> In its response to this contention, USAC appears to require that Grande demonstrate its charges were *mandated* by the Texas PUC.<sup>34</sup> Nothing in the FCC’s orders require that intrastate SLC-like charges be mandatory, however. USAC’s quest for “documentation” of a mandatory intrastate SLC therefore was incorrect. Grande’s charge is a component of its local service fee, which, as discussed above, the Form 499-A Instructions acknowledge are to be reported on line 404. Grande’s evidence demonstrates that it properly reported the revenues on line 404.

Finally, Grande urges the Commission to disregard entirely the undocumented hearsay discussions between USAC and a representative of the Texas PUC.<sup>35</sup> In this section of the report – which is a section that is not provided to the carrier prior to issuance of the final audit report – USAC’s Internal Audit Division describes a conversation its representatives had with a representative of the Texas PUC. Relying on that conversation, USAC concludes “that any SLC charge would be a federal charge, and not a state charge.”<sup>36</sup> Obviously, Grande has no way to determine what, exactly, was said, or with whom USAC spoke. Grande is not aware of any authoritative interpretation from the Texas PUC or from any division with delegated authority to act on its behalf. Instead, this appears to be a staff-to-staff discussion between USAC and a Texas PUC employee – an employee who lacks authority to speak on behalf of the organization itself.

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<sup>33</sup> See Audit Report at 27, 30.

<sup>34</sup> Audit Report at 30 (stating that USAC “researched the Texas Public Utility Commission website for information to support a state SLC”).

<sup>35</sup> Audit Report at 30.

<sup>36</sup> *Id.*

More importantly, Grande has no way to determine what factual and legal assumptions were made and what question was asked by USAC. The nature of the question itself is critical here. The proper question to be asked is whether the Texas PUC has regulations that prohibit a CLEC from assessing as an intrastate fee a “customer line charge” to recover its costs of providing dialtone services. If, as Grande has shown, the authority for its customer line charge is not derived from Tariff F.C.C. No. 2, then Grande would need sufficient discretion to collect a per-line charge under state law. Grande submits that it does have such authority, as the Texas PUC does not regulate end user rates charged by CLECs. USAC’s purported conversations with an unidentified staffer do no bear upon this question, for it appears that USAC made an entirely different inquiry of the PUC staff member. The entire account of the conversation is hearsay evidence and should be disregarded.

**III. ISSUE: PRIOR TO AUGUST 2006, WAS GRANDE REQUIRED TO MAKE USE CONTRIBUTIONS ON REVENUES FOR BROADBAND INTERNET ACCESS SERVICES THAT IT OFFERED AS INFORMATION SERVICES?**

Grande seeks *de novo* review of USAC findings classifying revenues from Grande’s DSL-based Internet access services, which Grande has always classified as information service revenue, as telecommunications revenue for the period prior to August 13, 2006. In this section, Grande seeks review of the following amounts reclassified by USAC from line 418 to line 406 (telecommunications revenue):

**Finding No. 2 (Communications 2007 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (p. 26)**

**Finding No. 3 (Denton 2006 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 38, 40)**

**Total Amount Reclassified: [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]**

Grande's DSL-based revenues were reported as information service revenues on line 418.3 of the FCC Form 499-A. Grande seeks a Commission determination that its classification and reporting of these revenues was proper.

**A. Statement of Facts**

During the relevant time period, Grande provided many communications services to its end users, including several Internet access services. At issue in this section are Digital Subscriber Line ("DSL")-based services. Grande's DSL service offered "always on" high-speed Internet access to customers using existing telephone lines. Grande's DSL services included upload and download speeds exceeding dial-up connections, Internet access, email, personal web storage space, a web portal page and several other premium services.<sup>37</sup>

Grande offered its services in three tiers: Basic, Standard and Advanced. The Basic tier offered 384 kbps download and 128 kbps upload speeds, 2 email addresses and 20 MB of personal web space.<sup>38</sup> The Standard tier offered 1.5 Mbps/384 kbps download/upload speeds, 5 email addresses, 20 MB of personal web space and access to certain premium web content.<sup>39</sup> The Advanced tier offered all of the above, plus 784 kbps upload speeds, additional premium web content, and Internet security services.<sup>40</sup> Grande generally sold its DSL services at rates starting at \$24.95 per month, before package discounts.<sup>41</sup>

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<sup>37</sup> See Declaration of Stephen K. Knouse, attached as Exhibit 6 ("Knouse DSL Declaration").

<sup>38</sup> *Id.*, ¶ 5.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, ¶ 6.

Grande's DSL services meet the definition of "wireline broadband service."<sup>42</sup>

Grande reported revenues from these services as information service revenues on line 418 of its FCC Form 499-As. USAC agreed with Grande that its DSL services are wireline broadband services. However, USAC concluded that DSL services provided prior to August 13, 2006 must be reported as telecommunications services. Specifically, USAC agreed that the *Wireline Broadband Order* "allow[s] DSL revenue to be classified as non-telecommunications revenue on the Form 499-A" but contends that the effective date of this classification is August 13, 2006.<sup>43</sup> USAC thus reclassified DSL services provided before that date to line 406 and, further, classified 100% of the DSL service revenue as interstate telecommunications service revenue.<sup>44</sup>

Grande notes that the broadband Internet access issues raised in Grande's audit are similar to those raised by Madison River Communications, LLC ("Madison River") in its June 2009 appeal.<sup>45</sup> Grande urges the Commission to consider the arguments raised by Madison River when evaluating Grande's appeal.

**B. Summary of Argument**

There is no dispute as to the nature of Grande's DSL-based services. USAC agrees with Grande that its services were wireline broadband internet access services throughout the relevant time period. At issue, is the treatment of such services for USF purposes prior to August 13, 2006. Grande classified these services as information services, for which it reported

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<sup>42</sup> *In re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 14 (2005) ("Wireline Broadband Order").

<sup>43</sup> Audit Report at 30.

<sup>44</sup> Audit Report at 26, 30-31.

<sup>45</sup> *In re Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator*, WC Docket No. 06-122 (filed June 29, 2009) ("Madison River Audit Appeal").