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June 4, 2010

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

**Re: Notification of Ex Parte Presentation of Global Crossing Bandwidth, Inc.,
CC Docket No. 96-45**

Dear Ms. Dortch:

On June 3, 2010, Paul Kouroupas of Global Crossing and I met with the following Commission staff members regarding the pending Application for Review filed by Global Crossing Bandwidth, Inc. (“GCB”) in connection with an audit report that was issued by the Universal Service Administrative Company in February 2007 and upheld by the Wireline Competition Bureau (“WCB”) in August 2009: Austin Schlick, Christopher Killion, and Diane Griffin Holland of the Office of General Counsel; Carol Matthey, Rebekah Goodheart, and Vickie Robinson of WCB; and Priya Aiyar, Legal Advisor to Chairman Genachowski. At this meeting, we discussed the legal arguments presented in GCB’s Application for Review, including GCB’s contentions that (1) it complied fully with the applicable instructions governing universal service contributions, and (2) in any event, USAC and WCB were not justified in shifting the contribution obligations of GCB’s customers to GCB as a remedy.

GCB also takes this opportunity to respond in more detail to questions raised by staff at the June 3 meeting. *First*, staff noted that the Commission’s *Second Order on Reconsideration* indicates that a wholesale carrier such as GCB may not treat a customer as a reseller (for purposes of invoking the carrier’s carrier rule) unless that customer both (1) incorporates the purchased telecommunications services into its own offering, and (2) can reasonably be expected to contribute to support universal service based on revenues from those offerings.¹ Based on this standard, staff postulated that a wholesale customer that resells telecommunications services may not qualify as a reseller, notwithstanding the nature of its service offerings, unless the wholesale carrier also has an independent basis to believe it actually will contribute to universal service. In

¹ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 18400, 18507 (App. C) (1997) (“*Second Order on Reconsideration*”).

other words, the downstream customer's classification apparently would depend on the reasonableness of the upstream provider's expectations regarding that customer's compliance with USF contribution requirements.

GCB respectfully submits that such an interpretation is fundamentally untenable. Whether a service provider qualifies as a reseller—*i.e.*, a telecommunications carrier rather than end user—necessarily turns on the nature of the services it provides, not a third party's expectations. For example, if one of GCB's wholesale carrier-customers unequivocally resells GCB's wholesale point-to-point transmission service to an end user as a telecommunications service, then that entity's classification as a reseller cannot be altered depending on GCB's ability to predict its compliance with the USF rules. Nevertheless, even assuming GCB's ability to predict such compliance could somehow affect the downstream customer's classification, GCB submits that if it has a reasonable belief that a customer in fact will resell interstate telecommunications services, then GCB's expectation that the customer will contribute to universal service is *per se* reasonable. As GCB explained in the Application for Review, because all carriers that resell interstate telecommunications services have an unequivocal duty to contribute to universal service under Section 254(d) of the Act and Section 54.706(a)(16) of the Commission's rules, GCB is entitled to expect that they will fulfill their obligations. *See* Application for Review at 13 & n.42.

The *Second Order on Reconsideration* is entirely consistent with this analysis. Contrary to staff's suggestion that the order promulgated a definition of "reseller" that still applies today, it merely contains the original version of the Commission's USF Worksheet (Form 457) and filing instructions in an Appendix. Importantly, those instructions *did not apply* to GCB's 2004 revenues, because Form 457 had been superseded by then. In any event, nothing in those instructions can reasonably be read to suggest that it would be *unreasonable* for a wholesale carrier to expect its reseller customer to comply with the law. To the contrary, it seems clear that the Commission adopted a two-pronged approach—focusing both on the functional nature of the wholesale customer's service and on its expected contributor status—because not all entities that satisfied the first prong were *required* to contribute (which meant that the carrier's carrier rule did not apply in those cases). The Commission was not introducing a subjective test that asked wholesale carriers to predict whether carrier-customers that were required to contribute actually would do so.

There are common scenarios where a wholesale customer that satisfies the first prong of the reseller standard—by "incorporat[ing] the purchased telecommunications services into its own offerings," 12 FCC Rcd at 18507—would nevertheless be exempt from contributing to universal service. Notably, the phrasing of that first prong created an ambiguity as to whether the wholesale customer incorporated the purchased telecommunications service into (a) a separate telecommunications service (in which case it would be classified as a reseller), or (b) an information service, such as Internet access (in which case it would be classified as an end user). Moreover, the 1997 instructions recognize that even some entities that unequivocally qualify as resale carriers fail to trigger the carrier's carrier rule; specifically, "international only" and "intrastate only" carriers "should not be treated as resellers for the purpose of reporting revenues because they are not required to contribute to universal service." *Id.* at 18508. The critical point

here is that those entities were not to be treated as “resellers” because they were not *required* to contribute. The instructions do not remotely suggest that a resale carrier that *was* required to contribute should be treated as an end user based on the wholesale provider’s doubts as to its likely compliance with the law. In short, because the first prong of the 1997 standard was not, by itself, dispositive of whether the wholesale customer would actually operate as a telecommunications carrier covered by the contribution obligations, the second prong was necessary to distinguish resale carriers that contribute in their own right from end users and other non-contributors.

By the time the Commission issued the 2005 instructions—which applied during the contribution year at issue—the instructions did not purport to “define” resellers at all. Instead, the instructions included a new two-pronged guideline that maintained the focus on wholesale carriers’ responsibility to ascertain the nature of their resale customers’ *obligations* under the contribution rules. The first prong provided that a wholesale carrier should verify that each reseller will “resell the filer’s services in the form of telecommunications [*and not as information services*].” 2005 Instructions at 18 (brackets in original, italics added). And although the 2005 instructions also included language stating that a wholesale carrier “should verify” that a reseller will “contribute directly to the federal universal service support mechanisms,” *id.*, that requirement is plainly intended to ensure that wholesale carriers will distinguish entities that must contribute (as a legal matter) from entities that need not do so. Again, it cannot be read to suggest that a downstream customer that does not in fact contribute is no longer considered a reseller. To the contrary, the reference in the instructions to verifying that “*resellers*” will contribute confirms the Commission’s understanding that their status as resale carriers was not at issue.

As a result, if USAC or the Commission were to determine that a wholesale carrier failed to conduct proper diligence to ascertain a reseller’s likelihood of contributing to universal service—and assuming the worksheet instructions were binding despite the Commission’s failure to promulgate them in accordance with the APA—then such a failing perhaps could have given rise to forfeiture liability. But, as GCB has explained, a wholesale provider’s failure to support a reasonable expectation that its customer will contribute says *nothing* about whether that customer is actually a reseller. That is an entirely separate question that turns on the nature of that customer’s service offerings. Only if the customer was not, in fact, a reseller of interstate telecommunications services (and was, instead, an end user or an exempt reseller) may the wholesale carrier be required to contribute based on revenues from the sale of telecommunications service to that entity.

The Commission’s history of enforcement action against delinquent resellers—and its requirement that they make back payments to make the fund whole—further undermines any argument that a wholesale carrier’s insufficient diligence could somehow strip its reseller customer of its status as a reseller. *See* Application for Review at 19 n.66 (providing examples of enforcement actions against resellers for non-payment of USF contributions). Under the theory that staff has posited, the fact that those resellers failed to contribute apparently would mean that the underlying carrier would be deemed to have violated its diligence requirements, in which case the erstwhile “resellers” would be stripped of that title. In turn, the Commission’s

back-payment demands would have been directed at the wrong entity, as the reclassification of the revenues at issue (flowing from the change in the downstream customers' classification) would shift the contribution obligation to the wholesale carrier. Moreover, if a reseller's classification were subject to change depending on the reasonableness of the underlying wholesale carrier's expectation of payment, then resellers presumably would have an affirmative defense in enforcement actions that they were not resellers after all based on the failure of their supplier to obtain a sufficient assurance of payment. The fact that the Commission routinely has taken action against resellers for nonpayment confirms the common-sense conclusion that they remained resellers based on the nature of their service offerings, regardless of whether the underlying wholesale carrier(s) took sufficient action to support an "expectation" that their customers would contribute to universal service.

In short, there is no basis in the *Second Order on Reconsideration* or any other authority for shifting a reseller's contribution obligation to GCB, even assuming it failed to comply with the 2005 instructions (an assertion we believe is itself unsustainable). Such a reclassification of revenues can be justified only by an evidence-based determination that the purported reseller was in fact an end user, in light of the services it provided, such that the revenues derived from the sale of telecommunications service to that entity were improperly classified as "carrier's carrier" revenues. Neither USAC nor WCB ever conducted that fact-based analysis, thus precluding the reclassification of revenue at issue.

Second, assuming that GCB is correct that the wholesale carrier's predictive judgments as to USF contributions have no bearing on the appropriate classification of its customers, staff inquired whether it is nevertheless permissible to reclassify "carrier's carrier" revenues as "end user" revenues on the ground that a reseller and underlying wholesale carrier have joint and several liability for unpaid contributions, such that USAC may properly recover from *either* entity. In the same vein, staff suggested that the "carrier's carrier" exception from the contribution requirement was a matter of "grace" and can be suspended as needed to aid in collections.

Those theories also are fatally flawed. Since the adoption of the *USF First Report and Order* in 1997, the Commission has assessed universal service contributions only on carriers collecting *end-user* telecommunications revenues.² In doing so, the Commission explicitly "relieve[d] wholesale carriers from contributing directly to . . . support mechanisms . . ."³ Because the Commission's rules place the contribution obligation squarely on carriers serving end users, any attempt to impose that obligation after the fact on wholesale carriers serving resellers—without a change in the underlying rules—plainly would be arbitrary and capricious and otherwise contrary to law. Such an approach would further violate the APA by irrationally saddling wholesale carriers' with their customers' obligations or potentially requiring payment

² See *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, ¶ 843 (1997) ("*USF First Report and Order*"); 47 C.F.R. § 54.706(b).

³ *USF First Report and Order* ¶ 846. The Commission has recognized that wholesale revenues remain part of the contribution base through the rates charged by resellers to end users. *Id.*

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by both. *See* Application for Review at 23 & n.77 (explaining double payment potential); *cf. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007) (vacating requirement that wholesale carriers contribute to universal service based on revenues from services sold to interconnected VoIP providers because of Commission's failure to supply a cogent rationale). A vicarious liability scheme would further run afoul of Section 254(d), which requires each carrier to contribute based on its own provision of telecommunications services, thus precluding the liability-shifting about which staff inquired. *See* Application for Review at 22-23.

Moreover, any such attempt would compel wholesale carriers to contribute to the universal service fund while leaving them without any ability to recover the associated costs. Notably, the Commission's rules prohibit a carrier from using USF line items to recover any more than the direct contribution costs associated with a given customer.⁴ Since a wholesale carrier does not receive any revenues from a reseller that are subject to contribution under Section 54.706, the wholesale carrier may not assess any universal service fee on reseller customers.⁵ The Commission may not read its rules to produce such a manifestly unjust result.

Please contact the undersigned if you have any additional questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for GCB

cc: Austin Schlick
Christopher Killion
Diane Griffin Holland
Carol Matthey
Rebekah Goodheart
Vickie Robinson
Priya Aiyar

⁴ *See Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, at ¶ 49 (2002). *See also* 47 C.F.R. § 54.712.

⁵ These inequities would be particularly pronounced if the Commission were to recover resellers' unpaid contributions from wholesale carriers in a retrospective fashion. Global Crossing's rate structure—like the rate structures of most carriers—has been premised on the assumption that it will not contribute to the universal service fund based on wholesale revenues. Thus, if the Commission were to reverse course and determine that wholesale revenues are assessable after the fact, Global Crossing would have no practical ability to recover the associated costs from its reseller customers. To avoid the irreparable harm that would flow from such action, any change in Commission policy would have to be prospective in nature (and adopted in conformity with the APA).