

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

In the Matter of)	
)	
XO Communication Services, Inc.)	WC Docket No. 06-122
Request for Review of Decision of the)	
Universal Service Administrator)	

COMMENTS OF AT&T

Cathy Carpino
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

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Its Attorneys

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I. INTRODUCTION

AT&T, on behalf of its wholly owned operating affiliates, hereby submits comments in response to XO's appeal of several Universal Service Administrative Company (USAC) audit findings.¹ Several of XO's appealed findings are not new to the Wireline Competition Bureau (Bureau). In fact, AT&T alone has appeals pending at the Commission involving two of the four findings in the XO Appeal (i.e., USAC's inappropriate reclassification of reseller revenue to end-user revenue and USAC's enforcement of the Bureau's unlawful FCC Form 499-A revision deadline).² Both of these issues have languished at the Commission for years, long past the time periods set forth in the Commission's rules for Bureau and Commission action on requests for review of USAC decisions.³ AT&T supports XO's appeal on both of these issues, as described below, and urges prompt Bureau and Commission resolution of all related pending appeals. The third finding on which we comment concerns XO's and USAC's dispute over the regulatory classification of one of XO's Multi-Protocol Label Switching (MPLS)-enabled services. USAC disagrees with XO's assertion that its Multi-Transport Network Services (MTNS) is an information service, exempt from federal universal service contribution. However the Bureau

¹ XO Communication Services, Inc. Request for Review of Decision of the Universal Service Administrator, CC Docket No. 06-122 (filed Dec. 29, 2010) (XO Appeal).

² See Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, CC Docket No. 96-45 (filed Oct. 10, 2006) (AT&T October 2006 Appeal) (appealing, among other findings, USAC's erroneous reclassification of AT&T's carrier's carrier revenue to end-user revenue); AT&T Inc. Application for Review of Action Taken Pursuant to Delegated Authority, WC Docket No. 06-122, CC Docket No. 96-45 (filed Sept. 13, 2010) (contesting the Bureau's decision to uphold USAC's denial of two AT&T affiliates' Form 499-A revisions). See also SBC Communications Inc. Application for Review of Action Taken Pursuant to Delegated Authority, CC Docket Nos. 96-45, 98-171, 97-21 (filed Jan. 10, 2005) (AT&T Application for Review of the Bureau's *Form 499-A Revision Deadline Order*) (challenging the Bureau's order establishing an asymmetrical Form 499-A revision deadline).

³ 47 C.F.R. §54.724.

decides this matter, it should make clear that its analysis, which should be based on Commission precedent, is specific to the facts before it.

II. DISCUSSION

A. The Bureau Should Direct USAC To Cease Imposing A Strict Liability Standard On Wholesale Providers For Any Shortcomings Of Their Resellers.

Beginning with the 2007 FCC Form 499-A Instructions, Commission staff added the following italicized language to the procedures that wholesale contributors “should” have to ensure that they report as carrier’s carrier revenue only those revenues from entities that reasonably would be expected to contribute to the federal universal service fund: “The procedures should include, but not be limited to, maintaining the following information on resellers: . . . *and, as described below, the annual certification by the reseller and evidence of the filer’s use of the FCC’s website to validate the contributor status of the reseller . . . Each year, the filer must obtain a signed statement from the reseller containing the following language: . . .*”⁴ Thus, for the first time, wholesale providers were required to obtain *annual* reseller certifications from all resellers that claim to be exempt from the wholesale provider’s federal universal service fees.⁵ USAC alleges that XO failed to follow the procedures contained in the

⁴ Telecommunications Reporting Worksheet, FCC Form 499-A (2007) (rel. March 2007) (Form 499-A Instructions). Staff has maintained this language in subsequent Form 499-A Instructions, including the 2008 Form 499-A Instructions, which applied to contributors’ calendar year 2007 revenues (i.e., XO’s audit period).

⁵ In theory, of course, the March 2007 Form 499-A Instructions were to govern how contributors report the previous calendar year’s revenues (i.e., 2006), which would have required wholesale providers to obtain retroactive reseller certifications from all of their resellers and made impossible staff’s directive to obtain “evidence” in 2006 “of the filer’s use of the FCC’s website to validate the contributor status of the reseller.” AT&T and others have complained for years about the inequity and unlawfulness of subjecting contributors to retroactive requirements and how the Commission has failed to seek notice and comment

2008 499-A Instructions and, consequently, it reclassified XO's revenue associated with six resellers.⁶ In reaching this conclusion, USAC rejected as inadequate and "inappropriate"⁷ the evidence XO submitted to support its classification of these resellers' revenues as carrier's carrier revenues, which included obtaining "confirmatory certifications" from its resellers in January 2010 that, although the resellers were not direct contributors to the federal universal service fund in 2007, "each entity to which the reseller provides resold telecommunications is itself an FCC Form worksheet filer and a direct contributor to the federal universal service support mechanisms."⁸

USAC was incorrect to discount XO's so-called "confirmatory certifications" from non-contributing resellers. As XO explains, and as is evident from the language that the Commission requires all reseller certifications to include, there are some resellers that are not current contributors to the federal universal service fund but from whom wholesale providers must nonetheless accept reseller certifications.⁹ While uncommon, like XO, AT&T has received a small number of certifications from resellers that do not appear on the Commission's web site as

on many additions to the Form 499-A Instructions, such as this one. *See, e.g.*, Letter from Robert W. Quinn, Jr., AT&T, to Dana Shaffer, FCC, CC Docket Nos. 96-45, 97-21 (filed Oct. 4, 2007).

⁶ XO Appeal at 37. According to XO, USAC rejected a small number of XO's reseller certifications because they were executed prior to the year (2007) in which they were supposed to apply and XO was unable to produce evidence of having visited the Commission's web site to verify that the resellers in question were current federal USF contributors in 2007. *Id.* at 31.

⁷ *Id.* 32 (quoting USAC Reseller Draft Audit Finding at 38).

⁸ *Id.* at 41.

⁹ *Id.* *See also* 2008 499-A Instructions at 19 (requiring reseller certifications to include the statement that, "I also certify under penalty of perjury that either the company contributes directly to the federal universal service support mechanism, or that [*sic*] each entity to which the company provides resold telecommunications is itself an FCC Form 499 worksheet filer and a direct contributor to the federal universal service support mechanisms.") (Emphasis added).

current contributors but that indicate on AT&T's reseller certification form that the "CUSTOMER is not a direct contributor to the federal universal service fund but each entity to which CUSTOMER provides resold telecommunications is itself an FCC Form 499-A filer **and** a direct contributor to the federal universal service fund." (Emphasis in original). In addition to including the mandatory paragraph noted above in note 26, *supra*, AT&T uses a check box on its reseller certification form to facilitate identifying these resellers (along with the language quoted immediately above) but there certainly is no Commission requirement to do so. On review, the Bureau should find that XO's confirmatory certifications from these non-contributing, intermediate resellers provide adequate support for its decision to exclude these resellers' revenues from its contribution base, and the Bureau should reverse USAC's decision to reclassify such revenues.

Underlying this USAC audit finding and others like it, including AT&T's 2006 unresolved appeal of a USAC reseller certification audit finding,¹⁰ is the erroneous notion that the wholesale provider is somehow benefiting by accepting a reseller's certification and it should therefore be held financially accountable for any inaccuracies in its resellers' certifications. That simply is not the case. If USAC determines that a reseller failed to make adequate contributions, it should direct its collection activities to the reseller, and not to the reseller's wholesale provider, such as XO.¹¹ There is no indication in XO's Appeal that any of the resellers in question are

¹⁰ AT&T October 2006 Appeal.

¹¹ *See also* Petition of AT&T, CenturyLink, Sure West, and Verizon for Clarification or in the Alternative for Partial Reconsideration, *Request for Review of a Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific d/b/a TelePacific Communications*, WC Docket No. 06-122 (filed June 1, 2010) (requesting the Bureau to clarify that it did not intend to require wholesale providers that complied with the Form 499-A Instructions to restate their prior year revenues in the event that the Bureau determines that one of their resellers failed to make adequate contributions).

defunct. Indeed, most of these resellers were at least in existence in January 2010, when they provided XO with their confirmatory certifications.¹² Thus, USAC, which began its audit of XO in July 2008 and presented its draft audit findings to XO in December 2009, had ample time to initiate collection activities against these resellers. XO should not be held accountable if USAC squandered an opportunity to seek appropriate recovery from these resellers.

B. The Bureau's Asymmetrical Form 499-A Revision Deadline Must Be Reversed.

It appears that sometime in 2008, XO determined that it had over-reported its end-user revenues because it had “erroneously billed internal [XO] accounts and assessed USF on the amounts.”¹³ XO states that this error caused it to overstate its revenues from 2005 to 2008. When XO filed a revision to its 2008 Form 499-A, adjusting its revenues to account for this over-reporting, USAC disallowed any adjustment outside of calendar year 2007.¹⁴ In support of its disallowance, USAC cited the Bureau's 2004 *Form 499-A Revision Deadline Order*, in which the Bureau established a firm one-year deadline for Form 499-A revisions that result in a decrease to the provider's contribution obligations but it imposed no comparable deadline for Form 499-A revisions that increase that party's contribution obligations.¹⁵

Several parties, including AT&T, challenged the Bureau's order, contending, among other things, that the Bureau lacked authority to promulgate a substantive rule, which the asymmetrical revision deadline plainly was, and the Bureau violated the Administrative

¹² XO Appeal at 41.

¹³ *Id.* at 63.

¹⁴ *Id.* at 63-64.

¹⁵ *Id.* (citing *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 1012 (WCB 2004) (*Form 499-A Revision Deadline Order*)).

Procedure Act by failing to comply with that Act's notice and comment requirements.¹⁶ Six years later, the Commission has yet to act on AT&T's appeal. As we explained last September, in yet another application for review involving the Bureau's *Form 499-A Revision Deadline Order*, the passage of time has done nothing to remedy this procedurally defective deadline.¹⁷ In fact, the Commission's inaction has made things worse because, during the past six years, the Bureau has denied almost a dozen petitions based on this invalid deadline, including two by AT&T affiliates. Until the Commission issues procedurally proper final rules, it should direct USAC to accept all Form 499-A revisions that providers might file – including XO's revisions to its 2006 and 2007 Form 499-A filings (covering calendar years 2005 and 2006) – so long as the revisions comply with the standard that existed prior to the Bureau's *Form 499-A Revision Deadline Order*.

C. The Bureau Should Apply Commission Precedent To Determine Whether XO's MTNS Offering Is An Information Service Or A Telecommunications Service And It Should Reject Suggestions To Treat All MPLS-Enabled Services As Telecommunications Services.

USAC and XO disagree about whether a particular XO service offering is an information service, exempt from federal universal service assessment, or a telecommunications service, the revenues from which should be included in XO's federal universal service contribution base. The service at issue is XO's MTNS, which XO describes as a "Wide Area Network ('WAN') solution provided using Multi Protocol Label Switching ('MPLS') technology."¹⁸ MTNS uses either Frame Relay or Ethernet connections to "provide private data connectivity over [XO's]

¹⁶ AT&T Application for Review of the Bureau's *Form 499-A Revision Deadline Order*.

¹⁷ AT&T Inc. Application for Review of Action Taken Pursuant to Delegated Authority, WC Docket No. 06-122, CC Docket No. 96-45 (filed Sept. 13, 2010).

¹⁸ XO Appeal at 46.

MPLS-enabled IP network.”¹⁹ According to XO, MTNS is an information service because “[i]n each case, MTNS utilizes protocol processing, and provides the advantages of a MPLS-enabled IP network, dedicated Internet access and significant flexibility in selecting port speeds and committed bandwidth levels on each port.”²⁰ USAC disagrees with XO’s classification of MTNS as an information service. After putting forth a number of theories during the audit for why MTNS is an interstate telecommunications service,²¹ USAC seems to have concluded that, because MTNS “does not accomplish a ‘net conversion’ between end users,”²² it is a telecommunications service.

The use of a particular technology (MPLS, in this instance) in a service is not dispositive as to whether that service, when offered to end users, is a telecommunications service or an information service. Instead, parties, the Commission, and the Commission’s auditors should be guided by the statutory definitions of those two terms.²³ As XO explains, “each MPLS-service

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.* at 52 (explaining that USAC initially reclassified XO’s MTNS revenue because XO “could not provide a traffic study or other proof that its private lines special access circuits carried less than 10% interstate traffic”).

²² *Id.* at 56 (citing USAC Non-Telecommunications Draft Audit Findings at 28). *See also id.* at 57 (indicating that USAC concluded that the protocol processing inherent in MTNS is simply an “internetworking protocol”).

²³ *See* 47 U.S.C. § 153(20) (“The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”); (43) (“The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in form or content of the information as sent and received.”); and (46) (“The term ‘telecommunications service’ is the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”). *See also* Letter from Jennifer McKee, FCC, to Michelle Tilton, USAC, DA 09-748 (dated April 1, 2009) (stating that “contribution obligations must be consistent with Commission precedent concerning

warrants its own individual assessment – and that while some may be considered ‘telecommunications,’ others are rightly categorized as ‘information services.’”²⁴ We agree. Just as it would be incorrect for USAC to treat all MPLS-enabled services as telecommunications services,²⁵ so too would it be incorrect for a service provider to treat all of its MPLS-enabled services as information services merely because of the presence of that technology in its service offerings. Based on the information contained in XO’s redacted appeal, AT&T cannot say whether XO reasonably applied the Commission’s information service precedent when it concluded that its MTNS was an information service. On review, the Bureau will have to conduct a factual, service-specific inquiry of XO’s MTNS to determine whether it should grant XO’s request.

The Bureau also will have to draw from over three decade’s worth of Commission precedent on the topic of basic and enhanced services (and – post-1996 Act – telecommunications services and information services) to determine the proper regulatory classification of XO’s MTNS. According to XO, MTNS is an information service because of the protocol processing inherent in the service.²⁶ As XO notes, the Commission has previously

the services for basic transmission purposes or transmission inextricably intertwined with information-processing capabilities. Filers providing services that use frame relay, ATM, MPLS, or other transmission protocols should report their revenues consistent with Commission precedent.”) (citations omitted).

²⁴ XO Appeal at 48.

²⁵ *Id.* (“USAC’s insistence to reclassify XOC’s MTNS-related revenues amounts to nothing more than a continued attempt to treat *all* MPLS-related revenue as derived from ‘telecommunications’ rather than ‘information services.’”) (Emphasis in original).

²⁶ *Id.* at 56. To be sure, XO relies on additional bases for its assertion that it correctly reported its MTNS-related revenue as information service revenue. *See id.* at 53-61. However, it is unclear from the pleading whether the described features and functionalities were available to (and used by) MTNS customers (*see, e.g., id.* at 59 “Although most enhanced features are not currently part of the MTNS offering. . . .”) and whether, under XO’s view, any MPLS-enabled service, at least as provided by XO,

concluded that “both protocol conversion and protocol processing services are information services under the 1996 Act.”²⁷ In its *Non-Accounting Safeguards Order*, the Commission noted with support the then-Common Carrier Bureau’s definitions of “protocol processing” and “protocol conversion”: “‘Protocol processing’ is a generic term, which subsumes ‘protocol conversion’ and refers to the use of computers to interpret and react to the protocol symbols as the information contained in a subscriber’s message is routed to its destination. ‘Protocol conversion’ is the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks.”²⁸ The Commission previously recognized the following three exceptions to its finding that protocol processing services are enhanced services: (1) the protocol processing involves communications between an end user and the network itself rather than between or among users; (2) the protocol processing is in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing customer premises equipment); and (3) the

could ever be a telecommunications service. To the extent that a provider is merely using an MPLS-enabled backbone “in the middle” of what would otherwise be a telecommunications service offering, the Bureau should be guided by the Commission’s decision in its so-called *AT&T IP-in-the-Middle Order*, which addressed an analogous situation. *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004).

²⁷ XO Appeal at 56 (quoting *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, 11 FCC Rcd 21905, ¶ 104 (1996) (*Non-Accounting Safeguards Order*)).

²⁸ *Non-Accounting Safeguards Order* at n.229 (quoting *IDCMA Petition for a Declaratory Ruling That AT&T’s Interspan Frame Relay Service is a Basis Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, n.5 (CCB 1995)). We note that the Common Carrier Bureau was, in turn, quoting from a 1986 Commission decision. See *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, 104 FCC 2d 958, ¶ 295 (1986) (*Computer III Phase I Order*). In that order, the Commission went on to explain that there are “two universal service attributes to protocol processing: (a) in general, it entails computer processing applications that necessarily operate upon the format, code, and content of a subscriber’s transmission; and (b) in so doing, protocol processing attempts to maintain, without any degradation, the original information content of a subscriber’s transmission.” *Id.* at ¶ 296.

protocol processing involves internetworking (i.e., conversions taking place solely within the carrier's network to facilitate provision of a basic network service that results in no net conversion to the end user).²⁹

If XO's MTNS involves no net protocol conversion (or, perhaps more accurately, involved no net protocol conversion during the audit period)³⁰ and does not fall within one of the three exceptions listed above, then the Bureau will have to determine whether XO's MTNS service "interpret[s] and react[s] to protocol information associated with the transmission of end-user content,"³¹ consistent with the Commission's *Computer Inquiry* precedent. If it concludes that it does, the Bureau also will have to determine whether, as XO asserts, that the protocol processing in its MTNS is "inextricably intertwined" with the transmission facilities that XO is selling to its customers as part of this offering.³² If the Bureau disagrees with XO's arguments then, as XO notes, it should be given the opportunity to calculate the portion of its MTNS revenues associated with the transmission facilities, while reporting the service's non-integrated information service components on Line 418 of the FCC Form 499-A.³³

²⁹ *Non-Accounting Safeguards Order* at ¶ 106.

³⁰ XO Appeal at Exh. 11 (noting that, for its MTNS Ethernet Access service, "[b]oth ends of the circuit must be Ethernet" and that, for its MTNS Frame Relay Access service, "[b]oth ends of the circuit must be Frame Relay").

³¹ *Non-Accounting Safeguards Order* at ¶ 104 ("other types [i.e., non-net protocol conversion types] of protocol processing services that interpret and react to protocol information associated with the transmission of end-user content clearly 'process' such information...[and] are information services under the 1996 Act.").

³² XO Appeal at 53.

³³ *Id.* at 59.

III. CONCLUSION

AT&T urges the Bureau to act promptly on XO's Appeal, and all related pending appeals as we discuss above. The Bureau should accept XO's confirmatory certifications from non-contributing resellers as acceptable support for XO's decision to treat these resellers' revenues as carrier's carrier revenue, and it should permit XO to revise its 2006 and 2007 FCC Form 499-A filings to remove erroneously included amounts from its contribution base. Finally, the Bureau should apply the Commission's long-standing basic/enhanced and telecommunications service/information service precedent when determining whether XO's MTNS is an information service or a telecommunications service. The Bureau's inquiry must be fact-specific and its resulting decision also should be specific to that service.

Respectfully Submitted,

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

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

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Its Attorneys