

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

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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I. INTRODUCTION AND SUMMARY

Level 3 Communications, LLC (“Level 3”) hereby replies to comments filed with respect to the Commission’s Notice of Proposed Rulemaking on reform of the universal service contribution mechanism.¹ The comments confirm that, no matter what the FCC does with respect to contribution reform, the Commission will need to put in place a system of rapid adjudication and guidance. This guidance needs to occur early in the contribution process, not after years of audits and appeals. While Verizon’s and USTelecom’s proposals for amnesty are a good step, Level 3’s private ruling proposal would provide a better means of providing rapid guidance.

The comments confirm many other points made in Level 3’s initial comments. Numerous commenters also demonstrate how the proposed general rule to incorporate information services that include transmission into the contribution base could sweep extremely

¹ See *Universal Service Contribution Methodology; A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, FCC 12-46, WC Docket No. 06-122, GN Docket No. 09-51 (rel. April 30, 2012) (“FNPRM”).

broadly—far beyond services that compete with services subject to contribution today. Similarly, the proposals with respect to bundling or to assess all retail revenues of services that integrate transmission with information services, or that are bundled with telecommunications would similarly and unlawfully assess information service revenues that are outside the scope of Section 254(d). In order to preserve the Internet as an engine of economic growth and innovation, and to avoid distorting the emergence of Internet distribution as an alternative to other forms of distribution, with respect to Internet services, the Commission’s presumption should be “hands off” except where it determines inclusion of a specific service or application is necessary.

Commenters also confirm that a value-added tax (“VAT”) approach is unworkable and that the proposed changes to the reseller certification form would be extremely burdensome and difficult to implement.

As in its initial comments, Level 3 supports those commenters that urge the Commission to continue to explore connections as an alternative to a revenues-based system. While all contribution mechanisms will present complexities, a connection-based mechanism has the potential to get the FCC out of the business of having to classify each and every new service that comes on the market or to sort through revenue allocation methodologies—all of which are artificial and will create competitive distortions.

Finally, Level 3 agrees with those commenters that support notice and comment for changes to Form 499-A, for making clear that Form 499-A changes must be operationally prospective, that oppose switching to an annual contribution factor, and that make clear that the FCC cannot ban USF-pass through charges.

II. A SYSTEM OF RAPID PRIVATE RULINGS IS THE BEST WAY TO PROMOTE EFFICIENCY, FAIRNESS AND SUSTAINABILITY, AND SHOULD BE IMPLEMENTED WITH ANY CONTRIBUTION SYSTEM.

Several commenters recognize the need for rapid guidance and adjudication in any universal service contribution system and that such rapid guidance and adjudication is critical to maintaining the competitive neutrality and fairness of the universal service contribution mechanism. As Comcast points out, both the case-by-case and categorical definitional approaches require additional line drawing to rule specific services in or out of the contribution mechanism, especially with respect to new services.² Other commenters also confirm that the current system does not provide rapid or clear guidance in anything like a timely manner.³ There can be little doubt that there is a need for a better guidance system. As Sprint states, “[t]axing authorities (*e.g.*, income, property, and sales tax collectors) typically issue and maintain explicit, detailed rules accompanied by guideline materials to ensure all taxpayers can clearly understand their obligations.”⁴

No matter how detailed the rules and guidance, there needs to be a system of rapid adjudication. As Sprint explains,

“taxing authorities quickly, routinely and publicly provide rule interpretations when a tax treatment question arises. If there were similar transparency and clarity in the USF assessment process, service providers and their subscribers could plan appropriately and make economically rational decisions based on their communications needs as opposed

² See Comments of Comcast Corp. at 7-8, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Comcast Comments”).

³ See *e.g.* Comments of XO Communications at 5-6, 45-47 (detailing pending guidance requests and long pending appeals) WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“XO Comments”).

⁴ Comments of Sprint Nextel Corp. at 8 n. 17, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Sprint Comments”).

to decisions based on the potential imposition of a significant USF surcharge in addition to paying for the actual costs of their services.”⁵

Accordingly, “if a question arises about the appropriate treatment of a particular product or service . . . the FCC should quickly and publicly issue clear interpretive guidance in a manner that ensure all contributors have a common understanding.”⁶ Verizon and USTelecom similarly highlight this issue, proposing that the Commission provide amnesty for providers that meet with staff with respect to good faith interpretations of Form 499 instructions, such that there would be no adverse consequence to the provider of seeking clarification from the Commission.⁷

Level 3’s proposed private ruling process would meet these needs and result in guidance more efficaciously than USTelecom and Verizon’s amnesty proposal. The petitioner would be responsible for framing the question and proposed resolution.⁸ The Bureau would have 90 days in which to decide to grant or deny the requested clarification, or the request would be deemed granted. The ruling would protect the petitioner against any refund liability were the Commission subsequently to rule a different way, giving the petitioner at least interim guidance on which it could rely. Other parties would have to file their own requests in order to receive similar prospective protection, which would also ensure that potentially important variations were presented to the Bureau. The incentive for a petitioner to come forward would be to obtain clear guidance and protection against retroactive changes. The benefit for the system and the Commission is much earlier and more focused requests for guidance.

⁵ *Id.*

⁶ *Id.*

⁷ See Comments of the United States Telecom Association at 10, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“USTelecom Comments”); Comments of Verizon at 9-10, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Verizon Comments”).

⁸ The Commission could, of course, set standards for both the specificity of the request and the accompanying analysis.

The idea behind Level 3’s proposal is that it does no good for an umpire to wait until the third inning to call the balls and strikes on pitches in the first inning. The problem that has paralyzed the Commission is that if one assumes that every decision will stand for years and take substantial effort to change, the Commission is unlikely to act for fear of unknown consequences. A different approach—one that has been particularly successful in the high tech world—is to make lots of decisions with smaller stakes, so that the proper approach can be calibrated over time. Noted Internet retailer Amazon.com follows this approach: one of its leadership principles states, “Bias for Action—Speed matters in business. Many decisions and actions are reversible and do not need extensive study. We value calculated risk taking.”⁹ The project of promulgating guidance for universal service contribution would benefit greatly from this wisdom.

Accordingly, to improve the fairness and efficacy of the universal service contribution system, the Commission should adopt Level 3’s proposal for private rulings as a part of any contribution reform.

III. THE COMMISSION SHOULD NOT ATTEMPT TO EXTEND CONTRIBUTION OBLIGATIONS TO ALL “BENEFICIARIES” OF A BROADBAND INTERNET

A. The “Beneficiaries” Approach Lacks Any Discernible Limits.

In attempting to justify expansion of universal service contribution obligations to broadband Internet access services, some commenters articulate what could be called a “beneficiary” theory of universal service contribution—that all entities that “benefit from universal service programs due to their ability to connect via the public network with households

⁹ Amazon Leadership Principles at <http://www.amazon.com/values-careers-homepage/b?ie=UTF8&node=239365011> (last accessed Aug. 6, 2012).

and businesses that would not have access to their services in the absence of universal service support mechanisms” should be universal service contributors.¹⁰

The “beneficiary” approach, however, has no discernible limits. Facebook, for example, benefits from the expansion of the broadband Internet (assuming the broadband Internet to be a “public network”) and benefits from adding incremental subscribers. A more expansive broadband Internet also benefits Internet content providers, whether content suppliers such as Netflix or Hulu, information vendors such as Bloomberg or Lexis/Nexis, providers of cloud-based productivity services such as Microsoft Messenger, or sellers of goods such as Amazon.com or Zappos.¹¹ And, as AT&T points out (and Level 3 did in its comments), it is not much more of a limitation to specify that a beneficiary must “provide telecommunications” because that phrase is ambiguous and can capture a broad range of Internet activity.¹²

There is certainly no indication in Section 254 that Congress intended the Commission’s permissive authority to reach so broadly. While the FCC “permissive” authority permits it to direct contribution from a “provider of interstate telecommunications” when the public interest warrants, it would obliterate the statutory framework to declare that assessing any and all transmission by any entity that “benefits” from widely deployed broadband (essentially everyone) is in the public interest.

¹⁰ Comments of the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance at 5, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 6, 2012)(“NCTA et al Comments”).

¹¹ See Comments of AT&T at 7-9, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“AT&T Comments”); Comments of Microsoft Corp. at 4-5, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Microsoft Comments”); Comments of Level 3 Communications at 9-10, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Level 3 Comments”).

¹² See AT&T Comments at 7-9; Level 3 Comments at 9-10.

B. Assessing “Cloud”-Based Distribution Will Both Limit Internet Innovation and Create Competitive Distortions between Internet Distribution and Other Distribution.

There can be little doubt that the Internet has been one of the biggest engines of innovation. And one of the ways that the Internet has transformed daily life is by providing new ways to distribute products and information. Amazon.com, iTunes, YouTube, Facebook, TripAdvisor and many others are innovative ways to distribute products and information. Threatening to apply a universal service assessment to broad classes of Internet services would chill, at least in some part, Internet innovation.

The Internet as a distribution mechanism also competes with other non-assessable distribution mechanism. Netflix’s on-line delivery through Internet Content Delivery Networks (“CDNs”) competes with non-assessable modes of delivery for video programming, including broadcast and multichannel video (cable, u-verse, FiOS, DBS). If Internet delivery through CDN is assessed, it would be the only form of video distribution subject to USF contribution.¹³ Assessing these new modes of Internet content delivery, including content delivery networks, when these are not close substitutes for assessable telecommunications services, would simply serve to make the Internet and broadband less useful to Americans by placing Internet-based services at a competitive disadvantage with other modes of delivery.

¹³ Title VI cable services are not subject to universal service assessment, and the Commission has specifically excluded contribution from open video systems, cable leased access, direct broadcast satellite and broadcasters. *See* 47 C.F.R. § 54.706(d).

IV. USE OF “PERMISSIVE” AUTHORITY SHOULD BE LIMITED PRIMARILY TO COVERING SERVICES THAT ARE CLOSE SUBSTITUTES FOR SERVICES UNDER “MANDATORY” CONTRIBUTION, AND NOT SIMPLY TO EXPAND THE CONTRIBUTION TAX BASE BEYOND WHAT CONGRESS CONTEMPLATED.

As AT&T points out, there is a significant difference between the FCC asserting the authority to assess a class of services, and actually *exercising* that authority.¹⁴ While the NPRM and many commenters assert broad principles, these principles are generally so broad as not to provide a reliable guide—or any sense of limiting principles.¹⁵ A better approach would, in the first instance, utilize basic competition analysis to determine whether a service being considered for contribution assessment is a close substitute for mandatory contribution services. Notably, if the Commission focuses only on close substitutes, it will assess contributions in a manner that is fair and competitively neutral. It will also be less likely to extend contribution obligations to services that would entail substantial, and therefore inefficient, deadweight loss.¹⁶

This is essentially what the Commission did in assessing interconnected VoIP and with respect to audiobridging. In deciding to exercise its Section 254(d) permissive authority to require contribution by providers of interconnected VoIP services, the Commission noted, “interconnected VoIP service ‘is increasingly used to replace analog voice service,’”¹⁷ and it

¹⁴ See AT&T Comments at 9 (noting that the phrasing of the proposed general rule governing contribution from information services would have the effect of exercising asserted authority).

¹⁵ See e.g. AT&T Comments at 13 (asserting principles of sustainability, competitive neutrality, ease of administration and equitable fairness); NTCA et al Comments at 5-6 (suggesting the public interest is met when an entity benefits from a public network, and also when needed for competitive neutrality).

¹⁶ See Level 3 Comments at 3-5.

¹⁷ *Universal Serv. Contribution Methodology; Fed.-State Joint Bd. on Universal Serv.; 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Admin. of Telecommunications Relay Serv., North Am. Numbering Plan, Local No. Portability, & Universal Serv. Support Mechanisms; Telecommunications Services for*

predicted that “as the interconnected VoIP service industry continues to grow,” it would “attract subscribers who previously relied on traditional telephone service.”¹⁸ The Commission was, in essence, viewing interconnected VoIP as a close substitute to traditional telephone service, and thus finding it in the public interest to extend universal service contribution obligations.

Similarly, when the Commission considered audiobridging, a key factor was that “the purpose and function of the bridge is simply to facilitate the routing of ordinary telephone calls.”¹⁹ The Commission viewed audiobridging as simply a close substitute for placing a call to each of the endpoints, such as might be done with a multiline telephone with conference calling capability. This became even clearer in the *Intercall Reconsideration Order* in which the Commission distinguished a call between two audiobridging participants intentionally dialing in to the same conversation from a free “chat line” service in which callers to the bridge were randomly connected to other callers.²⁰

Applying this test of a “close substitute,” there are only a few “cloud-based” services that would even begin to appear to be suitable candidates for the imposition of universal service contribution obligations. As discussed further below, this suggests that the *exercise* of the

Individuals with Hearing & Speech Disabilities, & the Americans with Disabilities Act; Administration of the North Am. Numbering Plan and North Am. Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-In-Billing and Billing Format, Report and Order and Further Notice of Proposed Rulemaking, ¶ 44, 21 FCC Rcd. 7518, 7540, FCC 06-94 (2006).

¹⁸ *Id.*

¹⁹ *Request for Review by InterCall, Inc. of Decision of Universal Serv. Admin, Order, ¶11, 23 FCC Rcd. 10731, 10734-35, FCC 08-160 (2008).*

²⁰ *See Universal Serv. Contribution Methodology; Fed.-State Joint Bd. on Universal Serv.; Petitions for Reconsideration and Clarification of the InterCall Order by Global Conference Partners, A+ Conference Ltd., Free Conferencing Corp., & the Conference Group, Order on Reconsideration, ¶10 n. 35, 27 FCC Rcd. 898, 902, FCC 12-10 (2012).*

Commission’s permissive authority should continue to be case-by-case, rather than blanket, and in any event should not reach the means by which Internet content is provisioned.

V. MANY COMMENTERS AGREE THAT THE PROPOSED EXPANSIVE INCLUSION OF INFORMATION SERVICES IS NOT APPROPRIATE.

As Level 3 explained in its comments, the Commission must tread carefully to avoid extending universal service to information services beyond the limitations of Section 254(d).²¹ Many other commenters agree. AT&T notes that the “general rule” approach “would sweep in a vast range of over-the-top Internet services in addition to interconnected over-the-top VoIP.”²² In fact, “any provider of over-the-top Internet services”—even beyond interconnected and non-interconnected VoIP—would be covered by the proposed rule “so long as it arranges for the provision of transmission between any points through the Internet.”²³ Instead, the Commission should make considered decisions about which services to include and are permitted by statute. As Verizon notes, the Commission must “clearly articulate[] the line between assessable broadband service and non-assessable services and applications that use broadband”²⁴ to avoid impermissibly assessing revenues from information services.

Microsoft also describes the difficulties with assessing “over-the-top” or “network-independent” applications for USF contributions.²⁵ First, standalone over-the-top applications, like email or other applications yet un-designed, are not telecommunications services, even if providers supply transmission at some point in the chain, and are generally “not intended or used

²¹ See Level 3 Comments at 8.

²² AT&T Comments at 5.

²³ *Id.* at 8.

²⁴ Verizon Comments at 42.

²⁵ Microsoft Comments at 5-8.

as replacements for telecommunications services.”²⁶ Such services are often provided free or in bundles of several applications for a flat fee, complicating assessment.²⁷ Further, providers in the unregulated information services industry likely do not have billing and administrative platforms in place to process USF assessments; implementing such systems would be extremely costly.²⁸ Regulation of these network-independent applications, “including increasingly popular communications applications such as those integrated within social media platforms” would likely fall far outside the scope of the Commission’s permissive authority to impose USF obligations.²⁹

VI. MANY COMMENTERS AGREE THAT THE FCC SHOULD NOT ADOPT THE PROPOSED BUNDLING RULES.

The comments confirm Level 3’s view that the proposed bundling rule is fundamentally flawed and should be rejected.³⁰ As Comcast argued, the proposal “could result in assessments on services or products that are beyond the scope of the Commission’s statutory authority to assess under section 254 of the Act.”³¹ Comcast explains that allocating the entire discount from the bundled offering to the non-assessable services could also “introduce economic distortions” and cause providers to design bundled offerings “in response to the contribution mechanism

²⁶ *Id.* at 6.

²⁷ *See id.*

²⁸ *See id.*

²⁹ *Id.* at 7.

³⁰ *See, e.g.*, Level 3 Comments at 16-17; Comcast Comments at 10-12; AT&T Comments at 26-27; Comments of Vonage Holdings Corp. at 4-5, WC Docket 06-122, GN Docket 09-51 (filed July 9, 2012)(“Vonage Comments”); Comments of the American Cable Association at 7-8, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“ACA Comments”).

³¹ Comcast Comments at 10.

rather than offering the package of services that consumers desire.”³² AT&T also notes that the proposed rules could distort the market and that although consumers prefer bundles, many “might be willing to forgo the convenience of purchasing a bundled service in order to save, perhaps, a significant amount of money” on USF charges.³³ Sprint observes that the “total retail bill” approach applied to bundles would likely “introduce a new major distortion in the market for information services,” even as it gives tentative support for the proposal.³⁴ NCTA argues that allocating the entire discount to non-assessable services is “troubling” and illogical; a better approach would be to assume that “a portion of the discount is attributable to each service in the package.”³⁵ Any reasonable allocation should be acceptable.³⁶

Treating non-assessable bundled services as telecommunications services will also deter providers from offering bundled packages, restricting competition on such packages and flying in the face of consumer preferences.³⁷ Comcast further argues that deterring providers from offering such bundles could “adversely impact innovation,” because, as the FCC has previously recognized, encouraging providers to respond to consumer demand can promote deployment and reduce initial costs of new technology.³⁸ This method would also penalize information service

³² Comcast Comments at 11. *See also, e.g.*, AT&T Comments at 26-27; Vonage Comments at 4-5; Sprint Comments at 22-23.

³³ AT&T Comments at 26-27.

³⁴ Sprint Comments at 22-23.

³⁵ Comments of the National Cable and Telecommunications Association at 9, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“NCTA Comments”).

³⁶ *See id.*

³⁷ *See* Comcast Comments at 10-11; AT&T Comments at 26-27.

³⁸ Comcast Comments at 11.

providers that offer “customers a more feature rich information service” bundled with telecommunications services.³⁹

Using the stand-alone pricing approach is no better: it would also result in a higher universal service fee, preventing consumers from realizing the full price reduction of purchasing services as a bundle.⁴⁰ Comcast also explains how the stand-alone pricing approach could result in paying *both* USF assessments for telecommunications and local franchise taxes on the basis of more revenues than the provider actually receives, if it pays each assessment on standalone prices that together exceed the amount of the discounted bundle.⁴¹

Finally, the proposed rules will have other unintended consequences. As Comcast notes, providers will likely have to update billing systems to accommodate the new scheme, creating administrative difficulties and incurring high costs.⁴² Mandatory rules on how to allocate bundled discounts “may not reflect the reality of a provider’s circumstances and may have inadvertent consequences in other areas, such as taxes”⁴³

VII. THE FCC SHOULD NOT ADOPT A “TOTAL REVENUES” APPROACH, WHETHER TO ENTERPRISE SERVICES, TO SERVICE INTEGRATING TELECOMMUNICATIONS, OR TO ALL SERVICES.

Just as with bundling revenues, assessing services on a “total revenues” approach⁴⁴ would be unfair and create substantial competitive distortions. As Verizon explains, filers report revenues that include myriad non-assessable goods and services, including “revenues from equipment sales and a wide array of services” such as “video services, web hosting, cloud

³⁹ AT&T Comments at 27; *see also* Vonage Comments at 4-5.

⁴⁰ *See* Comcast Comments at 12.

⁴¹ *See id.*

⁴² *See* Comcast Comments at 13; AT&T Comments at 27; Vonage Comments at 4-5.

⁴³ NCTA Comments at 8.

⁴⁴ FNPRM at 5391, ¶ 69.

services, and IT solutions,” which “compete with services provided by entities that do not file a Form 499.⁴⁵ Verizon notes that revenues from its own healthcare products, currently in development, will be reported on Form 499-A and would be assessed for USF under the “total revenues” approach.⁴⁶ Similarly, Level 3 provides network management services and other non-telecommunications value-added services for which Level 3 competes with non-telecommunications providers.

This approach would put companies like Level 3, Verizon, and Form 499-A filers that provide non-telecommunications products or services at a substantial disadvantage to other providers of those products and services, which “would clearly (and substantially) impact that ability to innovate in new and important market segments.”⁴⁷ Even commenters that support a “total revenues” approach, such as the Alaska Communications Systems Group (“ACS”), agree that including revenue from services that do not incorporate a telecommunications component will create “competitive distortions” and fail to comply with the “‘equitable and nondiscriminatory’ mandate of Section 254(d).”⁴⁸

VIII. COMMENTS CONFIRM THAT A “VALUE-ADDED TAX” APPROACH TO WHOLESALE SERVICES IS UNWORKABLE.

The comments confirm that a value-added tax is unworkable in a complex industry like telecommunications and should be rejected. Comcast highlights the “considerable implementation difficulties, costs, and potential distortions” that would result from the pricing

⁴⁵ Verizon Comments at 43-44.

⁴⁶ *See id.* at 44.

⁴⁷ *Id.* at 45.

⁴⁸ Comments of Alaska Communications Systems Group, Inc. at 20, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“ACS Comments”).

assumptions necessary to implement a (“VAT”).⁴⁹ A VAT would, as Comptel explains, “unduly complicate the assessment and contribution process.”⁵⁰

Sprint notes that the difficult judgments necessary to determine proper allocations in a value-added system “present an opportunity for misallocation, which could result in competitive distortions.”⁵¹ The Fiber Provider Coalition describes the complex issues and difficulties of determining the value added by resellers that combine wholesale telecommunications services with enhanced and services to offer finished products to consumers.⁵² Peerless echoes these concerns and notes that a VAT will also create “competitive pitfalls,” giving providers an opportunity to game the system.⁵³ Additionally, the value-added approach also undervalues “ways of adding value that provide functionality above and beyond the pure (and assessable) telecommunications service.”⁵⁴ Assessing only some of the value added could create distortions by providing an “incentive to attribute added value to non-assessable inputs where possible.”⁵⁵ Peerless adds that it “would not be possible to construct a value-added system that is consistent with the Commission’s authority.”⁵⁶

⁴⁹ Comcast Comments at 13. *See also* Sprint Comments at 20; Centurylink Comments at 17; Verizon Comments at 18.

⁵⁰ Comments of COMPTTEL at 32, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“COMPTTEL Comments”).

⁵¹ Sprint Comments at 20.

⁵² *See* Comments of the Fiber Provider Coalition at 4-6, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Fiber Provider Coalition Comments”).

⁵³ Comments of Peerless Network, Inc. at 4-6, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Peerless Comments”).

⁵⁴ Comcast Comments at 14.

⁵⁵ *Id.* at 14.

⁵⁶ Peerless Comments at 3.

IX. COMMENTS CONFIRM THAT THE COMMISSION SHOULD NOT REQUIRE MORE DETAILED RESELLER CERTIFICATIONS, BUT SHOULD DEVELOP A RESELLER LIST THAT CONTRIBUTORS CAN USE.

The comments confirm that the proposed changes to reseller certifications would be extremely burdensome to both wholesalers and resellers, and would be unworkable in practice. AT&T and others describe in detail the administrative difficulties and costs inherent in the current certification system.⁵⁷ To manage the complex process, AT&T must employ a team of employees and often encounters problems obtaining valid certifications, which sometimes results in “expensive manual adjustments to the resellers’ accounts, including back-billing and credits.”⁵⁸ AT&T has also had problems with the forms themselves, and has had found that resellers often fail to update certification forms.⁵⁹

Comcast, AT&T, Verizon, and others explain why the proposed, additional certification requirements will be unworkable, with which Level 3 agrees. Resellers will likely have to provide revenue-percentage information on a circuit-by-circuit basis for thousands of circuits, and even the “circuit-specific percentage may not be static.”⁶⁰ Tracking these percentages would be administratively impossible and very costly, likely requiring manual billing adjustments to hundreds of thousands of circuits for a large wholesale provider.⁶¹ The process would be “administratively burdensome,” requiring wholesale customers to “continuously monitor its contribution status with respect to each and every wholesale input.”⁶² BT Americas Inc. explains

⁵⁷ See, e.g., AT&T Comments at 30-32; Verizon Comments at 17-20.

⁵⁸ AT&T Comments at 31.

⁵⁹ See *id.* at 32.

⁶⁰ *Id.* at 36; see also Verizon Comments at 19.

⁶¹ See AT&T Comments at 36; Verizon Comments at 20.

⁶² Comcast Comments at 15. See also Comments of CTIA - The Wireless Association at 12, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012) (arguing that the

that the adjustments and other administrative difficulties would require additional staffing to accomplish.⁶³

Second, as Level 3 previously observed and as other commenters confirm, if the contribution status of the reseller were to change, a wholesale provider could have to make retroactive billing assessments on the portion of revenues that become assessable.⁶⁴

Furthermore, the Commission does not identify how wholesalers should handle resellers that do not promptly update certifications under the proposed rules; if wholesalers reject requests for retroactive USF credits due to a certification update that was not timely made, resellers may threaten to file complaints against them.⁶⁵ AT&T explains that such complaints are already common based on AT&T's own internal certification requirements for resellers.⁶⁶

Instead of imposing burdensome and expense-generating rules, the Commission should adopt the bright-line test proposed by Verizon and others.⁶⁷ Verizon suggests a “bright-line rule that a wholesale customer is considered an ‘exempt’ reseller only if its assessable revenues exceed its purchases of assessable telecommunications services or telecommunications.”⁶⁸ To qualify, resellers would have to be registered with the FCC.

proposed changes will make the certification process even more cumbersome and inefficient)(“CTIA Comments”).

⁶³ Comments of BT Americas Inc. at 8, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“BT Americas Comments”).

⁶⁴ See Level 3 Comments at 20-21; Comcast Comments 15-16.

⁶⁵ See AT&T Comments at 37.

⁶⁶ See *id.*

⁶⁷ See, e.g., Verizon Comments at 20; USTA Comments at 11. See also CTIA Comments at 12 (arguing that wholesalers should have to obtain only an initial certification, and then simply make annual checks of the contributor's status).

⁶⁸ Verizon Comments at 20.

X. THE COMMISSION SHOULD HARMONIZE ALL CONTRIBUTION SYSTEMS TO A SINGLE SYSTEM.

Commenters argue that the FCC should have a consistent approach to assessments across all of its funds currently driven off of Form 499.⁶⁹ It would be inefficient to have multiple collection mechanisms, as the Commission has already recognized in creating unified Form 499 reporting. As Earthlink, Integra, and tw telecom explain, service providers would shoulder the administrative burden of developing

“entirely new billing systems and internal processes based on connections and/or numbers for USF contribution purposes *and* simultaneously maintain existing billing systems and internal processes based on revenues for purposes of paying regulatory fees and contributing to the TRS, NANPA, and LNPA funding mechanisms.”⁷⁰

XI. THE COMMISSION SHOULD HAVE SYMMETRICAL DEADLINES FOR REVISIONS, AND SHOULD HAVE A DATE OF REPOSE.

The comments overwhelmingly support adoption of symmetrical deadlines for revisions, and the need for repose is essential to ensure fairness for contributors.⁷¹ Commenters uniformly argue that the asymmetrical rule, allowing contributors to recover just one year of overpayments while remaining indefinitely at risk for increasing obligations is unfair and arbitrary and capricious.⁷² A date of repose is especially crucial for USF, where there is great uncertainty on the classification of services. A declaratory ruling assessing a service retroactively could force a filer to restate several years of revenue or more. Instead, the Commission should adopt a symmetrical limitations period for adjustments, regardless of whether they would increase or

⁶⁹ See, e.g., Earthlink et al Comments at 2-3; Comments of Cincinnati Bell Inc. at 19, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012).

⁷⁰ Earthlink et al Comments at 2-3.

⁷¹ See, e.g., Verizon Comments at 12-15; CTIA Comments at 20-22; USTelecom Comments at 6; XO Communications Comments at i.

⁷² See *id.*

decrease a providers USF obligation. The IRS practice, limiting audit risk to three years⁷³ while providing a longer period to enforce collection of unpaid funds,⁷⁴ provides a workable model.

XII. THE COMMISSION SHOULD CONTINUE TO DEVELOP ALTERNATIVES TO THE REVENUE-BASED CONTRIBUTION SYSTEM.

Numerous commentators with a wide range of perspectives question the continued viability of a revenues-based contribution mechanism.⁷⁵ While critical details would need to be developed and a connections-based mechanism would entail complexities that have not been fully assessed because such a system does not yet exist, it is a potential solution that avoids the difficult task of artificially parsing products that include telecommunications integrated with non-telecommunications services or bundles, as well as continually attempting to draw the line between assessable and non-assessable services. Over the long term, as Comcast and AT&T, among others, point out, that line drawing exercise will continue to be difficult,⁷⁶ even if the Commission implements the private ruling process Level 3 has proposed. Accordingly, Level 3 agrees with those commenters who support further exploration of a connections methodology.

⁷³ See 26 U.S.C. § 6501(a); 26 C.F.R. § 301.6501(a)-1(a).

⁷⁴ See 26 U.S.C. § 6501(e).

⁷⁵ See Comcast Comments at 7-9; Comments of Google Inc. at 2-4, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012); AT&T Comments at 17; Verizon Comments at 3-4; Comments of the Information Technology Industry Council at 2, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012); Comments of the Independent Telephone & Telecom Alliance at 4; Microsoft Comments at 13; Sprint Comments at 11-13; Comments of the Voice on the Net Coalition at 1, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012); Vonage Comments at 2.

⁷⁶ Comcast Comments at 7-9; AT&T Comments at 18.

XIII. COMMENTS CONFIRM THAT THE ASSESSMENT PROCESS NEEDS REFORM.

A. Commenters Broadly Support Notice and Comment for Form 499-A, but It Is Also Critical that Form Changes Occur before the Year to Be Assessed.

The comments overwhelmingly support notice and comment for changes to Form 499-A and its instructions, with some commenters arguing that notice and comment is required for APA compliance.⁷⁷ Sprint and Verizon argue that additional certification and verification requirements inserted into the Form 499-A and its instructions “constitute new legal obligations and should have been subject to APA notice and comment”⁷⁸ and “substantive changes to the USF regime adopted without adherence to the APA are invalid.”⁷⁹ CenturyLink similarly argues that notice and comment is necessary because USAC auditors “treat the instructions as binding rules” although they do not technically carry the force of law.⁸⁰ Providing notice and comment for changes to the Form 499-A and its instructions will also help avoid problems with proposed changes.⁸¹ Verizon argues that notice and comment will prevent the Commission from making confusing changes to the Form 499-A instructions.⁸²

⁷⁷ *See, e.g.*, Sprint Comments at 20; AT&T Comments at 41-42; Comments of CenturyLink at 7, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“CenturyLink Comments”); CTIA Comments at 15 (arguing that substantive changes to the Form 499-A and instructions are subject to notice and comment requirements of the APA); US Telecom Comments at 10; BT Americas Comments at 6; Comcast Comments at 30.

⁷⁸ Sprint Comments at 20. *See also* USTelecom Comments at 10.

⁷⁹ Verizon Comments at 8.

⁸⁰ CenturyLink Comments at 7. *See also* CTIA Comments at 15 (arguing that substantive changes to the Form 499-A and instructions are subject to notice and comment requirements of the APA).

⁸¹ *See, e.g.*, AT&T Comments at 42; Verizon Comments at 7; CenturyLink Comments at 7-8; CTIA Comments at 15-16.

⁸² *See* Verizon Comments at 7.

To enable filers to adequately implement changes, it is critical that changes to the Form 499-A and instructions occur *before* the year to be assessed. As Verizon, AT&T, CTIA, and others argue, changes should only be made on a going-forward basis.⁸³ AT&T demonstrates that late changes to the Form 499-A instructions, made only a month or two in advance of the due date, are actually retroactive changes, and can be costly or even impossible to comply with.⁸⁴ It is essential for providers to be able to have the access to the relevant instructions during the period they are tracking and compiling the necessary data.⁸⁵

B. Changing the Contribution Factor Annually Would Create a Risk of Disruptive Changes.

Comments confirm that switching to annual adjustments to the contribution factor could be disruptive. Comcast explains that “[a]nnual modifications to the contribution factor could result in larger incremental changes with each adjustment,” creating greater fluctuations for customer bills and causing “sticker shock” for consumers.⁸⁶ Many commenters supporting an annual contribution factor simply ignore the potential for large disruptive swings in the contribution factor from year to year.⁸⁷

Some commenters propose various solutions to prevent such disruption. For example, some commenters supporting the change to annual adjustments suggest that mid-year corrections

⁸³ See Verizon Comments at 9; CTIA Comments at 16; Comments of Earthlink, Integra, and tw telecom at 20, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012)(“Earthlink et al Comments”).

⁸⁴ See AT&T Comments at 41-42.

⁸⁵ See CTIA Comments at 15-16; Sprint Comments at 21; USTelecom Comments at 10 (“changes to the instructions should apply only on a going-forward basis”).

⁸⁶ Comcast Comments at 31.

⁸⁷ See, e.g., CTIA Comments at 17; USTelecom Comments at 11.

could be made to prevent shortfall when necessary.⁸⁸ It is unclear how mid-year corrections are different, much less superior to, quarterly corrections. One commenter suggests imposing a cap on the contribution factor.⁸⁹ However, this could create the potential for shortfall without a built-in safety valve. If the Commission does opt for an annual adjustment, a reserve could be implemented anyway to smooth out variations separate from moving to an annual system.⁹⁰

C. While Pay and Dispute Should Be Eliminated, Its Harshness Can Be Blunted by Allowing for Correction of Clerical Errors and By Implementing a Speedy Private Ruling Process.

The comments overwhelmingly support eliminating the pay-and-dispute process.⁹¹ As AT&T notes, the FCC’s long history of delaying action on a contributor’s appeal for years despite short deadlines would make a “pay and dispute” rule “anything but fair.”⁹² Requiring providers to pay and dispute “could create a real financial hardship” even if the Bureau were to act within 90 days.⁹³

Instead, the Commission should implement a private letter ruling process to address such disputes in a timely manner. As Level 3 explained in its initial comments, the Wireline Competition Bureau could issue such rulings, which would be deemed granted if the Bureau did not rule within 90 days.⁹⁴ A private ruling system would enable providers to seek guidance for

⁸⁸ See, e.g., Verizon Comments at 12.

⁸⁹ See COMPTTEL Comments at 35-36.

⁹⁰ See, e.g., Verizon Comments at 12.

⁹¹ See, e.g., Level 3 Comments at 24; AT&T Comments at 45; COMPTTEL Comments at 36.

⁹² AT&T Comments at 45.

⁹³ AT&T Comments at 45.

⁹⁴ See Level 3 Comments at 12.

difficult questions and would give guidance on permissible interpretations to other providers, who would be able to see the letter rulings.⁹⁵

D. Comments Confirm that the Commission Cannot Ban USF Pass-through Fees.

The Commission should not and cannot prohibit providers from including USF pass-through fees as a line item on end-user customer bills.⁹⁶ As Level 3, Verizon, and others explained in their comments, such a ban would violate the First Amendment.⁹⁷ Furthermore, such a rule would run afoul of regulations in some states: the California Public Utilities Commission explains that it opposes the proposed rule, which “contradicts CPUC policies which require transparency of program surcharges on customer bills.”⁹⁸

XIV. CONCLUSION

Level 3 supports the Commission’s efforts to reform the universal service contribution mechanism. The best place to start such a reform is to implement a prompt mechanism for private rulings. The Commission should not implement changes that simply expand universal service contribution assessments to include revenues from information services whenever any transmission is used, whether through a rule with respect to integrated services or one regarding bundling. The FCC should generally avoid assessing “cloud” services except when they are

⁹⁵ *Id.*

⁹⁶ *See, e.g.*, Level 3 Comments at 25; Verizon Comments at 52; COMPTTEL Comments at 39 (“Under no circumstances should the Commission limit carrier flexibility to recover their universal service contributions from end users through line items or surcharges.”); ACS Comments at 24-25; BT Americas Comments at 9-10; CTIA Comments at 28-29; Peerless Comments at 14; Earthlink et al Comments at 21; Comments of the International Carrier Coalition at 15-16, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012); NCTA Comments at 6.

⁹⁷ *See, e.g.*, Level 3 Comments at 25; Verizon Comments at 52-53.

⁹⁸ Comments of the California Public Utilities Commission at 16, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012).

close substitutes for, and thus compete directly with, assessable services. The Commission should not adopt a VAT approach to wholesale services, nor should it expand the existing reseller certification. The Commission should instead look for a simpler approach, such as maintaining a list of registered wholesalers. The Commission should adopt procedural safeguards, such as notice and comment to its Form 499-A process. It should also continue to explore in greater detail a connections-based contribution mechanism.

Respectfully submitted,



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