

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

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
)	

JOINT REPLY COMMENTS OF FIBERTECH NETWORKS, LLC, LIGHT TOWER HOLDINGS, LLC, SIDERA NETWORKS, LLC, AND ZAYO GROUP, LLC

Fibertech Networks, LLC (“Fibertech Networks”), on behalf of itself and its subsidiary Fiber Technologies Networks, L.L.C. (collectively, “Fibertech”), Light Tower Holdings LLC, on behalf of itself and its subsidiaries (collectively, “Lighttower”), Sidera Networks, LLC (“Sidera”) and Zayo Group, LLC (“Zayo”) (Fibertech, Lighttower, Sidera, and Zayo are referred to herein as the “Fiber Provider Coalition”) submit the following Joint Reply Comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Further Notice of Proposed Rulemaking on potential revisions and modifications to the contribution methodology for the Universal Service Fund (“USF” or “Fund”).¹

The vast majority of comments submitted in this proceeding support the Fiber Provider Coalition’s conclusion² that a value-added USF regime would be unduly burdensome, disruptive to the existing commercial structure between wholesalers and resellers and raise serious concerns about anticompetitive behavior. There was strong consensus that carriers should be permitted to continue to pass through the impact of USF contribution obligations to their end users. In

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

² Joint Comments of Fibertech Networks, LLC, LightTower Holdings, LLC, Sidera Networks, LLC and Zayo Group, LLC, WC Docket No. 06-122 and GN Docket No. 09-51 (filed July 9, 2012) (“Fiber Provider Coalition Comments”).

addition, numerous commenters agreed that the reseller certification process must be clarified and the record in this proceeding provides strong support for several methods by which this process could be improved and made more efficient, including limiting the number of times a wholesaler must obtain a certification and establishing a reliable website source through which providers could verify the contribution status of their customers. Many of the comments supported the Fiber Provider Coalition request for confirmation and clarification of the classification of certain communications services, such as VPN and MPLS, based on established FCC precedents. Finally, there was strong support across all segments that the process needs to be streamlined, simplified and that any changes need to minimize additional costs and burdens, which inevitably would be passed along to customers in one form or another.

I. Comments Raised Serious and Detrimental Concerns about the Proposed Value-Added System

The Commission should reject the proposed value-added system for collection of USF contributions from wholesale providers. The detailed and thorough record developed as part of this proceeding demonstrates there is little support for the adoption of a value-added system. On the contrary, numerous telecommunications providers, both large and small, expressed strong opposition to the use of this methodology. Objections to the use of this system were far-ranging and include inexperience with the process and lack of methodologies and procedures for carriers to implement the system,³ negative consequences for existing contractual relationships among

³ Comments of Cable and Wireless Worldwide, WC Docket No. 06-122 and GN Docket No. 09-5, at 3-4 (filed July 6, 2012) (“The U.S. industry does not have the established imputation methodologies, or experience with the value-added approach, necessary for such a program to work smoothly. Further, the administrative and transitional problems of moving to a value-added approach from the current regime would be enormous. It would take *years* before the Commission, industry and consumers were on the same page about the details of such program, and the implementation costs would be horrendous.”) (emphasis added).

providers and between providers and their customers,⁴ the inability of such a system to streamline the wholesale revenue contribution process,⁵ as well as the gamesmanship that may ensue upon adoption of this process.⁶

Even among supporters of the value-added system, there are serious concerns about the design of the system and unintended negative consequences that may result from its implementation. While some commenters note that the methodology “shows some promise” for addressing problems within the contribution system, they admit that more analysis and system design would be necessary before implementation.⁷ As the Coalition for Rational Universal Service and Intercarrier Reform noted, while “a value-added methodology is economically rational ... it would only make sense if it could be administered without even more complexity than the status quo.”⁸ However, nothing in the proposed methodology or comments supports the conclusion that a value-added system would be “less complex” than the existing system; to the contrary, there is significant evidence that it would be *more* complex.⁹

⁴ Comments of BT Americas Inc. and its US Affiliates, WC Docket No. 06-122 and GN Docket No. 09-5, at 7 (filed July 9, 2012) (“[C]ustomers may have contract law-based arguments to refuse to pay universal service/regulatory fees they previously paid. A contract that had been entered into on the basis that it would generate margins of 15% may have all the margins wiped out if the reseller or onward seller could no longer contractually pass on USF of 15.7% to its customer.”).

⁵ Comments of Level 3 Communications, LLC, WC Docket No. 06-122 and GN Docket No. 09-5, at 19 (filed July 9, 2012) (“The Commission should ensure that whatever changes it makes to wholesale procedures are streamlined and implementable - something that cannot be said about the current complex requirement on wholesale providers. However, both the FNRPM’s proposed VAT structure and revised reseller certification forms fail these objectives.... The VAT proposal, while nice in theory, is unworkable in practice.”) (“Level 3 Comments”).

⁶ Comments of AT&T, WC Docket No. 06-122 and GN Docket No. 09-5, 33 (filed July 9, 2012) (noting that the value-added system would provide an incentive for “resellers to re-price their offerings”) (“AT&T Comments”).

⁷ Comments of CITA-The Wireless Association, WC Docket No. 06-122 and GN Docket No. 09-51, at 11 (filed July 9, 2012) (“The value-added assessment process discussed in the FNRPM shows some promise for addressing these issues, although the Commission would need to consider further how such a system would work before moving forward to adopt it.”) (“CTIA Comments”).

⁸ Comments of the Coalition for Rational Universal Service and Intercarrier Reform, WC Docket No. 06-122 and GN Docket No. 06-51, at 10 (filed July 9, 2012).

⁹ See e.g., Fiber Provider Coalition Comments at 4-6.

In addition, other commenters support the Fiber Provider Coalition’s conclusion that, even if the proposed value-added system structure would work in situations where a reseller merely rebrands a wholesale service for sale to its end customers, such a structure does not reflect the reality of a majority of services.¹⁰ As Cincinnati Bell noted, “[i]t is rarely as simple as reselling the service in exactly the same form but with a simple markup.”¹¹ In reality, most services are significantly more complex and involve multiple providers with inputs of different components that result in a final product, often including both telecommunications and non-telecommunications services, and the value-added system as applied to real world communications products would result in an untenable and complicated system far more difficult to manage.¹² As Clearwire explained:

the value-added revenues approach does not provide greater clarity than the existing wholesale-resale certification process when determining whether a wholesale input is incorporated into other telecommunications services at retail ... [nor does it] offer a methodology for apportioning the value-added across multiple services provided using the input. Without a clear methodology for handling these issues, the value-added approach would embody many of the same difficult classification and allocation issues that are present in the current system.”¹³

¹⁰ *Id.* at 4. Comments of Comcast Corporation, WC Docket No. 06-122 and GN Docket No. 09-51, at 13-14 (filed July 9, 2012) (“[T]he value-added proposal assumes that the wholesale service will be resold without adding any value other than what is purely necessary to turn a wholesale service into a resale service. It ignores other ways of adding value that provide functionality above and beyond the pure (and assessable) telecommunications service.... [T]he value-added approach underestimates the difficulty of determining the amount of value the assessable activity provided by the downstream firm adds to a finished retail service.”) (“Comcast Comments”).

¹¹ Comments of Cincinnati Bell, WC Docket No. 06-122 and GN Docket No. 09-51, at 14 (filed July 9, 2012) (“Cincinnati Bell Comments”).

¹² *Id.* at 6.

¹³ Comments of Clearwire Corporation, WC Docket No. 06-122 and GN Docket No. 09-51, at 9-10 (filed July 9, 2012). *See also* Comments of Cincinnati Bell at 14 (“If all services and carrier relationships were as simple as presented in the theoretical example in Table 1 of the FNPRM, a value-added approach might be workable, but the reality is far from simple. Providers buy many different types of services from other providers and incorporate them into their own services in many different ways.”).

The Fiber Provider Coalition strongly disagrees with AT&T's assertion that adoption of the value-added system is "simpler"¹⁴ than reform of the reseller certification process. While the Fiber Provider Coalition advocates for an overhaul of the reseller certification process, it agrees with American Cable Association's assertion that the value-added system "could be even more confusing and burdensome than the current process of relying on exemption certifications.... If a value added system were adopted, there is a good chance that wholesale and retail companies would dispute such variables as jurisdictional allocation, or one party might have difficulty obtaining timely data from the other as the filing deadline approaches."¹⁵

Furthermore, AT&T's position in this proceeding confirms concerns raised by the Fiber Provider Coalition that the value-added system would lead to anti-competitive behavior between competitors.¹⁶ AT&T, the nation's largest telecommunications provider, while expressing support for this methodology, acknowledged that it may "prompt resellers to re-price their offerings so that the interstate telecommunications component of a service offering is identical to the price assessed by the wholesale provider in order to avoid a direct contribution obligation on that component."¹⁷ Apart from the fact that this would leave resellers with no margin, AT&T's comment reflects the fact that this methodology will give incumbent LECs the ability and incentive to manipulate the market.

II. The Existing Reseller Certification Process Must Be Revised and Clarified

Many commenters agree with the Fiber Provider Coalition that the existing reseller certification process is difficult for providers to implement and difficult for the FCC and USAC

¹⁴ AT&T Comments at 35.

¹⁵ Comments of the American Cable Association, WC Docket No. 06-122 and GN Docket No. 09-51, at 10-11 (filed July 9, 2012).

¹⁶ Fiber Provider Coalition Comments at 7.

¹⁷ AT&T Comments at 33.

to enforce. NTCA's extensive list of existing problems with the system, including wholesalers forced to act as "de facto enforcement agents of the Commission" and requiring wholesalers to effectively indemnify the Commission for reseller's failure to contribute,¹⁸ further highlights the ongoing and systematic problems with the current system.

The record provides a multitude of methods by which the FCC could clarify and streamline this process to improve accuracy and efficiency. Several commenters support the Fiber Provider Coalition's recommendation of allowing wholesalers to obtain a one-time initial certification when services are initialized.¹⁹ CTIA recommends that the Commission streamline the reseller requirement by allowing wholesalers to "obtain a reseller certification just once, at the initiation of service to a wholesale customer, but check the contributor's status on the FCC's website annually."²⁰ EarthLink, Integra and tw telecom also agree with the Fiber Provider Coalition that resellers should bear some portion of the burden of compliance and should be required to "notify their wholesale providers as soon as their contribution status changes."²¹ The Satellite Industry Association also provides another creative solution under which resellers would file their certifications with the Commission, which would then ensure that such certifications remain up to date.²² Adoption of any of these proposals, either separately or in

¹⁸ Comments of NTCA, WC Docket No. 06-122 and GN Docket No. 09-51, at 45 (filed July 9, 2012). NTCA noted a number of flaws with the current reseller certification process including "(1) wholesalers have been turned into de facto enforcement agents of the Commission by requiring them to collect certifications from resellers; (2) wholesalers have been required to effectively indemnify the Commission against contributions evaded by their resellers; (3) resellers have been required to learn and comply with a variety to certification procedures imposed by different wholesalers; and (4) obtaining certifications that satisfy regulatory requirements has often proven to be a more significant factor than competitive equity in determining which resellers and wholesalers are subject to or exempt from contribution obligations."

¹⁹ Fiber Provider Coalition Comments at 13.

²⁰ CTIA Comments at 12.

²¹ Comments of Earthlink, Integra and tw telecom, WC Docket No. 06-122 and GN Docket No. 09-51 at 16 (filed July 9, 2012) ("Earthlink et al. Comments").

combination, would provide the necessary clarification to reduce administrative burdens and costs for both the wholesale and reselling carriers, and also the burden on USAC in administering audits.

The Fiber Provider Coalition also supports those commenters that believe that wholesale carriers should not be held liable by USAC or the FCC for minor incorrect allocations of reseller revenue as long as the carrier can demonstrate compliance with established procedures.²³ Should a wholesale provider mistakenly classify revenue as exempt from contribution even though the reseller is later demonstrated to not have contributed to the Fund, such an oversight should be forgiven as long as the wholesale provider can demonstrate that it relied on the established procedures.

III. The Record Supports Classification of Enterprise Communications Services Under Existing Precedence

A significant number of commenters in the proceeding agree with the Fiber Provider Coalition's recommendation that providers should be allowed to rely on existing and well-established precedent to determine the USF contribution requirements of MPLS, VPN and other similar services deemed "Enterprise" services by the Commission in the NPRM.²⁴ The reliance on precedent for classification of these services and the separation of basic transmission services or components, as advocated by the Fiber Provider Coalition, is set forth in detail in the MPLS Industry Group Proposal, which asserts that USF contribution assessments should be based only

²² Comments of Satellite Industry Association, WC Docket No. 06-122 and GN Docket No. 09-51, at 6-7 (filed July 9, 2012) ("The Commission should require 'resellers' to file their certifications at the Commission and ensure their certifications remain current.").

²³ See e.g., Comments of Verizon, WC Docket No. 06-122 and GN Docket No. 09-51, at 20 (filed July 9, 2012) ("If the Commission adopts a new rule governing the reseller exemption process, it should make clear that contributions that follow the process spelled out in its rules cannot later be found liable for increased contributions if information in the FCC's database or in customer certifications ... is later determined to be inaccurate.") ("Verizon Comments").

²⁴ Fiber Provider Coalition Comments at 16. In these comments, Enterprise services are interchangeably described as "Advanced" services.

on the access portion of these services. The Fiber Provider Coalition joins with others in support of adoption of that proposal and believes it will provide the necessary clarity sought by this coalition and others.²⁵

Other participants also expressed their support for relying on established guidelines and precedent to properly address the contribution requirements of these services. In order to improve efficiency and consistency in this process, Level 3 Communications recommends the adoption of “a rapid system for case-by-case guidance ... [rather than] through over-inclusive categorical rules.”²⁶ Instead of attempting to develop “catch-all” categories, given that “enterprise services are complex and evolving rapidly,” commenters generally agreed that one size does not fit all and different service providers have different product designs and call them by different terms thereby making it impossible to merely classify “VPN” or “MPLS” under uniform umbrella classifications.²⁷

While a small group of providers disagree with this approach based only on vague and unsupported assertions that all services should be included in the contribution base,²⁸ all of the commenters agree that the Commission must move forward and provide clear guidance on the

²⁵ Comments of Sprint Nextel Corporation, WC Docket No. 06-122 and GN Docket No. 09-51, a 44 (filed July 9, 2012) (“Prompt FCC action on the MPLS Industry Group Proposal will remove current market distortions while providing a level of certainty for MPLS providers and enterprise MPLS customers alike.”); Verizon Comments at 24 (“Commission should adopt the Industry Proposal put forth by a diverse group of communications service providers to address MPLS contributions prospectively under the current revenue-based system.”); Comments of XO Communications, WC Docket No. 06-122 and GN Docket No. 09-51, at 23 (filed July 9, 2012) (“XO urges the Commission to adopt this [MPLS Industry Group] proposal in the interim while it considers additional reforms in order to stabilize a growing component of the USF contribution base.”).

²⁶ Level 3 Comments at 13.

²⁷ Comments of MegaPath, WC Docket No. 06-122 and GN Docket No. 09-51, at 2 (filed on July 9, 2012).

²⁸ *See e.g.*, Comments of BVNW Consultants, WC Docket No. 06-122 and GN Docket No. 09-51 (filed July 9, 2012) (asserting that the “Commission should issue a clarification that all enterprise communications services with a telecommunications component are subject to federal USF assessment”).

Washington, DC 20006

Counsel for Fiber Provider Coalition

Charles B. Stockdale, Esq.
Vice President & General Counsel
Fibertech Networks, LLC
300 Meridian Centre
Rochester, NY 14618

Leslie J. Brown, Esq.
Vice President and Deputy General Counsel
Light Tower Holdings LLC
80 Central Street
Boxborough, MA 01719

Paul Eskildsen, Esq.
Senior Vice President & General Counsel
Sidera Networks, LLC
55 Broad Street, 2nd Floor
New York, NY 10004

Jill Sandford
Associate General Counsel
Zayo Group, LLC
360 Hamilton Avenue, 7th Floor
White Plains, NY 10601

Dated: August 6, 2012