

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

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| In the Matter of |) | |
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| Universal Service Contribution Methodology |) | WC Docket No. 06-122 |
| |) | |
| A National Broadband Plan For Our Future |) | GN Docket No. 09-51 |
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**REPLY COMMENTS OF
XO COMMUNICATIONS SERVICES, LLC.**

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SUMMARY

The *FNPRM* in this proceeding lays the groundwork for the Commission to make the most significant reforms to the Universal Service Fund (“USF”) contributions system since 1997. All commenters agreed with the need to reform USF contributions, and to do so quickly. When the USF contribution factor has exceeded 17% for two of the first three quarters of this year, now is not the time to be timid, or to delay. Instead, the Commission should move forward to improve the efficiency and fairness of the contribution system while also moving toward a system that is suitable for upcoming decades.

The initial comments provide a clear “to do” list of reforms for the Commission. First, regardless of the contribution system that will apply in the future, there is widespread support for the Commission to take several immediate, interim steps to address flaws in the USF contribution system today. The Commission should issue an order adopting these interim changes before the end of this year, setting them in place for the upcoming 2013 USF contribution year.

Second, the majority of comments recognize that a revenues-based contribution system, with sensible modifications to update and simplify the system, can provide the long term solution the Commission seeks. With the interim improvements in hand, the Commission should next analyze expansion of the revenue base to identify ways to make the contribution base more stable and more equitable. A modified revenues-based system is clearly the best long term solution for USF reform. The alternative methodologies described in the *FNPRM* and minimally supported by commenters would require far more definition and refinement by the Commission and a far longer lead time by the industry in order to become viable. As they stand today, other proposed methodologies for assessing USF contributions would require complex new line-

drawing, would require the development of new tracking systems and audit capabilities and would not ensure that providers of interstate telecommunications services make equitable and nondiscriminatory contributions to USF, as required by 47 U.S.C. § 254.

Finally, the comments support common-sense improvements to make USF appeals more predictable and fair, while retaining the current discretion contributors have to recover their USF contribution costs from their end users.

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REPLY COMMENTS OF
XO COMMUNICATIONS SERVICES, LLC.

XO Communications Services, LLC and its affiliates (collectively, “XO”) by its attorneys, hereby submits these Reply Comments on proposals to reform the federal universal service fund contribution system.¹ The initial comments have provided a clear “to do” list for prioritizing contribution reforms. The Commission first should act expeditiously to adopt interim improvements that the industry widely supports. These improvements should be put in place before the next contribution year begins in January 2013, regardless of which contribution methodology the FCC pursues as a long term goal. Second, the comments show strong support for the use of a modified revenues-based contribution methodology, with sensible expansions of the revenue base in order to stabilize funding and more equitably distribute the contribution obligations. This reform should be the Commission’s preferred option, as it would be easiest to administer and requires the least development and the least lead time. Finally, the comments

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, FCC12-46 (rel. April 30, 2012) (“*FNPRM*”).

show support for reforms to the USF audit and appeal process, while retaining the current flexibility for contributors to recover USF contribution obligations from their customers.

I. THERE IS WIDESPREAD SUPPORT FOR CERTAIN IMMEDIATE STEPS TO ADDRESS FLAWS IN THE CURRENT SYSTEM

Commenters strongly supported a handful of changes that could be made immediately to improve the current contribution system. The reforms address the most persistent problems with the current system and will lead to more stable, predictable and equitable contributions while the Commission considers the merits of alternative long-term solutions. XO urges the Commission to place these reforms at the top of its “to do” list and adopt them before the next contribution year begins in January 2013.²

A. The Commission Should Clarify And Simplify Wholesale Carrier Obligations.

Many commenters pointed out the difficulties and uncertainties involved in the current reseller qualification system. Verizon, for example, noted that the annual re-certification process for resellers “requires considerable time and resources” to implement across its reseller base.³ A good first step in resolving these difficulties would be to address the pending USF appeals verifying the standards that wholesale carriers must satisfy in order to classify revenues as attributed to resellers in block 300 of the Form 499-A. XO also agrees with suggestions to simplify the reseller certification process, such as by replacing it with a searchable database of

² Google argues that the Commission should forego these easy fixes because such efforts might distract from developing a long term resolution. Google Comments at 11. XO disagrees. It is precisely because the proposed alternatives require development, and ultimately significant lead time for the industry to implement, that the interim fixes are required now. The Commission should not allow the goal of creating a perfect system become the enemy of the good.

³ Verizon Comments at 16; *see also* AT&T Comments at 31 (time and costs of implementing the wholesale/retail system are “enormous”).

“exempt” resellers,⁴ by replacing the unnecessary annual re-certification safe harbor with a one-time certification safe harbor⁵ and/or by mandating USF collection in the absence of a reseller certificate.⁶ Each of these reforms would create a bright line distinction between wholesale and retail revenues, and would allow certification on an entity-wide basis, as is commonly done today.

XO agrees with the many commenters raising concerns about a value-added approach to distinguishing between wholesale and retail revenues. Although this approach is intriguing, commenters noted the practical difficulties in identifying the amount of value added and other administrative complexities of the approach.⁷ These difficulties render this approach at least as difficult, if not more so, than the current reseller certification process. Therefore, XO agrees with commenters that oppose implementation of a value added approach at this time.

B. The Commission Should Move Immediately To An Annual Contribution Factor While Maintaining Quarterly Revenue Projections For Billing Purposes.

Commenters from a wide cross-section of the industry strongly supported the *FNPRM*'s proposal to move to an annual contribution factor instead of a quarterly factor.⁸ The use of an annual contribution factor would simplify billing and recovery of USF contribution payments from end users and make contribution obligations more predictable. This proposal

⁴ Verizon Comments at 20.

⁵ Fiber Provider Coalition Comments at 13 (advocating a one-time certification with an obligation for the reseller to notify the wholesale carrier of changes in status).

⁶ Level 3 Comments at 21.

⁷ *See, e.g.*, CompTel Comments at 29; Cincinnati Bell Comments at 13-14; Earthlink *et al.* Comments at 16; Level 3 Comments at 19; Verizon Comments at 18;

⁸ *FNPRM* at ¶ 353; *See* AT&T Comments at 43; CTIA Comments at 17; CenturyLink Comments at 8; T-Mobile Comments at 11; US Cellular Comments at 40; Verizon Comments at 11-12.

should be adopted immediately, effective with contributions for charges on or after January 1, 2013.

However, as XO stated in its initial comments, carriers should continue to project revenues to USAC on a quarterly basis. These quarterly projections are used to send monthly USF invoices, which in turn are subject to an annual true-up based on the Form 499-A. Carriers would more accurately be able to forecast their quarterly revenues than they would be able to forecast annual revenues. As a result, retention of the Form 499-Q quarterly projections will minimize the magnitude of true-ups stemming from the Form 499-A annual revenue filings.

C. The Commission Should Adopt A Single, Symmetrical Limitations Period For Adjustments To Reported Revenue.

As the *FNPRM* notes, in 2004, the Wireline Competition Bureau adopted an order that requires contributors to revise their Form 499-A filings within one year if the revision would result in a decrease in the contributor's contribution obligation.⁹ This order is the subject of three pending Applications for Review filed by SBC Communications, Inc. ("AT&T"), Qwest Communications International, Inc. ("Qwest"), and Business Discount Plan, Inc. ("BDP"), each of which was filed on January 10, 2005.

The comments strongly support the adoption of a reasonable, *symmetrical* deadline for revisions to revenues reported on the Form 499-A.¹⁰ XO agrees that a symmetrical deadline for revisions promotes predictability in contributions and is fair to contributors. XO believes that a time period of two years for both downward and upward adjustments adequately balances the need for a reasonable time for revisions with the need for certainty within the Fund.

⁹ *Federal-State Joint Board on Universal Service et al.*, Order, 20 FCC Rcd 1012, 1013 (WCB 2004), *applications for review pending*.

¹⁰ AT&T Comments at 46-47; CTIA Comments at 21-22; CenturyLink Comments at 8; US Cellular Comments at 44; Verizon Comments at 15.

D. The FCC Should Adopt The MPLS Industry Group Proposal For Reporting Of Enterprise Revenues.

As the Commission is aware, uncertainty has existed in the industry for many years regarding whether MPLS-enabled services are assessable for USF purposes and, if so, how assessable revenues are to be allocated. XO participated in months of industry discussion and analysis among a diverse group of communications service providers (the MPLS Industry Group) to develop a consistent and competitively-neutral methodology to apply prospectively to MPLS-enabled services within the current revenues-based contribution system.¹¹ The comments generally supported the adoption of this proposal.¹² XO urges the Commission to adopt this proposal in the interim while it considers additional reforms in order to stabilize a growing component of the USF contribution base and allow the Commission to better evaluate the long-term viability of the revenues-based system.

E. The FCC Should Receive Public Comment on The Form 499-A Instructions But Should Not Make those Instructions Binding Rules.

The *FNPRM* seeks comment on whether it should modify the process by which the Form 499-A and the accompanying Instructions are revised.¹³ Most commenters addressing this proposal supported providing a notice and comment period before revisions are made to the Form 499-A.¹⁴ As XO explained in its initial comments, XO supports procedural changes that

¹¹ See Letter from MPLS Industry Group, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 4-7 (filed Mar. 29, 2012) (describing the industry proposal) (“MPLS Industry Group Letter”).

¹² See BT Comments at 1-2; Ionary Consulting Coalition Comments at 4-5; Sprint Comments at 40; Verizon Comments at 24.

¹³ *FNPRM* at ¶¶ 344-49.

¹⁴ See AT&T Comments at 42; CTIA Comments at 13; CenturyLink Comments at 7; Comcast Comments at 30; Earthlink *et al.* Comments at 20; Level 3 Comments at 22; T-Mobile Comments at 9; Verizon Comments at 8-9.

will provide advance notice of revisions to the Instructions and provide an opportunity for public comment on the revisions.

However, the Commission should not convert the Instructions' guidance into binding FCC rules. That is, in authorizing public input into the revisions, the Commission should not modify the limited delegation of authority given to the Wireline Competition Bureau to modify only the "administrative aspects" of the forms, not make substantive changes to the forms. The underlying FCC Orders, duly adopted pursuant to the requirements of the Administrative Procedure Act, should remain as the only source of binding obligations for contributors.

II. LONG TERM REFORM – MOST COMMENTERS SUPPORT RETAINING THE REVENUES-BASED CONTRIBUTION METHODOLOGY AND EXPANDING THE BASE OF ASSESSABLE SERVICES.

Few, if any, commenters suggested that the Commission could quickly migrate to a USF-assessment system based upon numbers or connections. It is clear that both systems are beset with thorny implementation problems, and any attempt to replace the current revenue-based assessment system with a numbers-based or connections-based model would take years of additional development. By contrast, numerous commenters observed that the USF can be funded adequately for the foreseeable future using the existing revenue-based assessment system, *provided* that the list of assessable services is expanded substantially.¹⁵

A. Assessment of Revenues Remains the Preferred Method Of Funding the USF Program.

The comments make clear that the existing USF-contribution system is broken and in urgent need of repair. The question is whether the Commission's goals for the USF-

¹⁵ See, e.g., NASUCA Comments at 10-11; Rural Telecommunications Group Comments at 10; USA Mobility Comments at 4.

program can best be achieved by modifying the existing revenues-based assessment system, or by jettisoning the existing framework entirely in favor of a numbers-based or connections-based assessment system. Like XO, many commenters opined that the Commission's stated goals of insuring the sustainability of USF, making assessment non-discriminatory and administering the program efficiently can best be accomplished by retaining – but overhauling – the existing assessment of revenues system.¹⁶

The revenues-based system has the great advantage of incumbency. Contributors have the systems in place that are required to collect, report and remit USF funds. Reasonable modifications can be implemented relatively easily and quickly – in 6 months or less – by USAC and the contributor community alike.¹⁷ Replacing the existing system with a numbers-based or connections-based model, on the other hand, will take years of program development and implementation efforts. Detailed new rules would need to be promulgated; entirely new instructions drafted; and extensive new back-office systems developed and implemented by both USAC and contributors. Since the comments reflect very little agreement on a numbers-based versus connections-based system, or how numbers or connections would be counted if either were selected, it is inconceivable that a consensus in favor of either approach can be achieved and installed in the reasonably foreseeable future.

Notably, virtually no commenter suggested that any contribution model is a perfect choice. The failures with the existing system that led to the *FNPRM* make clear that the revenues-based system has problems which must be addressed. But even the supporters of

¹⁶ See, e.g., CompTel Comments at 21; AARP Comments at 11; Alaska Communications Systems Group Comments at 11; California PUC Comments at 3; CenturyLink Comments at 16-17; MetroPCS Comments at 5; NASUCA Comments at 9; Time Warner Cable Comments at 3; USA Mobility Comments at 1.

¹⁷ CompTel Comments at iii.

numbers-based and connections-based alternatives concede that those approaches have problems as well. Indeed, it is interesting that several commenters paid lip service to a numbers-based or connections-based system as a theoretical ideal, but quickly defaulted to extensive discussions in their comments on how best to fix the existing revenues-based system, a tacit admission that there is no perfect solution, and the only realistic option is to fix the existing framework.¹⁸

However, there is consensus in the comments on one proposition – that the existing contribution system needs to be fixed *quickly*. Since the only reform that can be implemented quickly is an upgrade of the current revenues-based assessment system, XO submits that fixing the existing revenues-based system is the obvious best choice.

B. The Commission Must Aggressively Expand the List of Assessable Services.

The comments make clear that technical change and service substitution have drained the existing contribution system of the resources required to sustain the USF program. Legacy TDM and voice services simply will not generate adequate revenues to support program requirements. The solution is obvious – quickly expand the list of assessable services to capture revenues attributable to new services which incorporate the provision of telecommunications but currently escape USF assessment unfairly.

Critically, minor tinkering will not solve the problems with the current system. In order to identify a broad enough base to reduce the contribution factor significantly and ensure a sustainable source of USF funding, the Commission must utilize its permissive authority to require “other provider[s] of interstate telecommunications” to contribute to USF. Two particular offerings must be added to the list of assessable services, or the entire exercise will prove pointless.

¹⁸ See, e.g., AT&T Comments at 24-41 (providing extensive comments on reforms to the revenues-based model).

Most commenters agree that it is essential that broadband Internet access services be added to the list of assessable services.¹⁹ Traditional circuit switched voice services that historically have formed the backbone of the assessable revenue base are quickly being replaced by bundled service offerings offered via broadband Internet access. As customers have migrated to broadband access, so must the USF contribution responsibility migrate to broadband access. This is particularly true now that the distribution side of USF has been reformed to subsidize the provision of such broadband Internet access services. Opponents of adding broadband Internet access claim that taxing these services may impede their adoption.²⁰ But the same could be said of *any* service that bears the USF contribution burden. This may have been a legitimate argument in the early days of broadband Internet access roll out, but is not a serious concern now that market penetration is extremely high and consumers already have expressed a clear preference for broadband services. The opposition of cable companies to assessment of broadband Internet access is nothing more than a transparent effort to retain a sizable and artificial cost advantage over legacy circuit switched services.

Similarly, the record supports adding text messaging to the list of assessable services. Texting is being substituted for cellular voice services in a major way. Since most CMRS providers treat text revenues as exempt from USF assessment, the swift migration to texting constitutes a major drag on contributions to the USF fund. The claim of CMRS providers that texting constitutes an “information service” is highly questionable.²¹ Any information storage is extremely fleeting and sporadic; regular users of texting know first hand that service is

¹⁹ See CompTel Comments at 14-17; AARP Comments at 25; Association of Teleservices International Comments at 6; Ionary Consulting Coalition Comments at 2-3; Earthlink *et al.* Comments at 7; MetroPCS Comments at 15; US Cellular Comments at 21; California PUC Comments at 6-7; NASUCA Comments at 7.

²⁰ See Comcast Comments at 16; Verizon Comments at 41.

²¹ CTIA Comments at 23; Verizon Comments at 33.

virtually real time, and it is the nearly instantaneous message delivery that has made the service so attractive as an alternate means of intercommunication. Similarly, the need for protocol conversion is spotty, and is simply a by-product of the backbone transmission networks carriers use, rather than the end user service. Thus, texting probably does not qualify as an information service under current Commission analysis.

However, there is no need to get bogged down in that debate. Even if texting qualifies as an information service, the provision of “telecommunications” clearly is required and the Commission is free to assess carriers as “other provider[s] of interstate telecommunications.” It is the height of unfairness to give cellular carriers – the largest and best capitalized companies in the telecommunications industry – a free pass on providing financial support for the USF program simply by defining bundled charges (as some large wireless carriers are doing) as attributable to texting rather than voice services.²² CMRS providers simply must be required to shoulder their fair share of the USF financing burden; continuing to permit wireless carriers to shift their responsibility for USF support to wireline carriers is highly discriminatory.

Simply put, USF contribution reform will fail unless these two enormous loopholes from providing USF support – broadband Internet access and texting services – are closed. Cable companies and cellular carriers are playing a game in their comments of “don’t tax you, don’t tax me, tax the man behind the tree.” But that game simply will not work any longer. To have a sustainable base of assessable revenue, the undeserved and unfair exemptions enjoyed by these two service categories must be ended.

²² See XO Comments at 24-27.

III. THE FCC SHOULD MAKE USF ADMINISTRATION MORE EFFICIENT AND PREDICTABLE

A. The FCC Should Make USF Appeals More Predictable.

Any improvement to the administration of the contribution system must also address contributor appeals of USAC decisions. Appeals of USAC decisions play an important role in clarifying USF rules and in applying the rules to new situations. Prompt resolution of these issues is vital to ensure that funding of the programs remains sufficient and that administration of universal service continues to be equitable and non-discriminatory. To achieve these goals, XO proposed a rule that establishes a reasonable time period for resolution of the appeal, backed by meaningful consequences that provide contributors with needed certainty concerning their contribution obligations.²³

Separate from XO's proposal, two other commenters also recommended that the Commission provide certainty in resolving USF appeals. Level 3 proposed a system of private letter rulings under which a requestor's petition would be "deemed granted" if not acted upon within 90 days.²⁴ Level 3 states that such status would prevent retroactive liability on the requestor, even if the Commission later assesses USF on the particular revenues. This approach, it says, would be similar to the treatment of "deemed lawful" tariffs filed pursuant to Section 204(a)(3) of the Act. T-Mobile proposes a similar regime, with letter ruling requests deemed granted if not acted upon within 6 months.²⁵

Although XO supports these alternatives as a way to provide more clarity up-front for contributors, XO believes that its proposal for resolution of USF appeals is preferable. Under XO's proposal, the Commission would have a concrete dispute before it, with specific services

²³ See XO Comments at 45-48.

²⁴ Level 3 Comments at 12.

²⁵ T-Mobile Comments at 13.

and specific potential revenues at issue. This provides a basis not only to provide fact-based certainty, but also to control against potential unintended consequences from ambiguous requests which are deemed granted through inaction.

Therefore, XO believes that its proposal for a one-year deadline for resolution of contributor appeals is preferable. A one-year time period for resolution should be more than sufficient to address the issues raised in a contributor appeal. If the Commission fails to issue an order in response to the appeal within one-year, then the petitioner's appeal should be deemed to have been granted.²⁶ As a result, the petitioner would not be obligated to pay the additional USF at issue in the appeal. However, this provision would be limited to the petitioner and to the specific time period at issue in the audit or other USAC decision. That is, the "deemed granted" provision would have effect only with respect to that petitioner and that specific time period at issue. It would not affect other contributors, and, with respect to the petitioner, would not limit the ability of USAC or the FCC to examine future time periods.²⁷

B. Commenters Agree That The FCC Should Reject The Pay And Dispute Proposal In The NPRM.

The *FNPRM* proposes a rule that would require USF contributors to make full payment of the amount billed by USAC, even where such amounts are disputed or subject to an

²⁶ Cf. 47 U.S.C. § 160(c).

²⁷ When the Commission first adopted Section 54.724, it included a provision providing for default consequences in the event of Bureau inaction. In the original version of Section 54.724, if an appeal properly before the Common Carrier Bureau was not acted upon within 90 days, then USAC's decision would be deemed to be upheld. *Eighth Order on Reconsideration*, 13 FCC Rcd at 25096, ¶ 74. However, the rule did not provide similar consequences for appeals properly before the Commission (*i.e.*, those appeals raising novel issues of law or policy). Because it was too difficult for petitioners to determine whether an appeal would be addressed by the Bureau or by the Commission, the FCC eliminated the consequences of the Bureau's non-action. *Federal-State Joint Board on Universal Service (Changes to the Board of Directors of the National Exchange Carrier Association, Inc.)*, Order, 15 FCC Rcd 9336 (2000). XO submits that the presumption in favor of USAC's decision was inconsistent with the *de novo* review of USF appeals, and therefore such a presumption was incorrect in the first place.

appeal.²⁸ Specifically, the so-called “pay and dispute” rule would require a contributor to pay the full amount invoiced, or be assessed late fees, interest charges and penalties. Such fees, interest and penalties would apply even if an appeal were ultimately granted by the FCC, except if the disputed charges are the result of “clear error by the Administrator.”

XO strongly opposed this proposal in its initial comments. Other commenters addressing this proposal also opposed its adoption.²⁹ AT&T and CompTel, for example, both persuasively argued that a pay and dispute rule would be manifestly unfair to contributors, at least if the FCC does not also adhere to its current 90 day deadline for resolution of appeals.³⁰ For the reasons explained in XO’s comments and in the initial comments of AT&T, CompTel and others, the Commission should reject its proposed “pay and dispute” rule.

IV. THE COMMISSION SHOULD NOT MODIFY ITS RULES FOR RECOVERY OF USF CONTRIBUTIONS FROM END USERS

In the final section of the *FNPRM*, the Commission seeks comment on proposals to modify the way in which universal service contribution charges are passed through to their customers. Virtually every commenter joined XO in opposing the changes discussed in this section.³¹ Generally, the record shows that there is no public interest reason to change the existing regulations relating to recovery of USF contribution charges from end users. The current system is working well and, to XO’s knowledge, has not generated consumer confusion or complaints.

²⁸ *FNPRM* at ¶ 363 (proposing “pay and dispute” rule).

²⁹ *See, e.g.*, AT&T Comments at 45; CompTel Comments at 36.

³⁰ *Id.* AT&T argued for an exception to a pay and dispute rule, even if the Commission acted within 90 days, for mistaken reports of revenues or other inadvertent errors increasing a contributor’s assessments. AT&T Comments at 45.

³¹ *See* CTIA Comments at 28-29; CompTel Comments at 39; Verizon Comments at 52; ACS Comments at 24; Cincinnati Bell Comments at 23; Earthlink *et al.* Comments at 21; Level 3 Comments at 25, MegaPath Comments at 5; Peerless Networks Comments at 14; T-Mobile Comments at 12; US Cellular Comments at 49.

V. CONCLUSION

XO compliments the Commission for a thorough and much-needed reexamination of the USF contribution system. For the reasons explained above, modification of the existing revenues-based USF contribution methodology to broaden the USF revenue base is the best means to make the Fund more stable, predictable and equitable. XO accordingly urges the Commission to act swiftly to reform the contribution system as described in its comments and this reply.

Respectfully submitted,

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