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August 13, 2012

***Via Electronic Submission***

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room TW-A325  
Washington, D.C. 20554

Re: ***Notice of Oral Ex Parte Communication***  
***WCB Docket No.06-122***

Dear Ms. Dortch:

This letter is to inform you that Sprint Nextel Corporation (“Sprint”), through its representatives Charles W. McKee, Marybeth Banks, and J. Breck Blalock, met in separate meetings on August 9, 2012, with Angela Kronenberg, Wireline Legal Advisor to Commissioner Clyburn, and Priscilla Delgado Argeris, Legal Advisor to Commissioner Rosenworcel, and on August 13, 2012, with Nicholas Degani Wireline Legal Advisor to Commissioner Pai regarding the above-referenced proceeding.

Sprint reiterated its position expressed in Sprint’s Comments and Reply Comments filed in response to the FCC’s recent FNPRM on contribution<sup>1</sup> that the Commission should adopt a connections-based contribution methodology where consumers would pay the same fixed monthly charge for each type of network connection they use, regardless of the identity of the service provider(s) they choose to utilize. This approach would be competitively neutral, simple to administer, provide stability to USF funding, and easy for consumers to understand.

Sprint reiterated its position that administrative efficiency and the public interest would be best served if the FCC focuses on adoption of a new contribution methodology and not adopt “interim” measures particularly in the context of resolving pending petitions for reconsideration of the *TelePacific* matter.<sup>2</sup> In particular, the FCC should not adopt significant changes to the USF reporting or reseller certification process while in the middle of engaging in comprehensive contribution methodology reform. “Interim” measures will exacerbate competitive distortions in

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<sup>1</sup> Universal Service Contribution Methodology, Further Notice of Proposed Rulemaking, WC Docket No. 06-122, FCC 12-46 (rel. Apr. 30, 2012) (“*Contribution Methodology FNPRM*”).

<sup>2</sup> *Universal Service Contribution Methodology; Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications*, WC Docket No. 06-122, Order, DA 10-752 (WCB rel. Apr. 30, 2010).

the current system and would require the industry to make costly modifications to their systems, only to be required to revise them again to comply with the new long-term methodology the Commission will adopt.

In particular, the Commission should not require resellers to apportion facilities or services purchased from wholesale providers between services resold as telecommunications services or require resale certifications on a service-by-service basis. First, as a practical matter, any significant interim changes in contribution methodology, reporting, or facilities apportionment would require carriers to engage in costly and time consuming procurement, billing, and reporting system development and modifications. These changes would take significant development time and risk being obsolete by the time they were ready for use.

Second, the Commission sought comment within the last month on whether to require resellers to apportion facilities or services purchased from wholesale providers between services resold as telecommunications services and whether to require resale certificate on a service-by-service basis.<sup>3</sup> The record on this issue is only now being fully developed and should be considered in the context of the broader issues raised in the FNPRM.

Third, any suggestion that such changes would be a mere “clarification” of existing FCC rules grossly mischaracterizes the current state of understanding with respect to Commission rules and precedent. As other parties to this docket have recently explained, the Commission has never had a requirement that suggest that a reseller certification must be made on an individual service basis. In addition, any requirement that would require carriers to make indirect contributions based on the wholesale purchase of access circuits used to provide information services, such as broadband internet access services, to the carrier’s customers would violate Section 254 of the Act requiring equitable and nondiscriminatory contributions and the Commission’s policy of competitive neutrality.<sup>4</sup> In any event, because the rules do not explicitly require service-by-service certification, the Commission must adopt any such rule through notice and comment rulemaking.

In addition, imposing a service by service reseller certification requirement in the *TelePacific* proceeding would violate the procedural and substantive requirements of the Paperwork Reduction Act (“PRA”), and any penalties imposed for violating such a requirement would be prohibited by the PRA’s “Public Protection” clause. The FCC has long prescribed the following reseller certification in connection with Form 499 filings:

I certify under penalty of perjury that my company is purchasing service for resale in the form of telecommunications or interconnected Voice over Internet Protocol service. I also certify under penalty of perjury that either *my company* contributes

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<sup>3</sup> *Contribution Methodology FNPRM* at ¶ 170-78.

<sup>4</sup> *See TelePacific Ex Parte* at 2-3 (filed August 1, 2012); *Verizon Ex Parte* at 1-2 (filed August 6, 2012); *TelePacific Ex Parte* at 2-4 (filed July 30, 2012).

directly to the federal universal support mechanisms, or that each entity to which I provide resold telecommunications is itself an FCC Form 499 worksheet filer and a direct contributor to the federal universal service support mechanisms.<sup>5</sup>

The black letter of the certification pertains to the company making it as a whole, and not to any specific services. The Commission cannot use the *TelePacific* proceeding to convert the current entity-based certification requirement to a service-by-service one without violating the PRA. Under the PRA, the FCC must provide a 60-day notice and comment period, estimate the burden of proposed information collections, justify the need for the collection, and certify that the collection is necessary for the proper performance of agency functions.<sup>6</sup> The Director of OMB must then independently assess and determine “whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”<sup>7</sup>

Effective in 2007, the Bureau changed the Form 499 instructions to first require carriers to “obtain a signed statement from the reseller” certifying that the reseller “company contributes to the federal universal support mechanisms, or that each entity to which [it] provide[s] resold telecommunications” is a 499 filer and contributor.<sup>8</sup> The FCC sought PRA approval from OMB approval for the revised form and instructions, filing a Supporting Statement that estimated and justified the paperwork and record-keeping burden the changes imposed.<sup>9</sup> But the FCC has never estimated or justified the immense burden of a service-by-service certification – and never sought or received OMB approval for such a burden – because its regulations have never required it. The FCC’s Supporting Statement for the 2007 changes provided OMB with no estimate of the burden of imposing a service-by-service certification, nor any justification for such a burden. Nor have any of the dozen FCC submissions to OMB on this collection in the

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<sup>5</sup> See Instructions, Telecommunications Reporting Worksheet, FCC Form 499-A (2007), at 19 (emphasis added), available at <http://transition.fcc.gov/Forms/Form499-A/499a-2007.pdf>.

<sup>6</sup> 44 U.S.C. § 3506(c).

<sup>7</sup> 44 U.S.C. § 3508. The PRA regulations further explain that the purpose of the Act is “to reduce, minimize and control burdens and maximize the practical utility and public benefit” of information collected by or for the Federal government. 5 C.F.R. § 1320.1. The President last year emphasized the importance of improving regulation and the regulatory review process. See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). The requirement that telecommunications carriers prepare, submit, and maintain reseller certifications is clearly a “collection of information” subject to the PRA, because it is a requirement to obtain, solicit, or disclose facts or opinions for an agency. 44 U.S.C. § 3502(3). See also 5 C.F.R. § 1320.3(c) (defining “[c]ollection of information” to include “any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information”).

<sup>8</sup> See Instructions, Telecommunications Reporting Worksheet, FCC Form 499-A (2007), at 19, available at <http://transition.fcc.gov/Forms/Form499-A/499a-2007.pdf>.

<sup>9</sup> See FCC Supporting Statement, December 18, 2006, available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=12154&version=1>.

years since addressed this issue.<sup>10</sup> Never having been presented with any such requirement, OMB has never approved one.

The FCC recently recognized in the pending FNPRM that the regulations currently provide for entity-based certifications, and it solicited comment on the possibility of *changing* the certification requirement to a service-by-service one.<sup>11</sup> Any attempt to impose such a service-by-service certification via the *TelePacific* proceeding would be a clear procedural violation of the PRA absent notice and comment, a Commission estimation and justification of the burden of such a requirement, and subsequent OMB approval.<sup>12</sup> Moreover, as others in this proceeding have pointed out, the burden would be immense, requiring the creation and funding of record-keeping systems to trace, on a transactional level, the service-by-service use of every telecommunications service that one carrier purchases from another.<sup>13</sup> Adding yet further administrative burdens to USF, which is already the most paperwork-intensive and burdensome regulatory regime the FCC imposes, is not necessary for the proper performance of agency functions nor does it provide practical utility sufficient to pass PRA review even if properly proposed and submitted to OMB.<sup>14</sup>

Finally, if the Commission must make interim changes to the USF contribution methodology, the Commission should consider modifying the contribution methodology for Multi-Protocol Label Switching ("MPLS") enabled enterprise data services along the lines proposed by industry. Sprint and five other MPLS providers recently submitted an interim contribution proposal that would eliminate the uncertainty and competitive distortions that exist today in this growing enterprise market (attached). The proposal is straightforward and complete

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<sup>10</sup> See OMB Control Number History for Control Number 3060-0855, available at <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3060-0855>.

<sup>11</sup> *Contribution Methodology FNPRM* at ¶ 168-171.

<sup>12</sup> See 44 U.S.C. § 3506(c).

<sup>13</sup> See, e.g., Comments of AT&T Services, Inc. at 32 (filed July 9, 2012) (explaining that providing service-by-service circuit-specific reseller certifications is contrary to industry practice, noting that many wholesalers will not accept such certifications, and further arguing that the administrative burden of doing so would be immense for both resellers and wholesalers); Comments of Verizon at 17-19 (filed July 9, 2012) (arguing that requiring service-by-service circuit-specific reseller certifications is contrary to FCC precedent, contrary to industry practice, and would be extremely burdensome); Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications at 10 (filed July 6, 2010) ("Requiring TelePacific to contribute to USF indirectly on a circuit-by-circuit basis is inconsistent with Commission rules and FCC Form 499 Instructions that classify revenues as wholesale on an entity-by-entity basis. There is nothing in the FCC's universal service orders or rules that even suggests this determination must be made on an individual service basis."); Comments of the Coalition for Fairness and Restraint in USAC Fund Administration at 7 (filed July 6, 2010) ("Nothing in the FCC's universal service orders or rules requires this determination to be made on an individual service-by-service basis. To the contrary, it would be virtually impossible for wholesale carriers to classify all of their revenues based on the end user services that their reseller customers may choose to provide.").

<sup>14</sup> See 44 U.S.C. § 3508 (establishing necessity and practical-utility standards).

and already has the support of other MPLS providers. Adoption of this proposal as an interim mechanism would provide the Commission with a significantly broader base on which to base USF contributions without prejudicing the Commission's future deliberations over the contribution methodology.

Pursuant to Section 1.1206 of the Commission's rules, this letter is being electronically filed with your office. Please let us know if you have any questions regarding this filing.

Respectfully submitted,

/s/ J. Breck Blalock  
J. Breck Blalock  
Director, Government Affairs

cc: (via e-mail)  
Angela Kronenberg  
Priscilla Delgado Argeris  
Nicholas Degani  
Charles W. McKee

March 29, 2012

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20534

**Re: Universal Service Contribution Methodology, WC Docket No. 06-122**

Dear Ms. Dortch:

On March 27, 2012 Sheba Chacko of BT Americas, Tiki Gaugler and Lisa Youngers of XO Communications, Ivana Kriznic of Orange Business Services, Marybeth Banks of Sprint Nextel Corporation, Michele Farquhar of Hogan Lovells representing NTT America, Jim Pachulski of the TechNet Law Group, and Chris Miller and Maggie McCready of Verizon met with Vickie Robinson, Ernesto Beckford, Valerie Hill and Chin Yoo of the Wireline Competition Bureau. The purpose of the meeting was to discuss universal service contribution reform and, more specifically, the group's proposal for contribution obligations related to Multi-Protocol Label Switching (MPLS) enabled enterprise data services. The details of the proposal are contained in the attachment.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's Rules. Should you have any questions, please contact the undersigned.

*/s/ Marybeth Banks*  
Marybeth Banks  
Director – Government Affairs  
Sprint Nextel Corporation

*/s/ Sheba Chacko*  
Sheba Chacko  
Senior Counsel  
BT Global Services

*/s/ Michele Farquhar*  
Michele Farquhar  
Counsel  
NTT, America Inc.

*/s/ Tiki Gaugler*  
Tiki Gaugler  
Senior Attorney  
XO Communications

*/s/ Ivana Kriznic*  
Ivana Kriznic  
Regulatory Counsel  
Orange Business Services

*/s/ Maggie McCready*  
Maggie McCready  
Vice president – Federal Regulatory  
Verizon

Attachment

cc (e-mail): Carol Matthey, Rebekah Goodheart, Trent Harkrader, Vickie Robinson, Ernesto Beckford, Chin Yoo, and Valerie Hill

## **Proposal for USF Contributions on MPLS-Enabled Services**

### ***Executive Summary***

There is longstanding confusion among customers, between service providers, and at the Commission regarding the potential universal service fund (USF) contribution obligations of companies offering enterprise data services relying on Multi-Protocol Label Switching (MPLS). For the most part, MPLS-enabled service providers consider all or some portion of these services to be non-assessable information services. But there are wide variations in the USF contributions for individual services. Some providers treat all revenues associated with MPLS-enabled services as information service revenue not subject to USF contributions. Other providers, on the other hand, identify transmission services provided in conjunction with MPLS-enabled services and make USF contributions based on revenues derived from those services. These MPLS-based universal service contribution issues have been pending, but unresolved, since at least 2004 when the Commission opened its *IP-Enabled Services* docket. As more and more services migrate to MPLS platforms (away from, for example, traditional private line services) and the USF contribution factor continues to climb—reaching nearly 18 percent in the first quarter of this year—the time is ripe to resolve this uncertainty. Resolution of these USF contribution issues is particularly appropriate as the Commission seeks ways to shore up the existing universal service contribution base, which continues to erode, and to repurpose the USF to support broadband services.

The diverse group of communications services providers identified below<sup>1</sup> has come together over the last several months and developed a compromise, interim proposal to address

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<sup>1</sup> British Telecom, NTT America, Orange Business Services, Sprint Nextel Corporation, Verizon, and XO Communications.

MPLS contribution prospectively within the current revenue-based contribution system. This Proposal could also be adopted as a transition to the contribution reform process. The group proposes that revenues associated with the access transmission components of all MPLS-enabled services be imputed on a uniform basis and made subject to USF contribution obligations. If adopted, this Proposal would accomplish two important goals: (1) resolve the uncertainty surrounding MPLS universal service contribution obligations that confuses customers and frustrates providers by creating an unfair competitive environment; and (2) stabilize a growing component of the USF contribution base, allowing the Commission to better evaluate the long-term viability of a revenue-based system.

Under this Proposal, the Commission would establish MPLS Assessable Revenue Component (MARC) proxies for imputation purposes. These MARC proxies would be calculated and published in a uniform rate schedule based on the access transmission facilities connecting the customer to the provider's MPLS network. Individual providers of MPLS-enabled services would use the Commission's MARC proxy schedule to determine the imputed assessable revenues for the access transmission components they use to provide MPLS-enabled services to their customers. These calculations would establish their USF contribution base for these services that would be subject to the USF contribution factor.

By establishing a uniform baseline for USF contributions, the proposed MARC proxies would ensure that all providers make USF contributions for MPLS-enabled services on a like basis on a portion of the integrated revenues. In addition, the uniform USF contribution bases established using the proposed MARC proxies would be subject to the same USF contribution factor as other USF assessable services. This would allow overall USF contributions for MPLS-enabled services to fluctuate as the USF contribution factor changes.

As described in greater detail below, this Proposal would apply to all MPLS-enabled services and would not depend on the Commission's regulatory classification of any MPLS-enabled service as an information service or a telecommunications service. The Commission has ample legal authority to seek comment on this Proposal and adopt it as a prospective rule in the ongoing *2006 Contribution Order*<sup>2</sup> or *IP Enabled Services*<sup>3</sup> dockets.

### ***Background***

MPLS is not itself a service, but rather a technology used to provide a wide range of services. MPLS-based services may enable communications between networks relying on different physical infrastructures and different protocols (*e.g.*, ATM, Ethernet, Frame Relay, or IP), supporting a seamless, managed flow of data packets between different end-user locations. MPLS-enabled services offer customers class of service (COS) and quality of service (QOS) capabilities utilizing techniques such as traffic classification and prioritization at the customers' premises or within the providers' networks to ensure proper performance of mission-critical versus best-efforts customer applications. MPLS-enabled managed services may also offer COS and QOS capabilities by forwarding packets up to a maximum data rate and discarding packets exceeding the maximum data rate. These COS and QOS capabilities change the form and/or content of information as sent and received. Moreover, they are offered and sold to customers for the benefit of customers and not to enable providers to manage their telecommunications networks. Real-time monitoring, performance and reporting information and tools are also integral parts of MPLS-enabled managed service offerings. These information tools allow

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<sup>2</sup> *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) ("*2006 Contribution Order*"), *aff'd*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) ("*Vonage Holdings*").

<sup>3</sup> *IP-Enabled Services*, 19 FCC Rcd 4863 (2004) ("*IP-Enabled Services NPRM*").

customers to ensure their mission-critical applications are performing as required and to pinpoint in real-time when and why their Virtual Private Networks underperform. MPLS technology may also be used in multicasting services, which allow for storage and retrieval of content.

As is evident from this discussion, MPLS technology is implemented in myriad services for which there are no clear rules regarding USF contribution obligations. In the absence of clear rules, there is an uneven playing field among competing service providers. Some providers make USF contributions on the access offered on a stand-alone basis or on other transmission components of their MPLS-enabled services. These providers are at a disadvantage in competing against providers (including systems integrators) that do not make similar USF contributions on their MPLS-enabled services. In turn, the disparate treatment confuses customers and distorts the market.

Moreover, it is difficult for providers to negotiate long-term contracts for MPLS-enabled services without a clear understanding of how USF contributions will be assessed on MPLS-enabled services in the future. Without certainty regarding their contribution obligations, providers must ensure the terms of their contracts provide flexibility to implement whatever USF contribution mechanism may be imposed for MPLS-enabled services prospectively.

### ***Details of the Proposal***

Under the Proposal, the Commission would direct that, prospectively, all providers make USF contributions based on proxies for the access transmission components of their MPLS-enabled services. Providers would (1) identify the speed of each access transmission component of their MPLS-enabled services on a customer-by-customer basis; (2) utilize the appropriate MARC proxy based on the speed of each access transmission component to determine their USF contribution base; and (3) apply the current USF factor to that USF contribution base. The use of

the appropriate MARC proxy to determine the USF contribution base would be a safe harbor floor; individual carriers could elect to use their actual access transmission rates to determine their USF contribution base provided those rates yield a larger USF contribution base than the MARC proxies.

The Proposal involves three basic steps:

1. First, providers of MPLS-enabled services would identify the quantity and speed of the access transmission components of the MPLS-enabled services they provide to their customers. USF contributions, however, would not be required on backbone facilities that are part of MPLS-enabled services because backbone facilities are not dedicated to any individual customer or service. For example, if a customer purchases an MPLS-enabled service that connects three customer locations, each with one 1.5 Mbps access transmission service, and a fourth customer location with 45 Mbps access transmission service, a provider would include the three 1.5 Mbps access transmission services and the one 45 Mbps access transmission service in determining its USF contribution base.

2. Second, providers would utilize the appropriate MARC proxy for each of the access transmission components of their MPLS-enabled services to determine their USF revenue contribution base. The Commission would establish the MARC proxies based on access rates found in Tariff No. 5 of the National Exchange Carrier Association (“NECA Tariff”), which provides a publicly-available source for access transmission rates. For purposes of establishing MARC proxies, the NECA Tariff access rates for Rate Band 1 would be used because those rates are associated with the largest and most cost efficient NECA companies. These MARC proxies would be used only for purposes of establishing uniform proxies for assessable revenue and are

not intended to necessarily reflect current market prices for any particular access transmission service.

The MARC proxies would be calculated using the current NECA Tariff rates for Ethernet Transmission Services (ETS) because these rates reflect the current forward looking access transmission technology and would include rate elements depicting the standard configuration of those ETS facilities for MPLS-enabled services. The three ETS rate elements included in the proposed calculation of the MARC proxies are the Channel Termination, the ETS Basic Port, and the ETS Extended Ethernet Virtual Circuit (E-EVC). In the standard MPLS-enabled service configuration using ETS facilities, the customer location is connected to the MPLS network using these components. This configuration is also consistent with the requirements of the NECA Tariff terms and conditions.

In order to simplify matters, the rates for several individual ETS speeds are averaged together to provide MARC proxies applicable to bands of speeds (*e.g.*, up to 5 Mbps, over 5 Mbps and up to 10 Mbps, etc.). These MARC proxy bands are technology neutral and would be used to determine the USF contribution bases for legacy access transmission services, such as DS1 services (1.5 Mbps) and OC3 services (135 Mbps). Attachment A illustrates the calculation of the MARC proxies.<sup>4</sup>

3. Third, after determining the USF contribution base for their MPLS-enabled services, providers would then apply the current USF contribution factor to that base. This calculation would yield the USF contributions due for a provider's MPLS-enabled services.

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<sup>4</sup> The current NECA Tariff includes Ethernet speeds up to 1 Gbps. In order to accommodate higher speeds, the MARC Proxies include an extrapolated rate for 10 Gbps. This extrapolation was done by applying a statistical linear regression formula to the lower Ethernet speeds.

Under the Proposal, the use of MARC proxies to determine the USF contribution base for MPLS-enabled services would be a safe harbor floor. Individual providers could elect to use their own access transmission rates to determine the USF contribution base for their MPLS-enabled services for each speed band only if their rates yield a larger USF contribution base than the corresponding MARC proxies for each speed band. Providers electing to use their own access transmission rates would bear the burden of proving their USF contribution bases for MPLS-enabled services exceed the safe harbor floor.

The current reseller certification process would continue to operate under the Proposal. Regardless of whether a provider self provisioned (to itself or an affiliate) or purchased the access transmission component as a wholesale input from another carrier, the MPLS-enabled service provider would be obligated to contribute under the Proposal and could not claim its MPLS-enabled service was an integrated information service not subject to USF contributions. Therefore, providers that resell access transmission components purchased from facilities-based carriers in connection with their MPLS-enabled services would make USF contributions using the MARC proxies just as any other provider of MPLS-enabled services. These resellers would be eligible to certify to the underlying facilities-based carrier that they make USF contributions on the access transmission components. Facilities-based carriers would not be required to make USF contributions on the access transmission services provided to resellers that so certify, as is the case today.

### ***The Benefits of the Proposal***

Adoption of the Proposal would provide significant benefits that support the public interest. It would eliminate the uncertainty that now surrounds the USF contribution obligations of providers of MPLS-enabled services. By directing that all providers make USF contributions

based on the access transmission components of their MPLS-enabled services, the Commission would provide much-needed clear guidance to the industry.

The Proposal creates a structure for ensuring that USF contributions are competitively neutral. By requiring all providers to use the same uniform set of MARC proxies to impute assessable revenues for the access transmission components of MPLS-enabled services, the Commission would level the playing field and eliminate competitive disparities among USF contributors. Customer confusion would be minimized by supporting a uniform USF contribution methodology for all providers of MPLS-enabled services. And with knowledge of the ground rules for USF contributions, providers will be better able to negotiate long term contracts for MPLS-enabled services.

Moreover, the use of NECA Tariff rates to calculate MARC proxies for the access transmission components of MPLS-enabled services is transparent and reasonable. Current NECA Tariff rates are publicly available through the Commission's electronic tariff filing system. In addition, NECA Tariff rates are regulated and are therefore considered just and reasonable. Using these NECA Tariff rates ensures that the MARC proxies for MPLS-enabled services are likewise just and reasonable.

NECA Tariff rates for ETS cover a wide range of access transmission speeds that are commonly used as access transmission components of MPLS-enabled services. This wide range minimizes the need to estimate or extrapolate MARC proxies for other speeds.

Finally, the Commission can easily use NECA Tariff rates to publish a schedule of MARC proxies for determining USF contribution bases on MPLS-enabled services. The Commission can also update such a schedule periodically to reflect changes in the underlying NECA Tariff rates.

### ***The Commission's Legal Authority to Adopt the Proposal***

The Commission could find it has the legal authority to adopt the Proposal without determining the regulatory classification of any individual MPLS-enabled services. For example, in its *VoIP USF Order*, the Commission declined to classify interconnected VoIP as either a “telecommunications service” or an “information service.” However, based on its Section 254(d) permissive authority, it established a prospective contribution requirement:

The Commission has not yet classified interconnected VoIP services as “telecommunications services” or “information services” under the definitions of the Act. Again here, we do not classify these services. To the extent interconnected VoIP services are telecommunications services, they are of course subject to the mandatory contribution requirement of section 254(d). Absent our final decision classifying interconnected VoIP services, we analyze the issues addressed in this Order under our permissive authority pursuant to section 254(d) . . . .<sup>5</sup>

The Commission could take the same approach here by finding it has permissive authority to require USF contributions on the access transmission component of MPLS-enabled services, on a prospective basis, without making any determination of their regulatory status of such services.

The Commission could find that its authority to impose USF contribution obligations for purposes of promoting universal service stems from Section 254(d) of the Act. Section 254(d)'s first sentence – the source of the Commission's “mandatory authority” – provides that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the . . . mechanisms established by the Commission to preserve and advance universal service.”<sup>6</sup> Section 254(d)'s third sentence – the

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<sup>5</sup> See *2006 Contribution Order*, 21 FCC Rcd at 7537 ¶ 35. In the *2006 Contribution Order*, the Commission also relied, in the alternative, on its ancillary jurisdiction to assess USF on VoIP revenues to the extent such offerings were telecommunications revenues. See *id.* Because the D.C. Circuit subsequently upheld the Commission's permissive authority approach, there is no need for the Commission to invoke its ancillary jurisdiction here.

<sup>6</sup> 47 U.S.C. § 254(d).

source of its “permissive authority” – states that the Commission may require “[a]ny other provider of interstate telecommunications” to contribute to universal service, “if the public interest so requires.”<sup>7</sup>

The Commission could determine it has the “permissive authority” to impose USF contribution obligations on the access transmission component of MPLS-enabled services under the same theory set out for interconnected VoIP services in the *2006 Contribution Order* and upheld by the D.C. Circuit in 2007.<sup>8</sup> There, the Commission found that the requirements of Section 254(d)’s permissive authority language applied in the event interconnected VoIP offerings were integrated information services because: (1) entities supplying interconnected VoIP service provided interstate telecommunications, and (2) assessment of USF on their revenues was in the public interest.<sup>9</sup> The Commission could make the same findings here for MPLS-enabled services.

MPLS-Enabled Services Provide Interstate Telecommunications. In the *2006 Contribution Order*, the Commission explained that even where an entity “offered” an integrated information service to the public, it could still be understood to “provide” an input to that service – namely, “interstate telecommunications”:

Common definitions of the term “provide” suggest that we should consider the meaning of “provide” from a supply side, *i.e.*, from the provider’s point of view. For example, Black’s Law Dictionary defines “provide” to mean “[t]o make,

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<sup>7</sup> *Id.*

<sup>8</sup> *2006 Contribution Order*, 21 FCC Rcd at 7538-41 ¶¶ 38-45. To the extent any MPLS-enabled services qualified as telecommunications or telecommunications services, the Commission would have mandatory authority to adopt the Proposal under Section 254(d)’s first sentence. Thus, as in the *2006 Contribution Order*, the Commission need not affirmatively classify MPLS-enabled services to apply the USF contribution obligation. *Vonage Holdings*, 489 F.3d at 1239-42.

<sup>9</sup> *Id.* at 7538-41 ¶¶ 40-45.

procure, or furnish for future use, prepare. To supply; to afford; to contribute.” Transmission is an input into the finished service “offered” to the customer. But from the interconnected VoIP provider’s point of view, we believe that the provider “provides” more than just a finished service. We believe that it is reasonable to conclude that a provider “furnishes” or “supplies” components of a service, in this case, transmission.<sup>10</sup>

Under this approach, entities offering interconnected VoIP services also “provided” the underlying telecommunications – even if an interconnected VoIP service was properly deemed an information service with no distinct telecommunications service component.<sup>11</sup> The Commission also found that interconnected VoIP services were jurisdictionally mixed, involving at least some interstate traffic.<sup>12</sup> In 2007, the D.C. Circuit ratified this analysis.<sup>13</sup>

The Commission could apply this framework to MPLS-enabled services. First, like interconnected VoIP services, the Commission could find that MPLS-enabled services incorporate an access transmission component whether or not the services are considered

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<sup>10</sup> *Id.* at 7538-39 ¶ 40.

<sup>11</sup> *See, e.g., id.* at 7539 ¶ 41 (identifying telecommunications underlying interconnected VoIP services). Indeed, the Commission made clear that a VoIP provider “provided” telecommunications even if it did not provide the underlying connectivity – the mere provision of the VoIP service constituted the provision of transmission, or telecommunications. *See id.* at 7539-40 ¶ 41.

<sup>12</sup> *See id.* at 7540 ¶ 42 (“the Commission previously determined that Vonage’s interconnected VoIP service is a jurisdictionally mixed service in which part of the service is interstate in nature. We believe that other interconnected VoIP services similarly are jurisdictionally mixed and thus are subject to USF contributions on interstate and international revenues. For these reasons, we conclude that interconnected VoIP providers are ‘providers of interstate telecommunications’ under section 254(d)”). *See also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 ¶ 16 (2005), where, pursuant to its new regulatory framework for broadband Internet access services offered by wireline facilities-based providers, the Commission found wireline broadband Internet access services to be “an integrated package of transmission and information processing capabilities from the provider, and the identity of the owner of the transmission does not affect the nature of the service to the end user.”

<sup>13</sup> *See Vonage Holdings Corp.*, 489 F.3d at 1239-41.

integrated information services.<sup>14</sup> Second, like companies offering interconnected VoIP services, the Commission could find that companies offering MPLS-enabled services could properly be understood to “provide” the underlying telecommunications, even if they are only “offering” integrated information services. As with interconnected VoIP services, the transmission is an element of the finished service. Finally, like interconnected VoIP services, the Commission could find that MPLS-enabled services are likely to involve significant interstate communications, giving rise to revenues suitable for USF assessment.<sup>15</sup> Thus, no classification of MPLS-enabled services is necessary.

Imposing Interim USF Contribution Obligations on MPLS-Enabled Services Based on a Compromise Approach Would Serve The Public Interest. The Commission’s permissive authority may only be exercised where, as here, the public interest so requires. As explained above, the USF contribution base is under substantial pressure as the system struggles to support existing programs while preparing for a transition to support broadband services.<sup>16</sup> At the same time, the customers and the industry have faced and continue to face significant uncertainty over the proper USF treatment of a fast-growing sector of the communications marketplace. Thus, the prospective exercise of the Commission’s permissive authority to impose USF contribution

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<sup>14</sup> Indeed, the very definition of “information service” directs that the term only applies to offerings provided “via telecommunications.” 47 U.S.C. § 153(24).

<sup>15</sup> Consistent with the Commission’s precedent regarding private-line services, to the extent that more than ten percent of the traffic traversing the access transmission component of an MPLS-enabled service is jurisdictionally interstate, all of the MARC proxies associated with that access transmission component should be deemed interstate for purposes of USF contribution under the Commission’s rules. See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 at 9173 ¶ 778 (1997) (subsequent history omitted) (“*First Universal Service Order*”) (“under the Commission’s rules, if over ten percent of the traffic carried over a private or WATS line is interstate, then the revenues and costs generated by the entire line are classified as interstate”).

<sup>16</sup> See generally *Connect America Fund*, 26 FCC Rcd 4554 (2011).

obligations on the access transmission component of MPLS-enabled services would promote the public interest by: (1) stabilizing one component of the universal service support base;<sup>17</sup> (2) removing the competitive disparity that currently exists between providers of MPLS-enabled services; (3) reducing a significant source of regulatory uncertainty for customers and providers; and (4) avoiding the protracted litigation that would result from attempting to impose contribution obligations retroactively on integrated revenues of services that providers have appropriately reported as not assessable under existing law. Likewise, prospective adoption of the Proposal would ensure that the Universal Service Administration Company (USAC) would not be required to refund any contributions that providers have made based on historical MPLS-related revenues.

It is important that the treatment of MPLS-enabled services be addressed in the context of an industry-wide rulemaking, not via a party-specific appeal, declaratory ruling, or other narrow procedural vehicle. The Commission need not open a new proceeding, however, to do so.<sup>18</sup> The Commission has had a proceeding open for several years proposing broad reform of the universal service contribution methodology.<sup>19</sup> In addition, in the *IP-Enabled Services* proceeding, the Commission acknowledged the capabilities of MPLS<sup>20</sup> and sought comment broadly on the

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<sup>17</sup> See, e.g., CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) at 149 (recommending that the FCC broaden the universal service contribution base).

<sup>18</sup> Consistent with the APA, the Commission should provide notice and opportunity for comment on this Proposal, such as by issuing a public notice published in the Federal Register. This notice should include an initial Regulatory Flexibility Act (“RFA”) analysis. See, e.g., *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 40-43 (D.C. Cir. 2005) (FCC may promulgate a legislative rule after seeking comment by public notice in an open rulemaking docket, as long as it publishes the proposal in the Federal Register and complies with the RFA).

<sup>19</sup> See, e.g., *2006 Contribution Order*, 21 FCC Rcd at 7524-25 ¶ 12.

<sup>20</sup> *IP-Enabled Services NPRM*, 19 FCC Rcd at 4874-75 ¶ 11 & n.42.

appropriate contribution obligations of IP-enabled service providers.<sup>21</sup> Thus, the Commission should seek comment on, and adopt, this Proposal in one or both of these open proceedings. In addition, it could incorporate this Proposal into a comprehensive Notice of Proposed Rulemaking addressing universal service and intercarrier compensation reform.

Resolving the USF contribution obligations of MPLS-enabled services in a rulemaking proceeding would properly recognize the industry-wide scope of issues surrounding MPLS-enabled services. A rulemaking approach would ensure that any result reflects the input of all interested parties, provide clarity to all stakeholders, and place providers on a level playing field.<sup>22</sup> Further, a rulemaking proceeding would allow the Commission to require a reasonable, uniform level of USF contribution obligations upon all MPLS-enabled services even though many such services constitute integrated information services. An order issued in a rulemaking proceeding at the Commission level also would help to ensure that the new and novel issues raised in this matter are addressed by the Commission, not one of its Bureaus.<sup>23</sup>

Finally, and perhaps most significantly, prospective adoption of the Proposal would avoid the massive and industry-wide disruptions that would likely result from any attempt to impose retroactive assessment of USF on revenues relating to MPLS-enabled services. Retroactive application of USF contribution obligations would create an administrative nightmare and would be unfair to the entities that have been providing and purchasing these offerings under the well-

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<sup>21</sup> *Id.* at 4905-09 ¶¶ 63-66.

<sup>22</sup> 47 U.S.C. § 254(d) (contributions must be equitable and non-discriminatory); *id.* at § 254(b)(7) (FCC may adopt additional universal service principles); *First Universal Service Order*, 12 FCC Rcd at 8801 ¶ 47 (adopting competitive neutrality principle).

<sup>23</sup> 47 C.F.R. § 0.291(a)(2) (WCB is not permitted to “act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines”).

founded view that they are information services. In order to “true up” past USF assessments, the Commission would have to re-engineer quarterly contribution factors (potentially back many years) as if the revenues from these new services had been included the assessable base. This would require industry-wide Form 499 restatements involving many billions of dollars in aggregate revenue to apply a lower factor over a larger contribution base. Such restatements could well be impossible to develop, given the age of the relevant accounting and product data, and there is no reason to believe that for many individual providers that the net effect of this process would actually increase contributions. In sum, imposing retroactive contribution obligations would require the Commission and USAC to administer and monitor a massive, industry-wide effort reaching back years to redistribute USF contributions. The resources that such a process would consume are unimaginable and unwarranted.<sup>24</sup>

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<sup>24</sup> The XO audit, for example, was just one audit of one contributor for one year. That audit took more than two years to complete, ultimately involving thousands of hours, dozens of people, and multiple legal, engineering, and other experts – presumably for both XO and USAC. For this reason, as noted above, the Proposal also would not require USAC to refund any contributions based on historical MPLS-related revenues, and would not require providers to pass on such refunds to past customers of their MPLS-enabled services.

Attachment A

**MARC Proxies**

	<u>2 Mbps</u>	<u>5 Mbps</u>	<u>10 Mbps</u>	<u>20 Mbps</u>	<u>50 Mbps</u>	<u>100 Mbps</u>	<u>250 Mbps</u>	<u>500 Mbps</u>	<u>750 Mbps</u>	<u>1 Gbps</u>	<u>10 Gbps</u> Extrapolated*
ETS Channel Termination (customer premises more than 300 feet from	\$ 110.20	\$ 111.42	\$ 113.00	\$ 127.84	\$ 149.98	\$ 160.25	\$ 227.13	\$ 300.47	\$ 345.63	\$ 400.62	\$ 512.24
ETS Extended Ethernet Virtual Connections (E- EVCs)	\$ 15.80	\$ 20.03	\$ 36.06	\$ 72.11	\$ 112.17	\$ 180.28	\$ 375.25	\$ 580.90	\$ 790.00	\$ 1,001.55	\$ 1,377.05
ETS Basic Port, per month per termination	\$ 55.30	\$ 61.22	\$ 67.60	\$ 75.11	\$ 82.63	\$ 90.14	\$ 124.43	\$ 157.74	\$ 199.48	\$ 240.37	\$ 307.80
<b>Calculation of MARC proxies (ETS Channel Termination + ETS E-EVC + ETS Basic Port)</b>	<b>\$ 181.30</b>	<b>\$ 192.67</b>	<b>\$ 216.66</b>	<b>\$ 275.06</b>	<b>\$ 344.78</b>	<b>\$ 430.67</b>	<b>\$ 726.81</b>	<b>\$ 1,039.11</b>	<b>\$ 1,335.11</b>	<b>\$ 1,642.54</b>	<b>\$ 2,197.09</b>

<b>MARC proxies, by band</b>		
<b>Up to 5Mbps</b>	<b>\$ 186.99</b>	average of 2Mbps and 5Mbps
<b>Over 5Mbps up to 10Mbps</b>	<b>\$ 204.67</b>	average of 5Mbps and 10Mbps
<b>Over 10Mbps up to 100Mbps</b>	<b>\$ 316.79</b>	average of 10 Mbps, 20Mbps, 50Mbps and 100Mbps
<b>Over 100Mbps up to 500Mbps</b>	<b>\$ 732.20</b>	average of 100 Mbps, 250Mbps and 500Mbps
<b>Over 500Mbps up to 1Gbps</b>	<b>\$ 1,338.92</b>	average of 500 Mbps, 750Mbps and 1Gbps
<b>Over 1Gbps up to 10Gbps</b>	<b>\$ 1,919.82</b>	average of 1Gbps and 10Gbps
<b>Over 10 Gbps</b>	<b>\$ 2,197.09</b>	10Gbps

NOTE: NECA tariff rates are for Rate Band 1

\* Extrapolation performed by applying statistical linear regression formula to NECA Tariff ETS rates for 10Mbps, 100Mbps and 1Gbps

	Extrapolation			
	1 <u>10M</u>	2 <u>100M</u>	3 <u>1G</u>	4 <u>10G</u>
ETS CT	\$ 113.00	\$ 160.25	\$ 400.62	\$ 512.24
ETS E-EVC	\$ 36.06	\$ 180.28	\$ 1,001.55	\$ 1,377.05
ETS Port	\$ 67.60	\$ 90.14	\$ 240.37	\$ 307.80
Proxy	\$ 216.66	\$ 430.67	\$ 1,642.54	\$ 2,197.09