

September 4, 2012

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 06-122 - USAC Guidance Order Ex Parte

Dear Ms. Dortch:

On August 31, 2012, on behalf of U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”), I spoke with Vickie Robinson of the Wireline Competition Bureau concerning the above-referenced proceeding. I explained that TelePacific supports Verizon’s request¹ that the Commission continue to permit the industry to use the existing entity reseller certification process unless and until it adopts, through rulemaking, a service-specific certification rule that provides the industry sufficient guidance to implement such a new certification.

Frontier and Windstream also have urged the Commission to “determine whether to impose an apportionment requirement, if at all, only within the context of broader contribution reform after considering all comments filed in response to the NPRM and only with clear guidance to carriers and sufficient lead time for carriers to make any necessary systems changes.”² Similarly, Sprint has argued that the Commission cannot adopt a “new requirement that providers give resale certifications to wholesale carriers on a service-by-service basis” in the TelePacific proceeding based on the Commission’s course of conduct and the Paperwork Reduction Act requirements.³

TelePacific, Verizon, XO, and Sprint have all argued that there is no existing rule that requires reseller certifications on a service-by-service basis.⁴ In this letter, TelePacific summarizes the history of the reseller exemption and Form 499 instructions to show that neither the 1997 *Universal Service Order*, nor the original Form 457

¹ See Verizon Notice of Oral Ex Parte Communication, WC Docket No. 06-122 (filed Aug. 30, 2012).

² See Frontier et al. Ex Parte Communication, WC Docket No. 06-122 (filed Aug. 20, 2012)

³ See Sprint Nextel Corporation Notices of Oral Ex Parte Communication, WC Docket No. 06-122 (filed Aug. 13 & Aug. 29, 2012).

⁴ See *id.* See also, U.S. TelePacific Corp. d/b/a TelePacific Communications Notice of Ex Parte, WC Docket No. 06-122 (filed July 30, 2012); Verizon Notices of Ex Parte, WC Docket No. 06-122 (filed Aug. 1, 3, 6, and 14, 2012); XO Communications Services, LLC Notices of Ex Parte Presentations, WC Docket No. 06-122 (filed Aug. 6, 2012).

Beijing
Boston
Frankfurt
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T +1.202.373.6000
F +1.202.373.6001
bingham.com

worksheet instructions, nor the current Form 499 worksheet instructions require reseller certifications on a service-by-service basis. Therefore, TelePacific urges the Commission not to adopt, for the first time, a requirement that carriers provide resale exemption certificates on a service-by-service basis. The Commission should address service-by-service certifications only within the context of broader contribution reform and only with clear guidance to carriers and sufficient lead time for carriers to make systems changes.

In the *Universal Service Order*, the Commission adopted a contribution methodology based on end user revenues. The Commission recognized that carriers providing telecommunications services on a wholesale basis would not make contributions to USF on the sales of such services, even though they fall under the “mandatory” contribution category of telecommunications services.⁵ Although the Commission adopted the end user methodology to avoid the “double counting problem,” it did not state that all telecommunications service revenues must be subject to contribution once.⁶ The Commission concluded that:

[USF] contributions will be based on revenues derived from end users for telecommunications and telecommunications service, or “retail revenues”...End user revenues would also include revenues derived from other carriers *when such carriers utilize telecommunications services for their own internal uses* because such carriers would be end users for those services. This methodology is both competitively neutral and relatively easy to administer.⁷

The Commission did not direct wholesale carriers to treat any other category of revenue from other carriers as end user revenue. Under the construction principle of *expressio unius est exclusio alterius* -- the mention of one thing implies the exclusion of another, the fact that the Commission classified one type of revenue from other carriers as end

⁵ Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, ¶ 846 (1997) (“*Universal Service Order*”).

⁶ In dicta, the Bureau claimed that the *Second Reconsideration Order* clarified the distinction between end user and carrier’s carrier revenues. Federal-State Joint Board on Universal Service Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc., Order, 24 FCC Rcd 10824, ¶ 15 (2009) (“the contribution mechanism should operate in a competitively neutral manner by preventing double counting of revenue for contribution, but at the same time ensure that such revenue was subject to contribution once”). Because the *NECA Order* did not acknowledge, let alone justify, any departure from the *Universal Service Order*’s classification of carrier’s carrier revenues as end user revenues only when the reseller used the purchased services for its own internal use, the Bureau was incorrect to conclude that the Commission intended all telecommunications revenue to be “subject to contribution once.” See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

⁷ *Universal Service Order*, at ¶ 844 (emphasis added).

user revenue but not other types is interpreted as the Commission's intention to exclude other types of carrier's carrier revenue from the category of end user revenue.

The first form used to report revenues subject to USF assessment, Form 457, was attached to the *NECA Order*.⁸ Although the *NECA Order* referenced the form in two paragraphs, it included no substantive discussion of it.⁹ With respect to reseller revenues, the Form 457 instructions provided that:

Revenues from services provided to resellers will be excluded from the funding base for determining universal service contributions of the underlying contributor. For this purpose, a reseller is a telecommunications service provider that 1) incorporates the purchased telecommunications services into its own offerings and 2) can reasonably be expected to contribute to support universal service based on revenues from those offerings.¹⁰

This language does not explicitly require that each purchased service be incorporated into a resold service that is subject to USF contribution. To the contrary, language in the following paragraph confirms that determination of reseller status is made based on whether the reseller as an entity is a USF contributor:

An underlying contributor should have documented procedures to ensure that it reports as revenues from resellers only revenues from *entities* that reasonably would be expected to contribute to support universal service.¹¹

The only "carriers" the Form 457 instructions directed contributors *not* to treat as resellers were "international only" and "intrastate only" carriers who are exempt from USF contributions altogether.¹²

The current Form 499 Instructions likewise do not require resellers to certify that they incorporate each individual purchased telecommunications service into "telecommunications" on which they contribute directly. Rather, the instructions provide that a carrier may classify revenues as revenue from other contributors if they "are revenues from services provided by underlying carriers to other *entities* that currently are contributors to universal service support mechanisms and that are resold in the form of telecommunications."¹³ Like the original Form 457, the current instructions retain the "entity" language quoted above and provide that resellers may certify exemption on a company-wide basis:

⁸ Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, 12 FCC Rcd 18400 (1997) ("*NECA Order*").

⁹ See *NECA Order*, at ¶¶ 43, 80.

¹⁰ *NECA Order*, at 18508.

¹¹ *Id.* (emphasis added).

¹² *Id.*

¹³ 2012 Form 499-A Instructions, at 21 (emphasis added).

I certify under penalty of perjury that the company is purchasing service for resale in the form of U.S. telecommunications or interconnected Voice over Internet Protocol service. I also certify under penalty of perjury that either the company contributes directly to the federal universal support mechanisms, or that each entity to which the company provides resold telecommunications is itself an FCC Form 499 worksheet filer and a direct contributor to the federal universal service support mechanisms.¹⁴

And like the Form 457 Instructions, the only “carrier” revenue the instructions direct contributors *not* to treat as resale are revenues from “exempt entities” including “international only,” “intrastate only,” and providers that meet the *de minimis* threshold.¹⁵

In addition, in 2007, the FCC removed any ambiguity that may have existed in the Form 499 instructions about providers being able to provide an entity-wide certification. A specific reference to “and not as information services” that had been in prior versions of the 2003-2006 instructions was removed in 2007. The earlier versions of the instructions provided:

The filer should verify that each reseller will: 1) resell the filer’s services in the form of telecommunications [*and not as information services*]; and 2) contribute directly to the federal universal service support mechanisms.¹⁶

By deleting the reference to “and not as information services,” any ambiguity about providers being permitted to certify on an entity-wide basis was removed.

In short, nothing in the *Universal Service Order*, the *NECA Order*, the Form 457 instructions, or Form 499 instructions explicitly require service-by-service reseller certifications. Even assuming, *arguendo*, that the instructions are ambiguous, contributors are directed to consult Commission rules to determine contribution obligations.¹⁷ Because the rules do not explicitly require service-by-service certification, the Commission must adopt any such rule through notice and comment.¹⁸

As TelePacific and others have noted, the Commission has requested and received comments on the issue of whether it should adopt a service-by-service

¹⁴ 2012 FCC Form 499 Instructions, at 22.

¹⁵ *Id.*

¹⁶ 2006 FCC Form 499 Instructions, at 17 (emphasis added; brackets in original); 2005 FCC Form 499 Instructions, at 18 (same); 2004 FCC Form 499 Instructions, at 17; 2003 FCC Form 499 Instructions, at 16.

¹⁷ 2012 Form 499-A Instructions, at 2.

¹⁸ High-Cost Universal Service Support, Implementation of Verizon Wireless and Sprint Nextel Merger Commitments, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 12854, ¶¶ 8-9 (2010).

certification requirement.¹⁹ At a time when the Commission has sought comment on the issue of service-by-service certification, and proposed to put all changes to the Form 499 instructions out for notice and comment,²⁰ it should not ignore the comments it has received or adopt such a new certification prior to enacting comprehensive contribution reform. Even if implementation of such a certification on an interim basis were possible, any new systems to implement the certification likely will become obsolete once the Commission adopts comprehensive universal service fund contribution reform. Rather than requiring carriers to incur time and expense to develop new systems, the Commission should expand the contribution base to include retail broadband Internet access revenues, or the telecommunications transmission portion of the service, and any rule changes should be prospective so that all providers (wireline, cable, wireless, stand-alone ISP, etc.) whether or not they own loop facilities contribute on an equitable and nondiscriminatory basis.

The Commission should adopt a narrow order addressing the original request on reconsideration regarding note 41 of the *TelePacific Order*. The Commission should clarify that (1) USAC may not require a wholesale carrier that meets the reasonable expectation standard to restate revenues and (2) obtaining resale certifications on an entity basis is consistent with the reasonable expectation standard. Any further requirements to change reseller certifications from an entity to service-specific basis should be instituted in the context of broader contributions reform, should provide carriers sufficient time to make complex systems changes, and should be prospective only.

Sincerely,

/s/ _____
Tamar E. Finn, Esq.
Counsel for U.S. TelePacific Corp.

cc: (via E-Mail)

Michael Steffen
Angela Kronenberg
Christine Kurth
Nicholas Degani
Priscilla Delgado Argeris
Julie Veach
Carol Matthey
Vickie Robinson

¹⁹ Universal Service Contribution Methodology, Further Notice of Proposed Rulemaking, WC Docket No. 06-122, FCC 12-46, ¶ 170 (rel. Apr. 30, 2012) (“*Contribution Methodology NPRM*”).

²⁰ *Contribution Methodology NPRM*, at ¶¶ 143-71 and ¶¶ 344-49.