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October 26, 2012

Ex Parte

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

**RE: Universal Service Contribution Methodology; Universal Service
Administrative Company Request for Guidance, WC Docket No. 06-122**

Dear Ms. Dortch:

On October 25, 2012, I spoke separately with Michael Steffen, Legal Advisor to Chairman Genachowski, and Angela Kronenberg, Wireline Legal Advisor to Commissioner Clyburn, regarding the above-captioned proceeding. I explained that the 2004 Wireline Competition Bureau order¹ establishing an asymmetrical, one-year deadline for contributors to refile a Form 499 to reduce Universal Service Fund (USF) contributions is procedurally flawed and lacks a substantive basis. The one-year rule in the *Bureau Order* should have been—but was not—the subject of a notice and comment rulemaking because it affects providers' interests and rights by depriving them of a meaningful opportunity to recover overpayments to the fund.

I also explained that the federal default, four-year statute of limitations applies to USF contribution actions, and that the federal debt collection laws do not prohibit the Commission from adopting an express, rational limit on how far back USF contributors and Universal Service Administrative Company auditors should go in situations where revenues may be understated.

If the Commission desires to address a limitations period for contributors to refile prior year Form 499s the required course is to issue a notice of proposed rulemaking (NPRM). An NPRM would provide the Commission with a record (required by the Administrative Procedures Act) on which to evaluate the important legal and policy issues associated with constraining a contributor's ability to recover overpayments into the USF as well as a rational limit on audits and refilings to increase contributions. With respect to the former, establishing a very short, one-year deadline to decrease contributions and obtain a refund from the USF is a substantive matter that requires notice and comment rulemaking under the APA. *See, e.g., Lamoille Valley Railroad Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983). Moreover, the Commission cannot simply rely on the various applications for review, and resulting comments, of the *Bureau Order*

¹ *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 1012, ¶ 10 (WCB 2004) (“*Bureau Order*”).

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to cure this defect. To “affirm” the *Bureau Order* the Commission is required to—but has not—initiate a rulemaking. See, e.g., *Air Transport Ass’n of America v. Dep’t of Transportation*, 900 F.2d 369, 379 (D.C. Cir. 1990). Nor can the Commission rely on the April 2012 comprehensive *USF Contribution Reform NPRM* because, while that notice seeks comment on many things, it expressly does not call for comments on these issues. *Universal Service Contribution Methodology, A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, ¶ 15 (2012) (citing the *Bureau Order* and the one-year refiling deadline as a settled rule).

This letter is being filed electronically pursuant to Section 1.1206 of the Commission’s rules. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Bergman". The signature is written in a cursive, slightly slanted style.

cc: (via e-mail)
Michael Steffen
Angela Kronenberg