

contributions through this process. Indeed, the instructions direct filers to “consult the specific rules that govern contributions for each of the Mechanisms.”² The Commission has delegated to the Bureau authority to supervise administration of the information collection on Form 499, but not to create substantive obligations: “this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.”³ Any substantive rule change must be included in a notice of proposed rulemaking issued by the Commission rather than through changes to the worksheet instructions. Moreover, the Bureau should make clear the basis for its proposed changes to the instructions, including whether they are required to implement a Commission rule or are intended to be ministerial. To the extent the current or proposed Form 499 instructions attempt to change a substantive requirement of the Commission’s universal service rules, they remain subject to legal challenge and nothing in these comments should be interpreted as conceding that the current instructions are legally binding.

II. Mergers and Acquisitions (pp. 9, 14)

The Bureau proposes changes to pages 9 and 14 of the Form 499-A instructions to state that successor companies are responsible for ensuring that the revenues of acquired entities from the previous calendar year are reported to USAC. Companies often decide by contract to have an acquired entity be responsible for reporting revenues prior to consummation of a merger or acquisition. While this change makes the instruction slightly better than the existing one, Joint 499 Filers are aware of no FCC order or rule that requires an acquiring company be held liable for universal service contributions owed by a separate legal entity. The current and proposed

² 2012 Form 499 Instructions at 2.

³ *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, CC Doc. No. 98-171, 14 FCC Rcd 16602, ¶39 (1999).

instructions inappropriately place the ultimate burden of reporting prior years' revenue on the acquiring company without going through the notice and comment process necessary to establish such a substantive rule. While a company may agree by contract to undertake payment of another entity's obligation to make universal service contributions, the Commission cannot unilaterally shift that burden without complying with the Administrative Procedures Act ("APA").

USAC utilizes a form for companies to report mergers and identify which entity will report revenues for which period.⁴ Should either company fail to file revenues consistent with that form, USAC has the tools necessary to pursue corrective action from each party individually. While Joint 499 Filers do not agree that it is appropriate to shift the burden of one entity's reporting/contribution obligation to another, especially without the required notice and comment rulemaking, at a minimum, the USAC form should be updated to require USAC to notify the purchasing company if the company that sold assets does not file its final Forms 499-A or 499-Q.

III. Allocation of Local Revenue to Interstate Jurisdiction (pp. 16, 17)

The Bureau proposes to delete certain language from the Form 499-A instructions about completing Line 404 "in order to better reflect Commission precedent and rules" for federal subscriber line charges ("SLCs").⁵ Joint 499 Filers support removal of the instruction that required competitive local exchange carriers ("CLECs") without SLCs to allocate a portion of local revenue to the interstate jurisdiction. As noted herein, the Public Notice should have provided a reference to the Commission precedent and rules on which the change is based. Because the new instructions refer to the fact that the Commission does not regulate federal subscriber line charges for non-incumbent LECs, Joint 499 Filers assume that one potential basis for this change is the Commission's observation in the *Universal Service Order* that "Carriers

⁴ See <http://www.usac.org/res/documents/cont/pdf/mergers/deactivation-sale.pdf>.

⁵ Public Notice at 3.

other than ILECs do not participate in the formal separations process that our rules mandate for ILECs and hence do not charge SLCs nor distinguish between the interstate and intrastate portion of their charges and costs.”⁶ Joint 499 Filers support the change to make the instructions consistent with pre-existing law and note again that Commission rules trump any inconsistent Form 499 instructions.

Joint 499 Filers suggest that the Bureau must make another change to be consistent with current law. Specifically, delete the last sentence of the Line 404 instruction, which states: “Interconnected VoIP providers not reporting based on the safe harbor must make a similar allocation as well as determine the appropriate portion of revenues to allocate to interstate and international toll service.” Interconnected VoIP providers, like CLECs, are non-incumbent local exchange carriers (“LECs”) and their rates are not regulated by the Commission. The *2006 USF Contribution Methodology Order* gave interconnected VoIP providers three options for jurisdictionalizing revenue: (1) safe harbor; (2) report actual interstate telecommunications revenue; or (3) rely on traffic studies.⁷ Joint 499 Filers are aware of no Commission order that directed VoIP providers to allocate local service revenues to the interstate jurisdiction. Removing the last sentence requiring Interconnected VoIP providers to allocate local service revenue to the interstate jurisdiction is consistent with Commission precedent, particularly with the removal of the similar instruction for CLECs.

IV. Sale of Stand-alone Broadband Transmission Services (n.43)

Footnote 43 of the Form 499-A instructions misrepresents the *Wireline Broadband Order* by omitting “stand-alone” in line 7 just before “ATM.” In the *Wireline Broadband Order*, the

⁶ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶366 (1997) (“*Universal Service Order*”).

⁷ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶52 (2006) (“*2006 Contribution Methodology Order*”).

Commission stated that wireline broadband Internet access service is distinguishable from “other wireline broadband services, such as *stand-alone* ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used by basic transmission purposes (*emphasis added*).”⁸ The Bureau should consequently add the term “stand-alone” in line 7 of footnote 43 just before “ATM” to conform to the Commission’s decision.

V. Sale of Special Access to Broadband Internet Providers (p. 18)

The Bureau proposes to change page 18 of the Form 499-A instructions to state: “Filers should report on Line 406 revenues derived from the sale of special access on a common carrier basis to providers of all retail broadband Internet access service.” This proposed change is inconsistent with the *Wholesaler-Reseller Clarification Order* because it does not cross reference contributors’ and resellers’ ability to rely on entity certification through December 31, 2013.⁹ During this transition period, it is impractical for a contributor or a reseller to determine the nature of the service(s) provided by its customer. As set forth in the *Wholesaler-Reseller Clarification Order*, wholesalers may rely on entity reseller certificates through December 31, 2013 in order to give wholesalers and customers time to make changes to internal policies and procedures.¹⁰ The instruction should therefore be revised to reference contributors’ and resellers’ ability to rely on entity certification through December 31, 2013.

⁸ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶9 (2005) (“*Wireline Broadband Order*”).

⁹ *Universal Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau filed by Global Crossing Bandwidth, Inc., et al.*, Order, WC Docket No. 06-122, FCC 12-134 (rel. Nov. 5, 2012) (“*Wholesaler-Reseller Clarification Order*”).

¹⁰ *Id.* at ¶41.

VI. Revenues/Customers Not Subject to Reseller Certification Process (p. 23)

The Bureau proposes a number of changes to instructions on page 23 of the Form 499-A about attributing revenues from resellers and end users. One such change states that filers need not verify the reseller status for per-minute switched access charges and reciprocal compensation revenues reported on line 304. The instructions for line 304 are broader, directing filers to report per-minute charges for originating or terminating calls, including VoIP, in line 304. Joint 499 Filers recommend that the Bureau clarify that carriers do not have to verify a customer is a reseller for *all* per-minute origination or termination revenues reported in line 304, whether classified as switched access, VoIP, or reciprocal compensation, and whether provided pursuant to tariff or contract. Making the instructions consistent will ensure there is no confusion that carriers might be required to verify reseller status for some per-minute origination or termination revenues but not others.

In addition, Joint 499 Filers generally oppose the requirement imposed on carriers to verify reseller status by collecting reseller certifications and note that Global Crossing Bandwidth, Inc., an affiliate of Level 3 Communications, LLC, is challenging whether the “reasonable expectation” standard, which relies in part on reseller certifications, is lawful.¹¹ The verification requirements are unduly burdensome, especially where the filer provides multiple products to a large number of reseller customers. It is and should be USAC’s responsibility to police revenue reporting and contribution by resellers. The reseller verification requirements unfairly subject wholesale carriers to additional contribution if the reseller certifications fail to meet the reasonable expectation standard and the reseller has not actually contributed to universal service. The Commission should not force wholesale carriers to pay additional

¹¹ See *Global Crossing Bandwidth, Inc. v. Federal Communications Commission et. al*, No. 12-1482 (D.C. Cir. Dec. 19, 2012).

contribution that should be paid by the reseller entity that failed to meet its obligation to make universal service contributions.

VII. Service-by-Service Reseller Certification Language (pp. 24-25)

The Bureau proposes to add alternative instructions on pages 24 and 25 of the Form 499-A instructions to implement the service-by-service certification in the *Wholesaler-Reseller Clarification Order* even though the Bureau acknowledges that a proceeding is pending to consider adopting a rule to specify language for reseller certificates.¹² The addition of the alternative instructions is premature, and such language should not be included in the 2013 Form 499-A. Rather, a separate schedule should be set to obtain comments and replies on the various options to implement the service-by-service certification.

To the extent that this instruction is revised without a separate review, Joint 499 Filers submit that the use of “OR” in the alternative language is confusing. Does the Commission propose that the reseller select only one of the three options? Is there a scenario where a provider might select more than one of the options? Moreover, how is a “reseller” supposed to determine a percentage for special access circuits that are used within the “reseller’s” interoffice transport network to provide multiple telecommunications and information services, especially where the relative percentage of telecommunications and information services is not currently tracked and may not be capable of tracking? And when a “reseller” purchases fiber-based transport or loop circuits, which footnote 57 of the *Wholesaler-Reseller Clarification Order* states are outside its scope, how does the proposed certification capture the difference between circuits that are subject to service-by-service certification and circuits that are not? These are just a few of the difficult issues that the Commission must address before adopting language to implement any

¹² See e.g., *Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, ¶169 (2012).

service-by-service certification. To the extent the Commission does not stay or reverse on reconsideration the January 1, 2014 implementation requirement, Joint 499 Filers urge the Commission to make any revision to this instruction clear so that wholesalers have sufficient guidance to implement the new certification and sufficient lead time to make system changes. Moreover, as described in Section VI, the Commission should not impose burdensome requirements on wholesale carriers to verify reseller status or force them to pay additional contributions that should be paid by the reseller entity that fails to meet its universal service contribution obligations. Moving to a service-by-service certification will only increase the burden of reseller verification, making it more likely that minor mistakes will result in a wholesale carrier failing to meet the reasonable expectation test and potentially be punished in the form of additional contribution assessments where USAC has not done its job to police required reseller contributions to universal service.

VIII. Other Reseller Certification Issues (p. 24)

The Bureau also sets forth model language for entity reseller certification on page 24 of the 2013 instructions, which is the same as in the 2012 FCC Form 499-A, but does not account for customers that are also wholesale carriers or the proposed instruction on page 23 of the 2013 instructions that acknowledges certain types of revenue do not require verification. To account for those situations where customers are also wholesale carriers or where certain types of revenue do not require verification, Joint 499 Filers propose that the instruction at the top of page 24 be revised as follows (deletions in strike through, additions in italics):

each entity to which the company provides resold telecommunications (*“Customer”*) is ~~itself~~ an FCC Form 499 worksheet filer and *the Customer is either a direct contributor to the federal universal service support mechanisms or has verified its customers’ reseller status as required by Commission rules.*

Further, if the Commission continues to maintain the 499 filer database on its website, the Commission should add a field that indicates when the entity first filed a Form 499-A and, if different, when the entity first became a USF contributor. The addition of such information will be instrumental to verify reseller status.

IX. Treatment of *de minimis* entities (p. 25)

Joint 499 Filers request that the Bureau revise the instruction on page 25 of the Form 499-A describing revenues from entities exempt from USF contributions. The instruction should make clear that wholesale-only carriers, which have complied with the Commission's reseller verification requirements, may meet the *de minimis* threshold and owe no direct USF contribution. Moreover, such wholesale-only carriers should not be treated as end users by entities that provide them wholesale services.

X. Jurisdiction of Private Lines (p. 25 & n.58)

Joint 499 Filers request that the Form 499-A instructions for allocating revenue between jurisdictions be amended to be consistent with Commission precedent and rules. Referencing the Commission's Part 36 rules, the Form 499-A instructions state that revenues associated with private and WATS lines should be treated as 100% interstate if more than 10% of the traffic carried over those lines is interstate. The instructions should spell out the 10% rule as adopted by the Commission, which assumes private lines are assigned to the *intrastate* jurisdiction unless the customer provides a certificate of more than 10% interstate use.¹³ Indeed, "[s]ince 1989, the 'more than 10%' certification has been necessary only to 'convert' what appears to be an intrastate line into an interstate line. By contrast, the Commission has never indicated that this

¹³ See e.g., Comments of Level 3 Communications, LLC and PAETEC Communications, Inc., *In the Matter of Request for Review by Madison River Communications, LLC of Decision of Universal Service Administrator*, WC Docket No. 06-122, pp. 6-10 (filed Jan. 29, 2009), available at <http://apps.fcc.gov/ecfs/document/view?id=6520194423>.

rule (or certification thereunder) was meant to achieve the opposite -- to *confirm* that an intrastate line really was intrastate.”¹⁴ Contrary to Commission precedent, USAC has taken the opposite position in audits, defaulting private lines to the *interstate* jurisdiction unless the customer provides a certificate of use. It is a waste of USAC’s, the industry’s, and the Commission’s time to require contributors to appeal USAC interpretations of Form 499 instructions that contradict Commission rules. The Commission should amend the instruction and direct USAC to apply the 10% rule properly.

As changes to pages 16 and 17 of the Form 499-A instructions implicitly acknowledge, and as the *Universal Service Order* explicitly acknowledges, the Commission’s separations rules in Part 36 (which govern jurisdictional allocations for both SLCs (36.154(c)) and private lines (36.154(a)) do not apply to non-incumbent LECs. The Commission therefore should amend the instructions to state that the 10% rule does not apply to non-incumbent LECs.

XI. Conclusion

As described herein, Joint 499 Filers provide specific recommended revisions to particular sections of the Form 499-A instructions released by the Bureau. Joint 499 Filers appreciate having the opportunity to comment on the proposed revisions and looks forward to working with Commission and Bureau on future revisions.

Respectfully submitted,

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¹⁴ *Id.* at p. 8.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was sent via electronic mail on January 11, 2013 to:

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