

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

In the Matter of Proposed Changes to FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions)))))	WC Docket No. 06-122
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**COMMENTS OF THE AD HOC COALITION OF INTERNATIONAL TELECOMMUNICATIONS
COMPANIES**

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I. Introduction

The Ad Hoc Coalition of International Telecommunications Companies (“Coalition” or “ACITC”)¹ is a grassroots organization comprised of both U.S. and non-U.S. companies, including prepaid calling card providers, international transport carriers, and a broad spectrum of entities engaged in the provisioning of wholesale communications services. The Coalition submits these comments on behalf of its members in the above-captioned proceeding.

As an initial matter, the Coalition commends the Commission for soliciting comments on Forms 499-A, 499-Q and the accompanying instructions (“Instructions”). The Coalition and other industry participants have been calling upon the FCC to take this statutorily required action for several years.² The ACITC appreciates the Commission’s recognition that the Administrative Procedure Act (“APA”) requires public notice and the opportunity for comment on the Instructions. By taking this step, the Commission has acknowledged that its previous method of approving the Instructions was unlawful. In the past, the FCC failed to provide the public with notice or the opportunity to comment on changes to the Instructions, and instead delegated exclusive responsibility for the preparation and dissemination of the Forms and Instructions to the Wireline Competition Bureau (“Bureau”).³ The Coalition and other industry players have repeatedly notified the Commission of this glaring omission which calls into question the legitimacy of several years of

¹ www.telecomcoalition.com

² See, e.g., Request for Review of Decision of Universal Service Administrator by IDT Corporation and IDT Telecom, WC Docket 96-45, filed June 30, 2008 (“IDT Petition”); Petition of The Ad Hoc Coalition of International Telecommunications Companies for Declaratory Ruling Regarding Universal Service Contributions, WC Docket No. 06-122, filed August 29, 2009 (“Coalition Second Petition”); Request for Review by Global Crossing Bandwidth of Decision of the Universal Service Administrator, CC Docket Nos. 96-45 and 97-21, filed June 22, 2007 (“Global Crossing Request”).

³ See, e.g., *Mis-Administration and Misadventures of the Universal Service Fund: A Case Study in the Importance of the Administrative Procedure Act to Government Agency Rulemaking*, 19 CommLaw Conspectus 343, 346 (2011) (“Not only did the FCC’s clandestine delegation of substantive rulemaking and decision-making to USAC violate the APA; but so too did USAC’s implementations of that illegitimately delegated authority by its adopting, announcing and enforcing rules and decisions for which it had no legal authority.”).

USF program administration and enforcement.⁴ However, despite these alerts, the Commission elected to pursue prospective corrective measures only (and with respect to specific hand-picked issues), and avoided addressing its past failures.

The Coalition's members have been substantially harmed by modifications to past Forms and Instructions effectuated outside the strictures of the APA.⁵ The Bureau's integration of the so-called "Carrier's Carrier Rule" into the Instructions has been particularly damaging to competition since providers up and down the service supply chain are impacted by what the Commission readily concedes are less than clear rules governing intercarrier relationships vis-à-vis USF contribution responsibilities.⁶ The Coalition's members, in particular, have been harmed by the Bureau's unlawful adoption of definitions for the terms "reseller," "end user" and "distributor" - which appear nowhere in the FCC's rules - and the creation of a "vicarious liability" regime whereby wholesalers can be held responsible for the unpaid USF contributions of their reseller and other ill-defined classes of customers. These harms have been exacerbated by the Commission's failure to recognize any limits to USAC's ability to reach back in time and bill service providers for USF contributions owed on revenues earned many, many years in the past. Indeed, at this juncture the Commission does not even acknowledge the applicability of the four-year federal default statute of limitations to USAC's administration of the USF program; nor does the Commission require USAC to limit back-billing to periods for which an aggrieved contributor is likely to possess documentation necessary to counter

⁴ See, e.g., IDT Petition at 7-11; Global Crossing Request at 17-18; Coalition Second Petition at 6-9.

⁵ 5 U.S.C. § 553(b) of the APA requires federal agencies to provide notice of all proposed rules in the Federal Register.

⁶ See Comments of CompTel on U.S. TelePacific's Petition for Partial Reconsideration and Request for Stay, WC Docket No. 06-122 (Jan. 9, 2013) at 2 ("The Commission has candidly admitted that its wholesaler/reseller rules for universal service reporting and contribution purposes and its Form 499-A Instructions are far from precise and that it did not anticipate the implementation difficulties that might arise when a wholesale service is incorporated by a reseller into a non-assessable retail service.").

an otherwise unsubstantiated bill, i.e., the applicable 3 or 5-year document retention period set forth in FCC rules and 499 Instructions.⁷

In adopting new Forms 499 and Instructions, the Commission must take specific measures to prevent further injury arising from the perpetuation of pre-existing flaws in the Forms and Instructions, which are not specifically addressed in the redlined portions of the documents which have been placed on public notice.⁸ In particular, the Commission should direct the Bureau to strike references to terms that are undefined in the Commission's rules and have arisen through various versions of the Instructions as adopted outside of the APA (namely "reseller," and "distributor") and apply the plain, ordinary, and intended meaning of terms that appear in the Commission's rules and orders (i.e. "end user"). The Commission should not stand by and permit USAC to perpetuate the enforcement of Form 499 instructional "guidance" where the "guidance" directly conflicts with underlying Commission rules, orders and plain English. Doing so condones the illicit behavior of the Commission's delegated agents.

The Commission is actively considering fundamental definitional issues and other matters related to the reseller certification process in its pending USF Reform proceeding.⁹ Likewise, a pending petition for review before the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit")

⁷ See, e.g., *inContact, Inc. v. Federal Communications Commission*, No. 12-133 (D.C. Cir. filed March 5, 2012) (Petition for review filed by inContact, Inc. challenging FCC order upholding Bureau dismissal, on procedural grounds, of a petition seeking to invalidate a 2009 USAC invoice for true-up fees on revenues earned in 2003 and reported in 2004 Form 499-A); See also *In the Matter of inContact Inc.*, Petition for Special Relief and Waiver by inContact, Inc. of a Decision of Universal Service Administrator, WC Docket No. 06-122 (filed Apr. 13, 2009); *In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator*, Order, 25 FCC Rcd. 4739 (May 7, 2010); Application for Review of Order of Wireline Competition Bureau by inContact, Inc., WC Docket No. 06-122 (filed June 7, 2010); *In the Matter of Universal Service Contribution Methodology, Application for Review of a Decision by the Wireline Competition Bureau by inContact, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd. 632 (Jan. 5, 2012).

⁸ The complete Forms 499 and their Instructions were placed on public notice, in their entirety. As such, it is appropriate to comment both on proposed redline changes and all other substantive content therein.

⁹ *In the Matter of 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, FCC 12-46 (rel. Apr. 30, 2012) ("USF FNPRM") at ¶ 181.

raises reseller certification issues. Until the Commission has the opportunity to develop a full record on the numerous issues that will be impacted by these changes or has otherwise been instructed by the court, it should not endorse the Bureau's reseller certification language. Only upon the Commission's authority at the conclusion of the USF Reform proceeding or by court order can such terms be reintroduced into the Instructions. And, such terms cannot be defined in isolation. They must be accompanied by fundamental changes to the reseller certification process, lawfully adopted by the FCC, either through the USF Reform proceeding or in response to a decision by the court.

Wherefore, the Coalition respectfully requests that the Commission: (1) Modify language implementing the carrier's carrier rule to ensure that only revenues from consumers of interstate telecommunications qualify as end-user revenues subject to USF fees by applying the plain, ordinary definition of the term "end user" and striking references to terms such as "reseller" and "distributor" that are under active consideration in the FCC's USF Reform proceeding and pending before the D.C. Circuit; (2) Remove the vicarious liability provision from the proposed Instructions; and (3) Add language to impose a three-year limitations period on invoicing USF contributions.

II. The Commission Must Await Resolution of Carrier's Carrier Issues in the USF Reform Proceeding before Adopting Reseller Certification Language and Definitions

A. The Unlawful Evolution of Instructions Implementing the Carrier's Carrier Rule

The Carrier's Carrier Rule ("CCR") exempts wholesale providers from USF liability whose reseller customers can be reasonably expected to contribute directly to the Fund. The purpose of the CCR is to ensure that, to the extent USF contributions apply to the revenue at issue, at least one entity in the supply chain is paying the contribution. Wholesalers are required to have documented procedures to ensure that they are reporting as carrier's carrier revenue only revenues from entities that reasonably would be expected to contribute to the USF. The CCR has existed since the inception of the post-Telecommunications Act of 1996 USF revenue reporting worksheet; although

modifications have been made to the Instructions, altering the compliance threshold for wholesale providers.

A number of modifications to the Instructions intended to implement the CCR have been accomplished without notice and comment required by the APA, and in contravention of the FCC's rules. In particular, the Bureau skirted the APA when it adopted definitions of terms appearing nowhere in the FCC's rules and established vicarious liability for wholesalers in certain circumstances. These unlawful requirements cannot be allowed to stand; yet the draft Instructions continue to incorporate these provisions. As a result, the Commission must act to eliminate these unlawful provisions from the Instructions.

B. The Commission Must Adopt Comprehensive Reforms through Rulemaking and Direct the Bureau to Strike Unlawful Terms from the Instructions

The Commission is for the first time considering defining certain key terms that currently do not appear in its rules in the context of its USF Reform proceeding.¹⁰ Yet, the Instructions preemptively attempt to define certain of these undefined terms. It would be wholly improper for the Commission to permit the Bureau to adopt definitions for terms subject to notice and comment in the USF Reform proceeding. On the same token, the FCC must not permit the Bureau to develop a reseller exemption process that relies on core terms for which no lawfully adopted FCC definitions exist. Moreover, enabling the Bureau to adopt piecemeal changes to the USF exemption process would compromise the Commission's ability to address the fundamental carrier's carrier issues under review in the USF Reform proceeding. Until the Commission has the opportunity to develop a full record on the numerous issues that will be impacted by these changes, it should not endorse the Bureau's reseller certification language. Instead, the Commission should command the Bureau to strike references to terms that are undefined in the Commission's rules and have arisen through various versions of the Instructions as adopted outside of the APA (namely "reseller" and "distributor") and apply the plain, ordinary, and intended meaning of terms that appear in the

¹⁰ See USF FNPRM.

Commission's rules and orders (i.e. "end user"). The Commission should only add such terms to the Instructions at the conclusion of the USF Reform proceeding to prevent further marketplace confusion and harms to carriers.

While the Bureau itself has acknowledged that the Instructions function as mere "guidance" for filers and do not carry the weight of the law,¹¹ permitting legally defective Instructions to advise filers on compliance requirements will only perpetuate and compound the widespread confusion and uncertainty that currently exists in the marketplace. Moreover, adopting the Bureau's unauthorized definitions will perpetuate the imbalanced playing field that exists as a consequence of Instructions which find no basis in law, regulation or FCC jurisprudence. As discussed herein, a number of parties have addressed this lack of legal foundation of the Instructions in filings before the Commission. And, recently, Global Crossing brought the issue before the D.C. Circuit, challenging a November FCC Order seeking to clarify certain issues relating to the reseller exemption certification process and the CCR.¹² It would be entirely unreasonable for the Commission to adopt changes to the Instructions while these fundamental issues remain pending before the FCC and the D.C. Circuit.

The Commission initiated the USF Reform proceeding for the purpose of addressing a number of matters affecting Fund contributors, including several reseller certification/carrier's carrier issues. The FCC created the perfect opportunity to remedy the numerous problems commenters have raised with the exemption process. Yet, the Commission risks seriously compromising this effort by permitting the Bureau to adopt changes to the Instructions, which substantively affect the

¹¹ *In the Matter of Federal-State Joint Board on Universal Service, Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, Order – Wireline Competition Bureau, 24 FCC Rcd. 10824, 10828 (Aug. 17, 2009); *In the Matter of Universal Service Contribution Methodology, Request for Review of Decision of Universal Service Administrator by Network Enhanced Telecom, LLP*, Order- Wireline Competition Bureau, 26 FCC Rcd. 6169, 6171 (Apr. 26, 2011); *In the Matter of Universal Serv. Contribution Methodology, Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, Order- Wireline Competition Bureau, 25 F.C.C.R. 14533, 14536 (Oct. 19, 2010); *In the Matter of Universal Service Contribution Methodology, a Broadband Plan for our Future*, Order – Commission, 27 FCC Rcd. 5357, 5418 (Apr. 30, 2012).

¹² *Global Crossing Bandwidth, Inc. v. Federal Communications Commission and United States of America*, Petition for Review (D.C. Cir. filed Dec. 19, 2012) ("Global Crossing Petition for Review").

wholesale certification process. In the absence of definitions adopted lawfully through an authorized rulemaking, filers must rely on the FCC's rules and orders, and cannot turn to the Instructions. The Commission must refrain from perpetuating the confusion and unlawful actions from the past through ad hoc fixes to the system when it has every opportunity to make comprehensive and thoroughly considered changes lawfully through the pending rulemaking proceeding.

C. The Bureau Must Strike the Terms "Distributor" and "Reseller" from its Instructions and Apply the Plain Meaning of the Term "End User"

Because the definitions of reseller and distributor are under active consideration in the FCC's ongoing USF reform proceeding, it would be premature and improper for the Bureau to adopt definitions of these terms via the Instructions. Moreover, because only the FCC has authority to create rules and define key terms associated with those rules, the Bureau has exceeded the scope of its authority in adopting substantive contribution requirements through the Instructions.¹³ And, because the Instructions have not previously been subject to notice and comment per the APA, certain terms and provisions that have evolved through numerous unlawfully promulgated versions of the Instructions are invalid. Finally, as proposed, certain key terms conflict with FCC rules and orders and/or the plain meaning of the term. Specifically, the terms "reseller" and "distributor" have not to date been defined via a lawful FCC proceeding, and as incorporated into the Instructions, conflict with proposals subject to comment in the ongoing USF Reform proceeding. And, the effective definition of the term "end user" in the Instructions conflicts with the plain meaning of the term and the spirit and purpose of the FCC's rules.

As embodied in the draft Instructions, the CCR requires wholesale providers to treat their reseller customers as end users if the wholesaler cannot provide evidence that it reasonably expected the reseller customer to contribute directly to the Fund. The result is treatment of a number of resellers as end users despite the fact that they do not operate as end users. These

¹³ The Bureau has no authority to initiate rulemakings and adopt substantive rules, and thus it exceeded the scope of its authority in adopting substantive rules applicable to USF contributors. 47 C.F.R. § 0.291(e).

resellers do not consume the services they purchase. Nonetheless, they are treated just like consuming members of the public. The Bureau has not sought public comment on this issue, per APA requirements. Moreover, it has implicitly adopted definitions of the terms “end user,” “reseller” and “distributor” that conflict with the purpose and spirit of the FCC’s rules. The proposed Instructions provide as follows:

Each filer should have documented procedures to ensure that it reports as “revenues from resellers” only revenues from entities that meet the definition of reseller...exempt entities, including “international only” and “intrastate only” providers and providers that meet the *de minimis* universal service threshold, should not be treated as resellers...¹⁴

Thus, the Instructions treat reseller revenues as USF assessable end-user revenues if they fail to meet the definition of “reseller” as adopted by the Bureau through numerous iterations of the Instructions that failed to comply with the APA. The proposed Instructions perpetuate this error, effectively classifying an “end user” as any entity that does not contribute directly to the Fund, such that resellers may qualify as end users if they do not contribute directly to the Fund, despite the fact that they do not use the services sold and in fact resell them. This aberration directly conflicts with the FCC’s rules which restrict USF contribution obligations to end-user revenues, and envision a narrow definition of “end user.”

i. Definition of “End User”

Per FCC rules, only retail end-user revenues are subject to USF contribution obligations.¹⁵ In its First USF Report and Order, the FCC confirmed that per the Joint Board’s recommendations, contribution responsibilities would attach “solely...[to] end user telecommunications revenues.”¹⁶ The Commission clarified that such revenues are “derived from end users for telecommunications

¹⁴ See Wireline Competition Bureau Seeks Comment on Proposed Changes to FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions, WC Docket No. 06-122, DA 12-1872 (Nov. 23, 2012), Attachment 2 – Draft 2013 Form 499-A Instructions (Redline Copy) (“Draft Instructions”) at 23.

¹⁵ 47 C.F.R. § 54.706 (b) (“Except as provided in paragraph (c) of this section, every entity required to contribute to the federal universal service support mechanisms under paragraph (a) of this section shall contribute on the basis of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions.”).

¹⁶ See *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, CC Docket No. 96-45 at ¶ 772 (1997); see also *id.* at ¶¶ 843-45, 848 and 854.

and telecommunications services, or "retail revenues" and would only "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."¹⁷ The Commission neglected to define the term "end user" because the term carries a plain, ordinary definition in common parlance.¹⁸ Because the term is not ambiguous, its ordinary meaning governs.¹⁹ Newton's Telecom Dictionary defines an end user as "[a]ny individual, association, corporation, government agency, or entity other than an IXC that subscribes to interstate service provided by an Exchange Carrier and does not resell it to others..."²⁰ This definition excludes distributors and resellers of telecommunications services. In fact, there is no definition of "end user" that could possibly include any entity or individual that does not "consume" the services at the "end" of the service delivery chain. It is without question that the Commission has never, in a duly constituted rulemaking proceeding, either: (1) announced its intention to change the plain meaning of the term "end user" to include reseller or distributor revenue or (2) declared such revenue to be subject to an exception to the rule holding that only end-user revenues shall be included in the contribution base.

Accordingly, the Commission must not adopt Instructions which contemplate treating revenues from resellers or any other entity that does not consume the telecommunications services it purchases as USF assessable end-user revenues. Instead, the Commission must direct the Bureau

¹⁷ *Id.* at ¶ 844.

¹⁸ The Commission has stated that "End user telecommunications revenue consists of telecommunications revenues that carriers collect from end users and includes revenues such as those derived from subscriber line charges and from carriers that purchase telecommunications services for their own internal use." *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order, CC Docket Nos. 96-45, 98-171, 90-571, 92- 237, 99-200, 95-116, 98-170, FCC 99-175, ¶ 56 (rel. July 14, 1999).

¹⁹ *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation is entitled to deference only when the language of the regulation is ambiguous).

²⁰ Newton's Telecom Dictionary, 17th ed. (2001).

to apply the plain, ordinary definition of the term “end user” such that only consumers of telecommunications services are required to contribute to the USF, per the FCC’s rules.

ii. Definition of “Distributor”

In addition to treating revenues from certain resellers as “end-user” revenues, since 2001, the Instructions have purported to treat revenues from prepaid calling card distributors as interstate, retail end-user revenues. Specifically, the Instructions define “revenues from prepaid calling cards” as “revenues from prepaid calling cards provided either to customers, distributors or to retail establishments” and direct that “all prepaid calling card revenues are classified as end-user revenues.”²¹ In effect, the Instructions define prepaid calling card “distributors” and “retailers” as end users, in conflict with the plain meaning of these terms and the FCC’s rules, and impose contribution obligations on these entities without having afforded the public the opportunity for comment per the APA. A number of filers have commented on the illegality of this Instruction.²²

Because this requirement has been adopted outside of the mandates of the APA, it must be stricken from the Instructions. In addition to conflicting with the APA, the Instruction is inconsistent with the FCC’s recent Further Notice of Proposed Rulemaking (“FNPRM”) seeking comment on proposals for reforming the USF contribution system.²³ Therein, the Commission confirmed that no existing FCC rule currently defines distributor revenues as “end user” revenues subject to USF contributions. In the FNPRM, the FCC sought comment on whether, *in the future*, it *should* treat revenues from distributors as end-user revenues, thus confirming that the Commission has never ruled that revenues from distributors are subject to treatment as end-user revenues at any time in the past. *See* USF FNPRM at ¶ 181 (“We seek comment on adopting a rule to require prepaid calling card providers to report and contribute on all end user revenues, and who should be deemed the

²¹ Draft Instructions at 19.

²² *See* Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, CC Docket No. 96-45 (filed October 10, 2006) (“AT&T Appeal”) at 13-20; IDT Petition at 12-14; Petition of The Ad Hoc Coalition of International Telecommunications Companies for Declaratory Ruling Regarding Universal Service Contributions, WC Docket No. 06-122, filed February 12, 2009 (“Coalition First Petition”) at 11-14.

²³ *See* USF FNPRM.

end user for purposes of such a rule... Alternatively, we seek comment on adopting a rule to require prepaid calling card providers to contribute based on the amounts paid by end users for prepaid cards, whether the prepaid calling card is purchased by the end user directly from the prepaid calling card provider or from a marketing agent, distributor, or retailer.”).²⁴ As a result, the Coalition urges the Commission not to adopt Instructions which incorporate language purporting to treat all revenues from prepaid calling cards (including revenues from sales to distributors) as end-user revenues. At the very least, the term must be excluded from the Instructions until it has been lawfully defined by the FCC after thorough consideration of related issues in the context of its pending USF reform proceeding.

iii. Definition of “Reseller”

As discussed above, the Bureau has developed a definition of the term “reseller” through numerous changes to the Instructions over time without notice or the opportunity for affected parties to comment. This definition of “reseller” therefore does not comply with the strictures of the APA. Because it substantively impacts the rights of filers by determining their USF contribution obligations, the Commission should have afforded the public the opportunity to comment on this important issue. The Instructions propose to define a “reseller” as

a telecommunications carrier or telecommunications provider that: (1) incorporates purchased telecommunications services into its own telecommunications offerings; and (2) can reasonably be expected to contribute to federal universal service support mechanisms based on revenues from such offerings when provided to end users.²⁵

By this definition, the Bureau proposes to classify certain reseller revenues as “end-user” revenues. All revenues from non-contributing resellers are treated as end-user revenues, despite the fact that the purchaser does not consume the services. The definition of reseller is directly linked to the unlawfully adopted definition of “end user,” which as discussed above, remains the subject of debate before the Commission. In addition, the Commission has attempted to “clarify”

²⁴ Emphasis added. This passage also confirms that the FCC has not previously defined the status and obligations of retailers.

²⁵ Draft Instructions at 23.

certain carrier responsibilities under the CCR by its November 5, 2012 Wholesaler-Reseller Clarification Order. In particular, the Commission attempted to “confirm” the application of the above definition of “reseller,” which has been adopted through changes to the Instructions over time.²⁶ This particular aspect of the order is the subject of a challenge in the D.C. Circuit.²⁷ In light of these pending challenges and lack of adherence to the APA, the Coalition strenuously objects to the adoption the definition of “reseller” in the proposed Instructions. Once again, the Commission must instruct the Bureau to remove this language pending the outcome of the USF Reform proceeding and petition for review before the D.C. Circuit.

D. The Commission Must Direct the Bureau to Remove the Vicarious Liability Provision from the Instructions

In 2004, the CCR was changed vis-à-vis the Instructions by the insertion of the following language, “[f]ilers will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users” (the “vicarious liability” provision). This language imposes significant compliance obligations on wholesale providers and changes the regulatory relationship between wholesalers and resellers. Now, in this post-2004 era, wholesale providers that fail to police their customers’ contribution obligations – regardless of whether or not they have a good faith belief that the carrier customers must contribute directly to the Fund – may be severely penalized.

This change to contributors’ reporting obligations arose via modifications to the 2004 Instructions, which were not subject to notice and comment per the requirements of the APA. This obligation clearly imposes a substantive requirement on filers, and thus should have been subject to notice and comment. Moreover, the vicarious liability provision improperly shifts the USF burden of

²⁶ *In the Matter of Universal Service Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau filed by Global Crossing Bandwidth, Inc., 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, XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator, Universal Service Administrative Company Request for Guidance*, WC Docket No. 06-122, Order, FCC 12-134 (rel. Nov. 5, 2012) at ¶ 3.

²⁷ See Global Crossing Petition for Review.

certain carriers onto their wholesale suppliers. By defaulting on its contribution obligation, a carrier does not transform into an end user. And, there is no justification for saddling a wholesale supplier with the contribution obligations of its reseller customer as a result of the reseller's failure to comply with its own legal obligations.

The Coalition and a number of other groups and individual filers have urged the Commission to take action to invalidate this unlawful provision.²⁸ Yet, the proposed 2013 Instructions contain this vicarious liability mandate. They provide:

Filers that do not comply with the above procedures will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users.²⁹

Continued adherence to the concept of vicarious liability will perpetuate the injustices effected by this unlawful provision. The Commission must not adopt Instructions that contain any version of the vicarious liability provision.

III. The Commission Must Adopt a Limitations Period on USAC's Ability to Back-bill

No matter how noble the Commission's goals may be in regards to fulfilling APA requirements on a prospective basis (as evidenced by its decision to, at long last, publish the Forms 499 and their Instructions), absent the adoption of restrictions on USAC's authority to enforce, reclassify revenue and engage in back-billing of contributions based on illicit "Instructions," carriers will continue to be subject to uncertainty and the potential of facing crippling USF contributions on revenues earned many, many years ago. Presently, USAC recognizes absolutely no limitations to its ability to reach back in time and collect USF fees from contributors. The Coalition urges the Commission to follow the recommendations of other filers and adopt a clear limitations period to USAC's ability to back-bill. Specifically, the Coalition encourages the Commission to adopt a 3-year

²⁸ See, e.g., Global Crossing Request at 9-13; AT&T Appeal at 8-13; IDT Petition at 14.

²⁹ Draft Instructions at 23.

limitations period consistent with the general IRS rule for federal taxes that establishes a three-year limitations period for both refunds and further assessments, as proposed by Verizon and CTIA.³⁰

Similarly, the FCC's prior document retention period supports a three-year limitations period. Prior to 2007, the Commission required USF contributors to maintain documents in support of their Form 449-Q and Form 499-A filings for a period of three years.³¹ Three years represents a reasonable timeframe during which contributors can be expected to present documentation to support or challenge a USF assessment. Outside of this period, claims are stale, and contributors cannot be expected to provide sufficient documentation to rebut the assessment.

Furthermore, the FCC must recognize that the four-year federal default statute of limitations ("Federal SOL") operates as a bar to the imposition of additional USF fees. The Federal SOL applies to all claims arising under an Act of Congress promulgated after December 1, 1990 for which no other limitation period is specified.³² The Telecommunications Act, enacted by Congress in 1996

³⁰ See Letter from Scott Bergmann, CTIA, to Marlene Dortch, Secretary, FCC, WC Docket No. 06-122 at 2 (Aug. 16, 2012); Letter to Marlene Dortch, Secretary, FCC from Alan Buzacott, Executive Director, Verizon, re Universal Service Contribution Methodology; Universal Service Administrative Company Request for Guidance, WC Docket No. 06-122, attaching White Paper Concerning FCC Form 499 Refiling Deadlines and Obligations (Oct. 25, 2012) at 7.

³¹ See 47 C.F.R. § 54.711(a)(2006). Although the Commission extended the document retention period in 2007 to 5 years, three years is a more appropriate limitations period for USF assessments to protect contributors against stale claims. See *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, 22 F.C.C.R. 16372, 16412 (2007).

³² 28 U.S.C. § 1658(a); *Verizon New England, Inc. v. New Hampshire Public Utils. Comm'n*, 2005 WL 1984452, *5 n.5 (D.N.H. 2005), citing *Pepepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 203 n.5 (1st Cir. 2000) ("Absent the existence of an explicit limitations period, civil claims that arise under federal statutes enacted after December 1, 1990 are subject to 28 U.S.C. § 1658(a) which imposes a four-year limitations period on such actions."); *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.1 (1995) (describing section 1658 as a "general, 4-year limitations period for any federal statute [enacted after Dec. 1, 1990] without one of its own"); *Campbell v. Amtrak*, 163 F. Supp. 2d 19, 22 (D.D.C. 2001) (describing section 1658 as the "federal default statute of limitations"). Note that the statute applies to actions brought by a federal agency. See, e.g., *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) (finding an action brought by secretary of labor against a private company within the four-year statute of limitations under 28 U.S.C. § 1658); *SEC v. Buntrock, Fed. Sec. L. Rep.* (CCH) P92, 833 (N.D. Ill. 2004) (applying the four-year statute of limitations under 28 U.S.C. § 1658 to an action by the SEC under the Private Securities Litigation Reform Act).

(the "Act"), includes no time limitation for actions brought by or against the Commission.³³ As a result, the Federal SOL clearly applies to the Act, and courts have found the same.³⁴ This application likewise affects claims arising under Section 254 of the Act, including claims regarding the Commission's USF regulatory scheme, promulgated there under.³⁵ Like all statutes of limitations, the Federal SOL begins to run when it is known or should be known that a claim arises.³⁶ USAC becomes aware of a contribution obligation when revenues are reported in FCC Form 499-A. As a result, at a minimum, the Commission must not permit USAC to assess USF fees on revenues reported over four years prior.

Absent these actions, the Commission's efforts to solicit public input on the Forms and Instructions will be in vain. The FCC must combine its request for comments with clear limitations to USAC's authority to back-bill. Otherwise, USAC will undoubtedly continue to abuse its authority and issue bills to contributors for revenues earned as far back as 1996, when the Fund was created.

IV. Conclusion

In short, the Coalition commends the FCC's long overdue direction to the Bureau to seek comments on Forms 499-A, 499-Q and the accompanying Instructions. However, as drafted, the Forms and Instructions remain flawed. To correct the injustices caused by years of applying Instructions that were not properly subject to notice and comment per the APA, the Commission must modify the draft Instructions. In particular, the Commission should exclude certain terms unless and until it adopts definitions and addresses the implementation of these requirements

³³ See, e.g., 47 U.S.C. §§ 151 et seq.; 47 C.F.R. §§ 0.1 et seq.

³⁴ See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 n.5 (2005) ("Since the claim here rests upon violation of the post-1990 TCA [the 1996 Act], § 1658 would seem to apply."); *e.spire Comms. Co., inc. v. Baca*, 269 F. Supp. 2d 1310, 1320 (D.N.M. 2003) ("Because the Telecommunications Act was enacted after December 1, 1990, the four-year statute of limitations applies to the claims under the federal Telecommunications Act."); *Verizon Maryland Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552-54 (D. Md. 2002); *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Utils. Comm'n*, 107 F. Supp. 2d 653, 668 (E.D. Pa. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 WL 156674, *3-*5 (N.D. Ill. 1998).

³⁵ *Id.*

³⁶ See, e.g., *Southern Surety Co. v. Austin*, 22 F.2d 881, 882 (5th Cir. 1927) ("A cause of action accrues when the debt is due and suit may be brought on it.").

lawfully through its pending USF Reform proceeding, or until matters related to the implementation of the CCR are resolved through the pending Global Crossing D.C. Circuit appeal. Specifically, the Coalition respectfully requests that the Commission: (1) Modify language implementing the carrier's carrier rule to ensure that only revenues from consumers of interstate telecommunications qualify as end-user revenues subject to USF fees by applying the plain, ordinary definition of the term "end user" and striking references to terms such as "reseller" and "distributor" that are under active consideration in the FCC's USF Reform proceeding and pending before the D.C. Circuit; (2) Remove the vicarious liability provision from the proposed Instructions; and (3) Add language to impose a three-year limitations period on invoicing USF contributions.

Respectfully submitted,



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