

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Wireline Competition Bureau Seeks	)	
Comment on Proposed Sample Reseller	)	
Certification Language for FCC Form 499-A	)	
Instructions	)	

**COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC**

Level 3 Communications, LLC (“Level 3”) submits these comments in response to the Wireline Competition Bureau’s (“Bureau’s”) Public Notice dated August 2, 2013, in the above-captioned proceeding.<sup>1</sup> The Bureau should not adopt any changes to the current version of the Form 499-A reseller certification language until the Commission rules on TelePacific’s Petition for Partial Reconsideration<sup>2</sup> of the *2012 Wholesaler-Reseller Clarification Order*<sup>3</sup> in this proceeding. If the Bureau does decide to move forward with changes to the reseller certification language now, it should adopt the proposed changes no later than October 1, 2013, so carriers can complete the modifications to their systems and procedures that will be necessary to implement the changes prior to January 1, 2014.

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<sup>1</sup> See *Wireline Competition Bureau Seeks Comment on Proposed Sample Reseller Certification Language for FCC Form 499-A Instructions*, Public Notice, DA 13-1700 (rel. Aug. 2, 2013).

<sup>2</sup> U.S. TelePacific Corp. d/b/a TelePacific Communications, “Petition for Partial Reconsideration,” WC Docket No. 06-122 (Dec. 5, 2012) (“TelePacific Petition”). Concurrently with its reconsideration petition, TelePacific also filed a Request for Stay Pending Reconsideration.

<sup>3</sup> *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Order, 27 FCC Rcd 13780 (2012) (“*2012 Wholesaler-Reseller Clarification Order*”).

## I. INTRODUCTION AND BACKGROUND

The Commission is currently considering significant changes to its Universal Service Fund (“USF”) contributions system pursuant to a Further Notice of Proposed Rulemaking issued last year in this docket.<sup>4</sup> The changes under consideration include the manner in which wholesale carrier revenue is treated for USF contribution purposes.<sup>5</sup> The rulemaking is still pending, but in the *2012 Wholesaler-Reseller Clarification Order* the Commission went ahead and provided guidance on several issues related to wholesale revenue reporting and reseller certifications that had arisen in the context of the Universal Service Administrative Company’s (“USAC’s”) administration of the Commission’s USF rules. Among other things, the order contained the following “clarification” concerning reseller contribution obligations:

We do not read the existing definition of “reseller” so broadly that it would enable a company to certify it is a reseller if it contributes on any of its product offerings that may incorporate wholesale inputs. Such a broad reading, in the extreme case, would allow a carrier to claim reseller status for all of its wholesale inputs even though it only contributed on a small fraction of its product offerings.<sup>6</sup>

According to this clarification, the specific services a reseller purchases from a wholesaler must be part of the retail offerings on which the reseller is contributing USF in order for the wholesaler to report the revenue from the reseller as carrier’s carrier revenue. One problem with this new interpretation is that the instructions to Form 499-A require wholesalers to obtain “entity-specific” certifications from resellers stating only that the reseller contributes to USF.<sup>7</sup> The Commission’s new interpretation, however, would require wholesalers to obtain “service-specific” certifications stating that the particular *services* the reseller purchases from the

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<sup>4</sup> See *Universal Service Contribution Methodology*, WC Docket No. 06-122, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357 (2012).

<sup>5</sup> See *id.* at 5412-22.

<sup>6</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13797 n.111.

<sup>7</sup> See *id.* at 13797; 2013 Form 499-A Instructions at 23.

wholesaler are being used to provide the particular retail services for which the reseller contributes to USF. Acknowledging this inconsistency, the Commission ruled in the *2012 Wholesaler-Reseller Clarification Order* that wholesalers who had relied on entity-specific reseller certifications using the existing language in the Form 499-A instructions would not have to restate wholesale revenue as end-user revenue or make additional USF contributions.<sup>8</sup> But the Commission also directed that the Bureau modify the Form 499-A instructions to reflect the new interpretation going forward.<sup>9</sup>

On December 5, 2012, TelePacific filed a Petition for Partial Reconsideration and Request for Stay Pending Reconsideration of the *2012 Wholesaler-Reseller Clarification Order*.<sup>10</sup> In its Petition, TelePacific argued that the new interpretation requiring service-specific reseller certifications is discriminatory and violates Section 254 of the Communications Act of 1934, as amended (the “Act”)<sup>11</sup> because it “imposes USF on providers of broadband Internet access services utilizing certain leased special access facilities but not ... on facilities-based providers of the identical service.”<sup>12</sup> The current Form 499-A instructions, according to TelePacific, “apply the carrier’s carrier rule on an entity-by-entity basis, consistent with past Commission orders and rules” and “effectively exempt telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor ....”<sup>13</sup> Several

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<sup>8</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13797.

<sup>9</sup> *Id.* at 13798.

<sup>10</sup> *See supra* note 2.

<sup>11</sup> 47 U.S.C. § 254.

<sup>12</sup> TelePacific Petition at iii-iv.

<sup>13</sup> *Id.* at iv.

parties filed comments in support of TelePacific's reconsideration petition.<sup>14</sup> The Commission, however, has not yet acted on the petition.<sup>15</sup>

The Bureau issued proposed revisions to the Form 499-A instructions in a Public Notice dated November 23, 2012 ("November 2012 Bureau Revisions").<sup>16</sup> Under the revised language, wholesalers would need to obtain service-specific certifications stating that the wholesale services at issue are incorporated into retail services on which the reseller directly contributes to USF or, alternatively, stating on what percentage of the retail revenues (from services that incorporate the wholesale services at issue) the reseller contributes to USF.<sup>17</sup> Several parties submitted comments on the proposed revisions in January 2013 that were critical of various aspects of the proposed language.<sup>18</sup> Several months later, on July 26, 2013, a group of industry

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<sup>14</sup> See COMPTTEL's Comments in Support of U.S. TelePacific's Petition for Partial Reconsideration and Request for Stay (Jan. 9, 2013); BT Americas, Inc., *et al.*, Joint Comments in Support of Request for Stay Filed by U.S. TelePacific Corp. (Jan. 9, 2013); Comments of the Independent Telephone & Telecommunications Alliance in Support of U.S. TelePacific Corp. d/b/a TelePacific Communications' Petition for Partial Reconsideration & Request for Stay (Jan. 9, 2013); Comments of Sprint Nextel Corp. (Jan. 9, 2013); Comments of tw telecom, inc. & Integra Telecom Inc. (Jan. 9, 2013).

<sup>15</sup> The *2012 Wholesaler-Reseller Clarification Order* is also the subject of a Petition for Clarification and Partial Reconsideration filed with the Commission by XO Communications Services, LLC on December 5, 2012, and a Petition for Review filed with the U.S. Court of Appeals for the District of Columbia Circuit by Global Crossing Bandwidth, Inc. on December 19, 2012. These filings concern the reasonable expectation standard and evidentiary standards related to determining whether resellers are contributors that the Commission delineated in the *2012 Wholesaler-Reseller Clarification Order*.

<sup>16</sup> *Wireline Competition Bureau Seeks Comment on Proposed Changes to FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions*, Public Notice, DA 12-1872 (rel. Nov. 23, 2012).

<sup>17</sup> *Id.*, Attachment 2, at 24.

<sup>18</sup> See Comments of Hypercube, LLC, *et al.* (Jan. 11, 2013); Comments of the Independent Telephone & Telecommunications Alliance (Jan. 11, 2013); Comments of Network Enhanced Telecom, LLP (Jan. 11, 2013); Comments of U.S. TelePacific Corp. d/b/a TelePacific Communications (Jan. 11, 2013); Comments of Verizon and Verizon Wireless (Jan 11, 2013); Comments of AT&T (Jan. 11, 2013); Comments of the Ad Hoc

participants submitted an *ex parte* letter with an alternative set of proposed revisions to the Form 499-A instructions.<sup>19</sup> The Bureau sought comment on the industry group’s proposed changes in the Public Notice dated August 2, 2013.

**II. THE BUREAU SHOULD WAIT UNTIL THE COMMISSION HAS RULED ON TELEPACIFIC’S PETITION BEFORE CHANGING THE RESELLER CERTIFICATION LANGUAGE**

TelePacific raised important issues in its Petition regarding the Commission’s new interpretation of the certification, reporting and contribution requirements for wholesale carriers and resellers. Those issues concern whether the Commission’s new service-specific interpretation: (1) has the effect of impermissibly discriminating, contrary to Section 254 of the Act, between broadband Internet access services provided by facilities-based carriers (which are not subject to USF contributions) and those provided by resellers that purchase special access services from those same facilities-based carriers (which are indirectly subject to USF contributions passed through from facilities-based carriers that have to pay based on revenue from resellers that purchase special access inputs); and (2) is a change to the Commission’s reseller certification standards that is arbitrary because it has not been adequately explained.

In addition to TelePacific’s important legal concerns about the Commission’s new interpretation in the *2012 Wholesaler-Reseller Clarification Order*, it should be noted that the existing requirement that wholesalers obtain entity-specific certifications from all resellers is itself extremely burdensome and imposes significant and unnecessary costs on the industry. As

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Coalition of International Telecommunications Companies (Jan. 11, 2013); Comments of Sprint Nextel Corp. (Jan. 11, 2013); Comments of XO Communications, LLC (Jan. 11, 2013).

<sup>19</sup> See Letter from Mary Henze, Assistant Vice President, AT&T Services, Inc., *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, July 26, 2013 (“Industry Group *Ex Parte*”).

Level 3 and several other carriers explained in their joint comments concerning the November 2012 Bureau Revisions,

[t]he 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 contribution that should be paid by the reseller entity that failed to meet its obligation to make universal service contributions.<sup>20</sup>

These burdens would only be compounded by the service-specific approach required by the Commission's new interpretation in the *2012 Wholesaler-Reseller Clarification Order*.

The Bureau should therefore, at the very least, maintain the status quo and refrain from requiring wholesalers to change their certification processes prior to Commission action on TelePacific's reconsideration petition. In the event the Commission grants TelePacific's petition, carriers would need to incur still more costs to unwind changes made in response to the *2012 Wholesaler-Reseller Clarification Order*. Such unnecessary costs can be avoided by simply waiting to require carriers to implement these changes until the Commission has acted on TelePacific's petition.

### **III. IF THE BUREAU DOES ACT, IT SHOULD ADOPT THE INDUSTRY GROUP'S PROPOSED CHANGES QUICKLY TO ALLOW FOR IMPLEMENTATION PRIOR TO JANUARY 1, 2014**

If the Bureau, notwithstanding the concerns expressed above, decides to move forward with changes to the Form 499-A instructions relating to reseller certifications, then it should adopt the changes in the industry group's proposal and do so quickly — no later than October 1, 2013 — so carriers have time to implement the changes prior to January 1, 2014. The industry

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<sup>20</sup> Comments of Hypercube Telecom, LLC, Level 3 Communications, LLC, TDS Metrocom, LLC and Zayo Group, LLC, WC Docket No. 06-122, Jan. 11, 2013, at 6-7.

group's changes accurately reflect the Commission's interpretation from the *2012 Wholesaler-Reseller Clarification Order* and, at the same time, enable wholesalers to rely on entity-level, account-level and service-specific certifications as appropriate depending on the situation of each reseller customer.<sup>21</sup> Thus, to the extent the Bureau decides to move ahead with changes to the reseller certification language, the industry group's proposal is acceptable.

It is important for the Bureau, if it is going to act, to do so quickly so that wholesale carriers and their reseller customers can adjust their processes to conform with the new certification requirements prior to January 1, 2014. All new processes should be in place prior to that date so carriers are ready to comply at the start of the calendar year to which the new Form 499-A instructions will apply. In the *2012 Wholesaler-Reseller Clarification Order*, the Commission recognized the complexities involved with the certification process and the need for wholesalers and their customers to adjust their practices in response to changes to the Commission's policies:

[W]holesalers and customers may have established operating, reporting and financial procedures that relied on the sample certification language and suggestion to check the Commission's website to determine whether an entity is a contributor contained in last year's Form 499-A instructions. Both wholesale providers and their customers may need time to make changes to their internal policies and procedures, as well as to their existing contracts, to ensure compliance with the Commission's reseller requirements as clarified in this order.<sup>22</sup>

The Commission was correct in this regard, and the Bureau should therefore act in time for carriers to implement the required internal changes to comply with modified reseller certification requirements. If the Bureau acts by October 1, 2013, carriers should have enough time to implement the changes by January 1, 2014.

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<sup>21</sup> See Industry Group *Ex Parte*, Attachment, at 2 & n.4.

<sup>22</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13798.

#### IV. CONCLUSION

For the foregoing reasons, the Bureau should not adopt any changes to the reseller certification language contained in the Form 499-A instructions unless such changes are necessary following Commission action on the TelePacific petition for reconsideration of the *2012 Wholesaler-Reseller Clarification Order*. If the Bureau decides to adopt such changes now, however, it should adopt the ones proposed by the industry group and do so prior to October 1, 2013, in order to enable carriers to modify their procedures and systems in time to implement the changes by January 1, 2014.

Respectfully submitted,



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R. Edward Price  
Senior Corporate Counsel  
Level 3 Communications, LLC  
225 Kenneth Drive  
Rochester, New York 14623  
(585) 255-1227

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