

**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 TW TELECOM INC. AND EARTHLINK, INC.

tw telecom inc. (“tw telecom”) and EarthLink, Inc. (“EarthLink”) (collectively, the “Joint CLECs”) hereby submit these comments on the Wireline Competition Bureau’s (“Bureau’s”) August 2, 2013 *Public Notice* in the above-referenced proceeding.¹

I. INTRODUCTION

In the *Public Notice*, the Bureau seeks comment on how it should implement the clarifications made regarding the Commission’s reseller requirements in the *2012 Wholesaler-Reseller Clarification Order* and in particular, whether it should include in the 2014 FCC Form 499-A Instructions the revisions to the reseller certification language and accompanying instructions proposed by a group of eight industry participants (“Industry Proposal”).² As

¹ 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) (“*Public Notice*”).

² See Letter from Mary Henze, Assistant Vice President, AT&T Services, Inc., Jonathan Blakey, Vice President, Regulatory Affairs, BCE Nexxia, Sheba Chacko, Senior Counsel and Head, North American Regulation and Global Telecoms Policy, BT Americas Inc., Melissa Newman, Vice President Federal Regulatory Policy & Affairs, CenturyLink, Ivana Kriznic, Regulatory Counsel, Orange Business Services U.S., Inc., Marybeth M. Banks, Director – Government Affairs, Sprint Corporation, Alan Buzacott, Executive Director, Federal Regulatory Affairs, Verizon, and Tiki Gaugler, Senior Attorney, Regulatory, XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-122 (filed July 26, 2013).

discussed herein, the Commission must eliminate the policy, which it described in the *2012 Wholesaler-Reseller Clarification Order*, of treating resellers that purchase special access inputs to broadband Internet access service differently from facilities-based providers of broadband Internet access service under the existing universal service contributions system. Until the Commission takes such action, the Bureau should move forward with implementing the clarifications made in the *2012 Wholesaler-Reseller Clarification Order* by adopting the Industry Proposal.

II. DISCUSSION

A. The Commission Must Eliminate The Discrimination Against Broadband Providers That Rely On Special Access Inputs In The Existing Contributions System.

In the *2012 Wholesaler-Reseller Clarification Order*, the Commission reiterated its requirement that wholesale providers of special access must contribute directly to the universal service fund (“USF” or “Fund”) on revenues from the sale of special access inputs to broadband Internet access service.³ The wholesale providers generally pass those contribution obligations through to their CLEC reseller customers (*e.g.*, EarthLink or tw telecom). As a result, CLECs that purchase special access as inputs to broadband Internet access service are effectively subject to universal service contribution obligations. Yet incumbent LECs and other providers that rely on their own facilities to provide broadband Internet access service are not subject to *any* such obligations.⁴ The existing system thus imposes a “tax” at the current USF contribution factor

³ See *Universal Service Contribution Methodology*, Order, 27 FCC Rcd. 13780, n.109 (2012) (“*2012 Wholesaler-Reseller Clarification Order*” or “*Order*”) (stating that “a provider of special access circuits [has] the obligation to contribute on the revenues derived from the sale of such transmission on a common carrier basis to providers of retail broadband Internet access service”).

⁴ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶ 104 (2005)

(*i.e.*, 15.1 percent) on only a subset of all broadband Internet access service providers (*i.e.*, CLECs that rely on special access inputs).⁵ And those CLECs must compete directly against incumbent LECs and other facilities-based providers that are not subject to this tax in the downstream retail market for broadband Internet access service.⁶

As tw telecom and other commenters have repeatedly demonstrated, this regime flatly contradicts the Commission’s longstanding universal service and broadband policies.⁷ In particular, it violates the principle of competitive neutrality underlying the FCC’s universal service policies by forcing “carriers with universal service obligations to compete directly with

(“*Wireline Broadband Classification Order*”). In addition, CLECs that rely on unbundled network elements as inputs to broadband Internet access service are not subject to any direct or indirect universal service contribution obligations.

⁵ *See, e.g.*, Comments of tw telecom inc. and Integra Telecom, Inc., WC Dkt. No. 06-122, at 5 (filed Jan. 9, 2013) (“tw telecom *et al.* Jan. 9, 2013 Comments”); Request for Stay Pending Reconsideration by U.S. TelePacific Corp. d/b/a TelePacific Communications, WC Dkt. No. 06-122, at 8 (filed Dec. 5, 2012) (“TelePacific Petition for Stay”) (“By singling out for USF contribution broadband Internet access delivered over leased special access circuits, the Commission placed TelePacific and its customers (and similarly situated providers and their customers) at a distinct competitive disadvantage – a cost increase of 17.4% based on the current Contribution Factor – in the broadband market.”); Comments of Sprint Nextel Corporation, WC Dkt. No. 06-122, at 2-3 (filed Jan. 9, 2013) (“Sprint Jan. 9, 2013 Comments on Petition for Partial Reconsideration”); Reply Comments of XO Communications Services, LLC in Support of U.S. TelePacific’s Petition for Partial Reconsideration and Request for Stay, WC Dkt. No. 06-122, at 3 (filed Jan. 24, 2013) (“XO Jan. 24, 2013 Reply Comments on TelePacific Petitions”).

⁶ This “tax” is applied to special access inputs that are already overpriced due to the Commission’s failure to adequately regulate the rates, terms, and conditions on which incumbent LECs offer special access services. *See tw telecom et al.* Jan. 9, 2013 Comments.

⁷ *See id.* at 3-4; TelePacific Petition for Partial Reconsideration, WC Dkt. No. 06-122, at 9-11 (filed Dec. 5, 2012) (“TelePacific Petition for Partial Reconsideration”); Sprint Jan. 9, 2013 Comments on Petition for Partial Reconsideration at 5-9; XO Jan. 24, 2013 Reply Comments on TelePacific Petitions at 3; COMPTEL’s Comments in Support of U.S. TelePacific’s Petition for Partial Reconsideration and Request for Stay, WC Dkt. No. 06-122, at 12-15 (filed Jan. 9, 2013) (“COMPTEL Jan. 9, 2013 Comments on TelePacific Petitions”).

carriers without such obligations.”⁸ As Sprint has explained, “resellers and vertically integrated providers face substantially different USF contribution burdens, despite providing virtually identical services to end users.”⁹ The current system also fails to “regulate like services in a similar manner” in direct contravention of the *Wireline Broadband Classification Order*.¹⁰ That is, the Commission has “contradicted and undermined” its own precedent by adopting a regime that “interferes with the broadband market and picks winners and losers among broadband Internet access service providers.”¹¹

The Commission must take swift action to address its unequal treatment of broadband Internet access service providers that rely on special access inputs and all other broadband Internet access service providers under the existing contributions system. The Commission could do so in one of several ways.

First, the Commission could expand the contribution base to include all providers of broadband Internet access service. This solution is ideal because it would not only put all such providers on a level playing field but it would also help the Commission accomplish its universal service contribution reform goals (*i.e.*, by limiting the overall contribution burden, establishing a stabilized and sustainable contribution base, and simplify administration of the current

⁸ See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 795 (1997) (subsequent history omitted). That principle is based on Section 254(d) of the Act, which requires that contributions be made on an “equitable and nondiscriminatory basis.” 47 U.S.C. § 254(d).

⁹ Sprint Jan. 9, 2013 Comments on Petition for Partial Reconsideration at 11.

¹⁰ See *Wireline Broadband Classification Order* ¶ 45.

¹¹ TelePacific Petition for Stay at 8; see also Sprint Jan. 9, 2013 Comments on Petition for Partial Reconsideration at 6; COMPTTEL Jan. 9, 2013 Comments on TelePacific Petitions at 13-14.

contributions system).¹² The Commission could adopt this solution in its ongoing universal service contribution reform rulemaking.¹³

Second, the Commission could eliminate the requirement that wholesalers contribute directly on revenues from special access inputs used to provide broadband Internet access service and make any necessary changes to the reseller certification process to ensure that wholesalers do not impose any pass-through charges for inputs used to provide only broadband Internet access service. In so doing, the Commission would eliminate the indirect contribution obligations of broadband Internet access providers that rely on special access inputs. The Commission could take this action in the pending universal service contribution reform rulemaking proceeding.¹⁴

Third, the Commission could *effectively* eliminate the requirement that wholesalers contribute directly on revenues from special access inputs used to provide broadband Internet access service by permitting wholesalers to accept certifications from reseller customers on an entity-by-entity basis in which the reseller certifies that it is exempt from any pass-through charges from the wholesaler because it contributes directly to the Fund for any end user services that are subject to contributions and that are provided using inputs purchased from the wholesaler (a practice followed by most wholesalers and resellers today). There is support in the record for eliminating the discrimination against broadband Internet access service providers that utilize

¹² See Comments of EarthLink, Integra, and tw telecom, WC Dkt. No. 06-122, at 5-7 & 13-15 (filed July 9, 2012) (“tw telecom *et al.* July 9, 2012 Comments”).

¹³ See *Universal Service Contribution Methodology*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357, ¶¶ 65-72 (2012) (“2012 Universal Service Contribution Reform FNPRM”) (seeking comment on “extending assessments to broadband Internet access”).

¹⁴ Such action would undoubtedly constitute a “logical outgrowth” of the pending universal service contribution reform rulemaking. See tw telecom *et al.* Jan. 9, 2013 Comments n.20.

special access inputs by permitting wholesalers to rely on entity-by-entity certifications.¹⁵ The Commission could take this step either in the context of addressing TelePacific's pending petitions for partial reconsideration and stay pending reconsideration of the *2012 Wholesaler-Reseller Clarification Order* or in the ongoing universal service contribution reform rulemaking proceeding.

B. Until The Commission Eliminates The Discrimination Against Broadband Providers That Rely On Special Access Inputs, The Bureau Should Move Forward With Revising The Form 499-A Instructions Pursuant To The Industry Proposal.

In the *2012 Wholesaler-Reseller Clarification Order*, as in the *2012 Universal Service Contribution Methodology FNPRM*, the Commission sought to address the lack of clarity regarding the contribution obligations of wholesalers and resellers when wholesale inputs are incorporated into other services that are not telecommunications services.¹⁶ As the Joint CLECs have previously explained, eliminating the discrimination against broadband providers that rely on special access inputs would largely alleviate this problem because the most common situation in which wholesale inputs are incorporated into other services that are not telecommunications services is when such inputs are used to provide broadband Internet access service.¹⁷ For

¹⁵ See TelePacific Petition for Partial Reconsideration at 14-16; Comments of Sprint Nextel Corporation, WC Dkt. No. 06-122, at 5-7 (filed Jan. 9, 2013) (explaining that “it is reasonable for [wholesale] providers to rely on entity-level certifications when claiming the reseller exemption from direct-contribution requirements”); XO Jan. 24, 2013 Reply Comments on TelePacific Petitions at 4; see also Letter from Michael Saperstein, Director, Federal Regulatory Affairs, Frontier Communications, Malena F. Barzilai, Senior Government Affairs Counsel, Windstream, and Nancy Lubamersky, VP, Public Policy and Strategic Initiatives, TelePacific Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-122, at 2 (filed Aug. 20, 2012).

¹⁶ See *2012 Wholesaler-Reseller Clarification Order* ¶ 40 & n.111; *2012 Universal Service Contribution Reform FNPRM* ¶ 143.

¹⁷ See *tw telecom et al.* July 9, 2012 Comments at 15.

example, by broadening the contribution base to include all broadband Internet access service providers and making that service assessable for USF contribution purposes, the Commission would significantly reduce the number of situations in which a wholesale input is incorporated into a non-assessable service.

Until the Commission eliminates the discrimination against broadband providers that rely on special access inputs and makes any necessary changes to the Form 499-A reseller certification process, however, the Bureau is faced with implementing the *2012 Wholesaler-Reseller Clarification Order*. That *Order* is flawed not only because it results in discrimination against these broadband Internet access providers¹⁸ but also because it appears to mandate an unworkable service-by-service (and in practice, circuit-by-circuit)¹⁹ approach to reseller certification.²⁰ The Industry Proposal, on the other hand, is still consistent with the *Order's* clarification that a customer is a “reseller” if it contributes on its specific service offerings that incorporate the wholesale service as an input (as opposed to if it contributes on *any* of its service offerings that may incorporate wholesale inputs)²¹ while allowing wholesalers to accept various types of certifications specifying which services the customer is or is not purchasing for resale pursuant to the certificate.²² In particular, the Industry Proposal gives wholesalers the flexibility to accept “entity-level certifications,” “account-level certifications,” or “service specific

¹⁸ See *2012 Wholesaler-Reseller Clarification Order* n.109.

¹⁹ See Sprint Jan. 9, 2013 Comments on Petition for Partial Reconsideration n.2.

²⁰ See *2012 Wholesaler-Reseller Clarification Order* ¶ 40 & n.111.

²¹ See *id.* n.111.

²² See Industry Proposal, Attachment, at 2.

certifications.”²³ For this reason, the Bureau should adopt the Industry Proposal and it should do so quickly. Wholesalers and resellers will need to use revised certifications beginning January 1, 2014 and as the Commission itself has recognized, “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 *Order*].”²⁴

III. CONCLUSION

For the foregoing reasons, the Commission should take the actions recommended herein by the Joint CLECs.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

Nirali Patel

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW

Washington, DC 20006

(202) 303-1000

Counsel for tw telecom inc. and EarthLink, Inc.

September 6, 2013

²³ *See id.* The Bureau should make clear that a wholesaler and its reseller customer can agree to other types of certifications so long as they meet the Commission’s reasonable expectation standard and are consistent with the *2012 Wholesaler-Reseller Clarification Order*.

²⁴ *2012 Wholesaler-Reseller Clarification Order* ¶ 41.