

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Review by IVANS, Inc. of)	
Decision of the Universal Service Administrator)	WC Docket No. 06-122
)	
Petition for Declaratory Ruling on the)	
Assessability of Certain Information Services)	

**JOINT REPLY COMMENTS OF
VERIZON AND VERIZON WIRELESS,¹ ORANGE BUSINESS SERVICES, BT AMERICAS
INC., BCE NEXXIA CORPORATION AND XO COMMUNICATIONS, LLC**

IVANS, Inc. (“IVANS”) seeks review of a June 7, 2013 Universal Service Administrative Company (USAC) letter ruling concerning IVANS’s Universal Service Fund (USF) contribution obligations.² Verizon, Orange Business Services, BT Americas Inc., BCE Nexxia Corporation, and XO Communications, LLC (“Joint Commenters”) do not have enough information to comment on the attributes of IVANS’s service or what contributions IVANS may or may not owe. However, as highlighted by the initial round of comments, three aspects of USAC’s decision involve issues pending in other Commission proceedings: (1) whether USF contributions are owed on MPLS-based services; (2) the appropriate limitations period in which USAC can look back and require additional USF contributions; and (3) whether USF contributions can be required from both the wholesaler and reseller on the same revenue.³ The Commission should be careful not to prejudice those proceedings in the instant appeal.

¹ In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc. (collectively, “Verizon”).

² IVANS Request for Review and Petition for Declaratory Ruling, *Request for Review by IVANS, Inc. of Decision of the Universal Service Administrator; Petition for Declaratory Ruling on the Assessability of Certain Information Services*, WC Docket No. 06-122 (Aug. 6, 2013) (“IVANS Appeal”).

³ See September 16, 2013 Comments of Sprint; Comments of AT&T; Comments of the Ad Hoc Coalition of International Telecommunications Companies (“ACITC Comments”); and Comments of US Telepacific Corp.

DISCUSSION

1. *MPLS-Enabled Services.* The Commission has acknowledged that it has not decided the regulatory classification of MPLS-enabled services and that many providers of these services treat all or part of the revenue from them as non-assessable information services revenue for USF contribution purposes.⁴ And many MPLS-enabled services are, in fact, information services. This proceeding represents at least the second time, however, that USAC has determined a particular service that utilizes MPLS technology is a telecommunications service.⁵ The Commission should resolve MPLS-enabled service contribution issues on a prospective, industry-wide basis by adopting the consensus proposal submitted by Joint Commenters.⁶ As Sprint recognized in its initial comments, the consensus proposal was submitted by a “diverse collection of USF contributors” and provides “a sensible solution that would ... resolve this issue while increasing aggregate USF contributions.”⁷

As a factual matter, MPLS is a protocol-agnostic processing capability that enables the seamless flow of data packets over a fully integrated network connecting different locations using IP protocol and any Layer 2 access protocol (*e.g.*, ATM, Ethernet, or Frame Relay). MPLS is a technology incorporated into a variety of enterprise data services, which generally have the attributes of information services—including, for example, protocol processing capabilities, customer-driven security features, and on-demand (and variable) packet prioritization. As its name – *Multi-Protocol* Label Switching – implies,

⁴ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004); *USF Contribution Methodology; A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, ¶ 44 (2012) (Commission has not “formally addressed enterprise communications services ... that are implemented with various protocols such as Frame Relay/ATM, MPLS and PBB for purposes of determining USF contribution obligations.”).

⁵ See *XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122 (December 29, 2010).

⁶ The proposal was developed by British Telecom, NTT America, Orange Business Services, Sprint Nextel, Verizon, and XO Communications. See Ex Parte Letter from Marybeth Banks, *et al.*, Sprint, BT, NTT, XO, Orange, Verizon, to Marlene Dortch, FCC, *Universal Service Contribution Methodology*, WC Docket No. 06-122 (March 29, 2012).

⁷ See Comments of Sprint at 3.

MPLS provides the inherent capability to convert between protocols, and thus many services that use MPLS enable net protocol conversion and are information services.⁸

Issues regarding the treatment of MPLS-enabled services for USF contribution purposes are of industry-wide importance. IP-based data services, including MPLS-enabled services, are used increasingly by enterprise customers, business consumers, and government entities to replace traditional private line and other services.

It is unclear whether the Commission can determine the appropriate treatment for IVANS's service here without the benefit of first addressing the MPLS issue more broadly.⁹ But, clearly, the present proceeding – which involves just one MPLS-enabled service offered by one provider – is not the context to make broad pronouncements or other determinations that would prejudice the outcome of a rulemaking or otherwise affect other providers. The record in this proceeding will necessarily be incomplete and focused on the facts concerning IVANS's service. Thus, the Commission should not and cannot make a more general determination concerning whether services that use MPLS should be subject to USF contribution requirements here, and instead should make that decision in an industry-wide rulemaking proceeding.

2. *Limitations Period.* The Commission should make clear that there is not an unlimited obligation to reach back in time to correct Form 499-A filings. USAC apparently has required IVANS to file contribution worksheets stretching back a period of fifteen years. An unlimited obligation to restate revenue reports stands in stark contrast to a Wireline Competition Bureau order that purported to

⁸ See, e.g., *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 104 (1996); *Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 F.C.C.2d 584, ¶ 11 (1983) (classifying as “enhanced” a service where “an otherwise basic packet-switched network . . . generate[s] an output to another network in a different protocol than its normal user inputs and outputs”); see also *id.*, ¶ 19.

⁹ By the same token, it is unclear whether USAC appropriately can assess revenues from MPLS-enabled services without first obtaining guidance from the Commission.

set an asymmetrical, one-year limit on a contributor's right to amend its Form 499-A filing when it overstated its past assessable revenue and is entitled to downwardly adjust its assessable revenue for the current reporting year.¹⁰ As other commenters have made clear, the Commission instead should adopt a sensible – and symmetrical – limitations period in a rulemaking proceeding.¹¹

Requiring carriers to correct errors that would result in an increased contribution liability regardless of how long ago those errors occurred is arbitrary and capricious. Indeed, the Commission already has adopted universal service contribution rules that effectively recognize the need for a limitations period on determining universal service contribution obligations. For example, universal service contributors are only required to keep records sufficient to support their Form 499-A filings and contribution calculations for five years. *See* 47 C.F.R. § 54.706(e) (“Any entity required to contribute to the federal universal service support mechanisms shall retain, for at least five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules.”).¹²

Even apart from this rule, over time, records are more likely to be incomplete or unavailable, memories will become stale, and the relevant evidence will become less reliable—that, after all, is a key rationale for having statutes of limitations in the first place. Thus, there would be a high risk of error in the absence of a time limit on upward revisions to reported revenues. Moreover, carriers are entitled to

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

¹¹ *See, e.g.,* ACITC Comments.

¹² In addition, the Commission requires audits related to universal service programs to be initiated and completed within five years. *See Schools and Libraries Universal Service Support Mechanism, et al.*, Fifth Report and Order and Order, 19 FCC Rcd 15808, ¶ 32 (2004) (“[W]e will initiate and complete any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year. . . . Under the policy we adopt today, USAC and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or a rule within five years of the final delivery of service for a specific funding year.”); *see also Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, et al.*, Report and Order, 22 FCC Rcd 16372, ¶ 29 (2007) (“We are therefore adopting a five-year standard for the other USF programs.”).

the stability and certainty that comes from knowing that their universal service contribution obligations are subject to a reasonable limitations period. That is why, in the absence of an express limitations period, 28 U.S.C. § 1658 provides a default four-year statute of limitations in circumstances such as this.¹³

The arbitrariness of an unlimited obligation to go back and upwardly adjust past reported revenue is exacerbated by the Bureau's adoption of a blanket rule that denies carriers the right correct overstated past revenues and receive credit for overpayments after one year has passed. That rule is procedurally infirm because it was beyond the Bureau's authority and should have been the subject of notice and comment rulemaking.¹⁴ Moreover, as a substantive matter, a one-year deadline for restating reported revenue that would decrease a carrier's USF contributions, while maintaining a limitless obligation to restate reported revenue that would increase contributions, could cause a carrier to contribute vastly more to the USF than it actually owes. That result is arbitrary and capricious and violates the section 254 requirement that USF contributions be assessed in an "equitable and non-discriminatory" manner. *See* 47 U.S.C. § 254(d).

Accordingly, while the Commission should set an appropriate limitations period pursuant to a rulemaking proceeding, it should set an outer limit here and make clear that such period should in no event exceed the four-year limit set out in 28 U.S.C. § 1658 or the five-year record-keeping requirement for Form 499-A filings.

3. *Wholesaler-Reseller Contributions.* IVANS asserts that USAC ignored evidence that its wholesaler, AT&T, had already made universal service contributions on certain revenue attributed to services provided to IVANS and required IVANS as the reseller to make contributions on that same

¹³ *See* ACITC Comments at 3.

¹⁴ The Commission delegated authority to the Bureau only to make "changes to the *administrative* aspects of the reporting requirements ... and not to the substance of the programs." *Bureau Order*, ¶ 9 (emphasis added); *see also* 47 C.F.R. § 0.291(e) (Bureau may not engage in rulemaking). But adopting a blanket rule that denies carriers the right to recover overpayments after one year embodies a substantive decision that affects carriers' rights.

revenue. AT&T submitted comments supporting IVANS on this issue.¹⁵ Again, Joint Commenters here take no position on the facts of this case nor the weight of any evidence presented to USAC. But the Commission has long recognized the need to “eliminate[] the problem of counting revenues derived from the same services twice,” because, among other things, doing so would “distort[] competition ... [by] disadvantage[ing] resellers.”¹⁶

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Respectfully submitted,

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¹⁵ See, e.g., Comments of AT&T at 1.

¹⁶ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 844 (1997).