

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
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)	

**COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS
ALLIANCE IN SUPPORT OF U.S. TELEPACIFIC CORP. d/b/a TELEPACIFIC
COMMUNICATION'S PETITION FOR PARTIAL RECONSIDERATION AND
REQUEST FOR STAY**

The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby submits its comments in support of the Petition for Partial Reconsideration and Request for Stay filed by TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) on December 5, 2012 in the above-captioned proceedings.¹ TelePacific seeks reconsideration and stay of the portion of the

¹ TelePacific Corp. d/b/a TelePacific Communication’s Petition for Partial Reconsideration and Request for Stay, WC Docket No. 06-122 (filed Dec. 5, 2012) (“TelePacific Petition for Partial Reconsideration” or “TelePacific Request for Stay,” as appropriate).

Commission's *2012 Wholesaler-Reseller Clarification Order* "clarifying" that reseller exemption certifications are required on a service-by-service basis.²

Given that this "clarification" imposes a new requirement that conflicts with Commission precedent and its statutory obligations under the Administrative Procedure Act ("APA") and Paperwork Reduction Act ("PRA"), this aspect of the *2012 Wholesaler-Reseller Clarification Order* must be overturned. ITTA therefore supports TelePacific's Petition for Partial Reconsideration regarding the Commission's change to the reseller certification process and grant of TelePacific's Petition for Stay pending review of this decision. The Commission's failure to provide stay relief "before these important questions of lawfulness are resolved" would "impose[] a strong risk of upsetting the balance struck by Congress."³ Absent Commission reconsideration of its decision and expeditious grant of the stay relief requested by TelePacific, it will be "virtually impossible to 'unscramble' the effects" of the *2012 Wholesaler-Reseller Clarification Order*.⁴

DISCUSSION

The Commission's interpretation in the *2012 Wholesaler-Reseller Clarification Order* that reseller certifications must be provided on a service-specific basis completely ignores, without any justification or consideration of the costs or benefits of such an interpretation, the conflict it creates with Commission precedent. As Frontier and others have pointed out, the service-by-service certification requirement is not a clarification of existing law; rather, it is a new requirement that the Commission cannot properly adopt without following proper notice and

² See *Universal Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau Filed by Global Crossing Bandwidth, Inc., et al.*, WC Docket No. 06-122, Order, FCC 12-134, ¶¶ 40-41 and n. 111 (Nov. 5, 2012) ("*2012 Wholesaler-Reseller Clarification Order*").

³ See *AT&T v. Ameritech*, Memorandum Opinion and Order, No. E-98-41, ¶ 24 (June 30, 1998).

⁴ *Id.*

comment rulemaking procedures and explaining the basis for the change based on a full consideration of the record.⁵

Nowhere in the Commission’s 1997 *Universal Service Order* establishing the existing Universal Service Fund (“USF”) contributions methodology,⁶ the instructions to the original form used for USF contributions purposes (Form 457), or the current Form 499 instructions is there a requirement that reseller certifications be provided on a service-by-service basis.⁷ Indeed, the question of whether the Commission should adopt, for the first time, a rule that requires resellers to apportion their wholesale purchases in some manner is being considered in the Commission’s Further Notice of Proposed Rulemaking regarding comprehensive reform of the USF contribution methodology.⁸ Specifically, the *Contributions Reform FNPRM* asks whether The Commission should adopt rules that would impose an “affirmative obligation on the

⁵ See, e.g., Letter from Michael Saperstein, *et al.*, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (filed Aug. 20, 2012), at 1 (“Joint Letter of Frontier, Windstream, and TelePacific” (“There is no existing rule that requires reseller certifications on a service-by-service basis”); Letter from J. Breck Blalock, Sprint, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (filed July 13, 2012), at 2 (“the Commission has never had a requirement that... a reseller certification must be made on an individual service basis” and “any suggestion that such changes would be a mere ‘clarification’ of existing FCC rules grossly mischaracterizes the current state of understanding with respect to Commission rules and precedent”); Letter from Steven A. Augustino, on behalf of XO Communications Services, LLC, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (filed Oct. 10, 2012), at 2 (“there is no current FCC rule that requires reseller certifications on a service-by-service basis” and a “requirement that would necessitate obtaining [such] certifications... would be a change in law which must be adopted on a prospective basis”); see also Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications (filed July 6, 2010), at 10; Comments of the Coalition for Fairness and Restraint in USAC Fund Administration (filed July 6, 2010), at 7.

⁶ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 846 (1997).

⁷ See Joint Letter of Frontier, Windstream, and TelePacific at 1; see also Letter from Tamar E. Finn, on behalf of U.S. TelePacific Corp., to Marlene H. Dortch, FCC, WC Docket No. 06-122 (filed Sept. 4, 2012) (summarizing the history of the reseller exemption and Form 499 instructions to show that there has never been a requirement to provide reseller certifications on a service-by-service basis).

⁸ *Universal Service Contribution Methodology, A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, ¶ 168 (2012) (“*Contributions Reform FNPRM*”).

part of the entity that purchases the wholesale telecommunications to specify in its certification the extent to which the wholesale input is incorporated into assessable services versus nonassessable services.”⁹

Given that a service-specific reporting obligation would represent a drastic departure from Commission precedent that “would require costly and time consuming changes to carriers’ administrative systems and would necessitate that carriers determine the exemption status of a vast spectrum of wholesale services,” the Commission “should determine whether to impose an apportionment requirement, if at all, only within the context of broader contribution reform after considering all comments filed in response to the [*Contributions Reform FNPRM*].”¹⁰ Indeed, the APA mandates that the Commission may only adopt such a rule after providing industry with sufficient notice and an opportunity to provide comment.

The APA requires the Commission to adopt changes to its rules through the notice and comment rulemaking process.¹¹ The APA applies when the Commission seeks to make substantive changes to its prior regulations,¹² and is triggered whenever the Commission seeks to substitute a new rule for an old rule that is “reasonably clear.”¹³ As demonstrated above, it is clear that prior to the *2012 Wholesaler-Reseller Clarification Order*, there was no requirement that reseller certifications be provided on a service-by-service basis. The Commission itself acknowledged in the *Contributions Reform FNPRM* that its universal service rules and orders

⁹ *Id.* at ¶ 170.

¹⁰ Joint Letter of Frontier, Windstream, and TelePacific at 1.

¹¹ 5 U.S.C. § 553(c); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (citing 5 U.S.C. § 553(b)-(c)).

¹² *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

¹³ *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001); *see also Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) (explaining that the Commission may not enforce new law without providing sufficient notice of the law’s requirements).

create no explicit requirement for service-by-service reseller certifications.¹⁴ The Commission’s own conduct demonstrates its recognition that it may adopt a new service-specific certification requirement only through rulemaking, given that it is proposing to adopt a rule that would require certifying providers to report service-specific information about their resold services in the *Contributions Reform FNPRM*.¹⁵

Moreover, the fact that the Commission has never sought approval for a service-by-service certification requirement pursuant to the PRA offers additional proof that such a requirement did not previously exist. Under the PRA, agencies must estimate the burden of a proposed information collection, justify the need for the collection, certify that the collection is necessary for the proper performance of agency functions, and provide a 60-day notice and comment period.¹⁶ The Director of the Office of Management and Budget must then independently assess and determine “whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”¹⁷

The requirement that telecommunications service providers give service-by-service certifications is clearly a “collection of information” subject to the PRA because it is a

¹⁴ *Contributions Reform FNPRM* at ¶ 168 (acknowledging that “the model certification language provided in the [Form 499-A] instructions beginning in 2007 does not specify service-specific certifications”). The FCC has long endorsed the following entity-by-entity, not service-specific, reseller certification language in connection with Form 499 filings: “I certify under penalty of perjury that my company is purchasing service for resale in the form of telecommunications or interconnected Voice over Internet Protocol service. I also certify under penalty of perjury that either *my company* contributes directly to the federal universal support mechanisms, or that each entity to which I provide resold telecommunications is itself an FCC Form 499 worksheet filer and a direct contributor to the universal service support mechanisms” (emphasis added).

¹⁵ *Id.* at ¶ 170.

¹⁶ 44 U.S.C. § 3506(c).

¹⁷ 44 U.S.C. § 3508.

requirement to obtain, solicit, or disclose facts or opinions for an agency.¹⁸ Moreover, numerous industry stakeholders have demonstrated that collection of such information is a substantial burden on providers.¹⁹ As ITTA pointed out, such a requirement “would be incredibly time-consuming and burdensome for carriers to implement as they would likely have to track and report on a circuit-specific basis, which would require extensive changes to current ordering, billing, and reporting systems.”²⁰

The PRA forecloses the Commission’s ability to adopt a new requirement for service-specific certifications without following proper procedural requirements and providing adequate justification for the change. As noted above, a service-by-service certification would impose a substantial new information collection obligation on the industry. The PRA does not permit the Commission to impose this burden without notice and comment, a Commission estimation and justification of the burden, and subsequent OMB approval.²¹ The Commission may meet these

¹⁸ 44 U.S.C. § 3502(3); *see also* 5 C.F.R. § 1320.3(c) (defining “[c]ollection of information” to include “any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information”).

¹⁹ *See, e.g.*, Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (filed Aug. 30, 2012), at 1 (“Verizon’s ordering, billing, and reporting systems, as well as its procedures for collecting reseller certifications from customers, are not currently designed for a service-specific process,” and thus “transitioning from an entity-wide certification process... will be costly and time-consuming”); Comments of CTIA – The Wireless Association, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012), at 12 (arguing that a service-by-service requirement would make the certification process even more cumbersome and inefficient); *see also* Comments of AT&T Services, Inc., WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012), at 32 (explaining that providing service-by-service circuit-specific reseller certifications is contrary to industry practice and that the administrative burden of doing so would be immense for both resellers and wholesalers); Comments of Verizon, WC Docket No. 06-122, GN Docket No. 09-51 (filed July 9, 2012), at 17-19 (arguing that requiring service-by-service circuit-specific reseller certifications is contrary to FCC precedent and industry practice, and would be extremely burdensome on providers).

²⁰ Letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, WC Docket No. 06-122, *et al.* (filed Aug. 13, 2012), at 2 (“ITTA Aug. 13 Letter”), at 2.

²¹ *See* 44 U.S.C. § 3506(c).

requirements in its ongoing, comprehensive *Contributions Reform FNPRM* proceeding, but may not do so, as it has here, in an *ad hoc* decision specific to the *TelePacific* proceeding.

Furthermore, while there is no procedural bar to the Commission's adoption of service-by-service certifications in its ongoing contributions reform rulemaking, the Commission should not do so. In addition to the burdens it would impose, the practical utility of such a requirement would be obviated if the Commission were to adopt contribution obligations for broadband Internet access providers as contemplated in the *Contributions Reform FNPRM*. The potential benefits, if any, would only be temporary because the Commission's adoption of a service-specific reseller certification requirement would necessitate myriad changes to "fix" a short-term problem that would largely disappear if broadband Internet access services are required to contribute to the Fund.²² Should the Commission nonetheless adopt a service-specific reseller certification requirement, it must provide a reasoned explanation for doing so that addresses the substantial cost and practical obstacles to its proposed rule change consistent with its statutory obligations under the APA and PRA.

In sum, the Commission should grant TelePacific's Petition for Partial Reconsideration and Request for Stay in connection with its decision in the *2012 Wholesaler-Reseller Clarification Order* to adopt a service-by-service reseller certification process. This change has no basis in any of the Commission's orders or rules relating to universal service, cannot be adopted in the narrow context of the *TelePacific* proceeding, and should be addressed in the *Contributions Reform FNPRM*. TelePacific has met its burden with respect to both requests by demonstrating that reconsideration will likely result in a reversal, in part, of the Commission's *2012 Wholesaler-Reseller Clarification Order* and that a stay is necessary to prevent irreparable

²² See ITTA Aug. 13th Letter at 2.

harm to providers, consumers, and the public interest should the Commission's interpretation be allowed to take effect.

CONCLUSION

For all of the foregoing reasons, the Commission should expeditiously grant TelePacific's Petition for Partial Reconsideration and Request for Stay consistent with its statutory obligations under the APA and PRA and sound public policy.

Respectfully submitted,

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