Before the
Federal Communications Commission
Washington, D.C. 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 SPRINT NEXTEL CORPORATION

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Commission's recent Order addressing Universal Service Fund ("USF") obligations of wholesale providers and their customers departs from long-standing precedent, harms competition, and violates statutory requirements. The Order, contrary to long-standing policies freeing advanced services from regulatory burdens, imposes significant regulatory costs on information services offered by competitive providers. Moreover, the Order bestows a massive competitive advantage on vertically integrated providers, who will avoid the burdens and costs resellers must now incur. As a result, the Commission's decision will contradict Commission policies, harm competition, and undermine statutory antidiscrimination mandates.

Furthermore, the Order violates requirements of both the Administrative Procedure Act ("APA") and the Paperwork Reduction Act ("PRA"). Though the Commission had the opportunity to address TelePacific's antidiscrimination challenge, the Order, in lieu of providing a reasoned analysis, relies on a procedural maneuver to avoid the issue entirely. In addition, the Commission must engage in notice-and-comment before imposing costly new regulations. Indeed, the Commission has an open rulemaking where it is considering broad USF reform, and a broad-based industry coalition has proposed a solution that would largely moot the issues raised here. Instead of addressing that proposal or any other aspect of the broader record generated through the rulemaking process, however, the Commission based its service-by-service certification requirements on the record of a single-party adjudication. Finally, the PRA will render the Order unenforceable, as the Commission did not gain approval of the massive burden a service-by-service certification system will represent.

Accordingly, the Commission should vacate the Order's discriminatory aspects. The Commission should either impose the same reporting and contribution requirements on self-

provisioned transmission inputs as competitive carriers, adopt the industry-coalition's proposal to subject information services to direct-contribution requirements, or enact another competitively-neutral reform. In any case, the Commission should adopt any of these changes only after appropriate notice and comment in the open USF-reform proceeding, and not on the record generated in the adjudication of a single party's claims.

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COMMENTS OF SPRINT NEXTEL CORPORATION

I. INTRODUCTION AND BACKGROUND

Sprint Nextel Corporation ("Sprint") hereby supports the request of U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") that the Commission reconsider several decisions in its recently issued Order addressing Universal Service Fund ("USF") obligations of wholesale providers and their customers that are both unlawful and damage competition.[1] The *Reseller Order*'s change to the definition of a reseller and the imposition of circuit-by-circuit

[1] *See Universal Service Contribution Methodology*, WC Docket No. 06-122, U.S. TelePacific Corp.'s Petition for Partial Reconsideration (filed Dec. 5, 2012) ("*TelePacific Petition*"), *requesting reconsideration of AT&T Inc., CenturyLink, SureWest Communications, and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration*, WC Docket No. 06-122, Order, FCC 12-134 (Nov. 5, 2012) ("*Order*" or "*Reseller Order*").

certification requirements will favor vertically integrated information service providers, impede investment in competitive information-service providers, and undermine statutory mandates and long-standing legislative and administrative policies that demand USF be administered in a competitively neutral manner.

The Telecommunications Act of 1996 ("1996 Act" or "Act") seeks to promote competition and spur deployment of advanced information-service technologies. To implement these goals, the Act (1) requires equitable and nondiscriminatory USF contributions and (2) minimizes information-service providers' regulatory burden. The Commission has implemented these directives through its "competitive neutrality" policy and determined effort to avoid burdening information-service providers with USF contribution requirements.

On November 5, 2012, however, the Commission issued the *Reseller Order*, several aspects of which— to the benefit of incumbent vertically integrated providers and to the detriment of competitive reseller providers—unlawfully discriminate against resellers. While the *Reseller Order* makes clear that the FCC is imposing a USF contribution obligation and what amounts to a circuit-by-circuit tracking obligation for circuits used by resellers for the provision of information services, it neglects to impose a corresponding wholesale-USF-contribution and circuit-by-circuit certification requirement on providers that sell information services using their own facilities.[2] As a result, vertically integrated providers can avoid these significant costs on the provision of information services. The result is inherently anticompetitive, as resellers face

[2] In practice, the Commission's new requirement to analyze and certify reseller status on a service-by-service level appears to require Sprint to undertake a circuit-by-circuit analysis in order to determine the Sprint services to which resold services are devoted. Sprint acquires access to transmission facilities from a number of different vendors, and Sprint integrates those circuits into a variety of different services. At any time, Sprint or a customer may shift the way a given circuit is used. If Sprint's certifications are to indicate whether a vendor's circuits are used for a service that generates USF-assessable revenue, Sprint must continuously track how each vendor's individual circuits are being used at any given time.

both enormous administrative expenses and a 16% USF assessment burden that vertically integrated providers do not.

The Commission has recognized and remedied this problem—but only for resellers that offer telecommunications rather than information services. The "reseller exemption" reflects the Commission's explicit desire to eliminate the advantage flowing to vertically integrated providers if wholesale (or "carrier's carrier") revenues were subject to USF-contribution requirements. That makes sense as a legal and a policy matter: the Commission cannot lawfully impose greater regulatory costs and burdens on one and not the other. Instead, the marketplace, not regulation, picks the competitive winner.

Yet, the Commission insists that this exemption applies only where resellers themselves make direct USF contributions. If a reseller's end-user revenue is derived from an information-service—and hence not subject to USF-contribution requirements—then the Commission rewards vertically integrated information-service providers with substantially lower regulatory burdens and fees than it imposes on competitive providers who buy telecommunications services but resell integrated information services. The result harms competitive providers of information-services—the very services that the 1996 Act seeks to expand.

Sprint concurs with TelePacific that this result is unlawful and damaging to competition. The contribution and certification requirements imposed by the Commission in the *Reseller's Order* violate the 1996 Act's nondiscrimination mandates. Furthermore, the Commission, relying on an incorrect procedural assertion, did not address the discrimination-related arguments TelePacific and others raised during the proceedings. As a result, the Commission violated its obligation to provide a reasoned explanation for its decision.

Beyond these legal infirmities, the Commission also used an improper procedural vehicle—adjudication, without Federal Register publication of any pending rule changes—to impose its new circuit-by-circuit certification requirement. The USF treatment of transmission inputs has significant consequences on the entire information-industry. Thus, the Commission should address this issue in an industry-wide rulemaking that allows broad input and a complete record. Indeed, the Commission currently has an open USF reform proceeding,[3] and a diverse coalition of industry participants—which includes both competitive and incumbent providers—have proposed a resolution that, if adopted, would render the discrimination problems in the *Reseller Order*—and TelePacific's challenge thereto—largely moot. But by modifying USF obligations on information services in the context of a narrow adjudication, the Commission has side-stepped the need to address the important proposals made in the open proceeding's record.

Finally, the Commission has imposed a massive new information-collection requirement on resellers, without seeking approval from the Office of Management and Budget ("OMB"), rendering the *Reseller Order* unenforceable under the Paperwork Reduction Act.

For these reasons and those set forth below, Sprint urges the Commission to grant TelePacific's petition and vacate the discriminatory aspects of the *Reseller Order*. To prevent discrimination and an un-level playing field, the Commission has several options. On one hand, it could ensure that self-provisioned transmission facilities are being subjected to the same contribution and reporting requirements the *Reseller Order* imposes on information services provided by resellers. On the other hand, the Commission could adopt the proposal made by the industry collation with regard to MPLS services. Under that proposal, as applied here, all

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[3] *See generally Universal Service Contribution Methodology; A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357 (2012) ("*USF FNPRM*").

information-service providers would make direct USF contributions using proxies—based on the speed of their service's transmission component—to establish the contribution base.[4] Either way, all providers would operate on a level playing field. Consideration of the issue in the *Universal Service Contribution Methodology* rulemaking proceeding may well elicit other ways to accomplish the Commission's goal in a competitively neutral manner. In any event, however, the Commission should impose any such modifications in the broader USF-reform proceeding, after consideration of a meaningful record, and not in an adjudication of a single party's dispute with USAC and the Wireline Bureau.

II. THE RESELLER ORDER IS DISCRIMINATORY, DAMAGES COMPETITION, AND CONTRADICTS LONG-STANDING POLICIES FOSTERING DEPLOYMENT OF ADVANCED SERVICES.

A. The Reseller Order Will Allow Incumbent Providers to Operate Without Constraint from Competitive Providers

The 1996 Act seeks to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[5] The Commission has issued a long string of orders seeking to enhance competition and increase information-service deployment.

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[4] *See* Ex Parte Letter of Marybeth Banks, Sprint Nextel Corporation; Sheba Chacko, BT Global Services; Michelle Farquhar, NTT, America, Inc.; Tiki Gaugler, XO Communications; Ivana Kriznic, Orange Business Services; Maggie McCready, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 4-5 (filed Mar. 29, 2012); *See generally USF FNRPM*.

[4] *See* Ex Parte Letter of Marybeth Banks, Sprint Nextel Corporation; Sheba Chacko, BT Global Services; Michelle Farquhar, NTT, America, Inc.; Tiki Gaugler, XO Communications; Ivana Kriznic, Orange Business Services; Maggie McCready, Verizon, to Marlene H. Dortch, Secretary, FCC, Docket No. 06-122, at 4-5 (filed Mar. 29, 2012).

[5] Telecommunications Act of 1996, Pub. L. 104-104, S. 652, 104th Cong., Introduction (1996).

For example, in the *Wireline Broadband Order*, the Commission expressed "confidence" that its information-service classification of broadband-wireline Internet service would ensure that "adequate incentives are in place to encourage the deployment and innovation of broadband platforms consistent with our obligations and mandates under the Act."[6] Similarly, in the *Wireless Broadband Order*, the Commission stated a goal of "encouraging the development of information services by ensuring that they remain free from common carrier regulation," and cited "the Act's overarching goal of fostering competition by providing a level playing field in the market and removing unnecessary regulatory impediments."[7]

However, the Commission has made it virtually impossible for reseller information-service providers to compete with vertically integrated providers by imposing a significant administrative burden on competitors that must purchase the inputs necessary to provide information services and providing these vertically integrated providers a more than 16% tax advantage over a key input resellers must purchase.[8] Although the *Reseller Order* provides that direct contributions come from the wholesale provider rather than the reseller, that distinction makes no meaningful difference. Indeed, courts recognize that "contributors almost always pass their contribution assessments through to their customers."[9] Thus, the indirect USF contribution on transmission inputs is a real cost for the reseller, who then must choose whether to forego profit or offer non-competitive prices, both of which undermine the reseller's business. Under

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6 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14856 ¶ 3 (2005) ("*Wireline Broadband Order*").

7 *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5901, 5921 ¶ 56 (2007).

8 *See* Proposed Fourth Quarter 2012 Universal Service Contribution Factor, CC Docket No. 96-45, DA 12-1484 (rel. Sept. 12, 2012).

9 *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1099 (D.C. Cir. 2009).

the *Reseller Order*, however, vertically integrated providers enjoy favored treatment that shields them from transmission-input USF surcharges altogether.[10]

Moreover, this discriminatory treatment doubles as a barrier to entry for new information-service providers. Freed from USF surcharges on their transmission inputs, only vertically integrated information-service providers will stand a realistic chance of survival. By extension, the viability of any new information-service entrant will depend on the entrant's ownership of transmission facilities. As a result, any new entrant must engage in a risky "two-step" entry. The entrant must risk significant amounts of capital not only for the development of the new information service, but also for deployment of underlying transmission facilities. Accordingly, the *Reseller Order* will likely both hasten the exit and prevent future entry of competitive information-service providers.

B. The Reseller Order Directly Contradicts Policies Designed to Free Information Services from Title II Regulation

Soon after passage of the 1996 Act, the Commission recognized that both Congress and the Commission have historically sought to "free" information services "from regulatory oversight," which has caused such services to see "exponential growth."[11] Indeed, the 1996 Act's legislative history bluntly states that the "definition of telecommunications service specifically excludes the offering of information services… precisely to avoid imposing common carrier obligations on information service providers."[12] More broadly, the Act's USF provisions

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[10] It should also not escape notice that many wholesale transmission providers are also vertically integrated service providers that compete directly with their wholesale customers, giving them an incentive to raise resellers' cost of providing service to end users as much as possible.

[11] *In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11524 ¶ 45 (1998) ("*Report to Congress*").

[12] S. Rep. No. 104-23, 104th Cong., 1st Sess. at 28 (1995).

instruct that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation."[13]

Likewise, though information-service providers offer a service that—by statutory definition—includes "telecommunications," [14] the Commission has routinely refused to subject information-service revenue to USF contribution requirements. For example, the year after the 1996 Act passed, the Commission stated that "information services are not inherently telecommunications services."[15] To find otherwise, according to the Commission, would make it "difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category."[16] Thus, an "offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components."[17] Subsequently, the Commission solidified this principle, refusing to apply common-carrier regulation to cable-modem service, "regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting…."[18] And the *Wireline Broadband Order*, issued nearly 10 years after the 1996 Act passed, reiterated this principle, finding that wireline broadband Internet access is "a functionally integrated, finished product, rather than both an information service and a

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13 47 U.S.C. § 254(b)(2).

14 47 U.S.C. § 153(24).

15 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 22493 at ¶ 789 (1997) ("*First Report and Order*").

16 *Report to Congress* at 11529 ¶ 57.

17 *Id*. at 11529 ¶ 58.

18 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4822-23 ¶ 38 (2002) ("*Cable Modem Order*").

telecommunications service."[19] In sum, the Commission has consistently refused to impose USF contribution requirements on the telecommunications portion of an information service.

The *Reseller Order*, however, directly contradicts this long-standing Commission policy. Indeed, the *Reseller Order* imposes significant administrative and record keeping burdens on the provision of information services and imposes discriminatory USF contributions onto the telecommunications component of an array of information services that rely on leased transmission facilities. As TelePacific explains in detail, it does not matter whether the contribution is direct or indirect.[20]

III. THE RESELLER ORDER IS UNLAWFUL BECAUSE IT VIOLATES STATUTORY MANDATES, FAILS TO PROVIDE A REASONED EXPLANATION FOR ITS DECISION, AND IMPROPERLY USES ADJUDICATION TO MODIFY ESTABLISHED RULES.

The *Reseller Order* is both substantively and procedurally unlawful. Several provisions of the Administrative Procedures Act ("APA"), three of which are particularly relevant here, constrain the Commission's authority to act. First, the APA requires reversal of any agency action "not in accordance with law."[21] Second, the APA prohibits decisions that are "arbitrary" or "capricious."[22] This provision requires the agency to provide a coherent, reasoned explanation for its decision.[23] It further requires a decision's reversal if the agency "entirely fail[s] to consider an important aspect of the problem…."[24] Finally, the APA requires an agency

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19 *Wireline Broadband Order* at 14911 ¶ 105.

20 *TelePacific Petition* at 7.

21 5 U.S.C. § 706(2)(A).

22 *Id.*

23 *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) ("Where the agency has failed to provide a reasoned explanation…, we must undo its action") (internal quotation marks and citations omitted).

24 *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

to modify established rules through rulemakings announced in the Federal Register, not through adjudication of individual matters.[25] The Commission has violated each of these requirements, rendering the *Reseller Order* unlawful.

A. The Commission's Decision to Impose USF Requirements on Reseller Firms but Not on Vertically Integrated Firms is a Discriminatory Policy That Violates Statutory Mandates

The 1996 Act requires *all* USF-contribution requirements to be "equitable and nondiscriminatory."[26] As a result, courts have required the Commission to avoid any contribution requirement that harms "some" providers "more than it harms others."[27] Under the APA, any Commission action that violates this statutory requirement is "of no effect."[28]

The Commission has consistently recognized the nondiscrimination requirement when implementing USF contributions. For example, the Commission's first USF-implementation Order adopted a "competitive neutrality" principle, finding that USF requirements should "neither unfairly advantage nor disadvantage one provider over another…."[29] Furthermore, the same Order created a "reseller exemption," which provides a USF exemption for telecommunications-service sales to carriers that resell those services to end users. The

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[25] *See Torch Operating Co. v. Babbitt*, 172 F. Supp. 2d 113, 124-25 (D.D.C. 2001) (citing *Alaska Prof'l Hunters Ass'n v. F.A.A.*, 177 F.3d 1030, 1036 (D.C. Cir. 1999)).

[26] *See* 47 U.S.C. §§ 254(b)(4) ("All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service"); 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service").

[27] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 435 (5th Cir. 1999).

[28] *United States v. Amdahl Corp.*, 786 F.2d 387, 392-93 (Fed. Cir. 1986) ("Administrative actions taken in violation of statutory authorization or requirement are of no effect") (citing *Utah Power v. United States*, 243 U.S. 389 (1917)).

[29] *First Report and Order* at ¶ 47.

exemption has only one purpose: to implement the "competitive neutrality" principle, as "[t]he double counting of revenues distorts competition because it disadvantages resellers."[30] The Commission further explained that it sought "to avoid a contribution assessment methodology that distorts how carriers choose to structure their businesses or the types of services that they provide."[31] In other words, the Commission has clearly recognized the discriminatory and hence unlawful nature of a policy that burdens resellers with greater USF obligations than vertically integrated providers.

Yet, the *Reseller Order* disregards the nondiscrimination requirement and competitive neutrality principle, discriminating against resellers in two primary ways. First, vertically integrated providers, as discussed above, will have the ability to offer information services that are wholly exempt from USF contribution requirements. Resellers, however, must incorporate a mandatory USF contribution—recently over 16%—baked into the costs of their service. Thus, under the *Reseller Order*, resellers and vertically integrated providers face substantially different USF contribution burdens, despite providing virtually identical services to end users.

Second, resellers must now prepare service-by-service certifications for all circuits that meet the "reseller exemption."[32] To comply, affected providers must develop and implement systems to track how each circuit is used. Moreover, because customers can freely shift their usage of particular circuits at any time, providers must develop processes and devote resources to tracking circuit usage on a continuing basis. Such systems do not currently exist because there is absolutely no business need for them; they will now have to be developed by one segment of the

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30 *Id*. at ¶ 845.

31 *Id*. at ¶ 846.

32 *See Reseller Order* at ¶¶ 40-41 (requiring reseller certifications for "the specific service offerings that incorporate the wholesale service as an input").

industry solely to satisfy the recordkeeping burden imposed by the *Reseller Order*. Providers' efforts to modify backend systems, track circuit usage, and prepare what may amount to circuit-by-circuit certifications will come at an enormous cost. By contrast, competitors who are vertically integrated need not spend the first dollar to implement this requirement, as they would not be required to submit reseller certifications.

Accordingly, the *Reseller Order*, by imposing steep administrative costs and USF-contribution burdens on resellers but not on vertically integrated providers, harms "some" providers "more than it harms others" and is a prohibited discriminatory practice. Moreover, this policy represents an abdication of the "competitive neutrality" policy, as it plainly serves to "disadvantage" resellers over vertically integrated providers. The *Reseller Order* also turns the reseller exemption's rationale on its head, as it "distorts" how providers structure their businesses. As a result, Sprint urges the Commission to reconsider its decision.

B. The Commission Failed to Provide a Reasoned Explanation for Ignoring Statutory Requirements and Commission Policy

The *Reseller Order* fails to address—substantively—TelePacific's contention that the *Reseller Order* is discriminatory.[33] Instead, the Commission avoids addressing the issue. Its *entire* analysis of the serious discrimination issues posed by Telepacific consists of the following:

> Nothing in the *Wireline Broadband Internet Access Order* or the *2006 Contribution Methodology Order* relieved a provider of special access circuits of 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. *See Wireline Broadband Internet Access Order*, 20 FCC Rcd at 14915-16, paras. 112-13; *2006 Contribution Methodology Order*, 21 FCC Rcd at 7549, para. 62 & n. 206. If TelePacific is seeking reconsideration of the decisions

[33] *See* Ex Parte Letter of U.S. TelePacific Corp. d/b/a TelePacific Communications to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (Mar. 21, 2011).

> adopted in the *Wireline Broadband Internet Access Order* and the *2006 Contribution Methodology Order*, that request is untimely.[34]

The suggestion that discrimination-related arguments amount to an untimely request for reconsideration of the *Wireline Broadband Order* is meritless. The D.C. Circuit plainly allows "statutory challenges to an agency's application… of a previously promulgated rule, even if the period for review of the initial rulemaking has expired."[35] This is so "because administrative rules and regulations are capable of continuing application," and "limiting review of a rule to the period immediately following the rulemaking would effectively deny many parties ultimately affected by a rule an opportunity to question its validity."[36]

Moreover, the Commission relies on aspects of the *Wireline Broadband Order* that must be reexamined. The core problem is that, in 2005, the Commission failed to recognize or analyze the ultimate implications of its decision. In particular, it failed to consider that applying a telecommunications-service classification to the offering of wholesale transmission to competitive information-service providers—without applying a corresponding USF exemption—would undermine the rationale behind the reseller exemption. Indeed, the most well-established aspect of the reseller exemption explicitly exempts—on antidiscrimination grounds—telecommunications service resellers from mandatory USF requirements. The antidiscrimination principle applies with equal force to a reseller of information services, but the administrative record confirms that the Commission, during the Wireline Broadband proceedings, never hinted it would treat information-service and telecommunications-service resellers differently.

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[34] *Reseller Order* at ¶ 39, n. 109.

[35] *Graceba Total Commc'ns. Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997).

[36] *Id*. (internal quotation marks and citation omitted).

Otherwise the public would have certainly raised the obvious antidiscrimination problem raised here.

The record makes clear that the Commission, during the Wireline Broadband proceedings, simply did not consider or make a ruling on the precise issue raised here: whether the antidiscrimination requirement of Section 254 of the Act and competitive neutrality principle allow the indirect USF surcharges on competitive information-services that integrated information-service providers do not face. The Commission's failure to fully analyze the potential competitive implications of its 2005 ruling on broadband may be entirely understandable, but that does not justify the Commission's failure to undertake such analysis now. Nor does any such justification provide any basis for adopting the legal fiction that the Commission considered this issue in 2005.

The *Wireline Broadband Order*'s infirmities notwithstanding, the *Reseller Order* itself—though ostensibly relying on the *Wireline Broadband Order*—imposes discriminatory and novel USF contribution requirements. Accordingly, affected parties may now challenge the novel application announced in the *Reseller Order*. The Commission's meritless procedural argument thus does not even begin to satisfy the Commission's obligation to provide a "reasoned explanation" for its decision, in violation of the arbitrary and capricious standard. Moreover, the Commission also violated the arbitrary and capricious standard when it "entirely failed" to consider whether the *Order* violates a statutory mandate—certainly "an important aspect of the problem."[37]

[37] *See State Farm*, 463 U.S. at 43.

C. The Commission Improperly Modified Established Certification Requirements via Adjudication

The *Reseller Order*'s service-by-service certification requirement required notice-and-comment rulemaking. Under the APA, if an agency "gives a rule a sufficiently definite interpretation," the agency cannot "fundamentally modif[y] that interpretation" via adjudication, but rather must engage in notice-and-comment rulemaking as prescribed by "Section 553 of the APA…."[38] That section requires that the "notice of proposed rule making shall be published in the Federal Register," and that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[39] Notice in the Federal Register is exempted only when (1) the agency issues "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," or (2) "when the agency for good cause finds… that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[40]

Here, the Commission now requires resellers to provide service-by-service certifications to their wholesale providers.[41] However, as Sprint has discussed on the record, prior to the *Reseller Order*, the absence of any service-by-service certification requirement was, at minimum, reasonably clear.[42] The Commission applies a "reseller exemption" to providers who purchase and resell transmission services. These providers, however, must certify their reseller

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[38] *Torch Operating Co.*, 172 F. Supp. 2d at 124-25 (citing *Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1036).

[39] 5 U.S.C. §§ 553(b)(1), (3).

[40] *Id.* § 553(b).

[41] *Reseller Order* at ¶ 40 (requiring reseller certifications for "the specific service offerings that incorporate the wholesale service as an input").

[42] Ex Parte Letter of Sprint Nextel Corp. to Marlene H. Dortch, Secretary, FCC, WCB Docket No. 06-122, at 1 (Aug. 29, 2012) ("*Sprint Ex Parte Letter*").

status to wholesale providers. As the Commission itself recently explained, "the model certification language provided in the [Form 499-A] instructions beginning in 2007 *does not specify service-specific certifications*."[43] In addition, the Form 499-A Instructions themselves require a reseller to certify only that "my company" makes direct USF contributions.[44] And as the record reflects, industry participants, consistent with the Commission's guidance, generally provide certifications at the entity level.[45] Indeed, the *Reseller Order* expressly recognizes the lengthy setup period that service-by-service certifications will require and delays the Order's implementation to accommodate those needs.[46] This would not be the case if service-by-service certifications had been the rule all along.

Accordingly, the *Reseller Order* represents a dramatic shift from the existing, reasonably clear certification requirements. Under the APA, the Commission could make this change only via rulemaking, with notice—containing the "terms or substance" of the certification requirement—published in the Federal Register. That way, all affected parties would have been on notice that the Commission was seeking to make this shift. The Commission, however, has attempted to impose this requirement in the TelePacific adjudication and did not publish notice

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43 *USF FNPRM* at 5419 ¶ 168 (emphasis added).

44 *See* Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A (2007), at 19, available at http://transition.fcc.gov/Forms/Form499-A/499a-2007.pdf ("*Form 499-A Instructions*").

45 *Sprint Ex Parte Letter* at 2; Comments of AT&T at 32, WC Docket No. 06-122 and GN Docket No. 09-51 (filed July 9, 2012) (explaining that providing service-by-service circuit-specific reseller certifications is contrary to industry practice, noting that many wholesalers will not accept such certifications, and further arguing that the administrative burden of doing so would be immense for both resellers and wholesalers); Comments of Verizon at 17-19, WC Docket No. 06-122 and GN Docket No. 09-51 (filed July 9, 2012) (arguing that requiring service-by-service circuit-specific reseller certifications is contrary to FCC precedent, contrary to industry practice, and would be extremely burdensome).

46 *Reseller Order* at ¶ 41 ("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").

in the Federal Register. Indeed, the Commission's notice here consisted of two largely boilerplate documents: one announcing that TelePacific sought review of a USAC audit, and another announcing that three parties sought clarification and reconsideration of the Wireline Bureau's resolution of that review.[47] Neither document announced the imposition of a service-by-service certification requirement, nor were the documents published in the Federal Register. As a result, only parties observing the TelePacific proceeding would have been aware of the Commission's pending rule change. Accordingly, the Commission improperly modified its rules, and Sprint urges the Commission to reconsider this decision.

IV. THE PAPERWORK REDUCTION ACT WILL NULLIFY ANY COMMISSION ATTEMPT TO ENFORCE THE CERTIFICATION REQUIREMENTS SET FORTH IN THE RESELLER ORDER

In addition to the APA, the Commission must also observe the requirements of the Paperwork Reduction Act ("PRA"). The Commission, however, has never sought approval of the massive information-collection burden imposed by a circuit-by-circuit certification process. The *Reseller Order* does not even attempt to address this issue, further violating the reasoned explanation requirement. And as a result of the PRA violation, the circuit-by-circuit certification requirement is effectively unenforceable.

A. The Reseller Order Implements a Brand New Information Collection Requirement, for Which the FCC Has Neither Sought nor Received OMB Approval

Under the PRA, an agency, before engaging in a "collection of information," must provide a 60-day notice and comment period, estimate the burden of the proposed information

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[47] *See* Comment Sought on Petition for Clarification and Reconsideration of the Wireline Competition Bureau's TelePacific Order Filed by AT&T Inc., CenturyLink, SureWest Communications, and Verizon, WC Docket No. 06-122, Public Notice, DA 10-1012 (rel. June , 2010); Comment Sought on Request of TelePacific Commcn's. For Review of a Universal Service Contribution Decision of the Universal Service Administrative Company and a Stay of That Decision, WC Docket No. 06-122, Public Notice, DA 10-86 (rel. Jan. 19, 2010).

collection, justify the need for the collection, and certify that the collection is necessary for the proper performance of agency functions.[48] A "collection of information" broadly refers to all requirements to obtain, solicit, or disclose facts or opinions to agency.[49] If an agency fails to meet these requirements, it may not enforce "any penalty" against any person who fails to comply with the information-collection requirement.[50]

As discussed above, the Commission, before the *Reseller Order,* had never required service-by-service certifications. Indeed, the Commission itself has recognized the burdensome process providers will have to initiate to comply with this new requirement. Because providers will now be required to collect, maintain, and disclose information regarding circuit usage, this requirement plainly qualifies as a "collection of information." Yet, the Commission has never sought OMB approval of the immense information-collection burden created by a service-by-service certification requirement. Rather, in 2007, when the Wireline Bureau last made substantive modifications to the certification instructions, the Bureau received approval for a certification that required each reseller to certify only that it "contributes directly to the federal universal support mechanisms," or is a 499 filer and contributor.[51] And the Commission's 2006 Supporting Statement for this new Form 499-A provided OMB with no estimate of the burden of imposing a service-by-service certification, nor any justification for such a burden.[52]

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[48] 44 U.S.C. § 3506(c).

[49] 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").

[50] 44 U.S.C. § 3512(a).

[51] *See Form 499-A Instructions* at 19.

[52] *See* FCC Supporting Statement, Dec. 18, 2006, available at http://www.reginfo.gov/public/do/DownloadDocument?documentID=12154&version=1.

The *Reseller Order* itself does not even purport to satisfy the Commission's obligations under the PRA. It neither estimates the paperwork burden of circuit-by-circuit certifications, attempts to show that the burden "is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility,"[53] nor even *seeks* let alone obtains the OMB's approval.

Accordingly, because OMB has never approved this burdensome new service-by-service certification requirement, any attempts to punish compliance failures will be null and void.

B. The Commission's Application for OMB Approval of the 2013 Forms 499-A and 499-Q Presents a Wholly Unjustified Estimate of the Collection's Burden

To justify the *Reseller Order*, the Commission might point to its Paperwork Reduction Act Notices in the Public Notice seeking comment on the revised 2013 Forms 499-A and 499-Q. Those notices, which estimate the burden at 13.5 hours and 10.0 hours respectively,[54] however, are wholly inaccurate given the scope of the systems that must be put in place and the volume of information to be collected. The development of new systems to track usage and prepare certifications on a circuit-by-circuit basis will require tremendous efforts and will involve tracking and maintaining thousands, if not hundreds of thousands, of records over multiple years.

Had the Commission followed the PRA's directives, these issues could have been presented to OMB as part of the approval process prior to the adoption of the *Reseller Order*. Moreover, even if OMB, after receiving comments on these issues, rejects the Wireline Bureau's

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[53] 44 U.S.C. § 3508. The PRA regulations further explain that the purpose of the Act is "to reduce, minimize and control burdens and maximize the practical utility and public benefit" of information collected by or for the Federal government. 5 C.F.R. § 1320.1. The President last year emphasized the importance of improving regulation and the regulatory review process. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[54] *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, Public Notice, DA 12-1872 at Attachments 2 & 4 (rel. Nov. 23, 2012).

proposed specific modifications to Forms 499-A and 499-Q, the underlying, unapproved certification requirement will still exist in the *Reseller Order*.[55] Accordingly, the PN seeking comment on revised Forms 499-A and 499-Q cannot overcome the Commission's failure to seek OMB approval of the service-by-service certification requirement imposed by the *Reseller Order*.

V. CONCLUSION

For the reasons set forth herein, the *Reseller Order* imposes reseller USF contribution and circuit-by-circuit certification requirements that undermine competition, impede innovation, and violate the Administrative Procedures Act and Paperwork Reduction Act. Thus, the Commission should grant the *TelePacific Petition* and reconsider its decision. The Commission should vacate the discriminatory aspects of the *Reseller Order*. The Commission should either impose the same reporting and contribution requirements on self-provisioned transmission inputs as competitive carriers, adopt the industry-coalition's proposal to subject information services to direct-contribution requirements, or enact another competitively-neutral reform. In any case, the Commission should adopt any of these changes only after appropriate notice and comment in the open USF-reform proceeding, and not on the record generated in the adjudication of a single party's claims.

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[55] The FCC's PRA violation, however, makes the requirement unenforceable. *See* 44 U.S.C. § 3512(b) ("Public Protection") (providing that an agency's failure to comply with the PRA provides "a complete defense" to any administrative or judicial action); *Saco River Cellular, Inc. v. F.C.C.*, 133 F.3d 25, 30 (D.C. Cir. 1998) (finding that the PRA precluded FCC enforcement of a paperwork requirement that had not received OMB approval); *Certain Notices of Apparent Liability for Forfeiture and Citations Issued for Violations of 47 C.F.R. § 20.19(h) and 47 C.F.R. § 20.19(i)*, Order, DA 11-2097 (released Dec. 30, 2011) (withdrawing NALs because the regulation allegedly violated had not received PRA approval at the time of the alleged violations).

Respectfully submitted,

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