

**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

I. INTRODUCTION AND BACKGROUND

Sprint Nextel Corporation (“Sprint”) hereby supports U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) in its request for the Commission to stay the *Reseller Order*’s requirement that telecommunications-services resellers certify their status on a service-by-service basis.¹ A stay is necessary to avoid the cost to competitive providers of

¹ See *Universal Service Contribution Methodology*, WC Docket No. 06-122, TelePacific Corp.’s Request for Stay Pending Reconsideration (filed Dec. 5, 2012) (“*Request for Stay*”), requesting a partial stay 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*”).

developing and implementing the new circuit-by-circuit² tracking systems that would be required to comply with the *Reseller Order*—systems which do not currently exist because they serve no business or regulatory purpose aside from compliance with the new Order. This waste and irreparable harm is likely because the *Reseller Order* is likely to be reversed on either reconsideration or appeal for the reasons TelePacific describes in its Petition for Partial Reconsideration and those Sprint sets forth in its Comments on TelePacific’s Petition (“PFPR Comments”).

For these reasons, as further set forth below, Sprint urges the Commission to grant TelePacific’s request for a stay.

II. STANDARD FOR ISSUANCE OF A STAY

The Commission generally applies four factors to its analysis of a stay request: (1) likelihood of success on the merits; (2) the threat of irreparable harm in the absence of a stay; (3) harm the stay would cause to other parties; and (4) whether a stay is in the public interest. As discussed below, each of these factors favor TelePacific’s request for a stay of the *Reseller Order*.³

III. TELEPACIFIC IS LIKELY TO PREVAIL ON THE MERITS OF ITS CHALLENGE TO THE COMMISSION’S SERVICE-BY-SERVICE CERTIFICATION REQUIREMENT

The *Reseller Order*’s service-by-service certification requirement is unlawful for a variety of reasons. First, as Sprint’s PFPR Comments discuss in detail, the *Reseller Order*’s new

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.

³ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 23 FCC Rcd. 1705, 1706-07 (2008).

certification requirements violate both the 1996 Act's antidiscrimination provisions⁴ and the Commission's "competitive neutrality" principle.⁵ Under this new requirement, resellers must now prepare circuit-by-circuit certifications for all circuits that meet the "reseller exemption."⁶ To comply, affected providers must develop and implement circuit-by-circuit tracking systems that do not currently exist because there is absolutely no business need for them. Providers' efforts to modify backend systems, track circuit usage, and prepare circuit-by-circuit certifications will come at an enormous cost. By contrast, vertically integrated providers have a distinct advantage, as they need not spend the first dollar to implement this requirement. Thus, the service-by-service certification requirement is unlawfully discriminatory and competitively biased.

As Sprint's PFPR Comments also discuss in detail, the *Reseller Order* violates a number of Administrative Procedure Act ("APA") requirements.⁷ The Commission chose to disregard TelePacific's contention that the *Reseller Order* is discriminatory,⁸ asserting only that TelePacific "untimely" requested reconsideration of the *Wireline Broadband Order*.⁹ The D.C.

⁴ 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").

⁵ See Sprint PFPR Comments at 10.

⁶ See *Reseller Order* at ¶¶ 40-41 (requiring reseller certifications for "the specific service offerings that incorporate the wholesale service as an input").

⁷ See Sprint PFPR Comments at 9-10.

⁸ 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).

⁹ *Reseller Order* at ¶ 39, n. 109.

Circuit, however, has already plainly rejected this type of procedural maneuver.¹⁰ The Commission's procedural dismissal does not satisfy the Commission's obligation to consider all important aspects of the problem and to provide a "reasoned explanation" for its decision.¹¹ Furthermore, the Commission used an improper procedural vehicle to impose its new certification requirement. The Commission cannot modify established rules in an adjudication, but rather must do so through notice-and-comment rulemaking. Here, the Commission, through an adjudication addressing TelePacific's challenge to a USAC audit, has imposed new reseller certification requirements that impose massive burdens on affected providers. Thus, the Commission's lack of reasoned decision making and failure to modify its rules through a notice-and-comment-rulemaking renders the certification requirement invalid under the APA.

Finally, the Commission has never sought approval of the massive information-collection burden imposed by a circuit-by-circuit certification process. The *Reseller Order* is silent on 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.¹² Indeed, the *Reseller Order* itself does not attempt to satisfy the Commission's PRA obligations in any manner. 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,

¹⁰ See Sprint PFPR Comments at 12-14; see also *Graceba Total Commc'ns. Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997).

¹¹ See *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹² See Sprint PFPR Comments at 17-20.

including whether the information shall have practical utility,”¹³ nor *seeks*, let alone obtains, OMB’s approval.

Moreover, in its Public Notice seeking comment on the most recent revisions to Forms 499-A and 499-Q, the Commission submits burden estimates (increasing from 10 to 13.5 hours) that are wholly inaccurate given the scope of the systems that must be put in place and the volume of information to be collected.¹⁴ 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.

Accordingly, the service-by-service reseller certification requirements violate statutory antidiscrimination and regulatory competitive neutrality requirements, are invalid under the APA, and are unenforceable under the PRA. TelePacific is thus likely to prevail on the merits of a challenge to this requirement, counseling strongly in favor of a stay.

IV. THE BALANCE OF HARMS FAVORS TELEPACIFIC’S REQUEST FOR A STAY

A. *The Reseller Order Will Cause Irreparable Harm to Sprint and Similarly Situated Providers Because It Will Dramatically Increase Resellers’ Costs and Regulatory Burdens Relative to Vertically Integrated Providers*

The discriminatory and improperly adopted *Reseller Order* threatens significant harm to Sprint and similarly situated providers. Currently, Sprint, like the vast majority of other resellers, submits entity-level reseller certifications that, as required by the Commission, certify

¹³ 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).

¹⁴ *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).

that “my company” makes direct USF contributions.¹⁵ Sprint does not, however, track usage at the individual circuit level. Doing so presents enormous administrative difficulty and expense, yet serves no business purpose or any valid Commission rule or regulation.

The new service-by-service certifications contemplated by the Commission will require Sprint to develop tracking systems and processes that serve no other purpose but compliance with the *Reseller Order*. 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. A service-by-service certification will thus require a complete overhaul of Sprint’s databases and tracking systems. That overhaul is so substantial that, today, Sprint cannot even provide a realistic estimate of the time and expense required. In addition, the new requirement’s burden is not limited to one-time implementation costs. Rather, because customers can freely shift their usage of particular circuits at any time, Sprint and other providers must develop processes and devote resources to tracking circuit usage on a continuing basis.

B. A Stay of the Reseller Order Will Not Harm Any Party and Will Benefit the Public’s Interest in Competition Among Information-Service Providers

On the other hand, a stay will not harm any party. The Commission has provided no indication that the USF or its recipients will benefit materially from the attempted addition of discriminatory contributions on carriers’ carrier revenue derived from resellers while

¹⁵ 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>.

TelePacific's reconsideration petition is pending.¹⁶ Nor will a stay harm wholesale providers, as the Commission has recognized that, under the status quo, it is reasonable for such providers to rely on entity-level certifications when claiming the reseller exemption from direct-contribution requirements.¹⁷

A stay will also strongly benefit the public interest. The Telecommunications Act of 1996 sought to enhance competition throughout the telecommunications industry.¹⁸ As TelePacific has discussed, however, imposing massive administrative burdens and USF contributions on resellers but not vertically integrated providers will stifle resellers' ability to compete with incumbents, causing significant harm to the public's interest in competition among information-service providers.

On the other hand, it is difficult to conceive of any tangible public-interest benefits that result from imposition of service-by-service reseller certifications. Moreover, the Commission has available a currently open rulemaking proceeding that expressly addresses these issues and affords the ability to reform USF arrangements for resellers in a procedurally and substantively

¹⁶ If the Commission hopes the *Reseller Order* will increase USF revenue, the basis for that hope cannot be gleaned from the administrative record on which the Order rests. As Sprint and TelePacific have pointed out, the *Reseller Order* discriminates against competitive providers and in favor of vertically integrated incumbents, for whom self-provisioned telecommunications inputs will remain free from USF costs. But the imposition of a 16% USF cost on the competitive segment of the industry will be self-defeating as a revenue matter to the extent it simply drives business to the USF-immune incumbent segment. In any case, the sparse administrative record on which the *Reseller Order* rests provides no basis for finding that the *Reseller Order* would in fact result in any net increase at all in USF revenue, despite the enormously destructive costs it would impose.

¹⁷ See *Reseller Order* at ¶ 41 (“[W]e conclude that the wholesale providers’ reliance on certificates in accordance with the sample language and other instructions in the Form 499-A worksheets was sufficient to justify a reasonable expectation”).

¹⁸ See Telecommunications Act of 1996, Pub. L. 104-104, S. 652, 104th Cong., Introduction (1996) (stating that the purpose of the Act is 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”).

proper manner.¹⁹ Thus, a stay will benefit the public's interest in competition without impacting the Commission's implementation of its universal-service obligations.

Accordingly, the balance of harms strongly favors granting TelePacific's request for a stay. The service-by-service reseller certification requirement will impose significant, irreparable harm on Sprint and similarly situated providers, while harming the public's interest in competition. On the other hand, granting a stay will harm neither any provider nor the public interest.

V. CONCLUSION

For the reasons set forth herein, the Commission should grant TelePacific's request for a stay of the *Reseller Order*'s service-by-service certification requirements. TelePacific is likely to succeed on the merits of a challenge, as the *Reseller Order* imposes unlawful circuit-by-circuit certification requirements that violate the Telecommunications Act, Administrative Procedures Act, and Paperwork Reduction Act. In addition, the certification requirements harm both resellers and the public interest, while a stay would cause little, if any, harm.

¹⁹ See *Universal Service Contribution Methodology, A National Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357 (2012).

Respectfully submitted,

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