

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.)	USAC Audit Report No. CR2005CP007
)	

ORDER

Adopted: August 17, 2009

Released: August 17, 2009

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we deny the requests filed by Global Crossing Bandwidth, Inc. (Global Crossing) seeking review of the Universal Service Administrative Company's (USAC) February 15, 2007 audit and appealing invoices submitted to Global Crossing based on the audit report.¹ In its audit report, USAC found that Global Crossing incorrectly reported revenues from customers that did not contribute to the universal service fund in 2004 as carrier's carrier revenue, as opposed to end user revenue on which Global Crossing's universal service contribution assessments are based.² We find that the record does not support Global Crossing's contention that it reasonably expected these customers to directly contribute to the universal service fund as resellers, and therefore we find that USAC's assessment of contributions on Global Crossing based on revenue from these non-contributing customers was proper.

II. BACKGROUND

A. The Act and the Commission's Rules

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that 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.³ To this end, the Commission has determined that any entity that provides interstate telecommunications services to the public for a fee

¹ Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc., CC Docket No. 96-45 (filed June 22, 2007) (Portions Confidential) (Global Crossing Request for Review); Letter from Danny E. Adams, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 97-21 (dated Jan. 31, 2008) (Portions Confidential) (Global Crossing Invoice Appeal).

² Independent Auditor's Report of Contributor Revenue Compliance on Global Crossing Bandwidth, Inc. (USAC Audit No. CR2005CP007) (Confidential) (USAC Audit Report).

³ 47 U.S.C. § 254(d).

must contribute to the universal service fund.⁴ The Commission further directed that contributions should be based on contributors' interstate and international end-user telecommunications revenues.⁵

3. Although the Commission declined to exempt from contribution "any of the broad classes of telecommunications carriers that provide interstate telecommunications services," not all carriers that provide interstate telecommunications service contribute directly to universal service.⁶ In particular, the Commission recognized that "[b]asing contributions on end-user revenues ... will relieve wholesale carriers from contributing directly to the support mechanisms" because these carrier's carriers do not earn revenues directly from end-users.⁷ Instead, the reseller that provides the service to the end-user and thereby earns end-user revenues will contribute directly to the universal service fund.⁸

4. The Commission also set forth the specific methodology for contributors to use to compute their universal service contributions.⁹ In the *Second Order on Reconsideration*, the Commission further clarified the distinction between end-user revenues and carrier's carrier revenues for purposes of universal service contributions.¹⁰ In that order the Commission adopted the FCC Form 457 Universal Service Worksheet, the predecessor to the current FCC Form 499, Telecommunications Reporting Worksheet.¹¹ To address the "double counting" issue it had identified in the *Universal Service First Report and Order*, but to ensure that all revenues were subject to universal service contribution, the Commission defined a reseller as "a telecommunications service provider that 1) incorporates the purchased telecommunications services into its own offerings and 2) can reasonably be expected to contribute to support universal service based on revenues from those offerings."¹²

5. The Commission also established that a wholesale carrier should have in place documented procedures to ensure that it reports as reseller revenues only revenues from those entities that

⁴ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8797, para. 787 (1997) (*Universal Service First Report and Order*), *aff'd in part, rev'd in part, remanded in part sub nom, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000). The Commission also requires certain other providers of telecommunications to contribute to the universal service fund. See, e.g., *Universal Service Contribution Methodology*, WC Docket Nos. 06-122 and 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237,99-200, 95-116, and 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

⁵ *Universal Service First Report and Order*, 12 FCC Rcd at 8797, para. 787; 47 C.F.R. § 54.706.

⁶ *Universal Service First Report and Order*, 12 FCC Rcd at 8797, para. 787. The Act and the Commission's rules do, however, exempt certain carriers from the contribution requirement. For example, carriers are not required to contribute directly to the universal service fund in a given year if their contribution for that year would be less than \$10,000. 47 C.F.R. § 54.708. Likewise, carriers with purely intrastate or international revenues are not required to contribute. *Universal Service First Report and Order*, 12 FCC Rcd at 9174, para. 779; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Sixteenth Order on Reconsideration, 15 FCC Rcd. 1679, 1685, para. 15 (1999). Certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers are also exempt from the contribution requirement. 47 C.F.R. § 54.706(d). Unless a carrier meets one of the exemptions, however, it must contribute to the universal service fund.

⁷ *Universal Service First Report and Order*, 12 FCC Rcd at 9207, para. 846.

⁸ *Id.*

⁹ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997) (*Second Order on Reconsideration*).

¹⁰ *Id.* at App. C.

¹¹ *Id.* Contributors are required to file quarterly and annually. 47 C.F.R. § 54.711(a).

¹² *Second Order on Reconsideration*, 12 FCC Rcd at 18507.

reasonably would be expected to contribute to support universal service.¹³ The Commission included a list of the minimum information which could be used to establish a reasonable expectation and encouraged wholesale carriers to obtain signed statements from the resellers.¹⁴ Since then, the instructions have been updated to assist wholesale carriers in meeting the reasonable expectation standard. In 2002, the instructions were updated to include the reseller's FCC Form 499 Filer ID as part of the minimum information to be retained, to include a link to the Commission's list of current contributors available on the Internet, and to clarify that the signed statement should be certified by the reseller.¹⁵ Although implicit in the instructions since their inception, in funding year 2004 (reporting 2003 revenue), the instructions were modified to explicitly alert the wholesale carrier that it "will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users."¹⁶

6. Contributors report their revenues by filing Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q) with USAC.¹⁷ USAC reviews these filings and verifies the information provided by the contributors.¹⁸ USAC also bills contributors for their universal service contributions.¹⁹

B. Petition for Review

7. Global Crossing is the wholesale arm of the Global Crossing North America family of companies.²⁰ According to Global Crossing, its primary line of business was selling telecommunications services for resale to other interexchange carriers.²¹ In the early-2000s, however, Global Crossing extended its offering to other wholesale customers including information service providers or enhanced service providers.²²

8. USAC's Internal Audit Division audited Global Crossing's 2005 FCC Form 499-A, reporting calendar year 2004 revenues.²³ In the audit report, USAC found, in relevant part, that Global Crossing reported as reseller revenues certain revenues from customers that did not in fact contribute to the universal service fund in 2004.²⁴ Based on this finding, USAC recommended that Global Crossing

¹³ *Id.* at 18508.

¹⁴ *Id.* ("The procedures should include but not be limited to maintaining the following information on resellers: legal name; address; name of a contact person, and phone number of the contact person. If the underlying contributor does not have other reason to know that the entity will, in fact, resell service, then the contributor should obtain a signed statement to that effect.")

¹⁵ Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, at 15 (2002).

¹⁶ Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, at 17 (2004).

¹⁷ 47 C.F.R. § 54.711(a) (setting forth reporting requirements in accordance with Commission announcements in the Federal Register). Contributors report historical revenue on the annual Telecommunications Reporting Worksheet (FCC Form 499-A), which is generally filed on April 1 each year. *See* Universal Service Administrative Company, Schedule of Filings, at <http://www.universalservice.org/fund-administration/contributors/revenue-reporting/schedule-filings.aspx> (last visited Aug. 17, 2009) (USAC Form 499 Filing Schedule). Contributors project future quarters' revenue on the quarterly Telecommunications Reporting Worksheets (FCC Form 499-Q), which are generally filed on February 1, May 1, August 1, and November 1. USAC Form 499 Filing Schedule.

¹⁸ 47 C.F.R. § 54.711(a).

¹⁹ *Id.* § 54.702(b).

²⁰ Global Crossing Request for Review at 2.

²¹ *Id.*

²² *Id.*

²³ *See* Global Crossing Request for Review at 3 (citing to USAC Audit Report, for which Global Crossing seeks confidential treatment.)

²⁴ *Id.*

report as end-user revenue the revenue from those customers that did not contribute to the universal service fund and re-file its 2005 FCC Form 499-A.²⁵ Instead of re-filing, Global Crossing noted certain errors it had made, recalculated the amount it believed was due, and offered to pay that amount.²⁶ USAC calculated Global Crossing's outstanding obligations, treating as end-user revenue all revenue for which Global Crossing's customers had not directly contributed, and invoiced Global Crossing in October and November 2007.²⁷

9. In June 2007, Global Crossing appealed USAC's audit finding that Global Crossing should contribute to the universal service fund on behalf of its non-contributing customers.²⁸ In January 2008, Global Crossing appealed the October and November 2007 invoices that included additional universal service contribution adjustments based on the audit finding.²⁹

III. DISCUSSION

A. USAC's Recovery of Contributions Assessed On Global Crossing's End User Revenue

10. Global Crossing challenges USAC's assessment, based on the audit finding, of universal service contributions to Global Crossing, and instead, argues that those contributions should be recovered directly from Global Crossing's customers.³⁰ Global Crossing also argues that, even if such recovery was permissible, USAC improperly applied the Commission's instructions for universal service contributions to the facts of this case.³¹ For the reasons discussed below, we deny Global Crossing's appeal.

11. Global Crossing contends that the Wireline Competition Bureau's (Bureau) decisions in the *American Cyber Order* and the *American Telecommunications Systems Order* support its argument that universal service contributions should be recovered from Global Crossing's customers, which Global Crossing asserts are resellers.³² In those decisions, the Bureau held that resellers could not through contractual agreements alter their fundamental obligation to report end-user revenues and contribute to the universal service fund.³³ The reseller's contribution obligation, however, is independent of the wholesale carrier's obligation to determine the status of and accurately report revenue from its customers. In response to the USAC audit of its 2005 FCC Form 499-A filing, Global Crossing failed to show that it had actual knowledge or a reasonable expectation that its customers were resellers that would contribute directly to the universal service fund.

²⁵ See *id.* at 4.

²⁶ *Id.* at 3.

²⁷ See Global Crossing Invoice Appeal at 1.

²⁸ Global Crossing Request for Review at 1.

²⁹ Global Crossing Invoice Appeal at 1.

³⁰ Global Crossing Request for Review at 1.

³¹ *Id.* at 18.

³² *Id.* at 10 (citing *Federal-State Joint Board on Universal Service, Petition for Review American Cyber Corp. et al.*, CC Docket Nos. 96-45 and 02-6, Order, 22 FCC Rcd 4925 (Wireline Comp. Bur. 2007) (*American Cyber Order*) and *Federal-State Joint Board on Universal Service, American Telecommunications Systems, Inc., et al.*, CC Docket No. 96-45, Order, 22 FCC Rcd 5009 (Wireline Comp. Bur. 2007) (*American Telecommunications Systems Order*)).

³³ *American Cyber Order*, 22 FCC Rcd at 4929-30, para. 16; *American Telecommunications Systems Order*, 22 FCC Rcd at 5012, para. 12.

12. Global Crossing further argues that USAC arrogated to itself the role of determining whether Global Crossing or its customers are responsible for contributing to the universal service fund.³⁴ Global Crossing is incorrect. Pursuant to the Commission's rules, universal service contributions shall be calculated and filed in accordance with the FCC Form 499-A, and USAC has the authority to verify any information reported on the FCC Form 499-A.³⁵ The reasonable expectation standard that the Commission includes in the FCC Form 499-A instructions ensures that wholesale carriers perform an appropriate level of due diligence in determining whether their customers are resellers that will, or likely will, contribute directly to the universal service fund. Although resellers have an obligation to contribute based on revenue received from their end-user customers, the underlying carrier has an independent obligation to accurately report the revenue received from its customers.³⁶ If the underlying carrier does not provide evidence to demonstrate its reasonable belief that its customers were resellers that would directly contribute to the universal service fund, then the Commission will consider the revenue from those customers to be end-user revenue and will look to the underlying carrier for the universal service contribution.³⁷ This ensures that carriers will adequately confirm and accurately represent the revenue of their customers.

13. Although the Commission has not dictated how a carrier may meet the reasonable expectation standard, it has provided guidance in the FCC Form 499-A instructions. Wholesale carriers can satisfy the reasonable expectation standard by maintaining certain minimum information on each reseller (i.e., Filer 499 ID, legal name, address, name of a contact person, and phone number of the contact person); and by verifying through the use of a certification that each reseller will: (1) resell the filer's services in the form of telecommunications; and (2) contribute directly to the federal universal service support mechanisms; or by retaining a printout from the Commission's website at <http://gullfoss2.fcc.gov/cib/form499/499a.cfm> indicating that the reseller is a current contributor to universal service.³⁸ A current reseller certification allows the wholesale carrier to demonstrate that its customer is indeed a reseller.³⁹ Thus, a wholesale carrier can substantiate its reasonable expectation regarding the status of a customer by retaining a current and properly executed reseller certification. This provides wholesale carriers the assurance and consistency they need to satisfy their obligation to accurately report their revenues.

14. In determining that Global Crossing had not properly classified the revenue at issue as reseller revenue, USAC relied upon the guidance in the Commission's 2005 FCC Form 499-A instructions. Specifically, USAC examined whether: 1) Global Crossing had maintained certain minimum information on each customer; 2) each of Global Crossing's customers was contributing to the

³⁴ Global Crossing Request for Review at 11.

³⁵ 47 C.F.R. § 54.711(a).

³⁶ Global Crossing's reliance on several Commission enforcement decisions to bolster its argument that the contribution obligation lays with its customers is misplaced. See *Telecom House, Inc.*, File No. EB-04-IH-0656, Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd 15131, 15135, para. 12 (2005); *Carrera Communications, Inc.*, File No. EB-04-IH-0274, Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd 13307, 13312, para. 14 (2005); *InPhonic, Inc.*, File No. EB-05-IH-0158, Notice of Apparent Liability and Order, 20 FCC Rcd 13277, 13283, para. 17 (2005); *Globcom, Inc. d/b/a Globcom Global Communications*, File No. EB-02-IH-0757, Order of Forfeiture, 21 FCC Rcd 4710, 4714, para. 10 (2006). The issue in this case is not whether resellers have an obligation to contribute directly to the universal service fund, but whether Global Crossing has an independent obligation to perform its own due diligence in establishing a reasonable expectation that its customers are resellers that will contribute on their own behalf.

³⁷ See Instructions to the Telecommunications Worksheet, FCC Form 499-A, at 18 (2005) (2005 FCC Form 499-A Instructions).

³⁸ *Id.*

³⁹ *Id.*

universal service fund; 3) Global Crossing had a valid reseller certification from each of its customers; and 4) Global Crossing had a printout from the Commission's current contributor website verifying the reseller contributor status of each of its customers.⁴⁰ If a carrier fails to demonstrate that it either has affirmative knowledge that its customer is contributing to the universal service fund as a reseller or has a reasonable expectation that its customer is contributing as a reseller based on the guidance provided in the FCC Form 499-A instructions or other reliable proof, USAC may properly reclassify that carrier's reported reseller revenue as end-user revenue.⁴¹ Moreover, where USAC properly reclassifies reseller revenue as end-user revenue, the carrier "will be responsible for additional universal service assessments that result."⁴² USAC found, and we agree, that the evidence Global Crossing presented – e.g., outdated certifications, contract provisions, company website information and product description – did not support a finding that Global Crossing had a reasonable expectation that its customers would contribute directly to the universal service fund as resellers.⁴³ We, therefore, affirm USAC's finding that Global Crossing did not demonstrate that it had a reasonable expectation that its customers were contributing resellers, and, therefore, Global Crossing should have reported revenue from these customers as end-user revenue.

B. USAC's Recovery Consistent with APA

15. Global Crossing argues that USAC's assessment of contributions on revenue reported as reseller revenue by Global Crossing violates the Administrative Procedures Act (APA) because USAC is exceeding its authority by creating a new rule and doing so without notice and comment.⁴⁴ Global Crossing is incorrect. USAC's reclassification of the revenues is consistent with existing rules and is not tantamount to adopting a new rule. In the *Second Order on Reconsideration*, the Commission clarified the distinction for contribution purposes between end-user revenues and carrier's carrier revenues.⁴⁵ The clarification made by the Commission in the *Second Order on Reconsideration* gave effect to the Commission's determination in the *Universal Service First Report and Order* that the contribution mechanism should operate in a competitively neutral manner by preventing double counting of revenue for contribution, but at the same time ensure that such revenue was subject to contribution once.⁴⁶ As discussed above, to prevent such double counting while ensuring that contribution was received at least once, the Commission defined a reseller as "a telecommunications service provider that 1) incorporates the purchased telecommunications services into its own offering and 2) can reasonably be expected to contribute to support universal service based on revenues from those offerings."⁴⁷ The Commission also established the reasonable expectation standard.⁴⁸ The Commission has crafted this policy consistent with normal procedures.

⁴⁰ See Global Crossing Request for Review at 7, 8.

⁴¹ See *supra* para. 5.

⁴² 2005 FCC Form 499-A Instructions at 18.

⁴³ See Global Crossing Request for Review at 20.

⁴⁴ Global Crossing Request for Review at 17.

⁴⁵ *Second Order on Reconsideration*, 12 FCC Rcd at 18507-08, App. C.

⁴⁶ *Universal Service First Report and Order*, 12 FCC Rcd at 9207, paras. 845-847 (discussing why the Commission determined not to assess gross revenues) as applied in *Second Order on Recon.*, 12 FCC Rcd 18507-08, App. C.

⁴⁷ *Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. C.

⁴⁸ *Id.* at 1508, App. C ("An underlying contributor should have documented procedures to ensure that it reports as revenues from resellers only revenues from entities that reasonably would be expected to contribute to support universal service.").

16. Global Crossing further argues that the Commission does not require wholesale carriers to meet specific criteria to establish that their customers are resellers.⁴⁹ Global Crossing states that the reseller certification requirement is not binding and has not been subject to the APA notice and comment process.⁵⁰ Global Crossing is correct that the 2005 FCC Form 499-A instructions do not mandate how wholesale carriers must substantiate the status of their customers as resellers; the instructions are indeed guidance from the Commission on how wholesale carriers may substantiate their customers' reseller status.⁵¹ However, USAC did not rely solely on the criteria in the Commission's instructions. Rather, USAC considered evidence provided by Global Crossing, but found that evidence wanting. Thus, USAC did not treat the guidance in the Commission's instructions as a binding rule, nor did it otherwise exceed its authority by verifying the accuracy of Global Crossing's submissions.⁵²

C. USAC Correctly Applied the 2005 FCC Form 499-A Instructions

17. Finally, Global Crossing argues that USAC misapplied the 2005 FCC Form 499-A Instructions to the facts of its case.⁵³ Global Crossing states that it had a reasonable expectation that its customers would contribute to the universal service fund and that the 2005 FCC Form 499-A Instructions permit it to rely on evidence other than a valid reseller certificate or a filer ID and website confirmation in reaching this expectation.⁵⁴ Although Global Crossing is correct that a wholesale carrier may establish its reasonable expectation in ways other than those listed in the FCC Form 499-A instructions, Global Crossing failed to do so. As discussed above, we affirm USAC's finding that Global Crossing did not demonstrate that it had a reasonable expectation that its customers were resellers that directly contributed to the universal service fund.⁵⁵ Global Crossing also argues that USAC erroneously used criteria from the 2007 FCC Form 499-A Instructions to analyze its 2004 revenue.⁵⁶ As discussed above, however, the requirement that underlying carriers report revenue from their customers as end-user revenue if they do not have a reasonable expectation that the customers will directly contribute to the universal service fund as resellers was contained in the 2005 FCC Form 499-A Instructions.⁵⁷

D. Global Crossing Invoice Appeal

18. In October and November 2007, USAC invoiced Global Crossing for additional contribution amounts based on the reclassification of Global Crossing's customer revenue.⁵⁸ In January 2008, Global Crossing appealed the October and November 2007 billing statements arguing that the statements include amounts that are the subject of the June 2007 appeal and therefore, should be rescinded.⁵⁹ As discussed above, USAC properly adjusted Global Crossing's contribution amounts pursuant to the audit findings related to the company's 2005 FCC Form 499-A filing and we therefore

⁴⁹ Global Crossing Request for Review at 18.

⁵⁰ *Id.*

⁵¹ 2005 FCC Form 499-A Instructions at 18.

⁵² We note that we find this argument particularly curious since Global Crossing relied on the guidance in the Commission's instructions to attempt to establish the status of its customers as resellers. *See* Global Crossing Request for Review at 20.

⁵³ Global Crossing Request for Review at 18-19.

⁵⁴ *Id.* at 20.

⁵⁵ *See supra* para. 14.

⁵⁶ Global Crossing Request for Review at 23.

⁵⁷ *See supra* para. 13; 2005 FCC Form 499-A Instructions at 18.

⁵⁸ Global Crossing Invoice Appeal at 1.

⁵⁹ *Id.* at 3-4.

decline to order USAC to rescind the adjusted invoices. Furthermore, to ensure the sufficiency of the universal service fund, contributors are required to pay disputed invoices under the “pay and dispute” policy; Global Crossing should therefore have paid the disputed invoices while its appeal was pending with the Commission.⁶⁰

IV. ORDERING CLAUSES

19. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to the authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), the request for review and appeal of invoices filed by Global Crossing Bandwidth, Inc. are hereby DENIED.

20. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission’s rules, 47 C.F.R. § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Acting Chief
Wireline Competition Bureau

⁶⁰ Under the “pay and dispute” policy, contributors are required to pay disputed invoices. In addition, USAC imposes late payment fees on invoices that are not paid in full, and these fees will not be waived unless the disputed charges are later found to be a result of an error by USAC. *See* USAC Website, Fund Administration, Contributors, File and Appeal, <http://www.usac.org/fund-administration/contributors/file-appeal/> (last visited Aug. 17, 2009); *see also* *Aventure Communications Technology, LLC, Request for Review*, CC Docket No. 96-45, WC Docket No. 06-122, Order, 23 FCC Rcd 10096, 10097-98, para. 5 (Wireline Comp. Bur. 2008); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, to Scott Barash, Universal Service Administrative Company, 23 FCC Rcd 4705 (dated Mar. 22, 2008).