

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 )

ORDER

Adopted: November 1, 2012

Released: November 5, 2012

By the Commission:

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION AND OVERVIEW..... 1
II. BACKGROUND ..... 9
A. The Act and the Commission’s Rules ..... 9
B. Petitions for Relief and USAC Request for Guidance..... 15
III. DISCUSSION ..... 31
A. To Be Considered a “Reseller,” a Provider Must Incorporate Wholesale Services into Its Service Offerings and Contribute on Those Service Offerings..... 33
B. Wholesale Providers Are Exempt from Contribution Obligations If They Can Demonstrate a Reasonable Expectation That Their Customers Are Resellers..... 37
C. USAC Should Not Double Collect if Clear and Convincing Evidence Shows that Another Provider Actually Contributed on the Subject Revenues ..... 43
D. Clarifying and Applying the Reasonable Expectation Standard ..... 47
1. The Relevant Time Period for the “Reasonable Expectation” Analysis is When a Wholesale Provider Collects and Submits Revenue Data to USAC..... 48
2. Wholesale Providers May Demonstrate a “Reasonable Expectation” by Complying with the Form 499-A Instructions or Through Other Reliable Proof..... 50

3. Application of the Reasonable Expectation Standard to the <i>XOCS Request for Review</i> and the <i>USAC Guidance Request</i> .....	53
4. Application of the Reasonable Expectation Standard to the <i>Global Crossing Application for Review</i> .....	55
IV. ORDERING CLAUSES .....	58
APPENDIX – List of Commenters .....	

## I. INTRODUCTION AND OVERVIEW

1. In this Order, we address several requests regarding federal Universal Service Fund (USF or Fund) contribution obligations of wholesale providers and their customers. Our actions today provide much-needed clarification for contributors on existing USF contribution obligations and administrative requirements for the contribution system.

2. Under current Commission requirements, wholesale carriers generally do not contribute on revenues earned from sales to customers that contribute to the Fund for the services that incorporate the wholesale service (carrier’s carrier revenues), but may be required to contribute on revenues earned from sales to customers that do not contribute to the Fund for the services that incorporate the wholesale service (end-user revenues).<sup>1</sup> In recent years, there have been disputes over how to comply with this general rule, arising in situations when contributors submit revenue information to the Universal Service Administrative Company (USAC) or subsequently undergo USAC audits. This order addresses a pending request for guidance from USAC as well as requests for review of Wireline Competition Bureau (Bureau) and USAC decisions involving the contribution obligations of specific wholesalers and their reseller customers, as summarized below. Our actions here provide greater clarity and predictability regarding the application of our current rules while we separately consider more comprehensive rule changes that may ultimately be simpler to administer.<sup>2</sup> By closing perceived loopholes in the current rules, our actions should assist in stabilizing the contributions system and promoting the sustainability of the Fund.<sup>3</sup>

3. The generally applicable findings of this Order are as follows. First, we affirm for USF contributions purposes the definition of “reseller” in the annual Telecommunications Reporting

<sup>1</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9206-08, paras. 843-47 (1997) (*Universal Service First Report and Order*) (subsequent history omitted); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*; *Federal-State Joint Board on Universal Service*, CC Dockets Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18507, App. A (1997) (*Universal Service Second Order on Reconsideration*).

<sup>2</sup> The Commission is separately undertaking comprehensive reform of the contributions system. *Universal Service Contribution Methodology: A National Broadband Plan For Our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357 (2012) (*Contribution Methodology Reform and Modernization Further Notice*). This Order focuses on bringing clarity to existing contribution obligations under the current system without prejudging the outcome of broader contributions reform.

<sup>3</sup> See Letter from David Cohen, USTelecom, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (filed Mar. 28, 2012) at 4-5 (highlighting the wholesaler-reseller issues raised in the Global Crossing and XOCS requests discussed in Sections II.B and III.A, C and D *infra* as one of the “most vexing and significant contributor issues,” and noting that “the Commission’s failure to act on pending contributor appeals can have the effect of picking winners and losers in the marketplace”); Letter from Maggie McCready, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (filed Apr. 3, 2012) at 1-2 (urging the Commission to act on the AT&T, CenturyLink, SureWest and Verizon petition for clarification, discussed in Sections II.B and III.B *infra*).

Worksheet (FCC Form 499-A) instructions attached to the 1997 *Second Order on Reconsideration*.<sup>4</sup> Thus, we make clear that a “reseller” is an entity that (1) incorporates purchased telecommunications into its own service offerings; *and* (2) can reasonably be expected to contribute to the Fund based on revenues from those offerings. In order to classify revenues from wholesale services as being carrier’s carrier revenues (and thus exempt from contributions), the wholesale provider must either have “affirmative knowledge” or a “reasonable expectation” that its customer is itself contributing to the Fund on revenues derived from those purchased wholesale services.<sup>5</sup>

4. Second, we provide guidance to USAC on how to proceed when a wholesale provider demonstrates a reasonable expectation that its customer is contributing to the Fund on revenues derived from its services that incorporate the wholesale input, but its customer did *not* in fact do so. In this situation, we affirm that the wholesale provider is not responsible for any outstanding contribution obligations.<sup>6</sup> Thus, we clarify that the Bureau in the *TelePacific Order*<sup>7</sup> did not alter existing requirements for wholesale providers to verify that their customers are contributing to the Fund, and if wholesale providers meet those requirements, they are not responsible for contributions on the revenues for sales to those customers.

5. We also provide guidance to USAC on how to proceed when a wholesale provider cannot demonstrate a reasonable expectation, but its customer *did* in fact contribute to the Fund based on the services that incorporate the wholesale input. In such instances, USAC should not attempt to recover additional contributions from the wholesale provider.<sup>8</sup>

6. Lastly, we clarify how a wholesale provider may demonstrate a reasonable expectation.

- We clarify that the relevant time period for the “reasonable expectation” analysis is the period during which a wholesale provider collects and submits the revenue data at issue to USAC.
- We affirm that a wholesale provider can meet the reasonable expectation standard by (1) complying with the guidance provided in the FCC Form 499-A instructions or (2) demonstrating that it has “other reliable proof,” as stated in the Bureau’s *Global Crossing Order*.<sup>9</sup> Specifically:
  - We affirm that the guidance provided in the instructions to the FCC Form 499-A constitutes a “safe harbor”; *i.e.*, wholesale providers that comply with all of these procedures will be deemed to have satisfied the reasonable expectation

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<sup>4</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A (“1997 Worksheet Instructions”).

<sup>5</sup> See *infra* Section III.A. For ease of discourse, we refer to this standard as the “reasonable expectation” standard throughout this Order but do not intend to exclude demonstrations through clear and convincing evidence of affirmative knowledge as well.

<sup>6</sup> See *infra* Section III.B.

<sup>7</sup> *Request for Review of a Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific d/b/a TelePacific Communications*, Order, WC Docket No. 06-122, 25 FCC Rcd 4652 (Wireline Comp. Bur. 2010) (*TelePacific Order*).

<sup>8</sup> See *infra* Section III.C.

<sup>9</sup> *Federal-State Joint Board on Universal Service; Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, CC Docket No. 96-45, Order, 24 FCC Rcd 10824, 10828-29, para. 14 (Wireline Comp. Bur. 2009) (*Global Crossing Order*). Global Crossing is now part of Level 3 Communications.

requirement.<sup>10</sup> To assist filers in complying with the safe harbor standard, we direct the Bureau to issue a public notice within thirty days seeking comment on any revisions that should be made to the 2013 FCC Forms 499 and instructions, which will be used to report 2012 revenues.

- We clarify that if filers choose not to take advantage of the safe harbor provided in the FCC Form 499-A instructions, USAC should consider all evidence that filers submit as potential “other reliable proof.” For example, filers may submit reseller certificates that differ in wording from the language in the FCC Form 499-A instructions regarding the form of reseller certificates. While USAC should *consider* all such evidence submitted, USAC is not required to deem such certificates, or any other evidence, as dispositive. Instead, under the “other reliable proof” standard, USAC should review all evidence submitted on a case-by-case basis to determine if a filer has presented clear and convincing evidence that it had a reasonable expectation that its customer is itself contributing to the Fund on revenues derived from the wholesale services purchased from the filer.

7. Below, we provide a summary of the wholesaler-reseller standard and the role of various types of reseller certificates within that standard.

STANDARD		RELEVANCE OF CERTIFICATES
<b>Did wholesale provider demonstrate ...</b>		
→ affirmative knowledge; <i>or</i>		
→ reasonable expectation through		
→ following 499-A instructions (“safe harbor”) <i>or</i>		After 2007, instructions specify <i>annual</i> certificates
→ other reliable proof		Where appropriate, USAC may take into account “outdated” certificates ( <i>i.e.</i> certificates signed <i>prior</i> to the calendar year in which revenues were collected) as part of a totality-of-the-circumstances analysis
<b>... that its customer <i>would</i> contribute to the Fund on the revenues derived from offerings that incorporate the purchased service?</b>		
<b>Yes</b>	Wholesale provider <b>not responsible</b> for additional contributions	
<b>No</b>	<b>Did wholesale provider’s customer <i>actually</i> contribute?</b> → Yes: wholesale provider <b>not responsible</b> for additional contributions → No: wholesale provider <b>responsible</b> for additional contributions	USAC may take into account “confirmatory” certificates (certificates stating that wholesaler’s customer <i>actually</i> contributed to the Fund)

8. In addressing these issues, we specifically address arguments raised in the following requests for Commission action:

- *Global Crossing Application for Review*. In September 2009, Global Crossing Bandwidth, Inc. (“Global Crossing”) filed an Application for Review of a Bureau order affirming a 2005

<sup>10</sup> See *id.* at 10828, para. 13.

USAC audit of Global Crossing.<sup>11</sup> As discussed in Section III.A and III.D below, the FCC Form 499-A instructions during the relevant time period did not contain any reference to obtaining reseller certificates on an *annual* basis. We largely affirm the Bureau's decision, but remand to USAC to reassess Global Crossing's contribution obligation in accordance with the applicable Form 499-A instructions as a safe harbor for satisfying the reasonable expectation standard or the "other reliable proof" standard as clarified in this Order.

- *Petition for Clarification of the TelePacific Order.* In June 2010, AT&T Inc., CenturyLink, SureWest Communications, and Verizon filed a petition requesting clarification or reconsideration of certain language in the *TelePacific Order*, which overturned a USAC decision regarding TelePacific's contribution obligations.<sup>12</sup> In Section III.B of this Order, we grant the *Petition for Clarification* and confirm that the *TelePacific Order* did not alter existing requirements that wholesale providers are not required to contribute on carrier's carrier revenues when they meet the reasonable expectation standard.
- *XOCS Request for Review.* In December 2010, XO Communications Services, Inc. ("XOCS") requested review of a USAC audit that, among other things, reclassified revenues from six XOCS reseller customers as assessable end-user revenues.<sup>13</sup> In Section III.D.3 below, we reverse this portion of the USAC audit to the extent that it is inconsistent with the discussion of the "other reliable proof" standard set forth in this Order, and remand that portion of the audit to USAC for further action consistent with this Order.
- *USAC Guidance Request.* In March 2011, USAC sought guidance on whether obtaining "post-dated" certificates for reseller customers after filing of the relevant Form 499-A is sufficient to allow a contributor to classify revenues as "carrier's carrier" revenues.<sup>14</sup> The *Guidance Request* arises out of the same audit that is the subject of the *XOCS Request for Review*. We provide guidance to USAC on these issues in Sections III.C, D.1, and D.3 of this Order by making clear that USAC should not consider such certificates, as described in the *Guidance Request* and the *XOCS Request for Review*, under the reasonable expectation standard, because a filer should have a reasonable expectation that a customer will contribute to the Fund *before* it reports revenues from the customer to USAC as "carrier's carrier" revenues. However, as we state above, USAC should not seek to "double collect" from a wholesale provider, even if the wholesale provider cannot demonstrate a reasonable expectation, if the wholesale provider's customer did *in fact* contribute to the Fund on the

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<sup>11</sup> Application for Review of Decision of the Wireline Competition Bureau by Global Crossing Bandwidth, Inc, CC Docket No. 96-45 (filed Sept. 16, 2009) (Application for Review).

<sup>12</sup> AT&T Inc., CenturyLink, SureWest Communications, and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration, WC Docket No. 06-122 (filed June 1, 2010) (*Petition for Clarification*).

<sup>13</sup> XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed Dec. 29, 2010) (*XOCS Request for Review*). XOCS also sought review of USAC's decision to (1) classify certain revenues from XOCS's Dedicated Transport Services as interstate; (2) classify revenues from certain Multi Protocol Label Switching (MPLS) enabled services as assessable telecommunications services revenues rather than exempt information services revenues; and (3) deny XOCS credits based on errors in its 2006 and 2007 annual Telecommunications Reporting Worksheets because revisions were made outside the 12-month window for the relevant filing year. *See id.* at iv-viii. This Order only addresses wholesaler-reseller issues; other issues will be addressed in a future decision.

<sup>14</sup> Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, WC Docket No. 06-122, CC Docket No. 96-45 (filed Mar. 1, 2011) (*Guidance Request*).



relevant services. Therefore, we clarify that USAC may consider “post-dated” certificates in determining whether a reseller customer *actually* contributed to the Fund.

## II. BACKGROUND

### A. The Act and the Commission’s Rules

9. 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.”<sup>15</sup> Section 254(d) further provides that “[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.”<sup>16</sup> To this end, the Commission has determined that common carriers and private carriage providers that provide interstate telecommunications to others for a fee generally must contribute to the USF based on their interstate and international end-user telecommunications revenues.<sup>17</sup> 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 to the Fund.<sup>18</sup> Providers with direct contribution obligations may pass through their contribution assessments to their customers.<sup>19</sup>

10. The Commission has designated USAC as the entity responsible for administering the universal service support mechanisms under Commission direction.<sup>20</sup> Pursuant to the Commission’s rules, contributors report their revenues by filing Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q), which are released annually by the Bureau on delegated authority,<sup>21</sup> with

<sup>15</sup> 47 U.S.C. § 254(d).

<sup>16</sup> *Id.*

<sup>17</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 9183–84, para. 795. Although the Commission exercised its permissive authority to assess private carriage providers, it exempted certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers from the contribution requirement. 47 C.F.R. § 54.706(d). The Commission also requires certain other providers of interstate telecommunications to contribute to the universal service fund. See, e.g., *Universal Service Contribution Methodology et al.*, CC Docket No. 96-45 *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7544, para. 52 (2006) (*2006 Contribution Methodology Order*) (requiring interconnected voice over Internet protocol (VoIP) providers to contribute to the Universal Service Fund).

<sup>18</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 9179, para. 787. Telecommunications service providers are not required to contribute 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.

<sup>19</sup> See 47 C.F.R. § 54.712(a) (authorizing contributors to recover federal universal service contribution costs from their customers); 2012 FCC Form 499-A Instructions at 21-22; see also *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Proposed Rulemaking, 23 FCC Rcd 1467, 1469, para. 4 n.10 (2008) (noting that providers almost always pass contribution obligations through to their customers).

<sup>20</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd. at 18423–24, para. 41; see 47 C.F.R. § 54.701.

<sup>21</sup> The Wireline Competition Bureau, formerly the Common Carrier Bureau (Bureau), has delegated authority to revise the Forms 499 and accompanying instructions to ensure “sound and efficient administration of the universal service programs.” See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18442, para. 81 (“Because it is difficult to determine in advance precisely the information that will be needed to administer the new universal service programs, the [Common Carrier] Bureau will have delegated authority to waive, reduce, or

(continued . . .)

USAC.<sup>22</sup> USAC reviews these filings and verifies the information provided by the contributors.<sup>23</sup> USAC also bills contributors for their universal service contributions.<sup>24</sup>

11. Because our present rules require contribution only once along the distribution chain (when a contributor provides telecommunications to an “end user”), a contributor also must apportion its telecommunications revenues between two categories: (1) revenues derived from sales by one carrier or provider to another carrier or provider that is expected to contribute, known as “carrier’s carrier” or wholesale revenues; and (2) revenues derived from sales to all other entities, known as “end-user” or retail revenues.<sup>25</sup> “Carrier’s carrier” revenues are not currently assessed. “End-user” telecommunications revenues include revenues from sales to carriers or providers that do not contribute to USF, such as *de minimis* carriers and exempted providers of interstate telecommunications.<sup>26</sup>

12. To assist contributors, the Commission has clarified the distinction – for contributions purposes – between revenues from “resellers” (or “carrier’s carrier” revenues) and revenues from “end users.” In 1997, 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.”<sup>27</sup> Thus, a wholesale provider should exclude revenues from its contribution base only if it has “affirmative knowledge” or a “reasonable expectation” that its customer is contributing to the Fund on the revenues

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eliminate contributor reporting requirements that may prove unnecessary. The Bureau also will have delegated authority to require any additional contributor reporting requirements necessary to the sound and efficient administration of the universal service programs.”). Consistent with this authority, the Bureau annually revises the Telecommunications Reporting Worksheet Instructions to provide instructions and guidance for complying with existing rules and requirements. 47 C.F.R. § 54.711(c). The FCC Forms 499 instructions are modified based on experience in administering the universal service program and explicit rulings by the Commission. *See, e.g., 2006 Contribution Methodology Order*, 21 FCC Rcd at 7533–50.

<sup>22</sup> 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, <http://www.usac.org/cont/499/filing-schedule.aspx> (last visited Nov. 2, 2012) (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. *Id.*

<sup>23</sup> 47 C.F.R. § 54.711(a).

<sup>24</sup> 47 C.F.R. § 54.702(b).

<sup>25</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507.

<sup>26</sup> *Id.*; *Federal-State Joint Board on Universal Service; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charge*, CC Docket No. 96-45 *et al.*, Fourth Order on Reconsideration & Report and Order, 13 FCC Rcd 5318, 5482, para. 298 (1997) (*Universal Service Fourth Order on Reconsideration*) (“Entities that resell telecommunications and qualify for the *de minimis* exemption must notify the underlying facilities-based carriers from which they purchase telecommunications that they are exempt from contribution requirements and must be considered end users for universal service contribution purposes”).

<sup>27</sup> *See* 1997 Worksheet Instructions; *see also* 2012 FCC Form 499-A Instructions at 21 (“For purpose of completing Block 3, a “reseller” is a telecommunications carrier or telecommunications provider that: 1) incorporates purchased telecommunications services into its own telecommunications offerings; and 2) can reasonably be expected to contribute to federal universal support mechanisms based on revenues from such offerings when provided to end users”); *Global Crossing Order*, 24 FCC Rcd at 10825-26, para. 5.

derived from the offering that incorporates the wholesale input.<sup>28</sup> If a wholesale provider cannot meet this standard for a particular customer, that customer should be treated as an end user rather than as a reseller for contributions purposes.

13. The Commission has directed providers to have in place “documented procedures” to ensure that a provider reports as “revenues from resellers” only revenues from entities that “reasonably would be expected to contribute” to the Fund.<sup>29</sup> These procedures should include collection of the customer’s legal name, address, name of a contact person, and phone number of the contact person. If a wholesale provider does not have other reason to know that a customer will, in fact, resell the service (and therefore contribute to the Fund based on those offerings), then the provider should obtain a signed statement to that effect.<sup>30</sup>

14. Under delegated authority, the Wireline Competition Bureau has provided additional guidance in the Form 499-A instructions to assist providers in meeting the reasonable expectation standard.

- In 2002, the instructions explained that filers should maintain their reseller customers’ FCC Form 499 filer identification numbers (Form 499 Filer ID).<sup>31</sup>
- In 2004, the instructions stated that a wholesale provider must be able to produce, upon request, the information relied upon to form a reasonable expectation. In addition, the instructions explained that the wholesaler would be responsible for any additional universal service assessments if it failed to demonstrate a reasonable expectation when its reseller customers did not actually contribute to the Fund.<sup>32</sup>
- In 2007, the Bureau modified the instructions to provide guidance that, to meet the Commission’s reasonable expectation standard, wholesale providers should seek certificates from their reseller customers annually. The Bureau also provided sample language in the instructions for the reseller certificate.<sup>33</sup> The instructions noted that wholesale providers may

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<sup>28</sup> See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18508, App. A (noting that the underlying contributor may have reason to know that its customer may, in fact, be a contributing reseller); *Global Crossing Order*, 24 FCC Rcd at 10829, para. 14 (wholesale provider should have “affirmative knowledge that its customer is contributing to the universal service fund as a reseller” or a “reasonable expectation that its customer is contributing as a reseller”).

<sup>29</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18508, App. A; see also *Universal Service Contribution Methodology; Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, WC Docket No. 06-122, USAC Audit CR 2008CP001, Order, 25 FCC Rcd 14533, 14539, para. 15 (Wireline Comp. Bur. 2010) (*NetworkIP Order*) (“The Commission requires... that wholesalers have a ‘reasonable expectation’ that its reseller customers would contribute to universal service and have in place documented procedures to demonstrate compliance with this requirement”).

<sup>30</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18508, App. A.

<sup>31</sup> See 2002 FCC Form 499-A Instructions at 15 (noting that providers could access a list of current contributors online at <http://gullfoss2.fcc.gov/cib/form499/499a.cfm>).

<sup>32</sup> 2004 FCC Form 499-A Instructions at 16-17.

<sup>33</sup> 2007 FCC Form 499-A Instructions at 19. The sample language was as follows: “I certify under penalty of perjury that the 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 federal universal service support mechanisms.” Substantially the same sample language is contained in the current Form 499-A instructions. See 2012 FCC Form 499-A Instructions at 22.



“verify the continuing validity of a reseller’s certificate” online through the Commission’s website listing current contributors, and that wholesale providers “may presume that any reseller identified as a contributor in this website in the month prior to an FCC Form 499-Q filing will be a contributor for the coming quarter, and that it was a contributor for all prior quarters during that calendar year.”<sup>34</sup>

## B. Petitions for Relief and USAC Request for Guidance

15. *Global Crossing Application for Review.* On September 16, 2009, Global Crossing filed an Application for Review of a decision by the Bureau affirming a USAC decision resulting from an audit in which USAC: (1) found that Global Crossing had inaccurately reported revenue from customers that did not contribute to the USF; (2) reclassified these revenues as assessable end-user revenues; and (3) issued revised invoices to Global Crossing based on the reclassified revenues.<sup>35</sup> On review, the Bureau rejected Global Crossing’s contention that it reasonably expected that certain reseller customers were contributing to the Fund and found that USAC’s assessment of contributions on Global Crossing based on revenue from these reseller customers was proper.<sup>36</sup>

16. As background, in 2005, USAC audited Global Crossing’s 2005 FCC Form 499-A, which reported Global Crossing’s 2004 revenues, to evaluate compliance with the Commission’s contribution requirements.<sup>37</sup> The 2005 FCC Form 499-A required reporting of both end user revenues as well as revenue from “resellers”—*i.e.* entities that purchase wholesale telecommunications, incorporate the purchased telecommunications into their own service offerings to end users, and separately contribute to the Fund.<sup>38</sup> In its audit, USAC found, in relevant part, that Global Crossing reported as reseller revenues certain revenues from customers that did not contribute to the Fund in 2004.<sup>39</sup> Specifically, USAC found that Global Crossing did not have a reasonable expectation that its reseller customers would contribute to the Fund because it did not obtain reseller certificates from every reseller customer, the reseller certificates it did obtain were not valid,<sup>40</sup> and/or the reseller customers did not have FCC Form 499 Filer ID numbers.<sup>41</sup> USAC evaluated additional evidence provided by Global Crossing—certain reseller certificates, contract provisions, the reseller customers’ company website information and product descriptions—but determined that such evidence did not support a finding that Global Crossing had a reasonable expectation that certain customers would contribute directly to the Fund.<sup>42</sup> Based on this finding, USAC recommended that Global Crossing report as end-user revenue the revenue from those non-contributing customers and re-file its 2005 FCC Form 499-A.<sup>43</sup> USAC subsequently reclassified as Global Crossing end-user revenue the revenue earned from its reseller customers that were not directly

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<sup>34</sup> 2012 FCC Form 499-A Instructions at 18–19.

<sup>35</sup> *Global Crossing Order*, 24 FCC Rcd at 10824, para. 1; Application for Review at 1-2.

<sup>36</sup> *Global Crossing Order*, 24 FCC Rcd at 10830-31, para. 18.

<sup>37</sup> *See id.*

<sup>38</sup> 2005 FCC Form 499-A Instructions at 17-27.

<sup>39</sup> Application for Review at 8; USAC Audit Report at 4, 8-10.

<sup>40</sup> USAC Audit Report at 8.

<sup>41</sup> *Id.* at 8-9.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> Application for Review at 8-9.

contributing to the Fund. Because end user telecommunications revenues are subject to the USF assessment, USAC assessed USF contributions on Global Crossing for these reclassified revenues.<sup>44</sup>

17. In June 2007, Global Crossing filed a request for review of USAC's audit decision.<sup>45</sup> Global Crossing argued that the reclassified revenues should be recovered directly from Global Crossing's reseller customers, rather than Global Crossing, and that even if such recovery was permissible, USAC improperly applied the 2007 FCC Form 499-A instructions to the audit of revenues for calendar year 2004.<sup>46</sup> On August 17, 2009, the Bureau released an order denying Global Crossing's request for review.<sup>47</sup> The Bureau agreed with USAC that the evidence provided by Global Crossing did not support a finding that Global Crossing had a reasonable expectation that certain customers would contribute directly to the Fund.<sup>48</sup> The Bureau found that USAC's assessment of additional USF contributions on Global Crossing based on revenues from these non-contributing customers was appropriate.<sup>49</sup>

18. In its Application for Review, Global Crossing makes four relevant arguments:

- Global Crossing contends that USAC should have conducted a fact-specific inquiry to determine whether its customers were resellers rather than simply shifting the contribution obligation to Global Crossing.<sup>50</sup> Global Crossing argues that the Bureau's order was arbitrary and capricious and raised due process concerns because the Bureau imposed liability without a factual basis for treating Global Crossing's customers as end users.<sup>51</sup>
- Global Crossing challenges the validity of the FCC Form 499 filing instructions in general, arguing that they were not adopted pursuant to the notice and comment requirements of the Administrative Procedures Act.<sup>52</sup> Global Crossing argues that it therefore cannot be held liable for the failure of its reseller customers to contribute to the Fund, even if it had failed to take the specific measures specified in the FCC Form 499 instructions.<sup>53</sup>
- Global Crossing asserts that the Bureau erroneously applied guidance that first appeared in the FCC Form 499-A instructions in 2007, but was not in the 2005 Form 499-A instructions for reporting 2004 revenues subject to the audit.<sup>54</sup> In particular, Global Crossing maintains it was not required to obtain reseller certificates or other evidence such as Filer ID numbers

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<sup>44</sup> *Id.*

<sup>45</sup> See generally Global Crossing Bandwidth, Inc., Request for Review of Decision of the Universal Service Administrator, CC Docket No. 96-45, at 21 (filed June 22, 2007) (Portions Confidential) (Request for Review). Global Crossing also appealed USAC's adjusted invoices that included additional universal service assessments based on the audit finding. *Global Crossing Order*, 24 FCC Rcd at 10827, para. 9.

<sup>46</sup> Request for Review at 1.

<sup>47</sup> See generally *Global Crossing Order*, 24 FCC Rcd 10824.

<sup>48</sup> *Id.* at 10828-29, paras. 12-14.

<sup>49</sup> *Id.*

<sup>50</sup> Application for Review at 19-23.

<sup>51</sup> *Id.* at 23-25. This issue is addressed in Section III.A *infra*.

<sup>52</sup> *Id.* at 10, 17-18.

<sup>53</sup> *Id.* at 17-18. This issue is addressed in Section III.D.2 *infra*.

<sup>54</sup> *Id.* at 14-25.

because the FCC Form 499 instructions in 2005 did not require it to obtain reseller certificates or other evidence from its customers.<sup>55</sup>

- Finally, Global Crossing argues that the Bureau failed to consider evidence that demonstrates that Global Crossing, under the standards set forth in the 2005 FCC Form 499-A instructions, reasonably expected its customers were reselling telecommunications.<sup>56</sup>

19. The *TelePacific Order* and *Petition for Clarification*. In December 2009, USAC found that TelePacific—a competitive carrier that offers small business customers bundled services, including voice telephony and Internet access service, over lines that it leases from wholesale carriers<sup>57</sup>—was liable for contributions on those Internet access service revenues. USAC reasoned that the Internet access service was a telecommunications service subject to USF reporting and contribution obligations because TelePacific provided the service over resold special access (T-1/DS-1) lines.<sup>58</sup>

20. TelePacific filed a request for review of the USAC decision on January 8, 2010.<sup>59</sup> Among other things, it argued that no federal universal service contributions should be due on the revenues associated with the sale of T-1 lines by wholesalers to TelePacific. On April 30, 2010, in the *TelePacific Order*, the Bureau reversed USAC's decision and found that, under Commission precedent, TelePacific is not required to contribute based on end user revenues from Internet access service.<sup>60</sup>

21. In the *TelePacific Order*, the Bureau concluded there was insufficient information in the record to address TelePacific's contention that its wholesale providers should not owe USF contributions on the revenues received from the special access lines.<sup>61</sup> The Bureau did note, however, that if TelePacific's reseller certificate affected the amount of revenues reported by the wholesale T-1 provider,

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<sup>55</sup> *Id.* at 19-25. This issue is addressed in Section III.D.4 *infra*.

<sup>56</sup> *Id.* at 12-13, 20-21. This issue is addressed in Section III.D.4 *infra*.

<sup>57</sup> U.S. TelePacific Corp. d/b/a TelePacific Communications Request for Review and Reversal of Universal Service Administrator Decision, WC Docket No. 06-122, at 2 (filed Jan. 8, 2010) (TelePacific Request for Review). TelePacific also offers wireline broadband Internet access service over other facilities, such as unbundled network elements and fiber. *See id.* The services provided by TelePacific over these alternative facilities are not relevant for purposes of this order.

<sup>58</sup> Administrator's Decision on Universal Service Fund Contributor Reporting Matter – U.S. TelePacific Corp. d/b/a TelePacific Communications (Filer ID 819502) Status of Revised 2008 FCC Form 499-A, at 6 (Dec. 10, 2009) (USAC Decision Letter). The issue arose when TelePacific sought to refile its 2008 Form 499, changing its reporting of certain Internet access revenues as “intrastate telecommunications revenues exempt from universal service contribution” to “information service revenues not subject to universal service contribution.” *TelePacific Order*, 25 FCC Rcd at 4656, para. 10.

<sup>59</sup> TelePacific Request for Review.

<sup>60</sup> *TelePacific Order*, 25 FCC Rcd at 4657, para. 15.

<sup>61</sup> Special access DS-1/T-1 lines sold to end users are generally subject to USF contribution obligations. *See* 47 C.F.R. § 54.706(a)(4) (listing special access as a service subject to contribution obligations). TelePacific argued that it should not be required to indirectly contribute to universal service (*i.e.*, by having to pay any wholesaler USF pass-through charges) based on the T-1 lines; other parties disagreed. Letter from Andrew D. Lipman, Counsel for TelePacific, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 1 (Feb. 1, 2010) (TelePacific *Ex Parte*); *see also* AT&T Reply Comments, WC Docket No. 06-122, at 4-5 (Feb. 3, 2010) (arguing that if TelePacific obtained broadband transmission on a common carrier basis from incumbent carriers and provided reseller certificates to those incumbents instructing them not to assess federal USF contributions on those facilities, TelePacific was obligated to report the revenues associated with the transmission component of any broadband Internet access services provided using those facilities in its assessable base).

the wholesale provider may be required to report revised revenue data as appropriate.<sup>62</sup> The Bureau instructed TelePacific to provide USAC with the names and contact information of its wholesale providers of special access transmission services so USAC could ensure that all contributions to universal service were promptly paid.<sup>63</sup>

22. On June 1, 2010, AT&T, CenturyLink, SureWest, and Verizon (collectively Wholesale Providers) sought clarification or reconsideration of this aspect of the *TelePacific Order*.<sup>64</sup> Specifically, the Wholesale Providers sought confirmation that under existing Commission orders and precedent, neither the Commission nor USAC is able to require these wholesale providers to restate prior year revenues and make additional contributions to the Fund if they relied on TelePacific's reseller certificates in classifying the revenues as "carrier's carrier" revenues.<sup>65</sup>

23. TelePacific opposed the Petition, arguing that it was premature because the Bureau had not yet determined if TelePacific should be treated as an end user or if any Petitioner was required to make additional USF contributions. TelePacific further argued that requiring USF contributions on the T-1 lines leased to TelePacific violated section 254's "equitable and nondiscriminatory" requirement and Commission principles of competitive neutrality for all broadband Internet access service providers.<sup>66</sup>

24. *XOCS Request for Review*. On December 29, 2010, XOCS filed a request seeking review of a USAC audit which, among other things, determined that XOCS failed to demonstrate that it had a "reasonable expectation" that six of its reseller customers would contribute to the Fund.<sup>67</sup> As a result, USAC reclassified revenues from six XOCS reseller customers as assessable XOCS end user revenues. According to USAC's records, these six customers did not contribute to the Fund during the relevant time period.<sup>68</sup>

25. XOCS acknowledges that the reseller certificates it received from six of its customers did not follow the guidance in the FCC Form 499-A instructions, because the reseller certificates were not signed (or renewed) in the year in which revenues were reported.<sup>69</sup> The Form 499-A instructions provide guidance that reseller certificates should be obtained "each year";<sup>70</sup> XOCS argues, however, that the guidance in the 2007 FCC Form 499-A instructions is not mandatory, and that it provided "other reliable proof" that it had a reasonable expectation that its customers would contribute to the Fund. First, XOCS argues that the reseller certificates, though signed before the relevant year, were executed sufficiently close to the audit year to constitute "other reliable proof."<sup>71</sup> Second, for two of the customers at issue, XOCS points to USAC quarterly contribution base filings that list the customers as filers of the quarterly Telecommunications Reporting Worksheet.<sup>72</sup> Finally, for the four remaining customers at issue, XOCS

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<sup>62</sup> *TelePacific Order*, 25 FCC Rcd at 4658, para. 16 & n.41. The record does not indicate whether TelePacific provided reseller certificates to some or all of its wholesale providers.

<sup>63</sup> *Id.* at 4658, para. 16.

<sup>64</sup> *Petition for Clarification* at 1.

<sup>65</sup> *Id.* at 1-2.

<sup>66</sup> TelePacific Comments at 5-9.

<sup>67</sup> *XOCS Request for Review* at 32.

<sup>68</sup> *Id.* at 31-32.

<sup>69</sup> *Id.* at 31-33, 40.

<sup>70</sup> *Id.* at 40; *see* 2008 FCC Form 499-A Instructions at 19.

<sup>71</sup> *XOCS Request for Review* at 40.

<sup>72</sup> *Id.* at 40-41.

submitted “confirmatory certifications,” obtained in January 2010, three years after the period in question, and during the USAC audit, in which the four customers each certified that they had either directly contributed to the Fund in 2007 on these revenues or each entity to which the customer had provided resold telecommunications was itself a direct contributor to the Fund.<sup>73</sup>

26. *USAC Guidance Request.* On March 1, 2011, USAC requested guidance from the Bureau on certain wholesaler/reseller issues. In particular, USAC asked whether a contributor that obtains reseller certificates after filing the relevant Form 499-A, which USAC refers to as “post-dated” certificates, satisfies the “reasonable expectation” standard and enables the wholesale provider to classify revenues from such customers as “carrier’s carrier” revenues.<sup>74</sup> USAC sought guidance on whether, in such situations, it should conclude that (1) “the contributor demonstrated an affirmative or actual knowledge or a reasonable expectation at the time it filed its FCC Form 499-A” and (2) that “the contributor’s carrier customers were incorporating the services purchased from the contributor into their own telecommunications offerings, and such customers’ USF contributions were based on revenues from such offerings when provided to end-users.”<sup>75</sup> The revenues at issue in the *Guidance Request*, unlike the revenues at issue in the *XOCS Request for Review*, are from customers that *did* contribute to the Fund during the audit period, based on USAC’s records.<sup>76</sup> USAC expresses concern that the use of post-dated certificates may result in under-reporting or underpayment of USF contribution obligations.<sup>77</sup>

27. The Bureau sought comment on the *Guidance Request* on March 7, 2011.<sup>78</sup> In response, XOCS filed comments stating that the *Guidance Request* “arises at least in part from” the XOCS audit that was the subject of the *XOCS Request for Review*, and provided further background on the issues raised in the audit.<sup>79</sup> According to XOCS, the *Guidance Request* involves similar circumstances, but a different set of customers, from the *XOCS Request for Review*. As in the *XOCS Request for Review*, USAC determined that XOCS’s reseller verification processes were insufficient to demonstrate a “reasonable expectation” that its customers would contribute to the Fund.<sup>80</sup> As noted above, however, the issue in the *Guidance Request* is the wholesale provider’s contribution obligation when a wholesaler does not demonstrate a reasonable expectation but the customers did contribute to the Fund.

28. With respect to the *Guidance Request*, XOCS argues that: (1) the Commission should prohibit USAC from reclassifying carrier’s carrier revenue as “end user” revenue in circumstances where USAC’s own records confirm that the customer in question reported its revenues and contributed to the

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<sup>73</sup> *Id.* at 41.

<sup>74</sup> *Guidance Request* at 1-2.

<sup>75</sup> *Id.* at 2-3.

<sup>76</sup> XO Comments at 3. For these revenues, USAC elected to treat the issue as an “Other Matter” and seek guidance on whether “post-dated” certificates were sufficient to demonstrate a reasonable expectation. In the context of a USAC audit, an issue may be deemed an “other matter” if it is not material or if the Commission’s rules do not specifically address the situation. In certain instances, USAC will classify an item as an “other matter” if USAC determines it should seek FCC guidance to determine whether a violation of the rules has occurred. *Guidance Request* at 1.

<sup>77</sup> *Guidance Request* at 3.

<sup>78</sup> *Comment Sought on Universal Service Administrative Company’s Request for Universal Service Fund Policy Guidance*, WC Docket No. 06-122, CC Docket No. 96-45, Public Notice, 26 FCC Rcd 3419 (Wireline Comp. Bur. 2011).

<sup>79</sup> XOCS Comments at 1-2. Comments were also filed by the Ad Hoc Coalition of International Companies, TelePacific, and Verizon. Level 3, Sprint, TelePacific, and XOCS filed reply comments.

<sup>80</sup> XOCS Comments at 3.



USF during the relevant period,<sup>81</sup> and (2) USAC should be required, in evaluating whether a wholesale carrier meets the reasonable expectation standard, to consider confirmatory certificates as “other reliable proof.”<sup>82</sup> On the first issue, Sprint, Level 3, and TelePacific concurred with XOCS, likewise arguing that “double collection” on revenues from both wholesalers and their customers would be inconsistent with Commission policy.<sup>83</sup> On the second issue regarding “other reliable proof,” several commenters argued that there should be flexibility in obtaining reseller certificates.<sup>84</sup>

29. As mentioned above, the audit underlying the *XOCS Request for Review* and the *Guidance Request* involves two distinct sets of reseller certificates. In the *XOCS Request for Review*, the issue is reseller certificates obtained *before* XOCS provided service to the customers (the “Pre-Service Certificates”).<sup>85</sup> These certificates were collected when XOCS began providing service to the customers, contained no expiration dates, and, according to XOCS, remained valid for the entire term of the associated service agreement.<sup>86</sup> As XOCS acknowledges, the Pre-Service Certificates were not updated annually (as specified in the guidance in the 2008 Form 499-A instructions), and USAC rejected the certificates because they “were not signed in the year in which revenues were reported.”<sup>87</sup> XOCS concedes that it “did not strictly comply with the guidance” in the Form 499-A instructions with respect to the Pre-Service Certificates.<sup>88</sup> XOCS argues, however, that its procedures as a whole (which included obtaining both the Pre-Service Certificates and the Confirmatory Certificates described in the next paragraph and raised in the *Guidance Request*) were sufficient to demonstrate a reasonable expectation that the customers would contribute to the Fund.<sup>89</sup>

30. In contrast, the *Guidance Request* involves reseller certificates obtained *after* the relevant Form 499 was filed. USAC requests guidance as to whether such certificates should be considered as part of the reasonable expectation analysis. XOCS obtained these certificates during the USAC audit, but *after* USAC rejected the Pre-Service Certificates and determined that XOCS did not meet the reasonable expectation standard. This occurred because XOCS contacted each of the customers that had submitted Pre-Service Certificates, and asked them to provide sworn declarations that they had, in fact, contributed

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<sup>81</sup> *Id.* at 2, 8-10.

<sup>82</sup> *Id.* at 12-21.

<sup>83</sup> XOCS Comments at 8 (arguing that it is unlawful for USAC to knowingly double collect); Sprint Reply at 2 (arguing that allowing USAC to double collect would eviscerate the carrier’s carrier rule); Level 3 Reply at 3 (arguing that double collection is inconsistent with contribution methodology principles); TelePacific Reply at 3 (double collection is inconsistent with FCC policy).

<sup>84</sup> *See, e.g.*, Verizon Comments at 3 (stating that the Form 499-A instructions offer flexible guidance to carriers, recognizing that resellers may be delayed in providing certificates for a number of reasons); Sprint Reply at 1, 3 (stating that the wholesaler faces a substantial burden in determining reseller status and should be given flexibility with regard to certificates).

<sup>85</sup> As discussed in Section III.D.1 below, wholesale providers may obtain evidence to support a reasonable expectation (including reseller certificates) until the filing deadline for the relevant FCC Form 499-A. We only refer to the XOCS certificates as “Pre-Service” for ease of reference and because XOCS stated that the certificates were obtained before providing service to the customer. As a general matter, wholesale providers should have an incentive for obtaining reseller certificates prior to providing service to a customer so that they can pass through any USF surcharges on a timely basis.

<sup>86</sup> XOCS Comments at 5.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.* at 6.

to the Fund during the relevant year.<sup>90</sup> These “confirmatory” (or in USAC’s terms, “post-dated”) certificates (“Confirmatory Certificates”) contained the language recommended in the Form 499-A instructions, and differed from a customary reseller certificate only in that the customer submitted a sworn declaration confirming what it, in fact, had done in the relevant year, rather than what it intended to do in the upcoming year.<sup>91</sup> XOCS argues that the Confirmatory Certificates are more trustworthy than the annual certificates required by the Form 499-A instructions (which amount to a statement of intent) because the Confirmatory Certificates were executed after the events in question and can report accurately as to whether the reseller in fact contributed.<sup>92</sup> Thus, XOCS argues, the Confirmatory Certificates should be allowed as evidence to demonstrate a reasonable expectation.<sup>93</sup>

### III. DISCUSSION

31. We find that the Bureau properly applied the definition of “reseller” for USF contributions purposes in the *Global Crossing Order*—*i.e.*, that a “reseller” is an entity that not only (1) incorporates purchased telecommunications into its own service offerings; but *also* (2) contributes to the Fund based on revenues from those offerings, as set forth in the *Universal Service Second Order on Reconsideration*. We then address the *Petition for Clarification of the TelePacific Order* and affirm that a wholesale provider is not required to contribute in instances in which it demonstrates a reasonable expectation that its customer is a reseller. We also address an issue raised in the *USAC Guidance Request* and clarify that when a wholesale provider cannot demonstrate a reasonable expectation, but its customer *did* in fact contribute to the Fund, USAC should not attempt to collect contributions twice on the same revenues.

32. We also provide clarification on how a wholesale provider may demonstrate a reasonable expectation. With respect to timing, we clarify that the relevant time period for the “reasonable expectation” analysis is the period during which a wholesale provider collects and submits the revenue data at issue to USAC. We also affirm that the reasonable expectation standard can be met by complying with the guidance provided in the FCC Form 499-A instructions or through “other reliable proof,” as stated in the *Global Crossing Order*. Finally, we provide guidance to USAC on how the standard should be applied with respect to the *Global Crossing* and XOCS audits upon remand.

#### A. To Be Considered a “Reseller,” a Provider Must Incorporate Wholesale Services into Its Service Offerings *and* Contribute on Those Service Offerings

33. We first conclude that the Bureau correctly upheld USAC’s decision and properly applied the definition of “reseller” for universal service contribution purposes in the *Global Crossing Order*. *Global Crossing* argues in its Application for Review that the Bureau’s order was arbitrary and capricious and raises due process concerns because the order affirmed the reclassification of certain *Global Crossing* customers as end users for USF contribution purposes without considering evidence regarding the “functional nature of the service provided by each wholesale customer at issue.”<sup>94</sup> *Global Crossing* asserts that the Bureau erred by focusing on whether *Global Crossing* reasonably expected its customers had contributed to the Fund and did not give sufficient weight to evidence that its customers

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<sup>90</sup> *Id.* at 5-6.

<sup>91</sup> *Id.* at 4-5.

<sup>92</sup> *Id.* at 14-15.

<sup>93</sup> *Id.* at 5-7.

<sup>94</sup> Application for Review at 12-14, 21, 23-25.

“incorporate[d] the purchased telecommunications services into its own offerings.”<sup>95</sup> We find that Global Crossing misreads the Bureau order, and more fundamentally, the established definition of “reseller” for contributions purposes.

34. In the 1997 *Universal Service Second Order on Reconsideration*, the Commission adopted the original Universal Service Worksheet (the predecessor to FCC Form 499), which included instructions for contributors, among other things, to exclude revenues from service provided to resellers from the funding base and defined a “reseller” for contributions purposes 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.”<sup>96</sup> This definition has been consistently included in the reporting instructions since 1997.<sup>97</sup> The two prongs of the definition are separate and independent, and wholesale providers must be able to demonstrate that customers satisfy both requirements in order to report the revenues from sales to those customers as carrier’s carrier revenues.<sup>98</sup>

35. The Bureau upheld USAC’s findings because Global Crossing failed to demonstrate compliance with the *second* prong of the reseller definition: whether Global Crossing had a reasonable expectation that each of its customers could be expected to contribute to the Fund based on revenues from the customer’s offerings.<sup>99</sup> Global Crossing contends, in essence, that the Bureau should have simply ignored this second prong. According to Global Crossing, all entities that “incorporate the purchased telecommunications services into their own offerings” (*i.e.* meet the first prong) are “resellers” and all such entities have “an unequivocal duty to contribute directly to universal service.”<sup>100</sup> Thus, argues Global Crossing, if its customer meets the first prong, it is “*per se* reasonable” for Global Crossing to assume that the customer will also meet the second prong (*i.e.* contribute to universal service).<sup>101</sup> Global

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<sup>95</sup> *Id.* at 12-14.

<sup>96</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A (emphasis added). Global Crossing acknowledges the same. See Application for Review at 5 (quoting *id.*). Furthermore, as Global Crossing itself points out, those instructions further provided that a wholesale provider should have documented procedures to ensure that it classifies as resellers only entities that “reasonably would be expected to contribute to support universal service.” Application for Review at 5 (quoting 1997 instructions). The original Universal Service Worksheet classified revenues from resellers under the general heading “Revenue from Other Contributors.”

<sup>97</sup> See, e.g., 2000 FCC Form 499-A Instructions at 13; 2005 FCC Form 499-A Instructions at 18; 2012 FCC Form 499-A Instructions at 21.

<sup>98</sup> To be clear, a customer is still a reseller if it incorporates a wholesale service into an offering that it is, at least in part, assessable telecommunications and contributes to the Fund for that service. Thus, if a customer purchases a DS1 line and incorporates that service into an offering of both telephone service and broadband Internet access service, it may certify that it is a reseller for purposes of that purchased service so long as it contributes on the assessable revenues from the telephone service.

<sup>99</sup> *Global Crossing Order*, 24 FCC Rcd at 10828-29, para. 14.

<sup>100</sup> Application for Review at 12-13.

<sup>101</sup> *Id.* at 13; Letter from Matt Brill, Counsel for Global Crossing, to Marlene H. Dortch, FCC, WC Docket No. 96-45, at 2 (dated June 4, 2010). Global Crossing maintains that USAC should have conducted a fact-based inquiry into whether Global Crossing’s non-contributing customers were *bona fide* resellers prior to reclassifying those revenues as end-user revenues and contends that it cannot be held liable for its customer’s failure to pay USF contributions unless that customer actually operated as an end user rather than a reseller. Application for Review at 20-22. Global Crossing argues that holding Global Crossing liable “without any finding that [Global Crossing’s customers] actually operated as end users” also amounts to an imposition of “strict liability” for its customers’ nonpayments. *Id.* at 10-25. As explained herein, however, the Bureau’s finding rested on the fact that Global Crossing lacked a reasonable expectation that its customers *contributed* to the Fund, not that its customers *resold*

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Crossing's argument is at odds with Commission precedent, and would essentially render the second prong of the reseller definition meaningless. Furthermore, as Global Crossing acknowledges, not all entities that "incorporate purchased telecommunications services into their own offerings" have a duty to contribute directly to universal service.<sup>102</sup> For instance, providers that incorporate purchased transmission into their own offering of retail broadband Internet access service do not currently have a duty to contribute on the revenues derived from the sale of broadband Internet access service.<sup>103</sup>

36. Thus, even had Global Crossing established that its customers incorporated the telecommunications services into their own offerings, Global Crossing's failure to establish that it reasonably expected its customers were *contributing* to the Fund based on the purchased services would have justified the Bureau's conclusion.<sup>104</sup> For these reasons, we find that the Bureau's decision was not arbitrary and capricious and does not raise due process concerns.<sup>105</sup>

**B. Wholesale Providers Are Exempt from Contribution Obligations If They Can Demonstrate a Reasonable Expectation That Their Customers Are Resellers**

37. In this section, we grant the Wholesale Providers' request for clarification or reconsideration of the *TelePacific Order* by clarifying that the order did not establish any new requirements for wholesale providers with regard to the verification of their customers' contributions to the Fund on the services incorporating such wholesale inputs.<sup>106</sup> In doing so, we affirm the existing requirement that the wholesale provider seeking exemption from contribution obligations must demonstrate that it had a reasonable expectation that each of its customers is a "reseller,"<sup>107</sup> as we have long defined that term to mean "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."<sup>108</sup> We emphasize that wholesale providers are exempt only if they can demonstrate a reasonable expectation that each of their customers is a "reseller" as so defined. To the extent a wholesale provider cannot satisfy both prongs of this standard for its sale of wholesale services to its reseller customers, it must contribute on the revenues associated with those services.

38. In some cases, a wholesale provider may report some revenues as "carrier's carrier revenues," and USAC may determine, after the fact, that the provider's customer was an "end user" (*i.e.*

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services. The Bureau did not rely on a presumption that a wholesale carrier is strictly liable for its customers' failure to meet their USF contribution obligation. As discussed in Section III.B *infra*, wholesale providers that demonstrate compliance with the reasonable expectation standard are *not* liable for their customers' nonpayments.

<sup>102</sup> Application for Review at 22 (discussing exemption for *de minimis* providers).

<sup>103</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket No. 02-33 *et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14915-16, para. 13 (2005) (*Wireline Broadband Internet Access Order*); *TelePacific Order*, 25 FCC Rcd at 4657, para. 15.

<sup>104</sup> See *infra* Section III.D.4. We discuss the application of the reasonable expectation standard to the Global Crossing appeal below, after we clarify how that standard should generally be applied by USAC.

<sup>105</sup> See Application for Review at 2-24 (arguing that the Bureau's decision imposed liability on Global Crossing without a factual basis).

<sup>106</sup> The Bureau is referring the petition to the full Commission for action pursuant to section 1.106(a) of the Commission's rules. 47 C.F.R. § 1.106(a).

<sup>107</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A; see also 2012 FCC Form 499-A Instructions at 21.

<sup>108</sup> See *supra* para. 12; 1997 Worksheet Instructions.

did not contribute to the Fund on the offerings that incorporated the wholesale input) for some or all of the services that it provided using the wholesale inputs, so that some or all of the relevant wholesale revenues were assessable “end-user” revenues. In those cases, USAC should look to the wholesale provider to determine if that provider can demonstrate that it had a reasonable expectation that its customer is a “reseller” for those services. Compliance with the reasonable expectation standard protects the wholesale provider in such cases from being held liable for any additional contributions that may result from a reclassification of revenues from carrier customers as assessable end user revenues because the wholesale provider has exercised appropriate due diligence to determine whether such revenues are exempt from contributions.

39. Nothing in the *TelePacific Order* altered these existing requirements. Thus, we clarify that in this instance, the Wholesale Providers are not required to restate wholesale revenues as end user revenues and make additional contributions to the Fund if they can demonstrate they reasonably expected that TelePacific met the longstanding definition of a reseller for those revenues.<sup>109</sup> Accordingly, in any further proceedings on this matter, USAC should determine whether TelePacific’s wholesale providers had a reasonable expectation that TelePacific was a reseller during the time period in question, in accordance with the analysis set forth in this order. If a wholesale provider cannot demonstrate a reasonable expectation as discussed in this order, USAC may require the wholesale provider to restate the revenues from TelePacific as “end user” revenues.

40. While we decide generally in this Order that a contributor may demonstrate a reasonable expectation by following the guidance in the Form 499-A instructions,<sup>110</sup> we acknowledge that the sample certification language and suggested procedure to check the Commission’s website to ascertain whether a carrier customer is a contributor that have been in the Form 499 instructions since 2007 may have led to some instances where neither the wholesaler nor its customer contributed on its respective revenues, allowing revenues for certain interstate services to avoid assessment altogether, contrary to the Commission’s original intent in establishing the current end-user assessment paradigm. This situation may have occurred in the past when the wholesale provider obtained a certificate from its customer consistent with the sample language in the Form 499-A instructions applicable to that time period and verified that the customer was listed as a contributor on the Commission’s website, but the customer was not actually contributing on the specific service offerings that incorporate the wholesale service as an input.<sup>111</sup>

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<sup>109</sup> TelePacific asks the Commission to clarify the impact of the *Wireline Broadband Internet Access Order* on the universal service contribution obligations of carriers that sell transmission to broadband Internet access providers, arguing that certain interpretations might violate section 254(d)’s requirement that contributions be assessed on an equitable and nondiscriminatory basis, as well as contradict principles of competitive neutrality and having a level playing field for all providers of broadband Internet access services. TelePacific Comments at 5-9; TelePacific *Ex Parte* at 4-5; cf. 47 U.S.C. § 254(d). 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 adopted in the *Wireline Broadband Internet Access Order* and the *2006 Contribution Methodology Order*, that request is untimely.

<sup>110</sup> See *infra* Section III.D.2.

<sup>111</sup> We do not read the existing definition of “reseller” so broadly that it would enable a company to certify it is a reseller if it contributes on any of its product offerings that may incorporate wholesale inputs. Such a broad reading, in the extreme case, would allow a carrier to claim reseller status for all of its wholesale inputs even though it only contributed on a small fraction of its product offerings. For example, if a customer purchases a DS1 line and incorporates that service into an offering of broadband Internet access service, it is *not* a reseller for purposes of that

(continued . . .)



41. We direct the Bureau to modify the 2013 Form 499-A instructions to revise the existing sample certificate language, which we find does not clearly reflect the longstanding requirement that in order to classify revenues as carrier's carrier revenues, wholesalers must have a reasonable expectation that their customers are "resellers" as defined above. Nonetheless, the issue under the Commission's rules is whether the wholesale providers had a reasonable expectation that their customers were resellers, and we 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.<sup>112</sup> We recognize that many providers have adopted the sample certificate language into their business practices and that it would be unfair to penalize these providers for reasonably doing so. We therefore direct USAC not to reclassify any revenues in situations where the wholesale provider relied on a certificate consistent with the applicable Form 499-A instructions (and otherwise complied with those instructions). In addition, wholesalers and customers may have established operating, reporting and financial procedures that relied on the sample certification language and suggestion to check the Commission's website to determine whether an entity is a contributor contained in last year's Form 499-A instructions. 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.<sup>113</sup> Thus, we will consider it sufficient for providers to demonstrate a reasonable expectation that particular customers were resellers by relying on certificates that are consistent with the sample language in the 2012 instructions through December 31, 2013.<sup>114</sup> Likewise, we will consider it sufficient for customers to provide certificates to wholesalers that are consistent with the sample language in the 2012 instructions for the same time period.

42. The Commission has sought comment on specific rule changes relating to wholesale-resale arrangements in the context of the pending contributions reform rulemaking proceeding, with one option under consideration that would significantly alter the respective contribution obligations of wholesalers and their customers.<sup>115</sup> We do not prejudge what rules the Commission may ultimately adopt in that proceeding.

(Continued from previous page) \_\_\_\_\_

line because it has no obligation to contribute on those broadband Internet access service revenues. This is true even if the customer contributes to the Fund based on revenues from other lines. In contrast, a customer is a reseller if it purchases a DS1 line and incorporates it into an offering of telephone service (and contributes on that resale), even if it also provides broadband Internet access service on that line.

<sup>112</sup> We note that the Wireline Competition Bureau effectively has treated the receipt of a reseller certificate in accordance with the sample language and other instructions in the Form 499-A worksheets as sufficient to meet the "reasonable expectation" requirement in the past. *See, e.g., TelePacific Order*, 25 FCC Rcd at 4655, para. 8 & n.22; *Global Crossing Order*, 24 FCC Rcd at 10825-26, para. 5.

<sup>113</sup> Several commenters that filed in response to the *Contribution Methodology Reform and Modernization Further Notice* note that they obtain certifications from thousands of resellers. *See* Comments of AT&T, WC Docket No. 06-122, GN Docket No. 09-51, at 43 (filed July 9, 2012); Comments of The American Prepaid Phonecall Association, WC Docket No. 06-122, GN Docket No. 09-51, at 2 (filed July 9, 2012); Comments of Verizon and Verizon Wireless, WC Docket No. 06-122, GN Docket No. 09-51, at 16 (filed July 9, 2012).

<sup>114</sup> Contributors that do not rely on the sample language in the current Form 499-A instructions are required to establish full compliance with the Commission's requirements as clarified in this Order. *See infra* para. 52.

<sup>115</sup> *See Contribution Methodology Reform and Modernization Further Notice*, 27 FCC Rcd at 5419-22, paras. 166-74 (seeking comment on a value-added approach, under which the Commission would eliminate the current exemption from contribution obligations for wholesalers and instead assess each provider, with credits provided to subsequent providers in the value chain).

**C. USAC Should Not Double Collect if Clear and Convincing Evidence Shows that Another Provider Actually Contributed on the Subject Revenues**

43. In this section, we respond to the USAC *Guidance Request*<sup>116</sup> by addressing the situation in which the wholesale provider has not demonstrated a reasonable expectation that a customer would contribute to the Fund, but the customer actually contributed to the Fund in the relevant calendar year on the services in question.

44. As stated above, the Commission adopted the wholesale exemption in part as a means of addressing concerns that the same revenue should not be assessed twice for USF contributions purposes.<sup>117</sup> Thus, we clarify that if a wholesale provider's customer actually contributed, USAC should not attempt to recover contributions from the wholesale provider on the subject revenues, even if the wholesale provider cannot demonstrate that it had a reasonable expectation that its customer would contribute when it filed the Form 499 revenue data. However, as we clarify provider obligations in this Order, we also stress that a wholesale provider that fails to show a reasonable expectation that its reseller would contribute on the subject revenues is not discharging its due diligence obligations under our requirements,<sup>118</sup> even in those situations where the reseller happens to mitigate some of the harm caused by the wholesale provider by making sufficient contributions to the USF on the subject revenues.

45. We note that the burden of proof is on the provider claiming double collection to demonstrate actual contributions were made to the Fund based on the relevant services through clear and convincing evidence. Such a standard is necessary to ensure that the no-double-collection exception does not swallow the rule of complying with universal service contribution obligations in the first instance. We note that USAC will only need to determine if a reseller customer actually contributed in cases in which the wholesale provider fails to demonstrate a reasonable expectation. We clarify that USAC, beyond checking its own records, is not required to conduct additional independent investigations of the wholesale provider's customers in making this determination; however, USAC should consider the evidence offered by the wholesale provider, including sworn reseller certificates ("confirmatory" certificates).

46. It is unclear from the *Guidance Request* whether USAC, with respect to the relevant XOCS reseller customers, conducted a "reasonable expectation" analysis consistent with existing precedent, as clarified below. On remand, USAC should evaluate whether XOCS had a "reasonable expectation" that the customer would contribute to the Fund. If USAC determines that XOCS failed to meet the reasonable expectation standard with respect to any particular customer(s), USAC should then consider XOCS's argument that its customers did in fact contribute to the Fund based on the subject revenues. The burden is on XOCS to submit clear and convincing evidence that a customer, in fact, contributed on the relevant services. Within the context of this analysis, USAC should take the Confirmatory Certificates into account, because they may be relevant to the issue of whether the customers in fact contributed to the Fund.<sup>119</sup> If USAC does determine that the customer contributed to the

<sup>116</sup> See *supra* paras. 26-30.

<sup>117</sup> See *supra* para. 11.

<sup>118</sup> See *supra* Section III.B and *infra* Sections III.D.1 and D.2; see also 47 C.F.R. § 54.711 and 2012 FCC Form 499-A Instructions at 28 (requiring an executive officer to certify that to the truth and accuracy of data in the Telecommunications Reporting Worksheet).

<sup>119</sup> These certificates, as discussed below in Section III.D.1, are not relevant to whether XOCS had a reasonable expectation prior to filing the Form 499-A that its resale customers would contribute, because such certificates were not obtained during the relevant time period. However, they are relevant to the second issue raised by the *Guidance Request*—whether USAC should conclude that "the contributor's carrier customers were incorporating the services

(continued . . .)

Fund, USAC should not seek to recover additional contributions on the subject revenues from XOCS or other wholesale providers.

#### D. Clarifying and Applying the Reasonable Expectation Standard

47. In this section, we provide guidance on how wholesale providers can demonstrate compliance with the “reasonable expectation” standard and apply it to the *XOCS Request for Review*, the *USAC Guidance Request*, and the *Global Crossing Application for Review*. Below is a summary of the type of reseller certificate at issue in each proceeding and whether USAC records showed that the customers at issue actually contributed to the Fund at all in the relevant year.

	Type of Reseller Certificate At Issue	Did Customers Actually Contribute to the Fund?
<i>XOCS Request for Review</i>	Pre-Service	No
<i>USAC Guidance Request</i>	Confirmatory	Yes
<i>Global Crossing Application for Review</i>	Pre-Service	No

#### 1. The Relevant Time Period for the “Reasonable Expectation” Analysis is When a Wholesale Provider Collects and Submits Revenue Data to USAC

48. We reiterate that the relevant time period for the “reasonable expectation” analysis is the period during which a wholesale provider collects and submits the revenue data at issue to USAC. Wholesale providers must conduct appropriate due diligence before reporting revenues as exempt and, to the extent that a wholesale provider relies on the FCC Form 499-A instructions to satisfy the reasonable expectation standard (the “safe harbor” method discussed in Section III.D.2 below), it must receive the relevant evidence before the filing deadline for the applicable annual Form 499-A.

49. XOCS, in both its *Request for Review* and in response to the *Guidance Request*, argues that USAC should have taken the Confirmatory Certificates into account as “other reliable proof” when determining whether XOCS had a reasonable expectation.<sup>120</sup> The Confirmatory Certificates, however, are irrelevant for purposes of determining whether XOCS had a reasonable expectation at the time that it failed to report the relevant revenues as “end user” revenues and failed to contribute on them. Specifically, because XOCS obtained the certificates years after the fact and thus did not consider the certificates at the time it submitted the 499-A forms, the Confirmatory Certificates could not have played any role in XOCS’s ability to determine at that time whether its customer could be reasonably expected to contribute to the Fund. Furthermore, holding that such Confirmatory Certificates can satisfy the reasonable expectation standard would diminish the incentive for wholesale providers to conduct due diligence at the proper time—*i.e.*, prior to reporting revenues, not after years of potential under-reporting and underpayments. We disagree with XOCS’s assertion that there is no risk of underpayment because USAC can investigate and collect from the reseller customer if the customer claimed to contribute, but did not.<sup>121</sup> Such a policy inappropriately removes the initial burden of due diligence from the wholesale provider and places it squarely back on the limited administrative resources of USAC and the Commission. Thus, we clarify that, for purposes of the reasonable expectation analysis, USAC need not

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purchased from the contributor into their own telecommunications offerings, and such customers’ USF contributions were based on revenues from such offerings when provided to end-users.” *Guidance Request* at 2-3.

<sup>120</sup> *XOCS Request for Review* at 40-41; XOCS Comments at 14-17.

<sup>121</sup> XOCS Comments at 19.

consider the Confirmatory Certificates or other evidence if the evidence could have had no possible influence on whether XOCS, at the time it submitted revenue data, had a “reasonable expectation” that a customer would contribute to the Fund on the relevant services. But, as noted above, USAC may consider such certificates in evaluating whether the customer actually contributed to the Fund and assessing the wholesale provider would thus lead to a double collection.<sup>122</sup>

## 2. Wholesale Providers May Demonstrate a “Reasonable Expectation” by Complying with the Form 499-A Instructions or Through Other Reliable Proof

50. In the *Global Crossing Order*, the Bureau held that USAC may reclassify a provider’s reported carrier’s carrier revenue as end-user revenue if the provider fails to demonstrate that it either 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.”<sup>123</sup> In the *XOCS Request for Review* and comments in response to the *Guidance Request*, XOCS claims that USAC failed to apply the “other reliable proof” standard as an alternative method of determining XOCS’s compliance with the “reasonable expectation” standard, and requests that the Commission instruct USAC to do so.<sup>124</sup>

51. We affirm this aspect of the *Global Crossing Order* and hold that a contributor may demonstrate a reasonable expectation by either following the guidance in the Form 499-A instructions or through other reliable proof. A wholesale provider that complies with *all* of the guidance in the Form 499-A instructions will be afforded a “safe harbor”—*i.e.*, that provider will be deemed to have demonstrated a reasonable expectation. If the relevant portion of the Form 499-A instructions has changed from year to year, USAC should treat the instructions from the year the form was due as applicable for purposes of applying the “safe harbor.” Consistent with the proposal in the *Contribution Methodology Reform and Modernization Further Notice*, and to assist filers in complying with the safe harbor standard in the future, we direct the Bureau to issue a public notice within thirty days seeking comment on any revisions that should be made to the FCC Forms 499 and instructions for reporting 2012 revenues in 2013, taking into account our directive in Section III.B above.<sup>125</sup>

52. If a wholesale provider follows procedures that deviate in any way from the guidance in the Form 499-A instructions, USAC should determine whether that provider has demonstrated a

<sup>122</sup> See *supra* Section III.C.

<sup>123</sup> *Global Crossing Order* at 10828-29, para. 14; see 2007 FCC Form 499-A Instructions at 19 (“Filers that do not comply with the above procedures will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users”).

<sup>124</sup> See *XOCS Request for Review* at 38-39 (“Nowhere does USAC accept the *Global Crossing Order*’s holding that wholesale carriers may submit ‘other reliable proof’ . . . XOCS respectfully requests that the Commission instruct USAC that it must give independent consideration to all ‘other proof’” submitted by wholesale carriers); XOCS Comments at 12-13 (“USAC rigidly applies the Form 499-A Instructions as the sole permissible method of verification – in clear violation of FCC orders . . . the FCC stated explicitly in *Global Crossing* that carriers may establish their affirmative knowledge or reasonable expectation by providing ‘*other reliable proof*’”) (emphasis in original).

<sup>125</sup> We note that *Global Crossing* argues that it cannot be bound by language in the FCC Form 499-A instructions. Application for Review at 17-18. As we clarify here, however, we are not, in fact, treating strict compliance with the instructions as the only means for a contributor to meet the “reasonable expectation” standard. See also *Contribution Methodology Reform and Modernization Further Notice*, 27 FCC Rcd at 5477-79, paras. 344-49 (proposing a formal process to seek public comment prior to adopting revisions to the FCC Forms 499 and instructions and seeking comment on whether contributors should be required to comply with instructions adopted under such a process).

reasonable expectation using the “other reliable proof” standard. When evaluating whether a contributor has provided sufficient “other reliable proof,” USAC should consider all relevant evidence, including reseller certificates or other documents that do not precisely track the language in the sample certificate language set forth in the instructions.<sup>126</sup> We caution providers that, should they choose to take this alternate route, USAC will be required to make a case-by-case factual determination as to whether each provider has shown that it had a reasonable expectation that its customer was a “reseller” for each purchased wholesale service. We also note that the provider bears the burden of production and the burden of proof under the “other reliable proof” method—and we clarify that the relevant standard of proof is that the wholesale provider demonstrate a reasonable expectation with clear and convincing evidence. USAC is not required to conduct any independent investigation, beyond checking its own records and considering the evidence from the provider, in making this determination. We direct USAC to refer matters directly to the Commission to the extent it cannot determine from the facts presented whether the provider has demonstrated a reasonable expectation either by relying on the guidance in the FCC Form 499-A or other reliable proof.

### 3. Application of the Reasonable Expectation Standard to the *XOCS Request for Review* and the *USAC Guidance Request*

53. As discussed above, XOCS obtained “Pre-Service Certificates” from its customers prior to the filing of relevant Form 499 revenue data, but did not update the certificates annually per the guidance in the applicable Form 499-A instructions. XOCS acknowledged the certificates did not meet the guidance in the instructions, but argued in the context of both the *XOCS Request for Review* and the *Guidance Request* that these certificates should be taken into account under the “other reliable proof” standard.<sup>127</sup> Other parties also commented on the treatment of similar certificates (*i.e.* forward-looking in nature, but dated outside the calendar year when revenues are earned). For example, Verizon stated that a customer may be delayed in providing an annual certificate for many reasons (for example, administrative oversight, or because the customer ordered service late in a calendar year after the date when annual certificates are typically gathered as part of the compliance process).<sup>128</sup>

54. We find that USAC should take into account XOCS’s Pre-Service Certificates when evaluating whether XOCS had “other reliable proof.” Even if reseller certificates do not follow the guidelines in the Form 499-A instructions, the certificates can still constitute “other reliable proof” supporting a reasonable expectation, depending on the totality of the facts and circumstances under which the certificates were obtained. Thus, for example, if customer delay results in the provision of a certificate that is not dated before the Form 499-A is filed, a wholesale provider may attempt to demonstrate a reasonable expectation by submitting evidence showing that it knew, at or before the time of filing, that the customer was filing a reseller certificate and had not done so through a clerical error or other non-substantive delay and may still submit the post-dated certificate as evidence to support this explanation. Accordingly, if USAC declined to give weight to the Pre-Service Certificates under the

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<sup>126</sup> As we have noted above, Confirmatory Certificates obtained after the fact are irrelevant for purposes of determining whether a contributor had a reasonable expectation at the time that it failed to report the relevant revenues as “carrier’s carrier” revenues and failed to contribute on them, because they were not considered during the relevant time period. *See supra* Section III.D.1.

<sup>127</sup> XOCS acknowledges that it did not obtain reseller certificates on an annual basis per the guidance in the Form 499 instructions. Request for Review at 38. Thus, the Pre-Service Certificates alone were insufficient to demonstrate a reasonable expectation under the “safe harbor” method.

<sup>128</sup> Verizon Comments at 3; *see also* Sprint Reply at 3 (agreeing with Verizon’s statement concerning the reasons for delayed certificates).



“other reliable proof” standard merely because they did not comply with the guidance in the instructions, we direct USAC to reconsider its analysis.

#### 4. Application of the Reasonable Expectation Standard to the *Global Crossing Application for Review*

55. Finally, we deny in part and grant in part Global Crossing’s Application for Review and provide additional clarification for the application of the reasonable expectation standard. Global Crossing makes two primary arguments in its petition. First, Global Crossing argues that the Bureau retroactively applied the 2007 instructions to revenues reported on its 2005 FCC Form 499-A, in particular by requiring a reseller certificate.<sup>129</sup> This is not correct; the Bureau did not apply the 2007 instructions. Rather, it applied the less detailed 2005 instructions, which explicitly directed filers to verify that each of their reseller customers would both “1) resell the filer’s services in the form of telecommunications and not as information services; and 2) contribute directly to the federal universal service support mechanisms.”<sup>130</sup> As acknowledged by Global Crossing, the 2005 instructions also stated that contributors that did not have an “independent reason” to know that a reseller satisfied both criteria should “obtain a signed statement certifying that these criteria are met.”<sup>131</sup> If Global Crossing did not have an “independent reason,” the instructions still provided that Global Crossing should obtain signed statements from its reseller customers.<sup>132</sup>

56. Second, Global Crossing argues that it did in fact demonstrate a reasonable expectation under the 2005 instructions. As discussed in Section III.D.2 above, Global Crossing would need to demonstrate that it either complied with all of the guidance in the 2005 instructions (the “safe harbor” method) or provide “other reliable proof” that it had a reasonable expectation that its customers would contribute to the Fund. With respect to the “safe harbor” method, we remand to USAC as set forth above for re-evaluation as to whether Global Crossing satisfied the reasonable expectation standard through compliance with the 2005 instructions.<sup>133</sup> To the extent that USAC determines that Global Crossing did not fully comply with the 2005 instructions as a safe harbor, we further direct USAC to re-evaluate whether the evidence previously submitted by Global Crossing could still serve as “other reliable proof” for demonstrating a reasonable expectation that the customers would contribute to the Fund on the relevant services.<sup>134</sup>

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<sup>129</sup> Application for Review at 15-16.

<sup>130</sup> 2005 FCC Form 499-A Instructions at 18 (emphasis added).

<sup>131</sup> See Application for Review at 16; see also 2005 FCC Form 499-A Instructions at 18.

<sup>132</sup> Global Crossing further argues that the Bureau retroactively applied the 2007 instructions by requiring printouts from the Commission’s contributor website verifying the status of each of its customers. Application for Review at 14-16. The Bureau, however, did not rely on the presence or absence of such printouts in the order, so the argument is moot. See *Global Crossing Order*, 24 FCC Rcd at 10826, para. 6 (“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”).

<sup>133</sup> We agree with Global Crossing that in 2005, certificates were not necessarily required to be annual; nonetheless the length of time that has passed between their execution and the filing of the Form 499-A could bear on their probative value.

<sup>134</sup> See, e.g., 2005 FCC Form 499-A Instructions at 18 (stating that documented procedures should include, but not be limited to, maintaining the following information on resellers: Filer 499 ID; legal name; address; name of contact person; and phone number of the contact person).

57. On remand, if USAC reclassifies any revenues associated with Global Crossing's non-contributing customers, we direct USAC to provide Global Crossing with detailed findings that form the basis for the decision to reclassify the revenues. We further direct USAC to reassess Global Crossing's contribution payment obligation in accordance with any new findings and to issue new invoices or refunds as appropriate.

#### IV. ORDERING CLAUSES

58. 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, 254, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed by Global Crossing Bandwidth, Inc. is hereby DENIED IN PART AND GRANTED IN PART as provided herein and is otherwise REMANDED to USAC for further consideration in accordance with the terms of this Order.

59. IT IS FURTHER 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, 254, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Clarification or in the Alternative for Partial Reconsideration filed by AT&T Inc., CenturyLink, SureWest Communications, and Verizon is hereby GRANTED as provided herein.

60. IT IS FURTHER 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, 254, and section 54.722 of the Commission's rules, 47 C.F.R. § 54.722, that the Request for Review filed by XOCS Communications Services, Inc. is hereby GRANTED IN PART as provided herein and is in relevant part REMANDED to USAC for further consideration in accordance with the terms of this Order.

61. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX

## List of Commenters

## GLOBAL CROSSING BANDWIDTH, INC. APPLICATION FOR REVIEW

<u>Commenter</u>	<u>Abbreviation</u>
Verizon and Verizon Wireless	Verizon

<u>Reply Commenter</u>	<u>Abbreviation</u>
None	

## AT&amp;T, CENTURYLINK, SUREWEST COMMUNICATIONS, AND VERIZON PETITION FOR CLARIFICATION

<u>Commenter</u>	<u>Abbreviation</u>
Coalition for Fairness and Restraint in USAC Fund Administration	Coalition
Qwest Communications International Inc.	Qwest
U.S. TelePacific Corp. d/b/a TelePacific Communications	TelePacific

<u>Reply Commenter</u>	<u>Abbreviation</u>
Ad Hoc Coalition of International Telecommunications Companies	Ad Hoc
AT&T, CenturyLink, SureWest, and Verizon	Wholesale Providers

## XOCS COMMUNICATIONS SERVICES, INC. REQUEST FOR REVIEW

<u>Commenter</u>	<u>Abbreviation</u>
AT&T	AT&T
Level 3 Communications, LLC and Paetec Holding Corp.	Level 3
Qwest Communications International Inc.	Qwest
Verizon	Verizon

<u>Reply Commenter</u>	<u>Abbreviation</u>
BT Americas, Inc.	BT
Sprint Nextel Corporation	Sprint
XO Communications Services, Inc.	XOCS

## UNIVERSAL SERVICE ADMINISTRATIVE COMPANY REQUEST FOR GUIDANCE

<u>Commenter</u>	<u>Abbreviation</u>
Ad Hoc International Coalition of International Telecommunications Companies	Ad Hoc
U.S. TelePacific Corp. d/b/a TelePacific Communications	TelePacific
Verizon and Verizon Wireless	Verizon
XO Communications Services, Inc.	XOCS

<u>Reply Commenter</u>	<u>Abbreviation</u>
Level 3 Communications, LLC	Level 3
Sprint Nextel Corporation	Sprint
U.S. TelePacific Corp. d/b/a TelePacific Communications	TelePacific
XO Communications Services, Inc.	XOCS