

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

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Petition for Clarification and Partial	)	
Reconsideration by XO Communications	)	
Services, LLC	)	

**ORDER ON RECONSIDERATION**

**Adopted: July 23, 2014**

**Released: July 25, 2014**

By the Commission:

**I. INTRODUCTION**

1. In this Order on Reconsideration (Order), we address a petition filed by XO Communications Services, LLC (XO) seeking clarification or partial reconsideration of the Commission’s *Wholesaler-Reseller Clarification Order*.<sup>1</sup> In that order, the Commission clarified certain aspects of the wholesale provider-reseller relationship and their respective contribution obligations to the federal Universal Service Fund (USF or Fund). For the reasons stated below, we grant XO’s request that we reconsider the use of the clear and convincing evidence standard when the wholesale provider relies on “other reliable proof” to establish a “reasonable expectation” that its reseller customer is contributing to the Fund, and when establishing the reseller’s actual payment of USF contributions. We deny XO’s request that we clarify, or in the alternative reconsider, the use of Confirmatory Certificates<sup>2</sup> to establish actual payment into the USF.

**II. BACKGROUND**

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

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that “every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”<sup>3</sup> Section 254(d) further

<sup>1</sup> Petition for Clarification and Partial Reconsideration by XO Communications Services, LLC, WC Docket No. 06-122 (filed Dec. 5, 2012) (XO Petition); see *Universal Service Contribution Methodology, Application 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*, WC Docket No. 06-122, Order, 27 FCC Rcd 13780 (2012) (*Wholesaler-Reseller Clarification Order*). Also pending is a petition for partial reconsideration of the *Wholesaler-Reseller Clarification Order* filed by U.S. TelePacific Corp., which we will address in a separate order. See U.S. TelePacific Corp. d/b/a TelePacific Communications Petition for Partial Reconsideration, WC Docket No. 06-122 (filed Dec. 5, 2012).

<sup>2</sup> Confirmatory Certificates are sworn declarations from wholesale providers’ reseller customers attesting to the customer having, in fact, contributed to the Fund during the relevant year. See *Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13793-94, para. 30; see also *infra* Section III.B.

<sup>3</sup> 47 U.S.C. § 254(d).

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>4</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>5</sup> Although the Commission declined to exempt from contribution requirements “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>6</sup> Providers with direct contribution obligations may pass through their contribution assessments to their customers.<sup>7</sup>

3. The Commission has designated the Universal Service Administrative Company (USAC) as the entity responsible for administering the universal service support mechanisms under Commission direction.<sup>8</sup> Pursuant to the Commission’s rules, contributors report their revenues by filing with USAC their Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q),<sup>9</sup> which are released annually by the Wireline Competition Bureau (Bureau or WCB) on delegated authority.<sup>10</sup> USAC reviews

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<sup>4</sup> *Id.*

<sup>5</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183-84, para. 795 (1997) (*Universal Service First Report and Order*) (subsequent history omitted). 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 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 Fund).

<sup>6</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 9179, para. 787. Telecommunications service providers are not required to contribute to the Fund in a given year if their contribution for that year would be less than \$10,000. 47 C.F.R. § 54.708.

<sup>7</sup> See 47 C.F.R. § 54.712(a) (authorizing contributors to recover USF contribution costs from their customers); 2013 FCC Form 499-A Instructions at 20; see also *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1467, 1469, para. 4 n.10 (2008) (noting that providers almost always pass contribution assessments through to their customers).

<sup>8</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18423–24, para. 41 (1997) (*Universal Service Second Order on Reconsideration*); see 47 C.F.R. § 54.701.

<sup>9</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 USAC, Schedule of Filings, <http://www.usac.org/cont/499/filing-schedule.aspx> (last visited July 24, 2014). 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>10</sup> The Wireline Competition Bureau, formerly the Common Carrier Bureau (Bureau), has delegated authority to revise the FCC 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 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

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these filings and verifies the information provided by the contributors.<sup>11</sup> USAC also bills contributors for their universal service contributions.<sup>12</sup>

4. Because our present rules require contribution to the Fund 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 wholesale revenues (also known as “carrier’s carrier” revenues<sup>13</sup> or “revenues from resellers”) and (2) revenues derived from sales to all other entities, known as retail (or end-user) revenues.<sup>14</sup> Wholesale revenues are not currently assessed. Retail 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>15</sup>

5. To assist contributors, the Commission has clarified the distinction – for contributions purposes – between revenues from “resellers” (*i.e.* wholesale 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>16</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 derived from the offering that incorporates the wholesale input.<sup>17</sup> If a wholesale provider cannot meet this

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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 7531–49, paras. 23–62.

<sup>11</sup> 47 C.F.R. § 54.711(a).

<sup>12</sup> 47 C.F.R. § 54.702(b).

<sup>13</sup> The wholesale provider is the “carrier’s carrier.”

<sup>14</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A.

<sup>15</sup> *See id.*; *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Fourth Order on Reconsideration et al., 13 FCC Rcd 5318, 5482, para. 298 (1997) (“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”); 47 C.F.R. § 54.708 (providing that “[i]f a contributor’s contribution to universal service in any given year is less than \$10,000 that contributor will not be required to submit a contribution or Telecommunications Reporting Worksheet for that year,” unless it is required to do so by the Commission’s rules governing Telecommunications Relay Service, numbering administration, or shared costs of local number portability); *see also* 47 C.F.R. § 54.706(d); *Universal Service First Report and Order*, 12 FCC Rcd at 9186, para. 800 (delineating various exempted providers).

<sup>16</sup> *See Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A; *see also* 2013 FCC Form 499-A Instructions at 23 (“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.”); *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, 10825-26, para. 5 (Wireline Comp. Bur. 2009) (*Global Crossing Order*).

<sup>17</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”).

standard for a particular customer, the revenues from that customer should be treated as retail revenues, not wholesale revenues.

6. The 2007 instructions for Form 499-A stated, in part, that wholesale providers should seek certificates from their reseller customers annually (Pre-Service Certificates). The instructions provided sample language, including a certification under penalty of perjury that the reseller contributes directly to the Fund.<sup>18</sup> These certificates are used to help establish that the wholesale provider had a reasonable expectation that the reseller would contribute to the Fund.<sup>19</sup>

**B. The XO Request for Review, USAC Guidance Request, *Wholesaler-Reseller Clarification Order*, and XO Petition**

7. *XO Request for Review*. In December 2010, XO filed a request seeking review of a USAC audit which, among other things, determined that XO failed to demonstrate that it had a “reasonable expectation” that six of its reseller customers would contribute to the Fund, and thus that the associated revenues were retail revenues subject to contributions by XO.<sup>20</sup> According to USAC’s records, these six customers did not contribute to the Fund during the relevant time period.<sup>21</sup> As a result, USAC reclassified revenues from these six XO customers as assessable XO retail revenues.

8. *USAC Guidance Request*. In March 2011, USAC requested guidance from the Bureau on certain wholesaler/reseller issues. In particular, USAC asked whether a contributor satisfies the “reasonable expectation” standard when it obtains reseller certificates after filing the relevant FCC Form 499-A (“Confirmatory Certificates”).<sup>22</sup> As opposed to a Pre-Service Certificate, where the reseller declares that it will contribute to the Fund during the service period, in a Confirmatory Certificate the reseller attests after the fact that it has contributed to the Fund during the period in question. In response, XO filed comments stating that the *Guidance Request* “arises at least in part from” the XO audit that was the subject of the *XO Request for Review* — albeit on issues other than those raised in XO’s request — and provided further background on the issues raised in the audit.<sup>23</sup> In particular, the XO revenues at issue in the *Guidance Request*, unlike the revenues at issue in the *XO Request for Review*, were from customers that *did* contribute to the Fund during the audit period, based on USAC’s records.<sup>24</sup>

9. *The Wholesaler-Reseller Clarification Order*. In November 2012, the Commission released the *Wholesaler-Reseller Clarification Order*, in which it addressed several requests regarding the USF contribution obligation for wholesale providers and their customers, including the *XO Request for Review* and the *Guidance Request* discussed above.<sup>25</sup> In the *Wholesaler-Reseller Clarification Order*, the Commission clarified that a wholesale provider may demonstrate that it had a “reasonable expectation” that its reseller customer was contributing to the USF based on the revenues the reseller derived from a service that uses the wholesaler’s offering by: (1) following all of the guidance in the FCC Form 499-A instructions for the relevant contribution year (thus, satisfying the “safe harbor” for demonstrating a

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<sup>18</sup> See 2007 FCC Form 499-A Instructions at 19; see also 2014 FCC Form 499-A Instructions at 24.

<sup>19</sup> *Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13801-2, paras. 50-52.

<sup>20</sup> XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122, at 32 (filed Dec. 29, 2010) (*XO Request for Review*).

<sup>21</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, at 1-2 (filed Mar. 1, 2011) (*Guidance Request*).

<sup>22</sup> *Id.* at 1-2.

<sup>23</sup> *Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13792, para. 27 (discussing XO Comments).

<sup>24</sup> *Id.* at 13792, paras. 26-27.

<sup>25</sup> See generally *Wholesaler-Reseller Clarification Order*.

reasonable expectation);<sup>26</sup> or (2) by presenting “other reliable proof” to establish such a reasonable expectation.<sup>27</sup> The Commission also clarified that if a wholesale provider fails to establish that it had a “reasonable expectation” (either through the “safe harbor” or using “other reliable proof”), USAC should nevertheless refrain from attempting to recover contributions from the wholesaler on the subject revenues if the wholesaler’s customer actually contributed to the Fund based on the services in question.<sup>28</sup> Furthermore, the Commission clarified that USAC, when determining whether a wholesaler’s customer actually contributed to the Fund, is not required to conduct an independent investigation beyond checking its own records, but should consider all evidence offered by the wholesaler.<sup>29</sup> Finally, the Commission clarified that the standard of evidence for establishing a “reasonable expectation” based on “other reliable proof”, and in establishing proof of actual payment, is the “clear and convincing evidence” standard.<sup>30</sup>

10. *XO Petition.* XO seeks reconsideration of the *Wholesaler-Reseller Clarification Order*’s use of the clear and convincing evidence standard to: (1) evaluate whether “other reliable proof” establishes that a wholesaler had a reasonable expectation; and (2) establish that the customer actually contributed. XO argues that the proper standard of evidence in administrative proceedings is the “preponderance of the evidence” standard, not the clear and convincing evidence standard.<sup>31</sup> XO also seeks clarification, or partial reconsideration, that a Confirmatory Certificate, with wording consistent with the applicable FCC Form 499-A instructions, sufficiently demonstrates that actual contributions were made to the Fund on the relevant services.<sup>32</sup>

### III. DISCUSSION

11. We grant XO’s request to reconsider the use of the clear and convincing evidence standard in the circumstances set forth in the *Wholesaler-Reseller Clarification Order*. We deny XO’s request to clarify that a Confirmatory Certificate alone establishes that a wholesale provider’s customer actually contributed to the Fund based on revenues associated with the wholesale provider’s telecommunications input.

#### A. Clear and Convincing Evidence Standard

12. After further examination, we reconsider the appropriate standard of evidence required in the circumstances articulated in the *Wholesaler-Reseller Clarification Order*. Absent statutory requirements to the contrary or factors warranting a heightened standard, the Commission generally applies the “preponderance of the evidence” standard in informal agency adjudications.<sup>33</sup> In the

<sup>26</sup> *Id.* at 13787, para. 14 (noting that in 2007, the Bureau modified the instructions to provide guidance in meeting the reasonable expectation standard).

<sup>27</sup> *Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13801-02, paras. 50-52.

<sup>28</sup> *Id.* at 13799, paras. 44-45.

<sup>29</sup> *Id.* at 13799, para. 45.

<sup>30</sup> *Id.* at 13799, 13802, paras. 45, 52.

<sup>31</sup> XO Petition at 11. Because we reconsider the proper standard and generally grant XO’s requested reconsideration in this regard, we need not address XO’s argument that the clear and convincing standard is improper under the Administrative Procedures Act and is arbitrary and capricious. *See id.*

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *See, e.g., American Communications Services, Inc.; MCI Telecommunications Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, CC Docket No. 97-100, Memorandum and Order, 14 FCC Rcd 21579, 21614, para. 76 (1999) (*ACSI Order*) (observing that the standard of evidence applicable in most administrative proceedings, unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard, is the preponderance of the evidence standard); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services* (continued . . .)

*Wholesaler-Reseller Clarification Order*, the Commission made no specific findings of the kind that would warrant a higher standard of evidence.<sup>34</sup> We also find that the preponderance of the evidence standard that is generally applied in administrative proceedings is sufficient in this context to safeguard the proper functioning of the contribution process.<sup>35</sup> The preponderance of the evidence standard balances our need to protect the Fund from the risk of underpayment with our desire to avoid imposing unnecessary burdens on industry and on USAC.<sup>36</sup> The Commission similarly has applied the preponderance of the evidence standard in another USF context (E-rate informal adjudications).<sup>37</sup>

13. Thus, for a wholesaler to demonstrate via “other reliable proof” that it had a reasonable expectation that its customers would contribute on the revenues associated with the services at issue, it must meet the preponderance of the evidence standard.<sup>38</sup> USAC should therefore evaluate the submitted evidence and determine whether it is sufficiently reliable and probative to demonstrate that it is more likely than not that during the relevant time period, the wholesale provider reasonably expected its customer to contribute on revenues from the services that incorporated the purchased telecommunications input.<sup>39</sup>

14. If a wholesale provider fails to establish that it had a reasonable expectation that a customer was contributing to the Fund, and seeks to avoid liability by establishing that its customer actually contributed on the relevant revenues, proof of such contribution must also be demonstrated by a preponderance of the evidence. The wholesale provider must establish that it is more likely than not that its customer contributed to the Fund on revenues from the services that incorporated the wholesale provider’s telecommunications input.<sup>40</sup> In order to meet the preponderance of the evidence standard in this situation, the proffered evidence must be corroborated by a check of USAC’s own records that the customer did, in fact, contribute to the Fund during the relevant year.<sup>41</sup> Confirmation by USAC that the

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*in Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20568–69, paras. 45–46 (1997) (*First Michigan Section 271 Order*) (adopting a preponderance standard for section 271 informal adjudications); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15833, para. 73 (2004) (*E-rate Fifth Report and Order*) (adopting a preponderance standard for E-rate informal adjudications).

<sup>34</sup> *Compare, e.g., ACSI Order*, 14 FCC Rcd at 21614, para. 76 n.177 (citing court cases in other contexts evaluating whether a heightened standard is warranted).

<sup>35</sup> Under Commission precedent, the preponderance of the evidence standard requires that the proponent demonstrate that it is more likely than not that its position is correct. *See, e.g., First Michigan Section 271 Order*, 12 FCC Rcd at 20568-69, paras. 45-46. The provider bears the burden of production and the burden of proof. *See Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13802, para. 52.

<sup>36</sup> *See Gorgan v. Garner*, 498 U.S. 279, 286 (1991) (because the “preponderance of the evidence” standard results in roughly equal allocation of risks of error between litigants, the Supreme Court presumes that such a standard is applicable in civil actions between private litigants unless particularly important interests or rights are at stake) (citations omitted).

<sup>37</sup> *See E-rate Fifth Report and Order*, 19 FCC Rcd at 15833, para. 73.

<sup>38</sup> As discussed in the *Wholesaler-Reseller Clarification Order*, if a provider deviates in any way from the guidance in the FCC Form 499-A instructions – that is, it does not meet the safe harbor requirements for establishing a reasonable expectation that its customer is contributing on the revenues from services that incorporate the wholesale provider’s telecommunications input – it may provide USAC with “other reliable proof” that it had a reasonable expectation. *See Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13801-02, para. 52.

<sup>39</sup> *See ACSI Order*, 14 FCC Rcd at 21614, para. 76. This Order on Reconsideration is an adjudicatory decision, and is presumptively retroactive, *see, e.g., Verizon v. FCC*, 269 F.3d 1098, 1109-12 (D.C. Cir. 2001); we direct USAC to conduct all pending and future audits consistent with the terms of this Order. *See infra* para. 20.

<sup>40</sup> *See ACSI Order*, 14 FCC Rcd at 21614, para. 76.

<sup>41</sup> *See supra* para. 9.

customer did contribute, however, does not in itself establish that the customer contributed on revenues from services that incorporated the wholesale provider's telecommunications input. The wholesale provider must also demonstrate that the reseller customer contributed specifically on the revenues associated with the wholesale provider's telecommunications input. We do not limit what proof a wholesale provider may submit to establish that the contributions were made on the relevant revenues. As discussed further below, a wholesale provider may submit, for instance, as part of its evidence for actual customer contributions, a properly drafted and executed Confirmatory Certificate that asserts that contributions were made by the reseller customer based on revenue from a service that incorporated the wholesale provider's telecommunications input for the relevant past period.

### B. Confirmatory Certificates

15. XO seeks clarification that a Confirmatory Certificate that contains language from the relevant FCC Form 499-A instructions sufficiently demonstrates that the wholesale provider's customer actually contributed to the USF on the relevant services. XO reasons that if a reseller certificate that contains the language from the relevant FCC Form 499-A instructions is sufficient to establish a reasonable expectation that the customer will contribute when executed during the relevant reporting period, the same language in a Confirmatory Certificate should be sufficient to establish that the wholesale provider's customer actually contributed to the USF on the relevant revenue.<sup>42</sup> We deny XO's request.

16. In the *Wholesaler-Reseller Clarification Order*, we afforded wholesale providers a safe harbor for satisfying the reasonable expectation standard by complying with *all* of the guidance in the FCC Form 499-A instructions.<sup>43</sup> XO essentially requests that Confirmatory Certificates, which by definition are executed *after* the relevant contribution period, serve as sufficient evidence of actual contribution, essentially creating another safe harbor.<sup>44</sup> At the outset, we correct XO's assumption: a reseller certificate alone does not satisfy the safe harbor for establishing a "reasonable expectation." Rather, a provider must have complied with *all* of the FCC Form 499-A instructions guidance. During the time period at issue in the XO audit, for example, the guidance in the instructions also required wholesale providers to collect the customer's legal name and address, the name of a contact person, the phone number of the contact person, and the customer's Filer 499 ID as well as evidence that the wholesale provider validated the customer's reseller status on the FCC website.<sup>45</sup> Only if the provider can show that it has complied with all of this guidance will it satisfy the conditions of the safe harbor for having a "reasonable expectation" that its customer was contributing to the USF on the relevant revenues.

17. If a wholesale provider fails, in the first instance, to satisfy the conditions for establishing a reasonable expectation, it may submit a Confirmatory Certificate as part of a demonstration that its reseller customer actually contributed on the relevant revenues. We do not, however, consider a Confirmatory Certificate to, standing alone, satisfy the preponderance of the evidence standard for demonstrating the reseller customer's actual contribution to the Fund — or to establish a second safe harbor, as XO essentially requests. The established safe harbor for demonstrating a reasonable

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<sup>42</sup> XO Petition at 5.

<sup>43</sup> *Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13801, para. 51.

<sup>44</sup> XO Petition at 7 (“[T]he Commission should clarify that . . . it is sufficient for a wholesale provider to rely upon a confirmatory certificate that is consistent with the then-applicable sample certification language in the Form 499-A Instructions in order to demonstrate that the reseller actually contributed to the USF on the relevant services.”).

<sup>45</sup> 2008 FCC Form 499-A Instructions at 19. The 2014 FCC Form 499-A instructions no longer require evidence that a wholesale provider validated the customer's reseller status on the FCC web site. 2014 FCC Form 499-A Instructions at 23 (instructing filers to maintain the following reseller information: Filer 499 ID; legal name; address; name of a contact person; phone number of the contact person; and an annual certification by the reseller regarding its reseller status).

expectation is appropriate because it provides a standard process by which wholesale providers can establish that they have exercised the appropriate due diligence to determine that the subject revenues are exempt from their contribution.<sup>46</sup> However, unlike a Pre-Service Certificate, which helps a wholesale provider to demonstrate the reasonableness of its expectation that its reseller customer will contribute to the Fund,<sup>47</sup> a Confirmatory Certificate is used after the fact to help establish a factual matter – that a reseller customer actually contributed on the relevant revenues. Given the disparities in what these certificates are being proffered to help establish, disparate treatment of them is warranted. Therefore, not only, as discussed above, is XO incorrect that a reseller certificate alone is sufficient to satisfy the safe harbor for a “reasonable expectation,”<sup>48</sup> but even if it were sufficient, we would still not accept it to establish an additional safe harbor for a reseller customer’s actual contribution. If essentially the same showing could be made by a provider after the fact to establish that its reseller customer actually contributed to the Fund, it would undermine the wholesale provider’s incentive to conduct appropriate due diligence, and shift the administrative burden of ensuring that the Fund receives its proper contributions to the limited administrative resources of USAC and the Commission. In order to safeguard the Fund from potential underpayments resulting from under-reporting of revenues, it is prudent to maintain the burden on wholesale providers to ensure that, prior to reporting revenues, the Fund will be made whole.<sup>49</sup>

18. Thus, we affirm that a Confirmatory Certificate by itself does not establish by a preponderance of the evidence that a wholesale provider’s customer *actually* contributed to the USF on the relevant revenues.<sup>50</sup> A properly drafted Confirmatory Certificate may help support such a finding under the preponderance of the evidence standard, but the evidence submitted must also be corroborated by USAC’s own records regarding the customer’s contribution, and must establish that the contribution was made on the relevant revenues.<sup>51</sup>

#### IV. ORDERING CLAUSES

19. ACCORDINGLY, IT IS ORDERED that, 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, the Petition for Clarification and Partial Reconsideration filed by XO Communications Services, LLC is hereby GRANTED in part to the extent discussed herein and is otherwise DENIED.

20. IT IS FURTHER ORDERED that USAC must apply the preponderance of the evidence standard to all pending and future audits, consistent with the terms of this Order.

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<sup>46</sup> See *Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13797, para. 38.

<sup>47</sup> See *id.* at 13800, para. 48; see also *supra* para. 6.

<sup>48</sup> See *supra* para. 16 (a wholesale provider must comply with all of the guidance in the relevant FCC Form 499-A instructions in order to be afforded a safe harbor for establishing a reasonable expectation).

<sup>49</sup> See *Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13800, paras. 48-49.

<sup>50</sup> See *id.* at 13799, para. 46. In the *Wholesaler-Reseller Clarification Order*, the Commission instructed USAC to consider Confirmatory Certificates because they *may be relevant* to the issue of whether the customers, in fact, contributed to the USF. The Commission, however, notably did not instruct USAC to consider such Confirmatory Certificates to be conclusive evidence.

<sup>51</sup> If USAC, based on the proffered Confirmatory Certificate, cannot determine through a check of its own records that a customer contributed to the Fund, the wholesale provider should provide USAC with the customer’s Filer ID and, if necessary, copies of the customer’s FCC Forms 499 to assist USAC in locating the customer’s information and confirming the customer’s contribution.



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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary