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information included evidence that, *during 2007*, USAC listed the entity as a current contributor in its FCC filings. Each quarter, USAC prepares a report identifying the projected revenues and obligations of the USF and included with this report is a listing of all companies that complete the quarterly Form 499-Q. The Form 499-Q is filed only by carriers⁸⁴ whose revenues are not *de minimis* and is used by USAC for the purpose of assessing a filer's quarterly USF contribution.⁸⁵ This is reliable, contemporaneous evidence that the two reseller customers listed qualified as resellers under the FCC's precedent.

Finally, XOCS submitted confirmatory certifications for four of the six resellers in January 2010. These certifications used the Form 499-A model language, which, in relevant part, had the customer certify that, in 2007,

Either the company contributes directly to the federal universal service support mechanisms, or that each entity to which the company provides resold telecommunications is itself an FCC Form 499 worksheet filer and a direct contributor to the federal universal service support mechanisms.

USAC's assertion that these confirmatory certifications are per se "inappropriate" for non-contributors is incorrect on its face. The FCC model language permits a non-contributing carrier to certify its reseller status if it operates as an intermediate wholesale carrier and *its own customers* were, in turn, USF contributors. In such a case, the certifying carrier will not itself be a USF contributor and, naturally, "USAC records" will show it as a non-contributor

⁸⁴ See, e.g., Telecommunications Reporting Worksheet, FCC Form 499-Q, Instructions at 3 (noting that the form must be filed by providers of interstate telecommunications services).

⁸⁵ See, e.g., *ADMA Telecom, Inc.*, 24 FCC Rcd 838, ¶ 3 (2009).

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(as happened here). Such intermediate wholesale carriers may be exempted from USF surcharges.

The evidence submitted by XOCS satisfies the *Global Crossing Order*'s "other reliable proof" method of classifying reseller revenue. The way in which this evidence satisfies the "other reliable proof" method is summarized for each of the resellers – dubbed Reseller Nos. 1-5 and Customer No. 6 to preserve the confidentiality of their identities.

For four of the resellers at issue, XOCS obtained *both* contemporaneous and confirmatory certifications of exemption. "Reseller No. 1" provided XOCS with a certification of exemption dated August 7, 2006, only six months prior to the audit period, and a confirmatory certification dated January 8, 2010 in which Reseller No. 1 certified that it met the reseller exemption requirements for calendar years 2007 – 2009.⁸⁶ Furthermore, Reseller No. 1 provided tax certificates stating that Reseller No. 1 is a reseller and purchased communications services from XOCS.⁸⁷ "Reseller No. 2" provided a certification dated December 12, 2006, less than three weeks prior to the audit period, and Reseller No. 2 also provided a confirmatory certification, dated January 13, 2010, confirming that the company met the reseller exemption requirements for calendar years 2007 – 2009.⁸⁸ Like Reseller No. 1, Reseller No. 2 also provided a certification of exemption from federal excise tax identifying Reseller No. 2 as a

⁸⁶ All supporting documentation for Reseller No. 1 is attached hereto as Exhibit 5. The name of each reseller discussed herein has been masked for confidentiality purposes but is identified on the attached exhibits.

⁸⁷ *Id.*

⁸⁸ All supporting documentation for Reseller No. 2 is attached hereto as Exhibit 6.

REDACTED FOR PUBLIC INSPECTION

reseller of communications services.⁸⁹ “Reseller No. 3” provided a certification of exemption in 2003 when it initially began purchasing services from XOCS and provided a confirmatory certification in January 2010 attesting that the company was a reseller during calendar years 2007 – 2009.⁹⁰ Reseller No. 3 also was identified as a Form 499-Q filer on USAC’s December 1, 2006 “Federal Universal Service Support Mechanisms Quarterly Contribution Base for the First Quarter 2007” report.⁹¹ “Reseller No. 4” provided its initial exemption certification on April 18, 2008.⁹² In addition, like Reseller No. 3, Reseller No. 4 was included in both the December 2006 and March 2007 USAC Federal Universal Service Support Mechanisms Quarterly Contribution Base for the first and second quarters of 2007.⁹³ The revenues attributable to these four resellers accounts for nearly [REDACTED]

[REDACTED] that USAC seeks to reclassify.

For “Reseller No. 5” XOCS obtained a reseller certification exemption dated May 31, 2006, again a mere six months prior to the time period relevant to the audit.⁹⁴ While XOCS was unable to obtain a confirmatory certification during the audit process in 2010, XOCS was able to determine that only a small portion of Reseller No. 5’s revenues identified by USAC could be subject to reclassification. Of the [REDACTED] [REDACTED] in revenues identified by USAC, only [REDACTED]

⁸⁹ *Id.*

⁹⁰ All supporting documentation for Reseller No. 3 is attached hereto as Exhibit 7.

⁹¹ *Id.*

⁹² All supporting documentation for Reseller No. 4 is attached hereto as Exhibit 8.

⁹³ *Id.*

⁹⁴ All supporting documentation for Reseller No. 5 is attached hereto as Exhibit 9.

[REDACTED] were for telecommunications services. The vast majority of the revenues represent collocation and power charges, which are not telecommunications services and are not subject to USF assessments even if the customer is an end user. Accordingly, even if the Commission were to decide that the supporting evidence provided by Reseller No. 5 is insufficient, only [REDACTED]

[REDACTED] of XOCS's reseller revenues would be subject to reclassification.

USAC also seeks to reclassify revenues from a final customer and an "un-reconciled difference." The final company identified by USAC actually is not a reseller and the revenues that USAC identifies as being attributable to "Customer No. 6" were never classified as reseller revenues.⁹⁵ As XOCS explained, in 2007, XOCS treated the customer as an end user and revenue from that customer was reported on XOCS's 2008 Form 499-A as end user telecommunications revenue. The error was introduced in the audit process (not in the USF reporting process), when XOCS mistakenly identified Customer No. 6 in the reseller sample USAC requested for testing. XOCS later acknowledged this error and notified USAC that Customer No. 6 was not a reseller and that XOCS had never included the [REDACTED]

[REDACTED] associated with Customer No. 6 in XOCS' reseller revenues. Accordingly, USAC's attempt to "reclassify" Customer No. 6's revenues is in error as the revenues were never included in the reseller revenue reported on the 2008 Form 499-A. Instead, the revenue amount USAC proposes to "reclassify" is properly

⁹⁵ XOCS initially identified another customer, [REDACTED] [REDACTED] as a reseller but has been unable to obtain the certifications and evidence necessary to support this classification. XOCS does not challenge the reclassification of revenues attributable to this company.

attributable to one of the many untested reseller customers. This revenue should remain as reseller revenue.

The final revenue that USAC seeks to reclassify as end user revenues represents revenues from resellers that were not part of the group of customers for which USAC requested and verified reseller status. As demonstrated in the discussion above, XOCS puts forth great effort into conducting a thorough review and analysis to determine if its customers actually should be classified as resellers. Based on XOCS's justified and reasonable belief that its reseller customers would directly contribute to the USF, the "un-reconciled" revenues should be treated similarly. Specifically, USAC should conclude that these revenues attributable to unverified resellers would, if reviewed, be found to be properly classified as reseller revenues.

In summary, XOCS requests the Commission conclude that the evidence provided by XOCS is more than sufficient to support a determination that XOCS reasonably expected that its reseller customers would directly contribute to the USF. For the six resellers in question, XOCS presented "other reliable proof" demonstrating that they could reasonably be expected to directly contribute to the USF, even if, in fact, they did not so contribute.

IV. ISSUE: DID XOCS CORRECTLY REPORT REVENUE FROM MTNS AS DERIVED FROM THE PROVISION OF AN INFORMATION SERVICE WHEN THE SERVICE EMPLOYS MPLS-BASED PROTOCOL PROCESSING AND OTHER ENHANCED FEATURES?

XOCS seeks *de novo* review of USAC's reclassification of Multi Transport Network Service ("MTNS") revenue from line 418 (non-telecom services) to line 406 (private line telecommunications).

A. Statement of Facts

XOCS's MTNS is a Wide Area Network ("WAN") solution provided using Multi Protocol Label Switching ("MPLS") technology. MTNS is provided across the XOCS MPLS-enabled Internet Protocol ("IP") network to offer multiple services across a single access circuit to each of a customer's multiple sites. It supports numerous applications needing private IP connectivity, internetworking between different types of Layer 2 connections, and access to the public Internet. The XOCS MTNS Frame Relay service option is designed to provide private data connectivity over the MPLS-enabled IP network. The XOCS MTNS Ethernet Port service option enables customers to connect multiple sites directly via Ethernet, Fast Ethernet or Gigabit Ethernet using the XOCS MPLS-enabled network. MTNS is not Frame Relay or Ethernet service; rather Frame Relay and Ethernet connections are used to provide access to XOCS's MPLS core for transport. In each case, MTNS utilizes protocol processing, and provides the advantages of a MPLS-enabled IP network, dedicated Internet access and significant flexibility in selecting port speeds and committed bandwidth levels on each port.⁹⁶

In its Non-Telecommunications Revenue audit finding,⁹⁷ USAC identified [REDACTED] [REDACTED] in XOCS MTNS-derived revenue for reporting year 2007. XOCS had reported MTNS-derived revenue as "information service" revenue under Line 418.3 that is exempt from USF assessment, but USAC reclassified the full amount as "interstate telecommunications" revenue to be reported on Line 406.⁹⁸

⁹⁶ See, Declaration of Dan Toomey ("Toomey Declaration"), ¶¶ 12-15. The Toomey Declaration is attached hereto as Exhibit 10.

⁹⁷ Non-Telecommunications Revenue DAF at 3.

⁹⁸ *Id.*

During its initial audit inquiry, USAC’s Internal Audit Division (“IAD”) undertook no inquiry to determine whether MTNS possesses the attributes of an information service. According to its preliminary Detailed Audit Finding, IAD considered solely whether XOCS could provide a “traffic study or other proof” showing that dedicated MTNS circuits “carried less than 10% interstate traffic,”⁹⁹ an inquiry which relates to whether the service is exempt from USF because it is jurisdictionally “intrastate” in character. Critically, USAC’s auditors failed to inquire whether MTNS possesses any of the attributes of an information service. IAD did not examine whether there is protocol processing, access to stored information, wireline broadband Internet access, or any of the many other features that qualify any particular offering as an information service. Similarly, IAD did not inquire into whether MTNS transmission is inextricably intertwined with enhanced components of the service.¹⁰⁰ Although IAD made a belated attempt to consider the features of MTNS after XOCS pointed out the shortfalls of its audit inquiry, IAD limited its second attempt at investigation to a cursory review of marketing materials on XOCS’s website rather than inquire into how the service is actually used by customers. The faulty focus of IAD’s investigation of MTNS led USAC to erroneously reclassify MTNS-derived revenue from the non-assessable “information service” category to treatment as assessable “telecommunications service,” an error which the Commission must now correct after conducting a *de novo* review.

⁹⁹ *Id.*

¹⁰⁰ *See, id.*

B. Summary of Argument

USAC's failure to investigate how MTNS service specifically is designed and delivered caused it to err in its audit finding. The fact is that MTNS is an MPLS-enabled service that qualifies under FCC rules, orders and policies as "information service" in several different ways. Numerous features of XOCS's MPLS, utilizing protocol processing technology, provide a subscriber with additional, different or restructured information, or involve subscriber interaction with stored information; and wireline broadband Internet access is offered. Under controlling FCC precedent, these facets of XOCS's MPLS qualify the services provided via MPLS - including MTNS - as information services, and the Commission must reverse USAC's finding that MTNS-derived revenue must be reclassified as "telecommunications service."

C. MPLS-Based Services Cannot be Assessed on a "One Size Fits All" Basis

USAC's insistence to reclassify XOCS's MTNS-related revenues amounts to nothing more than a continued attempt to treat *all* MPLS-related revenue as derived from "telecommunications" rather than "information" services. However, the Commission has made clear that each MPLS-service warrants its own individual assessment – and that while some may be considered "telecommunications," others are rightly categorized as "information service."

The 2008 Form 499-A makes no mention of MPLS-based services. Carriers reporting revenues on the 2008 Form thus were required to classify MPLS-based services depending upon the actual characteristics of the service supplied by the carrier.

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Although the 2009 Form cannot retroactively alter this conclusion,¹⁰¹ its language confirms the propriety of this approach. On February 25, 2009, the FCC released a revised FCC Form 499-A and accompanying worksheet Instructions that, among other things, incorporated a “nonsubstantive modification” to the form that added MPLS as an example of “interstate telecommunications.”¹⁰² Critically, however, the Wireline Competition Bureau later clarified that not all MPLS based services constitute “telecommunications” that are subject to USF assessment. In its clarifying letter, WCB explained that, while the revised instructions provide illustrative examples of services that may be subject to contribution, they “further state that...filers should consult the Commission’s rules and orders to determine whether they must contribute to one or more of the mechanisms.”¹⁰³ The Bureau went on to explain that, in determining their contribution obligation with respect to a particular MPLS-based service, contributors “should do so consistent with the definitions of ‘information services’ and ‘interstate telecommunications’ established under the Communications Act of 1934, as amended, and the Commission’s rules and orders.”¹⁰⁴ USAC and filers were informed that contribution obligations must be “consistent with Commission precedent concerning the services for...transmission

¹⁰¹ See *infra*, Section IV.E.

¹⁰² Letter from Jennifer McKee, Acting Chief of the Telecommunications Access Policy Division of the FCC’s Wireline Competition Bureau, to Michele Tilton, Director of Financial Operations of the Universal Service Administrative Corporation (“USAC”), April 1, 2009 (“Guidance Letter”); see also, Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions, Public Notice, DA 09-454 (WCB, rel. Feb. 25, 2009) (“2009 Form 499-A Revisions”).

¹⁰³ *Guidance Letter*.

¹⁰⁴ *Id.*

REDACTED FOR PUBLIC INSPECTION

inextricably intertwined with information-processing capabilities.”¹⁰⁵ The Bureau stated that filers should report their revenues derived from “MPLS, or other transmission protocols...consistent with Commission precedent.”¹⁰⁶

Thus, the Bureau’s 2009 Form clarifications, if they have any relevance here at all, confirm that no decision had been made that all MPLS-based service offerings are to be treated the same. In other words, the addition in 2009 of MPLS to the list of services that *might* be subject to contribution did not expand carriers’ obligation to contribute to USF based on revenues attributable to the provision of MPLS services. Indeed, such an expansion plainly would have exceeded the Bureau’s authority and been *per se* unlawful.¹⁰⁷ As AT&T recently explained,

as always has been the case, a carrier is required to include revenues from services that utilize MPLS in its contribution base only when MPLS is used to provide an interstate or international telecommunications service to an end user; to the extent a service provider offers a MPLS-based information service, it need not contribute on the revenue derived from the service.¹⁰⁸

It is clear, then, that whether a carrier must contribute to USF based on the revenues for any particular MPLS-based service, including MTNS, depends on whether the attributes of that particular service offering comprise exclusively the provision of

¹⁰⁵ *Id.*, citing the *Wireline Broadband Order*, ¶ 9.

¹⁰⁶ *Id.*

¹⁰⁷ *See 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements*, 14 FCC Rcd 16602, ¶ 39 (1999) (the FCC’s delegation of authority to the Bureau to modify contributor reporting requirements extends only to “making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.”).

¹⁰⁸ Comments of AT&T Inc., at 3, filed in WC Docket No. 06-122 (June 8, 2009).

telecommunications service or whether information service components are inextricably intertwined with the telecommunications transmission. This is a highly fact dependent inquiry that must be made by the filing carrier in the first instance. If a carrier reports the revenue derived from any particular MPLS-based service as information services revenue, USAC cannot reverse that declaration before undertaking an in-depth, service-specific analysis of the particular offering at issue - and making a determination that the service does not satisfy any of the several tests laid out in Commission rules and orders for classification as an information service.

1. **USAC Failed to Consider the Attributes of XOCS's MTNS Service**

In the instance of the XOCS audit, USAC clearly did not undertake such an inquiry. In its initial "Non-Telecommunication Revenue" Detailed Audit Finding (presented to XOCS in December 2009), USAC explained only that "MTNS is a wide area network solution that uses [MPLS] technology."¹⁰⁹ Similarly, in the spreadsheet included with work papers showing USAC's proposed reclassification of MTNS revenue, the auditors' explanatory notes state only that "Data and Internet Services - MTNS: MTNS...is a wide area network solution. It uses MPLS technology." These brief comments make clear that USAC failed to undertake any significant independent evaluation of the MTNS offering, specifically whether it possesses the attributes of an information service. USAC simply observed that MTNS is based on MPLS without inquiring in any way into what functions, features and capabilities are offered to customers.

¹⁰⁹ Non-Telecommunications Revenue DAF at 3. The Non-Telecommunications Revenue DAF is attached hereto as Exhibit 1.D.

Worse yet, it is evident that the auditors did not even have the correct question in mind at this stage. As the USAC workpapers make clear, XOCS reported revenue derived from MTNS on Line 418.3 - *i.e.* as exempt “information services” revenue. But instead of investigating the threshold matter of whether MTNS qualifies as an exempt information service, it is apparent that IAD examined instead the subsequent question – in the event a determination was made that MTNS is a telecommunications service, whether the service was jurisdictionally intrastate or interstate. In its DAF, IAD said that it reclassified MTNS revenue from Line 418 (information service) to Line 406 (interstate private line service) because XOCS “could not provide a traffic study or other proof that its private lines special access circuits carried less than 10% interstate traffic...”¹¹⁰ Therefore, IAD apparently made an irrelevant inquiry into whether MTNS was exempt from USF assessment because it was “intrastate,” and failed entirely to examine whether MTNS is an exempt “information service” as XOCS declared in reporting MTNS revenue on its Form 499.

After XOCS pointed out the fatal deficiency of IAD’s non-investigation of the threshold issue of whether MTNS is an information service during the actual audit, IAD attempted to cure the failure by examination of marketing collateral materials posted on the XOCS website.¹¹¹ Those documents are intended for the limited sales-related purposes for which they were prepared, but do not provide detailed information regarding the configuration, features and functionalities of XOCS’s MPLS-based products as does the sworn declaration of

¹¹⁰ *Id.* This finding itself is in error, for the reasons explained in Section IV.D, *supra*.

¹¹¹ Non-Telecommunications Revenue DAF at 24-25.

REDACTED FOR PUBLIC INSPECTION

the MTNS product manager, which clearly describes MPLS-based offerings that include many facets that qualify them as “enhanced.”

D. XOCS’s MPLS-Based Services Are Information Services and Therefore Not Subject to USF Assessment

MPLS is not a type of telecommunications -- it a technology that can be used to provide services that constitute information services that are not subject to USF assessment. As delivered by XOCS, MPLS includes both software port functions and transmission functions that cannot be separated. Since the MPLS port functions that clearly provide information services are inseparable from the transmission functions, MPLS “inextricably intertwines” the information functions contained in the port with the transmission functions of an MPLS network, and the entire bundle of services is exempt from USF assessment.¹¹²

The United States Supreme Court ruled in the *Brand X* case that wireline companies providing broadband Internet access do not offer stand-alone telecommunications service because of the “integrated character” of the bundled “offering.”¹¹³ The Supreme Court explained that providing access to a menu of information capabilities and providing access to DNS services was sufficient to conclude that Internet access service is properly classified as information service.¹¹⁴ In its seminal *Wireline Broadband Order*, the FCC applied the same analysis to reach the conclusion that wireline broadband Internet access services across-the-board should be treated as information services. Specifically, the Commission ruled that

¹¹² *National Cable & Telecoms Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”).

¹¹³ *Brand X*, 545 U.S. at 988.

¹¹⁴ *Id.* at pp. 991-92.

REDACTED FOR PUBLIC INSPECTION

“[w]ireline broadband access service...is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.”¹¹⁵

Like broadband Internet access services, XOCS’s MPLS-based services “inextricably combine [] the offering of powerful computer capabilities with telecommunications,” because they bundle together “computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications.”¹¹⁶ As explained in the attached Toomey Declaration, XOCS’s MPLS-based services use Label Edge Routers (“LERs”) to assign labels to incoming IP data packets.¹¹⁷ XOCS’s Label Switch Routers (“LSRs”) then forward packets along Label Switch Paths (“LSPs”). LSPs are end-to-end tunnels in XOCS’s MPLS network that can cross multiple types of Layer 2 transport types, such as ATM, Frame Relay and Ethernet.¹¹⁸ MPLS technology is used to translate between the different protocols and connect the LANs by transforming, reformatting and restructuring the data sent between them. Thus, end-to-end connections can be achieved between disparate customer sites which have completely different Layer 2 end-point technologies. This is done at the customer’s request and direction, and not for the benefit of XOCS.¹¹⁹

¹¹⁵ *Wireline Broadband Order*, ¶ 9.

¹¹⁶ *Wireline Broadband Order*, ¶¶ 14-15.

¹¹⁷ *Toomey Declaration*, ¶ 3.

¹¹⁸ *Id.*, ¶¶ 4-5.

¹¹⁹ *Id.*, ¶ 7; *see also*, Andrew G. Malis, *Converged Services over MPLS*, IEEE Communications Magazine, Sept. 2006, at p. 153 & Stephen A. Thomas, *IP Switching and Routing Essentials: Understanding RIP, OSPF, BGP, MPLS, CR-LDP, and RSVP-*

MPLS technology also enables customers of XOCS's MPLS-based services to prioritize traffic and application types, and even apply the prioritization dynamically during peak business periods. Customers, for example, may assign video and voice traffic the highest priority, give access to hosted applications a medium priority, and make the customer's intranet or Internet traffic the lowest priority.¹²⁰ The prioritization is determined by the customer and is for the benefit of the customer, not XOCS.¹²¹

Thus, the core function of XOCS's MPLS-based services - *i.e.* switching network frames or packets through the encoding of IP data streams with specific labeling - falls squarely within the FCC's established definition of "protocol processing." The Commission has described such protocol processing as "the use of a computer or computer-like device to process protocol-related symbols appearing either in a subscriber's transmission or generated within the network for the purpose of intra-network data transport,"¹²² and ruled that such "protocol processing" is classified as an "enhanced service."¹²³ Of course, the Commission has determined that the Telecommunication Act's definition of "information services" includes all of the services previously classified by it as "enhanced services."¹²⁴

TE (John Wiley and Sons, Inc.2001); *see also*, Harry Newton, Newton's Telecom Dictionary, 22d Updated and Expanded Edition, at p. 604 (CMP Books 2006).

¹²⁰ *Toomey Declaration*, ¶ 6.

¹²¹ *Id.*

¹²² *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, FCC 86-253, ¶ 16 (June 16, 1986).

¹²³ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, 3078 (1987), *aff'd on reconsideration*, 3 FCC Rcd 1150, 1154 (1988).

¹²⁴ *Wireline Broadband Order*, ¶ 29; *See also*, 47 U.S.C. § 153(20); 47 C.F.R. § 64.702(a).

REDACTED FOR PUBLIC INSPECTION

USAC does not dispute that XOCS's MPLS-based services, including MTNS, inextricably entail protocol processing. However, USAC contends that the "protocol processing" inherent in the MTNS product does qualify the product as an information service because it does not accomplish a "net conversion" between end users.¹²⁵ In so doing, USAC oversimplifies the FCC's test for ascertaining when protocol processing transforms an offering into an information service. The Commission has made clear that protocol processing is not synonymous with protocol conversion: "*both* protocol conversion and protocol processing services are information services under the 1996 Act."¹²⁶ While virtually all protocol processing that accomplishes a "net protocol conversion" qualifies as "enhanced," protocol processing that does not entail a net conversion can also create an information service when the service enables "additional, different or restructured information [to] the subscriber through various processing applications performed on the transmitted information, or other actions can be taken by either the vendor or the subscriber based on the content of the information transmitted through editing, formatting, etc."¹²⁷ In the instance of MTNS, protocol processing is used to deliver "business-quality private data networking services" to enterprise customers, which entails moving, storing and interacting with data.¹²⁸ The case study of MTNS usage provided on the XOCS website, for example,

¹²⁵ Non-Telecommunications Revenue DAF at 28.

¹²⁶ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, 11 FCC Rcd 21905, ¶ 104 (1996) ("*Non-Accounting Safeguards Order*").

¹²⁷ *Computer II Final Decision*, 77 FCC 2d at 420-421, ¶ 97 (1980).

¹²⁸ See, XO MultiTransport Networking Service, "MTNS Using Ethernet Access" visited at http://www.xo.com/SiteCollectionDocuments/business-services/data-and-internet-services/mtns/PS_MultiTransport_Networking_Service_Ethernet.pdf; and XO MultiTransport Networking Service, "MTNS Using Frame Relay Access" visited at <http://www.xo.com/SiteCollectionDocuments/business-services/data-and-internet->

REDACTED FOR PUBLIC INSPECTION

profiles a credit union that uses the service to move, access and interact with data through its various branch offices.¹²⁹

Thus, the protocol processing inherent in MTNS is not simply an “internetworking protocol” as suggested by USAC; rather, the protocol processing more broadly enables private data networking and processing in a fashion that qualifies it as “enhanced” under the Commission’s rules. USAC fundamentally misapprehended the nature of XOCS’s MTNS service when it acknowledged that the service “entail[s] protocol processing” but characterized the finished product as equal to “traditional Frame Relay and Ethernet network services.”¹³⁰ Frame Relay and Ethernet connections are used solely as a means to obtain access to the MPLS core and its enhanced functionality.

In addition to protocol processing, XOCS’s MPLS technology enables a host of services, capabilities and applications that are inextricably intertwined with transmission components. The FCC has defined “enhanced service” as including communications provided over common carrier transmission facilities that “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.”¹³¹ “Information services” are defined in the

services/mtns/PS_MultiTransport_Networking_Service_Frame_Relay.pdf attached hereto as Exhibit 11.

¹²⁹ Case Study: “EDS Credit Union Saves Money and Gets a Flexible Networking Solution by Expanding XO Partnership” at http://www.xo.com/SiteCollectionDocuments/about-xo/success-stories/eds_credit_union.pdf attached hereto as Exhibit 12.

¹³⁰ Non-Telecommunications Revenues DAF at 26.

¹³¹ 47 C.F.R. § 64.702(a); *See also*, Form 499-A Instructions at 29 (guidance on completing Line 418).

REDACTED FOR PUBLIC INSPECTION

Communications Act as meaning the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications....”¹³² In the case of MTNS, XOCS’s customers purchase their desired port speed and then define a committed bandwidth on these ports.¹³³ The port functions of the service offer numerous such enhanced/information service capabilities. The long laundry list of enhanced features derived from the port functions in XOCS’s MPLS-based technology includes:

- Managed electronic mail (e-mail) services
- Instant messaging
- Website, data hosting and data caching
- Data encryption to ensure privacy and security
- Username and password authentication
- Remote user access authorization
- Traffic prioritization on the ingress and egress links
- Verification mechanisms that validate every packet and protect against spoofing attacks.¹³⁴

Critically, XOCS’s MPLS-based services interact with data at the user’s request, and are not merely conversions done to facilitate transmission. Thus, the computer processing functions are not simply for the “management, control, or operation of a telecommunications system, or the management of a telecommunications service”,¹³⁵ and thus are fundamentally different and distinguishable from telecommunications services such as Frame Relay or ATM.

¹³² 47 U.S.C. § 153(20).

¹³³ See, “MTNS Using Ethernet Access” and “MTNS Using Frame Relay Access” attached hereto as Exhibit 11.

¹³⁴ *Toomey Declaration*, ¶¶ 6-9.

¹³⁵ See, *id.*

REDACTED FOR PUBLIC INSPECTION

USAC disregards these enhancements by contending that they are provided exclusively as part of XOCS's IP-VPN offering.¹³⁶ But that is not the case. These features are part of the functionality of ports provided as part of XOCS's MPLS backbone, and are inherent in the MPLS technology used to deliver MTNS. Although most enhanced features are not currently part of the MTNS offering, the capability to provide them is embedded in the underlying MPLS network. In fact, several of the enhancements – namely data encryption, username and password authentication, and remote access authorization – are provided to all XOCS MTNS customers that select the Managed Security option.¹³⁷ Effectively, since MTNS entails simply the purchase of a port (with its assorted features) and a committed bandwidth, the service is not a transport service at all; the service is higher up in the stack and cannot be separated from the processing of data or accessing of stored data such as e-mail. Indeed, even if the revenue associated with the provision of a local loop or committed bandwidth is regarded as assessable telecommunications related revenue, that is no excuse for USAC to attempt to reclassify revenue associated with the purchase of the port with its inextricably enhanced feature set. Only the revenue attributable to the telecommunications portions of the service could be subject to assessments. If the Commission agrees with USAC's classification, XOCS should be given the opportunity to calculate the portion of its revenues that are attributable to telecommunications, while reporting the information service components on line 418 of the Form.

¹³⁶ Non-Telecommunications Revenue DAF at 28.

¹³⁷ *Toomey Declaration*, ¶ 7.

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Finally, it is critical to acknowledge that XOCS's MPLS-based services provide wireline broadband access to the public Internet.¹³⁸ This capability is available to all customers of XOCS's MPLS-based services and most avail themselves of it; and XOCS in fact serves as the customer's ISP in such instances.¹³⁹ The FCC has made clear that wireline broadband Internet access is an information service,¹⁴⁰ and is exempt from USF assessment.¹⁴¹ Since the wireline broadband Internet access capabilities inherent in XOCS's MPLS-based services are fully integrated and inextricably intertwined with the overall service offering, this circumstance alone qualifies the entire service as an information service under Commission's rules.¹⁴² While USAC concedes that dedicated wireline Internet access is included as part of MTNS, it contends that the Internet access capability is not inextricably intertwined because customers are not required to activate it and there is no separate charge for its use.¹⁴³ USAC's reasoning simply ignores the fact that dedicated Internet access is always available in MTNS, that it is uncontested that "nearly all customers" of MTNS avail themselves of the capability, and that the charges for Internet access service are included as part of the bundled MTNS service fee – all evidence that dedicated Internet access is indeed effectively inseparable from MTNS as a whole, thereby qualifying the entire offering as an information service. It is true that there is no separate charge within the MTNS service offering for obtaining dedicated wireline broadband Internet access –

¹³⁸ *Toomey Declaration*, ¶ 11.

¹³⁹ *Id.*

¹⁴⁰ *Wireline Broadband Order*, ¶¶ 9-17.

¹⁴¹ *Id.*, ¶¶ 112-113.

¹⁴² See *Toomey Declaration*, ¶ 11.

¹⁴³ Non-Telecommunications Revenue DAF at 27-28.

but that is just the point – Internet access is completely integrated into both the functionality and pricing of the overall MTNS offering.

E. USAC May Not Assess USF on MPLS-Based Services Retroactively to 2007

There can be no dispute that MPLS-based services, such as MTNS, were not listed in USAC documentation as assessable telecommunications services during the audit year - 2007. Form 499-A Instructions were not amended to include a reference to MPLS as a possible telecommunications service (depending upon how it is provided, as explained above) until fully two years later - specifically February 25, 2009.¹⁴⁴ USAC’s claim that the FCC has “consistently deemed MPLS and other similar services to be telecommunications services,” and in fact made those determinations “many years before the 2009 revision to the Instructions” is unsupported by any citation to rules or orders.”¹⁴⁵ USAC cites no precedent because none exists. On the contrary, the record is clear that at least until the Form 499-A Instructions were revised in 2009, the industry as a whole treated MPLS-based services as information services. Accordingly, MPLS service providers neither collected USF surcharges from their customers nor reported their revenue as assessable telecommunications revenue.¹⁴⁶

¹⁴⁴ 2009 Form 499-A Revisions.

¹⁴⁵ Non-Telecommunications Revenue DAF at 34.

¹⁴⁶ *See, e.g.*, Masergy Petition for Clarification, or in the Alternative, Application for Review, at 2, WC Docket No. 06-122 (filed March 30, 2009) (“Masergy Petition”) (“the most common practice in the industry today is for carriers ... not to collect USF surcharges on MPLS ... since it is an information service”); Comments of Sprint Nextel Corporation, at 15, WC Docket No. 06-122 (filed June 8, 2009) (“the MPLS industry has uniformly treated MPLS services as information services that are exempt from USF contributions”); Comments of BT Americas, at 10-11, WC Docket No. 06-122 (filed June 8, 2009).

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Appellate courts have held that agencies may “not retroactively change the rules at will”, and that “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly”, a principle that has been well established for “centuries.”¹⁴⁷ This notion has particular force in a situation such as the USF regime, where carriers are permitted to recover USF liability through surcharges to customers, but only if they had fair notice that the service in question would be assessable at the time the service was provided. Indeed, the FCC recently applied this principle to USAC, by reversing a USAC determination to classify audio teleconferencing as telecommunications, and then to apply that determination retroactively. In the *InterCall* case, the Commission approved USAC’s decision to classify audio bridging as telecommunications on a “going forward basis,” but reversed USAC’s attempt to require contributions for past periods, on the ground that it was “unclear to InterCall, as well as to the industry, that stand-alone providers of audio-bridging services have a direct USF contribution obligation.”¹⁴⁸ Under this precedent, USAC cannot apply the classification of MPLS first enunciated in 2009 to a 2007 audit year.

Interestingly, USAC seems to acknowledge that MPLS-based services other than MTNS cannot be assessed retroactively for 2007. Specifically, USAC accepted XOCS’s treatment of its MPLS-based IP-VPN offering as an information service that is not subject to USF assessment. XOCS reported revenue derived from its MPLS-based IP-VPN service as information service under Line 418, and IAD correctly did not disturb that treatment. Having

¹⁴⁷ *NetworkIP v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008).

¹⁴⁸ *Request for Review of InterCall, Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd 10731, ¶¶8, 23-24 (2008).

made the correct determination with respect to XOCS's MPLS-based IP-VPN service, it is inexplicable why IAD insisted that the highly analogous XOCS MPLS-based MTNS service should receive the opposite treatment. Thus, while MTNS is properly regarded as an information service even now, there can be no dispute that it was properly treated as information service for the audit year 2007.

V. **ISSUE: MAY XOCS TAKE CREDITS TO REVERSE PRIOR REPORTING ERRORS WHEN THE BUREAU ORDER LIMITING SUCH DOWNWARD ADJUSTMENTS IS ARBITRARY AND CAPRICIOUS AND IS PENDING ON APPEAL BEFORE THE FULL COMMISSION?**

A. **Statement of Facts**

Between May 2005 and March 2008, XOCS erroneously billed internal XOCS accounts and assessed USF on the amounts. These revenues were included in XOCS' USF contribution base as end user telecommunications revenues for each of the reporting years. As a consequence, XOCS's end user revenues were overstated on its Form 499-As for each of the years 2005 through 2008. This error is referred to herein as the "Internal Billing Error." In its revised 2008 Form 499-A, XOCS reported an adjustment of [REDACTED]

[REDACTED] to correct for these errors.

During the audit, USAC disallowed [REDACTED]

[REDACTED] of this credit. USAC concluded that "no downward revisions may be applied" for the prior years, because they were made outside the 12-month window for the

relevant filing year.¹⁴⁹ USAC cites a 2004 order of the Wireline Competition Bureau establishing this “Downward Adjustment Limitation.”¹⁵⁰

B. Summary of Argument

The *One Year Downward Adjustment Deadline Order* is arbitrary and capricious and was beyond the Bureau’s authority to issue. The Order is the subject of three pending appeals before the FCC. This asymmetrical limitation should be reversed, and when the Commission does so, XOCS requests that the disallowed credits on its 2008 Form 499-A be reinstated.

C. Application of the One Year Downward Adjustment Deadline is Arbitrary, Capricious and Contrary to Law

USAC agrees that the Internal Billing Amounts did not belong in the contribution base. But USAC determined that XOCS could deduct only those Internal Billing Amounts related to calendar year 2007, which amounted to less than half of the total amount reported. USAC denied the remaining Internal Billing Amounts deduction, related to May 2005 through December 2006 and January 2008 through May 2008, on the ground that such deductions were contrary to the One Year Downward Adjustment Deadline.¹⁵¹

XOCS challenges the application of this deadline to the Internal Billing Amounts deductions for the period May 2005 through December 2006. Notably, the One Year Downward

¹⁴⁹ Credit for Past Errors DAF, at 1. The Credit for Past Errors DAF is attached hereto as Exhibit 1.E.

¹⁵⁰ *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 1012, 1016-17, ¶10 (WCB 2004) (*One Year Downward Adjustment Deadline Order*).

¹⁵¹ Upon review, XOCS determined that its adjustment only included revenues erroneously billed through March 2008 (not May). This change does not affect the amount XOCS had deducted in its 2008 Form 499-A, however. See Credit for Past Errors DAF, at 2.

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Adjustment Deadline is the subject of three pending Applications for Review filed by SBC Communications, Inc. (“AT&T”), Qwest Communications International, Inc. (“Qwest”), and Business Discount Plan, Inc. (“BDP”), all filed on January 10, 2005.

AT&T challenged the One Year Downward Adjustment Deadline as a substantive rule adopted outside the scope of the Bureau’s delegated authority, which precluded the Bureau from making substantive changes to the Form 499-A instructions.¹⁵² AT&T also challenged the One Year Downward Adjustment Deadline because it is a substantive rule and was adopted without following the notice and comment rulemaking requirements under Section 553 of the Administrative Procedure Act.¹⁵³

In addition, AT&T contested the One Year Downward Adjustment Deadline as being arbitrary and an abuse of the Bureau’s discretion. AT&T noted that it is arbitrary for a filer to be precluded from making downward modifications after one year had passed when there is no time limit to modifications that would increase a filer’s contribution base.¹⁵⁴ As Qwest noted, under the federal income tax code, the same statute of limitations period applies to both underpayments and overpayments, and the Internal Revenue Code allows netting of overpayments and underpayments for applicable years still open under the statute of limitations.¹⁵⁵ Qwest also correctly explained that the rule is arbitrary and capricious because any purported benefit from the rule – promoting “vague policy objectives regarding the

¹⁵² AT&T Application at 7-9. *Accord* Qwest Application at 7-8. *See In re 1998 Biennial Regulatory Review*, 14 FCC Rcd 16602, 16621 ¶ 39 (1999).

¹⁵³ AT&T Application at 7-10. *See* 5 U.S.C. §553. *Accord* Qwest Application at 3-7, BDP Application at 12-19.

¹⁵⁴ AT&T Application at 10-11.

¹⁵⁵ Qwest Application at 17, *citing* 5 U.S.C. §§ 6402 and 6501.

administrative efficiency, certainty, and integrity of the Commission’s contribution system” – is completely outweighed by the harms resulting from the rule – enabling parties to make changes in the face of the incredible complexity of the contribution rules often based on arcane legal classifications and difficult technical distinctions.¹⁵⁶

XOCS submits that USAC’s application of the One Year Downward Adjustment Deadline leading it to refuse XOCS’s adjustments for 2005 and 2006 is unjustified because that rule was unlawfully adopted and is arbitrary and capricious as applied to XOCS, for the same reasons set forth in the AT&T, Qwest, and BDP Applications for Review. In the event that the Commission grants these pending Applications for Review, XOCS requests that the disallowed credits on its 2008 Form 499-A be reinstated.

¹⁵⁶ Qwest Application at 11-17.