

No. 12-1482

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties, intervenors, and amici in this case are listed in the Brief of Petitioner.

2. Rulings under review.

Universal Service Contribution Methodology; 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, 27 FCC Rcd 13780 (Nov. 5, 2012) (JA___).

3. Related cases.

This case has not previously been before this Court or any other court. We are aware of no pending cases related to this one.

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GLOSSARY

FCC	Federal Communications Commission
Fund	Federal Universal Service Fund
USAC	Universal Service Administrative Company

INTRODUCTION

The Communications Act of 1934, as amended (the “Communications Act”), requires all telecommunications providers to contribute to the federal Universal Service Fund. 47 U.S.C. § 254(d). This obligation extends to telecommunications “wholesalers,” which sell interstate telecommunications to other telecommunications providers, as well as to “resellers,” which incorporate telecommunications purchased from wholesalers into the retail telecommunications services they offer to end-user customers.

To avoid “double-counting,” or assessing contributions on the same interstate telecommunications service twice, a Federal Communications Commission rule provides that contributions are to be based on “end-user telecommunications revenues.” 47 C.F.R. § 54.706(b). As a consequence, resellers generally contribute to the Fund based on their “end-user” revenues, and wholesalers generally are exempt from making contributions on their “reseller” revenues.

All contributors must report their revenues for the purpose of calculating universal service contributions by filing Telecommunications Reporting Worksheets with the FCC. 47 C.F.R. § 54.711(a). In 1997, the Commission adopted Worksheet instructions that distinguished “end user” revenue (which is subject to contribution obligations) from “reseller” revenue

(which generally is exempt from contribution obligations) based on the definition of “reseller” included in the instructions. *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 18400, 18508 (1997) (“*Second Order on Reconsideration*”). That definition consistently has been included in the Worksheet instructions since 1997.

Global Crossing is a wholesale telecommunications provider. The Universal Service Administrative Company (USAC), which administers the Fund, audited Global Crossing’s 2005 Telecommunications Reporting Worksheet. USAC determined that Global Crossing failed to properly classify certain of its 2004 revenues between the “end user” and “reseller” categories and thus owed additional universal service contributions. Global Crossing appealed to the Commission.

In the *Order* on review, the Commission largely denied Global Crossing’s administrative appeal. The *Order* clarified how a wholesaler like Global Crossing can demonstrate a “reasonable expectation” that its reseller customer will contribute to the Fund. But in light of that clarification, the Commission directed USAC to reanalyze Global Crossing’s 2005 universal service contributions. Applying the guidance provided by the *Order*, USAC on remand reduced Global Crossing’s contribution liability from \$5.6 million to \$4.34 million.

Global Crossing did not seek Commission review of USAC's re-audit, which is a condition precedent to review by this Court. Although Global Crossing timely petitioned for review of the *Order*, that order is not final for purposes of the Hobbs Act because it did not impose any additional contribution liability on the company. Global Crossing's Petition for Review thus must be dismissed. Were the Court to reach the merits of Global Crossing's petition, the company's challenge to the *Order* would fail. The Commission, in the *Order*, reasonably affirmed its longstanding definition of "reseller" for universal service contribution purposes. That definition gave effect to the Commission's rules and policies. It also is entirely consistent with section 254(d) of the Communications Act.

JURISDICTION

The Federal Communications Commission released the *Order* on review on November 5, 2012.¹ This Court has jurisdiction to review “final orders” of the Commission when a petition for review is filed within 60 days. *See* 28 U.S.C. §§ 2342(1), 2344. Global Crossing’s petition for review was timely filed on December 19, 2012, but as explained below, *see* pp. 26-29, the Court lacks jurisdiction because the *Order* is not a “final order” for purposes of the Hobbs Act. *See CSX Transp., Inc. v. Surface Transp. Bd.*, --- F.3d ---, 2014 WL 7093363 (D.C. Cir. Dec. 16, 2014).

STATEMENT OF ISSUES PRESENTED

1. Whether this Court has jurisdiction to consider this matter, when the *Order* on review did not determine Global Crossing’s universal service contribution liability.

2. Whether the Commission acted consistently with the Communications Act and its own rules when it affirmed for universal service

¹ *See Universal Service Contribution Methodology; 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*, 27 FCC Rcd 13780 (Nov. 5, 2012) (JA___).

contribution purposes the definition of “reseller” in the annual Telecommunications Reporting Worksheet instructions.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum to this Brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY FRAMEWORK

1. Section 254(d) of the Communications Act specifies that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis,” to the federal Universal Service Fund – a program that helps deliver certain telecommunications and information services to schools, libraries, and persons in rural and other high-cost services areas. 47 U.S.C. § 254(d). The Commission has interpreted section 254(d) to require any entity that provides interstate telecommunications services to the public for a fee to contribute to the Fund.² In order to “broaden the base of mandatory contributors,” the Commission expressly declined to exempt “any of the broad classes of

² See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179 (¶ 787) (1997) (“*First Report and Order*”), *aff’d in part, rev’d in part, remanded in part sub nom, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000).

telecommunications carriers that provide interstate telecommunications services” – including “resellers” or “wholesalers” – from the contribution requirement of section 254(d). *First Report and Order*, 12 FCC Rcd at 9177, 9179 (¶¶ 783, 787).

2. Universal service contributions generally are based on the revenues telecommunications providers receive from “end users” of their telecommunications services. *See* 47 C.F.R. § 54.706(b); *First Report and Order*, 12 FCC Rcd at 9173-9175 (¶ 779); 9206-9208 (¶¶ 843-849).

The Commission elected to “[b]as[e] contributions on end user revenues” to “eliminate[] the problem of counting revenues derived from the same services twice.” *Id.* at 9207 (¶ 845). That “double-counting problem” would occur where a wholesaler sells an interstate telecommunications service to a reseller, and the reseller incorporates that service into its own retail offering of interstate telecommunications to end-user customers.

Absent the end-user rule, the Commission’s broad interpretation of section 254(d) would require both the wholesaler and the reseller to make universal service contributions based on revenues from the same service. *See First Report and Order*, 12 FCC Rcd at 9207 (¶ 845). The Commission predicted that such “double-counting” could disadvantage resellers and “distort[] how carriers choose to structure their businesses or the types of services that they

provide.”³ *Id.* at 9207 (¶ 846). To avoid those pitfalls, the Commission by rule adopted a contribution mechanism that requires resellers to contribute directly to the Fund, while wholesalers, which sell telecommunications to other providers (and thus do not earn revenues directly from end-users), are generally “relieve[d] ... from contributing directly.” *Id.* This system ensures that “transactions are only counted once.” *Id.*

3. Some resellers are not required to make universal service contributions, however, even though they receive revenues from end users. Section 254(d), for example, allows the Commission to “exempt a carrier or class of carriers” from contributing to the Fund “if the carrier’s telecommunications activities are limited to such an extent that the level of such carrier’s contribution to the preservation and advancement of universal service would be *de minimis*.” 47 U.S.C. § 254(d). Pursuant to that authority, the Commission has exempted telecommunications providers from making universal service contributions for a given year if their contribution

³ Based on its “[a]ssum[ption] that wholesale carriers will pass on some portion of the cost of contribution to their [reseller] customers,” the Commission predicted that “the reseller...that sells to end users will be disadvantaged vis-à-vis non-resellers of the same retail service.” *First Report and Order*, 12 FCC Rcd at 9207 (¶ 846). Unlike the non-reseller, which would contribute once based on its end-user revenues, the reseller could effectively be forced to contribute twice – first, based on its own end-user revenues, and second, by assuming a portion of the contributions shifted down the distribution chain from its wholesale provider. *Id.*

would be less than \$10,000. *See* 47 C.F.R. § 54.708. This rule extends to “[e]ntities that resell telecommunications services and qualify for ... *de minimis*” status under Rule 54.708(a). *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5318, 5482 (¶ 298) (1997) (“*Fourth Order on Reconsideration*”). Such resellers “must be considered end users for universal service contribution purposes,” and wholesalers must contribute to the Fund for telecommunications services they sell to them. *Id.*

Similarly, resellers that incorporate wholesale interstate telecommunications services into an offering of retail broadband Internet access service “are not required to contribute to the universal service fund for revenues derived from the provision of that service.” *Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific d/b/a TelePacific Communications*, 25 FCC Rcd 4652, 4655 (¶ 8) (WCB 2010) (“*TelePacific Order*”), *aff’d*, *Order*, ¶¶ 37-42 (JA____ - ____); *see Order* ¶ 35 (JA____). These resellers also are considered “end users,” and as a result the “[wholesale] telecommunications carrier providing [them with] telecommunications services is obligated to contribute

to universal service on those revenues.”⁴ *TelePacific Order*, 25 FCC Rcd at 4655 (¶ 8); *see Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14864 (¶ 16 & n.44), 14909-14910 (¶ 103), 14916 (n.357) (2005) (“*Wireline Broadband Order*”), *aff’d Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3rd Cir. 2007).

4. Pursuant to the Commission’s rules, telecommunications providers report their revenues for the purpose of calculating universal service contributions by filing Telecommunications Reporting Worksheets. *See* 47 C.F.R. § 54.711(a). The Commission adopted the first Telecommunications Reporting Worksheet, FCC Form 457, in 1997. *See Second Order on Reconsideration*, 12 FCC Rcd at 18442 (¶ 80) ; *id.* at 18495-18513 (Worksheet). The Commission delegated to the Wireline Competition Bureau authority to revise this Worksheet and its instructions periodically to ensure “sound and efficient administration of [the agency’s] universal service programs.” *Id.* 18442 (¶ 81); 47 C.F.R. § 54.711(c). This includes authority to “require any additional contributor reporting requirements.” *Id.* The

⁴ Other resellers exempt from section 254(d) contribution obligations include: “international-only” resellers, *see* 47 C.F.R. § 54.706(c); resellers that only provide services to government entities, *see First Report and Order*, 12 FCC Rcd at 9186 (¶ 800); and system integrators, *see Fourth Order on Reconsideration*, 13 FCC Rcd at 5473 (¶ 278).

Bureau publishes the current Worksheet, now designated Form 499-A, in the Federal Register. 47 C.F.R. § 54.711(a).

To assist contributors, the Worksheet instructions have always “clarified the distinction – for contributions purposes – between revenues from ‘resellers’ ... and revenues from ‘end users.’” *Order* ¶ 12 (JA___).⁵ The initial FCC Form 457 instructions defined a “reseller” as a “telecommunications service provider that 1) incorporates ... 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.” *Second Order on Reconsideration*, 12 FCC Rcd at 18507. As the Commission has explained, “wholesale providers must be able to demonstrate that customers satisfy both requirements in order to report the revenues from sales to those customers as [reseller] revenues.” *Order* ¶ 34 (JA___); *id.* ¶ 37 (JA___). This definition has been “consistently included” in the Worksheet instructions since 1997, essentially verbatim. *Id.* ¶ 34 (JA___). *See, e.g.*, 2005 FCC Form 499-A at 18 (JA___).

The instructions also have always advised telecommunications providers that they should have in place “documented procedures” to ensure

⁵ Revenues from resellers are often referred to as “‘carrier’s carrier’ revenues.” *See id.* We avoid that term only in the interest of clarity.

that they report as “revenues from resellers” only revenue from entities that “reasonably would be expected to contribute” to the federal universal service fund. *See, e.g., Second Order on Reconsideration*, 12 FCC Rcd at 18508 (FCC Form 457); 2005 FCC Form 499-A at 18 (JA___). The initial FCC Form 457 instructions explained that those procedures should include, at a minimum, collection of the customer’s “legal name; address; name of a contact person, and phone number of the contact person.” *Id.* Where a wholesale provider “d[id] not have other reason to know that a [customer] will, in fact, resell service,” those instructions recommended that the wholesale provider “obtain a signed statement to that effect” (*i.e.*, a “reseller certificate”). *Id.* The Wireline Competition Bureau, acting pursuant to Rule 54.711(c), has since “provided additional guidance in the Form 499-A instructions to assist providers in meeting the reasonable expectation standard.” *Order* ¶ 14 (JA___).

5. The Commission has designated USAC as administrator of the agency’s universal service programs. 47 C.F.R. § 54.701. USAC is “solely responsible” for the billing and collection process, *Second Order on Reconsideration*, 12 FCC Rcd at 18424 (¶ 42), and is authorized, among other things, to conduct audits of carriers concerning their universal service contributions. *See* 47 C.F.R. § 54.707. Under the FCC’s rules, any person

“aggrieved” by an “action taken” by USAC may seek review by the Commission. *Id.* § 54.719(b).⁶ Such requests for Commission review of USAC decisions are typically first “considered and acted upon” by the Wireline Competition Bureau. *Id.* § 54.722(a). The Bureau conducts “‘*de novo*’” review of request[s] for review of decisions issue[d] by [USAC].” *Id.* § 54.723(a). An affected party may seek review by the full Commission of the Bureau’s decision. *See id.* § 54.722(b). The Commission “may grant the application for review in whole or in part, or it may deny the application with or without specifying any reasons therefor.” *Id.* § 1.115(g).

II. FACTUAL BACKGROUND

A. The USAC Audit

In 2005, USAC audited Global Crossing’s 2005 FCC Form 499-A, which reported Global Crossing’s calendar year 2004 revenues. USAC found that Global Crossing “reported as reseller revenues certain revenues from customers that did not contribute” to the Fund in 2004. *Order* ¶ 16 (JA___). USAC further found that Global Crossing “did not obtain reseller certificates from every reseller customer,” as recommended by the 2005 FCC Form 499-A instructions, and that some of “the reseller certificates it did obtain were not valid.” *Id.* USAC also “evaluated additional evidence provided by

⁶ In 2014, the Commission revised Rule 54.719 to require an aggrieved party to first seek review by USAC.

Global Crossing” – including “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.” *Id.* USAC thus recommended that Global Crossing re-file its 2005 FCC Form 499-A, with the revenue from those customers that did not contribute to the Fund reported as end-user revenue. *Id.* Global Crossing declined. USAC then reclassified that revenue, consistent with its recommendation, and assessed Global Crossing’s universal service contributions with that revenue included in its contribution base. *Id.* This led to a \$5.6 million increase in Global Crossing’s universal service contribution liability for 2004. *See* Br. 1.

B. The Bureau Order

Global Crossing appealed USAC’s audit decision in June 2007. On August 17, 2009, the Wireline Competition Bureau denied that appeal. *Federal-State Joint Board on Universal Service; Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, 24 FCC Rcd 10824, 10825 (¶ 3) (WCB 2009) (“*Bureau Order*”) (JA____).

The Bureau first rejected Global Crossing's argument that the reclassified revenues should be recovered directly from Global Crossing's reseller customers. As the Bureau explained, "[a]lthough resellers have an obligation to contribute based on revenue received from their end-user customers, the underlying [wholesale] carrier has an independent obligation to accurately report the revenue received from its customers." *Bureau Order* ¶ 12 (JA___); *id.* ¶ 11 (JA___). The Bureau, like USAC, found that Global Crossing did not satisfy that obligation because it "fail[ed] to demonstrate ... affirmative knowledge" or a "reasonable expectation" that its reseller customers would make universal service contributions "based on the guidance in the FCC Form 499-A instructions or other reliable proof." *Id.* ¶ 14 (JA___). The Bureau therefore affirmed USAC's finding that "Global Crossing should have reported revenue from [certain] customers as end-user revenue," making Global Crossing "responsible for additional universal service assessments that result." *Id.* (quoting 2005 FCC Form 499-A Instructions at 18 (JA___)).

The Bureau separately rejected Global Crossing's argument that USAC created a new rule without public notice and comment, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 *et seq.*, when it assessed contributions on revenue that Global Crossing reported as reseller

revenue. *Id.* ¶ 15 (JA____). The Bureau explained that in the *Second Order on Reconsideration*, 12 FCC Rcd at 18507, “the Commission clarified the distinction ... between end-user revenues and [reseller] revenues” to “g[i]ve effect to” the FCC’s determination in the *First Report and Order* “that the contribution mechanism” should “prevent[] double counting of revenue for contribution” while “ensur[ing] that such revenue was subject to contribution once.” *Bureau Order* ¶ 15 (JA____) (citing *First Report and Order*, 12 FCC Rcd at 9207 (¶¶ 845-847)). That same distinction was made in the 2005 FCC Form 499-A Instructions (at 18 (JA____)), which provided that “each filer should have documented procedures” to “verify ... that each reseller will 1) resell the filer’s services in the form of telecommunications ... ; and 2) contribute directly to the federal universal service support mechanisms.” *See Bureau Order* ¶ 13 (JA____). Because “USAC relied upon the guidance in [those] instructions,” the Bureau held that “USAC’s reclassification of [Global Crossing’s] revenues [wa]s consistent with [the FCC’s] existing rules,” and “not tantamount to adopti[on of] a new rule.” *Id.* ¶¶ 14, 15 (JA____, ____).

Finally, the Bureau found no merit to Global Crossing’s argument that USAC improperly “treat[ed] the guidance in the [2005 FCC Form 499-A] instructions as a binding rule.” *Id.* ¶ 16 (JA____). The Bureau noted that

USAC “did not rely solely on the criteria in the Commission’s instructions”; rather, it “considered evidence provided by Global Crossing, but found that evidence wanting” – an assessment with which the Bureau agreed. *Id.*; *see id.* ¶ 14 (JA____).

C. The Commission Order

Global Crossing sought Commission review of the *Bureau Order*. On November 5, 2012, the Commission issued the *Order* on review, which denied in part and granted in part Global Crossing’s application for review.

1. The Commission found that the *Bureau Order* “properly applied the definition of ‘reseller’ for [universal service] contributions purposes,” “*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.” *Order* ¶¶ 31, 33 (JA____, ____). In so finding, the Commission rejected Global Crossing’s view that if its customer “incorporate[d] the purchased telecommunications services into its own offerings, ... it is ‘*per se* reasonable’ for Global Crossing to assume that the customer will also ... contribute to universal service.” *Id.* ¶¶ 34, 35 (JA____, ____). The Commission saw no reason to “ignore[] th[e] second prong” of its longstanding “reseller definition,” *id.* ¶ 35 (JA____), which “ha[d] been consistently included in the [Telecommunications Reporting

Worksheet] instructions since 1997.” *Id.* ¶ 34 (JA____). As the Commission noted – and “Global Crossing acknowledge[d]” – “not all entities that ‘incorporate purchased telecommunications services into their own offerings’ have a duty to contribute directly to universal service.” *Id.* ¶ 35 (JA____). Thus, were the Commission to “render the second prong of the reseller definition meaningless,” *id.*, “revenues for certain interstate services” would “avoid assessment altogether.” *Id.* ¶ 40 (JA____). That, however, would be “contrary to the Commission’s original intent in establishing the current end-user assessment paradigm,” *i.e.*, to solve the “double-counting” problem. *Id.*

The Commission also found meritless Global Crossing’s assertion that the Bureau imposed “strict liability” on Global Crossing for its customers’ failure to make universal service contributions. *Order* n.101 (JA____). As the Commission explained, “wholesale providers that demonstrate compliance with the reasonable expectation standard are *not* liable for their customers’ nonpayments.” *Id.* In fact, “[c]ompliance with [that] standard protects the wholesale provider ... from being held liable for any additional contributions.” *Id.* ¶ 38 (JA____).

To effectuate the *First Report and Order*, the Commission clarified that even if the wholesaler “cannot demonstrate that it had a reasonable expectation that its customer would contribute” to the Fund, the wholesaler is

not liable for universal service contributions where its “customer actually contributed.” *Id.* ¶ 44 (JA____). As the Commission explained, “the wholesale exemption” was adopted “as a means” to ensure “that the same revenue ... not be assessed twice for [universal service] contributions purposes.” *Id.* Thus, wholesalers need not contribute when their reseller customers contribute directly to the Fund.

2. The Commission separately affirmed the *Bureau Order*’s holding that “a contributor may demonstrate a reasonable expectation by either following the guidance in the Form 499-A instructions or through other reliable proof.” *Id.* ¶ 51 (JA____). The Commission instructed that “[a] wholesale provider that complies with *all* of the guidance in the Form 499-A instructions will be afforded a ‘safe harbor’ – *i.e.*, [it] will be deemed to have demonstrated a reasonable expectation.” *Id.* However, if the wholesale provider “deviate[s] in any way from the guidance in [those] instructions,” the Commission directed USAC to apply the separate “‘other reliable proof’ standard,” which considers “all relevant evidence.” *Id.* ¶ 52 & n.125 (JA____, ____). The Commission also clarified that the “provider,” not USAC, “bears

the burden of production and the burden of proof” on the “reasonable expectation” question.⁷ *Id.* ¶ 52 (JA____).

3. In light of these clarifications, the Commission granted in part Global Crossing’s application for review, and remanded the audit of Global Crossing’s 2005 FCC Form 499-A to USAC, with the directive that USAC re-evaluate “whether Global Crossing satisfied the reasonable expectation standard through compliance with the 2005 instructions,” and if it did not, “whether the evidence previously submitted by Global Crossing could still serve as ‘other reliable proof’” of “a reasonable expectation that [its] customers would contribute to the Fund.” *Id.* ¶ 56 (JA____). The Commission made no findings regarding Global Crossing’s classification of its 2004 revenues, nor did it assess any additional contribution liability on Global Crossing (as the *Bureau Order* had done).

⁷ The Commission further held that “the wholesale provider” must “demonstrate a reasonable expectation with clear and convincing evidence.” *Order* ¶ 52 (JA____); *see id.* ¶ 45 (JA____). On reconsideration, the Commission held that wholesalers must meet a lesser “preponderance of the evidence standard” instead. *See Universal Service Contribution Methodology; Petition for Clarification and Partial Reconsideration by XO Communications Services, LLC*, 29 FCC Rcd 9715, 9719-9720 (¶¶ 11-14) (2014) (“*Order on Reconsideration*”) (JA____). The issues addressed in the *Order on Reconsideration* are not before the Court. *See* Br. 19.

D. Global Crossing's Petition for Review and USAC's Actions on Remand from the Commission

On December 19, 2012, Global Crossing sought judicial review in this Court. A month later, it filed an uncontested motion to hold the case in abeyance pending USAC's ruling on possible liability. Global Crossing explained that, "[b]y holding this case in temporary abeyance, the Court could consider all relevant challenges related to the FCC Order in one case rather than on a piecemeal basis." Global Crossing Uncontested Motion To Hold Case In Abeyance at 4 (filed Jan. 22, 2013). The Court granted the motion, as well as a subsequent similar motion.

On August 1, 2014, USAC re-determined Global Crossing's contribution obligations based on its 2004 revenues. *See* Letter from USAC to Douglas Richards, Level 3 Communications (Aug. 1, 2014) ("*USAC Remand Order*") (JA___-___). Applying the Commission's rules, as clarified by the *Order*, USAC determined that revenues from 17 of Global Crossing's customers would be treated as reseller revenues not subject to a contribution assessment. USAC again determined that revenues from 119 other customers should be re-classified as end-user revenue, however, based on Global Crossing's failure to satisfy the reasonable expectation standard. *Id.* at 4-5. As a result, USAC determined that Global Crossing owed the Fund \$4.34 million – \$1.26 million less than the amount from the initial audit. *Id.*

Global Crossing elected not to appeal USAC's decision to the Commission, Br. 19, and instead asked the Court (which agreed) to reactivate this case.

SUMMARY OF ARGUMENT

1. The Court should dismiss Global Crossing's petition for review.

While the *Order* clarified the Commission rules and policies that USAC was required to use to re-evaluate Global Crossing's reported 2004 revenues, the *Order* did not reach the issue of Global Crossing's liability (if any) for additional universal service contributions. Thus, it is an interlocutory non-final order that is not appealable. *See CSX Transp.*, 2014 WL 7093363.

2. Were the Court to reach the merits, Global Crossing's challenge to the *Order* would fail. The Commission by rule limited universal service contributions to "end-user revenues" to avoid the "double-counting" that would occur if a wholesaler and its reseller customer were both assessed contributions for the same interstate telecommunications service. *See First Report and Order*, 12 FCC Rcd at 9205-9208 (¶¶ 842-848); 47 C.F.R. § 54.706(b). Consequently, telecommunications providers such as Global Crossing must apportion their revenues between "reseller" revenues and "end-user" revenues to determine their contribution obligations. In this context, a "reseller" has long been defined 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.” *Second Order on Reconsideration*, 12 FCC Rcd at 18507. That definition of “reseller” has been included in the FCC’s Telecommunications Reporting Worksheet (FCC Form 499-A) instructions since 1997.

The Commission, in the *Order* on review, reasonably affirmed that definition of “reseller.” Critically, not all resellers are required to make universal service contributions. Absent a requirement that the wholesaler contribute where it lacks a “reasonable expectation” that its reseller customer will do so, many interstate telecommunications services would evade the universal service contribution obligations in section 254(d). That was not the Commission’s intent. In basing contributions on “end-user revenues,” the Commission sought to ensure that all interstate telecommunications revenues were counted once – not twice, but also critically, not never at all. The “reseller” definition gives effect to that policy.

Nor does the “reasonable expectation” requirement shift contribution liability from resellers to wholesalers. Where a reseller is under *no* obligation to make universal service contributions (and double-counting thus is not a concern), there is no reason to exempt the wholesaler from its own section 254(d) obligations. And contrary to Global Crossing’s position, where a

reseller is required to contribute directly to the Fund – but fails to do so – compliance with the “reasonable expectation” requirement actually *protects* the wholesaler from additional contribution liability. Only if the wholesaler fails to take advantage of the “safe harbor” by following the longstanding guidance in the FCC Form 499-A instructions, or fails to submit “other reliable proof” of a “reasonable expectation,” could it be required to contribute to the Fund if a reseller to which it sells services fails to contribute.

The Commission had authority to rely on its longstanding “reseller” definition to clarify Global Crossing’s universal service contribution obligations. It is well established that an agency can interpret its own rules in the context of an adjudicatory proceeding; it is not first required to answer an interpretive question through rulemaking. Thus, it is of no consequence that the FCC Form 499-A instructions about which Global Crossing complains were not adopted through notice-and-comment rulemaking. Those instructions gave wholesalers like Global Crossing ample notice of the procedures they should use to allocate interstate telecommunications revenues between end-user and reseller revenue, how they should verify their customers’ reseller status, and the consequences for failing to follow that guidance. There is no impropriety in holding Global Crossing accountable for its decision to ignore those instructions.

3. The “reseller” definition also does not run afoul of section 254(d)’s directive that universal service contributions be assessed “on an equitable and nondiscriminatory basis.” 47 U.S.C. § 254(d). There is nothing inequitable or discriminatory in denying a wholesaler an exemption from its *own* section 254(d) contribution obligations where its reseller customer is not required to contribute directly to the Fund; to hold otherwise would allow revenues for certain interstate telecommunications services to avoid assessment altogether.

Moreover, the reseller definition imposes liability on a wholesaler for its *own* behavior – specifically, its failure to demonstrate a “reasonable expectation” its reseller customer will contribute directly to the Fund. It is a wholesaler’s own lack of due diligence that places it at a disadvantage to wholesalers that comply with the FCC’s rules.

For the same reason, there is no credible basis for Global Crossing’s argument that the reseller definition is inconsistent with the principle of competitive neutrality. That argument, which Global Crossing lacks standing to make, hinges on a reseller’s ability to mislead its wholesale provider to avoid universal service contribution obligations. Given that the wholesalers easily can protect themselves from additional contribution liability through compliance with the reasonable expectation standard (including the “safe

harbor” offered by adherence to the FCC Form 499-A instructions), that strategy is unlikely to offer resellers a competitive advantage.

STANDARD OF REVIEW

Global Crossing bears a heavy burden to establish that the *Order* on review is “arbitrary, capricious [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). Under this “highly deferential” standard, this Court presumes the validity of agency action. *E.g., Nat’l Tel. Co-op. Ass’n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). The Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g., Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Insofar as Global Crossing challenges the FCC’s interpretation of section 254(d) – a provision of the agency’s organic statute – the Court applies the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *E.g., City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013). Under *Chevron*, the Court must first determine “whether Congress has directly spoken to the precise question at issue” and, if so, “give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842-43. When “the statute is silent or ambiguous” on the relevant issue, however, the Court should defer to the FCC’s “permissible

construction of the statute.” *Id.* at 843; *see Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 744 (D.C. Cir. 2001).

Similarly, this Court gives a “high level of deference” to the FCC’s interpretation of its own orders and regulations. *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Court accepts the agency’s interpretation “unless [it] is plainly erroneous or inconsistent with the regulations.” *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1093 (D.C. Cir. 2012) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks, citations, and alteration omitted)).

ARGUMENT

I. THE COURT SHOULD DISMISS GLOBAL CROSSING’S PETITION FOR REVIEW FOR LACK OF FINALITY AND THUS OF JURISDICTION

Under the Hobbs Act, 28 U.S.C. § 2342, this Court has jurisdiction to review only “final orders” of the Commission. “A final order in an administrative adjudication is normally ‘one that disposes of all issues as to all parties.’” *CSX Transp.*, 2014 WL 7093363, *2 (quoting *Blue Ridge Envtl. Def. League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012)). The *Order* does not satisfy that standard, and thus the Court lacks jurisdiction.

The *Order* affirmed for universal service fund contribution purposes the longstanding definition of “reseller” in the annual Telecommunications Reporting Worksheet instructions, which the Commission had first adopted in 1997. *Order* ¶¶ 3, 33-36 (JA___, ___-___). It further clarified how Global Crossing might satisfy the second prong of that definition, which requires a wholesaler to demonstrate a “reasonable expectation” that its reseller customer will contribute directly to the Fund. *Id.* ¶¶ 50-52 (JA___-___). While the *Order* addressed issues pertinent to Global Crossing’s universal service contributions for the year 2004, it did not address – let alone decide – whether Global Crossing owed any further contributions to the Fund for that year. Rather, it remanded this issue to USAC with a directive that USAC “reassess Global Crossing’s contribution obligation ... as clarified in this Order.”⁸ *Id.* ¶ 8 (JA___); *id.* ¶ 56 (JA___). As in *CSX Transp.*, above, the *Order* on review is not final (and thus not appealable) because further agency proceedings were required to determine whether the party seeking review would actually have any liability and, as a consequence, have to pay any

⁸ Global Crossing wrongly suggests that the *Order* imposed additional universal service contribution liability on the company. *See* Br. 57 (asking Court to “vacate and remand ... [the *Order*] to the extent [it] determined that Global Crossing is required to reclassify 2004 revenues from its reseller customers as end-user revenues and that it, rather than the resellers themselves, must contribute to universal service based on those revenues”); *id.* 5. The *Order* made no such determinations.

money – additional universal service contributions here, and railroad rate reparations in *CSX Transp.*

The current case is, if anything, an even more compelling example of a non-final order than that in *CSX Transp.* Here, after all, Global Crossing admitted in its motion to hold this case in abeyance that judicial review prior to further administrative proceedings would constitute “piecemeal litigation.” See p. 20, above. Finality under the Hobbs Act (28 U.S.C. § 2342, which petitioner invokes here) “is to be narrowly construed” precisely to avoid such piecemeal litigation. *CSX Transp.*, 2014 WL 7093363, *1 (quoting *Blue Ridge*, 668 F.3d at 753); cf. *Linder v. Dept. of Defense*, 133 F.3d 17, 23 (D.C. Cir. 1998) (explaining that the final judgment rule in 28 U.S.C. § 1291 “avoids the mischief of economic waste and of delayed justice that can accompany piecemeal litigation”). Moreover, Global Crossing in the same abeyance motion also pointed out that “[d]epending on the outcome of USAC’s action on remand, Petitioner may determine that it will withdraw this appeal....” Global Crossing Uncontested Motion To Extend Abeyance By Six Months at 4 (filed Mar. 6, 2014). As this Court has said: “When completion of an agency’s processes may obviate the need for judicial review, it is a good sign that an intermediate agency decision is not final.”

DRG Funding Corp. v. Sec’y of Hous. & Urban Dev., 76 F.3d 1212, 1215 (D.C. Cir. 1996).

When USAC reconsidered the matter on remand, it found Global Crossing liable for about \$4.3 million, \$1.6 million less than in its original decision. Global Crossing could have sought review of that decision by the Wireline Competition Bureau and the Commission, *see* 47 C.F.R. § 54.719(b) & (c), and ultimately by this Court, but did not. Its failure to do so does not turn the *Order* on review, which made no finding on liability, into a final decision.

II. THE COMMISSION REASONABLY INTERPRETED ITS UNIVERSAL SERVICE CONTRIBUTION RULES

Global Crossing contends that the Commission erred when it affirmed for universal service contribution purposes the definition of “reseller” in the FCC Form 499-A instructions. Br. 29-46. This argument lacks merit. The reseller definition is consistent with, and gave effect to, the Commission’s orders and rules. That definition – which has been included in the instructions since 1997 – also provided Global Crossing sufficient notice of how it should classify “end user” and “reseller” revenues for purposes of calculating its universal service contributions.

A. The FCC Form 499-A Instructions Are Consistent with the Commission's Rules

Global Crossing claims a conflict between the reseller definition in the FCC Form 499-A instructions and Rule 54.706(b), which provides that universal service contributions must be based on a contributor's projected "end-user telecommunications revenues." *See* Br. 32-37. According to Global Crossing, the Commission "implicitly (by definition) and explicitly, through the discussion in the *First [Report and] Order*, excluded revenues from other carriers," so a wholesaler cannot be required to contribute to the Fund based on revenues earned from its reseller customers. *Id.* 35.

1. Global Crossing's argument is unpersuasive. Agencies are not required to interpret identically the same term in different provisions of a statute – as the Supreme Court explained, "[c]ontext counts." *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 567, 576 (2007); *see Sw. Power Admin. v. FERC*, 763 F.3d 27 (D.C. Cir. 2014). That is no less true when the FCC interprets its own rules. *See Talk Am. Inc.*, 131 S. Ct. at 2261; *Auer*, 519 U.S. at 461.

In the relevant context of universal service, the Commission reasonably included the second prong in the reseller definition ("reasonable expectation") to address the situation where a reseller is exempt from universal service contribution obligations. *See Order* ¶ 35 & n.103 (JA___);

Bureau Order ¶ 15 (JA____). In that circumstance, the wholesaler can have no “reasonable expectation” that its reseller customer will directly contribute to the Fund, and revenues from the reseller are classified as “end-user” revenue upon which the wholesaler must contribute. *See Order* ¶ 11 & n.26 (JA____, ____). In other words, for contribution purposes, the Commission uses “end-user” as a proxy for an entity that is not required to contribute directly to the Fund. *Id.* ¶ 2 (JA____).

This framework “gave effect” to the *First Report and Order*, 12 FCC Rcd at 9206-9208 (¶¶ 843-849), which did not categorically exclude reseller revenue from a wholesaler’s universal service contribution base. *Bureau Order* ¶ 15 (JA____). Rather, “the Commission adopted the wholesale exemption” in that Order “as a means of addressing concerns that the same revenue should not be assessed twice for [universal service fund] contributions purposes.” *Order* ¶ 44 (JA____); *see Bureau Order* ¶ 15 (JA____). Where the reseller is exempt from contribution requirements, no double-counting occurs if the wholesaler is instead required to contribute, and “revenue [i]s subject to contribution once.” *Bureau Order* ¶ 15 (JA____); *see First Report and Order*, 12 FCC Rcd at 9207 (¶ 846).

There would be under-counting, however, if a wholesaler were never required to contribute on revenue from the sale of interstate

telecommunications services to resellers. *See* Br. 32-37. That would “allow[] revenues for certain interstate services to avoid assessment altogether,” which would be “contrary to the Commission’s original intent in establishing the current end-user assessment paradigm.” *Order* ¶ 40 (JA____). That also would be contrary to the Commission’s decision in the *First Report and Order* to “broaden the base of mandatory contributors.” 12 FCC Rcd at 9177 (¶ 783). Given that the Commission expressly declined to “exempt from contribution” requirements “wholesalers” like Global Crossing, *id.* 9179 (¶ 787), it makes no sense for the FCC, in that same Order, to grant wholesalers a complete exemption through Rule 54.706(b).

2. Global Crossing further argues that “it is *per se* reasonable to assume that the customer will comply with [the universal service fund] contribution obligation” if its documentation shows that its customer is a reseller of telecommunications services. Br. 45. However, as Global Crossing concedes, *id.* 10-11, 44-45, an entity that satisfies the first prong of the reseller definition (*i.e.*, it “incorporates purchased telecommunications services into its own offerings”) sometimes has *no* contribution obligation. *See Order* ¶ 11 & n.26 (JA____); *Order on Reconsideration* ¶ 4 & n.15 (JA____). Global Crossing thus misses the mark when it argues that “the FCC’s construction of its definition presumes that it is *unreasonable* to

expect resellers to comply with their mandatory [universal service fund] obligations.” Br. 46. The second prong of the reseller definition enforces the *wholesaler’s* contribution obligation when the reseller is *not* required to contribute, thus ensuring that every interstate telecommunications service is assessed once. *See* pp. 30-32, above.

Further, it is entirely reasonable to require a wholesaler seeking an exemption from its section 254(d) contribution obligations to bear the burden of proving its eligibility for that exemption. *Bureau Order* ¶ 12 (JA___); *Order* ¶¶ 45, 49, 51-52 (JA___, ___, ___-___). Wholesalers “must already track their sales for billing purposes,” making it “administratively easy” for the wholesaler to determine whether its reseller customer has an obligation to contribute to the Fund. *See First Report and Order*, 12 FCC Rcd at 9208 (¶ 848). That is not the case for USAC, which has no commercial relationship with the more than 1,000 resellers that make universal service contributions annually. Global Crossing’s view “removes the initial burden of due diligence from the wholesale provider” benefitting from the exemption “and places it squarely back on the limited administrative resources of USAC and the Commission.” *Order* ¶ 49 (JA___); *see id.* ¶ 35 & n.101 (JA___). But if USAC were saddled with this responsibility, “the no-double-collection exception” embodied in Rule 54.706(b) would “swallow the rule” that all

providers of interstate telecommunications “comply[] with universal service contribution obligations.” *Id.* ¶ 45 (JA___); *see id.* ¶¶ 49, 52 (JA___, ___).

B. The Commission Did Not Impose Strict Liability

Global Crossing’s argument that the Commission “impose[d] strict liability on wholesale carriers whose reseller customers fail to comply with their obligation to directly contribute to universal service,” Br. 30, is baseless. Global Crossing’s argument presumes that wholesalers are never required to contribute directly to the Fund. That is incorrect. *See First Report and Order*, 12 FCC Rcd at 9179 (¶ 787). To “eliminate[] the double-counting problem,” the Commission by rule merely “relieve[d] wholesale carriers from contributing directly” when their reseller customers also are required to contribute. *Id.* 9207 (¶ 846). Where a reseller is under *no* obligation to make universal service contributions (and double-counting thus is not a concern), the wholesaler is not exempt from its section 254(d) obligations and must contribute. The second prong of the reseller definition enforces the wholesaler’s own liability in the latter circumstance.

Global Crossing’s argument also ignores the fact that “[c]ompliance with the reasonable expectation standard” actually “protects the wholesale provider ... from being held liable for any additional contributions” when its reseller customers fail to contribute directly to the Fund. *Order* ¶ 38 (JA___);

see id. n.101. The *Order* clarified that wholesalers demonstrating a “reasonable expectation” that their reseller customers will contribute “are *not* liable for their customers’ nonpayments.” *Id.* n.101 (JA___); *see id.* ¶¶ 39, 51-52 (JA___, ___ - ___). Notwithstanding the fact that certain of its reseller customers “had not paid contributions,” Br. 31-32, Global Crossing could have avoided additional contribution liability if it had simply complied with the procedures set forth in the FCC Form 499-A instructions. Those procedures were hardly burdensome: in 2005, they merely provided that a wholesaler lacking an “independent reason” to know that a customer satisfied both criteria in the reseller definition should “obtain a signed statement [from the customer] certifying that those criteria are met.” 2005 FCC Form 499-A Instructions at 18 (JA___).

C. The Commission Reasonably Relied on the FCC Form 499-A Instructions to Clarify Wholesalers’ Universal Service Contribution Obligations

Finally, Global Crossing contends that the Commission could not rely on the reseller definition in the FCC Form 499-A instructions to clarify its universal service contribution obligations because that definition was not adopted pursuant to notice-and-comment rulemaking. Br. 38-46. This argument is unavailing.

Global Crossing seems to contend that the Commission cannot lawfully interpret Rule 54.706(b) based on the guidance in the FCC Form 499-A instructions, because the latter were not adopted through notice-and-comment rulemaking. *See* Br. 39-41. The Commission’s review of USAC’s audit of Global Crossing was an informal adjudication, however. *See Order on Reconsideration*, 29 FCC Rcd at 9719 (¶ 12) (JA___). It is neither unusual nor improper for an agency to interpret its own rules (as well as the statute it administers) in the context of an adjudication. Contrary to Global Crossing’s apparent position, an agency need not address every possible contingency or issue through rulemaking before answering an interpretive question regarding an existing rule through adjudication. *See Qwest Svcs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (“Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, and accordingly agencies have very broad discretion whether to proceed by way of adjudication or rulemaking.”) (citations and quotation marks omitted).

Indeed, this Court previously has affirmed the Commission when it relied on the FCC Form 499-A instructions to clarify a telecommunications provider’s universal service contribution obligations under the FCC’s rules. For example, in *The Conference Group, LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013), this Court affirmed the FCC when it “relied” on the FCC

Form 457 instructions adopted in the *Second Order on Reconsideration*, 12 FCC Rcd at 18499-18513, to find that an audio bridging provider “was required to make direct payments to the [universal service fund].” Similarly, in *AT&T v. FCC*, 454 F.3d 329, 333-334 (D.C. Cir. 2006), the Court noted with approval the FCC’s reliance on its “universal service contribution forms” to find a calling card provider was “require[d] to pay universal service fees.”

In the adjudicatory proceeding below, the Commission reasonably relied on the longstanding FCC Form 499-A instructions to clarify existing universal service contribution obligations for wholesalers like Global Crossing. *See Order* ¶¶ 31-36, 50-52, 55-57 (JA____-____, ____-____, ____-____). The Commission’s rules provide that all universal service contributions shall be filed in accordance with FCC Form 499-A. 47 C.F.R. § 54.711(a); *see also Order* n.21 (JA____). The instructions in that form – though not binding – provide guidance to contributors concerning how they should allocate revenues between “end-user” and “reseller” revenue, as well as how they should verify their customers’ reseller status. *See Bureau Order* ¶ 16 (JA____); 2005 FCC Form 499-A Instructions at 4 (JA____). The Commission’s Telecommunications Reporting Worksheet instructions have included the same definition of “reseller” since 1997 – a fact that Global

Crossing concedes. Br. 38. It was proper for the Commission to rely on those instructions, which provided Global Crossing ample notice of how it should calculate its universal service contributions in accordance with Rule 54.706(b).⁹

Global Crossing also had adequate notice that “[f]ilers will be responsible for any addition universal service assessments that result if its customers must be reclassified as end users.” Br. 42 (quoting 2004 FCC Form 499-A Instructions at 17 (JA____)).¹⁰ As the Wireline Competition Bureau explained, this requirement was “implicit in the [worksheet] instructions since their inception.” *Bureau Order* ¶ 5 (JA____). Since 1997, those instructions have required telecommunications providers to apportion their revenue between two categories: end-user revenue and reseller revenue. *See Second Report and Order*, 12 FCC Rcd at 18507. If revenue does not meet the definition of “reseller” revenue in the instructions, by default it must

⁹ The Commission also did not violate the APA. As Global Crossing concedes, Br. 39, FCC Form 499-A is an “information collection,” not a legislative rule subject to notice and comment requirements. *See* 5 U.S.C. § 553. Nor did the Commission violate its own rules, Br. 40, which only require Federal Register publication of FCC Form 499-A in its final form. *See* 47 C.F.R. § 54.711(a).

¹⁰ The judicial and administrative decisions cited in footnote 15 of Global Crossing’s brief are thus inapposite, because each concerns an agency’s amendment of an existing rule outside the rulemaking process. *See* Br. 43.

be end-user revenue subject to assessment for universal service contribution purposes. *See Bureau Order* ¶ 12 (JA____); *Order* ¶ 12 (JA____); pp. 30-32, above. There is no “other” category in FCC Form 499-A to which that revenue can be assigned. *See* 2005 FCC Form 499-A Instructions at 18.

This policy is firmly grounded in FCC precedent. As the Commission explained in the *Order*, “[e]nd-user’ telecommunications revenues include revenues from sales to carriers or providers that do not contribute to [the Fund], such as *de minimis* carriers and exempted providers of interstate telecommunications.” *Order* ¶ 11 (JA____) (citing *Fourth Order on Reconsideration*, 13 FCC Rcd at 5482 (¶ 298)). It also includes revenues from sales to resellers offering retail broadband Internet access. *See id.* ¶ 35 (JA____) (citing *Wireline Broadband Order*, 20 FCC Rcd at 14915-14916 (¶ 13); *TelePacific Order*, 25 FCC Rcd at 4657 (¶ 15)). Concededly, that precedent did not expressly specify that “*all* non-contributing resellers should be treated as ‘end users’ for contribution purposes.” Br. 45 (emphasis added). But “it certainly provided ample notice” to Global Crossing that it would be liable for universal service contributions where it lacked a reasonable expectation that those customers would contribute directly to the Fund. *Qwest*, 509 F.3d at 537 (though prior FCC decision was not “strictly applicable,” it gave calling card provider sufficient notice that it offered a

telecommunications service subject to access charges); *see also AT&T*, 454 F.3d at 333 (FCC precedent holding that revenues from “prepaid calling cards ... ordinarily ... must be included” in “universal service support” placed a provider of “enhanced” prepaid calling cards “on notice that the Commission might require it to pay universal service fees”).

Finally, this Court lacks jurisdiction to address Global Crossing’s argument that it was deprived of the opportunity to seek judicial review of FCC Form 499-A and its accompanying instructions because they were adopted “without notice and comment or [Federal Register] publication.” Br. 40. To the extent there were any merit to the argument that the form should have been adopted via notice-and-comment rulemaking – and again, it is not a rule and need not have been so adopted – Global Crossing should have raised that procedural challenge through a petition for review filed within 60 days of the form’s adoption. This Court has held that “challenges to the procedural lineage of agency regulations, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the 60-day period provided by” the Hobbs Act, 28 U.S.C. § 2344. *JEM Broad. Co., Inc.*

v. FCC, 22 F.3d 320, 325 (D.C. Cir. 1994).¹¹

* * *

Notwithstanding the express language of the 2005 FCC Form 499-A Instructions, Global Crossing failed to collect the documentation required to demonstrate a reasonable expectation that certain of its reseller customers would contribute directly to the Fund. *Bureau Order* ¶ 17 (JA____). Instead, Global Crossing “unilaterally chose not to pay universal service contributions without Commission sanction or approval.” *AT&T*, 454 F.3d at 334. “In doing so,” Global Crossing “assumed the risk of [the] adverse Commission decision” it received in the proceeding below. *Id.*

III. REQUIRING WHOLESALERS TO MAKE UNIVERSAL SERVICE CONTRIBUTIONS ON RESELLER REVENUE DOES NOT VIOLATE SECTION 254 OF THE COMMUNICATIONS ACT

Global Crossing argues that the “reseller” definition in the FCC Form 499-A instructions is at odds with section 254(d)’s directive that universal

¹¹ To be sure, a telecommunications provider like Global Crossing could bring an “as applied” challenge to the substance of the Commission’s contribution rules and policies, as clarified by FCC Form 499-A, when those rules and policies are applied to it in an adjudicatory proceeding. *See Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 8 (D.C. Cir. 2009). Indeed, had Global Crossing not forfeited its administrative review rights, the company could have raised such a challenge with the Commission and (ultimately) the Court in this case. *See* p. 29, above.

service contributions be assessed “on an equitable and nondiscriminatory basis.” Br. 46-53; 47 U.S.C. § 254(d). This argument, which is largely waived, fails on the merits. There is nothing inequitable or discriminatory in denying a wholesaler an exemption from its own section 254(d) contribution obligations where its reseller customer is not required to contribute directly to the Fund; to hold otherwise would deprive the Fund of contributions on revenues for certain interstate telecommunications services. Further, where a reseller *is* required to contribute (but fails to do so), a wholesaler’s compliance with the FCC Form 499-A instructions serves as a “safe harbor” that shields it from additional contribution liability and, correspondingly, the inequitable and discriminatory treatment alleged in Global Crossing’s brief.

A. The Reseller Definition in the FCC Form 499-A Instructions Does Not Discriminate among Telecommunications Providers

1. Global Crossing asserts that the reseller definition in the FCC Form 499-A instructions runs afoul of section 254(d) because it discriminates *among* wholesale carriers based on “the behavior of a third party reseller.” Br. 49, 50. Before the agency, however, Global Crossing argued that the “reasonable expectation” requirement discriminated *between* wholesalers and resellers because it shifted contribution liability from the latter to the former. *See* Global Crossing Application for Review at 22-23 (JA__-__). Because

Global Crossing did not first present its current argument to the Commission, that argument is not before this Court. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 972 (D.C. Cir. 1999); 47 U.S.C. § 405(a) (providing that the filing of petition for reconsideration with the FCC is a “condition precedent to judicial review” of any “questions of fact or law upon which the Commission ... has been afforded no opportunity to pass”).

2. Were the Court to reach it, Global Crossing’s argument would fail. First, the reasonable expectation standard imposes liability on wholesalers for their *own* behavior, specifically, their failure to perform sufficient due diligence in apportioning their revenues between “reseller” and “end-user” revenues, as required by the Commission’s rules. *See* 47 C.F.R. §§ 54.706(b), 54.711(a). “Although resellers have an obligation to contribute based on revenue received from their end-user customers,” the wholesaler “has an independent obligation to accurately report the revenue received from its customers.” *Bureau Order* ¶ 12 (JA___); *see id.* ¶ 11 (JA___); *Order* ¶ 44 (JA___). The Commission reasonably reclassifies “reseller” revenue as “end-user” revenue where a wholesaler fails to discharge that obligation. *Bureau Order* ¶ 12 (JA___). There is nothing discriminatory about this policy, which assesses additional universal service contributions only against those wholesalers that fail to “perform [the] appropriate level of due diligence”

required by the FCC's rules. *Id.* Where the wholesaler demonstrates a reasonable expectation that its reseller will contribute directly to the Fund – and the reseller fails to do so – the Commission, via USAC, will seek additional universal service contributions from that reseller and not the wholesaler. *See Order* ¶¶ 38-39 (JA____-____). “Compliance with the reasonable expectation standard” thus actually “protects the wholesale provider in such cases.” *Id.* ¶ 38 (JA____).

Second, it is not inequitable or discriminatory for the Commission to waive a wholesaler's contribution liability if its reseller customer *actually* contributes to the Fund. Br. 49-50. The Commission included the “reasonable expectation” requirement in the second prong of the reseller definition to ensure that the revenues for *every* interstate telecommunications service are assessed *once*. *First Report and Order*, 12 FCC Rcd at 9207 (¶ 846); *Bureau Order* ¶ 15 (JA____); *Order* ¶ 40 (JA____). Such a one-time assessment occurs if the reseller “mak[es] sufficient contributions to the [Fund],” which “mitigate ... the harm caused by the wholesaler[’s]” failure to demonstrate a “reasonable expectation that its reseller would contribute.” *Order* ¶ 44 (JA____). If the reseller does *not* contribute, however, it is reasonable to hold the wholesaler liable for additional contributions because its failure to “adequately confirm and accurately represent” its revenues

would otherwise lead to a reduction in universal service contributions.

Bureau Order ¶ 12 (JA____); *cf. Rural Cellular Ass'n. v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009) (holding that “a solution targeting only” one industry group “was hardly unfair” because that group “w[as] responsible for” the underlying problem); *Black Oak Energy, LLC, v. FERC*, 725 F.3d 230, 239 (D.C. Cir. 2013) (explaining that the Court “accept[s] disparate treatment between ratepayers ... if FERC offers a valid reason for the disparity”) (internal citation and quotation omitted).

Finally, Global Crossing misses the mark when it asserts that the Commission should “go after the scofflaws” (*i.e.*, non-contributing resellers) rather than “targeting ... wholesale carriers.” Br. 52. As set forth above, *see* pp. 7-9, certain resellers are not required to make universal service contributions. Thus, there are situations where the Commission cannot “enforce the contribution obligations of ... resellers,” Br. 52, because no such obligation exists. That is why the wholesaler must contribute to the Fund where it lacks a reasonable expectation that the reseller will contribute.

B. The Commission Did Not Exempt Resellers from Section 254(d) Contribution Obligations

Global Crossing also asserts that the Commission “exempt[ed] ... resellers whose wholesale suppliers lack a reasonable expectation [that] the

reseller will contribute to USF” from section 254(d). Br. 54. Global Crossing mischaracterizes the reasonable expectation requirement.

When the Commission limited contributions to end-user revenues, it generally exempted *wholesalers* from their section 254(d) contribution obligations. That exemption only is available where “double counting” otherwise would result. Where a reseller is under *no* obligation to make universal service contributions (*e.g.*, the reseller is subject to the *de minimis* exemption in section 254(d), *see* Br. 53), there is no double-counting problem and therefore no basis to exempt its underlying wholesaler provider from contributing to the Fund. *See* pp. 30-32, above. Hence, the second prong of the reseller definition does not “exempt” resellers from section 254(d); it enforces the wholesaler’s general section 254(d) obligations where its reseller customer is exempt, to ensure that revenues from every interstate telecommunications service are included in the universal service fund contribution base.

Nor can resellers “ignore their obligation to contribute, knowing that the FCC will assess the shortfall on the wholesale carrier.” Br. 54. Even if resellers do not make required contributions, wholesalers need not reclassify reseller revenues as end user revenues (and make additional contributions) if they satisfy their due diligence obligation by demonstrating a reasonable

expectation that the reseller would contribute directly to the Fund. *See Order* ¶¶ 38-39 (JA___ - ___). In such circumstances, the wholesaler is shielded from liability for additional universal service contributions.

C. Global Crossing Does Not Have Standing to Pursue Its Competitive Neutrality Claim, which in any Event Lacks Merit

Finally, Global Crossing argues that the reseller definition in the FCC Form 499-A instructions “is inconsistent with Section 254(d)’s requirement of a competitively neutral contribution system.” Br. 57. According to Global Crossing:

Where the reseller fails to contribute to [the universal service fund] but misleads its wholesale carrier, it can sell service without incorporating any [universal service fund] contribution costs because the FCC has shifted the costs of contributing to [the universal service fund] to the wholesale carrier. In price competition with a third party carrier (other than its wholesale supplier), the reseller has no [universal service fund] contribution costs while the third-party must recoup its contribution costs.

Br. 56.

Global Crossing cannot establish the concrete injury required for Article III standing because under its hypothetical (above) it is the wholesale supplier, not the injured competitor of the reseller. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Similarly, Global Crossing lacks

prudential standing, since it may not enforce rights belonging to a third-party. *See LaRoque v. Holder*, 650 F.3d 777, 781 (D.C. Cir. 2011).

In any event, there is no credible basis for Global Crossing's argument, which turns on a reseller's ability to "mislead[] its wholesale carrier." Br. 56. That is unlikely, because the wholesaler can "protect" itself through "[c]ompliance with the reasonable expectation standard." *Order ¶¶ 38-39* (JA___-___); *see* p. 17, above.

CONCLUSION

For the reasons set forth herein, the petition for review should be dismissed for lack of jurisdiction. Alternatively, it should be denied on the merits.

Respectfully submitted,

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January 9, 2015

No. 12-1482

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 9,860 words.

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January 9, 2015

Statutory and Regulatory Appendix

5 U.S.C. § 553

5 U.S.C. § 706

28 U.S.C. § 1291

28 U.S.C. § 2342

28 U.S.C. § 2344

47 U.S.C. § 153

47 U.S.C. § 254

47 U.S.C. § 405

47 C.F.R. § 1.115

47 C.F.R. § 54.701

47 C.F.R. § 54.706

47 C.F.R. § 54.707

47 C.F.R. § 54.708

47 C.F.R. § 54.711

47 C.F.R. § 54.719

47 C.F.R. § 54.722

47 C.F.R. § 54.723

5 U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After

consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 2342

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of-

-
- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 153

(51) Telecommunications carrier

The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

47 U.S.C. § 254

(d) Telecommunications carrier contribution

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. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

47 U.S.C. § 405

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under

section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 1.115

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

(b)(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

(2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.

(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

(d) Except as provided in paragraph (e) of this section, the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

(e)(1) Applications for review of interlocutory rulings made by the Chief Administrative Law Judge (see § 0.351) shall be deferred until the time when exceptions are filed unless the Chief Judge certifies the matter to the Commission for review. A matter shall be certified to the Commission only if the Chief Judge determines that it presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The request to certify the matter to the Commission shall be filed within 5 days after the ruling is made. The application for review shall be filed within 5 days after the order certifying the matter to the Commission is released or such ruling is made. Oppositions shall be filed within 5 days after the application is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested. A ruling certifying or not certifying a matter to the Commission is final: Provided, however, That the Commission may, on its own motion, dismiss the application for review on the ground that objections to the ruling should be deferred and raised as an exception.

(2) The failure to file an application for review of an interlocutory ruling made by the Chief Administrative Law Judge or the denial of such application by the Commission, shall not preclude any party entitled to file exceptions to the initial decision from requesting review of the ruling at the time when exceptions are filed. Such requests will be considered in the same manner as exceptions are considered.

(3) Applications for review of a hearing designation order issued under delegated authority shall be deferred until exceptions to the initial decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. In addition, the Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the hearing designation order be deferred and raised when exceptions in the initial decision in the case are filed. A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge within 5 days after the designation order is released. Any application for review authorized by the Administrative Law Judge shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested.

(4) Applications for review of final staff decisions issued on delegated authority in formal complaint proceedings on the Enforcement Bureau's Accelerated Docket (see, e.g., § 1.730) shall be filed within 15 days of public notice of the decision, as that date is defined in § 1.4(b). These applications for review oppositions and replies in Accelerated Docket proceedings shall be served on parties to the proceeding by hand or facsimile transmission.

(f) Applications for review, oppositions, and replies shall conform to the requirements of §§ 1.49, 1.51, and 1.52, and shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554. Except as provided below, applications for review and oppositions thereto shall not exceed 25 double-space typewritten pages. Applications for review of interlocutory actions in hearing proceedings (including designation orders) and oppositions thereto shall not exceed 5 double-spaced typewritten pages. When permitted (see paragraph (e)(3) of this section), reply pleadings shall not exceed 5 double-spaced typewritten pages. The application for review shall be served upon the parties to the proceeding. Oppositions to the application for review shall be served on the person seeking review and on parties to the proceeding. When permitted (see paragraph (e)(3) of this section), replies to the opposition(s) to the application for review shall be served on the person(s) opposing the application for review and on parties to the proceeding.

(g) The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor. A petition requesting reconsideration of a ruling which denies an application for review will be entertained only if one or more of the following circumstances is present:

(1) The petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(2) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(h)(1) If the Commission grants the application for review in whole or in part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which review is sought;

(ii) Remand the matter to the designated authority for reconsideration in accordance with its instructions, and, if an evidentiary hearing has been held, the remand may be to the person(s) who conducted the hearing; or

(iii) Order such other proceedings, including briefs and oral argument, as may be necessary or appropriate.

(2) In the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought. (See § 1.102.) Following the completion of such further proceedings the Commission may affirm, reverse or modify the order from which review is sought, or it may set aside the order and remand the matter to the designated authority for reconsideration in accordance with its instructions. If an evidentiary hearing has been held, the Commission may remand the matter to the person(s) who conducted the hearing for rehearing on such issues and in accordance with such instructions as may be appropriate.

Note: For purposes of this section, the word “order” refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the “memorandum opinion” or other material which often accompany and explain the order.

(i) An order of the Commission which reverses or modifies the action taken pursuant to delegated authority is subject to the same provisions with respect to reconsideration as an original order of the Commission. In no event, however, shall a ruling which denies an application for review be considered a modification of the action taken pursuant to delegated authority.

(j) No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section.

(k) The filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority.

47 C.F.R. § 54.701

(a) The Universal Service Administrative Company is appointed the permanent Administrator of the federal universal service support mechanisms, subject to a review after one year by the Federal Communications Commission to determine that the Administrator is administering the universal service support mechanisms in an efficient, effective, and competitively neutral manner.

(b) The Administrator shall establish a nineteen (19) member Board of Directors, as set forth in § 54.703. The Administrator's Board of Directors shall establish three Committees of the Board of Directors, as set forth in § 54.705: (1) the Schools and Libraries Committee, which shall oversee the schools and libraries support mechanism; (2) the Rural Health Care Committee, which shall oversee the rural health care support mechanism; and (3) the High Cost and Low Income Committee, which shall oversee the high cost and low income support mechanism. The Board of Directors shall not modify substantially the power or authority of the Committees of the Board without prior approval from the Federal Communications Commission.

(c)(1) The Administrator shall establish three divisions:

(i) The Schools and Libraries Division, which shall perform duties and functions in connection with the schools and libraries support mechanism under the direction of the Schools and Libraries Committee of the Board, as set forth in § 54.705(a);

(ii) The Rural Health Care Division, which shall perform duties and functions in connection with the rural health care support mechanism under the direction of the Rural Health Care Committee of the Board, as set forth in § 54.705(b); and

(iii) The High Cost and Low Income Division, which shall perform duties and functions in connection with the high cost and low income support mechanism, the interstate access universal service support mechanism for price cap carriers described in subpart J of this part, and the interstate common line support mechanism for rate-of-return carriers described in subpart K of this part, under the direction of the High Cost and Low Income Committee of the Board, as set forth in § 54.705(c).

(2) As directed by the Committees of the Board set forth in § 54.705, these divisions shall perform the duties and functions unique to their respective support mechanisms.

(d) The Administrator shall be managed by a Chief Executive Officer, as set forth in § 54.704. The Chief Executive Officer shall serve on the Committees of the Board established in § 54.705.

47 C.F.R. § 54.706

(a) Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms. Interstate telecommunications include, but are not limited to:

- (1) Cellular telephone and paging services;
- (2) Mobile radio services;
- (3) Operator services;
- (4) Personal communications services (PCS);
- (5) Access to interexchange service;
- (6) Special access service;
- (7) WATS;
- (8) Toll-free service;
- (9) 900 service;
- (10) Message telephone service (MTS);
- (11) Private line service;
- (12) Telex;
- (13) Telegraph;
- (14) Video services;

(15) Satellite service;

(16) Resale of interstate services;

(17) Payphone services; and

(18) Interconnected VoIP services.

(19) Prepaid calling card providers.

(b) Except as provided in paragraph (c) of this section, every entity required to contribute to the federal universal service support mechanisms under paragraph (a) of this section shall contribute on the basis of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions.

(c) Any entity required to contribute to the federal universal service support mechanisms whose projected collected interstate end-user telecommunications revenues comprise less than 12 percent of its combined projected collected interstate and international end-user telecommunications revenues shall contribute based only on such entity's projected collected interstate end-user telecommunications revenues, net of projected contributions. For purposes of this paragraph, an "entity" shall refer to the entity that is subject to the universal service reporting requirements in § 54.711 and shall include all of that entity's affiliated providers of interstate and international telecommunications and telecommunications services.

(d) Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services are not required to contribute on the basis of revenues derived from those services. The following entities will not be required to contribute to universal service: non-profit health care providers; broadcasters; systems integrators that derive less than five percent of their systems integration revenues from the resale of telecommunications. Prepaid calling card providers are not required to contribute on the basis of revenues derived from prepaid calling cards sold by, to, or pursuant to contract with the Department of Defense (DoD) or a DoD entity.

(e) Any entity required to contribute to the federal universal service support mechanisms shall retain, for at least five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules. These records shall include without limitation the following: Financial statements and supporting

documentation; accounting records; historical customer records; general ledgers; and any other relevant documentation. This document retention requirement also applies to any contractor or consultant working on behalf of the contributor.

47 C.F.R. § 54.707

The Administrator shall have authority to audit contributors and carriers reporting data to the administrator. The Administrator shall establish procedures to verify discounts, offsets, and support amounts provided by the universal service support programs, and may suspend or delay discounts, offsets, and support amounts provided to a carrier if the carrier fails to provide adequate verification of discounts, offsets, or support amounts provided upon reasonable request, or if directed by the Commission to do so. The Administrator shall not provide reimbursements, offsets or support amounts pursuant to part 36 and § 69.116 through 69.117 of this chapter, and subparts D, E, and G of this part to a carrier until the carrier has provided to the Administrator a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier in accordance with § 54.201.

47 C.F.R. § 54.708

If 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 to by our rules governing Telecommunications Relay Service (47 CFR 64.601 et seq. of this chapter), numbering administration (47 CFR 52.1 et seq. of this chapter), or shared costs of local number portability (47 CFR 52.21 et seq. of this chapter). The foregoing notwithstanding, all interconnected VoIP providers, including those whose contributions would be de minimis, must file the Telecommunications Reporting Worksheet. If a contributor improperly claims exemption from the contribution requirement, it will subject to the criminal provisions of sections 220(d) and (e) of the Act regarding willful false submissions and will be required to pay the amounts withheld plus interest.

47 C.F.R. § 54.711

(a) Contributions shall be calculated and filed in accordance with the Telecommunications Reporting Worksheet which shall be published in the Federal Register. The Telecommunications Reporting Worksheet sets forth information that the contributor must submit to the Administrator on a quarterly and annual basis. The Commission shall announce by Public Notice published in the Federal Register and on its website the manner of payment and dates by which payments must be made. An executive officer of the contributor must certify to the truth and accuracy of historical data included in the Telecommunications Reporting Worksheet, and that any projections in the Telecommunications Reporting Worksheet represent a good-faith estimate based on the contributor's policies and procedures. The Commission or the Administrator may verify any information contained in the Telecommunications Reporting Worksheet. Contributors shall maintain records and documentation to justify information reported in the Telecommunications Reporting Worksheet, including the methodology used to determine projections, for three years and shall provide such records and documentation to the Commission or the Administrator upon request. Inaccurate or untruthful information contained in the Telecommunications Reporting Worksheet may lead to prosecution under the criminal provisions of Title 18 of the United States Code. The Administrator shall advise the Commission of any enforcement issues that arise and provide any suggested response.

(b) The Commission shall have access to all data reported to the Administrator. Contributors may make requests for Commission nondisclosure of company-specific revenue information under § 0.459 of this chapter by so indicating on the Telecommunications Reporting Worksheet at the time that the subject data are submitted. The Commission shall make all decisions regarding nondisclosure of company-specific information. The Administrator shall keep confidential all data obtained from contributors, shall not use such data except for purposes of administering the universal service support programs, and shall not disclose such data in company-specific form unless directed to do so by the Commission. Subject to any restrictions imposed by the Chief of the Wireline Competition Bureau, the Universal Service Administrator may share data obtained from contributors with the administrators of the North American Numbering Plan administration cost recovery (See 47 CFR 52.16 of this chapter), the local number portability cost recovery (See 47 CFR 52.32 of this chapter), and the TRS Fund (See 47 CFR 64.604(c)(4)(iii)(H) of this chapter). The Administrator shall keep confidential all data obtained from other administrators and shall not use such data except for purposes of administering the universal service support mechanisms.

(c) The Bureau may waive, reduce, modify, or eliminate contributor reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms.

47 C.F.R. § 54.719

(a) Any party aggrieved by an action taken by the Administrator, as defined in § 54.701, § 54.703, or § 54.705, must first seek review from the Administrator.

(b) Any party aggrieved by an action taken by the Administrator, after seeking review from the Administrator, may then seek review from the Federal Communications Commission, as set forth in § 54.722.

(c) Parties seeking waivers of the Commission's rules shall seek relief directly from the Commission.

47 C.F.R. § 54.722

(a) Requests for review of Administrator decisions that are submitted to the Federal Communications Commission shall be considered and acted upon by the Wireline Competition Bureau; provided, however, that requests for review that raise novel questions of fact, law or policy shall be considered by the full Commission.

(b) An affected party may seek review of a decision issued under delegated authority by the Common Carrier Bureau pursuant to the rules set forth in part 1 of this chapter.

47 C.F.R. § 54.723

(a) The Wireline Competition Bureau shall conduct de novo review of request for review of decisions issue by the Administrator.

(b) The Federal Communications Commission shall conduct de novo review of requests for review of decisions by the Administrator that involve novel questions of fact, law, or policy; provided, however, that the Commission shall not conduct de novo review of decisions issued by the Wireline Competition Bureau under delegated authority.

47 C.F.R. § 69.2

For purposes of the part:

(m) End user means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an “end user” when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an “end user” if all resale transmissions offered by such reseller originate on the premises of such reseller.

No. 12-1482

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

CERTIFICATE OF SERVICE

I, Maureen Flood, hereby certify that on January 9, 2015, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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