

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

In the Matter of
Universal Service Contribution Methodology
Request for Review of a Decision of the
Universal Service Administrator by Cisco WebEx
LLC
WC Docket No. 06-122

ORDER

Adopted: December 16, 2016

Released: December 16, 2016

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a request by Cisco WebEx LLC (Cisco) seeking review of an audit of Cisco's 2009 revenues by the Universal Service Administrative Company (USAC), the administrator of the Universal Service Fund (USF or Fund). USAC found that Cisco's WebEx online collaboration service comprises two separate and distinct services (a desktop and document sharing application and an audio teleconferencing service), and that Cisco must contribute to the Fund based on revenues from the audio service when provided by Cisco using toll or toll-free calling via the public switched telephone network (PSTN) (Cisco PSTN Minutes). As discussed more fully below, based on Commission precedent, we reverse USAC's decision and find that the Cisco PSTN Minutes, when used in conjunction with the desktop and document sharing application (Desktop Application), are integrated into a single Cisco WebEx information service that is not subject to universal service contribution requirements.

II. BACKGROUND

A. The Act and the Commission's Rules and Requirements

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanism established by the Commission to preserve and advance universal service." Section 254(d) further provides that "[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." To this end, the Commission has determined that common carriers and private carriage providers that provide interstate

1 Cisco WebEx LLC Request for Review of a Decision by the Universal Service Administrator, WC Docket No. 06-122 (filed Apr. 8, 2013) (portions confidential) (Request for Review). In this order, we refer to the company filing this appeal as "Cisco" and to the online collaboration service as "WebEx."

2 See Request for Review, Exh. A (Audit Report) (confidential).

3 47 U.S.C. § 254(d).

4 Id.

telecommunications to others for a fee generally must contribute to the USF, based on their interstate and international end-user telecommunications revenues.⁵

3. The Commission has designated USAC as the entity responsible for administering the universal service support mechanisms under Commission direction.⁶ Pursuant to the Commission's rules, contributors report their revenues by filing with USAC their Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q),⁷ which are released annually by the Bureau on delegated authority.⁸ USAC reviews these filings and verifies the information provided by the contributors.⁹ USAC also bills contributors for their universal service contributions.¹⁰

4. Under the Commission's existing rules and requirements, contributions are assessed based on a contributor's "projected collected interstate and international end-user telecommunications revenues, net of projected contributions."¹¹ Assessable revenues include, but are not limited to, interstate revenues from fixed and mobile telephone service, paging service, special access service, toll-free service, satellite service, operator service, payphone service, interconnected VoIP service, and prepaid calling cards.¹² In contrast, revenues from information services are not currently included in the USF contribution base.¹³

5. Under existing Commission precedent, when a contributor offers its customers a bundled package of telecommunications and information services – that is, services that are not functionally integrated – it must allocate the revenues between the telecommunications service and the information service. A bundle of services is two or more distinct services, one of which is telecommunications, which

⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183-84, para. 795 (1997) (*Universal Service First Report and Order*) (subsequent history omitted). Although the Commission exercised its permissive authority to assess private carriage providers, it exempted certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers from the contribution requirement. 47 CFR § 54.706(d). The Commission also requires certain other providers of interstate telecommunications to contribute to the Fund. See, e.g., *Universal Service Contribution Methodology et al.*, CC Docket No. 96-45 et al., Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7544, para. 52 (2006) (*2006 Contribution Methodology Order*) (requiring interconnected voice over Internet protocol (VoIP) providers to contribute to the Fund).

⁶ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*; *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18423-24, para. 41 (1997) (*Universal Service Second Order on Reconsideration*); see 47 CFR § 54.701.

⁷ 47 CFR § 54.711(a) (setting forth reporting requirements in accordance with Commission announcements in the Federal Register).

⁸ The Wireline Competition Bureau, formerly the Common Carrier Bureau, has delegated authority to revise the FCC Forms 499 and accompanying instructions to ensure "sound and efficient administration of the universal service programs." See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18442, para. 81.

⁹ 47 CFR § 54.711(a).

¹⁰ 47 CFR § 54.702(b).

¹¹ 47 CFR § 54.706(b).

¹² 47 CFR § 54.706(a)(1)-(19). This list is not intended to be comprehensive. See 47 CFR § 54.706(a). See also 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received"); *Universal Service First Report and Order*, 12 FCC Rcd at 9173, para. 777 (requiring those who offer telecommunications on a common-carriage basis for a fee to contribute); *id.* at 9183, para. 795 (requiring those who offer telecommunications on a private-carriage basis for a fee to contribute).

¹³ See 47 U.S.C. § 153(20) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications").

are packaged together, for a single price typically less than the sum of the separate prices.¹⁴ For instance, the residential triple play offering, which includes telephone, Internet access, and video, is a bundled offering. Services in a bundle are not functionally integrated as we describe in this order because other than being sold together in a package the services are not linked, or are only minimally linked, in their capabilities.¹⁵

6. A contributor offering bundled services has three options for allocating the revenues received between the telecommunications service and the information service. First, contributors may elect to allocate revenues based on “unbundled service offering prices,” i.e., revenues the contributor derives from the unbundled provision of telecommunications service (with any reductions in revenue from the bundled discounted price allocated to the non-telecommunications revenues).¹⁶ Second, contributors may elect to treat all bundled revenues as telecommunications revenues.¹⁷ Third, contributors may use “any reasonable alternative method” for allocating revenues so long as that method reflects the contributor’s obligation to equitably contribute to universal service.¹⁸

B. The Cisco WebEx Request for Review

7. *The WebEx Service.* Cisco describes its WebEx service as “an online collaboration service that allows users to share information and collaborate on work product through the integration of audio, video, and computing capabilities.”¹⁹ According to Cisco, the WebEx service permits participants to simulate an in-person meeting online, allowing users the flexibility to collaborate without being in a single physical location.²⁰ WebEx features include desktop and document sharing, whiteboarding, video integration, remote keyboard and mouse control, host controls, chat features, presence information, and audio integration.²¹ It is uncontested that the Desktop Application is an information service.²²

8. The audio feature, in layman’s terms, allows participants in an online collaboration session to speak to, and hear, other participants in the session. Cisco offers users several options for

¹⁴ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review—Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access, and Local Exchange Markets*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7426, para. 15 (2001) (*CPE Bundling Order*).

¹⁵ See *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-78, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7294-95, paras. 13-14 (2006) (*2006 Prepaid Calling Card Order*).

¹⁶ *CPE Bundling Order*, 16 FCC Rcd at 7420, 7447, paras. 2, 50 (acknowledging that “enhanced services are now referred to as ‘information services’ in the 1996 Act” but using the term “enhanced services” throughout the order). In the *Stevens Report*, the Commission concluded that the definitions of “telecommunications services” and “information services,” added to the Act by the Telecommunications Act of 1996, “essentially correspond to the pre-existing categories of basic and enhanced services.” *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11516, para. 33 (1998) (*Stevens Report*). See also *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 992-93 (2005) (*Brand X*).

¹⁷ *CPE Bundling Order*, 16 FCC Rcd at 7447, para. 51.

¹⁸ *Id.* at 7448, para. 53. Unlike the first two options, this third option is not afforded a “safe harbor,” that is, this third option is not afforded a presumption of reasonableness in an audit or enforcement context but instead is evaluated on a case-by-case basis. *Id.* at 7448, paras. 52-53.

¹⁹ Request for Review at 1.

²⁰ *Id.* at 1-2.

²¹ *Id.* at 2.

²² *Id.* at 6; Audit Report at 12 (the USAC Internal Audit Division “concur[s] [with Cisco] that [Cisco’s] desktop and document sharing service is an information service as defined by the FCC”).

utilizing audio functionality. First, the user may use Cisco-provided toll or toll-free calling (or call back) via the public switched telephone network. Second, the user may use Cisco-provided non-interconnected VoIP. In other words, rather than obtaining the audio function via the PSTN, users may connect through the Internet to the WebEx online Desktop Application, and use the application's native audio functionality through the participant's computer microphone and speakers (the "Cisco Non-Interconnected VoIP option"). Third, the user may also use a third party (non-Cisco) teleconferencing service. Finally, the user may use its own internal teleconferencing solution.²³

9. When participants use the Cisco-provided audio options, that is, either the Cisco PSTN Minutes or the non-interconnected VoIP option, the Desktop Application integrates information from the data stream of the audio component into, for example, a graphical representation of who is present and who is speaking as well as detecting and highlighting the video stream of who is speaking.²⁴ Participants may also use the Cisco-provided toll or toll-free audio component of the WebEx service without connecting to the Desktop Application.²⁵ For the participant joining by audio only, the session would be similar to a traditional conference call – that is, the participant would be able to converse with the other participants but would not have access to the Desktop Application, and there would not be an associated video stream during the collaboration session. Other participants of the session who access the Desktop Application, however, would see additional information regarding the audio-only participant, including a graphical representation of the participant and when the participant is speaking, and the host of the session could utilize various host control functions over the audio-only participant.²⁶

10. *USAC Audit.* In 2012, USAC audited Cisco's 2010 FCC Form 499-A (reporting 2009 revenues).²⁷ In its final audit report, USAC described the WebEx service as "two separate and distinct services": a "desktop and document sharing application" (Desktop Application) and the audio function, including the PSTN toll and toll-free minutes provided by Cisco, which USAC refers to as "an audio bridging product" (that is, a teleconferencing service).²⁸ USAC did not contest Cisco's broad characterization of the WebEx collaboration service (as described above) and concurred with Cisco that the Desktop Application is an information service.²⁹ USAC found, however, that the Cisco PSTN Minutes (including minutes used in conjunction with the Desktop Application) are a separate telecommunications service and not sufficiently integrated with the Desktop Application because: (1) the two services were accessed separately (i.e., the Desktop Application is accessed through the Internet and the Cisco PSTN Minutes are accessed through the PSTN); (2) customers can substitute other audio options for the Cisco PSTN Minutes; (3) participants may use only the Cisco PSTN Minutes without the Desktop Application; (4) the Cisco PSTN Minutes are billed separately on customer invoices; and (5) revenue from the Cisco PSTN Minutes are recorded separately in Cisco's books of account.³⁰ USAC thus

²³ Letter from Brita Strandberg, Counsel to Cisco WebEx LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 2 (filed Sept. 23, 2013) (Cisco Sept. 23 *Ex Parte* Letter); Audit Report at 12.

²⁴ Request for Review at 15; Letter from Brita Strandberg, Counsel to Cisco WebEx LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 1-2 (filed Jan. 30, 2014) (Cisco Jan. 30 *Ex Parte* Letter); Letter from Brita Strandberg, Counsel to Cisco WebEx LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 2 (filed Mar. 26, 2014) (Cisco Mar. 26 *Ex Parte* Letter).

²⁵ See Letter from Brita Strandberg, Counsel to Cisco WebEx LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 1 (filed Mar. 6, 2014) (Cisco Mar. 6 *Ex Parte* Letter).

²⁶ Cisco Jan. 30 *Ex Parte* Letter at 1.

²⁷ See Audit Report generally.

²⁸ *Id.* at 12.

²⁹ *Id.* at 11, 12 (as an information service, revenues from the Desktop Application are not subject to USF assessment).

³⁰ *Id.* at 28-32.

sought to reclassify the revenue from the Cisco PSTN Minutes used in conjunction with the Desktop Application as assessable telecommunications revenue.³¹

11. *Request for Review.* In April 2013, Cisco filed a request seeking review of the USAC audit.³² Cisco explained that during the audit period, it “made a good faith effort to report revenue derived from the WebEx sessions conducted entirely by phone as telecommunications revenue,” by “devis[ing] an over-inclusive proxy” that reported as telecommunications revenue all Cisco PSTN minutes that may not have been used in conjunction with the Desktop Application.³³ Cisco devised a proxy because it could not “readily determine when a customer use[d] audio without using [the Desktop Application].”³⁴ Under this proxy, Cisco reported as assessable the revenue associated with “minutes from call legs that join a WebEx session before an online meeting has started, regardless of whether and when an online meeting is later begun.”³⁵ It also included “minutes from WebEx sessions initiated by telephone, regardless of whether an online session is also initiated.”³⁶ It contributed on those revenues. Cisco did not report as assessable, and USAC concurred with this treatment of, revenues from the Cisco provided non-interconnected VoIP option or revenues from the Desktop Application session itself.³⁷ Thus, the only issue in this appeal is whether the revenues from the Cisco PSTN Minutes are assessable when used with the Desktop Application.³⁸

III. DISCUSSION

12. Here, we focus on the very limited service that USAC sought to reclassify, which Cisco appeals. That is, we consider only whether the Cisco PSTN Minutes when used with the Desktop Application are a separate telecommunications offering or telecommunication service and assessable or instead are part of a single, integrated information service and non-assessable. The relevant analysis is fact specific and turns on the factual particulars of how the service is offered to the end user and how the service at issue works.³⁹ Although we review USAC decisions *de novo*,⁴⁰ given the fact-specific nature of this inquiry, we limit our review to the issue presented in this appeal.⁴¹

³¹ *Id.* at 35.

³² *See generally* Request for Review.

³³ Due to the nature of the WebEx service, Cisco states it was not able to “simply identify audio-only WebEx usage.” Therefore, it devised an over-inclusive proxy to address WebEx audio minutes which may have in fact been used with the Desktop Application but were reported as telecommunications revenue because Cisco was not able to identify audio-only usage. Cisco explained that “WebEx users that join before an online session has launched and users that join meetings initiated by phone may, in fact, use the online collaboration capabilities WebEx offers in the course of their WebEx meeting.” Cisco Mar. 6 *Ex Parte* Letter at 1; Request for Review at 6 n.9. We point out that Cisco used this proxy only to classify revenues associated with the Cisco PSTN Minutes.

³⁴ Request for Review at 6 n.9.

³⁵ Cisco Mar. 6 *Ex Parte* Letter at 1.

³⁶ *Id.* During the period covered by the audit, Cisco offered customers a separate traditional audio-only conference service. Revenues from this service were reported as telecommunications and are not at issue in this Order. Request for Review at 6 n.9.

³⁷ Audit Report at 12.

³⁸ Request for Review at 6 n.9; Cisco Sept. 23 *Ex Parte* Letter at 2-3. We therefore need not and do not consider classification issues beyond those that are directly in dispute in this appeal. During the audited period, Cisco allowed customers to purchase audio on a standalone basis. Cisco Mar. 26 *Ex Parte* Letter at 2. Cisco states that it reported the revenue associated with the audio-only usage as telecommunications and paid the associated USF assessment. *Id.*

³⁹ *Brand X*, 545 U.S. at 991; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket No. 02-33 et al., Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853,

(continued....)

13. We find that based on the facts presented, the Cisco PSTN Minutes when used with the Desktop Application are functionally integrated into a single information service. Based on our review of the record and longstanding precedent regarding the analytical framework used to determine whether a service is an information service, we conclude that USAC erred in reclassifying revenue from the Cisco PSTN Minutes used with the Desktop Application as assessable revenues. As set forth in detail below, we find that, from the end-user's perspective, Cisco is offering a single service, and that the WebEx service is functionally integrated under Commission rules and precedent.⁴² Based on the facts before us, we grant Cisco's request to reverse the USAC audit finding that reclassified revenue from Cisco PSTN Minutes used with the Desktop Application as assessable revenues.

A. Classification Precedent

14. The Commission has long distinguished between telecommunications services and information services.⁴³ Even before these terms were adopted in the 1996 Act, the Commission established a basic/enhanced dichotomy of classification of service in the *Computer II Final Decision* and subjected the former to Title II regulation, while exempting the latter.⁴⁴ The Commission, in the *Computer II Final Decision*, established first principles as a guide to determining when a service is basic service and when it is an enhanced service. The Commission noted the difficulty in defining the difference between basic and enhanced services and explained that defining the discrete transmission component in the enhanced service could be particularly difficult.⁴⁵ The Commission determined that substance not form should govern the classification of service.⁴⁶ To that end, the Commission explained that the essence of an enhanced service offering is that the transmission and data processing technologies are "intertwined so thoroughly as to produce a service different from any explicitly recognized in the Communications Act."⁴⁷ The Commission tried "to draw a line which distinguishes [regulated services] under Title II of the Act, from historically and functionally [non-regulated] activities."⁴⁸

15. In the *Computer II Final Decision*, the Commission limited a basic transmission service to the "offering of transmission capacity between two or more points, suitable for a user's transmission needs and subject only to the technical parameters of fidelity or distortion criteria, or other

(Continued from previous page) _____
14892, 14895-6, paras. 73, 78 (2005) (*Wireline Broadband Internet Access Service Order*) (subsequent history omitted).

⁴⁰ 47 CFR § 54.723.

⁴¹ Our limited scope of review in this order does not include the Cisco PSTN Minutes when used *without* the Desktop Application. As explained above, Cisco reported such revenues on the Telecommunications Worksheet as assessable and USAC did not challenge this decision. We do not disturb this finding here.

⁴² *Brand X*, 545 U.S. at 991.

⁴³ Because the revenues at issue are from calendar year 2009 and were reported in calendar year 2010, we apply Commission rules and the relevant legal standards that were in effect during that time, informed by subsequent precedent applying those standards. See, e.g., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, 30 FCC Rcd 5601, 575, 5772, 5776, paras. 365, 376, 385 (2015) (*Open Internet Order*) (affirming and applying the longstanding precedent that the relevant question in classification determinations is whether a service is a "functionally integrated" information service, or whether there are separate offerings that are not "inextricably integrated"), *aff'd United States Telecomms Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pets for reh'g pending*.

⁴⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 419, 428, paras. 92, 114 (1980) (*Computer II Final Decision*).

⁴⁵ *Computer II Final Decision*, 77 FCC 2d at 430, para. 120.

⁴⁶ *Id.* at 430, 435, paras. 120, 131.

⁴⁷ *Id.* at 430, para. 120.

⁴⁸ *Id.* at 435, para. 131.

conditioning.”⁴⁹ The Commission also noted that any network management processing involved in the delivery of the transmission did not “alter the nature of the basic service.”⁵⁰ The Commission explained that the pure transmission capability “is virtually transparent in terms of its interaction with customer supplied information.”⁵¹ The Commission next explained that an enhanced service offering uses computer processing “to act on the content, code, protocol, and other aspects of the subscriber’s information” resulting in the potential of “additional, different, or restructured information” being provided to the subscriber.⁵² Moreover, in an enhanced service the content of the information need not be changed and may simply involve subscriber interaction with stored information, such as a voicemail box.⁵³

16. The basic/enhanced dichotomy was substantially incorporated in the 1996 Act, when Congress adopted the framework for regulatory treatment of what it called “telecommunication service” and “information service.”⁵⁴ Because the statutory definitions substantially incorporated the Commission’s terminology under the *Computer Inquiries*, Commission decisions regarding the distinction between basic and enhanced services are relevant here.

17. Since the 1996 Act, the Commission has applied a functional integration standard when classifying services that include both a telecommunications and information processing component.⁵⁵ Classification depends on the functional nature of the end-user offering (i.e., whether the end user is receiving a single, integrated information service) or whether, functionally, the consumer is receiving two separate and distinct services (a telecommunications service and an information service).⁵⁶ In *NCTA v. Brand X*, the Supreme Court found “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.”⁵⁷ Thus, classification turns on an analysis of both the factual particulars of how the service works and how it is provided.⁵⁸

18. In applying the standard, the Commission has looked at the transmission component of an information service to determine whether it is functionally integrated into the information service

⁴⁹ *Id.* at 419-20, para. 95.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 421, para. 97.

⁵³ *Id.*

⁵⁴ See 47 U.S.C. § 153(53) (defining “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used”); § 153(24) (defining “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service”).

⁵⁵ *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45 et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5474-75, para. 282 (1997) (*Universal Service Fourth Order on Reconsideration*); *Stevens Report*, 13 FCC Rcd at 11529, para. 58 (“[a]n offering that constitutes a single service from the end user’s standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components”).

⁵⁶ *Stevens Report*, 13 FCC Rcd at 11531, 11543, paras. 60, 86.

⁵⁷ *Brand X*, 545 U.S. at 990.

⁵⁸ *Id.*, at 990-991, 993 (relying on *Computer II Final Decision* and *Cable Modem Declaratory Ruling*); see also *Open Internet Order* at para. 330 (examining consumer conduct, providers’ marketing and pricing strategies, and technical characteristics of the service).

offering, or whether it is a separate offering that is merely packaged with the information service offering. The longstanding functional integration standard has been described in slightly different ways, for example, whether the telecommunications is always used in connection with the information processing capabilities,⁵⁹ or is inextricably intertwined,⁶⁰ or is part and parcel of and integral to the information service capabilities.⁶¹ Most recently, in the *Open Internet Order*, the Commission evaluated both how a service is marketed and offered, and the functional nature of how the service works.⁶²

19. In contrast, the Commission has found that merely packaging two services together does not create a single integrated service. For example, in the 2006 *Prepaid Calling Card Order*, the Commission distinguished the menu-driven prepaid calling card offering at issue there from the broadband Internet access service considered in *Brand X* and found that the calling card offering was not a single, integrated information service because there was no functional integration between the information service features and the telecommunications service.⁶³ The Commission found that the calling card end user could only use one capability (the information service or the telecommunications service) at a time, and the telecommunications transmission capability was completely independent of the information service capabilities.⁶⁴

20. In the 2008 *InterCall Order*, the Commission addressed a stand-alone audio bridging service and determined that the service was not an information service, as asserted by the petitioner in that matter, but instead was a toll conferencing, or teleconferencing, service.⁶⁵ The Commission further found that certain functions offered in conjunction with InterCall's service (validation functions, collect billing and participant information, record, delete playback, mute and unmute, and access operator assistance) were not "integrated" in the sense of changing the service into an information service for two reasons: first, the Commission had previously determined that gathering, storing, processing, and providing a customer with usage information "as part of a basic service" does not convert the service to an

⁵⁹ See, e.g., *Wireline Broadband Internet Access Service Order*, 20 FCC Rcd at 14960, para. 9. See also *Brand X*, 545 U.S. at 988; *2006 Prepaid Calling Card Order*, 21 FCC Rcd at 2794, para. 13 (asking whether the telecommunications and information services are "engaged or used simultaneously" and finding they are not).

⁶⁰ See *Brand X*, 545 U.S. at 978. There, the U.S. Supreme Court affirmed the Commission's application of that framework in classifying cable modem service, an Internet access service, as an information service, explaining that, given "the factual particulars of how the [service at issue there] works and how it [was] provided," the transmission component is sufficiently integrated, *i.e.* functionally integrated, with "the finished service to make it reasonable to describe the two as a single, integrated offering." *Id.* at 990. The fact that the Commission more recently applied that framework to conclude that broadband Internet access is a telecommunications service illustrates the ongoing validity of that framework for making classification decisions regarding a variety of services. Indeed, the U.S. Court of Appeals for the D.C. Circuit, in affirming the Commission's reclassification decision concerning broadband Internet access service in the *Open Internet Order*, found that the Commission was correct to focus on evidence of "consumer perception," including whether there is a "stand-alone offering of telecommunications" and "offered service that, from the user's perspective, transmits messages unadulterated by computer processing." *United States Telecom Ass'n v. F.C.C.*, 825 F.3d 674, 697-700 (D.C. Cir. 2016) (Of course, the service at issue in this appeal is not broadband Internet access).

⁶¹ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, para. 39.

⁶² *Open Internet Order*, 30 FCC Rcd at 5750-5777, paras. 341-387.

⁶³ *2006 Prepaid Calling Card Order*, 21 FCC Rcd at 7295-96, para. 15.

⁶⁴ *Id.*

⁶⁵ *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, WC Docket No. 06-122, Order, 23 FCC Rcd 10731, 10734-35, paras. 7, 11 (2008) (*InterCall Order*) (the Commission was unable to determine from the record whether the company was a private service provider offering telecommunications or a common carrier offering telecommunication services, but determined that as a "provider of telecommunications" the company was required to directly contribute to the USF).

information service;⁶⁶ and second, features such as muting, recording, erasing and accessing operator services did not “alter the fundamental [non-information service] character of Intercall’s telecommunications offering.”⁶⁷ The Commission did not make a finding regarding whether the ancillary features were information services, but instead found that the features were not sufficiently integrated to transform the underlying telecommunications offering into an information service, similar to the finding in the *Prepaid Calling Card Order*, because the customer could still conduct the conference call with or without accessing those features.⁶⁸ The Commission affirmed this finding in the *InterCall Recon Order*.⁶⁹

B. Application of Classification Framework to Cisco WebEx Service

21. In this order, we apply the Commission’s longstanding classification framework to the particular facts of the Cisco WebEx service described above. We conclude that when the Cisco PSTN Minutes are used in conjunction with the Desktop Application, the audio stream is integrated into, and is “part and parcel” of the collaboration session.⁷⁰ The Desktop Application, which is an information service,⁷¹ utilizes the data from the audio stream provided by the Cisco PSTN Minutes to, among other things, graphically represent who has joined the WebEx session and who is speaking, enable the interface to highlight the video of the speaker, and allow the host to perform certain control functions, such as muting or ejecting particular participants, or highlighting the video of a participant who is not speaking.⁷² The audio stream (whether it is PSTN or computer-based) is directly linked to, and being used in conjunction with, the information processing capabilities being utilized in the collaboration session – i.e. document sharing, video, etc. During the course of the collaboration session, participants can switch seamlessly from the Cisco PSTN Minutes to the Cisco Non-Interconnected VoIP provided as part of the Desktop Application (i.e. to their computer microphones), and vice versa. The Desktop Application takes information from the voice stream (e.g. whether a participant is currently speaking or has muted her phone) and displays it to all of the participants.⁷³ Finally, the Desktop Application includes controls that utilize the data from the audio stream that enable hosts of the collaboration session to eject participants, control who can speak, and otherwise modify and control the transmission capabilities of a session, including transmission that occurs using the Cisco PSTN Minutes.⁷⁴ Whenever the Cisco PSTN Minutes are used in conjunction with the Desktop Application, the features described above process and make available information from and about all audio inputs, including the Cisco PSTN Minutes, as part of the Desktop Application information service. In short, the online collaboration service incorporates the data stream from the Cisco PSTN Minutes so that the pathway associated with the Cisco PSTN Minutes is not a mere transparent transmission, but instead is processed to further enhance the capabilities of the online collaboration service. These capabilities are necessary to a meaningful (seamless and otherwise useful) collaboration experience.⁷⁵ We find that the Cisco PSTN Minutes when used with the Desktop

⁶⁶ *Id.* at 10735, para. 12.

⁶⁷ *Id.* at 10735, para. 13.

⁶⁸ *Id.* at 10735, para. 13, nn.37 & 38.

⁶⁹ *Petitions for Reconsideration and Clarification of the InterCall Order by Global Conference Partners, A+ Conference Ltd., Free Conferencing Corporation, and The Conference Group*, WC Docket No. 06-122, Order on Reconsideration, 27 FCC Rcd 898 (2012) (*InterCall Recon Order*).

⁷⁰ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, para. 39.

⁷¹ It is undisputed in the record that that the Desktop Application is an information service.

⁷² Cisco Jan. 30 *Ex Parte* Letter at 1.

⁷³ Cisco Dec. 13 *Ex Parte* Letter at 9.

⁷⁴ See Request for Review at 4; Cisco Dec. 13 *Ex Parte* Letter at 13 (host can mute microphones of individual participants or all participants at once, among other functions).

⁷⁵ Letter from Brita Strandberg, Counsel to Cisco WebEx LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 at 2 (filed Sept. 13, 2016) (Cisco Sept. 13, 2016 *Ex Parte* Letter).

Application are “intertwined so thoroughly” as to produce a single, integrated information service.

22. We also find that when the Desktop Application is used in conjunction with the Cisco PSTN Minutes, that service is viewed as a single, integrated service offering from the end user’s perspective. As part of our analysis, we analyze the end user’s perspective in terms of what is “offered” to the customer—here, end users of WebEx—which turns on the nature of the functions the end user is offered.⁷⁶ In *Brand X*, the Supreme Court explained that it is “common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.”⁷⁷ Based on the record, Cisco marketed the WebEx service, including the ability to use Cisco-provided toll or toll-free (or call back) service with the Desktop Application, as a single, integrated collaboration service, rather than a bundle of information processing and telecommunications features.⁷⁸ Cisco describes the WebEx service as offering its potential customers “a single, integrated service, not a group of features.”⁷⁹ These descriptions appear to be borne out in how customers likely would perceive the operation of the service. Buying the Cisco PSTN Minutes allows Cisco’s customers to provide collaboration session participants with a PSTN-based audio option that is fully integrated into the Desktop Application, which allows all participants using the Desktop Application to interact with each other in a similar way regardless of what audio option a particular participant is using. For example, participants can see who joined the meeting, whose phone is muted, the audio option each participant used to join the meeting, which participants are sharing video and which are actively speaking.⁸⁰ Similarly, the host can mute, unmute, eject participants, grant and remove access to chat and sharing features, shift the focus of the video option, and transfer host status to another participant.⁸¹ Based upon all these factors, we find that on balance, the Cisco PSTN Minutes are part of the WebEx “offering,” and not a standalone service bundled with Desktop Application.

23. We agree with Cisco that the classification decision turns on the capabilities a provider offers and customers’ perception of those capabilities and that focusing on what the customer can do with the service after buying the service (e.g. substitute another audio solution for the Cisco PSTN Minutes) is not determinative in this case.⁸² Therefore, we find persuasive Cisco’s argument that the flexibility to

⁷⁶ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822-23, para. 38.

⁷⁷ *Brand X*, 545 U.S. at 990.

⁷⁸ Request for Review at 3, citing Exh. E: Letter from Brita Strandberg, Counsel to Cisco WebEx LLC, to Brandon Ruffley and Joshua Dadeboe, Senior Internal Auditors, USAC, dated Oct. 24, 2011, Attach. at 2 (Exh. E) (otherwise confidential). See *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, 20 FCC Rcd 4826, 4830, para. 15 (2005) (*2005 Prepaid Calling Card Order*) (finding that prepaid calling card that automatically plays an advertisement during call set up is not an enhanced service, in part, because the packaging materials do not mention the use of the card as a device for listening to advertisements); *2006 Prepaid Calling Card Order*, 21 FCC Rcd at 7294, para. 13 (finding that menu-driven prepaid calling cards that allow the user the option of accessing information about the retailer, sports, weather, or restaurant or entertainment information is not an enhanced service, in part, because the cards are marketed (including packaging materials, in-store signage, and point-of-purchase displays) as a means to make telephone calls).

⁷⁹ Request for Review at 2, 16 (emphasis original). For example, Cisco’s sales team’s brochures and presentations use phrases such as “Start to finish – a fully integrated experience,” “Run online meetings with integrated audio,” “[D]o almost anything with WebEx that you can do in person, minus the travel time,” and “Use integrated voice conferencing, high-definition video, and file, application, and desktop sharing to create more dynamic, effective, and productive meetings, even for mobile device users.” Request for Review at 3, citing Exh. E, Attach. at 2.

⁸⁰ Cisco Dec. 13 *Ex Parte* Letter at 9.

⁸¹ *Id.* at 13.

⁸² Request for Review at 13-14. Although the post-purchase behavior of consumers may be relevant to elucidating the end user’s perspective of what is “offered,” here the record does not support a finding that consumers, through their post-purchase behavior, typically view the Cisco PSTN Minutes as a discrete offering. See, e.g., *supra* para. 22 (discussing how the operation of the service supports the view that customers are likely to perceive it as an

(continued...)

substitute audio providers and forego the integration of the Cisco PSTN Minutes with the Desktop Application does not change the fact that Cisco offers all the capabilities a customer needs to engage in online collaboration in a single, seamless service.⁸³ The Commission, in the *Computer II Final Decision*, also looked to the nature of the enhanced services and their markets when it chose not to regulate enhanced services that contain a transmission component.⁸⁴ It concluded that the fact that an enhanced service may do some of the things that regulated services can do did not require that it be classified as a telecommunications service, because there was also a substantial processing component to the service.⁸⁵ On this point, the fact that Cisco offers its customers flexibility in choosing between various options for the audio component of its service should not necessarily require a finding that the audio component is not integrated into the information service. When used with the Desktop Application there is a substantial processing component that transforms the Minutes into part of an information service by incorporating the data stream from the audio component as noted above.⁸⁶

24. We also conclude that Cisco's WebEx service is distinguishable from the service at issue in the *Prepaid Calling Card Order*,⁸⁷ which USAC relied upon for its finding that the Cisco PSTN Minutes are telecommunications services.⁸⁸ In the *Prepaid Calling Card Order*, the Commission examined a menu-driven prepaid calling card product that provided users with toll-free access to a menu of options including the ability to make a telephone call, or to access information such as sports, weather, restaurant, or entertainment information.⁸⁹ The Commission found that the services in the *Prepaid Calling Card Order* were bundled telecommunications and information services and there "simply [was] no functional integration between the information service and the telephone capability,"⁹⁰ because the telecommunications and information services were not engaged or used simultaneously, and the calling cards were marketed to consumers as vehicle for making traditional telephone calls.⁹¹ The Commission noted that the customer may use only one capability at a time, and the use of the telephone calling capability was completely independent of the other capabilities.⁹² Unlike the services in the *Prepaid Calling Card Order* that were only minimally linked because they were not engaged or used simultaneously, the Desktop Application converts information from the data stream of the Cisco-provided audio component into a graphical representation of who is present and who is speaking as well as

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integrated service); *infra* para. 24 (discussing how not all capabilities are available when customers use a substitute audio solution).

⁸³ Request for Review at 10-11.

⁸⁴ *Computer II Final Decision*, 77 FCC2d at 435, para. 132.

⁸⁵ *Id.*

⁸⁶ Cisco Sept. 13, 2016 *Ex Parte* Letter at 2 ("in the event that a user joins by phone only, WebEx incorporates information from that participant into the collaboration session where it becomes part of the visual display showing meeting attendees, who is speaking, and other meeting data.").

⁸⁷ Request for Review at 15-16 (describing the services in the *2006 Prepaid Calling Card Order* as an "ill-fitting marriage of unrelated products [bundled] to gain regulatory advantage" and distinguishing that bundle of services from the integration of the Cisco PSTN Minutes and Desktop Application). See Audit Report at 16; InterCall Comments at 5-6.

⁸⁸ Audit Report at 16.

⁸⁹ *2006 Prepaid Calling Card Order*, 21 FCC Rcd at 7294, para. 11.

⁹⁰ *Id.* at 7295, para. 15.

⁹¹ *Id.* at 7294, para. 13 (stating that "there is no doubt that these cards are *marketed* to consumers as a vehicle for making traditional telephone calls," and discussing AT&T's marketing materials) (emphasis added).

⁹² *Id.* at 7295-96, para. 15.

detecting and highlighting the video stream of who is speaking.⁹³ The Desktop Application integrates the data from the audio stream of the Cisco PSTN Minutes, and both are used simultaneously so that participants receive real time information about the other participants on the collaboration.⁹⁴ According to Cisco, the only way to receive this fully integrated functionality is to buy and use the Desktop Application with the Cisco PSTN Minutes, rather than some other audio option.⁹⁵ Although it is possible to use the Cisco PSTN Minutes without the collaboration service, we do not believe that this mere possibility diminishes the functional integration when the Desktop Application and the Cisco PSTN Minutes are used together. Unlike the services in the *Prepaid Calling Card Order* which were technically incapable of being used simultaneously, here the services are capable of – and are – used together and exhibit functional integration when they are so used. Furthermore, in contrast to broadband Internet access services as discussed recently in the *Open Internet Order*, the information service here, the Desktop Application, does not ‘ride atop’ the Cisco PSTN Minutes.⁹⁶ Rather, the Minutes are integrated into the Desktop Application in a way that provides WebEx users with functionality that is not available to users who opt to use an audio solution other than the Cisco PSTN Minutes.

25. One commenter, InterCall, argues that Cisco’s audio component is not sufficiently integrated to be classified as an information service, relying on the *InterCall* and *InterCall Reconsideration Orders*.⁹⁷ These orders are factually distinguishable. In the *InterCall Order*, the Commission found that standalone audio bridging providers had an obligation to directly contribute to the USF.⁹⁸ The service at issue in that order was traditional teleconferencing where participants call into a conferencing bridge and can speak amongst themselves but without an information processing capability such as the Desktop Application component of the WebEx service. The Commission found that the additional features at issue there were either adjunct-to-basic (e.g., validation function, collection of billing and participant information), or were a bundle of separate capabilities (e.g., record, delete, play back, mute/unmute, operator access), neither of which altered the fundamental character of the telecommunications offering.⁹⁹ Here, the question is whether the Cisco PSTN minutes are integrated into the Desktop Application. As explained above, the aspects of the Desktop Application that integrate the Cisco PSTN Minutes are features native to the Desktop Application, rather than the Cisco PSTN Minutes, and a participant utilizing the Cisco PSTN Minutes over a standard telephone without the Desktop Application cannot, for example, mute certain participants or see visual representations of other

⁹³ *Id.* at 7294, para. 13; Cisco Jan. 30 *Ex Parte* Letter at 1-2; Cisco Mar. 26 *Ex Parte* Letter at 2.

⁹⁴ Cisco Dec. 13 *Ex Parte* Letter at 9-11.

⁹⁵ Cisco Mar. 26 *Ex Parte* Letter at 2 (“While WebEx enables third-party and partner audio, neither of these audio options offers customers the same level of integration as WebEx audio”).

⁹⁶ The Commission explained that the transmission element of broadband Internet access was not inextricably intertwined with the information service because the transmission component could be separated out and had been, in certain circumstances, separated out, and that the “[information] services ride atop [the transmission] service.” *Open Internet Order*, 30 FCC Rcd at 5774, para. 381.

⁹⁷ InterCall Comments, WC Docket No. 06-122, at 13-14 (filed May 15, 2013) (arguing that Cisco’s audio component is not sufficiently integrated to be classified as an information service; but in any event, that its own audio component used with a resold WebEx service should be treated similarly to Cisco’s audio component). Cisco explains that resale partners that resell the Desktop Application with non-Cisco-provided conferencing solutions have a lesser degree of integration, the extent to which varies by reseller. Cisco Mar. 26 *Ex Parte* Letter at 2. Because our decision here turns on the factual particulars of how the service works and how it is provided by Cisco, we do not address in this order whether a third party audio feature should be deemed to be functionally integrated with a resold WebEx service. See Cisco Sept. 23 *Ex Parte* Letter at 3. If InterCall believes it has a case for waiver or clarification given the analysis in this order, it may file a request so that we may develop a robust record on the issues presented for purposes of evaluating the merits of the request.

⁹⁸ *InterCall Order*, 23 FCC Rcd at 10734, para. 7.

⁹⁹ *Id.* at 10734-35, paras. 11-13. See *supra* para. 18.

participants.¹⁰⁰ Further, the record reveals that the PSTN Minutes are functionally integrated with capabilities such as those that provide presence or other information about participants, which go beyond facilitating the transmission of the PSTN Minutes and thus fall outside the scope of adjunct-to-basic and the telecommunications systems management exception.¹⁰¹ Because this results in a functionally integrated information service, the inclusion of other functions would not convert what otherwise is an information service into a telecommunications service in any case.¹⁰²

26. In the *InterCall Reconsideration Order*, Global Conference Partners (GCP), the petitioner, was primarily focused on obtaining clarification regarding the long distance transport and audio bridge components of InterCall's service, mentioning whiteboarding and other computer capabilities only in passing.¹⁰³ Because the Commission was not provided with details regarding how the computer capabilities interacted with the telecommunications portion of the service, it was unable to perform a fact specific analysis of, for example, whether the audio stream was functionally integrated as we have done with Cisco's WebEx service here. Furthermore, the petitioner specifically stated that the "telecommunications" component of the InterCall service was "*bundled*" long distance service.¹⁰⁴ Given this record, the Commission ruled that it could not "reasonably determine" that the computer capabilities, "as described by GCP," were "sufficiently integrated" with the conferencing service.¹⁰⁵

27. Finally, we conclude that the pricing of the Cisco PSTN Minutes is not dispositive for purposes of this appeal. On the one hand, Cisco argues that because its per minute price for Cisco PSTN Minutes was substantially more than the average U.S. price for toll-free audio conferencing, it "confirms that WebEx 'alter[s] the fundamental character' of the service . . . and thereby qualifies as an integrated information service."¹⁰⁶ On the other hand, although conceding that billing practices are not determinative, USAC found support for its position that the Cisco PSTN Minutes and the Desktop

¹⁰⁰ See *InterCall Order*, 23 FCC Rcd, at 10735, para. 13 (conference call may be conducted "with or without accessing [such features as muting, recording, erasing, and accessing operator services]").

¹⁰¹ See, e.g., *Open Internet Order*, 30 FCC Rcd at 5768, para. 368 (distinguishing storage and retrieval of information to identify a caller's physical location from functions falling within the telecommunications systems management exception to section 3(24) of the Act that, by contrast, "allow[] more efficient use of the telecommunications network by facilitating accurate and efficient routing from the end user to the receiving party"); *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3313-14, para. 11 (2004) (*Pulver.com Order*) (classifying Free World Dialup as an information service, and citing among the computing capabilities it offers the ability for "members to 'acquire' information about other members' online presence at any particular time).

¹⁰² Cf. *Open Internet Order*, 30 FCC Rcd at 5769-70, para. 370 n.1046 (function that is adjunct-to-basic when provided as part of a telecommunications service would not be classified as a telecommunications service when "there would be no telecommunications service to which [the functionality] is adjunct"); *Pulver.com Order*, 19 FCC Rcd at 3314-15, para. 13 n.50 ("in discussing various types of signaling that occurs within a basic service, the Commission noted that certain protocol processing network functions intrinsic therein 'may be properly associated with basic service without changing its nature, or with an enhanced service without changing the classification of the latter as unregulated under Title II of the Act'") (quoting *Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 591, para. 15 (1983)).

¹⁰³ Global Conference Partners Petition for Partial Reconsideration and Clarification of the InterCall Order, CC Docket No. 96-45, at 22 (filed July 30, 2008).

¹⁰⁴ *Id.* at 23 (emphasis added); see *supra* para. 5 (discussing bundling).

¹⁰⁵ *InterCall Recon Order*, 27 FCC Rcd at 904, para. 13.

¹⁰⁶ Cisco Jan. 30 *Ex Parte* Letter at 2 (citing *InterCall Order*); Request for Review at 6.

Application were separate and distinct services based on Cisco's billing practices.¹⁰⁷ There could be a myriad of factors that determine how a service is priced and billed, and what customers are willing to pay.¹⁰⁸ Although customers may be willing to pay more for the fully integrated service, they may also be willing to pay more because they find the Cisco PSTN Minutes more convenient than a third party audio solution, or for some other reason. Furthermore, just as unified pricing in the *Prepaid Calling Card Order* did not signify integration between the telecommunications and information services, disaggregated pricing here does not signify a lack of functional integration.¹⁰⁹ There are various business and administrative reasons that influence how a provider prices its service and bills its customers, and although we believe billing practices may be informative, we are not persuaded on this record that the manner in which Cisco chooses to bill its customers (even if viewed, *arguendo*, as cutting against a finding of functional integration) is sufficient to outweigh the substantial evidence discussed above, which shows that this particular service is functionally integrated from the consumer's perspective. How a provider chooses to price a service may inform a classification decision, but pricing is not determinative in this instance given the other factors discussed above.

IV. ORDERING CLAUSES

28. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, and sections 0.91, 0.291, and 54.722 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 54.722, that the Request for Review filed by Cisco WebEx LLC is hereby GRANTED to the extent described herein and REMANDED to the Universal Service Administrative Company for further action and consideration in accordance with the terms of this Order..

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

FEDERAL COMMUNICATIONS COMMISSION

Matthew S. DelNero
Chief
Wireline Competition Bureau

¹⁰⁷ Audit Report at 28-32. Cisco priced the Cisco PSTN Minutes separately from the Desktop Application, itemized the Cisco PSTN Minute charges separately on the customer's bill, and recorded the revenue separately in its books.

¹⁰⁸ As Cisco itself explains, the Cisco PSTN Minutes were typically "the most expensive [audio option] in large part because ... [Cisco] must lease [the] transmission circuits." Cisco Sept. 23 *Ex Parte* Letter at 2.

¹⁰⁹ 2006 *Prepaid Calling Card Order*, 21 FCC Rcd at 7298, para. 22.