

# USF Tracker - June 28, 2019

Thomas W. Cohen, Henry T. Kelly, Chip Yorkgitis, Michael R. Dover,  
Winafred R. Brantl

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## Kelley Drye Commentary

Much of the activity this month focused on the FCC's controversial proposal to establish an overall cap to the Universal Service Fund. Stakeholders aligned to oppose the proposal, while Commissioner O'Rielly again publicly defended the concept. The comment cycle on the proposal surely will be robust. Meanwhile, this month saw the USF contribution factor hit a new high – and practically no one noticed.

For too long, contributions has been the elephant in the room that everyone ignores. Over the years, the factor has passed several milestones without the backlash one would expect. Indeed, 10 years ago, the Kelley Drye blog noted that people were up in arms about a 3% telecommunications excise tax but there was no outcry over the then-record high 14.1% contribution factor. Starting July 1, however, the factor will be a shocking (to us) 10% higher than that factor – to the latest record-high of 24.4% of assessable revenues. And still we don't hear the outcry.

The issue is not the overall size of the Fund – that's actually down over \$1 billion from 2012 levels. The core problem is that the present contribution base has been eroding since the day the USF was established. Interstate long distance services were the centerpiece of the assessable base back then, but long distance has largely disappeared since 1997, both as a concept and as a revenue source. Over the past 20+ years, new technologies and services have gained favor, and these new services either don't pay anything into the Fund or they pay much less than the services that they replace. Back in 2012 when the USF was at its peak expenditure level, the contribution factor averaged 17%. In 2019, it is averaging over 20% to support a much smaller fund. And the rate fluctuates significantly from quarter to quarter; the factor is up 5.6 percentage points this quarter after dropping 1.2 percentage points the previous quarter. Year over year, the factor is up 6.5 percentage points from one year ago.

Section 254 states that the support mechanism for universal service must be "specific, predictable and sufficient." While the history of the factor might satisfy the specificity element, USF contributions are neither predictable nor sufficient. It's time the FCC did something about that.

### Recent News

- On June 25, Commissioner O'Rielly, architect of the new Universal Service Fund (USF) spending cap proposal, gave remarks at the Hudson Institute that were focused on universal service policy. He expressed his belief that the FCC's primary responsibility is to protect ratepayers' contributions which means eliminating waste, fraud, and abuse and capping spending.
- On June 12, the FCC's Office of Managing Director announced the proposed universal service contribution factor for the third quarter of 2019 will increase from 18.8% to 24.4%. This contribution factor represents a record high.

- In June, the [twenty-first Universal Service Monitoring Report](#) prepared by the Universal Service Joint Board was released. The report shows that over the decade from 2007 to 2017, the total reported telecommunications revenue has decreased by 61% (from \$299,451[1] to \$182,918) while non-telecommunications revenues have more than doubled (from \$131, 615 to \$321,597). In 2017, the total disbursements were approximately \$4.7 billion, \$1.3 billion, \$262 million, and \$2.6 billion for high cost, low income, rural health care and E-rate respectively.
- On May 31, 2019, the FCC released a [notice of proposed rulemaking](#) (NPRM) to consider the adoption of an overall budget cap on the USF, separate from any individual budgets for each of the four USF programs. Comments will be due by July 15, 2019, and the reply comments are due by August 12, 2019.

## Schools and Libraries (E-Rate)

- On May 30, The Wireline Competition Bureau (WCB) issued a Public Notice seeking comment on a Petition for Rulemaking from a group of Texas carriers asking the FCC to amend the rules to prohibit the use of universal service funds for special construction of fiber networks that overbuild existing fiber networks. Network overbuild has been an area of concern for Commissioner O’Rielly. Comments will be due July 1, 2019, and reply comments are due July 16, 2019.
- USAC released FY2019 Wave 9 Funding Commitment Decision Letters on June 20. As of June 21, FY2019 commitments total over \$967 million.

### Lifeline

- On June 27, CTIA along with several public interest groups filed a joint petition to pause implementation of the Lifeline minimum service standards set to take effect in December 2019 until the Commission's study of the Lifeline program marketplace, scheduled for June 2021, is complete. In the petition, the parties ask WCB to pause the effective date of the changes that would 1) significantly increase the minimum broadband data usage allowance from the current 2 GB level; and 2) phase down support for voice services.
- On June 25, USAC launched the Representative Accountability Database (RAD) to allow representatives who perform Lifeline enrollments and other related transactions to register for their Representative ID. In the next phase of RAD deployment scheduled for late July, service provider representatives will give their ID to all the ETCs that they support. ETCs will then link these unique IDs to appropriate NLAD and National Verifier accounts. USAC will then be able to use this ID to track a representative’s transactions in the NLAD and National Verifier. This system is intended to help monitor potentially fraudulent activity.
- On June 25, the National Verifier soft launch began in Arizona, Connecticut, Georgia, Iowa, Kansas, Nebraska, Nevada, New York, Vermont, Virginia, and West Virginia. The National Verifier also fully launched in Indiana, Kentucky, and Michigan on June 11, 2019. With these three states the National Verifier is fully operational in 25 states.

### High Cost/Connect America Fund (CAF)

- On June 5, the WCB released a Public Notice clarifying errors in its earlier Notice related to its offers of alternative connect America model (A-CAM) II support to certain carriers. In 34 instances, the model improperly deemed census blocks ineligible and made it appear that the census blocks were served by an unsubsidized competitor. The date for carriers to elect or reject model-based support is extended to July 17, 2019.
- On June 20, the WCB released a Public Notice seeking comment on a petition from Northeast Iowa Telephone Co. and Western Iowa Telephone Association that seeks clarification or declaratory ruling on the definition of locations under the A-CAM for residences that also serve as businesses. Comments will be due on July 10, 2019, and reply comments are due July 25, 2019.
- On June 7, the WCB issued a Public Notice announcing it was ready to authorize CAF Phase II auction support for an additional set of winning bidders identified in the attachment to that notice.

## Rural Health Care

- In connection with recent FCC rules to carry forward unused funds from past funding years, USAC announced that it projects \$83.22 million in unused funds to be available for use in future funding years beginning in funding year (FY) 2019.
- For its July 11 Open Meeting, the FCC will consider a [NPRM](#) proposing a Connected Care Pilot program that would use USF funds to support health care providers' costs of broadband service to enable low-income patients and veterans to access telehealth services. This proposal follows Commissioner Carr's proposal for a \$100 million pilot program for telehealth applications.

## USF Appeals Tracker

Kelley Drye's Communications group prepares a comprehensive summary of pending appeals and guidance requests before the FCC relating to USF contributions issues. Due to the number of appeals and the FCC's routine disposition of them, appeals relating to the imposition of late filing fees and petitions seeking waivers of the quarterly Form 499 revision deadlines are not included in this summary.

This list covers appeals filed on or after January 1, 2016. Pending appeals filed before January 2016 are not included.

Number of Appeals Pending	New Appeals Filed	Contribution Questions Pending
11	<b><i>Tata Communications.</i></b> <i>Tata requests a waiver of the 12% threshold for calculating the LIRE in light</i>	<ul style="list-style-type: none"> <li>• Private line services (10%) rule</li> <li>• Systems integrator exemption</li> <li>• Use of safe</li> </ul>

*of increases in the USF contribution rate. (filed Mar. 29, 2019).*

*Coverage of USAC's 2009 guidance requests added.*

harbors/traffic studies

- Jurisdiction (international calls)
- Wholesale/resale classification
- Private carriage

### **1. *Tata Communications, Inc.* Primary issues: Limited International Revenue Exemption**

- Petition for Waiver (filed March 29, 2019).
- In its petition, Tata asks to continue contributing to USF solely on the basis of its interstate end-user telecom revenues, thereby excluding international revenues from assessment. Tata's contributions are already based on interstate revenues alone, pursuant to the Limited Interstate Revenue Exemption (LIRE), but it seeks to extend this exemption through a waiver of Commission rules. Tata believes that recent changes to its jurisdictional mix will change in a way that would preclude Tata from the LIRE. Under the LIRE rules, if less than 12% of a carrier's combined interstate and international revenues is derived from interstate traffic, that carrier is exempt from contributing based on international revenues.
- If the company were forced to contribute on the basis of all revenues, claims Tata, it would amount to a "draconian penalty" that exceeds Tata's total interstate telecom revenues. According to Tata, the FCC should waive the rules and extend its exemption because such a dramatic increase in contributions would violate Section 254(d) of the Communications Act and have deleterious effects on the public interest, including undermining competition in the interstate telecommunications marketplace. The Commission has previously encouraged carriers faced with this massive contribution spike to file petitions for waiver—Tata is now taking the Commission up on its offer.

### **2. *Gtek Computers and Wireless, LLC.* Primary issues: Systems integrator exemption.**

- Request for Review and Contingent Request for Waiver (filed Sept. 16, 2016).
- Renewed Request for Review and Contingent Request for Waiver (filed Feb. 22, 2019).
- Gtek seeks to review USAC's denial of its appeal to cancel the sanctions, interest, and penalties imposed for its failure to file a Form 499-A for 2010-2015. Gtek argues that the levying of sanctions was improper and erroneous because Gtek is a systems integrator that derives less than five percent of its revenue from the resale of telecommunications. Thus, Gtek asserts, it is qualified for the systems integrator exemption and is not required to file a Form 499-A. Alternatively, Gtek requests a waiver in light of its reliance on the Form 499-A instructions, the FCC's longstanding systems integrator exemption policy, and the fact that the sanctions would surpass the revenue Gtek derived from providing interconnected VoIP service.
- In 2019, Gtek renewed its request for cancellation of sanctions. Gtek argues that it is a systems integrator that receives less than five percent of its revenue from reselling telecommunications,

and is therefore exempt from filing Forms 499-A according to the form instructions. Gtek contends USAC is trying to limit the systems integrator exemption to a subclass that offers ‘legacy’-type telecommunications—a definition that Gtek contends is unsupported by any prior Commission statements or by the language in Form 499. Gtek thus asks the Commission to rule on its 2016 appeal, reverse the USAC denial, and cancel the sanctions.

**3. *Sprint Spectrum, L.P.* Primary issues: Jurisdictional classifications (prepaid cards), use of safe harbors.**

- Request for Review of a Decision of the Universal Service Administrator (filed December 14, 2018).
- In its request, Sprint asks that the Wireline Competition Bureau reverse USAC’s conclusion that Sprint’s reported allocations for bundles of telecom and non telecom services were unreasonable, and to reverse USAC’s decision to reject Sprint’s traffic studies. In connection with its prepaid card services, Sprint reported USF revenues as a bundled offering, using an allocation method it considered reasonable. USAC had begun an audit in September 2016 of Sprint’s 2016 Form 499-A filing. In the audit, USAC concluded that Sprint did not adequately support its allocation method and instead applied the USF safe harbor of treating 100 percent of the bundled revenues as telecommunications. Additionally, USAC rejected Sprint’s traffic studies to determine the jurisdiction of its prepaid services. Sprint appealed.
- In the request for review, Sprint poses two questions: first, whether USAC erred when, in assessing the allocation of revenue for one prepaid bundled offering, it applied the 100 percent telecommunications safe harbor method due to an alleged failure to retain documentation of the allocation used; and second, whether USAC erred when it retroactively created and enforced new rules regarding the sufficiency of jurisdictional documentation, of which Sprint had no notice. Sprint contends that its allocation method was reasonable, that USAC did not have a valid basis to reject the method, and that USAC applied the safe harbor method allegedly as a penalty for the failure to retain documentation of the allocation. Sprint further contends that USAC acted unlawfully in retroactively concluding that Sprint’s traffic studies (which were filed regularly) were insufficient to justify the carrier’s reported revenue.

**4. *SLIC Network Solutions, Inc.* Primary issues: Form 499-A deadline**

- Request for Review and Consolidated Action (filed April 6, 2018).
- SLIC requests that the FCC review and reverse the decision by USAC to reject SLIC’s Forms 499-A submitted for 2014, 2015, and 2016, and that the Commission vacate the requirement that any revised Form 499-A that would yield decreased contributions be submitted by March 31 of year after the original filing due date (i.e., the one-year downward revision deadline). As a result of an error, SLIC’s non-assessable revenues were incorrectly reported to USAC as assessable revenues for the years 2008 through 2016. When SLIC tried to submit revised Forms 499-A and recover its overpayments, USAC rejected the filings as untimely, citing the *One-Year Deadline Order*. Because that order is still subject to petition for reconsideration and applications for review, SLIC has submitted this request for review.

**5. *Altice USA, Inc.* Primary issues: Jurisdictional classifications (private line)**

- Request for Review of Decision of the Universal Service Administrator (filed February 2, 2018).
- Altice seeks reversal of USAC's reclassification of revenues from certain geographically intrastate private line services as interstate in an audit of Lightpath NJ, an Altice subsidiary. In the January 2017 audit, USAC interpreted the FCC's "Ten Percent Rule" to establish that geographically intrastate private lines are presumptively interstate, and to require carriers and their customers to furnish evidence establishing the appropriate jurisdictional allocation for private line revenue. Altice contends that this application of the Rule was incorrect and violated the prohibition against USAC's resolving ambiguities in the Commission's rules. USAC denied Altice's appeal of the audit, and, in doing so, retroactively relied on the Wireline Competition Bureau's *Private Line Order*, which offered a substantively new interpretation of the Rule for determining the jurisdictional nature of revenues associated with private line service, and created new burdens of proof and evidentiary standards for carriers. Thus, Altice requests that the Commission direct USAC to 1) reverse its audit finding and 2) not retroactively apply the *Private Line Order*.

**6. XO Communications Services, LLC. Primary issues: Jurisdictional classifications (private line)**

- Application for Review of Decision of the Wireline Competition Bureau (filed May 1, 2017).
- XO Communications Services (XOCS) asks that the Commission review the Wireline Competition Bureau's order denying several requests for review, including one by XOCS. In an audit, USAC rejected XOCS's intrastate classification of physical intrastate circuits because XOCS could not produce evidence that the traffic was not interstate. USAC operated on the presumption that an intrastate circuit was nonetheless interstate unless XOCS could prove that the circuit's traffic was no more than 10% interstate. In response, XOCS filed a request for review, which the Bureau denied in the 2017 *Private Line Order*. XOCS seeks review of the Bureau's decision because, XOCS argues, it is in conflict with case precedent and Commission policy. XOCS contends that the Bureau misapplied the Commission decisions establishing the Ten Percent Rule and also that the Bureau, in effect, created new standards that could not be applied retroactively.

**7. TDS Metrocom, LLC. Primary issues: Jurisdictional classifications (private line)**

- Application for Review or Clarification, or in the Alternative, Request for Waiver (filed May 1, 2017).
- TDS filed an application for review of the Wireline Competition Bureau's 2017 *Private Line Order* regarding application of the Ten Percent Rule for allocating jurisdictionally mixed intrastate private lines. In its application, TDS contests USAC audit findings related to the amount of interstate traffic carried by private lines. In 2012 USAC notified TDS of its intention to conduct an audit of the company's Form 2011 Form 499-A filing. In response, TDS provided a list of private lines documenting the end points, showing that all but one had intrastate end points. TDS also furnished end user certifications collected during and after the audit period from certain 2010 private line customers. However, because TDS did not demonstrate that 10% or less of the traffic carried over its remaining end user private lines was interstate, USAC required TDS to make USF contributions on all remaining revenue reported in line 406 of Form 499-A. TDS filed a request for review of the audit report, requesting that the Commission reverse

USAC's finding, which the Wireline Competition Bureau denied four years later. The Bureau instead remanded the audit to USAC to consider additional documentation. TDS Metrocom thus filed an application for review of the Bureau's order, arguing that it violates FCC precedent, is based on mistakes in fact, and violates the APA.

**8. *Eureka Broadband Corporation*. Primary issues: Reseller revenues**

- Application for Review (filed Feb. 10, 2017).
- Eureka submits its application for review of the Commission's decision to remand to USAC Eureka's 2007 petition for reconsideration. In 2003, Eureka responded to a USAC investigation concerning missing contributions owed by Eureka, for which Eureka had been billed for USF contributions by its underlying carrier, MCI, and which MCI was supposed to remit to USAC. During its 2003 investigation, Eureka contends, USAC did not try to confirm if MCI had remitted these charges to the Fund. Instead, in 2004, USAC chose to assess upon Eureka those same charges. Thus, in 2007, Eureka filed a petition for review, which the Wireline Competition Bureau denied. Eureka shortly thereafter filed its petition for reconsideration.
- In response, after nine years, the Bureau remanded the issue to USAC for further consideration. Therefore, in this application, Eureka contends that the Bureau violated the APA and the Commission's Rules by refusing to promptly act on Eureka's earlier petitions; rendering an arbitrary and capricious decision in conflict with the directive that USF contributions are due only once with respect to any revenue stream; announcing a drastic policy change in its memorandum opinion and order, and applying that policy retroactively against Eureka; and reaching an erroneous finding as to whether the Fund had already been fully compensated USF contributions on the revenue in question.

**9. *Locus Telecommunications, LLC*. Primary issues: Private carrier revenues**

- Petition for Declaratory Rulings Relative to the Treatment of Private Carriage Revenues (filed Nov. 22, 2016).
- Locus seeks declaratory rulings to clarify carriers' rights relative to the treatment of private carriage revenues under federal law. Specifically, Locus requests rulings that revenues derived from private carriage offerings are exempted from non-USF Title II fees and North American Numbering Plan administration fees; that USAC's policy of sharing Form 499-A revenue data with Title II Program administrators is unlawful; and that carriers must be afforded the opportunity for redress—both retroactively and prospectively—for these Title II fees calculated on private carriage revenues.

**10. *Locus Telecommunications, LLC*. Primary issues: Private carrier revenues**

- Request for Review of Decisions of the Title II Program Administrators (filed Nov. 2, 2016).
- Locus seeks review of the decisions of Rolka Loube (TRS Fund Administrator) and Neustar (administrator of the LNP funding mechanism) for assessing revenues from both common carriage offerings and private carriage offerings. Locus argues that the Form 499-A is deficient for failing to provide carriers a means to segregate private carriage revenues from common carriage revenues. Locus therefore asks that the Commission instruct the Title II Program

Administrators to recognize its private carrier status and to reissue invoices as requested; direct USAC to withhold private carriage revenues from data shared with the Program Administrators; order USAC to discontinue its policy of relying on the “primary” service identified in Line 805 of Form 499-A; and provide relief as appropriate.

**11. 2009 USAC Guidance request. Primary issues: Prepaid calling cards, Frame relay/ATM, VPN and Dedicated IP services**

- Letter from Richard A. Beldon, USAC, to Julie Veatch, Wireline Competition Bureau, FCC, August 19, 2009 (received August 24, 2009).
- On August 19, 2009, USAC submitted a list of outstanding policy guidance requests which it had presented to the FCC. Of the 6 individual items on that list, 3 were requests for guidance on USF contribution matters. Specifically, these concerned reporting on prepaid card revenue; the classification of Asynchronous Transfer Mode (ATM) and Frame Relay revenue; and the classification of VPN and Dedicated Internet Protocol revenue.
- USAC requests clarification regarding the revenues to be reported by prepaid calling card providers. Prepaid cards present an issue for accurate assessment of revenue because they may be sold through a third-party distributor, sold without a face value, or sold at a discount. Further, the date on which a prepaid calling card is sold to the end-user may be ambiguous (because of sales through distributors or wholesalers), so it is unclear when a carrier should report the associated revenue. Because of the uncertainty surrounding these cards, USAC asked the FCC to identify the amount of revenue that should be reported and the date when such revenues should be counted.
- USAC also seeks advice relating to revenue from Asynchronous Transfer Mode (ATM) and Frame Relay products. In its audits of Forms 499-A, USAC found several instances where this ATM revenue was classified as “non-telecommunications” because carriers considered it derived from an information service. USAC seeks greater clarity regarding the proper classification of ATM and Frame Relay revenue.
- Finally, USAC seeks guidance on the revenue received from VPN and Dedicated Internet Protocol services. This revenue was related to data transport using IP, which, according to USAC, is similar to Private Line/Frame Relay. That revenue is supposed to be reported as telecommunications-derived, but carriers had classified IP revenues as “non-telecommunications.” USAC has requested guidance on this issue.