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November 13, 2013

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: *Ex Parte* Letter of Masergy Communications Inc.  
Request for Review by IVANS, Inc. of a Decision of the Universal Service  
Administrator; Petition for Declaratory Ruling on the Assessability of  
Certain Information Services  
WC Docket No. 06-122**

**ATTENTION: Julie Veach**

Dear Ms. Dortch:

Masergy Communications Inc. (“Masergy”), by undersigned counsel, submits this *ex parte* letter to urge the Commission to act on the IVANS, Inc. (“IVANS”) request for a review and a declaratory ruling concerning the regulatory treatment of Multi-Protocol Label Switching (“MPLS”) service. Masergy agrees with those commenters in this proceeding that believe that expeditious regulatory clarity is necessary in order for service providers to account for MPLS revenues in a fair and efficient manner in regulatory filings and other matters.<sup>1</sup>

The current industry confusion over the proper regulatory classification of MPLS has continued since 2009. In 2009, the Commission modified the 499-A instructions to include MPLS within the list of private line telecommunications services subject to USF contributions. Interested parties at the time raised concerns with the Wireline Competition Bureau that the change in the instructions constituted a substantive change in the underlying law regarding the regulatory treatment of MPLS under existing Commission precedent. Masergy filed a Petition for Clarification or Application for Review requesting clarification of the amendment to the 2009 499-A Instructions, which the Commission opened for comment.<sup>2</sup> After this filing, but

<sup>1</sup> See, e.g., Comments of Sprint Nextel Corporation, at 1 (Sept. 16, 2013); Comments of U.S. TelePacific Corp. d/b/a TelePacific Communications, at 2 (Sept. 16, 2013).

<sup>2</sup> See Comment Sought on Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review, Public Notice, DA 09-1021 (May 7, 2009).

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before comments were requested on Masergy's petition, a letter was issued from Jennifer K. McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, to Michelle Tilton, Director of Financial Operations, Universal Service Administrative Company, noting the inclusion of MPLS as an example of interstate telecommunications in the 2009 Form 499-A Instructions and directing filers to "consult the Commission's rules and orders to determine whether they must contribute" to USF.<sup>3</sup> The letter further noted that the change in instructions should be read in context of this precedent rather than modifying it. In other words, the letter merely decreed that the change in instructions should not be deemed to be substantive, as such a change would have been completed without the required opportunity for notice and comment. No FCC release providing guidance on the regulatory treatment of MPLS service has occurred since this 2009 letter.

Separately in 2009, the Commission sought comment on a request from the Universal Service Administrative Company ("USAC") seeking guidance on Universal Service Fund ("USF") contribution issues arising during USAC audits of carrier-filed FCC Forms 499, and in particular, the appropriate treatment of Virtual Private Networks ("VPNs"), ATM, Frame Relay, and Dedicated IP transmission.<sup>4</sup> In 2012 the Commission stated that it had still not "formally" addressed enterprise communications services such as Dedicated IP, VPNs, WANs, and other network services that are implemented with various protocols such as Frame Relay/ATM, MPLS and PBB for purposes of determining USF contribution obligations.<sup>5</sup>

The issue of how MPLS and similar services should be accounted for has thus continued for many years. The FCC's clarifying letter on this issue did not eliminate the ambiguity created by the addition of MPLS to the 499-A Instructions; if anything, it added to the ambiguity. While the clarifying letter correctly stated that, as a matter of law, the Bureau could not make any substantive changes to Commission precedent through revisions to the Instructions to the 499-A, that in turn means that the revised Instructions and the letter did not resolve the long-standing ambiguity with respect to how the relevant services should be treated. While the letter may have asserted that the Bureau was not changing regulations, it did not provide any guidance on how

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<sup>3</sup> See Letter from Jennifer K. McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, to Michelle Tilton, Director of Financial Operations, Universal Service Administrative Company, DA 09-748, at 1 (rel. Apr. 1, 2009).

<sup>4</sup> See *Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administration Company*, Public Notice, 24 FCC Rcd 12093, WC Docket Nos. 05-337 and 06-122 and CC Docket No. 96-45, DA 09-2117 (rel. Sept. 28, 2009) ("2009 Public Notice").

<sup>5</sup> *Universal Service Contribution Methodology*, WC Docket No 06-122, Further Notice of Proposed Rulemaking, FCC 12-46, 27 FCC Rcd 5357, 5382 (2012).

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MPLS should be viewed under existing precedent and how it should be classified and did nothing to reduce industry confusion. The IVANS Petition is yet another indication that the Commission has not adequately responded to USAC's request for clarity, which in turn has led to ongoing disputes between USAC and contributors, and has created significant uncertainty in the telecommunications industry. Some providers are treating these revenues as information services, others as telecommunications services, and still others are splitting the service between both categories. Clearly, this case-by-case, audit-by-audit<sup>6</sup> approach is not competitively neutral,<sup>7</sup> and the Commission therefore needs to take steps to formally address these issues clearly and quickly.

As to actual classification of these services, Masergy continues to believe that there is clear precedent that the MPLS port functions are information services.<sup>8</sup> These functions offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" without "any capability for the management, control or operation of a telecommunications system."<sup>9</sup> Thus, it is clear under very long-standing precedent that at least the port portion of MPLS is information service. Similarly, there are strong arguments that because the MPLS's port functions rely on the use of the intertwined intermediate transmission between ports and cannot function separately and may offer the functionalities necessary to deem the service as broadband. As such, MPLS could very well meet the "inextricably intertwines" standard that the information functions contained in the port with the transmission functions of an MPLS network.<sup>10</sup> To the

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<sup>6</sup> See, e.g., *XO Commc'n Servs. Inc., Request for Review of a Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed Dec. 29, 2010).

<sup>7</sup> See 47 U.S.C. § 254(b) and (d).

<sup>8</sup> "MPLS" is actually a unitary service with multiple components. MPLS includes both software port functions and transmission functions. The software port functions analyze, monitor, track and process traffic sent by the consumer and manipulate the traffic flow and storage based on the latency and quality of service needs of the data in question. In addition, MPLS provides transmission functions that can include ATM Frame Relay, Ethernet, public Internet or several other non-TDM transmission methods. MPLS also offers access to information using transmission via the public Internet, including the use of DNS naming and resolution and SMTP-based electronic mail. Many varieties of VPN services offer these features, meaning that a disparate treatment of MPLS from other VPN services creates a disparity and competitive disadvantage for carriers offering MPLS, as opposed to other VPN services. See Comments of Masergy, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45, at 2-3 (Oct. 28, 2009).

<sup>9</sup> 47 U.S.C. § 153(43).

<sup>10</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33,

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extent that transmission functions are intertwined with Internet access functions and information services, such as the port functions, the FCC has already determined that such services should be treated as information services.<sup>11</sup> An analogous analysis can be undertaken with many VPN services. While there may be some variance from provider to provider, the lack of clarity from the Commission on the application of this precedent to MPLS remains a significant issue.

Ever since the Form 499-A instructions were changed in 2009, there has been significant industry confusion over the appropriate regulatory treatment of MPLS (and other similar services such as VPN). And while there have been numerous requests for the Commission to provide some certainty on these services, to date, the FCC has offered no formal guidance, which has led to significant ongoing confusion on the proper classification of the services, and likely wildly inconsistent analyses on the proper treatment of the service from carrier to carrier. Such lack of clarity is harmful to the industry. Masergy urges the Commission to provide the industry formal guidance on how these services should be treated, and continues to believe that MPLS and similar services (or at a minimum, a portion of those services) should be properly classified as information services.

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*Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 USC §160(c) with Regard to Broadband Services Provided Via Fiber to the Premises*; *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242, *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1485, at ¶¶9-15.

<sup>11</sup> *Id.*

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Please do not hesitate to contact the undersigned should you have any questions concerning this filing.

Respectfully submitted,

*/s/ Douglas D. Orvis*

Douglas D. Orvis

*Counsel for Masergy Communications Inc.*