

KELLEY

DRYE

FEDERAL UNIVERSAL SERVICE UPDATE

UNDERSTANDING THE 2010 499A, USF COMPLIANCE, AUDITS AND ENFORCEMENT

KELLEY DRYE WEBINAR

MARCH 9, 2010

Steve Augustino
Washington Harbour
3050 K Street NW
Suite 400
Washington, DC 20007
tel: 202.342.8612
fax: 202.342.8451

John Heitmann
Washington Harbour
3050 K Street NW
Suite 400
Washington, DC 20007
tel: 202.342.8544
fax: 202.342.8451

Federal Universal Service Update

Understanding the 2010 499A, USF Compliance,
Audits and Enforcement

Steve Augustino and John Heitmann

March 9, 2010

Agenda

- 2010 499-A
- USF Contributor Audits
- USF Appeals

2010 499-A

Relevant Law

- 54.702(c): “The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress”
- *1999 499-A Order*: Common Carrier Bureau (now WCB) delegated authority only over “the administrative aspects of the reporting requirements, not to the substance of the underlying programs”
- *Global Crossing Order*: 499-A instructions are “guidance from the Commission”

2010 Form – Audio Bridging

- “Stand Alone Audio Bridging Provider” added as a filing entity
 - Check-box on Line 105
- Confirms that *non-common carrier* providers do not pay TRS, etc.
- **But** footnote 47: audio bridging revenues are “telecommunications service revenues”

5

KELLEY
DRYE

2010 Form – Other Changes

- VoIP and CMRS traffic studies
 - Filers *must* submit the study to USAC *and* the FCC
- Registration information
 - Must be updated within one week

6

KELLEY
DRYE

2010 Form – Reminders

- 2010 Form due by April 1
- True-up will be processed in 3Q 2010
 - Credits/shortfalls shown on July, August, Sept. invoices
- Revisions to 2009 499-A must be filed by March 31. No downward revisions permitted after this date

USF Audits

Audit – Process (cont'd)

- Draft “Detailed Audit Findings” (DAFs)
- Exit Conference (company’s offices)
- Contributor written response to DAFs
 - Usually 20 days, but negotiable
- USAC IAD reply, Financial Operations review
- USAC Board Approval
 - At quarterly meeting
- FCC appeal

11

KELLEY
DRYE

Common Audit Issues

- Wholesale revenues
 - Were resellers properly validated?
- Private line revenues
 - Jurisdictionalized using 10% rule
- Non-telecommunications services
 - Bundles
 - Broadband Internet access
- SLC revenues
 - To be reported as 100% interstate

12

KELLEY
DRYE

Common Audit Issues (cont'd)

- USF recovery surcharge
 - This *is* assessed USF
- Data sources
 - Estimates must be current
 - Estimates should not be used if actual data are available
- Prepaid cards
 - Face value of cards
 - LIRE exemption
 - Which entity is the service provider?

13

KELLEY
DRYE

Tips

- Before the audit
 - Document the process for completing the Form 499-A
 - Retain all work papers and studies
 - Review telecom/non-telecom and jurisdictional classifications carefully
 - Maintain good records on resellers
 - Depart from instructions only after careful consideration

14

KELLEY
DRYE

Tips

- During the audit
 - Get regulatory/legal involved early
 - Monitor the silence/follow up stage carefully
 - Document requests and keep a log of information provided
 - Involve product managers/sales in the explanations of services
 - Expect to appeal

15

KELLEY
DRYE

KELLEY
DRYE

USF Appeals

Pending appeals

- TelePacific
- Madison River
- Grande
- Global Crossing
- Masergy
- Level 3 and Ascent Media

TelePacific

- Procedural issues
 - USAC authority
- Key issue: CLEC wireline broadband Internet access
 - USAC interpretation of *Wireline Broadband Order*
 - Use of special access T1s
 - Competitive neutrality
 - The “second question”
 - Facilities-based vs. non-facilities-based
 - CLEC vs. ISP
 - Valid reseller certificate?
 - If input is assessable, direct or indirect contribution?
 - UNE inputs different
 - Retroactive exposure (*InterCall*)
 - Potential liability

Madison River

- Key issues:
 - CLEC wireline broadband Internet access (pre-*Wireline Broadband Order*)
 - CLEC use of UNEs for DSL
 - Facilities-based vs. non-facilities-based, under *Computer II* rules
 - Transmission component unbundling requirement?
 - Intrastate T1s
 - Service ordered out of intrastate tariff connecting two points in the same state
 - Reliance on customer representation vs. documentation to prove less than 10% interstate use

19

KELLEY
DRYE

Grande

- Key issues:
 - CLEC customer / subscriber line charges
 - Always interstate?
 - CLEC wireline broadband Internet access
 - Pre-August 2006 / Pre-*Wireline Broadband Order* DSL services
 - USAC classification of entire service as interstate telecommunications services
 - Revenue from reseller customers
 - “Reasonable expectation” standard
 - Double recovery

20

KELLEY
DRYE

Audit Overview

- IAD Contributor Audits
- IAD/FCC IG “Improper Payment” Audits
- Government Auditing Standards issued by Comptroller General of U.S. apply
- Purpose
 - *Verify the accuracy of revenues reported*
 - *Analyze the process for completing the 499-A*

9

KELLEY
DRYE

Audit -- Process

- USAC audit letter
 - Sent to 499-A preparer
- Filer completes various exhibits and templates requested (30 days)
- Entrance Conference (company’s offices)
- On-site visits
 - Usually 3-5 days
- Silence/Follow up requests
 - Periodic requests, usually sent informally

10

KELLEY
DRYE

Global Crossing

- Key issues:
 - Revenue from reseller customers
 - Evidence regarding reseller status: 2005 vs. 2007 instructions
 - Reasonable expectations vs. certificate and website verification
 - APA violation
 - Shifting contribution requirement from reseller to wholesaler
 - Strict liability standard
 - Section 254 violation
 - Due process violation

21

KELLEY
DRYE

Masergy

- Key issue:
 - 2009 499-A instructions include MPLS service in the list of telecommunications services subject to USF contributions
 - MPLS definition
 - Information service?
 - Local line transmission / local access
 - Wireline Competition Bureau delegated authority
 - Back billing and recovery of contributions
 - Pending USAC request for guidance on ATM/Frame Relay and VPN / Dedicated IP services

22

KELLEY
DRYE

Level 3 and Ascent Media

- Key issue:
 - Reporting errors and the consequences
 - Waivers
 - Pay and dispute policy
 - USAC policy making authority
 - Excessive penalties (late fees and interest on unpaid amounts invoiced)
 - APA violation?
 - DCIA limitation?
 - Section 254 “equitable and nondiscriminatory” violation? (Ascent Media)
 - *Aventure* (waiver granted)

23

KELLEY
DRYE

KELLEY
DRYE

Questions?

Steve Augustino
saugustino@kelleydrye.com
202-342-8612

John Heitmann
jheitmann@kelleydrye.com
202-342-8544

2010 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2009 Revenues)

Approval by OMB
3060-0855

>>> Please read instructions before completing. <<<

Annual Filing -- due April 1, 2010

Block 1: Contributor Identification Information

During the year, filers must refile Blocks 1, 2 and 6 if there are any changes in Lines 104 or 112. See Instructions.

101 Filer 499 ID [If you don't know your number, contact the administrator at (888) 641-8722.

If you are a new filer, write "new" in this block and a Filer 499 ID will be assigned to you.]

102 Legal name of reporting entity

103 IRS employer identification number

[Enter 9 digit number]

104 Name telecommunications provider is doing business as

105 Telecommunications activities of filer [Select up to 5 boxes that best describe the reporting entity. Enter numbers starting with "1" to show the order of importance -- see directions.]

- | | | | |
|--|--|--|---|
| <input type="checkbox"/> Audio Bridging (teleconferencing) Provider | <input type="checkbox"/> CAP/CLEC | <input type="checkbox"/> Cellular/PCS/SMR (wireless telephony incl. by resale) | <input type="checkbox"/> Coaxial Cable |
| <input type="checkbox"/> Incumbent LEC | <input type="checkbox"/> Interconnected VoIP | <input type="checkbox"/> Interexchange Carrier (IXC) | <input type="checkbox"/> Local Reseller |
| <input type="checkbox"/> Paging & Messaging | <input type="checkbox"/> Payphone Service Provider | <input type="checkbox"/> Prepaid Card | <input type="checkbox"/> Private Service Provider |
| <input type="checkbox"/> Shared-Tenant Service Provider / Building LEC | <input type="checkbox"/> SMR (dispatch) | <input type="checkbox"/> Toll Reseller | <input type="checkbox"/> Satellite Service Provider |
| <input type="checkbox"/> Other Local | <input type="checkbox"/> Other Mobile | <input type="checkbox"/> Other Toll | |

If Other Local, Other Mobile or Other Toll is checked, describe carrier type / services provided: →

106.1 Holding company name (All affiliated companies must show the same name on this line.)

106.2 Holding company IRS employer identification number

[Enter 9 digit number]

107 FCC Registration Number (FRN) [https://fjallfoss.fcc.gov/coresWeb/publicHome.do]
[For assistance, contact the CORES help desk at 877-480-3201 or CORES@fcc.gov]

[Enter 10 digit number]

108 Management company [if filer is managed by another entity]

109 Complete mailing address of reporting entity corporate headquarters

Note: this address will be used for the ITSP FCC regulatory fee billings unless the appropriate box is checked on Line 208.

Street1
Street 2
Street 3
City State Zip (postal code) Country if not USA

110 Complete business address for customer inquiries and complaints

check if same address as Line 109

Street1
Street 2
Street 3
City State Zip (postal code) Country if not USA

111 Telephone number for customer complaints and inquiries [Toll-free number if available]

() - ext -

112 List all trade names used in the past 3 years in providing telecommunications. Include all names by which you are known by customers.

| | | | |
|---|--|---|--|
| a | | g | |
| b | | h | |
| c | | i | |
| d | | j | |
| e | | k | |
| f | | l | |

Use an additional sheet if necessary. Each reporting entity must provide all names used for telecommunications activities.

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

Block 6: CERTIFICATION: to be signed by an officer of the filer

601 Filer 499 ID [from Line 101]

602 Legal name of reporting entity [from Line 102]

Section IV of the instructions provides information on which types of reporting entities are required to file for which purposes. Any entity claiming to be exempt from one or more contribution requirements should so certify below and attach an explanation. [The Universal Service Administrator will determine which entities meet the *de minimis* threshold based on information provided in Block 4, even if you fail to so certify, below.]

603 I certify that the reporting entity is exempt from contributing to: Universal Service TRS NANPA LNP Administration

Provide explanation below:

Stand alone audio bridging provided on a private carrier basis

604 Please indicate whether the reporting entity is State or Local Government Entity I.R.C. § 501 or State Tax Exempt (see instructions)

605 I certify that the revenue data contained herein are privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the company. I request nondisclosure of the revenue information contained herein pursuant to Sections 0.459, 52.17, 54.711 and 64.604 of the Commission's Rules.

I certify that I am an officer of the above-named reporting entity as defined on page 33 of the instructions, that I have examined the foregoing report and, to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true and that said Worksheet is an accurate statement of the affairs of the above-named company for the previous calendar year. In addition, I swear, under penalty of perjury, that all requested identification registration information has been provided and is accurate. If the above-named reporting entity is filing on a consolidated basis, I certify that this filing incorporates all of the revenues for the consolidated entities for the entire year and that the filer adhered to and continues to meet the conditions set forth in Section II-B of the instructions.

606 Signature

607 Printed name of officer

First MI Last

608 Position with reporting entity

609 Business telephone number of officer

() - ext -

610 Email of officer || Required if available -- not for public release ||

611 Date

612 Check those that apply: Original April 1 filing for year New filer, registration only Revised filing with updated registration Revised filing with updated revenue data

Do not mail checks with this form. Send this form to: **Form 499 Data Collection Agent c/o USAC 2000 L Street, N.W. Suite 200 Washington DC, 20036**
 For additional information regarding this worksheet contact: Telecommunications Reporting Worksheet information: (888) 641-8722 or via email: Form499@universalservice.org

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

KELLEY

DRYE

SPEAKER BIOS

**Attorney
Biography**

Steven A. Augustino

Tel. 202.342.8612
Email saugustino@kelleydrye.com



Areas of Concentration

Steve Augustino is a partner in the firm’s Washington, DC office. He focuses his practice on telecommunications and video gaming matters.

Mr. Augustino represents all types of telecommunications service providers, including competitive local carriers, VoIP providers and prepaid calling card providers. His work for these clients includes negotiating interconnection agreements, representing carriers in interconnection arbitration proceedings and advising on rulemaking proceedings. Mr. Augustino has experience defending clients in Federal Communications Commission (FCC) enforcement actions, including Universal Service Fund (USF) compliance investigations and Universal Service Administrative Company (USAC) reporting audits. He has negotiated a dozen settlements with the FCC over customer proprietary network information (CPNI), payphone compensation, fax marketing, slamming, “fat finger dialing” and other carrier marketing practices. Mr. Augustino has led numerous national coalitions in pursuing public policy decisions favorable to competitive providers’ business plans.

With over 15 years of experience representing innovative content and service providers, Mr. Augustino added a gaming concentration to his practice in 2006, specifically geared towards addressing mobile and broadband access issues affecting video game developers and publishers. His experience in the gaming industry helps online and mobile gaming companies meet the business and legal challenges brought on by the intersection of gaming and communications policy in the United States.

Representative Experience

Led a coalition of carriers pursuing high-capacity and broadband network elements during the FCC’s Triennial Review of unbundled network element obligations. The coalition was successful in obtaining rules that preserve access to these elements where competitive alternatives are not present.

Filed one of the few competitive carrier forbearance requests seeking, among other things, removal of restrictions on access to combinations of unbundled network elements.

Led an industry trade association in enforcing a statutory prohibition on Bell Telephone Company ownership of alarm monitoring companies. These efforts resulted in the FCC declaring over \$1 billion in acquisitions to be unlawful.

Memberships and Associations

American Bar Association
Federal Communications Bar Association

Publications

“Communications” Chapter, *Developments in Administrative Law and Regulatory Practice 2005-2006*, American Bar Association Section of Administrative Law and Regulatory Practice, 2007, co-author.

“Regulating VoIP,” *Game Developer*, May 2007.

Client Advisories

“Annual CPNI Certification and Statement Filings Due March 1, 2008/FCC Enforcement Bureau Releases Certification Template,” February 1, 2008

“FCC Accepts AT&T Voluntary Conditions, Approves Merger of AT&T Inc. and BellSouth Corporation,” January 25, 2007

“Commission Grants Substantial Forbearance From UNE Obligations in Anchorage, Alaska Metropolitan Statistical Area,” January 25, 2007

“Advanced Wireless Services Spectrum Auction Presents Opportunities for Wireless Providers,” January 24, 2007

“Anti-Pretexting Legislation Takes Effect - VoIP Call Records Included,” January 19, 2007

“Novel Class Actions Seek Application of California Eavesdropping Law to Ordinary Course of Business Telephone Monitoring and Recording,” November 10, 2006

“New State Privacy Laws: Regulating the Use of Social Security Numbers and Requiring Wireless Security Warnings,” October 10, 2006

“FCC Competition Update,” August 29, 2006

“VoIP Providers File USF Forms for the First Time,” August 4, 2006

“FCC Opens Proceeding to Implement Katrina Panel Recommendations,” July 10, 2006

“FCC Modifies Universal Service Fund Contribution Obligations for Interconnected VoIP Providers and Wireless Providers,” June 27, 2006

“D.C. Circuit Affirms Triennial Review Remand Order,” June 19, 2006

“Lessons from the NSA Warrantless Wiretapping Controversy,” May 31, 2006

“Verizon’s Petition for Forbearance Deemed Granted,” March 21, 2006

“FCC Opens Rulemaking to Strengthen Privacy Protections,” February 21, 2006

Speaking Engagements

Implementing InterCall: USF Implications for the Conference Call Industry. Kelley Drye Webinar, July 2008.

Virtual Worlds: Real Disputes Around the Globe, 2008 ION Game Conference, May 2008.

cont'd

Speaking Engagements

Pre-Due Diligence: Preparing Your Company for Mergers & Acquisitions, Kelley Drye Seminar, February 2008.

Best Practices for Multi-National Casual Game Sites, Casual Connect Europe, February 2008

Federal Enforcement Issues – Shared Jurisdiction of the FCC and the FTC, COMPTTEL's Regulatory Workshop, October 2007

From Austin to Washington: Politics and Video Games, Austin Games Developers Conference, September 2007

Politics and Video Games, Casual Game Association's Casual Connect 2007, July 2007

Net Neutrality, IPTV, Wireless Broadband and More: A Gamer's Guide to Broadband Issues, Online Game Developers Conference, May 2007

USF Reform and Enforcement, Kelley Drye's Regulatory and Legislative Update, April 2007

Bar Admissions

District of Columbia, 1993

Maryland, 1991

Court Admissions

U.S. Supreme Court

U.S. Court of Appeals – District of Columbia

U.S. District Court – District of Columbia

U.S. District Court – Maryland

Education

Georgetown University Law Center

J.D., *magna cum laude*, 1991

University of Virginia

B.A., with highest distinction, 1988

Attorney
Biography

John J. Heitmann

Tel. 202.342.8544
Email jheitmann@kelleydrye.com



Areas of Concentration

John Heitmann is a partner in the firm's Washington, D.C. office and a founding member of the Telecommunications practice group. Mr. Heitmann focuses his practice on representing service providers and users in regulatory, appellate, litigation and transactional matters involving a broad range of communications law issues.

Mr. Heitmann represents companies in proceedings before the Federal Communications Commission (FCC) and state public utility commissions (PUCs). He has extensive experience in and regularly advises clients on regulatory policy, interconnection, compliance and enforcement matters.

Mr. Heitmann represents carriers in interconnection negotiations, arbitrations and dispute resolution proceedings before state PUCs and arbitration panels. He has appeared before more than a dozen state PUCs and multiple arbitration panels.

Mr. Heitmann also represents carriers in state, federal and appellate court litigation involving telecommunications-related issues. He has prevailed in cases before the U.S. Court of Appeals for the Fourth and Eleventh Circuits, and has cases pending in several federal courts.

In addition, Mr. Heitmann represents companies in transactional matters involving the sale and procurement of telecommunications, telecommunications capacity and facilities. He advises companies on regulatory and contractual compliance matters associated with telecommunications, information and technology service contracts.

Representative Experience

NuVox v. BellSouth (11th Cir. 2008)

Briefed, argued and succeeded in preserving a lower court victory overturning a Florida Public Service Commission order with respect to "commingling" under federal telecommunications law.

Successfully represented client in complex case involving interconnection agreement-based litigation before the Fourth and Eleventh Circuit Courts of Appeal, multiple federal district courts and multiple state commissions.

Successfully represented clients in joint interconnection agreement arbitration proceedings before nine state public utility commissions.

Representing clients in FCC regulatory proceedings involving unbundled network elements (UNEs), special access, 271 elements, broadband, forbearance, intercarrier compensation, customer proprietary network information (CPNI), mergers, resale and copper loop retirement.

Representing clients in state commission proceedings involving UNEs, intercarrier compensation, interconnection agreement arbitration, compliance audits and copper loop retirement.

Representative Experience

Representing clients in dispute resolution proceedings involving carrier-to-carrier contracts before numerous state commissions and arbitration panels.

Counseling clients on compliance, business strategy, litigation risk and product development with respect to telecom-regulatory and contractual requirements involving a wide array of subject matters, including intercarrier compensation (reciprocal compensation and access charges), UNEs/EELs, collocation, interconnection, building access, provisioning/OSS, privacy/CPNI, universal service/USF, net neutrality, CALEA, pole attachments, truth-in-billing, win-back/retention marketing, slamming, numbering/number portability, 911/E911, regulatory fees, reporting requirements and compliance with law enforcement requests.

Negotiating and drafting telecommunications-related contracts for clients, including interconnection agreements, commercial agreements, pole attachment agreements, infeasible rights of use (IRUs) and backhaul/facility/capacity agreements.

Representing clients on regulatory-related aspects of mergers and acquisitions, financings, offerings, etc.

Representing clients in state commission certification and transactions approval proceedings.

Advising clients with respect to and drafting carrier policy statements on privacy, CPNI, CALEA, FTC Red Flags, acceptable use and network management.

Memberships and Associations

American Bar Association – Antitrust

Federal Communications Bar Association – Co-Chair State and Local Practice Committee

Professional Activities

TelecomHUB, Board of Directors

Publications

“Federal Communications Commission Proposes “Network Neutrality” Rules Intended To Preserve A Free And Open Internet,” *Metropolitan Corporate Counsel*, January 2010.

Client Advisories

“Reminder: FCC Filing Due January 15, 2010,” January 6, 2010.

“Insights From Kelley Dye’s 2nd Annual Privacy Law Seminar,” November 30, 2009.

“FCC Seeks Comment on the Role of Intercarrier Compensation and the Universal Service Fund in the National Broadband Plan: Comments Due December 7, 2009,” November 16, 2009.

Client Advisories

“NTIA and RUS Eliminate Third Round of Funding; Seek Comment on Efficient Administration of the Programs,” November 13, 2009.

“FCC Seeks Comments on Appropriate Analytical Framework for Evaluating Questions Raised in Special Access NPRM,” November 11, 2009.

“FCC Releases Network Neutrality NPRM,” October 26, 2009.

“FCC Initiates Proceeding to Develop a National Broadband Plan,” April 9, 2009

“Annual CPNI Certification and Statement Filings Due March 1, 2008/FCC Enforcement Bureau Releases Certification Template,” February 1, 2008

“Court Decision Questions a Carrier’s Recovery of the PICC and Emphasizes Carrier Obligation to Comply with Truth-in-Billing,” November 9, 2007

“Kelley Dye Issues Advisory on Commentary Sought by FCC,” June 22, 2007

Speaking Engagements

“Making Sense of the FCC’s Network Neutrality NPRM,” Presented by Kelley Dye, Washington, D.C., December 2, 2009

“Privacy Law Paradigm Shift: Policymakers Respond to Rapidly Evolving Technologies,” Presented by Kelley Dye, Washington, D.C., November 17, 2009

“Open Internet: Discrimination, Security and Privacy,” CompTel Dallas Show, March 2009

“Telecom Outlook 2009: Local to Global Perspectives,” TelecomHUB – Tysons Corner, February 2009

“Federal Regulatory Update: the Year in Review and the Year Ahead,” CompSouth Annual Meeting – Austin, November 2008

“Navigating Uncharted Waters: Telecom Policy in the Obama Administration and the 111th Congress,” Kelley Dye Webinar, November 2008

“Growing Momentum for Electronic Communication Privacy Regulation and Legislation: What to Expect from the Next Congress, Federal Agencies, States and Courts,” Kelley Dye Seminar, October 2008

“Key Legal Issues in Telecom Deals – It’s More than Just Price,” CompTel Regional Workshop - Boston, April 2008

“Wireline Regulatory Issues: Battles Over Switched and Special Access,” CompTel/Kelley Dye Regulatory Workshop, February 2008

“Telecom Deals: Legal and Regulatory Considerations for Creating an Exit Strategy,” CompTel Nashville Show, February 2008

Bar Admissions

District of Columbia, 1997

New York, 1995

**Attorney
Biography**

John J. Heitmann

cont'd

Court Admissions

U.S. Court of Appeals – Fourth, Eleventh and District of Columbia Circuits

U.S. District Court – Northern District of Florida

District of Columbia Court of Appeals

State of New York Court of Appeals, 3rd Department

Education

New York University School of Law

J.D., *cum laude*, 1994

NYU Journal of International Law and Politics, articles editor

University of Notre Dame

B.A., *cum laude*, 1989

Notre Dame London Program, Spring 1998

Notre Dame Scholar