REDACTED – FOR PUBLIC INSPECTION

September 27, 2019

VIA HAND-FILING AND ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Request for Confidential Treatment Pursuant to 47 C.F.R. §§ 0.457 and 0.459

Dear Ms. Dortch:

BA Telecom, LLC ("BA Telecom" or "the Company") through counsel, hereby files this Request for Review of a Decision of the Universal Service Administrator. BA Telecom is filing a confidential and publicly available version of this letter and attached Request for Review.

BA Telecom respectfully requests that, pursuant to 47 C.F.R. §§ 0.457 and 0.459, the Federal Communications Commission ("FCC" or "Commission") withhold from any future public inspection and accord confidential treatment to the sensitive business information the Company is providing — all of which has been redacted from the publicly available version of the attached filing. The redacted information constitutes sensitive commercial information that falls within Exemption 4 of the Freedom of Information Act ("FOIA"). Exemption 4 of the FOIA provides that the public disclosure requirement of the statute "does not apply to matters that are ... (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."[1] Because these comments include commercial information "of a kind that would not customarily be released to the public," this information is "confidential" under Exemption 4 of FOIA.[2] In addition, BA Telecom would suffer substantial competitive harm if this information were disclosed.[3] Accordingly, the enclosed appeal is marked with the header "CONFIDENTIAL TREATMENT REQUESTED PURSUANT TO 47 C.F.R. §§ 0.457, 0.459 – NOT FOR PUBLIC INSPECTION."

In support of this request and pursuant to Section 0.459(b) of the Commission's rules, the Company hereby states as follows:

1. Identification of the Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1))

[1] 5 U.S.C. § 552(b)(4).
[2] *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).
[3] *See Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

BA Telecom seeks confidential treatment for its appeal to the Universal Service Administrative Company ("USAC") ("Appeal"), USAC's decision on that appeal ("Appeal Decision"), correspondence with USAC related to the Appeal and Appeal Decision, and this Request for Review.

2. Description of the Circumstances Giving Rise to the Submission (Section 0.459(b)(2))

On March 15, 2019, BA Telecom filed an appeal of a January 2019 USAC Invoice ("Appeal"). On July 29, 2019, USAC issued a decision denying that appeal ("Appeal Decision"). BA Telecom is requesting review of USAC's Appeal Decision pursuant to 47 C.F.R. § 54.719(b).

3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))

The information described above is protected from disclosure because it constitutes highly sensitive information. BA Telecom's Appeal, USAC's Appeal Decision, and this Request for Review contain information about BA Telecom's finances and strategic decisions, which constitute sensitive commercial information "which would customarily be guarded from competitors."[4] "A commercial or financial matter is 'confidential' for purposes of [FOIA Exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[5] The Appeal and Appeal Decision reveal information about BA Telecom's commercial arrangements, billing, marketing, and distribution practices, and financial health. Such information is confidential commercial information related to BA Telecom's ongoing operations. Improper disclosure of this information would result in substantial competitive harm by giving competitors and customers insights into BA Telecom's marketing and financial strategies. This would afford the Company's competitors and customers an unfair advantage in designing their own marketing strategies and negotiating future commercial contracts with BA Telecom.

4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4))

The domestic and international telecommunications market is highly competitive.

5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))

Disclosure of the information in this Request for Review, the Appeal and USAC's Appeal Decision would provide BA Telecom's competitors with sensitive insights related to BA Telecom's operations, costs, strategic decisions, and financial health—all of which would work to the Company's severe competitive disadvantage.

[4] 47 C.F.R. § 0.457.
[5] *Nat'l Parks*, 498 F.2d at 770.

6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6)) and Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))

BA Telecom does not make this information publicly available, consistently treating it as confidential.

7. Justification of Period During Which the Submitting Party Asserts That Material Should Not Be Available for Public Disclosure (Section 0.459(b)(8)).

Due to the extreme sensitivity of the information provided, BA Telecom requests that the materials identified as confidential be withheld from public disclosure indefinitely. Release of this information at any time would cause substantial competitive harm to BA Telecom for the foreseeable future. Therefore, the request for ongoing confidential treatment is reasonable.

Should you have any questions regarding the foregoing, please contact the undersigned at jsm@commlawgroup.com or (703) 714-1313.

Respectfully submitted,

Jonathan S. Marashlian
Jacqueline R. Neff
MARASHLIAN & DONAHUE, PLLC
The *Comm*Law Group
1420 Spring Hill Road, Suite 401
Tysons, Virginia 22102
Tel: 703-714-1313
jsm@commlawgroup.com
Counsel for Appellant

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of BA Telecom, LLC Request for Review of Decision of the Universal Service Administrator	WC Docket No. 06-122

REQUEST FOR REVIEW OF A DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

Pursuant to 47 C.F.R. § 54.719(b), BA Telecom, LLC ("BA Telecom," "the Company" or "Appellant") seeks review by the Wireline Competition Bureau ("Bureau") of a Universal Service Administration Company ("USAC") denial of an appeal of a USAC invoice.

SUMMARY

USAC erred in combining the interstate and international end-user telecommunications revenues of BA Telecom and its Filer Affiliate, UVNV, Inc., as reported on their 2017 and 2018 Forms 499-A and November 2018 Form 499-Q, in evaluating BA Telecom's qualification for LIRE. First, in interpreting an FCC Rule, Section 54.706(c), USAC overstepped the bounds of its limited authority. USAC has no authority to make or interpret rules, and therefore, any interpretation of FCC regulation is beyond its statutorily prescribed powers. Second, USAC's interpretation and application of Section 54.706(c) as requiring USAC to consider the international and interstate end-user telecommunications revenues of both Filer and Non-Filer Affiliates for LIRE qualification purposes conflicts with federal court precedent, the intent of FCC rules, and principles of statutory construction. Specifically, by requiring carriers like BA Telecom to include the revenues of other contributing Filer Affiliates within their revenue bases for purposes of LIRE

qualification, such carriers would be required to contribute to the USF more than they generate in interstate end-user telecommunications revenues in violation of the Fifth Circuit Court of Appeals' ruling in *TOPUC*. Furthermore, USAC's erroneous interpretation is inconsistent with FCC rules designed to capture revenues from exempt Non-Filers to avoid potential gaming of the system to shield otherwise assessable revenue from USF liability through the creation of Non-Filer Affiliates. Similarly, USAC's interpretation essentially mandates consolidated reporting and creates the absurd result that filers must coordinate filing with distantly related affiliates, violating principles of corporate sovereignty. Finally, the FCC has never interpreted Section 54.706(c) as USAC purports to in this case. Accordingly, BA Telecom had no notice that the rule would be applied in this manner, and USAC's unlawful interpretation therefore strips BA Telecom of its due process rights.

For these reasons, the Bureau should reverse USAC's denial of the Appeal, and direct USAC to examine only BA Telecom's international and interstate end-user telecommunications revenues in determining its USF liability based upon its 2017 and 2018 Forms 499-A and its November 2018 Form 499-Q. Furthermore, the Bureau should direct USAC to reissue the Invoice consistent with this decision.

I. QUESTIONS PRESENTED FOR REVIEW

This appeal presents the following questions for review by the Bureau. First, whether USAC erred in interpreting an FCC rule (Section 54.706(c)) in violation of its limited authority; Second, whether USAC's application of Section 54.706(c) conflicts with federal court precedent; Third, whether USAC's interpretation of Section 54.706(c) conflicts with the intent of the FCC's rules, the original purpose of LIRE, and principles of statutory construction; and, Finally, whether USAC's interpretation of Section 54.706(c) violates BA Telecom's due process rights.

II. FACTUAL BACKGROUND

BA Telecom, LLC, branded IndiaLD, provides international calling services from the United States to India and thirty-seven other countries. BA Telecom is registered with the Federal Communications Commission ("FCC" or "Commission") as a toll reseller (Filer ID 828082). Since 2009, BA Telecom has filed Forms 499-A with the FCC's Universal Service Fund ("USF") administrator, the Universal Service Administrative Company ("USAC"). Based upon revenues reported on the Company's 2009-2016 Forms 499-A, BA Telecom qualified for the Limited International Revenue Exemption ("LIRE"), and therefore paid USF fees exclusively on its interstate end-user telecommunications revenue. On its original 2017 and 2018 Forms 499-A, BA Telecom did not identify a holding company on Line 106.1 of the Form.[1] Similarly, on its original November 2018 Form 499-Q, BA Telecom did not identify a holding company.[2]

Based upon BA Telecom's original 2017 and 2018 Forms 499-A, USAC determined that the Company qualified for LIRE. As a result of the Company's LIRE qualification, the Company was *de minimis*, and had no direct USF liability. However, the Company later filed revised 2017

[1] *See* BA Telecom, LLC, 2017 Form 499-A (filed April 3, 2017) and BA Telecom LLC, 2018 Form 499-A (filed March 22, 2018).
[2] *See* BA Telecom, LLC, November Form 499-Q (filed October 24, 2018).

and 2018 Forms 499-A and a revised November 2018 Form 499-Q, identifying Ka'ena Corporation as its holding company. Specifically, BA Telecom filed a revised November 2018 Form 499-Q on October 29, 2018 listing Ka'ena Corporation as its holding company in line 105.[3] The Company filed revised 2017 and 2018 Forms 499-A, identifying Ka'ena Corporation as its holding company on Line 106.1, on December 20, 2018.[4] UVNV, Inc. ("UVNV"), a mobile service provider, Filer ID 829369, also identified Ka'ena Corporation as its holding company on Line 106.1 of UVNV's 2017 and 2018 Forms 499-A[5].

After USAC received BA Telecom's revised 2017 and 2018 Forms 499-A, it performed true-ups to identify any adjustments to the Company's USF liability based upon the Forms as revised. Because UVNV and BA Telecom identified a common holding company (Ka'ena Corporation) on their 2017 and 2018 Forms 499-A, USAC considered the interstate and international end-user telecommunications revenues of both UVNV and BA Telecom when evaluating each entity's LIRE qualification. Based upon the combined interstate and international end-user telecommunications revenues reported on UVNV's original and BA Telecom's revised 2017 and 2018 Forms 499-A, USAC determined that BA Telecom no longer qualified for LIRE. USAC also determined that, based upon its revised November 2018 Form 499-Q, BA Telecom did not qualify for LIRE with respect to revenues projected for Q1 2019 (January – March 2019). As a result, USAC determined that BA Telecom's USF liability should have been based on both its international and interstate end-user telecommunications revenues (rather than on the interstate revenues alone). As a result, BA Telecom no longer qualified for the *de minimis* exemption.

[3] *See* BA Telecom, LLC revised November 2018 Form 499-Q (filed October 29, 2018).
[4] *See* BA Telecom, LLC Revised 2017 Form 499-A (filed December 20, 2018) and BA Telecom LLC Revised 2018 Form 499-A (filed December 20, 2018).
[5] UVNV is a Mobile Virtual Network Operator ("MVNO") reselling T-Mobile wireless service under the Ultra Mobile and Mint Mobile brands. UVNV began offering wireless services in 2012.

Accordingly, on January 22, 2019, USAC issued an invoice ("the Invoice") that included support mechanism adjustments of [redacted] and [redacted] based upon the Company's revised 2017 and 2018 Forms 499-A, respectively.[6] The Invoice also included a [redacted] liability based upon the Company's revised November 2018 Form 499-Q.[7]

BA Telecom appealed the USAC Invoice by letter dated March 15, 2019, requesting that USAC restore the Company's LIRE qualification. USAC denied the appeal by letter dated January 29, 2019.[8] USAC determined that it had appropriately applied Section 54.706(c) of the FCC's rules, requiring USAC to combine UVNV and BA Telecom's interstate and international end-user telecommunications revenues to evaluate BA Telecom's LIRE eligibility because UVNV qualified as an "affiliated provider of interstate and international telecommunications services."[9]

III. ARGUMENT

In combining BA Telecom and UVNV's end-user interstate and international telecommunications revenue to determine BA Telecom's LIRE qualification, USAC has improperly interpreted an FCC rule in contravention of its limited authority. USAC relies upon the following FCC rule, 47 C.F.R. § 54.706(c), which provides that:

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

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[6] *See* USAC Invoice [redacted] ("Invoice").
[7] *Id*.
[8] *See* Letter from Jose L. Solana, President, Global Strategic Accountants, LLC, to USAC (March 15, 2019) ("Appeal").
[9] Letter from USAC to Jose L. Solana, President, Global Strategic Accountants, LLC (July 29, 2019) ("Appeal Decision").

USAC has determined that the cited FCC rule requires USAC to consider the revenues of ALL affiliates for purposes of determining a company's LIRE status – even the revenue reported by other Form 499 Filer affiliates ("Filer Affiliates"), as distinguished from affiliates that need not file Forms 499 or contribute to the USF ("Non-Filer Affiliates"). As discussed below, USAC's interpretation is at odds with the FCC's intent underlying the cited rule. USAC's interpretation conflicts with basic principles of statutory construction and violates the judicial precedent from which LIRE is derived. And finally, practical application of USAC's interpretation leads to absurd and impractical results and, thus, is at odds with common sense.

As an initial matter, USAC is not permitted to engage in any interpretation of FCC rules – *at all*. USAC must turn to the FCC for guidance on matters that involve interpretation or judgment.[10] And, as shown herein, for USAC to achieve the result it has achieved in rendering the disputed Invoice, it must have interpreted FCC Rule 54.706(c) because the result is contrary to the intent and language of the rule, precedent and common sense. Accordingly, USAC's rule interpretation exceeds the bounds of its authority, and by reading the rule to require inclusion of revenue from ALL affiliated telecommunications providers – not limiting the rule to apply to Non-Filer Affiliates, as the FCC clearly intended - USAC engaged in an improper and unenforceable rule interpretation. For this reason alone, the Invoice (and all subsequent invoices calculated on the same basis) must be rescinded, and USAC must refrain from future application of its interpretation of FCC Rule 54.706(c) until such time as FCC guidance is solicited and provided. In addition, USAC's rule interpretation conflicts with federal court precedent and principles of statutory construction, as discussed following.

[10] USAC may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress" and is required to seek guidance from the FCC on such matters. 47 C.F.R. § 54.702(c).

1. USAC's Improper Rule Interpretation Conflicts with Federal Court Precedent

First, USAC's unlawful rule interpretation clearly conflicts with federal court precedent in the *TOPUC* case, which served as the basis for the Commission's adoption of LIRE. On July 30, 1999, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued a decision[11] affirming in part, remanding in part, and reversing in part the Commission's May 8, 1997 Universal Service Order.[12] The Commission issued the 1997 Universal Service Order to implement provisions of the Telecommunications Act of 1996 ("Act") relating to deployment of universal service.[13] In the Order, the FCC concluded that USF contributions would be based on interstate and international end-user telecommunications revenues.[14] In *TOPUC*, COMSAT Corporation (among others) challenged the application of the Universal Service Order to the company.[15] In particular, COMSAT argued that including international end-user revenues within its USF contribution base obligated COMSAT to pay more in USF fees than it derived in interstate end-user revenues, an unreasonable result.[16] The Fifth Circuit agreed, concluding that the FCC had failed to demonstrate how requiring COMSAT to pay more in universal service contributions than it derived in interstate revenues met the equitable and non-discriminatory mandates of Section 254(d) of the Act.[17]

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[11] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*").
[12] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Erratum, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *motion for stay granted in part*, (Sept. 28, 1999), *petitions for rehearing and rehearing en banc denied*, (Sept. 28, 1999) ("*Universal Service Order"*).
[13] *Universal Service Order*, 12 FCC Rcd. 8776.
[14] *TOPUC*, 183 F.3d at 434.
[15] *TOPUC*, 183 F.3d at 434-35.
[16] *Id*.
[17] *Id*.

On remand, the FCC adopted the Limited International Revenue Exemption ("LIRE"), which limits the USF contribution burden on entities that primarily sell international services.[18] The Commission concluded that:

> A provider of interstate and international telecommunications shall not be required to contribute based on its international end-user telecommunications revenues if its interstate end-user telecommunications revenues constitute less than 8 percent of its combined interstate and international end-user telecommunications revenues.[19]

As originally intended, LIRE meets the demands of the Fifth Circuit in *TOPUC*. The Fifth Circuit concluded that requiring "COMSAT and carriers like it" (i.e. carriers that derive the majority of their revenues from providing international services) to contribute on their international and interstate end-user revenues did not meet the equitable mandates of Section 254(d) because these carriers "will contribute more in universal service payments than they will generate from interstate service."[20] Including the revenues of Filer Affiliates within the LIRE calculation violates the purpose and spirit of *TOPUC*. Carriers, like BA Telecom, that include the revenues of other contributing Filer Affiliates within their revenue base for purposes of LIRE would be required to contribute more than they can generate in interstate end-user revenues. This violates the court's ruling in *TOPUC*.

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[18] *In the Matters of Federal-State Joint Board on Universal Service and Access Charge Reform*, Sixteenth Order on Reconsideration in CC Docket No. 96-45 Eighth Report and Order in CC Docket 96-45 Sixth Report and Order in CC Docket 96-262, 15 FCC Rcd. 1679 (1999) ("LIRE Order").

[19] LIRE Order at 1687. The Commission later modified the LIRE threshold, such that providers whose interstate end-user revenues total less than 12% of their combined interstate and international end-user revenues are LIRE qualified and required to contribute exclusively on their interstate end-user telecommunications revenues. *See Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, CC Docket No. 96-45, 17 FCC Rcd. 3752, 3806-07, ¶¶ 125-28 (2002) ("*2002 Universal Service Order*").

[20] *TOPUC*, 183 F.3d at 435.

Repeatedly throughout the decision, the Fifth Circuit referred to the "carrier," *i.e.* the contributor required to register and make payments with the FCC on its revenues.[21] Similarly, in its 1997 Universal Service Order wherein the FCC required carriers providing interstate services to likewise contribute on the basis of international end-user revenues, the Commission repeatedly referred to the liability as belonging to each "contributor," using the terms "carrier" and "contributor" interchangeably.[22] Under FCC rules, "contributors" are independent individual filers.[23] Accordingly, in finding the Commission's instruction that "contributors" must include international end-user revenues in their contribution bases to be inconsistent with the equitable and nondiscriminatory mandates of Section 254(d) of the Act, the court effectively invalidated any requirement that would obligate any single contributor to contribute more to the USF than that contributor could generate in interstate revenues. USAC's interpretation and application of FCC Rule 54.706(c) conflicts with the court's directives, as implemented by the FCC. As a result, USAC's unlawful interpretation cannot withstand scrutiny under *TOPUC*.

2. USAC's Improper Rule Interpretation Conflicts with the Intent of the FCC's Rules, the Original Purpose of LIRE and Principles of Statutory Construction

a) Section 54.706(c) is Not Ambiguous; the FCC's Intent to Include Only Non-Filer Affiliate Revenues (and NOT the Revenue of Filer Affiliates) in its LIRE Qualification Analysis is Clear

USAC's unlawful interpretation of LIRE to require inclusion of the revenues of Filer Affiliates in its LIRE qualification assessment violates the original intent of the exemption and basic principles of statutory construction. The process governing statutory interpretation is clear.

[21] *TOPUC*, 183 F.3d at 434-35.
[22] *Universal Service Order*, 12 FCC Rcd. 8776 at ¶¶ 779, 836 and 841.
[23] *See* 47 C.F.R. § 54.711.

The first step courts must take is to determine if the provision at issue is ambiguous. If a provision is unambiguous, that is the end of the inquiry.[24]

Here, the provision at issue, 47 C.F.R. § 54.706(c), is clear on its face. When adopted, it was not ambiguous in the least. The provision reflects the FCC's intent in requiring USAC to consider ONLY the revenues of Non-Filer Affiliates in its LIRE calculation when evaluating the qualification of each distinct 499 Filer's qualification for the exemption. The reference in Section 54.706(c) to an entity's "affiliates" was intended only to cover a reporting entity's Non-Filer Affiliates, such as *de minimis*, governmental, or systems integrators/self-providers - entities which are themselves exempt from contributing to the USF for specific reasons (even though they may derive revenue from interstate and international telecommunications).[25] This is apparent not only from the reading of the provision in its entirety, but also from the context in which the FCC promulgated the regulation, as well as the purpose of the regulations.

When the FCC adopted Section 54.706(c) in 1999, the Commission recognized a clear distinction between Filers and Non-Filers. The Commission first introduced a filing requirement for carriers required to contribute to the USF in 1997.[26] In that Order, the Commission determined

[24] *Carcieri v. Salalzar*, 555 U.S. 379 (2009).

[25] 47 C.F.R. § 54.708 (exempting *de minimis* providers); *Universal Service Order*, 12 FCC Rcd. 8776 at ¶ 800 (holding that "government entities that purchase telecommunications services in bulk on behalf of themselves," entities that offer "interstate telecommunications to public safety or government entities" but not to others, and "public safety and local governmental entities licensed under Subpart B of Part 90 of our rules" are not required to contribute to universal service); 47 C.F.R. § 54.706(d) ("The following entities will not be required to contribute to universal service: non-profit health care providers; broadcasters; systems integrators that derive less than five percent of their systems integration revenues from the resale of telecommunications."); *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, 5476, ¶ 284 (1997) (non-profit schools, colleges, universities, and libraries "should not be made subject to universal service contribution requirements.").

[26] *In the Matters of: Changes to the Bd. of Directors of the Nat'l Exch. Carrier Ass'n, Inc.,* 12 F.C.C.R. 18400 (1997).

that most providers of telecommunications services must file FCC forms[27] to report revenues for universal service purposes.[28] The Commission specifically identified certain providers of telecommunications as Non-Filers because they were not required to contribute to the USF. And, because these entities were not required to contribute, the FCC determined they should not be burdened with the compilation, preparation and filing of data reports with the government, consistent with the requirements of the Paperwork Reduction Act.[29]

The class of Non-Filers considered by the FCC included, for example, *de minimis* providers.[30] *De minimis* providers were exempted from filing because they were non-contributors, not because they did not derive revenues from providing telecommunications services. Against this backdrop, in 1999 the FCC adopted the LIRE exemption, as embodied in Section 54.706(c). Because the Commission knew that certain Non-Filers still derived telecommunications revenues, it adopted the second sentence of Section 54.706(c). In other words, the Commission intended to combine the revenues of Filers and their Non-Filer Affiliates for purposes of calculating LIRE.

Thus, for example, assume a Filer qualified for LIRE but had an affiliated *de minimis* Non-Filer.[31] The Non-Filer Affiliate still derives revenues from providing interstate and international

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[27] The forms were originally referred to as "Telecommunications Reporting Worksheets," later changed to FCC Form 499 – Telecommunications Reporting Worksheets.

[28] *In the Matters of: Changes to the Bd. of Directors of the Nat'l Exch. Carrier Ass'n, Inc.*, 12 F.C.C.R. 18400, 18498 (1997).

[29] 44 U.S.C. §§ 3501, et seq.

[30] *Id*.

[31] *De minimis* providers were not required to file until 2000 with the release of the first Form 499-A. *1998 Biennial Regulatory Review –Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, FCC 99-175, 14 FCC Rcd. 16602 (1999). Arguably, the adoption of this filing requirement vis-à-vis the 2000 Instructions to FCC Form 499-A violates the Paperwork Reduction Act because it imposed an administrative burden on small businesses. (*De minimis* providers frequently qualify as small businesses). *See* 44 U.S.C. §§ 3501-02. The Instructions were also adopted without notice and comment in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553(b)-(c).

telecommunications services, but does not contribute to the USF on those revenues because its contribution would not exceed the *de minimis* threshold. By expanding the definition of "entity" in section 54.706(c), the Commission aimed to capture the revenues from such exempt Non-Filers, so as to avoid potential gaming of the system through the creation of Non-Filer Affiliates through which a "Filer" might shelter interstate revenue in an effort to preserve its LIRE eligibility.[32] The FCC curbed what would otherwise have been an easy opportunity for predominantly international telecommunications providers to manipulate the LIRE exemption and game the system. This was the FCC's obvious intent in expanding the definition of "entity" in section 54.706(c) to include Non-Filer Affiliate revenues within the revenue reported by a Filer, as such revenue would otherwise go unreported to USAC (i.e., sheltered and hidden in shell entities that qualified for exemptions from filing Telecommunications Reporting Worksheets, such as the *de minimis* exemption). Acknowledging the context and clear intent of the FCC renders Rule 54.706(c) unambiguous.

Moreover, the FCC's LIRE Order further discredits USAC's improper interpretation as contrary to the Commission's intent. Specifically, in the Order, the FCC stated:

> The limited international revenues exception that we adopt today also meets the requirement in section 254(d) of the Act that universal service support mechanisms be specific, predictable, and sufficient. By setting the international exception at the predetermined level of 8 percent, we establish a bright-line rule for providers. ***As soon as providers prepare their worksheets, they will know with certainty whether their interstate end-user telecommunications revenues comprise 8 percent or more of their total interstate and international end-user telecommunications revenues*** and, thus, whether they must contribute on the basis of their international end-user telecommunications revenues during the upcoming quarters in which their reported revenues will be assessed.

[32] When section 54.706(c) was adopted, the USF contribution rate hovered in the 4-6% range, thus requiring a telecommunications provider to derive over $150,000 of interstate revenue before exceeding the $10,000 *de minimis* contribution threshold and, thus, triggering the "499 Filing" requirement in the FCC rules. Absent the language in the second sentence of section 54.706(c), a predominantly international telecommunications provider could perpetually retain its LIRE eligibility by setting up straw man entities to shelter approximately $150,000 of interstate revenue.

> In sum, the 8 percent rule allows the provider to make decisions based on the specific and predictable operation of the support mechanism.[33]

As clearly stated by the FCC, the Commission intended providers to know whether they qualify for LIRE "as soon as providers prepare their worksheets." USAC's interpretation is contrary to that intent. Under USAC's interpretation, contributors must take into account not only the information reported on their own Form 499, but must investigate and determine the interstate and international revenue of their Filer Affiliates. In addition to directly conflicting with the FCC's intent to enable Filers to determine whether they qualify for LIRE as soon as they file their own forms (i.e. without reference to another Filer Affiliate's form), this result hardly meets the "specific, predictable, and sufficient" requirement set forth in Section 254(d). Indeed, as discussed in more detail herein, this is but one of the absurd consequences of USAC's tortured interpretation of section 54.706(c).

b) Even If Section 54.706(c) Is Found to be Ambiguous, the FCC Has Not Provided Guidance on the Application of the Rule; USAC Cannot Offer Its Own Interpretation but Must Seek Counsel from the Commission

If a statutory provision is unclear, the courts must then consider whether an agency's interpretation of the ambiguous provision is reasonable.[34] To the extent any ambiguity now exists, it is the direct result of USAC's overreaching of its authority by interpreting an FCC regulatory provision in such a way as to divorce the provision from its intended meaning and the logical and practical consequences of its original implementation. Even if it could be found to be ambiguous, the FCC has not offered any interpretation of the provision. Thus, because USAC has no authority to interpret FCC regulations, to the extent the provision is ambiguous, USAC must turn to the FCC for guidance. Rather than follow the mandated procedure, USAC took it upon itself to craft its

[33] LIRE Order at 1679, ¶ 24.
[34] *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005).

own interpretation – one which conflicts with the plain reading of the provision, the purpose of the provision, common sense and practicality. Accordingly, USAC's improper interpretation of section 54.706(c) must be ignored.

c) Applying Section 54.706(c) According to USAC's Interpretation Yields Absurd Results in Violation of Basic Principles of Statutory Construction

An equally well-established tenet of statutory construction is that courts have an affirmative duty to interpret statutes in such a manner as to avoid absurd results. This principle likewise applies to the interpretation of regulatory provisions.[35] And, even in cases where the language at issue appears clear on its face, courts will not apply a literal interpretation to a statutory or regulatory provision if doing so would lead to absurd consequences and would be contrary to the legislative or regulatory intent.[36] As discussed above, USAC's interpretation of Section 54.706(c) clearly conflicts with the FCC's intent. The FCC obviously intended to include only the revenues of the Filer and its Non-Filer Affiliates in its LIRE calculation. The Commission clearly did NOT intend for affiliated Filers to include revenues from other Non-Filer Affiliates for purposes of examining LIRE. This is abundantly clear when the practical application of such logic

[35] *Harris v. Velichkov*, 860, F.Supp.2d 970, 989 (D. Neb. 2012) ("One of the bedrock principles of statutory and regulatory interpretation is to avoid interpretations that would produce absurd results"); *City of Idaho Falls v. FERC*, 629 F.3d 222, 230 (D.C. Cir. 2011) ("To sum up, FERC's interpretation of Regulation 11.2 improperly divorces the regulation's text from both the rulemaking process from which it emerged and the underlying statutory scheme pursuant to which it was issued, making it 'plainly erroneous' and 'inconsistent with the regulation.'"); *Mitchell v. Shinseki*, 25 Vet. App. 32, 42 (2011) ("We have recognized the affirmative duty to avoid a literal interpretation of regulatory language that would produce 'an illogical and absurd result.'").

[36] *Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966); *U.S. v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."); *see also Alabama Power Co. v. Costle*, 636 F.2d 323, 360 n. 89 (D.C. Cir. 1979).

is applied in the context of affiliated telecommunications companies that may be affiliated by virtue of shared ownership interests of as little as 10% yet which lack any coordinated management or reporting procedures AND which are not otherwise required by FCC rules to undertake consolidated revenue reporting for USF contribution determination purposes.

This becomes self-evident when the regulatory context in which the FCC codified section 54.706 in 1999 is considered.[37] At that time, the instructions to FCC Form 457 (the predecessor to the Form 499-A) did not permit consolidated reporting for affiliated entities.[38] It was not until 2002 that the FCC reluctantly permitted affiliated filing entities to report on a consolidated basis,[39] and this allowance was not included in the instructions to the Form 499-A until 2003.[40] But, even now, Filers must satisfy a number of prerequisites to qualify for consolidated filing, including completing and submitting a consolidated certification.[41] This begs the question as to why the FCC would mandate consolidated reporting solely for the purposes of LIRE qualification at a time in which the Commission opposed it in every other context. USAC's interpretation essentially mandates consolidated reporting on the part of affiliated entities, by requiring the combining of revenues from Filer Affiliates to determine LIRE qualification. Surely, if the FCC intended to take such an unusual step and depart from its then current policy against consolidated reporting, it

[37] *See* LIRE Order.
[38] *See* 1999 Instructions for Completing the Universal Service Worksheet, FCC Form 457 (February 1999) and 2000 Instructions to Telecommunications Reporting Worksheet, Form 499-A (February 2000).
[39] *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd. 3752 (2002).
[40] 2003 Instructions to the Telecommunications Reporting Worksheet, Form 499-A at 7-8.
[41] *See* 2019 Instructions to the Telecommunications Reporting Worksheet, Form 499-A at 10-11.

would have provided some indication of its intent and reasoning somewhere in the text of section 54.706(c) or the regulatory history thereof.

Furthermore, USAC's interpretation requiring the combination of a Filer's revenues with both other Non-Filer Affiliates AND Filer Affiliates produces demonstrably absurd results. USAC's improper interpretation of the FCC's rules defies common sense. The rule makes no sense in context as USAC has interpreted and applied it to BA Telecom. Moreover, USAC's rule interpretation is practically impossible to enforce. First, USAC cannot effectively audit a company without auditing ALL of its affiliates. Under USAC's approach, to determine, for example, Company A's LIRE qualification, USAC must consider the revenues of ALL of Company A's affiliates. In auditing Company A, USAC must effectively audit *each* of Company A's affiliates. In other words, USAC cannot analyze Company A's reporting practices in isolation, but must also review the reporting practices of all of Company A's affiliates. As a result, if Company A is subject to a USAC audit, all of its affiliates are, practically speaking, also subject to an audit. This violates USAC's own audit procedures by failing to provide notice to all audited parties.[42]

Furthermore, this practice violates principles of corporate sovereignty, unduly burdens affiliates, and conflicts with concepts of fairness and equity embodied in Section 254(d) of the Communications Act.[43] Corporations are treated as legally distinct entities.[44] While affiliated corporations may have certain connections, they remain independent in the eyes of the law.[45] For example, only in rare instances when affiliated entities do not maintain separate existences, can

[42] *See* https://www.usac.org/about/about/program-integrity/bcap.aspx
[43] 47 U.S.C. § 254(d).
[44] *See* James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* § 7.1 (2011) ("Recognition of a corporate personality is considered to be the most distinct attribute of the corporation.").
[45] The Form 499-A Instructions acknowledge this fact, noting, "Entities with distinct articles of incorporation, articles of formation, or similar legal documents are separate legal entities." Instructions to 2019 FCC Form 499-A at 10.

the court "pierce the corporate veil" and impose liability on one affiliate for the actions of another.[46] Moreover, an affiliate's contacts with a forum will not, without more, render its affiliates subject to jurisdiction in the forum.[47] USAC, by consolidating the revenues of BA Telecom and its Filer Affiliate (for purposes of evaluating LIRE eligibility) has stripped the corporate identity of each individual affiliate, treating them as a single entity, in violation of principles of corporate sovereignty.

In addition, USAC's actions unduly burden corporations with multiple affiliates. USAC has essentially required all affiliates of a corporate filer to coordinate their Form 499 reporting practices. For corporations with a large number of affiliates, this imposes a complex and burdensome task. Moreover, such forced coordination violates the principles of fairness embodied in Section 254(d) of the Communications Act. It is clearly unfair to require affiliates with negligible connections, as little as 10% interest in or by another entity[48] (often times through passive investment rather than coordinated management)[49] to coordinate their reporting or else risk severe negative consequences (i.e. disqualification from LIRE, in this case resulting in a surprise USF contribution increase from [redacted] in each of January, February and March for prior periods).[50] The burden, of course, is even more egregious because it does not serve the FCC's ultimate goals in adopting LIRE, which was to fulfill the mandates of *TOPUC*.

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[46] *See, e.g., Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999).
[47] *See, e.g., Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925); *Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463 (D. Kan. 1983).
[48] *See* 47 U.S.C. § 153(2); Instructions to 2019 FCC Form 499-A at 16.
[49] In this case, BA Telecom and UVNV share a common holding company, which has no revenues or operations. It is merely an investment vehicle. The companies have no shared operations, activities or customers.
[50] [redacted].

Furthermore, USAC's actions are clearly discriminatory. They impose undue burdens on carriers with multiple affiliates, and expose them to disqualification from LIRE that companies with no affiliates do not face. Courts have determined that *TOPUC* clearly prohibits this disparate treatment of certain carriers.[51] Moreover, in essence, USAC has essentially required consolidated reporting among affiliated entities by requiring them to coordinate reporting or else risk disqualification from LIRE. Consolidated reporting, however, is clearly optional per FCC rules.[52] Once again, this demonstrates the conflict between USAC's interpretation of the rules and the FCC's intent.

d) USAC's Improper Interpretation Renders Language in the Commission's Rule Meaningless in Violation of Principles of Statutory Construction

Further, in construing statutory and regulatory provisions, courts do not examine a single word or phrase in isolation.[53] Rather, courts and agencies tasked with interpreting statutory and regulatory provisions must consider the entire statutory or regulatory context and the underlying policy of the provision.[54] In so doing, "it is a cardinal principle of statutory construction that a statute…be so construed that, if can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[55] USAC's interpretation renders a portion of section 54.706(c) meaningless in violation of this cardinal principle of statutory construction.

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[51] *AT & T Corp. v. Pub. Util. Comm'n of Texas,* 252 F. Supp. 2d 347, 353 (W.D. Tex. 2003) *aff'd sub nom. AT&T Corp. v. Pub. Util. Comm'n of Texas*, 373 F.3d 641 (5th Cir. 2004).

[52] Entities that elect consolidated reporting must meet a number of specific criteria enumerated by the Commission. *See 1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket 98-171, Report and Order, 14 FCC Rcd. 16602 (1999) (Consolidated Reporting Order); *Federal-State Joint Board on Universal Service et al*., CC Docket No. 96-45 et al., Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd. 3752 (2002).

[53] *Durr v. Shinseki*, 638 F3d. 1342 (11th Cir. 2011).

[54] *Corely v. United States*, 556 U.S. 303, 316 (2009); *Colortex v. Richardson*, 19 3d 1371 (11th Cir. 1994).

[55] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted).

Specifically, section 54.706(c) provides that the term "entity" "shall refer to the entity that is subject to the universal service reporting requirements in § 54.711 *and shall include all of that entity's affiliated providers of interstate and international telecommunications and telecommunications services.*" (emphasis added). USAC's reading of the second half of that sentence makes the language superfluous. Clearly, the FCC included the last half of that sentence to refer to something in addition to and distinct from an entity with contribution and reporting obligations (i.e. a Filer).

Throughout section 54.706, the term "entity" explicitly references providers that are required to contribute to the USF.[56] This is subsequently affirmed in section 54.706(c), which defined an "entity" as one that "is subject to the universal service requirements in § 54.711."[57] If the provision were to be given the interpretation ascribed to it by USAC, it would render much of the definition superfluous, as an entity's reporting and contributing affiliates would be considered "entities" pursuant to (1) section 54.706 when read as a whole; (2) the first part of the definition of an "entity in section 54.706(c), when read in conjunction with section 54.711; and (3) the second part of the definition in section 54.7011(c) as affiliates of the "entity." Thus, not only is USAC's reading of the regulatory provision circular, it would render the second half of the last sentence duplicative. And, as explained above, in interpreting statutory and regulatory provisions, courts must assume that the drafter did not intend to include superfluous or unnecessary language. Accordingly, USAC's unlawful interpretation must fail.

[56] *See* 47 C.F.R. § 54.706(a) ("Entities that provide interstate telecommunications to the public, or to such classes of users to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms.").

[57] In turn, section 54.711 makes no reference to the word "entity" but rather uses the term "contributor."

e) USAC's Improper Rule Interpretation Violates BA Telecom's Due Process Rights

Finally, USAC's improper interpretation of the LIRE exemption, 47 C.F.R. § 54.706(c), violates BA Telecom' due process rights. The FCC has never offered an interpretation of section 54.706(c) that requires contributors to include revenues from ALL affiliates, even other Filer Affiliates, for purposes of determining LIRE qualification. As a result, not only does USAC's rule interpretation exceed the bounds of its authority, but it violates BA Telecom' rights to prior notice under due process. Because the FCC has never before interpreted section 54.706(c) as USAC purports to in this case, BA Telecom had no notice that the rule would be applied in this manner. As such, application of this rule interpretation strips BA Telecom of its due process rights.[58] While the FCC can interpret and apply its rules, it cannot do so without advance notice to affected parties.[59] Because such advanced notice was not provided in this case, by attempting to apply the rule in manner not previously adopted by the FCC, USAC has violated BA Telecom's due process rights.

IV. CONCLUSION

For the foregoing reasons, the Bureau should reverse USAC's denial of the Appeal, and direct USAC to examine only BA Telecom's international and interstate end-user telecommunications revenues in determining its USF liability based upon its 2017 and 2018 Forms 499-A and its November 2018 Form 499-Q. Furthermore, the Bureau should direct USAC to reissue the Invoice consistent with this decision.

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[58] The APA requires advance notice of substantive rules to affected parties. 5 U.S.C. § 553. BA Telecom had no notice of a rule including ALL affiliate revenues (even revenues from other filers/contributors) in the calculation for purposes of determining LIRE qualification.

[59] *See Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); *See Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997) ("Notice and a meaningful opportunity to challenge the agency's decision are the essential elements of due process.").

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Respectfully submitted,

Jonathan S. Marashlian
Jacqueline R. Neff
MARASHLIAN & DONAHUE, PLLC
The *Comm*Law Group
1420 Spring Hill Road, Suite 401
Tysons, Virginia 22102
Tel: 703-714-1313
jsm@commlawgroup.com
Counsel for Appellant