REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of	)	
Request for Review by Locus Telecommunications, LLC of Decisions of The Title II Program Administrators	)	Docket No. 06-122

Request for Review by Locus Telecommunications, LLC of Decisions of the Title II Program Administrators

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Counsel for Locus Telecommunications, LLC

Jonathan S. Marashlian
Jacqueline R. Hankins
MARASHLIAN & DONAHUE, PLLC
The *Comm*Law Group
1420 Spring Hill Road, Suite 401
Tysons, Virginia 22102
Office Tel: 703-714-1313
E-Mail: jsm@CommLawgroup.com

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Request for Review by Locus Telecommunications, LLC of Decisions of the Title II Program Administrators

I. Introduction

By undersigned counsel, pursuant to 47 C.F.R. §§ 54.719 – 54.725, Locus Telecommunications, LLC ("Locus" or "the Company") hereby appeals the rejection of the Company's appeals of its Telecommunications Relay Services ("TRS"), Local Number Portability ("LNP"), and North American Numbering Plan Administration ("NANPA") fee (collectively, hereafter referred to as "Title II Program Fees") invoices by the respective administrators of those funds, or in the alternative[1], all TRS, LNP and NANPA invoices calculated on data derived from the Company's 2016 Form 499-A. For the reasons stated herein, Locus respectfully requests that the Federal Communications Commission ("FCC" or "Commission") direct Rolka Loube, Neustar and Welch & Company[2] (collectively the "Title II Program Administrators") to:

(1) recognize Locus as a private carrier, exempt from Title II Program Fees on private carriage revenue;

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[1] This appeal has been timely filed. The FCC's rules contain neither a deadline nor details on the process for appealing invoices or decisions issued by the Title II Program Administrators. The Commission's rules require USF contributors to appeal USAC decisions (interpreted by the FCC to include invoices) within 60 days of the decision/invoice date. 47 C.F.R. §§ 54.719 and 54.720; *In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator*, Order, WC Docket 06-122, DA 10-779 (May 7, 2010 Wireline Comp. Bureau); *In the Matter of Universal Service Contribution Methodology, Application for Review of a Decision by the Wireline Competition Bureau by inContact, Inc.*, WC Docket 06-122, Memorandum Opinion and Order, FCC 12-4 (January 5, 2012). Even if the 60-day appeal window applies to non-USF Title II Program invoices, Locus first appealed the July invoices to Rolka Loube and Neustar on August 26th, within 60 days of the July invoice dates. Rolka Loube and Neustar declined to issue formal written decisions on the appeals, but provided written confirmation of their decisions not to entertain the appeals on September 28th and September 30th respectively. Therefore, even if the 60-day clock applies to those "decisions," this appeal (dated Nov. 21, 2016) of those decisions has been timely filed. In the alternative, Locus appeals the underlying invoices issued by Rolka Loube and Neustar.

[2] Locus received and paid one invoice (dated September 12, 2016) for NANPA fees based upon revenue reported in its 2016 Form 499-A. Although Locus did not file a separate appeal with Welch & Company, this request for review covers all three Title II Program Administrators as all three programs suffer from the substantive challenges set forth herein.

(2) issue refunds for Title II Program Fees paid in error due to the Title II Program Administrators' imposition of fees on private carriage revenue[3]; and

(3) calculate all future Title II Program Fees based exclusively on Locus's interstate and international end-user common carrier revenues, as reported on its Forms 499-A, until such time as Locus no longer provides services on a private carrier basis.[4]

II. Background

In calendar year 2015, Locus sold prepaid calling cards, prepaid wireless/mobile services and voice termination services in addition to certain non-telecommunications offerings (such as wireless handsets and international top-up). Locus offered some of its services on a private carriage basis (namely its prepaid calling cards and voice termination services[5]) and others (prepaid wireless) on a common carriage basis. Earlier this year, Locus timely filed its 2016 Form 499-A reporting 2015 revenues from each of its offerings. In Line 105 of the Form, Locus identified service categories based upon total revenues earned by category.[6] Accordingly, Locus listed Cellular/PCS/SMR (prepaid wireless), a common carriage service, as its primary (#1) service offering in Line 105. Locus listed "Private Service Provider" as its second highest revenue driver (#2), Prepaid Card as the third (#3), and Toll Reseller services fourth (#4).

As presently administered by the Universal Service Administrative Company ("USAC"), the 2016 Form 499-A does not provide providers of both common and private carrier services, like

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[3] Locus seeks refunds for invoiced amounts paid based upon private carriage revenues. *See* Exhibit A.

[4] To the extent that the Title II Program Administrators cannot exclude only a select portion of the revenues (i.e. private carriage revenues) reported on the Company's 2016 Form 499-A from its Title II Program Fee contribution base, Locus requests that the Administrators be ordered to rescind, in their entirety, all invoices issued to date based upon revenues reported on the 2016 Form 499-A.

[5] [redacted]

[6] [redacted]

Locus, to segregate revenues derived from private carriage from revenues derived from common carriage offerings. As further discussed below, this flaw is problematic because, while revenues derived from common carriage are subject to Title II Program Fees, revenues from services provided on a private carriage basis are exempt from these fees, by law.

USAC, which administers the Universal Service Fund ("USF"), shares data reported on the Form 499-A with the administrators of the other Title II Programs to enable them to invoice contributors to those funding mechanisms. In an attempt to segregate and exclude its private carriage revenues from the revenue data shared by USAC with the Title II Program Administrators, Locus indicated its (partial) exemption from contribution to the NANPA, TRS and LNP funding mechanisms by checking the appropriate boxes in Line 603 of the Form.[7] Locus included the following written explanation:

> Locus is a private carrier with respect to all revenues reported on Lines 411, 412 and 414.1 [redacted]. Locus is therefore exempt from contributing to TRS, LNP Administration, and NANPA based on these private carriage revenues. Locus is a common carrier with respect to its remaining telecommunications revenues and is not exempt from contributing to TRS, LNP Administration and NANPA based on its common carrier revenues.

Along with its 2016 Form, Locus filed a supplement supporting its rationale for including the above language, along with supporting legal arguments. USAC declined to recognize the exemption and shared data reported on the Form with the Title II Program Administrators. In late July, Locus received invoices from Rolka Loube (TRS Fund administrator) and Neustar (administrator of the LNP funding mechanism) for TRS and LNP fees respectively. The July TRS invoice calculates Locus's TRS liability based on the entire amount reported in Line 512(b) of the 2016 Form 499-A [redacted]. The July TRS invoice assesses [redacted] – the assessment

[7] In prior year filings, Locus had attempted to exclude private carriage revenues from its Title II Fund contribution base by identifying them in Line 513. [redacted]

for period 1 of 12 (against a total obligation of [redacted] for 2016-17).[8] The July LNP invoice likewise appears to calculate Locus's LNP liability based on the entire amount reported in Line 423 of the 2016 Form 499-A.

On August 26th, Locus appealed the July invoices to the respective administrators, copying USAC. Locus argued that Rolka Loube and Neustar had incorrectly calculated Locus's TRS and LNP liability. Whereas Rolka Loube calculated Locus's TRS liability based on the entire amount reported in Line 512(b) of the 2016 Form 499-A [redacted], Locus asserted that its 2016-17 TRS contribution base should be [redacted].[9] Accordingly, Locus's total TRS liability should be [redacted][10], with monthly assessments of [redacted][11] (rather than the [redacted] invoiced on the July TRS invoice). Similarly, Locus noted that its LNP contribution should be based only on its reported common carriage revenues - [redacted].

On September 9th, Locus's counsel had a discussion with Neustar's counsel, who suggested that Neustar could only process the data it received from USAC and had no authority to make a decision on the appeal before it. On September 22nd, in discussions with USAC, USAC's General Counsel stated that USAC's hands are tied, and suggested that Locus either: (1) go back

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[8] Locus paid the July TRS and LNP invoices to avoid late payment fees, interest, and Red Light status. *See* http://www.usac.org/cont/late-payments/default.aspx. Locus has since received and paid August, September and October TRS invoices and August and September LNP/SOW invoices consistent with the July invoices. Locus also received and paid a September NANPA fee invoice. Locus appeals Rolka Loube and Neustar's rejections of the July invoice appeals, or in the alternative, the July, August and September TRS invoices, the July, August and September LNP/SOW invoices, the September NANPA invoice, and all future Title II Program Fee invoices issued based upon its 2016 Form 499-A revenue data.

[9] This equals [redacted] (reported in Line 512(b)) - [redacted] (interstate and international private service provider revenues reported in Line 603)).

[10] This equals the [redacted] TRS contribution base multiplied by the 2016-17 interstate telecommunications services provider TRS contribution factor (.01862).

[11] [redacted].

to the Title II Program Administrators; or (2) pursue the issue with the Commission. USAC's General Counsel also stated:

- USAC cannot adjust the Form.
- Form 499-A does not provide filers with a mechanism to segregate private from common carriage revenues.
- USAC shares data with the Title II Program Administrators based upon the primary service type checked in Line 105.
- USAC suggested that it is the Title II Program Administrators' responsibility to take the data they receive and to bill according to applicable rules, and that USAC could provide no relief on the pending appeals.

On September 28th, Rolka Loube advised that it would "contact USAC for additional information" on the appeal of the TRS fee invoice pending before it. On October 4th, Rolka Loube confirmed that it would not be issuing a further decision on the appeal and directed Locus to USAC, noting, "We are bound by the information we receive from USAC, please contact them directly." On September 30th, Locus's counsel received written confirmation from Neustar of its position on the appeal. In an attempt to secure guidance from the Commission on how to resolve this issue – both the pending invoice appeals and the broader issue, i.e., how carriers can legally segregate private and common carriage revenues on Form 499-A going forward, Locus and its counsel met with FCC staff on October 27, 2016. Following that discussion, Locus submits this request for review.

III. Argument

A. By Law, Carriers Can Offer Services on Both a Private and Common Carriage Basis; Only Common Carriage Revenues are Subject to Title II Program Fees

Congress, the FCC, and the courts have long recognized that carriers may operate as private service providers with respect to some services and common carriers with respect to others.[12] The

[12] *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("NARUC II") ("[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others."); *In re Audio Comm'cns, Inc.*, 8 FCC Rcd 8697, 8698-99 (1993) ("[A] single firm that is a common carrier is some roles need not be a common carrier in other roles.").

law does NOT require service providers to structurally separate in order to take advantage of the lower regulatory burdens imposed on private carrier services. Yet, that is precisely what USAC's current policies would require a service provider, like Locus, to do in order to avoid the imposition of Title II Program Fees on revenue derived from private carrier services.

The Communications Act provides that a "telecommunications carrier shall be treated as a common carrier under [Title II] *only to the extent that it is engaged in providing telecommunications services*." [13] Accordingly, the FCC "must examine the actual conduct of an entity to determine if it is a common carrier" for the specific purposes at issue rather than relying merely on its status as a common carrier for some purposes.[14] As the D.C. Circuit has explained, "the mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide [each service at issue] on a common carrier basis."[15] In sum, the Communications Act, the FCC's regulations, and decades of judicial precedent recognize that a single entity (*i.e.*, one service provider, one Form 499 Filer, one contributor) can act as both a common and a private carrier; and, by virtue of these distinct operations, a single entity may derive revenue that is subject to different regulatory schemes and associated costs (i.e., support fees and contributions).

Common carriage revenues are subject to both USF contributions and Title II Program Fees. Private carriage revenues, on the other hand, are subject to USF fees only, and are exempt from all other Title II Program Fees. By law, a single entity that derives revenue from both

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[13] 47 U.S.C. § 153(51) (emphasis added).

[14] *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 60 (2d Cir. 2006); *see also Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927) (explaining that "[a] common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests").

[15] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also Eagleview Technologies, Inc. v. MDS Associates*, 190 F.3d 1195, 1198 (11th Cir. 1999).

common and private carrier services should only be subject to the contributions and fees applicable to the revenues from each, distinct type of offering. It is unlawful and capricious to subject private carrier revenue to Title II Program Fees merely because the revenue is derived by a provider selling both common and private carrier services. As currently administered by USAC, the current Form 499-A (indeed, all Forms 499-A since the consolidated worksheet was adopted in 2002) forces carriers, like Locus, to pay Title II Program Fees on private carrier revenue, as further explained herein.

B. As Applied by USAC, the Form 499-A is Deficient and Fails to Provide Carriers with a Means to Segregate Common from Private Carriage Revenues

USAC fails to provide service providers, like Locus, with the opportunity to identify and segregate private from common carrier revenue anywhere in the Form 499-A itself or through the submission of supplemental information via Line 603. As such, USAC does not provide Locus with the ability to exclude private carrier revenue from being shared with the Title II Program Administrators. USAC's administration of the Form, therefore, does not comply with the Communications Act and FCC precedent, which specify that private carriage revenues are exempt from Title II Program Fees. Instead, USAC's policies force carriers, like Locus, to be subjected to these fees lest they engage in unlawful self-help (i.e., by excluding private carrier revenue from *both* the USF and Title II Program contribution bases).

C. USAC Wrongfully Rejected Locus's Supplemental Information and Incorrectly Shared Revenue Data with the Other Fund Administrators; USAC's Policy for Sharing Revenue Data Must be Overturned

Despite the limitations of the Form, Locus sought to exclude its private carriage revenue from its Title II Program Fee revenue base through a disclosure statement in Line 603 of the Form and a supplement to its 2016 Form 499-A. USAC, however, ignored the language in 603 and the supplemental filing. USAC claimed that it determined whether to share information reported with

the Title II Program Administrators based exclusively on the primary service identified in Line 105 of the Form (i.e., the service listed (#1) by the filer). Because Locus listed Cellular/PCS/SMR first (#1) in Line 105, and Private Service Provider second (#2), USAC shared revenue data with all of the Title II Program Administrators. Upon processing the aggregate revenue data provided by USAC, each Administrator billed Locus Title II Program Fees on private carrier revenue, in violation of the law.

USAC should not have ignored the supplement and language submitted in Line 603 of Locus's Form identifying private carriage revenues. USAC's policy is unlawful because it administratively denies Locus (and similarly situated filers) its legal right to exclude private carrier revenue from the Title II Program Fee base, which is necessary to avoid being invoiced by the Title II Program Administrators on said private carriage revenue.

Pursuant to FCC rules, contributors must have the opportunity to exclude *all* private carriage revenue from Title II Program Fee contributions. Denying a carrier the ability to exclude private carriage revenue from its Title II Program Fee base simply because it derived more revenue from common carriage than private carriage offerings clearly violates Commission rules.[16] USAC should withhold *any* private carriage revenues identified by the certifying contributor, regardless of whether the filer listed "Private Service Provider" as its primary service category in Line 105 of the Form. Accordingly, the Commission must direct USAC to rescind this policy, and to withhold Locus's certified private carriage revenues, as identified in Line 603 of the Form, from the data shared with the Title II Program Administrators. Anything less would be arbitrary and capricious and a violation of statute and judicial precedent.

[16] Likewise, one can presume that filers whose private service provider revenue is the primary source of revenue, but not their only source of revenue, and who identify themselves as #1 Private Service Provider in Line 105, are likely to be *under-contributing* to Title II Programs.

D. The Commission Must Direct the Title II Program Administrators to Recalculate and Reissue Title II Program Fee Invoices Based upon 2016 Form 499-A Revenue Data

In addition to addressing the broader issues raised above, the Commission must instruct the Title II Program Administrators to reissue all invoices based upon revenues reported in Locus's 2016 Form 499-A, to exclude contributions based upon private carriage revenues, consistent with FCC rules. Specifically, the FCC must direct the Administrators to: (1) recognize Locus as a private carrier, exempt from Title II Program Fees on private carriage revenue; (2) issue refunds for Title II Program Fees paid in error due to the Title II Program Administrators' imposition of fees on private carriage revenue[17]; and (3) calculate all future Title II Program Fee invoices based exclusively on Locus's interstate and international end-user common carrier revenues, as reported on its Forms 499-A, until such time as Locus no longer operates as a private service provider.[18]

IV. Conclusion

For the foregoing reasons, Locus respectfully requests that the Commission instruct the Title II Program Administrators to: (1) recognize Locus's private carrier status and reissue invoices as requested; (2) direct USAC to withhold properly certified private carriage revenues from data shared with the Title II Program Administrators; (3) order USAC to discontinue its policy of relying on the "primary" service identified in Line 105 of the Form for this purpose, and (4) provide such other relief as may be appropriate.

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[17] *See* Exhibit A.

[18] To the extent that the Title II Program Administrators cannot exclude only a select portion of the revenues (i.e. private carriage revenues) reported on the Company's 2016 Form 499-A from its Title II Program Fee contribution base, Locus requests that the Administrators rescind all invoices issued to date based upon revenues reported on the 2016 Form 499-A in their entirety.

Respectfully submitted,

Counsel for Locus Telecommunications, LLC

Jonathan S. Marashlian
Jacqueline R. Hankins
MARASHLIAN & DONAHUE, PLLC
The *Comm*Law Group
1420 Spring Hill Road, Suite 401
Tysons, Virginia 22102
Office Tel: 703-714-1313
E-Mail: jsm@CommLawgroup.com

EXHIBIT A

The following chart shows Title II Fee invoices issued to (and amounts paid by) Locus based upon revenues reported on the Company's 2016 Form 499-A. By this appeal, Locus seeks a refund for all amounts paid based upon private carriage revenues reported on its 2016 Form 499-A.

	DATE	INV	AMT
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
			[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
			[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
			[redacted]
			[redacted]