

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In the Matter of |) | |
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| Petition of The <i>Compliance</i> Group, Inc. for a Declaratory Ruling that the FCC's "Adjunct-to-Basic" Precedent Does Not Apply to I-VoIP Services and Ancillary Features |) | WC Docket No. _____ |
| |) | |
| Universal Service Contribution Methodology |) | WC Docket No. 06-122 |
| |) | |
| Federal-State Joint Board on Universal Service |) | CC Docket No. 96-45 |
| |) | |

**Petition of The *Compliance* Group, Inc.
for a Declaratory Ruling that the FCC's "Adjunct-to-Basic" Precedent
does not Apply to I-VoIP Services and Ancillary Features**

Introduction and Summary

Pursuant to Section 1.2 of the Federal Communication Commission's ("FCC" or "Commission") rules,¹ The *Compliance* Group, Inc. ("The *Compliance* Group")² respectfully submits this Petition seeking a Declaratory Ruling that the FCC's "adjunct-to-basic" precedent does not apply to Interconnected Voice over Internet Protocol ("I-VoIP") services and ancillary features.

The *Compliance* Group has learned that the Universal Service Administrative Company ("USAC") appears to be extending the "adjunct-to-basic" precedent to I-VoIP through a corollary concept – "associated with I-VoIP." Specifically, USAC appears to be considering "ancillary" services, offered in conjunction with an underlying I-VoIP service, to be I-VoIP, even if these ancillary features do not necessarily individually meet the four-pronged definition of "I-VoIP." However, the FCC has not expressly extended its adjunct-to-basic line of precedent to I-VoIP

¹ 47 C.F.R. § 1.2.

² The *Compliance* Group (www.ComplianceGroup.com) is a regulatory, tax and corporate compliance consulting firm based in McLean, VA.

offerings. Therefore, The *Compliance* Group respectfully requests that the Commission declare that the FCC's adjunct-to-basic precedent does not apply to I-VoIP services and ancillary features and instruct USAC to discontinue its extension of this concept to I-VoIP.

Background – The Adjunct-to-Basic Precedent

The FCC has ruled that certain services that otherwise might meet the literal definition of an enhanced service or information service nevertheless qualify as “adjunct-to-basic” services if they are “incidental” to underlying basic telecommunications services and do not “alter [...their] fundamental character.”³ Adjunct-to-basic services could include, for example, call forwarding, call waiting, caller ID or a recorded message provided with a calling card service. The Commission has determined that, since these services “facilitate the completion of calls through utilization of basic telephone service facilities,” they qualify as “telecommunications services.”⁴

USAC's Extension of the Adjunct-to-Basic Precedent to I-VoIP

USAC's extension of the adjunct-to-basic precedent to I-VoIP and ancillary features converts services that would otherwise qualify as exempt “information services” into USF-assessable I-VoIP services. For example, in conjunction with a core I-VoIP service (offered separately or as part of a bundled package), providers may offer ancillary features such as: auto attendant, call forwarding, call waiting, hunt group, or fax over IP (“FoIP”). Individually, such services meet the definition of information services because they offer the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

³ See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826 at ¶ 16 (2005) (“*Enhanced PPCC Order*”), *aff'd sub nom. American Tel. & Tel. Co. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

⁴ *Section 255 & 251(a)(2) Order*, 16 F.C.C. Rcd. at 6448-49, ¶ 77; *North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF 84-2, Memorandum Opinion and Order, 101 FCC 2d 349, 359-361, ¶¶ 24-28 (1985) (services that “facilitate the provision of basic services without altering their fundamental character” are not considered enhanced services), *recon.*, 3 FCC Rcd 4385, 4386, ¶¶ 8-9 (1988).

telecommunications.”⁵ However, by applying the adjunct-to-basic precedent to these features, USAC might treat them as USF-assessable I-VoIP services where offered alongside a regulated I-VoIP service. In other words, USAC treats services that do not necessarily fall within the Commission’s four-pronged definition of “I-VoIP”⁶ as I-VoIP for assessment purposes. Right now, in light of USAC’s seeming embrace of the “associated with” I-VoIP concept, a number of services (and the revenue derived therefrom) that are clearly non-telecommunications could be reclassified as assessable interstate telecommunications revenue by USAC in the audit context. Permitting USAC to reach such conclusions, which are clearly based on “interpretations” and “extensions” of FCC and judicial precedent and not the application of unambiguous law and clear FCC rules, exposes well-intentioned I-VoIP providers to unnecessary regulatory uncertainty. Moreover, aggrieved auditees may be forced to expend significant resources appealing audit decisions whose foundation is constructed on a clear abuse of USAC’s limited charter.⁷ The Commission should intervene and issue the declaratory ruling requested by this Petition to protect unsuspecting providers from the costly consequences of USAC’s overreach.

As another example – consider parked phone numbers. Providers offer this feature to their customers to allow them to purchase telephone numbers that remain inactive. Under USAC’s “associated with I-VoIP” concept, providers could be required to assess USF contributions on these numbers because the service is provided along with an I-VoIP offering. These services, however,

⁵ 47 U.S.C. § 153(24).

⁶ I-VoIP is a service is a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. 47 C.F.R. § 9.3.

⁷ USAC’s limited charter grants it authority to handle “billing contributors, collecting contributions ... and disbursing universal service support funds.” 47 C.F.R. § 54.702. USAC is not permitted to make policy or interpret statutes or rules, and if the Act or the rules are unclear USAC “shall seek guidance from the Commission.” 47 C.F.R. § 54.702(c).

are non-telecommunications because they do not include transmission.⁸ Such a reclassification would not only violate Commission precedent; it would unreasonably increase the cost to customers of choosing to use this type of service.

Limitations of the Adjunct-to-Basic Precedent

The FCC has exclusively applied the adjunct-to-basic precedent with respect to “telecommunications services.”⁹ I-VoIP services, however, do not qualify as “telecommunications services.” Only providers of “interstate telecommunications services” are required to contribute to the USF.¹⁰ However, the Communications Act authorizes the FCC to require “any other provider of interstate telecommunications...to contribute to the preservation and advancement of universal service if the public interest so requires.”¹¹ Pursuant to this authority, the FCC extended USF contribution obligations to I-VoIP providers in 2006. In its 2006 Order, the Commission clarified that I-VoIP qualifies as “telecommunications.”¹² Importantly, the Commission did not define I-VoIP as a common carrier “telecommunications service.” Because I-VoIP does not qualify as a “telecommunications service,” the Commission’s adjunct-to-basic principles and precedent – which apply exclusively to “telecommunications services” – simply do not apply to I-VoIP. As with its extension of USF contribution obligations to VoIP pursuant to its “permissive” authority under Section 254(d) of the Act, the Commission would need to expressly extend its adjunct-to-basic precedent to I-VoIP.¹³ Since the Commission has not done so, the “adjunct-to-basic” line of

⁸ The term “telecommunications” means “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50).

⁹ See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826 at ¶ 16 (2005) (“*Enhanced PPCC Order*”), *aff’d sub nom. American Tel. & Tel. Co. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

¹⁰ 47 U.S.C. § 254(d).

¹¹ *Id.*

¹² *In the Matter of Universal Serv. Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 F.C.C. Rcd. 7518, 7536, ¶ 34 *et seq.* (2006) (“2006 USF Order”).

¹³ Even though the Commission has not classified I-VoIP as a “telecommunications service” under Title II, it has expressly extended numerous Title II regulatory obligations to I-VoIP. For example, see *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed

precedent does not apply to I-VoIP and ancillary offerings and USAC lacks the authority to interpret FCC rules and precedent in such a way as to extend what the Commission has not expressly extended to I-VoIP.

A Declaratory Ruling Regarding the Limitations of the Adjunct-to-Basic Precedent is Needed

We call on the Commission to declare definitively that USAC cannot apply the adjunct-to-basic precedent to I-VoIP. Specifically, USAC cannot effectively reclassify ancillary services that otherwise meet the definition of information services merely because these services are provided alongside I-VoIP services.

It is incumbent on the Commission to clarify this issue that impacts the revenue reporting decisions of all I-VoIP service providers. I-VoIP service providers that have been treating ancillary services as “information services” could face serious liability for underreporting revenue in an audit if USAC prevails without Commission input. The Commission has a responsibility to issue a declaration to ensure that audit outcomes are consistent with Commission rules and legal precedent.

More generally, when USAC circumnavigates nearly a decade of I-VoIP precedent and nearly three decades of “adjunct-to-basic” precedent, it is the duty of the Commission to enforce its own precedent. Moreover, USAC has created uncertainty for I-VoIP providers with respect to their reporting and USF contribution obligations. Section 254 of the Communications Act requires that universal service mechanisms and the contributions into them be “predictable.”¹⁴ Given the

Rulemaking, 21 F.C.C.R. 7518, 7538-43, ¶¶ 35, 38-49 (2006) (extending USF contribution obligations to I-VoIP); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, Report and Order, 22 F.C.C.R. 11275 (extending disability access requirements under Title II to I-VoIP providers); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 F.C.C.R. 6927 (extending CPNI rules to I-VoIP service providers); *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (extending E911 obligations to I-VoIP providers).

¹⁴ 47 U.S.C. § 254(b)(5); § 254(d).

potential for confusion and inconsistency with regard to the reporting of ancillary services that are frequently provided in conjunction with core I-VoIP offerings, the Commission should clarify that the “adjunct-to-basic” line of precedent does not apply in the context of I-VoIP. I-VoIP services are not telecommunications services and do not inherit telecommunications service precedents such as the “adjunct-to-basic” precedent without Commission action grounded in statutory authority. Instead, ancillary services offered in conjunction with I-VoIP should be treated as information services.

The Commission Should Clarify that “Adjunct-to-Basic” Precedent has Not been Extended to I-VoIP for USF Purposes

The FCC cannot stand idly by if USAC unilaterally and unlawfully extends the FCC’s adjunct-to-basic precedent to ancillary services provided with an I-VoIP service. Should the Commission wish to extend its adjunct-to-basic precedent, it must do so through a lawful Commission order.

Conclusion

For the foregoing reasons, The *Compliance* Group urges the Commission to clarify that the FCC has not extended its adjunct-to-basic precedent to I-VoIP and ancillary services. Accordingly, the Commission should instruct USAC that it must separately analyze ancillary features offered with an I-VoIP service and treat such ancillary services that do not meet the definition of "I-VoIP" as unregulated information services and/or non-telecommunications as the case may be.

Respectfully Submitted,



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