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July 18, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Via Federal Express

Dear Federal Communications Commission:

Please find enclosed Petition for Review filed on behalf of American Cyber Corp. I have included an additional four (4) copies of the Petition, Exhibits and a Certificate of Service. Please contact our office should there be any questions

In accordance with the Second Report and Order and further Notice of Proposed Rulemaking Adopted April 23, 2003 in Docket 02-6, FCC 03-101, we have placed Docket Number 02-6 on the Petition. If this is not correct, please advise at once.

Respectfully,

Lawrence M. Brenton

LMB/tlb

cc. D. Scott Barash, Esq.

0+4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C 20554

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In the Matter of	)	
	)	
Request for Review by American Cyber Corp., of Decision of Universal Service Administrator	)	Docket No. 02-6
	)	
	)	

To The Commission

PETITION FOR REVIEW

AMERICAN CYBER CORP.

David G Crocker
Lawrence M Brenton

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Its Counsel

July 18, 2003

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I. SUMMARY

American Cyber Corp ("American Cyber"), by its counsel, hereby requests that the Commission review *de novo* the attached Decision (Exhibit A) of the Universal Service Administrative Company ("USAC") pursuant to 47 C F R § 54 719 through 47 C.F R. § 54 725. By an initial letter of September 12, 2001 (Exhibit B, the enclosed 2001 499-A form and instructions are omitted) rejecting the duly filed 2001 499-A form and its May 22, 2003 Decision, USAC refuses to accept American Cyber's 2001 form 499-A. This action is contrary to the USAC Form 499 Instructions, beyond USAC's authority delegated it by the Commission and contrary to Petitioner's contractual agreements with its underlying carrier, QAI, Inc. As a consequence, USAC has wrongfully billed American Cyber Universal Service Fund charges by invoices issued during the months of January through June, 2001. By this Petition, American Cyber urges the Commission to reverse these actions of USAC and determine that QAI, Inc rather than American Cyber is liable for such charges and all related interest and late charges.

All factual assertions herein are supported by the attached documentation and Petitioner's Declaration

II. BACKGROUND

As can be seen by the USAC letter rejecting American Cyber's 2001 form 499-A filing (Exhibit B) this matter is one of five virtually identical proceedings involving five carriers.[1]

[1] The carriers are Inmark, Inc d/b/a Preferred Billing, American Cyber Corp, Coleman Enterprises, Inc, LoTel, Inc d/b/a Coordinated Billing and Protel Advantage d/b/a Long Distance Service Petitions for Review for all five carriers are being filed simultaneously with the Commission The major circumstance differentiating the five carriers is the bankruptcy filings by Coleman Enterprises and American Cyber, each of which filed Chapter 11 proceedings In addition, it appears that with regard to American Cyber, QAI did not pay USAC invoices for a very extensive period of time in the year 2000, as monthly invoices during the first six months of 2001 totaled less than $30,000 00 each, exclusive of late payment penalties, but the balance invoiced by USAC in March of 2001 totaled $481,496 44 See Exhibit K

Each of the five carriers was, in calendar year 2000, a reseller of long distance telecommunication services Each contracted with QAI, Inc., for wholesale provision of underlying long distance service. Wholesale service was provided pursuant to contract (Exhibit C) by which QAI provided underlying long distance service and billing and collection, payment of expenses associated with the provision of services, expressly including Universal Service Fund charges, and payment to the reselling carrier of net proceeds after collection of a commission by QAI

In practice, there was virtually never a "margin" or funds available for payment to the reseller after payment of expenses and its commission, according to the methodology by which QAI calculated expenses associated with the provision of services In practice, virtually the only funds paid by QAI to the resellers consisted of what QAI deemed to be "optional" advances made pursuant to the contract, which QAI evidently then booked as loans to the resellers

The contractual agreements and course of dealing between the parties clearly established that QAI billed for, collected and reserved Universal Service Fund Charges in 2000 and was obligated to pay such charges when invoiced for them by USAC through June of 2001. These contracts and this course of dealing were consistent with USAC instructions, which clearly provide that every wholesaler of services must report on its own account and therefore pay all Universal Service Fund charges generated by revenues attributable to resellers in the absence of documentation establishing that the reseller is obligated to do so (Exhibit D, page 15 of 2001 499-A Instructions) The instructions for the September, 2000 499-S form and for the 2000 499-A form contain similar language, also included in Exhibit D. In this case, the parties agreed to exactly the opposite procedure; the wholesaler undertook the responsibility to bill for, collect and

pay Universal Service Fund obligations directly There is no prohibition against carriers making such an agreement.

Each of the resellers received correspondence dated August of 2000, likewise confirming that QAI bore responsibility for payment of Universal Service Fund charges (Exhibit E). The ongoing relationship between QAI and each of the resellers became disrupted in November and December of 2000, when QAI engaged in a dispute with its underlying long distance provider, Sprint, resulting in termination of the provision of services and loss of a substantial portion of each reseller's customer base In March of 2001, QAI requested of the three resellers not then in bankruptcy (Protel, LoTel and Inmark) that they assume responsibility for payment of Universal Service Fund charges (Exhibit E), which request was unequivocally refused (Exhibit F) Consistent with the contractual agreement of the parties, their course of dealing, and the 499-A instructions, each of the five resellers filed 2001 499-A forms (Exhibit G) explaining the obligation of QAI to report calendar year 2000 revenues and pay the resulting Universal Service Fund charges These forms were rejected collectively by USAC, resulting in letters of appeal (Exhibit H). Undersigned counsel contacted USAC on several occasions to inquire about the status of these appeals On May 22, 2003, USAC issued its Administrator's Decision on Contributor Appeal (Exhibit A), denying all appeals American Cyber requests *de novo* review and reversal of this Administrator's Decision

III. ARGUMENT

A. Universal Service Administrative Company does not have authority to reject a signed and filed 499-A form

The Universal Service Administrative Company has not been granted the authority to reject 499-A forms It has been granted the authority to audit forms, conduct inquiries and seek information but nowhere has it been granted the authority to receive a duly executed and completed form 499-A and choose to disregard it as it has done in this case The Administrator has expressly been denied the authority to act in doubtful situations without first seeking Commission Guidance 47 C F R § 54.702 (c) Rejecting filed 499 forms is clearly a power denied the Administrator

Nor does the Administrator have the authority to reject a contractual arrangement between carriers whereby the wholesale carrier agrees to pay Universal Service Fund charges, as USAC purports to do in its Decision

Further, such action violates USAC's own Instructions.

The Instructions issued by the Universal Service Administrative Company for 499 reporting have been given the force of regulations by the Commission See, for example, In the Matter of Request for Review by ABC Cellular Corporation, DA 02-3474, Order adopted December 16, 2002 In addition to citation to numerous Instructions as authority, the Order further recognizes, in footnote 10, that by virtue of portions of the Instructions adopted in connection with the preparation of 499 forms, contractual agreements between carriers at least in situations involving the transfer of customers will be honored in terms of the allocation of responsibility for payment of Universal Service Fund charges.

In the present case, the Universal Service Administrative Company Decision on Contributor Appeal is based primarily if not exclusively on the Administrator's determination that the Instructions are not to be followed. Contrary to the express language of the Instructions, under the Decision the wholesale carrier is not to include on its report of end user revenues those revenues for which it expressly agreed with the reselling carrier it would collect and pay Universal Service Fund charges Further, the agreement between the parties is disregarded.

If in fact the 499 Instructions do constitute regulations or at the very least reflect rules by which carriers may govern their operations, by what authority does the Administrator disregard not only the Instructions but also a contractual arrangement between a wholesale carrier and reseller expressly crafted to comply with the Instructions? The Petitioner submits that the Administrator has committed clear error by negating the contractual agreement between carriers and disregarding the Instructions

In support of the Decision, the Administrator states (without citation of any authority) "This demonstrates why FCC regulations and USAC do not allow USF obligations to transfer to a third party " This crucial sentence ignores those portions of the Instructions which relate to the reporting obligation of wholesale carriers and reseller carriers. There is no attempt here to transfer an obligation, it originates with the wholesaler, QAI, and should stay there as agreed

QAI is not merely some mysterious "third party" to which obligations are sought to be "transferred" By Instruction, QAI is the carrier responsible for reporting 499 revenues except in transactions in which it obtains from the reselling carrier confirmation and agreement to report 499 revenues and pay the resulting USF charges. In the present case, the carriers expressly

crafted their agreements to provide that the wholesale carrier, QAI, would collect and pay USF charges

The Administrator is perhaps also somewhat disingenuous in characterizing QAI as 'a third party, to whom USF obligations are being transferred' The Administrator directly billed QAI for USF obligations for a number of years It received and accepted payments from QAI. By means not revealed to Petitioner, the Administrator chose in 2001 to transfer billings, including substantial unpaid account balances, late payment charges and interest to Petitioner Had the Administrator instead followed its own Instructions as well as the contractual agreement between the carriers, it instead would have continued to bill QAI all of these charges through June of 2001

B. The Universal Service Fund Charges in Question are the Obligation of QAI and not American Cyber

It is beyond dispute that under the agreement between the parties, QAI undertook responsibility as wholesaler to pay Universal Service Fund charges. See Paragraph 2(a) and Schedule 2, paragraph 1(c) of Exhibit C QAI also billed for and collected such charges. See Exhibit K This contractual arrangement is consistent with the Universal Service Administrative Company instructions, which provide that the wholesale provider of telecommunication services is obligated to pay Universal Service Fund charges in the absence of an agreement by the reseller to do so. Here the agreement was exactly to the contrary and was again confirmed through the exchange of correspondence between QAI and three of the resellers in March of 2001, wherein QAI again confirmed its obligation to pay Universal Service Fund charges unless the resellers assume the obligation to do so, which they refused.

Because two of the resellers in question, American Cyber and Coleman Enterprises, filed bankruptcy proceedings, several documents have come to light in the course of those and continuing court proceedings which further confirm the obligation of QAI to pay the charges in question

In the Deposition of David Wiegand taken October 25, 2002 (excerpt attached as Exhibit J), Mr Wiegand confirmed his understanding that QAI was obligated to and in fact did pay Universal Service Fund charges, which it in turn billed to end user customers and reserved for payment of such charges

In addition to the express terms of the carriers' agreements, fairness and equity require that the agreement between QAI and the resellers for apportionment of Universal Service Fund charges not be negated by USAC, for the reason that QAI in fact billed for and collected the funds to be used to pay the Universal Service Fund charges that appeared on invoices during the first six months of 2001

Because QAI, without the knowledge or involvement of American Cyber, caused services by Sprint to be disrupted, American Cyber's customer base was nearly destroyed by the beginning of calendar year 2001, leaving it without revenues, reserves or simply the funds required to pay USAC invoices during the first six months of 2001. QAI, on the other hand, had billed for, collected and reserved those very funds.

In fairness and in equity and under the terms of the contractual agreement between QAI and the resellers and further, in compliance with the 499-A instructions, all Universal Service Fund obligations billed during the first six months of 2001, based as they were on calendar year

2000 activities, were and should be determined by the Commission to be the obligation of QAI and not of American Cyber

IV. CONCLUSION

Petitioner respectfully requests that on review, the Commission determine all universal service fund obligations charged it prior to July of 2001 including penalties, late charges and interest, be determined to be the obligation of QAI, Inc and not petitioner

Respectfully submitted,

AMERICAN CYBER CORP.

By _____

David G Crocker
Lawrence M. Brenton
Early, Lennon, Crocker & Bartosiewicz, PLC
900 Comerica Building
Kalamazoo, MI 49007
(269) 381-8844

Its Counsel

July ____, 2003

CERTIFICATE OF SERVICE

I, Teresa Bitterling, hereby certify that the foregoing "Petition for Review" was served this _____ day of July, 2003, by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

D Scott Barash, Esq
Vice President & General Counsel
Universal Service Administrative Company
Suite 600
2120 L Street, NW
Washington, D.C. 20037

Teresa Bitterling

Teresa Bitterling

AMERICAN CYBER CORP

Exhibits to Petition for Review

Exhibit A	Administrator's Decision on Contributor Appeal
Exhibit B	USAC Letter Dated September 12, 2001
Exhibit C	QAI Contract with Petitioner
Exhibit D	Page 15 of 2001 499-A Instructions
Exhibit E	QAI Correspondence of August, 2000
Exhibit F	QAI Correspondence of March 26, 2001
Exhibit G	Reply to QAI Correspondence of March 26, 2001
Exhibit H	Petitioner's 2001 Form 499-A
Exhibit I	Letter of Appeal to Administrator USAC
Exhibit J	David Wiegand Deposition Testimony
Exhibit K	Declaration of Daniel G Coleman

Exhibit A

EXHIBIT A

Administrator's Decision on Contributor Appeal

USAC **Universal Service Administrative Company**

Administrator's Decision on Contributor Appeal

May 22, 2003

BY FEDERAL EXPRESS

Lawrence M Brenton
Early, Lennon, Crocker & Bartosiewicz, P L C
900 Comerica Building
Kalamazoo, MI 49007-4752

RE American Cyber Corp, Inmark, Inc , Protel Advantage, Inc ; LoTel, Inc., Coleman Enterprises, Inc (Filer IDs 819152, 814681; 809181, 819396, 808522)

Dear Mr Brenton

After thorough review, the Universal Service Administrative Company (USAC) has completed its evaluation of the Letters of Appeal (Appeals) on behalf of American Cyber Corp d/b/a Discount Plus f/k/a Key Communications, Inmark, Inc d/b/a Preferred Billing, Protel Advantage, Inc d/b/a Long Distance Savings, LoTel, Inc. d/b/a Coordinated Billing Services, Coleman Enterprises, Inc d/b/a Local Long Distance individually "Appellant", collectively, "Appellants"). The Appeals address USAC's rejection of FCC Forms 499-A reporting zero revenue for the period January 1 - December 31, 2000

Background

USAC received two timely submissions, each marked as "original", of Forms 499-A reporting 2000 annual revenue from Appellants Because the forms were incomplete USAC returned all original forms with an attached explanation worksheet requesting the forms be resubmitted Appellants submitted revised Forms 499-A reporting zero interstate revenue for 2000 and included documents stating that a third party, QAI, Inc. had assumed responsibility for reporting revenue and paying charges on Appellant's behalf USAC returned all revised Forms 499-A and included a rejection letter, dated September 12, 2001, which explained why Appellants are each responsible for reporting and paying an Universal Service Fund (USF) obligation Further, USAC has no record of QAI assuming responsibility for reporting revenue and paying charges on behalf of Appellants

Discussion: Appellants appeals must be denied. Appellants argue that USAC does not have "jurisdiction, authority or discretion to "reject" or choose to ignore a properly filed form 499-A."

FCC regulations specifically require USAC to compare revenue information collected[1] and give USAC audit authority[2] *See* C F R. §§ 54.702(f) and 54 707

Documentation provided with the Appeals included correspondence between Appellants and QAI, Inc that discuss what QAI Inc 's obligations were with regard to filing of revenue reporting forms and at one point question whether QAI had accurately reported revenue, or in fact reported revenue at all. This demonstrates why FCC regulations and USAC do not allow USF obligations to transfer to a third party Appellants acknowledge in the Appeals that it would be improper for USAC to rely upon information provided by a third party

The FCC approves all Forms 499-A and accompanying instructions. As stated in USAC's September 12, 2001 rejection letter, and on the FCC-approved instructions that accompanied the Form, each entity is required to report and contribute In fact, FCC regulations refer specifically to information that a contributor must submit to USAC[3] and

---

[1] (f) Pursuant to its responsibility for billing and collecting contributions, the Administrator shall compare periodically information collected by the administrator of the TRS Fund from TRS Fund Worksheets with information submitted by contributors on Universal Service Worksheets to verify the accuracy of information submitted on Universal Service Worksheets When performing a comparison of contributor information as provided by this paragraph, the Administrator must undertake company-by-company comparisons for all entities filing Universal Service and TRS Fund Worksheets

[2] Audit controls The Administrator shall have authority to audit contributors and carriers reporting data to the administrator The Administrator shall establish procedures to verify discounts, offsets, and support amounts provided by the universal service support programs, and may suspend or delay discounts, offsets, and support amounts provided by the universal service support programs, and may suspend or delay discounts, offsets, and support amounts provided to a carrier if the carrier fails to provide adequate verification of discounts, offsets, or support amounts provided upon reasonable request, or if directed by the Commission to do so The Administrator shall not provide reimbursements, offsets or support amounts pursuant to part 36 and § 69 116 through 69 117 of this chapter, and subparts D, F, and G of this part to a carrier until the carrier has provided to the Administrator a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier in accordance with § 54 201

[3] Contributor reporting requirements (a) Contributions shall be calculated and filed in accordance with the Universal Service Worksheet The Telecommunications Reporting Worksheet sets forth information that the contributor must submit to the Administrator on a quarterly and annual basis The Commission shall announce by Public Notice published in the FEDERAL REGISTER and on its website the manner of payment and dates by which payments must be made An officer of the contributor must certify to the truth and accuracy of the Universal Service Worksheet, and the Commission or the Administrator may verify any information contained in the Universal Service Worksheet at the discretion of the Commission The Administrator of the Telecommunications Relay Service Fund shall provide data reported on the Telecommunications Relay Service Worksheet to the Administrator so that the Administrator may verify information contained in the Universal Service Worksheet Inaccurate or untruthful information contained in the Universal Service Worksheet may lead to prosecution under the criminal provisions of Title 18 of the United States Code The Administrator shall advise the Commission of any enforcement issues that arise and provide any

direct USAC to either estimate or verify information in instances where revenue is not reported or is inaccurately reported.[4] *See* C.F.R. §§ 54 711 & 54 713. While a third party may provide a service and file forms on another's behalf, the obligation to file the forms and the obligation to make payment to the USF remains the obligation of each entity. A third party does not assume the responsibility the obligation for payment for any of its resellers

USAC's review of Appellant's subsequently filed Forms 499 which report revenue for periods after 2000 show that Appellants continue to report interstate revenue. Yet the revised Forms 499-A reporting 2000 revenue that Appellant's filed reported $0 interstate revenue USAC has determined that Appellant's revised Forms 499-A reporting 2000 revenue were inaccurately submitted

Decision on Appeal Denied

USAC hereby denies Appellant's Appeal

---

suggested response

[4] Contributors' failure to report or to contribute54 713 Contributors' failure to report or to contribute A contributor that fails to file a Telecommunications Reporting Worksheet and subsequently is billed by the Administrator shall pay the amount for which it is billed The Administrator may bill a contributor a separate assessment for reasonable costs incurred because of that contributor's filing of an untruthful or inaccurate Telecommunications Reporting Worksheet, failure to file the Telecommunications Reporting Worksheet, or late payment of contributions Failure to file the Telecommunications Reporting Worksheet or to submit required quarterly contributions may subject the contributor to the enforcement provisions of the Act and any other applicable law The Administrator shall advise the Commission of any enforcement issues that arise and provide any suggested response Once a contributor complies with the Telecommunications Reporting Worksheet filing requirements, the Administrator may refund any overpayments made by the contributor, less any fees interest or costs

If you disagree with USAC's response to your Appeal, you may file an appeal with the Federal Communications Commission (FCC) within 60 days of the date of this letter. The FCC address where you may direct your appeal is

Federal Communications Commission
Office of the Secretary
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Sincerely,

USAC

Universal Service Administrative Company

cc Anita Cheng, FCC Common Carrier Bureau
James Shook, FCC Enforcement Bureau

Exhibit B

EXHIBIT B

USAC Letter Dated September 12, 2001

USAC

Universal Service Administrative Company

Lori S Ferraciano
Associate Manager Universal Service Revenue Administration

September 12, 2001

Patrick D Crocker
900 Comerica Bldg
Kalamazoo, MI 49007

Mr Crocker

This letter is in response to the April 2001 FCC Form 499-A filings that were submitted for American Cyber Corp (Filer 499 ID 819152), Inmark, Inc (Filer 499 ID 814681), LoTel, Inc (Filer 499 ID 819396), Protel Advantage, Inc (Filer 499 ID 809181), and Coleman Enterprises, Inc These filings reported zero revenue for all of these companies for the period of January - December 2000

Attached to each 499-A filing for the above mentioned companies was an addendum that stated QAI, Inc was required to file the 499-A filings for these companies and pay all universal service charges related to these filings This is not true according to FCC Rules Please see pages 4-7 of the Instructions to the Telecommunications Reporting Worksheet (attached) Each legal entity is required to file their own 499-A filing reporting their own revenue QAI may have provided a service to these companies in the past, but they are not obligated to file 499 filings for any of their resellers

In the addendum, it is pointed out the QAI has agreed to file 499 filings on behalf of these companies, as proven in their August 21, 2000 letter This letter states that QAI will be filing the September 1, 2000 FCC Form 499-S on their behalf There is no mention of any future filings, other than the September 1, 200 499-S Therefore, all of the above mentioned companies are required to submit the April 1, 2001 FCC Form 499-A on their own behalf

Not all companies are required to contribute directly to the Universal Service Fund The following excerpts from the FCC's Form 499 Instructions on pages 5-7, will help to explain what companies are exempt from contributing to the Universal Service Fund

Universal service exception for de minimis telecommunications providers

Section 54 708 of the Commission's rules states that telecommunications carriers and telecommunications providers are not required to contribute to the universal service support mechanisms for a given year if their contribution for that year is less than $10,000 [1]

[1] 47 C F R § 54 708

Providers should complete the table contained in Figure 1 to determine whether they meet the de minimis standard To complete Figure 1, potential filers must first complete block 4 of the Telecommunications Reporting Worksheet and enter the amounts from Line 420(d) and 420(e) in Figure 1 Telecommunications providers whose estimated contributions to universal service support mechanisms would be less than $10,000 are considered de minimis for universal service contribution purposes and will not be required to contribute directly to universal service support mechanisms

Exception for government, broadcasters, schools and libraries
Certain entities are explicitly exempted from contributing directly to the universal service support mechanisms and need not file this worksheet Government entities that purchase telecommunications services in bulk on behalf of themselves, e g , state networks for schools and libraries, are not required to file or contribute directly to universal service Public safety and local governmental entities licensed under Subpart B of Part 90 of the Commission's rules are not required to file or contribute directly to universal service Similarly, if an entity provides interstate telecommunications exclusively to public safety or government entities and does not offer services to others, that entity is not required to file or contribute directly to universal service In addition, broadcasters, non-profit schools, non-profit libraries, non-profit colleges, non-profit universities, and non-profit health care providers are not required to file the worksheet or contribute directly to universal service

Exception for systems integrators and self providers

Systems integrators that derive less than five percent of their systems integration revenues from the resale of telecommunications are not required to file or contribute directly to universal service Systems integrators are providers of integrated packages of services and products that may include the provision of computer capabilities, interstate telecommunications services, remote data processing services, back-office data processing, management of customer relationships with underlying carriers and vendors, provision of telecommunications and computer equipment, equipment maintenance, help desk functions, and other services and products) Entities that provide services only to themselves or to commonly owned affiliates need not file

Unless the above mentioned companies qualify for one of these exemptions, they will have a direct contribution obligation to USAC Underlying carriers can not assume that responsibility on these companies behalf

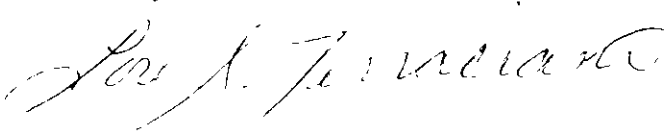
Please submit completed April 1, 2001 FCC form 499-A filings to the following address as soon as possible

Form 499- DCA
Attn Lori S Terraciano
80 S Jefferson Rd
Whippany, NJ 07981

If you need help completing the 499A, please contact the Form 499 help line at 973-560-4460 or through e-mail at Form499@neca.org

I trust this information provides you with the background necessary to resolve your questions/concerns Please contact the Form 499 help line at 973-560-4460 with any further questions

Thank you,



cc Bill Davis (PWC)
Lisa Harter

Exhibit C