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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Cingular Interactive, LP, Filer ID 809337, FRN 0003-2932-48	)	
	)	
Application for Review of a Demand Letter and Dunning Notices Issued February 20, 2004 by the Universal Service Administrative Company	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on Universal Service	)	

To: The Commission

APPLICATION FOR REVIEW

CINGULAR INTERACTIVE, LP

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APPLICATION FOR REVIEW

Pursuant to Section 54.719 *et seq* of the Commission's rules, 47 C.F.R. § 54.719 *et seq.*, Cingular Interactive, LP ("CI") hereby applies for review of the Universal Service Administrative Company's ("USAC's") assessment of Universal Service Fund ("USF") contributions from CI pursuant to past due notices dated February 20, 2004 and an invoice dated February 23, 2004.[1] These USAC requests represent the most recent assessments against CI.[2] For the reasons

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[1] Sixty Day Past Due Letter to Johnny M. Patten, CI from USAC Collections Department (February 20, 2004); Thirty Day Past Due Letter to Johnny M. Patten, CI from USAC Collections Department (February 20, 2004); Less Than Thirty Day Past Due Letter to Johnny M. Patten, CI from USAC Collections Department (February 20, 2004); USAC Invoice No. UBD10000098332 (February 23, 2004).

[2] Cingular previously sought review of a prior series of past due notices issued by USAC. Application for Review of CI in CC Docket No. 96-45 (January 30, 2004); Application for Review of CI in CC Docket No. 96-45 (February 4, 2004) ("Second Application for Review"). CI also sought reconsideration, Petition for Reconsideration of CI in CC Docket No. 96-45 (January 30, 2004), of a December 31, 2003 "Final Demand and Notice of Debt Transfer" from the Commission's Office of Managing Director threatening referral of CI's USF debt to the Department of Justice or the Department of Treasury for collection if the debt was not paid by January 30, 2004, Letter to Johnny M. Patten from Claudette E. Pride, Chief, Revenue and

(continued on next page)

discussed herein, CI owes no past due USF contributions. The only services CI provided during the time period for which USAC has sent invoices claiming USF contributions are information services, which are not subject to USF contribution requirements.

INTRODUCTION AND SUMMARY

In the absence of any documentation from the Commission or from USAC determining that CI provided telecommunications services and rejecting CI's notification that it did not provide any such services, CI is unaware of the specific basis for the claim that funds are owing or overdue. The demand appears to ignore CI's reclassification of its services as information services, as reported to USAC in a revised fourth quarter 2002 Form 499-Q. Therein, CI reduced its reported telecommunications service revenues to zero. The reclassification was based on the FCC's evolving interpretation of the difference between information services and telecommunications services, as discussed in Section I B, below.[3] The reevaluation of CI's services was prompted by a change in USF reporting and contribution requirements, as indicated in the cover letter, dated March 12, 2003;[4] in revising its USF reporting procedures, CI reevaluated its services in light of a series of FCC decisions[5] and concluded that it was not providing any

(footnote continued)
Operations Group, FCC (December 31, 2003), appended to Second Application for Review, Exhibit 1 ("Final Dunning Notice").

[3] A January 28, 2004 letter from CI contains a more detailed explanation for the reclassification. Letter to Diane Law Hsu, Deputy Chief – Telecommunications Access Policy Division, Wireline Competition Bureau, FCC from Ben G. Almond, Vice President-Regulatory Affairs, CI (January 28, 2004), appended to Second Application for Review, Exhibit 20 ("CI January 28, 2004 Letter").

[4] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements,* CC Docket 96-45, *Report and Order and Second Further Notice of Proposed Rulemaking,* 17 FCC Rcd 24952 (2002).

[5] CI and its parent, like other wireless service providers, had also been prompted to reexamine the proper classification of its services in the process of determining how to become CALEA-compliant. *See, e g,* Letter Request for Packet Mode Extension or, Alternatively, Clarification, dated November 19, 2001, from Ben G. Almond, Cingular Wireless LLC, to the Secretary (filed under request for confidential treatment).

telecommunications services.[6] Thereafter, CI did not have any telecommunications service revenue to report and thus has not filed (and need not file) any further quarterly Form 499-Q Telecommunications Reporting Worksheets.

Shortly after CI stopped reporting telecommunications service revenues because it had none, USAC started sending CI invoices for purportedly due USF contributions, citing 2003 Form 499-Q data that had *not* been filed; this appears to be an estimate by USAC based on prior years' data.[7] There is no indication whether these invoices were sent because the cessation of CI's Form 499-Q filings automatically led to an (erroneous) assumption that CI was continuing to provide telecommunications services and had failed to file a Form 499-Q or the invoices were based instead on an unstated rejection of CI's reclassification of its services as information services and a determination that CI continued to provide telecommunications services. There is no acknowledgement of CI's reclassification and no explanation for imputing telecommunica-

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[6] Letter to Christy Doleshal, Form 499 Data Collection Agent from Johnny M. Patten, Account Manager – Regulatory Accounting, Cingular Wireless, LLC (March 12, 2003), appended to Second Application for Review, Exhibit 2.

[7] CI's revised Form 499-Q for the fourth quarter of 2002 showing zero telecommunications service revenue was filed March 12, 2003, with a cover letter explaining that CI had determined its services were exclusively information services. Fourth Quarter 2002 FCC Form 499-Q Telecommunications Reporting Worksheet for CI (filed March 12, 2003), appended to Second Application for Review, Exhibit 2. This was followed by CI's 2003 Form 499-A, covering calendar year 2002, filed on March 27, 2003. Annual 2003 FCC Form 499-A Telecommunications Reporting Worksheet for CI (filed March 27, 2003), appended to Second Application for Review, Exhibit 3. The latter form reported telecommunications service revenues for the three quarters in which such revenues had been reported on Forms 499-Q. The first invoice sent by USAC using hypothesized Form 499-Q data as a basis for assessing USF contributions was prepared on April 22, 2003, only a few weeks later. USAC Invoice No. UBDI0000065374, appended to Second Application for Review, Exhibit 4. Additional invoices are dated May 22, 2003; June 20, 2003; July 22, 2003; August 22, 2003; September 22, 2003; October 22, 2003; November 21, 2003; December 22, 2003; January 22, 2004; and February 23, 2004. USAC Invoice Nos. UBDI0000068360, UBDI0000071288, UBDI0000074802, UBDI0000080380, UBDI0000083373, UBDI0000086377, UBDI0000089367, UBDI0000092334, UBDI0000095345, appended to Second Application for Review, Exhibits 5-13 ("USAC Invoices"); USAC Invoice No. UBDI0000098332 (February 23, 2004).

tions service revenue to CI. When CI did not pay the bills because it had no telecommunications service revenue and was not liable for USF contributions, USAC began assessing late fees.

Five months after CI had filed its last Form 499-Q and its Form 499-A for calendar year 2002, and after five invoices had been sent by USAC, USAC initiated an audit of CI's Form 499-A for calendar year 2002. Noting the significant reduction in interstate/international telecommunications service revenue reported for 2002 versus 2001, the August 26, 2003 audit letter requested supporting documentation for the decrease.[8] CI's response, dated September 25, 2003, explained that CI had reviewed its services "under existing Commission precedent," determined that all of its service offerings were "information services, not telecommunications services," and concluded that it was not obligated to file Form 499.[9] CI added that it was not "currently seeking to recover for funds it remitted to NECA based on prior years' [reported] revenue," but said CI did not have end user telecommunications revenue to report. The letter contained a description of CI's services and its rationale for reclassifying them as information services.

On October 15, 2003, USAC concluded its audit, stating:

> The information furnished is sufficient for the administrator to close its review. No further action is required on your part at this time regarding annual revenues reported for the period January through December 2002.[10]

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[8] Letter to Johnny M. Patten, CI from Peter J. Malone, Associate Manager – Revenue Administration, USAC (August 26, 2003), appended to Second Application for Review, Exhibit 14.

[9] Letter to Peter J. Malone, USAC from Johnny M. Patten, Senior Accounting Manager, Cingular Wireless, LLC (September 25, 2003), appended to Second Application for Review, Exhibit 15.

[10] Letter to Johnny M. Patten, CI from Peter J. Malone, Associate Manager – Revenue Administration, USAC (October 15, 2003), appended to Second Application for Review, Exhibit 16 ("USAC October 15, 2003 Letter").

Importantly, on October 28, 2003, less than two weeks later, USAC sent CI a dunning letter for allegedly past due USF contributions.[11] The amount claimed did not correspond to the amount stated in any of the allegedly past-due invoices, and did not identify which specific overdue balance USAC was seeking to recover. The letter stated that it was CI's "second past due notice" but also carried the heading "FIRST NOTICE—DELINQUENT ACCOUNT."

On November 26, 2003, CI responded to this notice, asserting that CI does not have a balance due to USAC and requesting that USAC review and correct its files.[12] On that same date, USAC sent two more dunning letters to CI. One of these carried the heading "PAST DUE NOTICE" and claimed an amount past due that was slightly greater than the amount claimed in the October 28 notice.[13] The second was described as a "second past due notice" but, like the October 28 notice, also carried the heading, "FIRST NOTICE—DELINQUENT ACCOUNT." This notice claimed an amount that was slightly less than the sum of the amounts claimed in the other two notices. Neither of the November 26 notices corresponded to the amounts stated in any of the allegedly past-due invoices, nor did they identify which specific overdue balances USAC was seeking to recover.

On Tuesday, December 16, 2003, representatives of CI and outside counsel met with staff of the Wireline Competition Bureau's ("Bureau") Telecommunications Access Policy Division to discuss this matter.[14] The staff had not been apprised of the correspondence between CI and USAC, which CI provided to the staff in the days after the meeting. The parties also discussed

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[11] Letter to Johnny M. Patten, CI, from USAC Collections Department (October 28, 2003), appended to Second Application for Review, Exhibit 17.

[12] Letter to USAC Billing and Disbursement from Johnny M. Patten, Accounting Manager – Regulatory Accounting, Cingular Wireless, LLC (November 26, 2003), appended to Second Application for Review, Exhibit 18.

[13] Letter to Johnny M. Patten, CI from USAC Collections Department (November 26, 2003), appended to Second Application for Review, Exhibit 19.

[14] The staff members in attendance included Diane Law Hsu, Jim Lande, and Paul Garnett.

the nature of CI's services and, pursuant to the staff's request, CI provided the staff with additional detailed information describing CI's services on January 28, 2004.[15]

Fifteen days after the meeting, on New Year's Eve, the OMD sent its Final Dunning Notice.[16] It sought payment of the amount USAC had claimed in its initial October 28 notice and threatened to refer the matter to the Department of the Treasury or the Department of Justice for collection.

Two demands for USF contributions were issued on January 14, 2004.

CI representatives had further discussions with Commission staff on January 26, 28, and 29, 2004 regarding this matter to determine the feasibility of *sua sponte* action on the Commission's or Bureau's part to rescind or otherwise hold in abeyance the Final Dunning Notice and future collection actions. CI was instructed to seek review of any USF contribution demand notices and that the filing of an Application for Review will result in OMD holding any collection action in abeyance until the Commission has the opportunity to consider the significant regulatory issues raised. CI reserves the right to seek a stay or other formal suspension of collection action in the event this understanding is incorrect.

Three additional demands for USF contributions were issued on February 20, 2004 and an invoice was sent on February 23, 2004.

In the absence of any Form 499-Q reports from CI reporting telecommunications service revenue, and after being informed that CI only provides information services, USAC had no valid basis for attributing any telecommunications service revenue to CI, and OMD has no basis for seeking to collect USF contributions. The USF contributions at issue would be due and owing only to the extent that CI's services are *not* information services but are, instead, tele-

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15 CI January 28, 2004 Letter.

16 Final Dunning Notice.

communications services. Neither USAC nor OMD has the authority, however, to classify services.

USAC's demands for payment on February 20 and 23, 2004, as well as prior invoices and dunning notices, must be vacated because CI's services are information services, not telecommunications services, and thus are not subject to federal USF contribution requirements. Moreover, USAC and OMD lack authority to make a determination that CI is providing telecommunications services, as discussed in Section III, below. They may not impose the USF assessments at issue unless and until the Commission reverses existing precedent and determines that CI's services are telecommunications services. Finally, any USF contribution billing for CI's services that have been reclassified as information services is arbitrary and capricious, given USAC's satisfactory completion of an audit of the reclassified services for calendar year 2002, the differing amounts claimed in each USAC dunning letter without any explanation or correspondence to the amounts billed on its invoices, and the failure to provide the basis for determining that the debt is due.

This matter can be resolved in favor of CI based on existing FCC decisions, policies, and guidelines. Accordingly, corrective action can be taken by the Wireline Competition Bureau under delegated authority. Those same FCC decisions, policies, and guidelines do not support assessing CI for USF contributions. CI's services could be found to constitute telecommunications services only by adopting new policies and overruling or departing from the Commission's authoritative case law, which cannot be accomplished under delegated authority. Accordingly, if a decision in favor of Cingular is not forthcoming, CI respectfully requests that the instant petition be referred to the full Commission pursuant to Section 54.722 of the rules.[17]

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[17] 47 C.F.R. § 54.722.

DISCUSSION

I. CINGULAR INTERACTIVE'S SERVICES ARE INFORMATION SERVICES, NOT TELECOMMUNICATIONS SERVICES

USAC has asserted that Cingular owes USF contributions because of alleged interstate/international telecommunications service revenues, which it has estimated in a series of invoices. According to the February 20th dunning letters, "[t]he FCC has determined that the funds are owed to the United States pursuant to the provisions of . . . 47 U.S.C. § 254" — *i e* , the statutory provisions authorizing the Commission to require telecommunications carriers (and certain providers of telecommunications) to contribute to federal USF programs. In order for any contributions to be due, however, the Commission first must reject CI's argument that its services are information services. The Commission has made no such determination. Moreover, USAC performed an audit and made no such determination. CI's services are clearly information services not subject to federal USF contribution obligations. In fact, USAC's latest invoices, dated January 22, 2004 and February 23, 2004, appear to agree, since they postulate zero interstate/international telecommunications revenue for CI and do not assess any new USF contribution obligation.

A. The Commission Does Not Require Providers of Information Services to Contribute to Federal USF Programs.

Section 254(d) of the Act requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[18] Section 54.706 of the rules further provides that "[e]ntities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee" including mobile radio services meeting this

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[18] 47 U.S.C § 254(d).

classification, "will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support programs."[19]

The Communications Act and Commission precedent are unequivocal — a given service can be *either* an information service *or* a telecommunications service, *but not both.*[20] Telecommunications carriers provide "telecommunications" on a common carrier basis — *i.e.*, "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."[21] In contrast, an "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service" — and has been deemed essentially equivalent to "enhanced services" under *Computer II*[22] An information service, by definition, is not "telecommunica-

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19 47 C.F.R. § 54.706(a)(2).

20 *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4823-24, ¶¶ 40-41 (2002) (*Cable Modem Declaratory Ruling*), *aff'd and rev'd in part, Brand X Internet Services v FCC*, 345 F.3d 1120 (9th Cir. 2003), *pet. for reh'g pending*; *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3029-30, ¶ 18 (2002) (*Broadband NPRM*); *Universal Service Report* at 11520, 11530, ¶¶ 39, 59; *Non-Accounting Safeguards, Order on Remand,* 16 FCC Rcd 9751, 9755-76, 9759-60, 9769, ¶¶ 9-10, 17-18, 37 (2001) (*InterLATA Information Service Remand Order*). *See also Universal Service Report* at 11520-24, ¶¶ 40-46.

21 47 U.S.C. § 153(43).

22 *Id.* § 153(20); H.R. CONF. REP. No. 104-458, at 115-16 (1996); *Second Computer Inquiry, Final Decision,* 77 F.C.C.2d 384, ¶ 97, *recon.*, 84 F.C.C.2d 50, ¶¶ 11-18, 26 (1980) (*Computer II*); 47 C.F.R. § 64.702(a); *Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order,* 16 FCC Rcd 9151, ¶ 11 n.16 (2001) ("*Compensation Order*"), citing *Federal-State Joint Board on Universal Service, Report to Congress,* 13 FCC Rcd 11501, 11,531 (1998) (*Universal Service Report*).

tions," even though telecommunications is an essential element of it.[23] Thus, end-user revenues derived from "information services" are not subject to USF assessment under the current regulatory scheme.

The Commission is clearly of the view that, regardless of whether an information services provider obtains telecommunications from another firm or self-provisions telecommunications on its own, the services remain information services. Having rejected dual classification, the Commission determined that a service should be classified as telecommunications "only when the entity provides a transparent transmission path," and that, as a consequence, if it "offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,' *it does not provide telecommunications, it is using telecommunications*"[24] As the Commission has held since as early as 1998, "[a]n offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components."[25] Where an information services provider utilizes another firm's telecommunications services, its product is classified solely as an information service.[26]

Further, when the telecommunications component of an information service is self-provided via an information service provider's own facilities, such as a cable television operator offering "cable modem" Internet access using telecommunications capacity on its own network, the Commission does *not* view the provider as offering a telecommunications service to an end

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23 *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9179-80, ¶ 788 (1997) (*Universal Service Order*).

24 *Universal Service Report* at 11521, ¶ 41 (emphasis added).

25 *See id* at 11529, ¶ 58.

26 *See Cable Modem Declaratory Ruling* at 4823-24, ¶¶ 40-41; *Broadband NPRM* at 3029-30, ¶ 18 (2002) (*Broadband NPRM*); *Universal Service Report* at 11520, 11530, ¶¶ 39, 59; *InterLATA Information Service Remand Order* at 9755-76, 9759-60, 9769, ¶¶ 9-10, 17-18, 37 ; *see also Universal Service Report* at 11520-24, ¶¶ 40-46.

user, but rather is merely "using telecommunications to provide end users with cable modem service."[27] Similarly, in the wireline context, the Commission has stated that because "wireline broadband Internet access services fuse communications power with powerful computer capabilities and content, these services appear to fall within the class of services that the Commission has traditionally identified as 'information services,' which blend communications with computer processing."[28] While the Commission has sought comment on whether information service providers should be required, in some instances, to contribute to federal USF programs based on their self-provisioned telecommunications, the Commission does not currently require them to do so.[29]

B. CI's Services Entail the Acquisition, Storage, and Retrieval of End User Information.

The Mobitex network, described in more detail in its January 28, 2004 letter to Bureau staff, incorporates a number of capabilities demonstrating that service offerings utilizing the Mobitex network are information services.[30] An information service includes "the offering of a capability for . . . acquiring, storing, [or] retrieving . . . information."[31] The Mobitex network meets each of these statutory criteria.

The Mobitex network stores an MPAK[32] communication from an end user for a period of up to 3 days until such time as the recipient retrieves the message. Here, the Mobitex network's

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27 *Cable Modem Declaratory Ruling* at 4824, ¶ 41. The Commission is still of this view, notwithstanding the Ninth Circuit's *Brand X* decision. *See* Federal Communications Commission, Petition for Rehearing En Banc in *Brand X Internet Services v FCC*, No. 02-70518 (9th Cir. filed Dec. 3, 2003).

28 *Broadband NPRM* at 3027, ¶ 13.

29 *Id.* at 3052, ¶ 74.

30 CI January 28, 2004 Letter.

31 47 U.S.C. § 153(20)

32 An MPAK is a unique protocol for transmitting a packet of data within the Mobitex system. *See* CI January 28, 2004 Letter, at 1

treatment of an MPAK communication directly parallels the Commission's description of email information services:

> The process begins when a sender uses a software interface to generate an electronic mail message (potentially including files in text, graphics, video or audio formats). The sender's Internet service provider does not send that message directly to the recipient. Rather, *it conveys it to a "mail server" computer owned by the recipient's Internet service provider, which stores the message until the recipient chooses to access it.*[33]

Like an email message, an MPAK is stored on a provider's facilities; and like an email message, the MPAK remains on the provider's facilities "until the recipient chooses to access it" — *i.e* , if and when the recipient customer has his or her device turned on in a coverage area. Furthermore, other offerings with store-and-forward or storage and retrieval capabilities akin to the Mobitex network, such as store-and-forward fax and voice mail, have been deemed information services.[34] Moreover, the Commission has stated that storing both member information and, if a member opts-in, voicemail messages on its server, that are accessible to other members is an information service.[35] Finally, the Commission has found that "telecommunications service is defined under the Act in terms of 'transmission,' and involves the establishment of a transparent communications path."[36] The Mobitex network's Dynamic Link Registry ("DLR")[37] feature, however, facilitates a "sessionless" technology, thus obviating any need to establish such a "transparent communications path." In addition, CI's Mobitex network provides a variety of

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33 *Universal Service Report* at ¶ 78 (emphasis added).

34 *See Telecommunications Carriers' Use of Customer Proprietary Network Information, Second Report and Order and Further Notice of Proposed Rulemaking,* 13 FCC Rcd 8061, 8116-8119, ¶¶ 72-74 (1998), *vacated in part on other grounds sub nom U S West, Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999) ("*CPNI 2nd R&O*"); *Petition for Declaratory Ruling that pulver com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,* WC Docket No. 03-45, *Memorandum Opinion and Order,* FCC 04-27 (rel. February 19, 2004) ("*Pulver.com*").

35 *Pulver.com* at ¶¶ 11-12.

36 *CPNI 2nd R&O* at ¶ 72.

37 *See* CI January 28, 2004 Letter, at 2.

protocol transformations and conversions through Gateways, Application Services, or as part of the inherent nature of the Mobitex network designed to meet customers' needs. Accordingly, CI's services clearly fall well within the statutory definition of information services, and USAC had no authority to demand further payment of USF contributions from CI.

II. USAC HAS FAILED TO COMPLY WITH THE COMMISSION'S RULES AND EXCEEDED THE SCOPE OF ITS DELEGATED AUTHORITY

The Commission has emphasized that USAC's authority is expressly limited to matters "exclusively administrative."[38] The Commission limited USAC's authority in this regard "[c]onsistent with Congress's directive that [USAC] not interpret rules or statute" and in part to assuage Congress's concerns for the lawfulness of Commission-adopted universal service support mechanisms. [39] USAC's actions toward CI, however, represent the very actions of concern to the Commission and Congress.

A. USAC's Apparent Interpretation of the Act's and Rules' Distinctions Between Telecommunications Services and Information Services Exceeds the Scope of Its Authority

Section 54.702(c) of the Commission's rules provides that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."[40] As discussed above, CI explained to the USAC that its services are information services not subject to federal USF assessments and USAC completed this examination, closing its audit for calendar year 2002. CI can only conclude that either: (1) USAC's issuance of the various dunning notices is essentially on "autopilot" despite the contrary determinations of its staff; or (2) USAC has implicitly rejected CI's argument, and thus necessarily "interpret[ed] unclear provisions of the

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[38] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, 25067-69, ¶¶ 16-18 (1998).

[39] *See id.* at 25067 ¶ 16; H.R. CONF. REP. No. 105-504 (incorporating S. 1768, § 2005(b)(2)(A) (105th Cong.), into appropriations legislation).

[40] 47 C.F.R. § 54.702(c).

statute or rules, or interpret[ed] the intent of Congress." In either case, issuance of the dunning notices does not comply with the Commission's Part 54 rules.

Section 54.702(c) also provides that "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation, [USAC] shall seek guidance from the Commission."[41] Based on its discussions with USAC personnel and Bureau staff, moreover, CI is fairly confident that USAC requested no such guidance concerning the issues raised by CI's determination that it is a provider of information services. The situation presented by CI's determination is precisely the type of issue that, to the extent USAC had any doubts or concerns, USAC could have and should have brought to the Commission's attention *before* proceeding with the iron fist of a debt collection action.

B. USAC's Efforts to Collect USF Contributions from Cingular Interactive Are Inconsistent with the Commission's USF Contribution Mechanisms

The Commission's USF contribution regime is not particularly complicated: (1) a carrier subject to the rules submits its annual and quarterly Form 499 filings, based on its own good faith estimates of its projected end-user revenues; (2) the carrier's contribution obligations are determined based on its reported revenues multiplied by the quarterly contribution factor; and (3) USAC bills and collects from a contributor carrier accordingly.[42] Thus, a carrier that enters "zero" for its end-user telecommunications will be subject to a bill of "zero."

The Commission's enforcement mechanisms *bolster* the self-reporting underpinnings of the USF support mechanisms. For example, Section 54.707 authorizes USAC "to audit contributors and carriers reporting data to the administrator."[43] In addition, Section 54.711 provides that "[t]he Commission or [USAC] may verify any information contained in the" Form 499 filings

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41 *Id*

42 *See id* §§ 54.709-54.711; Instructions for Form 499-A.

43 *Id* § 54.707.

and CI must "maintain records and documentation to justify information reported in the [Form 499], including the methodology used to determine projections, for three years and shall provide such records and documentation to the Commission or [USAC] upon request." Finally, "[i]naccurate or untruthful information . . . may lead to [criminal penalties]" and USAC must "advise the Commission of any enforcement issues that arise and provide any suggested response."[44]

USAC exercised its authority to verify CI's determination and, as described above, CI responded to USAC's inquiries, to USAC's apparent satisfaction.[45] To the extent that USAC had additional concerns concerning the legal issues raised by CI's decision, USAC was obligated to "advise the Commission of any enforcement issues that arise and provide any suggested response." USAC took none of the steps required or authorized under the Commission's rules, opting instead (whether by affirmative decision or database fiat) to continue to bill CI for services it has, in good faith, deemed to be information services. Such action is contrary to the Commission's rules. Accordingly, the Commission should reverse USAC's actions.

III. ISSUANCE OF THE INVOICES AND DUNNING NOTICES EXCEEDED THE SCOPE OF USAC'S DELEGATED AUTHORITY

USAC's claim that CI owes USF contributions is explicitly based on its attribution of interstate/international telecommunications service revenue to CI. CI, however, has reported no such revenue for 2003 and has informed USAC that it has none because all of its services are information services. Given that information services are not subject to USF, and that CI has filed no reports of telecommunications service revenue, the only way USAC could have reached

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[44] Section 54.711 also requires that "[a]n executive officer of the contributor must certify to the truth and accuracy of historical data included in the [Form 499 filings], and that any projections in the [Form 499 filings] represent a good-faith estimate based on the contributor's policies and procedures."

[45] *See* discussion at page 4 above; *see also* USAC October 15, 2003 Letter.

the decision that CI provided telecommunications services subject to USF in 2002 would be to disagree with CI's determination that it is providing only telecommunications services. This would necessarily entail a claim that CI's services are, in fact, telecommunications services and that CI is thus a "contributor" subject to USF contribution obligations. USAC, however, does not have delegated authority to make such a determination.

Under Section 54.702(c) of the rules, USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.[46] Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission." In other words, if USAC had any question about whether CI was providing only information services, it should not have unilaterally assigned CI an arbitrary quantity of telecommunications service revenues and billed it for USF support contributions; it should have sought FCC guidance. USAC's actions plainly exceed the scope of its delegated authority, and for this reason as well its enforcement of USF payment obligations must be rejected.

IV. IT WAS ARBITRARY AND CAPRICIOUS TO ISSUE CONFLICTING DEMAND NOTICES WITHOUT PROVIDING THE CALCULATIONS UTILIZED TO ESTABLISH THE DEBT

It is a fundamental tenet of administrative law that agency decisions must be supported by a reasoned basis.[47] USAC violated this tenet by failing to explain the basis for calculating the amounts purportedly due (including the allotment of presumed telecommunications service revenue to CI) and by failing to explain its determination (if any) that CI's services are telecommunications services. Because CI has not submitted data regarding interstate/international

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46 47 U.S.C. § 54.702(c).

47 *Burlington Truck Lines, Inc v U S*, 371 U.S. 156, 168 (1962).

telecommunications revenue for the 4th quarter of 2003, USAC's invoices must be based on arbitrarily selected figures.[48]

As previously noted by the Eighth Circuit in the context of Universal Service, "If the agency itself has not provided a reasoned basis for its action, the court may not supply one."[49] By issuing the February 20, 2004 demand letters and the February 23, 2004 invoice, USAC reached the conclusion that CI's USF contributions were past due. These letters and invoice, however, fail to provide the basis for the conclusion that there was any contribution due at all and fail, as well, to explain how it determined that the particular amount demanded was lawfully due, which is particularly arbitrary given USAC's acceptance of the reclassification (and consequent lack of USF contribution) with respect to the fourth quarter of 2002. This absence of any explanation crosses the line from "the tolerably terse to the intolerably mute."[50]

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48 The April, May, and June invoices used nonexistent "February 2003 499Q" data; the July, August, and September invoices used nonexistent "May 2003 499Q" data; the October, November, and December invoices used nonexistent "August 2003 499Q" data; and the January 2004 invoice used nonexistent "November 2003 499Q" data. USAC Invoices.

49 *Southwestern Bell Tel. Co. v FCC*, 153 F.3d 523, 549 (8th Cir. 1998) (quoting *Downer v United States*, 97 F.3d 999, 1002 (8th Cir. 1996) (per curiam)).

50 *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987); *Greater Boston Television Corp. v FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970).

CONCLUSION

For the foregoing reasons, USAC's invoices and demands for payment for USF contributions based on telecommunications services allegedly provided by CI during 2003 should be vacated. The Commission should confirm that CI's services are information services not subject to federal USF contribution obligations and order that the OMB's related collection proceeding be terminated as moot.

Respectfully submitted,

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