

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

Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
In the Matter of)	
Request for Review by)	
Alliance Group Services, Inc. of)	
Universal Service Administrator's Decision)	CC Docket No. 97-21
on Remand)	
_____)	

**APPEAL OF THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY'S
DECISION ON REMAND DENYING CONTRIBUTOR APPEAL**

Pursuant to Sections 54.719(c), 54.721 and 54.722 of the rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 54.719(c), 54.721 and 54.722, and the June 3, 2005 Administrator's Decision on Remand,¹ Alliance Group Services, Inc. hereby respectfully requests that the Commission reverse the Remand decision of the Universal Service Administrative Company ("USAC") denying Alliance's request that USAC accept Alliance's April 13, 2001 filing of its 2000 FCC Form 499-A. This is a timely filed Appeal of the Administrator's Decision on Remand ("*Remand Appeal*"), in full compliance with Section 54.720(d) of the Commission's rules.²

¹ *In re Alliance Group Services, Administrator's Decision on Remand*, Letter Order from Universal Service Administrative Company to Brad E. Mutschelknaus *et al.*, Counsel to Alliance Broadband Corporation (sic), dated June 3, 2005, ("*Administrator's Decision on Remand*"), appended hereto as *Attachment A*. USAC mistakenly refers to Alliance as "Alliance Broadband Corporation." For purposes of clarity and accuracy, the Company will be referred as "Alliance" or "Alliance Group Services, Inc."; *see also* 47 C.F.R. §§ 54.719(c), 54.721, and 54.722.

² 47 C.F.R. § 54.720(d).

Specifically, Alliance requests that the Commission reverse and vacate the June 3, 2005 decision of USAC concerning Alliance's 2000 FCC Form 499-A submission.³ Alliance also respectfully requests that the Commission order USAC to: (1) accept Alliance's revised filing of its 2000 FCC Form 499-A, which Alliance first attempted to submit on April 13, 2001, and (2) remove from Alliance's account all FUSF assessments based upon revenues reported by US Republic for services provided and billed prior to December 23, 1999, the date of sale of US Republic's customer base to Alliance (the "Sale Date"). Alliance further requests that the Commission clarify that Section 254(d) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), and Section 54.706(a) of its interpretive regulations require that providers of interstate telecommunications service contribute to the Federal Universal Service Fund ("FUSF") at such time as they provide and bill for such service.

STATEMENT OF INTEREST

Alliance's interest in the matter presented for review is direct and profound. Alliance is a contributor to the FUSF and received, after June 1, 2000, certain invoices from USAC that unlawfully sought to recover FUSF obligations associated with revenues previously generated by a company which sold its customer base to Alliance pursuant to an Asset Purchase Agreement. The terms of the Asset Purchase Agreement provided that US Republic, the seller company would remain obligated with regard to associated regulatory fees post-sale. Alliance's interest is in having the Commission resolve a matter in which USAC has adopted a policy absent sufficient legal basis and one that has exceeded the bounds of its delegated authority.

³ *See Administrator's Decision on Remand.* USAC released this item in the wake of the process initiated by the Commission's Wireline Competition Bureau's Order of December 9, 2004, *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service*; Order, DA 04-03669 (WCB, *rel.* December 9, 2004 ("December 9 Order").

It is Alliance's position that where adjustments made by USAC after the Sale Date are based upon revenues generated by services provided and billed prior to the consummation of the sale of a customer base, such revenues are properly categorized as pre-sales revenue. Stated another way, any universal service assessments against Alliance that are based upon services provided and billed by US Republic prior to the Sale Date, are pre-sale FUSF-eligible revenue for which Alliance is not liable under the terms of the Asset Purchase Agreement, applicable law, and sound regulatory policy.

Given USAC's rejection of Alliance's appeal of USAC's unlawful attempt to collect contributions based on pre-sale FUSF-eligible revenues, Alliance hereby asks the Commission to: (1) acknowledge that a telecommunications provider's obligation to contribute to the FUSF arises at such time as it provides interstate telecommunications services and bills for such services; and (2) determine, in accord with this conclusion, that Alliance's obligations in 2000 to pay FUSF fees were governed by the companies' Purchase and Sale Agreement, which provided for US Republic to be responsible for payment of associated regulatory fees.

STATEMENT OF FACTS AND USAC PROCEEDINGS

The Alliance – US Republic Asset Purchase Agreement

Alliance and US Republic, a subsidiary of VarTec Telecom Holding Company ("VarTec"), entered into an Asset Purchase Agreement ("Agreement") on December 23, 1999 ("Transfer Date").⁴ Among other things, the Agreement provided that the sale of assets occurred on December 23, 1999.⁵ As described in the Agreement, the assets at issue consisted of the long

⁴ See U.S. Republic and Alliance Group Services, Inc. Purchase and Sale Agreement ("Agreement"), Preamble and Section 1.1., attached hereto at *Attachment B*.

⁵ *Agreement*, Section 1.2.

distance customer base of US Republic, as well as associated vendor agreements and trade names (the “Acquired Assets” or “Assets”).⁶ As is further described in the Appeal, the Agreement involved solely the sale of the specific Acquired Assets and was not a purchase of the stock of US Republic or its operating facilities. The transaction constituted a partial asset purchase.

Of particular importance are the terms of the Agreement with regard to regulatory fees. With respect to FUSF charges, the Agreement specifies only that Alliance is to reimburse US Republic for FUSF fees and charges relating to the December 1999 billing cycle. The Agreement states further that US Republic has complied with FCC laws and will remain responsible for any acts, actions or violations of such laws involving the long distance customer assets that arose prior to the transfer date.⁷ The Agreement assumes that US Republic will continue to exist, as it obligates both US Republic and VarTec not to knowingly solicit, or “winback” those customers identified in the customer list sold to Alliance for a three (3) year period following the closing of the sale.⁸

Alliance’s “Revised” Filing Efforts

On March 31, 2000, VarTec filed a 2000 Form 499A on behalf of US Republic, its subsidiary and selling party to the Asset Purchase Agreement. The 2000 Form 499A for US Republic reported US Republic’s 1999 FUSF contribution base (*e.g.* interstate and international

⁶ *Agreement* at Section 1.1.

⁷ *Agreement* at Section 8(e).

⁸ As explained in Alliance's earlier *Appeal* to the Commission, based on available records, US Republic continued to operate through and into 2001. Per information previously submitted in the *Appeal*, documents from the Texas Secretary of State illustrates that US Republic did not dissolve itself in Texas until March 22, 2001; *see Exhibit E to Appeal*. A copy of this information is attached hereto at *Attachment H*.

end user) revenues as \$ 13,597,124.00 for 1999. USAC considers this filing to serve as the “original” filing attributable to Alliance’s revenue base.

Subsequently, Alliance filed a 2000 Form 499A (for its 1999 revenues) in April 2001, which USAC rejected for being submitted more than one year after the due date of the “original” Form. This filing included Alliance's end user revenues in 1999 and did not include any revenues associated with the acquisition of US Republic's long distance customer base. USAC considers this April 2001 filing to be a “revised” filing for Alliance’s revenues. This filing reports Alliance 1999 FUSF contribution base revenues as \$ 427,463.00. Thus, the difference between US Republic’s 1999 reported revenues (\$13,597,124.00) and Alliance’s 1999 reported revenues (\$427,463.00) is \$13,169,661.00.

USAC billed Alliance for FUSF obligations, beginning on September 22, 2000, based upon the 2000 Form 499A revenues reported by VarTec on behalf of its subsidiary, U.S. Republic. Thereafter, on October 22, November 22 and December 22, 2000, USAC billed Alliance for the remainder of what would have been US Republic’s FUSF obligation based on that company’s 1999 revenues (as reported in the April 2000 499A), a total of approximately \$763,717.56.

Most important, however, is the basis by which USAC made this change in its invoicing to Alliance. As determined in subsequent communications with USAC staff – and as described in detail and supported by a declaration in the prior *Appeal*⁹ – USAC adheres to a theory that Alliance, as the purchaser of US Republic’s revenues in 1999, bears the responsibility to report and to contribute to the FUSF based upon all revenues – its own and US Republic’s –

⁹ See *Appeal* at 5, see also *Appeal Exhibit J*, entitled “Declaration of Lawrence M. Brenton.” A copy of this Declaration is attached hereto at *Attachment F*.

for 1999. With respect to Alliance in particular, this theory was implemented as USAC practice in an arbitrary and capricious manner by a USAC staffer due to a summary decisional process.¹⁰ Furthermore, it has become apparent that USAC erroneously accepted the request in 2000 of US Republic's corporate parent VarTec that USAC credit US Republic's account and charge Alliance for revenues – revenues based upon US Republic's operation in 1999.¹¹

Consequently, USAC contended and continues to maintain that Alliance was responsible for reporting and contributing on revenues generated by a customer base that it neither owned nor controlled. Alliance disagrees strongly with USAC's interpretation of its legal and regulatory obligations.

On October 29, 2001, Alliance filed an *Appeal* with the Commission concerning USAC's decisions. The substantive aspects of that Appeal remain for consideration before the Commission. Alliance hereby incorporates the arguments, relevant exhibits and citations of that *Appeal* to this submission.¹²

QUESTIONS PRESENTED FOR REVIEW

1) *Whether USAC has the authority to hold liable the purchaser of assets of another carrier, when the seller company continues to operate and the asset purchase agreement between the companies does not provide for the assumption by the buyer of the seller's regulatory obligations?*

2) *When does the obligation to contribute to the FUSF arise for a provider of interstate telecommunications services?*

¹⁰ See Attachment F.

¹¹ See Alliance's *Appeal* at 4; see also *Appeal Exhibit G*, Letter from Maggie Home, VarTec Regulatory Project Manager to John Casey, Alliance Group Services, Inc., dated August 28, 2000. A copy of this Letter is attached hereto at *Attachment G*.

¹² A copy of the entire *Appeal* is included in the Docket of this instant proceeding, having been filed on October 29, 2001 by Alliance's former Commission counsel.

3) *Whether the procedural requirements in effect at the time in which USAC rejected Alliance’s revised FCC Form 499-A, or when Alliance submitted information in the wake of the FCC’s December 9 Order, are arbitrary and capricious?*

The relevant statutory provision governing these issues is 47 U.S.C. § 254(d), which states:

Every 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.¹³

The relevant regulation governing these issues is 47 C.F.R. § 54.706, which specifies:

Entities that *provide interstate telecommunications* to the public or to such classes of users as to be effectively available to the public, for a fee . . . must contribute to the universal service support programs.¹⁴

ARGUMENT

A. USAC MAY NOT HOLD THE PURCHASER OF AN ASSET LIABLE FOR REGULATORY OBLIGATIONS WHEN THE SELLER COMPANY HAS AGREED TO ASSUME THE OBLIGATIONS TO PAY INTO THE UNIVERSAL SERVICE FUND

It is reasonable policy, grounded in well-settled law, that the purchaser of an asset from a sale by a company which continues to do business does not make the purchaser liable or responsible for the regulatory obligations associated with that asset if the seller has agreed to assume those responsibilities.¹⁵ This is especially true in a case where the regulatory obligations

¹³ 47 U.S.C. § 254(d) (*emphasis added*).

¹⁴ 47 C.F.R. § 54.706 (*emphasis added*).

¹⁵ In short, there is generally no “successor liability” imposed on a purchaser of corporate assets. It is well accepted that a purchaser corporation, if purchasing all the assets of a corporation, does not ordinarily become liable for the general debts or on the general contracts of the selling corporation; here, there is less basis to imply that a corporation purchasing only a portion of

associated with an asset arise at the time when the regulated activity takes place, namely, during the provisioning of interstate telecommunications services.

Alliance agrees that a common carrier that purchases assets of a selling entity is not liable for the outstanding FUSF obligations of the Seller when the selling entity will continue to exist after the transaction closes. It is Alliance's position that the purchaser is responsible only for payment into the FUSF Program based upon revenues generated by the sum of the Purchaser's existing assets and the newly acquired assets, during the period of the Purchaser's ownership.

In March 2001, the Commission released the *Contribution Interval Order*, which directed carriers to make quarterly filings, rather than semi-annual filings, to reduce the interval between the accrual of revenues and the assessment of universal service obligations based on those revenues.¹⁶ Prior to the rule changes announced in the Order, carrier contributions to the FUSF fund were based on revenues generated a year earlier (*e.g.*, contributions based on carriers' revenues accrued in January through June of one year were assessed on carriers in January through June of the next year.) Under the revised methodology, a carrier's current contributions are based upon revenues accrued six months earlier. Therefore, for revenues

assets is liable for the sellers debts and obligations; *see generally*, Cargo Partner AG v. Albatrans, Inc., 352 F.3d 3d 41 (2nd Cir. 2003); U.S. v. First Dakota Natl. Bank, 137 F.3d 1077 (8th Cir. 1998); Adams v. General Dynamics Corp., 405 F. Supp 1020 (N. Dist. CA, 1970).

¹⁶ On March 9, 2001, the Commission adopted a rule change so that universal service contributions are based on quarterly Telecommunications Reporting Worksheet filings, with an annual true-up based on an annual Telecommunications Reporting Worksheet. *Federal-State Joint Board on Universal Service; Petition for Reconsideration filed by AT&T*, CC Docket No. 96-45, FCC 01-85 (rel. March 14, 2001) ("*Contribution Interval Order*"). See also *1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, FCC 99-175, CC Docket No. 98-171 (rel. July 14, 1999) (*Contributor Reporting Requirements Order*).

generated between October and December of 2001, a carrier will begin payment of contributions based on those revenues between April and June of 2002.¹⁷

To better illustrate this principle, assume that the a seller company does not survive an asset purchase transaction – the assets are purchased through a liquidation or the seller goes out of business after selling the assets in question. A review of the language in the instructions to Form 499Q states that USAC, and by extension the FCC, will consider a purchaser of a non-surviving entity’s assets to be obligated to continue paying the former entity’s FUSF obligation until that obligation is satisfied even though the seller has received most of the revenues upon which the payment is calculated.¹⁸

USAC’s *2000 Reporting Requirements for Companies Involved in the Transfer and/or Sale of Assets* (“*January 2000 USAC Guidelines*”) provide some insight into USAC’s operating perspective.¹⁹ It is important to note, however, that USAC’s payment guidelines are only instructive, not authoritative – as the FCC itself acknowledges in its *December 9, 2004 Order*.²⁰ Nevertheless, the guidelines support the principle that Alliance makes here – namely, that a carrier is only obligated to pay into the FUSF Fund based upon revenues generated by

¹⁷ USAC collects information concerning revenue generated in one quarter, calculates the contribution factor for a carrier, and divides that amount by three to determine an amount for a monthly invoice.

¹⁸ Nothing stated herein should be regarded as the agreement of Alliance with the USAC position that purchasers of assets are ever responsible for pre-closing FUSF obligations, or a waiver of Alliance’s ability to contest the USAC position.

¹⁹ On January 25, 2000, the Board of Directors of USAC directed the USAC Staff to implement a document entitled “Procedures for the Required Filing and Follow-Up of Contribution Reports for Companies involved in the Transfer and/or Sale of Assets.” See USAC Board of Directors, Board of Director Minutes, January 25, 2000, Action Item #3 (“*2000 Reporting Requirements for Companies Involved in the Transfer and/or Sale of Assets*” or “*January 2000 USAC Guidelines*”). A copy of this Document is attached hereto at *Attachment C*.

²⁰ See *December 9, 2004 Order* at ¶19; The Wireline Competition Bureau acknowledges that it has no authority to establish substantive rules or policies concerning USF, including substantive rules relating to contributor requirements. USAC, as an alleged recipient of the Commission’s and the Bureau’s authority, can have no more power than the Bureau or the Commission has to delegate.

assets within the carrier's ownership or control. In particular, the guidelines state, as a hypothetical example of transactions between buyers and sellers,

“Company A only sells a portion of its customer base (the Sold Customer Base) on 2/15/01 to Company B, and is still in operation. Company A is responsible for reporting Sold Customer Base revenue for the period Jan. 1-Dec. 31, 2000, on the April 1, 2001 worksheet. Company A must also report Sold Customer Base revenue for Jan. 1-Feb. 15, 2001 on the June 1, 2001 and April 1, 2002 worksheets. Company B must report Sold Customer Base revenue from Feb. 15 forward on the June 1, 2001 and subsequent worksheets. . . It is encouraged that Company A (selling party) review the Asset Purchase Agreement to insure that the agreement reflects the continued universal service obligation of Company A ([until third quarter 2001]) for assets that Company B (purchasing party) is receiving, and include an estimate of that obligation in the sale price.”²¹

Thus, the *January 2000 USAC Guidelines* illustrate that a purchaser of assets is only liable for FUSF payments based on revenues generated by those assets after acquisition, where the seller remains in existence. A similar example covers the situation where the seller goes out of existence and provides that the buyer must assume responsibility for the payments that the seller would have been required to make had it still existed.

In the instant case, the Asset Purchase Agreement evidences an agreement by US Republic to maintain its obligation to pay into the Fund.²² A review of the Act, the Commission rules, and various Commission Orders regarding the administration of the Universal Service

²¹ See *Reporting Requirements for Companies Involved in the Transfer and/or Sale of Assets*. Alliance acknowledges that these guidelines were issued prior to the implementation of a new billing and collection agent for USAC, or before the initiation of the quarterly reporting requirements. Notwithstanding these changes, the guidelines represent a viewpoint represented by USAC, which comports with the principles announced in more recent FCC authored *Worksheet Instructions*.

²² *Agreement* at 8(e) and 8(c).

Fund,²³ does not reveal any ruling or precedent that would support a determination that Alliance, as a purchaser, would be liable for the obligations of a Seller if the Seller continues to operate as a going concern. The FCC's statements in the Form 499A and 499Q Telecommunications Reporting Worksheets, and the Reporting Requirements for Companies Involved in the Transfer and/or Sale of Assets support the principle that a company is only responsible for assets it owns or controls for the period covered by FUSF reporting. **Notably, USAC has cited no legal authority for its conclusion that Alliance is liable for the revenues attributable to US Republic.**

B. FUSF CONTRIBUTION OBLIGATIONS ARISE WHEN TELECOMMUNICATIONS SERVICES ARE PROVIDED AND BILLED TO THE END USER

The Commission's resolution of the second question presented -- When does the obligation to contribute to the FUSF arise for a provider of interstate telecommunications services? -- is central to resolving this appeal. It is Alliance's position that the language of both Section 254(d) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 ("Act") and Section 54.706 of the Commission's rules require telecommunications service providers to contribute to FUSF based upon when they actually provide telecommunications services and bill their end users for such services. By contrast, USAC contends that the obligation to pay FUSF does not arise until USAC ultimately renders an invoice to a carrier, but that the obligation to pay is based upon historical revenues.

²³ As of April 11, 2000, the FCC had issued twenty-one Orders on Reconsideration in the main docket for Universal Service, CC Docket # 96-45 and a significant number of additional Orders in related dockets regarding administration of the program. None of those Orders addressed the instant issue.

The critical issue of when a telecommunications service provider's obligation to contribute to the FUSF arises is not an accounting question; rather, it is a legal obligation imposed on providers of interstate telecommunications service by statute and by regulation. By statute, and for the relevant time period in 1999, providers of interstate telecommunications services must contribute to the FUSF based upon each dollar of billed end-user revenue.²⁴ The invoices that a provider receives from USAC are merely the final administrative acknowledgement of the FUSF amount due as a result of the previously provided services.

Stated another way, the invoices generated by USAC are a way of facilitating the collection of mandatory contributions to the FUSF – nothing less, nothing more. The obligation to pay, by statute, is independent of the collection methodology and is premised upon the provision of interstate telecommunications services to end user customers and the resulting billing for such services. The situation is analogous to an individual's Federal income tax; income tax returns are due every April 15 for income tax liabilities created during the prior calendar year. Therefore, pursuant to Section 54.706 of the Commission's rules, and Section 254(d) of the Act, any carrier's obligation to contribute to the FUSF arose only at the time that it would have provided and billed its customers for telecommunications services, thus generating revenue upon which its FUSF obligations could be calculated.

Prior to Alliance's purchase of a customer base in late 1999, Alliance did not own, control, or receive a benefit in the form of revenue from that customer base. Alliance can

²⁴ We note that since April 1, 2003, contributors to the FUSF have been billed by USAC in the same month in which such entities generate the revenues that they previously have projected in their universal service filings. As a result, an issue such as this is unlikely to arise again under the present system. Should the Commission ultimately adopt a non-revenue based system of contribution that would assess contributors based on their provision of connectivity to interstate networks, the obligation to contribute to the FUSF likewise will attach at such time as providers generate and collect revenues based on placing lines or numbers into service for their end user customers.

not be liable for regulatory obligations associated with the revenues generated during that period. Rather, during the vast majority of the 1999 (through December 23, 1999), US Republic owned and controlled the customer base at issue. US Republic received revenue from that customer base because US Republic provided interstate telecommunications services to that customer base. It follows, therefore, that US Republic is responsible and obligated to pay Universal Service Fund charges based upon interstate telecommunications service revenue generated by the customer base.

Prior to its acquisition of the customer base from US Republic, Alliance did not provide telecommunications services to those customers. Indeed, the Asset Purchase Agreement governing the transfer of assets from US Republic to Alliance reaffirms this conclusion.

C. USAC’S POSITION THAT THE OBLIGATION TO CONTRIBUTE TO THE FUSF ARISES AT THE TIME USAC CALCULATES CONTRIBUTORS’ INVOICES IS BASELESS POLICY-MAKING THAT IMPERMISSIBLY EXCEEDS ITS DELEGATED AUTHORITY

A telecommunications carrier’s obligations to the Universal Service Fund are related to that carrier’s provisioning of interstate telecommunications services.²⁵ At the time the carrier provides such services, they also incur an obligation to pay regulatory surcharges to the Universal Service Fund. The obligation does not arise when USAC chooses to send an invoice. As is evident from the regulatory history of the program, the FCC has modified the process by which invoices will be sent and obligations will be collected.²⁶ It has not, however, modified or

²⁵ 47 U.S.C. § 254.

²⁶ *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Support Service Mechanisms, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24969-74, ¶¶ 29-39 (2002) (“Interim Contribution Methodology Order”).*

changed the basis upon which providers of telecommunications services are obligated to contribute to the FUSF; this obligation is determined by statute – namely, the provisioning of interstate telecommunications services renders a provider liable for the contribution.²⁷

USAC’s position, as stated in its denial of the Alliance *Appeal*, is that FUSF funding obligations arise “during the billing period covered by the Form 499-A.”²⁸ Specifically, USAC contends that the use of historical revenue is simply a different method established by the FCC to assess “current” obligations.²⁹ This statement highlights USAC repeated attempts to sidestep the underlying issues in this proceeding.

The FCC’s decision in the *Interim Contribution Methodology Order* attempted to address an industry-wide problem in which carriers were receiving invoices based upon the carrier’s financial condition as much as a year earlier.³⁰ In a rapidly changing and competitive environment, FUSF charges were imposing financial burdens on carriers, especially IXCs facing declining revenues.³¹ In response, the Commission changed the reporting schedule to ensure that invoice delivery dates were more closely tied to a carrier’s financial condition. The *Interim Contribution Methodology Order* did not address or affect whether one Company, a purchaser, is liable for the regulatory obligations of selling Company. If the *Interim Contribution Methodology Order* had any impact relevant to this *Remand Appeal*, it was to make it more

²⁷ See 47 U.S.C. § 254(b)

²⁸ See *Administrator’s Decision on Remand* at 2.

²⁹ *Id.*

³⁰ *Interim Contribution Methodology Order*, 17 FCC Rcd at 24968, ¶28; see also *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Support Service Mechanisms*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, 3755-59, ¶¶ 7-14 (2002).

³¹ *Interim Contribution Methodology Order*, 17 FCC Rcd at 24962, ¶16.

likely that USAC would recover any outstanding regulatory obligations from a surviving seller carrier in a more rapid fashion.

USAC cites no authority for its contention that the payment obligation arises during the billing period covered by the Form 499-A.³² USAC's obviously self-serving position lacks any legal basis. No statute, regulation, or Commission order has established that FUSF contribution obligations arise at the time that USAC calculates the amount of such contributions for invoicing purposes. USAC's self-created policy is without statutory or regulatory foundation and is plainly insufficient as a matter of law. Moreover, USAC's adoption of this policy exceeds the bounds of its express authority, as is discussed in detail below.

1. USAC has Impermissibly Created a Policy for which it has No Lawful Authority

USAC has no statutory basis for its interpretation – in fact, it cites to no statute, Commission rule, policy or order in its denial of Alliance's appeal. Finding no legal authority supportive of its position, USAC has chosen to create its own policy by concluding that obligations to contribute to the FUSF arise when USAC calculates the amount of contribution to be invoiced. However, USAC's enabling statutes do not permit it to make such policy formulations. USAC's role is strictly confined to program administration of the FUSF.³³ The

³² See Generally, *Administrator's Decision on Remand*

³³ See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, CC Docket Nos. 96-45, 97-21, 12 FCC Rcd 18400, 18423-24, ¶ 41 (1997) (“*Second Order on Reconsideration*”). See also 47 C.F.R. 54.701.

Commission and the Federal-State Joint Board retain full authority and control over the FUSF programs, and are the exclusive entities authorized to establish FUSF-related policy.³⁴

The limited responsibilities delegated to USAC are patently clear in the rules and regulations setting forth the scope of USAC's charter. Sections 54.702(a) and (b) of the Commission's rules specify that USAC is responsible for administering the FUSF programs, including billing, collection and disbursement of FUSF funds.³⁵ These regulations do not provide USAC with the discretion to create new policy governing universal service contributions, as it has done in the instant case. Indeed, in addressing early concerns expressed over the role of USAC, the Commission has emphasized that USAC's functions are to be "exclusively administrative,"³⁶ noting that Section 54.702(c) expressly limits USAC's authority by stating that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.

Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator is directed to "seek guidance from the Commission."³⁷ Despite the fact that the FCC's regulations clearly prohibit USAC from establishing policy or addressing, on its own, uncertainties with respect to the critical issue of when a carrier's

³⁴ See *In the Matter of Federal State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9192 ¶¶ 813-815 (1997) ("1997 Joint Board Order"); *In the Matter of Federal State Joint Board on Universal Service*, Report and Order, 13 FCC Rcd 25058 ¶¶ 69, 72 (1998) (stating that "We find that the Commission has the authority to review USAC decisions . . . because USAC is administering the universal service support mechanisms for the Commission, subject to Commission rules and oversight."); see also 47 U.S.C. § 254, *et seq.*

³⁵ 47 U.S.C. §§ 54.702(a)-(b).

³⁶ *1998 Joint Board Order* at 25067 ¶16.

³⁷ 47 U.S.C. §§ 54.702(c).

obligation to contribute to the FUSF arises, it clearly has done so in this case. Accordingly, the FCC now must step in to correct USAC's self indulgent, and multiple, errors.

2. USAC has No Legal Basis for its Self-Created Policy

USAC's stated policy has no basis in law. Neither the relevant statute – Section 254(d) of the Act – or the FCC's rules suggest that an entity's federal universal service contribution obligation is triggered when USAC issues its invoices. Indeed, the plain meaning of the governing statute and rules suggest that USAC's position is utterly without legal foundation. Both the language of Section 254 of the Act and of Section 54.706 of the Commission's rules governing "Contributions" require only that "[e]ntities that provide interstate telecommunications to the public . . . must contribute to the universal service support mechanisms." Thus, absent anything more, the plain meaning of the language of both the statute and the rule is that carriers become obligated to contribute to the FUSF at the time that such entities "provide" interstate telecommunications services to their customers.

Neither the rule nor the statute specify or anywhere indicate, as USAC suggests, that the obligation for "[e]ntities that provide interstate telecommunications to the public . . . [to] contribute to the universal service support mechanisms. . . arises at such time as the invoices from USAC are calculated" or "at such time as the carrier is invoiced by USAC." Acceptance of USAC's position would lead to the incongruous result that carriers that discontinue providing telecommunications services are instantly absolved from payment of FUSF attributable to all prior services for which USAC had not yet billed them. Such a result would be inconsistent with the FCC's express universal service policies, in which the Commission has determined that all entities that terminate or originate telecommunications traffic over the domestic PSTN should be

required to contribute equally to the FUSF.³⁸ Moreover, such a result would serve to diminish universal service funding – which could hardly be the intent of Congress in promulgating the FUSF contribution statute.

C. PRIOR FCC ACTIONS INDICATE THAT FUSF LIABILITY ARISES AT THE TIME END USERS PAY CARRIERS FOR TELECOMMUNICATIONS SERVICES

Prior FCC actions are consistent with Alliance's position that the obligation to contribute to the FUSF arises at the time that telecommunications services are provided and associated end user revenues are received. In 1997, the Commission set for public notice³⁹ the Puerto Rican Telecommunications Act of 1996 (the "PR Telecom Act"), which is based on the federal Telecommunications Act of 1996 ("Act") and which provides, in relevant part:

The obligation to contribute to the Universal Service Fund *shall begin on the date the telecommunications company begins to render telecommunications services* in Puerto Rico and to *generate income from such services*, pursuant to Section 254(f) of the Federal Communications Act.⁴⁰

The Commission sought public comment on several requests that it preempt portions of the PR Telecom Act that the petitioners' believed were inconsistent with the federal Act.⁴¹

³⁸ *In re Federal-State Board on Universal Service, Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776 ¶ 779 (1997) ("Universal Service Order").

³⁹ *Pleading Cycle Established for Comments on Petitions for Preemption and Declaratory Ruling Regarding the Puerto Rico Telecommunications Act of 1996*, Public Notice, 11 FCC Rcd 14989, CCB 96-24 (rel. Nov. 25, 1996) ("PRTA Public Notice")

⁴⁰ 27 L.P.R.A. § 265 Chap. 5 § 6(C)(5) (*app'd* Sept. 12, 1996) (*emphasis added*).

⁴¹ *PRTA Public Notice*; see also *Petition for Declaratory Ruling Regarding Preemption of the Puerto Rico Telecommunications Act of 1996, Order*, 13 FCC Rcd 5293, CCB Pol 96-24 (rel. Mar. 19, 1998) ("PRTA Order"). Ultimately, the parties who had petitioned the Commission voluntarily withdrew their petitions, which appear to have related to interconnection issues.

Section 254(f) of the Act requires “States” (which include territories such as Puerto Rico, see 47 U.S.C. §153(4)) to adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.⁴² If a State is prohibited by federal statute from adopting universal service regulations that are inconsistent with the Commission’s rules, it logically follows that Puerto Rico may not adopt universal service regulations inconsistent with the Commission’s federal universal service rules. As set forth above, Chapter III, Section 6(c)(5) of the PR Telecom Act specifically references its compliance with the requirements of Section 254(f) of the Act.⁴³

As set forth above, the PR Telecom Act explicitly provides that “the obligation to contribute to the Universal Service Fund shall begin on the date the telecommunications company begins to render telecommunications services in Puerto Rico and to generate income from such services, pursuant to Section 254(f) of the Federal Communications Act” (emphasis added). Given the requirements of Section 254(f), this provision must be consistent with the Commission’s rules; otherwise, as matter of law, it cannot exist. There can be no doubt that the Commission was well aware of the provisions in the PR Telecom Act – indeed, it set this very statute for public notice and comment nearly eight years ago. Yet the Commission has not set aside or criticized in any way the PR Telecom Act’s express requirement that FUSF funding obligations arise at the time that services are provided by the carrier. This PR Telecom Act requirement, and the Commission’s tacit acceptance of it, is consistent with the position of

Thus, the Commission never rendered an Order addressing the merits of the issues in this proceeding.

⁴² 47 U.S.C. § 254(f).

⁴³ *In re Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal State Board on Universal Service*, Second Order on Reconsideration in CC Docket No. 97-21, FCC 97-400 at 2-3 (rel. Nov. 26, 1997).

Alliance in the instant case, and contravenes USAC's interpretation of Section 254 and of the FCC's rules.

D. ALLIANCE'S STATUTORY INTERPRETATION IS CONSISTENT WITH CONGRESSIONAL FUSF POLICY

As a matter of policy, Alliance's interpretation of Section 54.706 of the Commission's rules and Section 254(d) of the Act is the reading that is most consistent with Congressional intent. There can be no doubt that Congress intended that carriers be required to contribute to FUSF whenever they use the PSTN to provide telecommunications services to end users. Acceptance of the Company's position ensures this result because under this approach, whenever FUSF-assessable services are provided, a corresponding obligation to contribute to FUSF arises. By contrast, the position advocated by USAC would create numerous funding gaps.

One obvious example – that acceptance of USAC's position would absolve carriers that discontinue service from paying FUSF attributable to all prior services for which it had not been billed by USAC -- was discussed above. As another example, we note again that in 1997, the FCC permitted USAC to amend its authorization to collect FUSF contributions from a quarterly to a monthly installment basis.⁴⁴ This modification effectively changed the due date for the first payments to the FUSF from January 1998 to February 1998. USAC's position would lead to the absurd result that providers who had generated interstate end user telecommunications revenues in 1997 did not owe an obligation to the FUSF as of January 1998 simply because they had not yet received an invoice from USAC.

⁴⁴ *Interim Contribution Methodology Order*, 17 FCC Rcd at 24969-74, ¶¶ 29-39.

In sum, Section 254(d) of the Act and relevant FCC interpretive regulations provide that the obligation for Alliance to contribute to the FUSF arose at the time that the Company provided telecommunications services to end users and billed for those services. As a result, any FUSF funding obligation attributable to services provided and billed during this time period constitutes an assessment of FUSF-obligation based upon revenues generated in a pre-sale period for which no obligation is attributable to Alliance, but rather to US Republic.

Accordingly, any required FUSF contributions based on services provided by Alliance prior to the Sale Date that had not been paid by the Sale Date, constitute FUSF obligations attributable to US Republic, in accord with USAC's own policies and the Asset Purchase Agreement.

USAC, by contrast, has no statutory basis for its interpretation – in fact, it cites to no statute, Commission rule, policy or order in its denial of Alliance's Appeal or its rationale for its reasoning in the *Administrator's Decision on Remand*. USAC's adoption of these policies and practices have never been subject to rulemaking and comment under the Administrative Procedure Act, nor is there basis for USAC's activities in law or policy. We also note that such action represents an unconstitutional taking under the 5th Amendment of the Constitution. At bottom, to uphold USAC's stated position is to render multiple private contractual agreements invalid and impose unreasonable regulatory obligations on all telecommunications companies.

E. USAC'S PROCEDURAL ARGUMENTS FAIL BECAUSE THEY ARE NOT IN THE PUBLIC INTEREST AND LEAD TO PERVERSE POLICY RESULTS

Absent its conclusions concerning substantive issues, USAC is only left to make procedural arguments supporting the *Administrator's Decision on Remand* which, on their own, are without merit, contravene the public interest, and most importantly, *evidence a promotion of form over substance*.

Regardless of whether Alliance produced accurate or sufficient financial materials in compliance with the *December 9 Order* (which it, nevertheless, did through its submission of materials to USAC via its FCC Form 499 submissions and through payment plan negotiations with USAC), USAC would not have been able to evaluate or consider deviation from its policies concerning application of revenues from a customer base purchased from an asset sale. Indeed, ***USAC’s primary reason for their repeated rejection of Alliance’s 499-A is that*** “Alliance again seeks to exclude from its revenue base revenues associated with certain telecommunications assets owned by Alliance during the billing period.”

USAC’s procedural arguments are flawed, nevertheless. As an initial matter, USAC’s procedural policy is striking in its asymmetry. USAC has limited a carrier’s ability to recover refunds beyond a date certain, but has accepted no corresponding limit on its own ability to conduct audits, impose changes to reported revenues, and collect under-payments. It is simply inappropriate for USAC to have such unequal and limitless discretion to recover funds from carriers, while imposing an apparently strict limit on the ability of carriers to obtain refunds.

USAC justifies its policy in part with the argument that there are few “indicia of reliability” in Form 499 revisions beyond the one-year deadline. However, USAC cannot have it both ways. If USAC feels confident that sufficient indicia of reliability exist for it to recover under-payments after a one-year period, it should possess the same level of confidence that reliable indicia exist to support identification of over-payments and refunds due to a carrier, as the Commission’s rules contemplate.

The records and information which USAC requests, whether based upon the FCC’s *December 9 Order* or pursuant to guidelines contained in the Instructions to the FCC

Form 499-A, were submitted by Alliance to USAC in prior submissions.⁴⁵ This information was, and is readily available to USAC to conduct a comparative analysis of the revenues Alliance generated in 1999 with: (1) those revenues reported by Alliance on its April 13, 2001 Form 499-A submission; (2) the revenues reported by US Republic in its April 1, 2000 Form 499-A submission; and (3) any financial statements Alliance has produced to USAC. Furthermore, USAC has the ability to cross-reference, share, obtain, and compare information provided to it in a contributors' 499-A with information available to it in other US government databases, including Internal Revenue Service Records, a fact acknowledged by USAC and the FCC in the Form 499-A Instructions.⁴⁶

In short, USAC's allegation that it is unable to determine whether Alliance accurately reported its revenues in 1999 on its "revised" submission in April 2000, is a red herring apparently designed to avoid confronting the underlying substantive issue concerning whether it is appropriate for USAC to impose obligations on revenues which Alliance neither generated or received. In an effort to provide the Commission with complete information, however, Alliance has attached to this *Remand Appeal* financial information concerning Alliance for the years ending June 30, 2000 which illustrates that Alliance did not report, claim or consider the revenues generated by US Republic's customer base as their own for the period prior to December 23, 1999.⁴⁷

⁴⁵ Indeed, Alliance has previously provided supporting information which would provide indicia of reliability concerning the financial status and reporting practices of both Alliance and US Republic. In its *Appeal*, Alliance provided copies of US Republic's Corporate Records and the Purchase and Sale Agreement between the companies. See *Exhibits E and F of the Appeal*. This information is provided here at *Attachments H and B*, respectively.

⁴⁶ See *FCC Form 499-A Instructions*, at pages 1-2.

⁴⁷ This information is attached hereto at *Attachment D*. A copy of Alliance's 2000 499-A, filed April 13, 2001, is also included as *Attachment E*.

Alliance's submission of an original 499-A on April 13, 2001 reflected an accurate statement of the Company's revenues and USAC was unjustified in rejecting it because it was a matter of days beyond an arbitrarily selected time period.⁴⁸ In fact, at the time in which USAC rejected Alliance's worksheet, there was no statute, rule or regulation which would have allowed USAC to engage in such unauthorized rejection of what it termed a "revised" Worksheet. Section 254 of the Communications of Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), provides generally for the equitable and nondiscriminatory contribution by telecommunications carriers to mechanisms established by the FCC and the Federal-State Joint Board to preserve and advance universal service.⁴⁹ Although its existence was not mandated by the Act, USAC was established at the direction of the FCC as an independent not-for-profit entity with the sole function of administering the Universal Service Fund ("FUSF") and other universal service support programs.⁵⁰

USAC's limited responsibilities are clear in the rules and regulations setting forth the scope of USAC's charter. Specifically, Sections 54.702(a) and (b) of the Commission's rules clearly state that USAC is responsible for administering the FUSF programs, including billing, collection and disbursement of FUSF funds. In addressing early concerns over the role of USAC, the Commission has emphasized that USAC's functions are to be "exclusively administrative",⁵¹ noting that Section 54.702(c) expressly limits USAC's power by stating that

⁴⁸ We note that every 499-A is executed by a corporate officer under penalty of perjury and in the shadow of criminal prosecution under 18 U.S.C. § 1001. It is highly likely that these requirements, on their own, provide some indicia of reliability.

⁴⁹ 47 U.S.C. §254.

⁵⁰ *See 1998 Joint Board Order*, 13 FCC Rcd at 25064, 25065-66 at ¶¶ 12, 14.

⁵¹ *1998 Joint Board Order* at 25067 at ¶ 16 (*responding to comments of BellSouth, Sprint, and US WEST*).

USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”⁵²

Despite the fact that USAC is clearly prohibited from establishing policy or addressing uncertainties in the administration of the FUSF on its own, it has clearly done so in this case. In rejecting Alliance’s request, USAC relied on its “previously adopted policy,” approved by the USAC Board of Directors during a USAC Board of Directors meeting on July 27, 1999, limiting the period for carrier-initiated adjustments to FUSF submissions. According to an Action Item entitled, “Recommended Deadline for True-Up of Form 457,” USAC’s staff recommended the following to the Board:

“[b]eginning with the September 1, 1999, data submission; carrier initiated requests for changes in reported revenues be limited to 12 months Changes to prior submissions as a result of an audit of a carrier’s revenue reported on the Form 457 would not be impacted by the proposed limitation.”⁵³

USAC’s staff offered the following rationale to support adoption of the recommendation:

“Historically, USAC has accepted any changes in revenue information reported by telecommunications service providers, regardless of when the changes were reported. It is becoming increasingly burdensome administratively to continue accepting revisions to reported revenue information indefinitely Each time a change is reported that affects end-user billed revenue, it necessitates revising the service provider’s billed amounts for the period impacted by the change.”⁵⁴

⁵² 47 U.S.C. §§ 54.702(c).

⁵³ The specific resolution stated, “RESOLVED, That the USAC Board of Directors directs staff to no longer accept carrier initiated requests for changes in revenues reported on prior FCC Form 457 beyond 12 months from the initial submission of the Form in question.” *See Action Item # aBOD05*, attached hereto as Exhibit 5.

⁵⁴ *See Action Item # aBOD05*.

Regardless of the conclusions reached in the FCC *December 2004 Order* concerning the policy on a going-forward basis, the adoption of such a policy is completely unauthorized and inappropriate.

First, nowhere is statutory or regulatory authority cited to support the USAC policy and nowhere is any indication given that USAC consulted with the Commission prior to adopting the policy. Thus, the adoption of, and reliance upon, such a policy directly contravened express limits on USAC's discretion.

Second, USAC attempted to support its position by stating that Commission "regulations do not require USAC to accept any late-filed Universal Service Worksheets."⁵⁵ Alliance notes the corollary – namely, that no Commission regulations restrict USAC from accepting a worksheet, nor do any Commission regulations govern the process by which it will accept, consider, or reject any worksheets filed out-of time. Thus, USAC was without discretion to reject a corrected worksheet, whenever it is filed.

Third, USAC's rationale for adopting the policy contradicts the rules that govern its operations. The one-year policy, adopted ostensibly to avoid an "administrative burden," ignored the provisions of Section 54.713 of the Commission's rules which specifically permits USAC to receive compensation for administrative tasks. Thus, the redirection of invoices to an appropriate payer, such as US Republic, rather than Alliance, does not impose an undue administrative burden on USAC. Because USAC is authorized to recover its costs for such tasks, arbitrary policies adopted to avoid the necessity for undertaking such tasks are completely

⁵⁵ See *October 1, 2001 USAC Rejection Letter (Administrator's Decision on Appeal)* at 1. A copy of this Letter was provided as *Exhibit D* to the *Appeal* and remains on the record in this proceeding.

unjustified. USAC could have imposed late fees on US Republic for failing to remain forthcoming concerning its responsibility for its own revenues.

Fourth, even if USAC's past activities in adopting a one-year limit for acceptance of corrected FUSF filings is deemed to be justified and appropriate on a going-forward basis, such a limit was not properly adopted by USAC as an administrative policy. Rather, such a rule should be adopted by the Commission pursuant to normal notice and comment rulemaking procedures. A one-year limit is more than a mere administrative or organizational measure. It is a decisional rule with potentially material adverse impact on contributors as well as on the FUSF as a whole. In Alliance's case, the automatic imposition of USAC's one-year limit clearly results in such a materially adverse impact, namely the imposition by USAC of nearly 1 million dollars in FUSF obligations and fees that are properly attributed to US Republic and its progeny. USAC's prior adoption and imposition of such a rule, without public notice or comment, that results in the confiscation of a carrier's property without just cause, violates of basic notions of due process.

Finally, USAC should not and can not legitimately reject the filing of a revised 499-A form which accurately reflects the amount of revenue the Company generated in 1999. As illustrated herein, it is arbitrary, capricious, and beyond the authority of USAC to apply revenues attributable to another Company, when that Company or its progeny have paid FUSF obligations based on the same revenue. To do so results in the perverse policy result of USAC engaging in a double recovery of funds for the Universal Service Fund.

CONCLUSION AND STATEMENT OF RELIEF

In summary, USAC itself apparently erred in underbilling US Republic for certain USF contribution dues. Upon discovering its own error, and then encountering difficulties in collecting from US Republic, USAC arbitrarily and capriciously tried to shift responsibility for the USF liability to Alliance by concocting new rules which are not permitted by the governing statutes, rules, or policies.

Accordingly, pursuant to Sections 54.719(c), 54.721 and 54.722 of the rules of the FCC, Alliance respectfully requests that the Commission direct USAC immediately to: (1) accept Alliance's revised filing of its 2000 FCC Form 499-A, which Alliance first attempted to submit on April 13, 2001, and (2) remove from Alliance's account (File ID # 820411) all FUSF assessments based upon revenues reported by US Republic for services provided and billed prior to December 23, 1999, the date of sale of US Republic's customer base to Alliance.

Respectfully submitted,

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