RECEIVED & INSPECTED
APR 1 1 2007
FCC - MAILROOM

EARLY, LENNON, CROCKER & BARTOSIEWICZ, P.L.C.
ATTORNEYS AT LAW
900 COMERICA BUILDING
KALAMAZOO, MICHIGAN 49007-4752
TELEPHONE (269) 381-8844
FACSIMILE (269) 381-8822

GEORGE H. LENNON
DAVID G. CROCKER
MICHAEL D. O'CONNOR
HAROLD E. FISCHER, JR.
LAWRENCE M. BRENTON
GORDON C. MILLER
GARY P. BARTOSIEWICZ
BLAKE D. CROCKER

ROBERT M. TAYLOR
RON W. KIMBREL
PATRICK D. CROCKER
THOMAS A. BIRKHOLD
RUSSELL B. BAUGH
ANDREW J. VORBRICH
TYREN R. CUDNEY

OF COUNSEL
JOHN T. PETERS, JR.

THOMPSON BENNETT
(1912 – 2004)
VINCENT T. EARLY
(1922 – 2001)
JOSEPH J. BURGIE
(1926 – 1992)

April 10. 2007

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

Via ***Federal Express***

RE: CC Docket No. 96-45 Matter No. DA-07-1263

Dear Ms. Dortch:

Enclosed for tiling in CC Docket No. 96-45 please find an original and four (4) copies of an Application for Review in the above referenced matter. Also enclosed for separate filing in the same docket. please find an original and four (4) copies of a Request for Stay in the above matter. I am filing one original and four copies pursuant to 47 CFR §1.51 (c) (1), as this matter is neither a rulemaking nor a hearing case.

Because this matter was originally mistakenly docketed in the CC Docket No. 02-6 docket, I am enclosing a second set of pleadings to be filed in that docket. Please note that the Order entered in matter number DA 07-1263 bore both docket numbers.

Very truly yours.

EARLY, LENNON, CROCKER & RARTOSIEWICZ, P.L.C

Lawrence M. Br'cnton

LMB/tld

Writer's E-mail: lbrenton@earlylennon.com

cc: Universal Service Administrative Company

No. of Copies rec'd 0+4
List A B C D E

RECEIVED & INSPECTED
APR 11 2007
FCC - MAILROOM

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	CC Docket No. 02-6
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. DA-07-1263
	)	
Petition for Review American Cyber Corp	)	
	)	
Petition for Review Coleman Enterprises, Inc	)	
	)	
Petition for Review Inmark, Inc., d/b/a Preferred Billing	)	
	)	
Petition for Review Lotel, Inc., d/b/a Coordinated Billing	)	
	)	
Petition for Review Protel Advantage	)	
	)	
	)	
To: The Commission	)	

APPLICATION FOR REVIEW

JOINT FILING BY AMERICAN CYBER CORP., COLEMAN ENTERPRISES, INC., INMARK, INC. D/B/A PREFERRED BILLING, LOTEL, INC. D/B/A COORDINATED BILLING, PROTEL ADVANTAGE, INC.

TABLE OF CONTENTS

I. PROCEDURAL HISTORY 1

II. SUMMARY 1

III. FACTUAL BACKGROUND 4

A. THE WHOLESALE-RESALE BUSINESS RELATIONSHIP BETWEEN APPLICANTS AND QAI. 4

B. QAI'S ACKNOWLEDGEMENT OF ITS OBLIGATION TO REPORT AND CONTRIBUTE TO THE UNIVERSAL SERVICE FUND AND APPLICANTS SUBMISSION OF FCC FORMS 499-A. 6

C. USAC'S REJECTION OF APPLICANTS' FORMS 499-A AND IMPOSITION OF BILLINGS BASED ON REVENUE THAT APPLICANTS DID NOT RECEIVE. 7

IV. ARGUMENT 7

A. STANDARD OF REVIEW 7

B. THE WIRELINE COMPETITION BUREAU'S FAILURE TO RENDER A WRITTEN DECISION WITHIN NINETY DAYS PRECLUDES THE COMMISSION FROM APPROVING THE ADMINISTRATOR'S DECISION. 8

C. THE WIRELINE COMPETITION BUREAU LACKED THE AUTHORITY TO REVIEW THE ADMINISTRATOR'S DENIAL OF APPLICANTS' APPEAL 9

D. THE WIRELINE COMPETITION BUREAU'S DECISION AFFIRMING THE ADMINISTRATOR'S DETERMINATION SHOULD ALSO BE REVERSED ON THE MERITS. 11

1. The Applicants Were Not Obligated to Contribute to the Universal Service Fund Because They Did Not Bill End-Users and Did Not Receive Any End-User Revenue. 11

2. Applicants' Wholesaler QAI, Who Billed For and Received All End-User Revenue, Was Solely Responsible to Report and Contribute to Universal Service Fund. 14

3. USAC Had No Authority to Reject Applicants' FCC Forms 499-A and Submit Bills to Applicants for Universal Service Contributions Based on USAC's Undocumented, Unexplained Estimates 17

V. RELIEF REQUESTED 19

I. PROCEDURAL HISTORY

Applicants filed letters of appeal with the Universal Service Administrative Company (sometimes referred to herein as "USAC" or "Administrator") in October 2001. (Exhibit I to Petitions). On May 22, 2003, USAC issued its Administrator's Decision on Contributor Appeal, denying all appeals. (Exhibit A to Petitions). On July 22, 2003, Applicants filed timely Petitions of Review with the Commission pursuant to 47 CFR §§ 54.719-54.724. On March 12, 2007, the Wireline Competition Bureau ("WCB") entered its Order denying the Petitions.

Applicants respectfully submit this Application for Review of the March 12, 2007 Order of the Wireline Competition Bureau acting on behalf of Federal Communications Commission ("Commission"), pursuant to 47 CFR §1.115.

Each of the five carriers submitting this Application for Review (referred to herein as "Applicants" or "carriers") filed a separate Petition for Review (referred to herein as the "Petitions") with the Commission for review of the actions of USAC. The Petitions noted, in footnote 1, that the issues were similar or virtually identical for each carrier. Although there does not appear to have been a formal consolidation of the five proceedings, all were decided in a single attached Order (the "Order") released March 12,2007 in proceeding DA-07-1263. (The Order is attached'hereto as Applicant Exhibit 1.)

II. SUMMARY

The decision of the WCB should be reversed on the following grounds:

1. Pursuant to 47 CFR § 54.724, the WCB was required to approve USAC's determination, if approval was to be ordered, within 90 days of the filing of the Petitions for Review unless it had been granted an extension by the Commission. The Petitions for Review were filed on June 22, 2003 and the WCB did not issue its decision until March 12, 2007.

Applicants were not provided with any notice of an extension of the ninety-day time limit, nor does the WCB reference an extension in its Order. Because USAC's decision to reject Applicants' 2001 FCC Forms 499-A reporting zero revenue and its billings based on such rejection were not approved within the time limit mandated by § 54.724, the USAC's decision is null and void and must be reversed.

2. Alternatively, pursuant to 47 CFR § 54.723(b), the Commission was required to conduct a ***de novo*** review of the Petitions in question because the Petitions presented novel questions of fact, law or policy. The WCB is specifically prohibited from deciding cases that involve novel questions of fact, law or policy. The issues raised in the Petitions for Review present issues of first impression that have not been determined by the Commission. The business model in these cases involved an agreement by which the wholesaler billed end-user customers, including charges for USF fees, received and retained all of the revenue and never remitted the revenue to the Applicant resellers. The wholesaler acknowledged its responsibility to report revenue to USAC and pay the USF fees in accordance with the Commission's rules and the Commission-approved 499 Instructions. Because no decisions have been rendered to address how the rules and instructions are to be applied in such a situation, the WCB acted outside of its authority when it considered the Petitions that should have been considered by the Commission ***de novo***. Accordingly, the Commission is requested to vacate the WCB's Order and consider the Petitions ***de novo*** as mandated by § 54.723(b).

3. Alternatively, the WCB's decision must also be reversed on the merits because USAC had no authority to (1) reject Applicants' 2001 FCC Forms 499-A which honestly and accurately reported zero revenue; (2) attribute undocumented and unexplained end-user revenue estimates to Applicants; and (3) bill the Applicants, all small family businesses, approximately

$1.4 million collectively based on those undocumented and unexplained revenue figures. The USAC's actions were in direct contravention of the Telecommunications Act of 1996 ("Act"), the Commission's rules and the Commission-approved 499 Instructions in that all of the foregoing require an equitable assessment of USF fees and are intended to avoid the double counting of revenue.

The 499 Instructions unequivocally imposed the obligation to report and pay solely upon Applicants' wholesaler, QAI, Inc., the entity which billed end-users, retained the revenue and did not remit any of the revenue to Applicants. Indeed, the WCB, USAC and QAI all admit that QAI was obligated to report and pay for the USF obligations. However, the WCB and USAC incorrectly determined that notwithstanding the obligation placed upon QAI as the wholesaler, both the wholesaler and the resellers ***are*** obligated to report and pay. The Commission set up the Universal Service mechanisms to specifically insure that revenue would not be double counted in wholesaler-reseller business models. Yet, the determinations of the WCB and USAC result not only in the double counting of revenue; but even worse, were based upon undocumented and unexplained revenue figures that USAC imposed upon the reseller carriers who received none of the revenue.

Applicants submit that the denial of relief by the WCB is in conflict with statute, regulation and established Commission policy within the meaning of 47 CFR § 1.115(b)(2)(i) in that (a) the outright rejection of the Applicants' 2001 499-A Forms was upheld and (b) the allocation of end-user revenue numbers to the Applicants by the USAC in the absence of any investigation or audit of Applicants or QAI was confirmed. USAC's actions in this regard are in clear violation of the Act, the Commissions rules, the Commission-approved 499 Instructions, are patently arbitrary and capricious, grossly unfair and must be reversed.

III. FACTUAL BACKGROUND

A. THE WHOLESALE-RESALE BUSINESS RELATIONSHIP BETWEEN APPLICANTS AND QAI.

In calendar year 2000, each of the five Applicants was a reseller of long distance telecommunication services. Each Applicant contracted with QAI or its affiliates for wholesale provision of underlying long distance service.[1] QAI in turn obtained its underlying service from Sprint. (Exhibit K to Petitions)

The wholesale service was provided pursuant to contracts by which QAI provided underlying long distance service, billing and collection, and payment of expenses associated with the provision of services. The contracts expressly obligated QAI to pay Universal Service Fund charges. After deducting expenses and commissions, if any net proceeds remained, QAI was required to pay the Applicants such net proceeds (defined as a "margin" in the contracts). (Exhibit C to Petitions) Under the terms of every agreement (particularly Schedule 2), QAI was to act as the wholesaler of telecommunications services and petitioners were retail carriers. This business model was unusual in that the contracts provided that QAI would directly bill end-user customers for "Long Distance usage provided by QAI", QAI would receive all funds in payment for same and QAI, as recipient of all monies, would remit universal service fund payments to the Universal Service Administrative Company. (See also, Exhibit E to Petitions, in which QAI acknowledged that as recipient of all monies, it was obligated to pay universal service contributions.)

[1] In the case of Petitioners Inmark, Inc. and American Cyber Corp. a virtually identical agreement was made with QAI affiliate Pathfinder Capital, Inc., a Nevada corporation. References herein to QAI are intended to include Pathfinder capital, Inc. in relation to Inmark, Inc. and American Cyber *Corp.*

This contractual arrangement is less common than the more widely followed procedure of a retail carrier billing for and collecting long distance usage charges and remitting universal service fund payments. However, there is nothing in the applicable Commission regulations or Commission-approved Instructions of USAC prohibiting the parties to a wholesale-retail arrangement from establishing and following the procedure adopted by the parties.

During the relevant time frame QAI did not distribute any so-called margin to the resellers because QAI claimed there was no money left over after QAI deducted its expenses and commission. In practice, virtually the only funds paid by QAI to the resellers consisted of what QAI deemed to be some optional advances made pursuant to the contract, which QAI booked as loans to the resellers. (Exhibit K to Petitions)

The contractual agreements and course of dealing between the parties clearly established that QAI billed for, collected and reserved Universal Service Fund Charges in 2000 and was obligated to pay such charges. (Exhibits E-G and J-K to Petitions) These contracts and this course of dealing were consistent with USAC Instructions, which clearly provide that every wholesaler of services must report on its own account and therefore pay all Universal Service Fund charges generated by revenues attributable to resellers in the absence of documentation establishing that the reseller is obligated to do so. (2001 499-A Instructions at p. 15. attached hereto as Applicant Exhibit 2)

The ongoing relationship between QAI and each of the resellers became disrupted in November and December of 2000, when QAI engaged in a dispute with its underlying long distance provider, Sprint, resulting in the interuption of long distance services to the end-users. (Exhibit K to Petitions) Applicants were successful in switching to a different wholesale carrier. but in doing so lost a large number of end-user customers.)

B. QAI'S ACKNOWLEDGEMENT OF ITS OBLIGATION TO REPORT AND CONTRIBUTE TO THE UNIVERSAL SERVICE FUND AND APPLICANTS SUBMISSION OF FCC FORMS 499-A.

In March of 2001, after QAI was no longer providing wholesale services, it requested that Petitioners execute a "Universal Connectivity Charge Exemption Certification" form to relieve it of its obligation to report revenues and remit USF charges to USAC for the period of time that QAI had billed and received the revenue from the end-users. (See Exhibit **F** to Petitions and Declarations, Exhibit K) Specifically, in its March 26, 2001 letter to Petitioners, QAI acknowledged that without a certification from Applicants, QAI would have to report the end-user revenue and pay the USF obligation: "[W]ithout the Certification, QAI will be forced to include revenue derived from [Applicants] as end-user revenue." (Exhibit F to Petitions)

QAI's request for Applicants to assume the obligation to report and pay the USF fees on revenue they did not receive was unequivocally refused. Indeed, Applicants demanded that QAI report the revenue it had received and remit USF fees as it was obligated to do. (Exhibit G to Petitions). While the alternative approach that was rejected might have been attractive to QAI, it would not have reflected the reality that under the parties' agreements, QAI had billed end-users for services, received all end-user revenues and was required to report and pay for those revenues as it had done in the past. Presumably it did so for 2000, on refusal by Applicants to assume QAI's responsibilities.

Each Applicant timely filed 2001 Forms 499-A truthfully disclosing that they received no end-user revenues in 2000. (See Exhibit H to Petitions) The Applicants also attached an Addendum with supporting documentation explaining that QAI was obligated to report calendar year 2000 revenues and pay the resulting Universal Service Fund charges since it had billed for and received those revenues. (Exhibit G to Petitions).

C. USAC'S REJECTION OF APPLICANTS' FORMS 499-A AND IMPOSITION OF BILLINGS BASED ON REVENUE THAT APPLICANTS DID NOT RECEIVE.

After Applicants filed their Forms 499-A, USAC rejected the forms in a letter dated September 12, 2001. (Exhibit B to Petitions.) The letter simultaneously instructs each carrier to file its own 499-A form (and be directly responsible for payment of resulting universal service fund charges) but rejects the 499-A forms filed by each carrier. (Id.)

Despite the fact that Applicants correctly reported that they had no end-user revenues, USAC collectively billed Applicants approximately $1.4 million based on estimated revenue Applicants never billed for or received from end-users or from QAI. USAC did not explain how it calculated the bills and had no factual basis to deem the Applicants to have received revenue that they had not received. Without conducting any investigation or audit of Applicants or QAI, IJSAC simply billed Applicants based on numbers it attributed to Applicants which were contrary to Applicants' Forms 499-A.

IV. ARGUMENT

A. STANDARD OF REVIEW.

At least three factors favor review of the WCB's Order under 47 CFR § 115.

First, the denial of relief by the WCB is in conflict with statute, regulation and established Commission policy within the meaning of 47 CFR § 1.115(b)(2)(i) in that (a) the outright rejection of the Applicants' 2001 499-A Forms was upheld; and (b) the allocation of end-user revenue numbers to the Applicants by the USAC in the absence of an investigation or audit was confirmed. Each of these actions far exceeds any authority granted USAC and was arbitrary and capricious.

Second, the present case presents an issue not previously resolved by the Commission within the meaning of 47 CFR §1.115(b)(2)(ii).

Third, 47 CFR §1.115(b)(2)(v) defines "Prejudicial procedural error" as a factor weighing in favor of Commission review. Here the Applicants' 499-A reports have admittedly been "returned" by USAC and, in spite of USAC's statements to the contrary, have been rejected, ignored and replaced by numbers attributed to Applicants by USAC. The WCB also failed to render its decision within ninety days as required by 47 CFR § 54.724 and was not entitled to decide the case because it involves novel questions of fact, law or policy. 47 CFR § 723(b). The actions at least amount to procedural error highly prejudicial to the Applicants, as they attempt to impose the responsibility for payment of approximately $1.4 million collectively of universal service contributions that are not owed by Applicants.

B. THE WIRELINE COMPETITION BUREAU'S FAILURE TO RENDER A WRITTEN DECISION WITHIN NINETY DAYS PRECLUDES THE COMMISSION FROM APPROVING THE ADMINISTRATOR'S DECISION.

47 CFR § 54.724 mandates that requests for Commission approval of Administrator decisions shall be made within ninety days. The Commission rule provides as follows:

> **Time periods for Commission approval of Administrator decisions.**
>
> (a) The Wireline Competition Bureau ***shall, within ninety (90) days, take action in response to a request for review of an Administrator decision that is properly before it.*** The Wireline Competition Bureau may extend the time period for taking action on a request for review of an Administrator decision for a period of ***up to ninety days.*** The Commission may also at any time, extend the time period for taking action of a request for review of an Administrator decision pending before the Wireline Competition Bureau.
>
> (b) ***The Commission shall issue a written decision in response to a request for review of an Administrator decision that involves novel questions of fact, law, or policy within ninety (90) days.*** The Commission may extend the time period for taking action on the request for review of an Administrator decision. The Wireline Competition Bureau also may extend action on a request for review of an Administrator decision for a period of up to ninety days.

(Emphasis added)

The regulation in question makes it clear that whether the appeal is considered by the Commission or the WCB, a written decision to uphold the Administrator's decision must have been rendered within ninety days unless extended by the Commission prior to the decision.

In the present proceeding, Applicants filed their petitions for review in July 2003. Applicants were not provided with notice that the ninety-day deadlines were being extended by the Commission or the WCB. Absent such an extension, the Administrator's decision could only be approved if the review was decided within the time limits of 47 CFR § 54.724. The failure to comply with the time limits therefore precluded either the Commission or the WCB from approving the Administrator's decision and the decision of the Administrator is therefore a nullity

C. THE WIRELINE COMPETITION BUREAU LACKED THE AUTHORITY TO REVIEW THE ADMINISTRATOR'S DENIAL OF APPLICANTS' APPEAL.

47 CFR § 54.722(a) provides that the WCB is prohibited from deciding petitions for review from determinations of the Administrator which involve novel questions of fact, law or policy and that such appeals must be considered by the full Commission:

> Requests for review of Administrator decisions that **are** submitted to the Federal Communications Commission shall be considered and acted upon by the Wireline Competition Bureau; ***provided, however, that requests for review that raise novel questions of fact, law or policy shall be considered by the full Commission.***

(Emphasis added.) In the instant matter, the issues raised by Applicants which were delegated to and considered by the WCB presented novel questions of fact, law and policy thereby requiring that the appeal should have been considered by the full Commission rather than the WC'B.

Specifically, Applicants' appeals presented the following issues which had not previously been ruled upon by the Commission:

- Whether retail carriers that did not bill for or receive end-user revenue are required to contribute to the Universal Service Fund.
- Whether USAC could reject FCC Forms 499-A submitted by Applicants which established that their wholesaler billed end-users, collected the revenue, acknowledged its responsibility to report the end-user revenue on its own Form 499-A and its obligation to contribute to the Universal Service Fund.
- Whether USAC could impose revenue figures contrary to 499-A reported figures and use those figures to bill Applicants for end-user revenue resellers did not receive, without first conducting an audit or investigation.
- Whether retailers who by agreement with their wholesaler do not bill or collect revenues are liable for USF contributions.

Neither Applicants nor the WCB were able to cite to or find any decisions or orders of the courts or the Commission addressing the precise issues presented in this case. The issues presented raise novel questions of fact, law and policy.

These novel questions have arisen in this case because USAC and the WCB do not know how to apply Universal Service Fund rules to something other than a prototypical wholesale-resale arrangement, the prototype being one in which the carrier's carrier obtains certification that the reseller will make universal service contributions and the reseller bills for and collects end-user revenues, reporting them on its 499 Forms and making universal service payments. The Commission's discussions follow a perfectly logical approach based on who bills and receives revenues, leading to the conclusion that in most such arrangements, it is the

reseller collecting the money that should pay, with responsibility on the wholesaler to verify that the reseller will do so, at which point its responsibility ends. There is no double liability in such an arrangement; the wholesale carrier obtaining proper certification from a reseller does not still remain responsible for universal service contributions. In the business model in the present case the parties departed from the prototypical model by expressly agreeing that the wholesale carrier would bill for and receive all revenues, report the revenues and pay universal service contributions. Under this arrangement there again should be no double liability; QAI was required by the law and by contract to report the revenues as QAI's end-user revenues and pay universal service contributions, not the Applicants.

These novel issues must be addressed by the full Commission, not by the WCB which had no authority to decide the appeals. Applicants respectfully request that the full Commission vacate the Order of the WCB and conduct the ***de novo*** review mandated by 47 CFR § 722(a)

D. THE WIRELINE COMPETITION BUREAU'S DECISION AFFIRMING THE ADMINISTRATOR'S DETERMINATION SHOULD ALSO BE REVERSED ON THE MERITS.

1. The Applicants Were Not Obligated to Contribute to the Universal Service Fund Because They Did Not Bill End-Users and Did Not Receive Any End-User Revenue.

The instructions for FCC Form 499-A specifically mandate that carriers report revenues that appear on the reporting entities "books of account"[2] and "financial records."[3] Applicants had no revenue on their books of accounts or financial records to report to USAC for the periods in question from either end-users or their wholesaler ***because they did not bill for or receive any such revenue.*** Applicants therefore honestly and accurately reported that they had not received any reportable revenue on the FCC Forms 499-A in question.

[2]Form 499-A Instructions at p. 15 (2001), attached hereto as Applicants Exhibit 2.
[3]Form 499-A Instructions at p. 26 (2001), attached hereto as Applicants Exhibit 2.

The 499-A Instructions contain two directives that unequivocally require carriers to report only revenues that appear in their financial records, and contain a third directive that instructs carriers to "show zero" if they had no revenues for the filing period:

- "In the Telecommunications Reporting Worksheet, filers must report revenues using two broad categories: (1) Revenues from other contributors to the federal universal service support mechanisms; and, (2) Revenues from all other sources. Taken together, ***these revenues should include all revenues billed to customers and should include all revenues on the reporting entities' books of account."*** (FCC Form 499-A Instructions (2001) at p. 15, Attached hereto as Applicants' Exhibit 2) (Emphasis added).

- "Whenever possible, revenue information should be taken ***from the contributors' financial records."*** (FCC Form 499-A Instructions (2001) at p. 26, Attached hereto as Applicants' Exhibit 2) (Emphasis added).

- "Provide data for all lines that apply. ***Show a zero for services which the contributor hod no revenues for the firing period."*** (FCC Form 499-A Instructions (2001) at p. 26, Attached hereto as Applicants' Exhibit 2) (Emphasis added).

The emphasized language in the 499-A Instructions makes it clear that carriers are only required to report revenue they actually bill for, whether directly from the end-users or from a rescllcr. In this case, Applicants had no revenue from either source. Applicants did not have any resellers, so they had no "carrier's-carrier revenue." Nor had Applicants billed or received revenue from the end-user customers because the end-users were billed by their wholesaler QAI and QAI retained all such revenue for itself, including revenue QAI derived from passing through USF charges to the end-users. To require Applicants, which are all small family businesses. to collectively pay approximately $1.4 million for revenue they never received is not required by the Act, the Commissions' rules, the FCC Form 499-A Instructions and is fundamentally unfair. For the Administrator to bury its head in the sand and ignore the economic realities of the business relationship between QAI and Applicants is patently arbitrary and capricious

The WCB also erred in concluding that Applicants were required to report revenue they never billed or received. The WCB's analysis on this point is summarized in its Order as follows:

> **As** noted above, the Act and the Commission's rules require that every telecommunications carrier that provides interstate telecommunications services contribute to the universal service support mechanisms based on end-user telecommunications revenues. The Commission expressly declined to exempt resellers from this general rule. Rather, the Commission explained that, in a wholesaler-reseller relationship, resellers generally bear the obligation to contribute directly to universal service ***because resellers earn revenues directly from end-users.***

(Order at p. 5, ¶ 14) (Emphasis added, footnotes omitted).

This quotation underscores the fundamental flaw in both the Administrator's decision and the WCB's affirmation of the decision. Applicants do not, and have not claimed that they are exempt from contributing to universal service. Instead they claim that since they had no revenue, they have no revenue to report. The emphasized language in the WCB's quotation above shows that the Act and the Commission's rules require **resellers** to report and pay when "resellers earn revenues directly from end-users," This requirement is logical, fair and makes perfect sense ***if the reseller has any revenues from end-users.*** However, when a reseller ***does not earn revenues from end-users*** as in the instant case, it obviously cannot be expected or compelled to report and contribute for revenue that it never billed or received. The WCB and Administrator do not challenge the evidentiary submissions made by Applicants that proves they did not bill for or receive any revenue from end-users or from any other source.

The Commission expressly structured the universal service contribution mechanism to prevent double counting revenue, which is exactly what would happen if the WCB and

Administrator's decisions are affirmed.[4] In short, the WCB's argument that all contributors are required to report and pay simply misses the mark, is not supported by the Act or the Commission's Rules and must be reversed.

2. Applicants' Wholesaler QAI, Who Billed For and Received All End-User Revenue, Was Solely Responsible to Report and Contribute to Universal Service Fund.

The Act establishing the universal service fund requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-discriminatory basis … to preserve and advance universal service." 47 U.S.C. § 254(d). When the Commission promulgated its rules to implement this requirement of the Act, it specifically recognized that in wholesaler-reseller relationships that revenue could potentially be double counted. The Commission expressly structured the universal support mechanism to insure that the same revenues were not double counted. Such a structure was mandated by the Act's requirement that contributions he "equitable and non-discriminatory." Double counting the same revenue is inherently inequitable and would discriminate against resellers, as the Commission recognized in its First Report.

When the Commission approved the 499 Instructions it put in place a procedure to prevent revenues from being double counted in wholesaler-reseller relationships by requiring certifications between wholesalers and resellers in order to determine which party in the chain of distribution is responsible for reporting and contributing to the universal service fund. The WCB explicitly recognizes this important principal in its Order:

As Petitioners point out, the Commission-approved Instructions that

[4] "We agree with the Joint Board's recommendation that we must assess contributions in a manner that eliminates the double payment problem, is competitively neutral and is easy to administer." Universal Service First Report and Order, 12 FCC Rcd 8776, 9206 at ¶ **843** (1997).

> accompany FCC Forms 499 require wholesalers to determine that their customers are resellers and are contributing to the universal service fund. ***Otherwise, wholesalers must treat those customers as end-users, report revenuesfrom those customers as end-user revenues, and contribute directly to thefund based on those end-user revenues.***

(Order at p. 5, ¶ 15)(Emphasis added, footnotes omitted).

Because the Commission's rules and the 499 Instructions are both designed to prevent double counting of end-user revenue, the burden to report and contribute cannot logically be imposed on more than one party in the chain of distribution of telecommunications services without resulting in double counting revenue. There is no provision in the Act, the Commission's rules or the Instructions that prevent parties in wholesaler-reseller relationships from agreeing the billing wholesaler is obligated to report and contribute to the universal service fund. Indeed, the exact opposite is true – the Commission-approved Instructions squarely place the burden on the wholesaler to report and contribute ***unless and until the reseller certifies that it will report and Contribute.'***

In the instant proceeding QAI had not only billed for and collected all of the revenue from the resellers' end-user customers, but it even passed through USF fees to the end-user customers for the very purpose of contributing to USF. QAI never remitted any of the revenue to Applicants. Additionally, the contracts between QAI and Applicants required QAI to bill the end-users, collect the revenue and remit USF fees to the Administrator. The parties had operated in this fashion with QAI collecting the revenue and contributing to the universal service fund until their relationship ended when QAI lost the ability to provide long distance service.

---

[5]The WCB's characterization of the certification requirement as nothing more than a "due diligence" requirement imposed on wholesalers, (Order at p. 5, ¶ 15), is incorrect and inconsistent with the mandatory burden imposed on wholesalers to report and pay absent a certification from its reseller.

When the wholesaler-reseller relationship terminated, QAI requested the resellers to certify that they would report and contribute to universal service. The resellers refused since QAI had collected the revenue from the end-users and never remitted any of the proceeds to the resellers. QAI specifically stated that it would be forced to report and contribute to universal service if the resellers refused to certify they would pay and report. Presumably it did.

USAC and the WCB both incorrectly characterize the Applicant's argument as an attempt to shift responsibility from the responsible carrier to some third party (QAI), when in fact the rules and Instructions placed the reporting and payment responsibility on QAI in the first instance unless and until it confirmed with resellers that the resellers would discharge these obligations. Applicants did not and have not argued that their contractual relationship with QAI trumps the Act, the Commissions rules and Instructions. Rather, they argue that the contractual relationship and the parties' conduct establishes that QAI was the one and only entity that was obligated to report and contribute the Universal Service Fund ***pursuant to the express requirements of the 499 Instructions.***

The rules and Instructions specifically place the reporting and payment responsibility on the carrier that ***bills*** the revenue, which comports with economic reality, common sense and the Act's requirement that the contributions be assessed in an equitable manner. The WCB's repetition of the mantra that "every telecommunications carrier is obligated to contribute to the support mechanisms" misses the point in the present case because only one carrier in the chain of distribution, QAI, was required to report the revenue it billed and contribute. To interpret the rules and instructions as suggested by the Administrator and the WCB would have resulted in ***triple counting*** the revenue in this case since there were three parties in the chain of

distribution; Sprint, QAI and the Applicants. Such an interpretation is flatly contrary to the Act, the Commission's rules and the 499 Instructions and must **be** rejected and reversed.

3. USAC Had No Authority to Reject Applicants' FCC Forms 499-A and Submit Bills to Applicants for Universal Service Contributions Based on USAC's Undocumented, Unexplained Estimates.

47 CFR § 54.702(c) precludes the Administrator from interpreting unclear rules or making policy without seeking guidance from the Commission:

> The Administrator ***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 shall seek guidance from the Commission.***

(Emphasis added) The Administrator violated the Commission's rule by acting outside the scope of its power.

Specifically, there **is** no language in the Act, the Commission's rules or the Form 499-A Instructions that empowers USAC to reject a timely filed Form 499-A. Rather, the Administrator is only empowered to "bill" a "contributor that ***fails to file*** a Telecommunications Reporting Worksheet ..." 47 CFR § 54.713 (emphasis added). The administrator is also empowered to "verify any information contained in the Telecommunications Reporting Worksheet at the discretion of the Commission." 47 CFR § 54.711(a). These are the only two rules relied upon by the WCB to justify the Administrator's "rejection" of Applicants' duly filed Forms 499. Neither of the rules gives USAC the right to reject 499 timely filed forms that accurately report zero revenue. Contrary to the WCB's argument, the right to review does not "necessarily include the discretion to reject forms containing incomplete or inaccurate information." (Order at p. 7, ¶ 21) The WCB's contention that it has the implied power to reject reports is the very sort of rule interpretation and policy

making that § 54.702(c) precludes the Administrator from engaging in.[6]

Each of the Applicants' Forms 499-A honestly and accurately reported that they had not received any revenue from end-users or QAI and attached an addendum with supporting exhibits proving that QAI had admitted that it was obligated to report and contribute to the universal service fund. Because Applicants timely filed their reports, the Administrator had no right to estimate a bill and submit to Applicants pursuant to § 54.713.[7] While the Administrator pursuant to § 54.711(a) could have audited and reviewed Applicants' and QAI's books and records to determine whether Applicants had honestly reported that they had not received any end-user revenue or revenue from QAI, it did not do so. Instead, the Administrator simply determined with absolutely no factual basis that reporting the revenue as zero was unacceptable even though the Instructions specifically direct a carrier who has no revenue to enter zero into the appropriate fields of the 499 Form. (Instructions at p. 26, Applicants' Exhibit 2) The Administrator knew full well that QAI had received all of the revenue and was obligated to report and contribute based on the addendum Applicants submitted with the Forms 499-A. Any review conducted by the Administrator would have simply confirmed Applicants filed honest and accurate reports and neither the Administrator nor the WCB contend otherwise. Neither the Administrator nor the WCB disputes that QAI billed the end-users and received all of the end-

---

[6]The WCB's reliance on ABC Cellular Corp. CC Docket No. 97-21, Order, 17 FCC Rcd 25192, 25196-97, ¶ 12 (Com. Car. Bur. 2002) is misplaced. That decision held that the Administrator had the power to reject 499 Forms which attempted to correct previously filed 499 Forms when the corrected Forms were filed beyond the deadlines in the Commission's rules and in the Form 499 Instructions because they were untimely. The decision in ABC Cellular offers no support for rejecting the 499 Forms filed in this case which were timely and accurate.

[7]The WCB alternatively argues that the Commission has the power to reject incorrect or incomplete filings upon its review. (Order at p. 7, ¶ 23) While this may be true in principal, the Commission must have a factual basis for rejecting the forms as being inaccurate and there is no such factual basis in this case. As discussed above, it is undisputed that Applicants never received any revenue and therefore honestly reported that they had none.

user revenue.

Under these circumstances USAC had no authority to **(1)** arbitrarily reject the 499-A Forms submitted by Applicants which honestly and accurately reported that they received no end-user revenue, (2) adopt its own undocumented and unexplained estimated revenue figures and **(3)** bill the carriers based on its undocumented unexplained revenue amounts. Yet, that is exactly what has happened in this case. Consequently, USAC was acting outside of its authority; it was making policy and purporting to apply rules to Applicants that did not apply, in direct contravention of 47 CFR § 54.702(c).

The Administrator's conduct is by definition arbitrary and capricious. Such conduct is a gross abuse of the power that was granted to the Administrator and is patently illegal.

V. RELIEF REOUESTED

Based on the foregoing, Applicants respectfully request that the Commission grant the following relief:

1. Pursuant to 47 CFR § 54.724, Order that USAC's rejection of Applicants' 2001 FCC Forms 499-A be reversed and the corresponding billings be withdrawn because of the WCB's failure to approve the USAC's action within ninety days as mandated by said regulation;

2. Alternatively, pursuant to 47 CFR § 54.722(a), Order that that WCB's Order be vacated and consider the Petitions for Review ***de novo*** because this case involves novel questions of fact, law or policy within the meaning of said regulation;

3. Alternatively, Order that the USAC accept Applicants' 2001 FCC Forms 499-A showing zero revenue and withdraw its billings based on its own calculations. In the alternative, the cases should be remanded to USAC to determine whether, after an appropriate

investigation and audit of the carriers' reported end-user revenues, revision of the 499-A forms submitted by the Applicants was appropriate: and/or

4. Order that USAC require QAI, who billed and collected all revenues and contracted to pay universal service payments, be solely obligated to report the end-user revenues it billed and contribute to the Universal Service Fund for such revenues.

Respectfully submitted,

Dated: April 10, 2007

Lawrence M. Brenton
Early, Lennon, Crocker & Bartosiewicz, P L C
900 Comerica Building
Kalamazoo, MI 49007
(269) 381-8844
lbrenton@earlylennon.com

Attorneys for Applicants

CERTIFICATE OF SERVICE

A copy of the foregoing Application for Review was served upon the Universal Service Administrative Company this 10th day of April via Federal Express delivery and United States mail, at the following address:

Universal Service Administrative Company
Attn: Tracy Beaver
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Teresa Denemy

Early, Lennon, Crocker Bartosiewicz. P.L.C.
900 Comerica Bldg
Kalamazoo, MI 49007
Phone 269.381.8844
Fax 269.381-8822

EXHIBIT 1

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. ***96-45***
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6
	)	
Petition for Review American Cyber Corp	)	
	)	
Petition for Review Coleman Enterprises, Inc	)	
	)	
Petition for Review Inmark, Inc., d/b/a Preferred Billing	)	
	)	
Petition for Review Lotel. Inc., d/b/a Coordinated Billing	)	
	)	
Petition for Review Protel Advantage, Inc.	)	

ORDER

Adopted: March 12,2007 Released: March 12,2007

By the Acting Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny the petitions filed by American Cyber Corp. (ACC), Coleman Enterprises, Inc. (Coleman), Inmark, Inc., d/b/a Preferred Billing (Inmark), Lotel, Inc., d/b/a Coordinated Billing (Lotel), Protel Advantage, Inc. (Protel) (collectively, Petitioners) seeking review of the Universal Service Administrative Company's (the Administrator) Decision on Contributor Appeal.[1] Specifically,

[1] Petition for Review by American Cyber Corp., CC Docket No. 02-6 (filed July 22,2003); Petition for Review by Coleman Enterprises, lnc., CC Docket No. 02-6 (riled July 22,2003); Petition for Review by Inmark, Inc., d/b/a Preferred Billing, CC Docket No. 02-6 (filed July 22,2003); Petition for Review by Lotel, Inc., d/b/a Coordinated Billing, CC Docket No. 02-6 (filed July 22,2003); Petition for Review by Protel Advantage, Inc., CC Docket No. 02-6 (riled July 22, 2003) (collectively, Petitions for Review); Petitions for Review at Exhibit **A** (Letter from the Universal Service Administrative Company to Lawrence M. Benton, Counsel to Petitioners (dated May 22, 2003) (Administrator's Decision on Contributor Appeal)). The Petitions for Review, including **the** Exhibits thereto, are substantively identical.

We note lhat all five petitions were tiled in the wrong docket, CC Docket Number 02-6, which concerns the Schools and Libraries program. For this reason, **we** also include in the caption CC Docket Number 96-45, which **is** the docket for, among other things, universal service contributor appeals.

Petitioners challenge the Administrator's decisions to bill Petitioners for universal service contributions from January through June 2001 and to reject Petitioners' Forms 499-A for **2001.** For the reasons set forth below, we affirm the Administrator's Decision on Contributor Appeal.

II. BACKGROUND

A. The Act and the Commission's Rules

2. Section 254(d) of the Communications Act of **1934,** as amended (the Act), directs that 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? To this end, the Commission has determined that any entity that provides interstate telecommunications services to the public for a fee must contribute to the Universal Service Fund (USF or Fund).' The Commission further directed that contributions should be based on contributors' interstate and international end-user telecommunications revenues.'

3. Although the Commission declined to exempt from contribution "any of the broad classes of telecommunications carriers that provide interstate telecommunications services,"' not all carriers that provide interstate telecommunications service contribute directly to universal service. In particular, the Commission recognized that "[b]asing contributions on end-user revenues **...** will relieve wholesale carriers from contributing directly to the support mechanisms" because these carrier's carriers do not earn revenues directly from end-users.[6] Instead, the reseller that provides the service to the end-user and thereby earns end-user revenues will contribute directly to universal service.'

4. Moreover, **the** Act and the Commission's rules exempt certain carriers from the contribution requirement, For example, carriers are not required to contribute directly to the universal service fund in a given year if their contribution for that year would be less than $10,000.[8] Likewise, carriers with purely intrastate or international revenues are not required to contribute.[9] Certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers are also

---

[2] 47 U.S.C. § 254(d)

[3] ***See Federal-Stare Joint Board on Universal Service,*** CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8797, para. 787 (1997) ***(Universal Service First Report and Order),*** **as** corrected by ***Federal-Stale Join? Board on Universal Service,*** CC Docket No, 96-45, Errata, FCC 97-157 (rel. lune 4, 1997), ***affd inparl, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel*** *v. FCC,* 183 F.3d 393 (5' Cir. 1999), ***cert. denied,*** 530 U.S. 1210 (2000), cert. dismissed, 531 U.S. 975 (2000). The Commission **also** requires certain other providers of telecommunicationsto contribute to the Fund. ***See. e.g., Universal Service Contribution Methodology,*** WC Docket Nos. 06-122 and 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237,99-200, 95-116, and 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

[4] *Id.*; ***see also*** 47 C.F.R. § 54.706.

[5] ***Universal Service First Reporr and Order,*** 12 FCC Rcd at 8797, para. 787

[6] ***Id.*** at 9207, para. 846

[7] *Id.*

[8] 47 C.F.R. § 54.708.

[9] *Universal Service* ***First Reporr and Order,*** 12 FCC Rcd at 9174, para. 779; ***Federal-State Joint Board on Universal Service,*** CC Docket No, 96- 45, Sixteenth Order on Reconsideration, 15 FCC Rcd. 1679, 1685, para. 15 (1999).

exempt from the contribution requirement." Unless a carrier meets one of the exemptions, however, it must contribute to universal service.

5. Contributors report their revenues by filing Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q) with the Administrator." The Administrator reviews these filings and verifies the information provided hy the contributors.[12] The Administrator also bills contributors for their universal service contributions.[13]

B. Petitions **for Review**

6. Petitioners are resellers of long distance communications services." They contracted with QAI, Inc. (QAI) for the wholesale provision of the underlying long distance service.[15] They allege that the contract obligated QAI to report the end-user revenues that Petitioners earned from reselling long distance service to end-users and to contribute to the USF based on those revenues.[16]

7. In 2001, after **QAI** ceased reporting Petitioners' end-user revenues and contributing *to* the USF, Petitioners filed FCC Forms 499-A.[17] On their forms, Petitioners failed to report any revenues for calendar year 2000.[18] Instead, Petitioners attached an addendum stating that QAI **was** responsible for all filings and payments related to the filings."

8. On September 12, 2001, the Administrator issued a letter to Petitioners directing them to "submit completed April 1, 2001 FCC form 499-A filings" as soon as possible." The Administrator noted that "[e]ach legal entity is required to file their own 499-A filing reporting their own revenue."[21]

---

[10] 47 C.F.R. § 54.706(d).

[11] *Id.* § 54.711(a) (setting forth reporting requirements in accordance with Commission announcements in the Federal Register). Contributors report historical revenue on the annual le n n p g V e (FCC Form 499-A), which is generally filed on April 1 each year. *See* 47 C.F.R. ni l Service Administrative Company, *Schedule of Filings*, *at http://www.universalservice.org/fund-administration/contributors/revenue-reporting/schedule-filings.aspx* (last visited March 5, 2007). Contributors project future quarters' revenue on the quarterly Telecommunications Reporting Worksheets (FCC Form 499-Q), which are generally filed on February 1, May 1, A 1, and November 1 *Id.*

[12] 47 C.F R § 54.711(a).

[13] *Id.* § 702(b).

[14] Petitions for Review at 2.

[15] *Id.*

[16] *Id.* at 2-3.

[17] *Id.* at E: ibi H (Petitioners' Forms 499-A for 2001)

[18] *Id* **As** noted above, carriers use Form 499-A to report revenues m the prior calendar year. ***See supra*** n Therefore, Petitioners were required to report revenues from calendar year 2000 on the 2001 Form 499-A.

[19] Petitions for Review at Exhibit H.

[20] ***Id*** at Exhibit B (Letter from Lori S. Terraciano, Universal Service Administrative Company to Patrick D. Crocker, Counsel to Petitioners (dated Sept. 12,2001)).

[21] *Id*

The Administrator also explained that, unless Petitioners meet one of the exemptions, they owe a direct contribution obligation, which cannot be assumed by underlying carriers.[22] Petitioners appealed the decision to the Administrator by letter dated October 9, 2001.[23]

9. On May 22,2003, the Administrator issued a Decision on Contributor Appeal, denying Petitioners' appeal." The Administrator noted that "while a third party may provide a service and file forms on another's behalf, the obligation to file remains the obligation of each entity."[25] A third party "does not assume the responsibility [of] the obligation for payment for any of its resellers."[26] The Administrator also defended its decision to reject Petitioners' FCC Forms 499-A, noting that it is empowered to verify information reported on FCC Forms 499-A and that the FCC-approved instructions that accompanied the FCC Form 499-A provide that "each entity is required to report and contribute.""

10. On July 22,2003, Petitioners filed Petitions for Review, pursuant to section 54.719(b) of the Commission's rules, which permits persons aggrieved by an action taken by the Administrator to seek review by the Commission.[28] Petitioners claim that the Administrator erred in two respects. First, Petitioners assert that the Administrator should have billed QAI from January through June 200 1 instead of Petitioners for the universal service obligations resulting from Petitioners' end-user revenues.[29] Second, Petitioners allege that the Administrator lacked authority to reject Petitioners' Forms 499-A for 2001.[30] Petitioners ask the Commission to reverse the Administrator's decisions and determine that QAI is liable for all payments, interest, and late charges."

11. The Commission has delegated authority to the Wireline Competition Bureau to consider petitions for review of decisions by the Administrator.[32] Section 54.723 of the Commission's rules specifies that the standard of review is *de novo*.[33]

III. DISCUSSION

12. For the reasons set forth below, we find that the Administrator properly billed Petitioners from January through June 2001 for the USF obligations resulting from Petitioners' provision of interstate

[22] *Id.*

[23] *Id.* at Exhibit I (Letter from Lawrence M. Benton, Counsel to Petitioners to the Universal Service Administrative Company (dated Oct. 9,2001)).

[24] ***See generally*** Administrator's Decision on Contributor Appeal

[25] *Id.* at 3

[26] ***Id.***

[27] *Id.* at 2

[28] ***See generally*** Petitions for Review

[29] *Id.* at 1,2, 5.

[30] *Id.* at 4.

[31] *Id.* at I.

[32] 47 C.F.R. § 54.722(a).

[33] *Id.* § 54.723.

and international telecommunications services to end-users in calendar year 2000. We further conclude that USAC appropriately rejected the Petitioners' FCC Forms 499-A for 2001. We therefore deny the Requests for Review.

A. Resellers' Obligation to Contribute to Universal Service

13. Petitioners generally contend that wholesalers, rather than resellers, are responsible for reporting resellers' end-user revenues and Contributing to the Fund based on those revenues." Petitioners' base their argument on the Instructions for completing FCC Form 499-A, which state that "if the [wholesaler] does not have independent reason to know that the [reseller] will, in fact, resell service and contribute to the federal universal service support mechanisms, then the [wholesaler] should either obtain a signed statement to that effect or report those revenues as end user revenue."[35] Petitioners, however, misunderstand the Instructions and their interpretation of resellers' and wholesalers' contribution obligations conflicts with the Act and the Commission's rules.

14. As noted above, the Act and the Commission's rules require that every telecommunications carrier that provides interstate telecommunications services contribute to the universal service support mechanisms based on end-user telecommunications revenues. The Commission expressly declined to exempt resellers from this general rule.[36] Rather, the Commission explained that, in a wholesaler-reseller relationship, resellers generally bear the obligation to contribute directly to universal service because resellers earn revenues directly from end-users."

15. Even though wholesalers generally do not contribute directly to the USF, the Commission requires wholesalers to perform due diligence to help ensure that all end-user revenues are captured. As Petitioners point out, the Commission-approved Instructions that accompany FCC Forms 499 require wholesalers to determine that their customers are resellers and are contributing to the universal service fund.[38] Otherwise, wholesalers must treat those customers as end-users, report revenues from those customers as end-user revenues, and contribute directly to the fund based on those end user-revenues.[39]

16. However, the fact that the Instructions require a wholesaler to prove that it is providing service to a contributing reseller rather than an end-user does not alter *resellers'* fundamental obligation, under the Act and the Commission's rules, to report their end-user revenues and contribute to the Fund.

---

[34] Petitions for Review at 2-3, 5 and Exhibit D, *citing* Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, at 15 (2001) (Instructions).

[35] Instructions at 15

[36] *Universal Service First Report and Order*, 12 FCC Rcd at 8797, para. 787 ("We ... find no reason to exempt from contribution any of the broad classes of telecommunications carriers that provides [sic] interstate telecommunications services, including satellite operators, resellers, wholesalers, paging companies, utility companies, or carriers that serve rural or high cost areas, because the Act requires 'every telecommunications carrier that provides interstate telecommunications services' to contribute to the support mechanisms.").

[37] *Id.* at 9207, para. 846

[38] Instructions at 15; see *also* Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-Q, at 12 (2001).

[39] Instructions at 15

Regardless of how QAI completed its forms, Petitioners maintained an independent obligation to report all end-user revenues on their FCC Forms 499 and to contribute to the fund based on those revenues."

17. Petitioners further assert that, in this particular case, QAI assumed the obligation to report Petitioners' end-user revenues and contribute to the Fund based on those revenues through its contracts with Petitioners.[41] In support of this claim, Petitioners' attach marketing agreements and correspondence with QAI.[42] Petitioners argue that the Administrator should have followed the arrangements in the marketing agreements and billed QAI.[43] Petitioners are incorrect. Regardless of what the agreements may provide, both federal and Commission precedent make clear that legal duties to comply with a federal regulatory scheme cannot be "contracted away.'"

18. Both the Supreme Court and the Commission have stated, "[i]f a regulatory statute is otherwise within the powers of Congress ... its application may not be defeated by private contractual provisions."" Because the Act and the Commission's rules require resellers to contribute to universal service, resellers cannot, by contract, shift this obligation to a third-party. A third-party may agree to pay on behalf of a reseller, and the Administrator may accept payments from the third-party, but if the third-party does not pay on the reseller's behalf, the reseller must pay.[46] Here, even though QAI may have contracted to pay Petitioners' universal service obligations, Petitioners retained the contribution obligation. We therefore conclude that the Administrator properly billed the Petitioners during January through June 2001 for the universal service obligations resulting from Petitioners' end-user telecommunications revenues.

19. We note that if QAI failed to comply with the terms of the contracts, Petitioners may be able to recover their universal service payments from QAI. We have consistently indicated however, that

---

[40] 47 C.F.R. §§ 54.706, 54.711(a).

[41] Petitions for Review at 6-7.

[42] Petitioners also point to the fact that the Administrator billed QAI and received and accepted payments from QAI for several years as evidence that QAI was responsible for the universal service obligations resulting from Petitioners' end-user revenues. *Id.* at **6.** We note, however, if QAI was reporting Petitioners' revenues, the Administrator may have been unaware of Petitioners' existence until Petitioners began filing their own forms.

[43] *Id.* at **1.4.**

[44] Petitioners allege that the Administrator's web site advised that contractual agreements between carriers at least in situations involving the transfer of customers will be honored in terms of the allocation of responsibility for payment of universal service fund charges. *Id.* at 4. Petitioners therefore argue that the Administrator must honor its marketing agreement with QAI. *Id.* Petitioners' argument is irrelevant because the contract at issue concerns billing arrangements, not the transfer of customers.

[45] *Connolly v. Pension Ben. Guar, Corp.*, 475 U.S. 211,224 (1986); *Preemption of Local Zoning Regulation of Satellite Earth Stations,* IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 19276, **19304,** para. 45 (1996); *Review of the Commission's Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy and Rules,* MM Docket Nos. 91-221 and 87-8, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1087, para. 54 & n.118 (2001).

[46] *See, e.g., Request for Review by Homer Community Consolidate,* File No. NEC.70C.03-IO-00.09700014, CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Rcd 9353 (Com. Car. Bur. 2001) (rejecting a claim by an applicant that it should be excused for its failure to timely file its form with the Administrator because it relied upon a third-party that filed the form late).

we will not adjudicate claims arising out of private contractual agreements!' Rather, the appropriate forum for private litigation is the courts.[48]

B. The Administrator's Authority to Reject FCC Form 499-A Filings

20. Petitioners also contend that the Administrator exceeded the authority delegated to it by the Commission when it rejected Petitioners' Forms 499-A for 2001. Petitioners argue that section 54.702(c) Commission's rules, which denies the Administrator the authority to act independently in doubtful situations, bars the Administrator from rejecting FCC Forms 499-A without first seeking Commission guidance." Petitioners' argument is contrary to Commission rules and orders.

21. The Commission's rules allow the Administrator "to verify any information" reported by carriers on their FCC Forms 499-A and determine whether the information is "untruthful or inaccurate."" This authority to review information provided on the forms necessarily includes the discretion to reject forms containing incomplete or inaccurate information. When Petitioners failed to report interstate revenues on their FCC Forms 499-A, the Administrator appropriately returned the filings to Petitioners and instructed Petitioners to return completed filings as soon as possible.

22. Moreover, the Administrator's decision to reject Petitioners' FCC Forms 499-A is consistent with prior Commission orders. For example, we have allowed the Administrator to reject FCC Forms 499-A and 499-Q—and to do so without first seeking guidance from the Commission—as long as the Instructions provide sufficient guidance for the Administrator's actions?' In their filings, Petitioners failed to report their revenues and claimed instead that QAI was responsible for reporting the revenues. But, as explained above, the Instructions make clear that, unless exempted by the Commission, each legal entity must report its revenues.[52] We find that the Administrator properly relied on these Instructions in reaching its decision.

23. We further note that, irrespective of the Administrator's authority to act on universal service filings, the Commission may, on review, decide that an applicant's filing was incorrect or incomplete and should be rejected. As explained above, Petitioners were required to report their own revenues on their FCC Forms 499-A. They failed to comply with the Commission's rules and the Instructions. We therefore conclude that Petitioners' Forms 499-A for 2001 should be rejected.

---

[47] ***See,*** *e.g.*, *Metromedia Company*, File Nos. 29700-CL-TC-1-86 *et al.*, Memorandum Opinion and Order, 1 FCC Rcd 1227, 1232, para. 33 (Com. Car. Bur. 1986).

[48] ***Id.***

[49] Petitions for Review at 4 (citing 47 C.F.R. § 54.702(c)).

[50] 47 C.F.R. §§ 54.711(a), 54.713

[51] ***See,*** *e.g.*, *ABC Cellular Corp.*, CC Docket No, 97-21, Order, 17 FCC Rcd 25192,25196-97, para. 12 (Com. Car. Bur. 2002) [concluding that the Administrator could reject an applicant's Form 499-Q without first consulting the Commission because the Instructions for the Form 499-Q provided sufficient guidance for the Administrator to conclude that the applicant had not complied with the Instructions).

[52] Instructions at 7 ("Each legal entity that provides interstate telecommunications service for a fee, including each affiliate or subsidiary of an entity, must complete separately and file a copy of the attached Telecommunications Reporting Worksheet."); ***id.*** at 15 ("In the Telecommunications Reporting Worksheet, filers must report revenues using two broad categories: (1) Revenues from other contributors to the federal universal service support mechanisms; and, (2) Revenues from all other sources. Taken together, these revenues should include all revenues billed to customers and should include all revenues on the reporting entities' books of account.").

V. ORDERING CLAUSES

24. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in Sections 1, 4(i), 4(j) and 254 of the Communications Act of 1934, as amended, 47 USC §§ 151, 154(i), 154(j) and 254 and pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Petitions for Review filed by American Cyber Corp., Coleman Enterprises, Inc., Inmark, Inc., d/b/a Preferred Billing, Lotel, Inc., d/b/a Coordinated Billing, Protei Advantage, Inc. ARE DENIED.

25. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 1.102 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Renee R. Crittendon
Acting Deputy Chief
Wireline Competition Bureau

EXHIBIT 2

FCC Form 499, February 2001
Approved by OMB 3060-0855
Estimated Average Burden Hours Per Response: 9.5 Hours

Telecommunications Reporting Worksheet, FCC Form 499-A

Instructions for Completing the
Worksheet for Filing Contributions
to Telecommunications Relay Service,
Universal Service, Number Administration,
and Local Number Portability Support Mechanisms

* * * * *

NOTICE TO INDIVIDUALS: Section 52.17 of the Federal Communications Commission's rules provides that all telecommunications carriers in the United States shall contribute on a competitively neutral basis to meet the costs of establishing numbering administration, and directs that contributions shall be calculated and paid in accordance with this worksheet. 47 C.F.R. § 52.17. Section 52.32 provides that the local number portability administrators shall recover the shared costs of long-term number portability from all telecommunications carriers, 47 C.F.R. § 52.32. Sections 54.706, 54.711, and 54.713 require all telecommunications carries providing interstate telecommunications services, providers of interstate telecommunications that offer intestate telecommunications for a fee on a non-common carrier basis, and payphone providers that are aggregators to contribute to universal service and file this Telecommunications Reporting Worksheet (FCC Form 499) twice a year. 47 C.F.R. §§ 54.706, 54.711, 54.713. Section 64.604 requires that every common carrier providing interstate telecommunications services shall contribute to the Telecommunications Relay Services (TRS) Fund on the basis of its relative share of interstate end-user telecommunications revenues, with the calculation based on information provided in this worksheet. 47 C.F.R. § 64.604(c)(iii)(4).

This collection of information stems from the Commission's authority under Sections 225,251, 254, and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 225,251,254, and 258. The data in the worksheet will be used to calculate contributions to the universal service support mechanisms, the telecommunications relay services support mechanism, the cost recovery mechanism for numbering administration, and the cost recovery mechanism for shared costs of long-term number portability. Selected information provided in the worksheet will be made available to the public in a manner consistent with the Commission's rules.

We have estimated that each response to this collection of information will take, on average, 9.5 hours. Our estimate includes the time to read the instructions, look through existing records, gather and maintain the required data, and actually complete and review the form or response. If you have any comments on this estimate, or how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Washington, D.C. 20554, Paperwork Reduction Project (3060-0855). We also will accept your comments via the Internet if you send them to jboley@fcc.gov. Please DO NOT SEND COMPLETED WORKSHEETS TO THIS ADDRESS.

Remember – You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid Office of Management and Budget (OMB) control number. This collection has been assigned an OMB control number of 3060-0855.

Lines (219-225) -- The third part of Block 3 contains FCC registration information, as required of all interstate telecommunications carriers pursuant to section 64.1195 of the Commission's rules. 47 C.F.R. § 64.1195. As explained above, virtually all carriers filing the Form 499 are considered to be interstate carriers. Interstate telecommunications carriers must provide the names and business addresses of their Chief Executive Officer, Chairman, and Resident. If the reporting entity does not have one or more of these officers or if the same person occupies more than one position, then names should be supplied for other senior-level officers of the reporting entity. For purposes of this filing, an officer is an occupant of a position listed in the articles of incorporation. List only one name if the filing entity is a sole proprietorship. If the filing entity is a partnership, list the managing partner on Line (219). If the legal entity is owned by two partners, list the second partner on Line (220). If there are three or more partners, provide information for the managing partner and the two other partners with the greatest financial interest in the partnership.

Line (225) -- check those jurisdictions where the filing entity provided telecommunications service in the past 15 months, and any additional jurisdictions in which the filing entity expects to provide telecommunications service in the next 12 months.

Note: All carriers must notify the FCC within one week if there is a change in any of the following types of information: business name(s) or addresses on Lies (102, 104, 109, and 112); Form 499 contact information on Lmes (203-206); names and addresses of officers on Lines (219-224); or jurisdictions in which the legal entity operates on Line (225). Any such carrier should report changes by completing pages 1, 2, 3, and 7 of the April 2001 Form 499-A and filing it with the Office of the Secretary, directed to the attention of

Office of the Secretary
Attention: Reference Information Center Copy
Room: CY-A257
445 12th Street, S.W.
Washington, D.C. 20554

C. Block 3 and Block 4 Contributor Revenue Information

Lines (301-302; 401-402) -- copy the Filer 499 ID from Line (101) into Lines (301) and (401). Copy the legal name of the reporting entity from Line (102) into Lines (302) and 402).

Lines (303-314; 403420) contain detailed revenue data.

1. Separating revenue from other contributors to the federal universal service support mechanisms (block 3) from end-user and non-telecommunications revenue (block 4) information (carrier's carrier vs end-user)

In the Telecommunications Reporting Worksheet, filers must report revenues using two broad categories: (1) Revenues from other contributors to the federal universal service support mechanisms; and, (2) Revenues from all other sources. Taken together, these revenues should include all revenues billed to customers and should include all revenues on the reporting entities' books of account

For the purposes of this worksheet, revenues from other Contributors to the federal universal service support mechanisms are revenues from services provided hy underlying carriers to other carriers for resale and are referred to herein as "carrier's carrier revenues" or "revenues from resellers." Revenues from all other sources consist primarily of revenues from services provided to end users, referred to here as "end-user revenues." This category includes non-telecommunications revenues.

For the purpose of completing Block 3, a "reseller" is a telecommunications carrier or telecommunications provider that: 1) incorporates purchased telecommunications services into its own offerings; and 2) can reasonably be expected to contribute to federal universal service support mechanisms based on revenues from those offerings.

Each contributor should have documented procedures to ensure that it reports as "revenues from resellers" only revenues from entities that reasonably would be expected to contribute to support universal service. The procedures should include but not be limited to maintaining the following information on resellers: legal name; address; name of a contact person; and phone number of the contact person. If the underlying contributor docs not have independent reason to know that the entity will, in fact, resell service and contribute to the federal universal service support mechanisms, then the underlying carrier should either obtain a signed statement to that effect or report those revenues as end user revenues.

Note: For the purposes of filling out this worksheet - and for calculating contributions to the universal service support mechanisms -- certain telecommunications carriers and service providers may be exempt from contribution to the universal service support mechanisms. These exempt entities, including "international only" and "intrastate only" carriers and carriers that meet the de minimis universal service threshold, should not be treated as resellers for the purpose of reporting revenues in Block 3. That is, filers that are underlying carriers should report revenues derived from the provision of telecommunications to exempt carriers and providers (including services provided to entities that are de minimis for universal service purposes) in Lines (403-417) of Block 4 of the Telecommunications Reporting Worksheet, as appropriate. Underlying carriers must contribute to the universal service support mechanisms on the basis of such revenues. In Block 5, Line 51I, however, filers may elect to report the amounts of such revenues (*i.e.*, those revenues from exempt entities that are reported as end-user revenues) so that these revenues may be excluded for purposes of calculating contributions to TRS, LNPA, and NANPA.

V. Reminders

- Is the filer affiliated with another telecommunications provider? Each legal entity must file separately. Each affiliate or subsidiary must show the same holding company name on Line (106).

- Provide data for all lines that apply. Show a zero for services for which the contributor had no revenues for the filing period. Be sure to include on Line (112) all names by which the filer is known to customers, including the names of agents or billers if those names appear on customer bills.

- Some contributors must file twice a year. Filers that are required to contribute to universal service support mechanism are also required to file a Form 499-S on September 1.

- Wherever possible, revenue information should be taken from the contributors' financial records.

- The worksheet must be signed by an officer of the reporting entity. An officer is a person who occupies a position specified in the corporate by laws (or partnership agreement), and would typically be president, vice president for operations, comptroller, treasurer, or a comparable position.

- Do not mail the worksheet to the FCC. See Section II-C for filing instructions.

- Remember -- you must refile parts of the worksheet if the Agent for Service of Process or FCC Registration information changes during the year.

- Note that Form 499 is one of several forms that telecommunications carriers and other providers of interstate telecommunications may need to file. Information concerning common filing requirements for such providers may be found on the Commission's web site, at www.fcc.gov/ccb/filing.pdf.

If you have questions about the worksheet or the instructions, you may contact:

Form 499 Telecommunications Reporting Worksheet Information	Form499@neca.org (973) 560-4400
Common Carrier Bureau	
Industry Analysis Division	(202) 418-0940
TTY (Network Services Division)	(202) 418-0484

If you have questions regarding contribution amounts, billing procedures or the mechanisms, you may contact:

Universal Service Administration	(973) 884-8173
TRS Administration	(973) 884-8173
NANPA Billing and Collection Agent	(973) 884-8173
Local Number Portability Administrators	(877) 245-5277

- FEDERAL COMMUNICATIONS COMMISSION -