

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

In the Matter of)
)
Request for Review by Global Crossing)
Bandwidth, Inc. of Decision of Universal)
Service Administrator)
)
)

CC Docket No. 96-45

CC Docket No. 97-21

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Office of the Secretary

GLOBAL CROSSING BANDWIDTH, INC. REQUEST FOR REVIEW OF DECISION
OF UNIVERSAL SERVICE ADMINISTRATOR

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF FACTS	2
A. The Audit and the Preliminary Audit Report.....	3
B. GCB’s Response	5
C. USAC’s Final Audit Report.....	6
ARGUMENT	9
I. USAC MAY NOT SEEK TO RECOVER FROM GCB CONTRIBUTIONS ACTUALLY DUE FROM ITS CARRIER-CUSTOMERS.....	9
A. The Commission Already Has Determined that Resellers, Not the Underlying Carriers, Are Responsible for Contributing to the USF	9
B. USAC Has Misinterpreted the Instructions in Attempting to Hold GCB Liable for Its Customers’ Contribution Obligations	13
C. USAC’S Attempted Approach to Wholesale Carrier Liability Violates the Administrative Procedure Act.....	17
II. EVEN IF USAC WERE FREE TO ENGAGE IN THE INQUIRY IT PURSUED, USAC MISAPPLIED THE 2005 FCC FORM 499A INSTRUCTIONS TO THE FACTS OF THIS CASE.....	18
A. At an Aggregate Level, GCB Had a Reasonable Expectation That Its Carrier Customers Were Carriers and Were to Contribute to the Fund.....	19
B. An Examination of the Specifics of the USAC Adjustments Demonstrates That Those Adjustments Are Erroneous.....	21
1. Non-Exempt Customers with Filer IDs	24
2. De Minimis and “International Only” Carriers.....	25
3. Customers Without Filer IDs	26
CONCLUSION.....	28

SUMMARY

The Commission must reject USAC's attempts to contravene the Communications Act of 1934, as amended (the "Act"), and Commission rules and orders, by attempting to hold Global Crossing Bandwidth, Inc. ("GCB") responsible for contributing to the universal service fund ("USF") on behalf of its wholesale customers. This dispute arises from an audit that began in September 2005, and concluded in April 2007, as amended in May 2007. In its Final Audit Report, USAC concluded that GCB should contribute to the USF on behalf of its reseller customers that for whatever reason failed to contribute to the USF. USAC never claimed that any of GCB's reseller customers in fact were not resellers, but yet inexplicably sought to reclassify millions of dollars of GCB reseller revenue as end user revenue. In its Final Audit Report, USAC makes four separate findings; in this appeal, GCB only challenges Audit Finding #1, which pertains to the shifting of reseller revenue to end user revenue.

With limited exceptions not applicable to the present case, the Act provides that all telecommunications carriers are required to contribute to the USF based on their interstate end user telecommunications revenue. On repeated occasions, the Commission has affirmed that this obligation explicitly extends to resellers, and that the resellers are not permitted to shift their contribution liability onto their underlying carriers.

In reaching its drastic conclusion, USAC based its actions on a determination that GCB did not have a "reasonable expectation" that its customers were resellers. USAC made this determination by selectively choosing among a non-exclusive list of criteria that it deemed appropriate to evaluate GCB's reasonable expectation. For example, USAC required that GCB maintain either (1) a current certification from the reseller carrier, or (2) a Filer ID with information from the website that the carrier was an active contributor. If GCB could not satisfy

either of these criteria (and even in some cases where it did satisfy the criteria), USAC concluded that GCB must reclassify the revenue derived from those reseller carriers as end user revenue. USAC *never* conducted the fact-specific inquiry to evaluate whether GCB's customers indeed were resellers, and USAC wholly disregarded reams of evidence that GCB made available to it demonstrating that the GCB's carrier customers were in fact resellers.

Reclassifying wholesale revenue as end user revenue directly conflicts with the Act and the Commission's rules and orders. Even if GCB did not have the requisite "reasonable expectation," which it did, the appropriate remedy is not to reclassify the reseller revenue as wholesale revenue. Indeed, a reseller does not cease being a reseller simply because it did not contribute to the USF. At all times, USAC must seek the USF contribution from the reseller.

Furthermore, USAC's attempt to define what constitutes a "reasonable expectation" is tantamount to the adoption of new rules or to the codification of the 2005 FCC Form 499A Instructions as rules, both of which are prohibited under the Administrative Procedure Act ("APA"). USAC's role is to administer the USF; it is not to promulgate, interpret, or enforce new rules. Only the Commission can adopt rules and only after appropriate notice and comment procedures.

A review of USAC's specific adjustments also demonstrates that those adjustments are erroneous. Despite USAC's pronouncement that the presence of a Filer ID would be sufficient to demonstrate that the carrier is a reseller, USAC still determined that it should shift revenue associated with certain carrier customers. USAC also sought to reclassify carriers that it believed were *de minimis* even though the information upon which it based its conclusion appears to be solely available to USAC, and thus unverifiable by GCB. Furthermore,

the failure of a carrier to obtain a Filer ID does not signify that the carrier is not a reseller. The Commission must reject each of USAC's factual determinations.

Consistent with applicable law, the Commission should reject USAC's Audit Finding #1 in its entirety, and should direct USAC to seek compensation from GCB's carrier customers.

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**GLOBAL CROSSING BANDWIDTH, INC. REQUEST FOR REVIEW OF DECISION
OF UNIVERSAL SERVICE ADMINISTRATOR**

Introduction

Global Crossing Bandwidth, Inc. (“GCB”), through its undersigned counsel and in accordance with sections 54.719(c), 54.720, and 54.721 of the Federal Communications Commission’s (“Commission” or “FCC”) rules, 47 C.F.R. §§ 54.719(c), 54.720, 54.721, respectfully submits this request for review of the decision of the Universal Service Administrative Company (“USAC”) issued to GCB on May 3, 2007, and corrected on May 4, 2007.

On April 30, 2007, USAC notified GCB by a brief email (followed-up with a letter dated May 3, 2007), that the USAC Board had approved a report of USAC’s Internal Audit Division (“IAD”) finding GCB liable for contributing to the Universal Service Fund (“USF”) on behalf of all of its wholesale carrier customers that had failed to remit contributions to the USF for the 2004 calendar year. On May 4, 2007, USAC amended its decision, which resulted in a slight reduction in the dollar amount of the alleged underreporting to approximately \$69,000,000. This translates to an estimated additional USF contribution said to be due from GCB in the amount of \$5,568,073.

To date, to the best of GCB's knowledge, USAC has not attempted to conduct a fact-specific inquiry into whether the GCB customers that failed to contribute to the USF in fact were resellers. Indeed, USAC has not disputed the volumes of information that GCB provided to USAC demonstrating that the GCB customers at issue were resellers. USAC also has not attempted to obtain compensation from any of GCB's reseller customers. Instead, USAC has sought to shift the USF liability from GCB's reseller customers to GCB without further effort or inquiry on USAC's part. Specifically, USAC has chosen to pursue GCB directly by unlawfully and inexplicably reclassifying reseller revenue as GCB's end user revenue if a particular reseller did not contribute to the USF without regard to the actual facts about the status of the reseller. USAC's action is in contravention of the Communications Act of 1934, as amended (the "Act"), and the Commission's rules and orders, which explicitly require resellers, not their underlying carriers, to contribute to the USF. For the reasons discussed herein, GCB respectfully requests pursuant to sections 54.719 – 54.721, and consistent with section 54.706(a), 47 C.F.R. §§ 54.719–54.721, 54.706(a) that the Commission reverse Finding #1 in USAC's Audit Report and direct USAC to seek contributions from the appropriate entities -- the resellers themselves.¹

Statement of Facts

GCB is the wholesale arm of the Global Crossing North America family of companies. Traditionally, GCB's customers were other interexchange carriers ("IXCs") to whom GCB offered telecommunications services suitable for resale. In the early-2000s, GCB began targeting other wholesale customers, including information services providers or enhanced services providers (collectively, "ESPs").

¹ In the Audit Report, USAC issued four separate audit findings; GCB only appeals Audit Finding #1.

In its 2005 FCC Form 499A, which pertains to revenues for the 2004 calendar year, GCB inadvertently (and mistakenly) listed all of its revenues as Block 3—or carrier’s carrier—revenues. In fact, a small portion of its revenue—approximately \$7 million—was attributable to customers that the Commission treats as end-users, such as ISPs and several carriers that qualified for the *de minimis* exemption. In its response to the USAC audit, GCB affirmatively brought this fact to USAC’s attention, calculated the amount due, and offered to pay that amount.

USAC steadfastly ignored GCB’s offer. Rather, USAC focused solely on the contribution status of GCB’s other customers, and, contrary to the Act, Commission rules and orders, sought to hold GCB liable for the failure of its carrier-customers to contribute to the USF on their own behalf.

A. The Audit and the Preliminary Audit Report

USAC commenced its audit on September 16, 2005, by sending a letter to GCB notifying it of the commencement of the audit and requesting certain information from GCB.² Over the next one and one-half years, USAC requested and GCB provided reams of information regarding every one of its calendar year 2004 customers. Among other information, GCB produced revenue information, contact information, contract provisions, carrier certifications, website information from its wholesale customers, and Filer IDs. Representatives from USAC’s Internal Audit Division (“IAD”) and representatives from GCB conferred on numerous occasions to address and resolve issues of interest to the auditors.

² See Exhibit 1: Letter from Wayne M. Scott, Vice President, Internal Audit Division, USAC, to Teresa Reff, Global Crossing (Sept. 16, 2005).

Nonetheless, despite the volume of information that GCB provided to USAC's IAD, USAC issued a Preliminary Audit Report,³ in which IAD disregarded virtually all of this documentation. It did so in favor of a retrospective, simplistic proposition that, if a given customer did not contribute to the USF, then the revenue should be reclassified as end user revenue such that GCB should be required to contribute to the USF with respect to that customer's revenue. This result, according to USAC, would hold even if the customer was, as an undisputed factual matter, a reseller with its own independent contribution obligation. On the basis of this simplistic approach, USAC recommended that GCB reclassify a net of \$94,484,907 as end user revenue, which would have resulted in an additional USF contribution of \$7,620,397.⁴

In its final analysis, it was irrelevant to USAC whether the individual customer in fact, was a carrier or an end user, or whether the customer had obtained a Filer ID. Indeed, USAC appears to have disregarded any information that GCB possessed on its customers. It is apparent that the only fact USAC deemed relevant was whether a customer contributed to the USF, and if the customer had not contributed to the USF, then IAD sought to reclassify the revenues associated with the customer as end user revenue (even though the customer is indisputably a reseller, not an end user). Thus, USAC's IAD concluded:

IAD recommends that GCB report reseller revenues for resale customers *that did not contribute* to the Universal Service Fund.

³ See Exhibit 2: Letter from Sophia Mensah, USAC, to Mike Allentoff, Global Crossing (Feb. 15, 2007) ("Preliminary Audit Report") (containing draft Detailed Audit Findings ("DAFs") and requesting "GCB's 'Carrier Response' to the provided Detailed Audit Findings (DAFS) and Other Matter.").

⁴ *Id.* at Summary.

Also, IAD recommends GCB have documented procedures to ensure it *annually* verifies that each reseller will contribute directly to the Universal Service Fund and file a FCC Form 499-A.⁵

In reaching this recommendation, USAC based its actions on a determination that GCB did not have a “reasonable expectation” that its customers were resellers. USAC made this determination by selectively choosing among a list of non-exclusive criteria that it deemed appropriate to evaluate GCB’s state of mind. USAC, however, never conducted a customer-by-customer, fact-specific inquiry as to whether a particular customer was an end-user. Rather, it quoted and then proceeded to misapply the following instruction: “[t]he Instructions provide for the underlying carrier’s responsibility for additional universal service assessments if these resellers *must be reclassified as end users.*”⁶ IAD made no attempt to determine if these resellers were end users. It merely observed that they had not contributed to the USF and *ipso facto* should be treated as end users. The quoted instruction, however, does not require or permit IAD’s attempted reclassification.

B. GCB’s Response

On March 9, 2007, GCB responded to IAD’s draft findings.⁷ In its response, GCB demonstrated that USAC’s overall approach was inconsistent with governing law and regulations and, even if the Instructions to Form 499A were binding (which they are not), USAC misinterpreted and misapplied the Instructions.

GCB noted that, although IAD nit-picked GCB’s procedures, IAD misapplied governing law when it concluded that, without further inquiry, GCB became responsible for

⁵ *Id.* at DAF #1, Recommendation (emphasis added).

⁶ *Id.* at DAF #1, Cause (emphasis added).

⁷ See Exhibit 3: Letter to Mr. Wayne Scott, Vice President – Internal Audit, Universal Service Administration Company from Michael J. Shortley, III, Vice President & General Counsel – North America (Mar. 9, 2007).

other carrier's contributions. Not only does prevailing Commission precedent not sanction this approach, but also USAC did not perform *any analysis whatsoever* of individual customers to determine if, in fact, they were end users.⁸ GCB also demonstrated that IAD's conclusions were factually unsupportable and that its conclusions did not flow from the plain language of the Instructions.⁹

Moreover, with respect to those carriers that did not have Filer IDs, GCB provided significant documentation, including contract provisions, website information, product descriptions and the like demonstrating that most of these customers were carriers. In those cases where they were not, GCB acknowledged this fact and calculated the amount of additional contributions due.¹⁰

C. USAC's Final Audit Report

USAC provided its Final Audit Report by email dated April 30, 2007.¹¹ USAC also issued two subsequent documents to GCB relevant to this appeal. By letter dated May 3, 2007, USAC notified GCB that it had completed the audit, and that USAC had sent the audit findings in a separate package.¹² In the May 3, 2007, letter, USAC stated that GCB may appeal

⁸ *Id.* at DAF#1, Carrier's Response.

⁹ *Id.*; *see also infra*, Parts I(B), II.

¹⁰ *Id.*

¹¹ *See* Exhibit 4: Email from Christy Mi, USAC, to Diane Peters, Global Crossing (April 30, 2007) (enclosing Memorandum from Wayne Scott, USAC, to WB Erwin, USAC, ostensibly dated February 15, 2007 ("Final Audit Report")). The February 15, 2007, date is incorrect. The memorandum incorporates GCB's responses to the Preliminary Audit Report, which GCB did not send to USAC until March 9, 2007. The memorandum also incorporates USAC's responses to GCB's position. The cover email also notes that "The attached report was approved by our board of directions [sic]." USAC has declined to confirm when the Board actually approved the recommendations although the USAC website indicates that the Board met on April 23, 2007.

¹² *See* Exhibit 5: Letter from Chang-Hua Chen, USAC, to Michael J. Shortley, III, Global Crossing (May 3, 2007).

USAC's findings to the Commission.¹³ On May 4, 2007, USAC notified GCB that IAD had made an error in the audit report sent to GCB on April 30, 2007, the correction of which resulted in a decreased contribution base for GCB.¹⁴ Upon request, USAC provided GCB with documentation in support of USAC's revised calculations.¹⁵

In its Final Audit Report, USAC again eschewed any necessity for determining whether any of GCB's customers in fact were end users. It continued to misapply the Commission's instructions by reclassifying as end users any customer that did not contribute and for which USAC did not accept GCB's documentation. USAC's IAD, in its response to GCB's analysis, observed:

IAD did, as noted in Finding #1, individually verify whether each reseller contributed to the USF in the relevant years. IAD did not reclassify revenue from Global Crossing resellers where IAD obtained verification from the USAC Form 499-A data base that an individual reseller was a current contributor.¹⁶

USAC then went on to mis-quote the Instructions as to the scope of a carrier's due diligence obligations. It also asserted that information regarding *de minimis* status appears on the FCC 499-A website when in reality it does not.¹⁷ Based upon these mis-statements of fact, USAC's IAD questioned the reasonableness of GCB's expectations as to the contribution status of its customers. USAC's IAD then continued to repeat its mistake of concluding that—so long as a particular customer did not contribute (and therefore GCB's expectations as to its

¹³ *Id.*

¹⁴ See Exhibit 6: Memorandum to Diane Peters, Global Crossing, from Wayne Scott, USAC, (May 4, 2007).

¹⁵ See Exhibit 7: Spreadsheet. USAC did not attempt to reconcile the May 4 spreadsheet with the one attached to the Preliminary Audit Report nor is it apparent how those two documents can be reconciled.

¹⁶ Final Audit Report at 8.

¹⁷ *Id.* Some of this information appears in the Locator for 2004 that is published well after the fact. As far as GCB can tell, this information did not appear on the 499A website. It does not so appear currently and GCB believes that it did not so appear in 2004.

contribution status could not have been reasonable)—revenues from that customer should be reclassified as end user revenue.¹⁸ USAC's IAD then repeated the same factual mistakes that infected its Preliminary Audit Report with respect to the specific customers.¹⁹

For its part, "USAC Management" takes issue with the materials that GCB relied upon to determine the nature of its customers. Management observed:

USAC management disagrees with Global Crossing's assertion that based on products purchased, contract provisions and the like that Global Crossing could reasonably conclude that its customers will contribute to the USF. The understanding of a customer's business plan is vital to determining the contribution expectations of that customer. This is apparent in Global Crossing's argument concerning *de minimis* carriers and international only carriers in that none of the companies identified themselves to Global Crossing.²⁰

Aside from the self-serving nature of this response, it is self-contradictory. USAC chides GB for not understanding its customers' business plan. Yet, in the same breath it bases adjustments on information those *same customers* chose to withhold from GCB. USAC cannot have it both ways.

USAC, however, did correct two obvious errors from the Preliminary Audit Report. It chose not to attempt to reclassify revenue from carriers that *it determined subsequent to the issuance of the Preliminary Audit Report actually had contributed to the USF*. USAC also acknowledged that it should not have reclassified non-telecommunications, IRU revenue as end-user, assessable revenue. The correction of these two errors (together with the minor adjustment set forth in the May 4, 2007, letter) reduced the effect on the contribution base by close to \$25,000,000.²¹ Nonetheless, USAC is still attempting to collect from GCB \$5,558,465, which is

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9.

²⁰ *Id.* at 10.

²¹ *Id.* at 10-11; Summary.

more than *ten times* the \$500,466 in contributions that GCB demonstrated are actually attributable to services provided to end users.

Argument

I. USAC MAY NOT SEEK TO RECOVER FROM GCB CONTRIBUTIONS ACTUALLY DUE FROM ITS CARRIER-CUSTOMERS.

USAC has effectively conducted an unauthorized free-wheeling inquiry into GCB's state of mind in its attempt to place the contribution obligation on GCB with respect to the end-user revenue of its customers. *First*, the Act and the Commission's rules require that the carriers that provide end-user services contribute to the USF on the basis of their own end-user revenue. Indeed, the Commission repeatedly has held that resellers, not their underlying carriers, are responsible for contributing to the USF. *Second*, the instructions to the 2005 FCC Form 499A ("2005 Instructions") merely provide a mechanism to determine—as between a carrier and its wholesale customers—to which entity to attribute end user revenue. The 2005 Instructions do not provide any mechanism for converting reseller revenue into end user revenue if the resellers have failed to contribute to the USF. Nor do the 2005 Instructions provide USAC with the discretion to interpret or create rules that would impose such liability. *Finally*, even if the Commission were to interpret the 2005 Instructions as permitting USAC to create additional rules, then the interpretation of the 2005 Instructions that USAC has adopted would be invalid, because the 2005 Instructions were not adopted in accordance with the notice and comment procedures required in the Administrative Procedure Act ("APA").

A. The Commission Already Has Determined that Resellers, Not the Underlying Carriers, Are Responsible for Contributing to the USF

In the Act, Congress established a payment obligation requiring "every telecommunications carrier that provides interstate telecommunications services" to contribute to

the USF.²² In implementing this Congressional mandate, the Commission explicitly declined to exempt resellers from this general contribution obligation, finding that Congress intended to require all carriers with end user revenue to contribute to the USF.²³ The Commission's regulations mirror the statute in this respect,²⁴ and, with respect to a failure to contribute, specify the consequences, namely, "[f]ailure to file . . . may subject *the contributor* to the enforcement provisions of the Act and any other applicable law."²⁵

Consistent with the Act and the Commission's rules cited above, the Commission repeatedly has held that resellers—not their underlying carriers—are responsible for contributing directly to the USF, and has prohibited resellers from shifting this obligation to their underlying carriers.²⁶ Indeed, pursuing and prosecuting resellers for delinquent USF contributions has been the hallmark of the Commission's enforcement practice since the passage of the Act. The Commission has consistently enforced the contribution obligation in the manner that the statute compels: against the carrier receiving revenues from end users.²⁷

²² 47 U.S.C. § 254(d).

²³ See *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9179, ¶ 787 (1997) ("*Universal Service First Report and Order*") (stating, "[w]e ... find no reason to exempt from contribution any of the broad classes of telecommunications carriers that provides interstate telecommunications services, including ...resellers...because the Act requires 'every telecommunications carrier that provides interstate telecommunications services' to contribute to the support mechanisms.").

²⁴ 47 C.F.R. § 54.706(a).

²⁵ 47 C.F.R. § 54.713.

²⁶ See *American Telecommunications Systems, Inc.*, Order, DA 07-1306 (rel. Mar. 14, 2007); *American Cyber Corp.*, Order, DA 07-1263 (rel. Mar. 12, 2007).

²⁷ See, e.g., *Globcom, Inc.*, Order of Forfeiture, 21 FCC Rcd 4710 (2006); *Carrera Communications, LP*, Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd 13307 (2005); *Inphonic, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 13277 (2005); *Telecom House, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd. 15131 (2005); *Globcom, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd. 19893 (2003).

For its part, USAC previously has concluded—and the FCC has upheld USAC’s decision—that resellers are responsible for contributing to the USF. In *American Telecommunications Systems*, the Commission upheld USAC’s determination that the non-contributing reseller, not the underlying carrier, had the “primary obligation to report such [end-user] revenues and contribute to the USF.”²⁸ Similarly, in *American Cyber Corp.*, the Commission upheld USAC’s rejection of the reseller’s argument essentially, that because the reseller did not contribute to the fund, its underlying, wholesale carrier was required to report and pay on such revenue. The Commission held:

However, the fact that the Instructions require the wholesaler to prove that it is providing service to a contributing reseller *rather than* an end-user does not alter the resellers’ fundamental obligations, under the Act and the Commission’s rules to report the end user revenues and contribute to the fund.²⁹

In addition, in both cases, the Commission reaffirmed the basic principle that the fundamental contribution obligation is non-delegable and non-assignable. The Commission specifically noted that, if the underlying carrier agreed to contribute on behalf of the reseller, the reseller may have an action against the underlying carrier for recovery of the funds so collected from the reseller.³⁰

Commission precedent makes clear that there is one entity that is responsible for contributing to the fund with respect to a given end-user dollar – the entity that collected that dollar from the end-user. The approach that USAC has adopted in GCB’s case, however, would permit USAC to arrogate to itself the role of determining which carrier is responsible for a given USF dollar. That approach would place underlying carriers in an untenable position. If the

²⁸ *American Telecommunications Systems, Inc.*, ¶ 7 (emphasis added).

²⁹ *American Cyber Corp.*, ¶ 16 (emphasis added).

³⁰ See *American Telecommunications Systems, Inc.*, ¶ 14; *American Cyber Corp.*, ¶ 19.

underlying carrier reported reseller revenue as end-user revenue, it could be liable *to the reseller* for such contributions. On the other hand, if it did not report and contribute, it could be liable directly to USAC. This result is foreclosed by the Commission's rules, which preclude this very type of double-recovery exposure.³¹

Rather than seeking to recover contributions from the owner of end-user revenue, USAC embarked on a journey into GCB's state of mind. USAC *never disputed* that the GCB customers at issue in fact were carriers with their own independent obligations to contribute. Rather, USAC has taken the position that if a reseller did not contribute to the USF, and GCB did not have a certification on file that USAC, in USAC's own opinion deemed appropriate, GCB therefore subjectively could not have had a reasonable expectation that such reseller would contribute. On this backward looking review of GCB's prior state of mind, USAC seeks to reclassify wholesale revenue to end user revenue without regard to the actual facts.

For example, in evaluating the 101 resellers with valid filer IDs, USAC determined that 38 resellers either were *de minimis* or did not file a 2005 FCC Form 499A.³² USAC then stated that GCB did not provide any information regarding those particular resellers, and, therefore, USAC *automatically* reclassified the revenue for those 38 resellers as end user revenue.³³ As another example, as stated above, USAC has sought to reclassify the revenue

³¹ See *Vonage Holdings Corp. v. FCC*, No. 06-1276, slip op. at 21 (D.C. Cir. June 1, 2007) (describing the purpose of section 54.706(b) of the Commission's rules—the carrier's carrier rule—as “a rule that prevents double payment at the wholesale and retail level by basing USF contributions only on “end-user telecommunications revenues.”) In *Vonage*, the D.C. Circuit reversed the Commission's explicit determination to require double-recovery on end-user revenue garnered by interconnected VOIP providers. The Commission *never* has sanctioned potential double recovery in any other context, yet USAC's approach would create precisely that result.

³² Final Audit Report at 9.

³³ *Id.* GCB does not dispute that it is responsible for contributing to the USF if its carrier customers are *de minimis*.

associated with the 55 resellers that did not have filer IDs as end user revenue.³⁴ USAC did not conduct a fact-specific inquiry into any one of the 38 resellers that either were *de minimis* or did not file an FCC Form 499A, nor did it inquire into the nature of the 55 resellers that did not have filer IDs. In other words, USAC made no efforts to determine whether these carriers in fact were end users and not resellers.

The plain language of the Act, the rules and Commission precedent squarely foreclose USAC's approach.

B. USAC Has Misinterpreted the Instructions in Attempting to Hold GCB Liable for Its Customers' Contribution Obligations

USAC relies upon two fragments from the 2005 Instructions to support its belief that it is permitted to reclassify reseller revenue as end user revenue. It first points to the statement that an underlying carrier must determine that the reseller is purchasing service for resale in the form of telecommunications and that the reseller “reasonably *would be* expected to contribute to support universal service.”³⁵ USAC then concludes (wrongly) that because GCB did not have certifications that USAC deemed appropriate, it could reclassify wholesale revenue as end-user revenue because the Instructions provide that “[f]ilers will be responsible for any additional universal service that result if its customer must be reclassified as an end users.”³⁶ USAC has interpreted the 2005 Instructions as permitting an unbounded inquiry into the state of mind of the underlying carrier when it provided service to wholesale customers and then completed its Form 499A. Thus, according to USAC, if the underlying carrier did not perform the appropriate due diligence (to be determined after the fact by USAC), then USAC is free to classify admittedly wholesale revenue as end-user revenue.

³⁴ Final Audit Report at 9.

³⁵ 2005 Instructions at 18 (emphasis added).

³⁶ *Id.*

There is no basis in the 2005 Instructions (even if they were binding) to reclassify reseller revenue as end user revenue. Consistent with the Act and the Commission's regulations, the 2005 Instructions are designed to determine who, among possibly multiple carriers, received the end-user revenue and to require *that entity* to report the end-user revenue as assessable. The 2005 Instructions further recognize that there are certain types of carriers that do not have a direct obligation to contribute—*i.e.*, carriers that qualify as *de minimis*—and therefore direct the underlying carrier to report those limited classes of wholesale revenue as end-user revenue. The 2005 Instructions also treat revenue from ISPs as end-user revenue although ISPs are, in some sense, wholesale customers of their underlying carriers. The 2005 Instructions merely require that a carrier determine, as a factual matter, what is end user revenue and report it as such. The 2005 Instructions also permit USAC to reclassify revenue that *actually is end-user revenue*, but was improperly treated as carrier's carrier revenue. That is not the case in this dispute.

This interpretation of the 2005 Instructions is not only faithful to the Act and Commission regulations, but also it flows naturally from the text of the Instructions themselves and avoids the absurd results that would flow from USAC's contrary interpretation. The 2005 Instructions did not require an underlying carrier to determine if one of its customers *actually* contributed to the fund (which is necessarily a retrospective inquiry). Rather, the 2005 Instructions direct the underlying carrier to determine if entity "reasonably would be expected"³⁷ to contribute – that is, whether the entity is of a type that has an independent contribution obligation.

The two limited provisions of the 2005 Instructions USAC cites do not provide USAC with the discretion to pick and choose from whom it will seek to recover USF

³⁷ *Id.*

contributions or to conduct an inquiry into the state of mind of wholesale carriers.³⁸ The Commission has held that the revenue reporting forms provided instructions regarding the appropriate reporting for resellers:

At all times relevant to the petition, FCC revenue reporting forms and instructions provided direction regarding the proper definition of reseller and the proper reporting of reseller revenue, *i.e., the entity with the end-user revenue reports and contributes*. To assist underlying carriers and their resellers, the Commission has a procedure in place that underlying carriers may use to determine whether the entities to whom they offer telecommunications or telecommunications services for resale are in fact direct contributors. Through the certification procedure, both parties to the reselling transaction have the information they need to determine whether the USF obligation should be collected by the underlying carrier *or* whether the reseller has an *independent obligation* to contribute. Here, Petitioners [the resellers] had an obligation to contribute based on the end-user revenues.³⁹

Thus, the Commission has made clear not only where the obligation to contribute resides, but also how the certification procedure works. Fundamentally, the certification procedure is *not* an inquiry into the state of mind of the underlying carrier. Rather, it is an inquiry into objective fact, namely, whether a particular entity is a carrier or an end-user. As the Commission made clear, this is an either/or determination and, if the contribution obligation resides with the reseller, it does not—and *may not*—reside with the underlying carrier.

³⁸ Indeed, the FCC has purposely withheld that discretion from USAC. *See, e.g., Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45*, 13 FCC Rcd 25058, ¶ 16 (1998) (stating, “Consistent with Congress’s directive that [USAC] shall not interpret rules or statute, we emphasize that USAC’s function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”) (citations omitted).

³⁹ *American Telesystems*, ¶ 11 (emphasis added).

The Commission recently reaffirmed this principle. In *American Cyber Corp.*, the Commission explicitly rejected the argument of several resellers that they were not responsible for contributing to the USF, stating:

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 reselling and contributing to the universal service fund. Otherwise, wholesalers must treat those customers as end users, report revenues from those customers as end-user revenues and contribute to the fund based on those end-user revenues.

However, the fact that the Instructions require the wholesaler to prove that it is providing service to a contributing reseller *rather than an end user* does not alter the **resellers'** fundamental obligation, under the Act and the Commission's rules to report the end-user revenues and contribute to the fund.⁴⁰

As described above, USAC went far beyond the scope of the 2005 Instructions. In doing so, USAC ignored clear precedent, and has attempted to shift the burden to GCB even though USAC *never disputed* GCB's assertion that the carriers at issue in fact are resellers. USAC's interpretation of the 2005 Instructions as vesting it with this type of discretion is simply incorrect.

In contrast with USAC's subjective, retrospective state of mind inquiry, GCB's interpretation of the Instructions is consistent with the requirements of the Act and Commission regulations that "every provider" of interstate telecommunications service contribute to the fund on the basis of its end-user revenue. It defines and isolates the contribution obligation, ensures that all end-user revenue is captured, confines USAC to the administrative, ministerial role

⁴⁰ *American Cyber Corp.*, ¶¶ 15-16 (emphasis in italics supplied; emphasis in bold in original).

assigned to it by the Commission and avoids the potential for improper double-recovery exposure.

The Commission therefore should vacate USAC's audit findings.

C. USAC'S Attempted Approach to Wholesale Carrier Liability Violates the Administrative Procedure Act

USAC's attempt to shift liability from the reseller to the underlying carrier is in direct violation of the APA as USAC is attempting to create a rule without the requisite authority and without following appropriate notice and comment rulemaking procedures. As described above, USAC's misapplies the 2005 Instructions. Even if USAC is correct in its interpretation of the 2005 Instructions, those instructions are not rules, and USAC does not have the authority to implement new rules or to interpret existing rules;⁴¹ USAC solely has the authority delegated to it by the Commission.

USAC's attempt to shift liability from the reseller customer to the underlying carrier is tantamount to the adoption of a new rule. As discussed above, the Commission repeatedly has held that resellers are responsible for contributing to the USF, and that resellers may not shift this liability to their underlying carriers. In the present case, USAC is attempting to do just that: to shift the reseller's obligation to GCB. USAC only could do so through a rule change (and, in fact, through a change of the Act). As an initial matter, USAC does not have the authority to adopt or to interpret existing rules.⁴² Even if USAC had the requisite authority,

⁴¹ See *supra* note 38.

⁴² *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, ¶ 65 (2000) ("We further conclude that facilities-based carriers shall have an affirmative duty to ascertain whether a potential carrier-customer (*i.e.*, a reseller) has filed a registration with the Commission prior to providing that carrier-customer with service. Once the facilities-based carrier determines the

however, “new rules that work substantive changes in prior regulations are subject to the APA’s procedures.”⁴³ Under the APA’s procedures, new rules must be subject to notice and comment requirements.⁴⁴ The Commission never issued a public notice seeking to change the compensation from the reseller to the wholesale provider, and, therefore, any attempt to do otherwise would be in violation of the APA.

Furthermore, with regard to 2005, the Commission also has not mandated that underlying carriers maintain any specific criteria to demonstrate that their carrier customers were resellers. In fact, the Commission specifically declined to require carriers to maintain an updated certification from their reseller customers.⁴⁵ Assuming *arguendo* that the 2005 Instructions could be read to include a current certification requirement, it would be necessary to adopt the premise that the 2005 Instructions are binding, which they are not. It also would be necessary to undergo a notice of comment and proposed rulemaking proceeding so as to satisfy the APA.⁴⁶ There has not been any notice and comment rulemaking proceeding that would endorse USAC’s interpretation of the rules, and the Commission must reject USAC’s attempts to directly contravene the Act and Commission’s rules and orders.

II. EVEN IF USAC WERE FREE TO ENGAGE IN THE INQUIRY IT PURSUED, USAC MISAPPLIED THE 2005 FCC FORM 499A INSTRUCTIONS TO THE FACTS OF THIS CASE

GCB had a reasonable expectation that each of its carrier customers was a reseller who should have been contributing to the USF. Nonetheless, USAC posits that, because GCB’s

registration status of its potential carrier-customer, the facilities-based carrier will not be responsible for monitoring the registration status of that customer on an ongoing basis”).

⁴³ *Sprint Corporation v. Federal Communications Commission*, 315 F.3d 369, 373 (D.C.Cir 2003).

⁴⁴ 5 U.S.C. § 553(b).

⁴⁵ *See supra* note 42.

⁴⁶ 5 U.S.C. § 553(b).

procedures were not to USAC's satisfaction, GCB could not have had a reasonable expectation concerning the contribution status of approximately 158 of its greater than 1000 wholesale customers. Yet, when one parses USAC's analysis, it is apparent that USAC still misapplied the 2005 Instructions upon which it relies in reaching its conclusions. USAC selectively chose from among the various indicia identified in the 2005 Instructions to create its own criteria that GCB should have used to form the basis of its reasonable expectation. Namely, USAC expected GCB to have on file either (1) what USAC deemed to be a valid certification or (2) a Filer ID and FCC website documentation that the carrier was an active contributor to the USF. The 2005 Instructions did not require GCB to rely solely on either of these criteria. Moreover, as stated above, USAC does not have the authority to adopt or to interpret rules, and was prohibited from holding GCB to this self-created requirement.⁴⁷ The Commission should conclude that GCB adequately performed the due diligence actually contemplated by the 2005 Instructions.

In addition, USAC's proposed adjustments cannot withstand scrutiny. Even if USAC was permitted to engage in the audit methodology it followed, its conclusions are fundamentally flawed and the Commission should vacate them.

A. At an Aggregate Level, GCB Had a Reasonable Expectation That Its Carrier Customers Were Carriers and Were to Contribute to the Fund

GCB had a reasonable expectation that each of its customers was a reseller and was contributing to the USF in an appropriate manner, and the Commission must prevent USAC—at its own discretion—from presuming that wholesale revenue is end user revenue without first determining whether each particular carrier at issue was a reseller. Even if GCB's expectation was not reasonable, the resellers remain solely responsible for contributing to the USF. Unless its carrier customers affirmatively informed GCB that they were not contributing to

⁴⁷ See *supra* Part I(C).

the USF (as several carriers did), GCB had a reasonable expectation that each of its carrier customers was a reseller based on a combination of resale certificates, the presence of filer IDs, contractual representations, other statements to GCB, and the products and services that the carrier purchased from GCB. USAC has not disputed that these indicators were accurate, nor has it sought to demonstrate that the customers were end users.

In 2004, virtually all of GCB's wholesale customers were carriers and virtually all of those carriers had Filer IDs. For those customers that did not have valid Filer IDs on file, GCB supplied sufficient material to USAC to demonstrate that these customers were carriers with an obligation to contribute to the USF. At bottom, GCB is entitled to rely upon a presumption that its customer will obey the law and therefore if a customer is a non-exempt carrier, GCB was reasonably entitled to expect that such customer would contribute to the USF.

The Commission must reject USAC's attempt to enact after-the-fact rules limiting and defining what constitutes a "reasonable expectation." In its Final Audit Report, USAC determined that GCB could obtain a reasonable expectation only through certifications or the Commission's website.⁴⁸ For 2004 revenues, there was no rule in effect that limited the formation of a "reasonable expectation" to either a resale certification or the FCC website. Nothing in the rules specified the manner in which the wholesale carrier would be required to document its knowledge of its customer's status as a reseller or its contribution to the USF.

Moreover, the 2005 Instructions are not binding rules, nor are they anywhere incorporated into the FCC's rules.⁴⁹ Even if the Commission were to view the 2005 Instructions as prescriptive, they simply state that the filer should have procedures to ensure that it reports

⁴⁸ Preliminary Audit Report at 8.

⁴⁹ Nor is USAC empowered to adopt or to interpret rules. *See supra* note 38. Only the FCC may conduct APA compliant rulemakings. 5 U.S.C. § 553.