

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

In the Matter of )  
 )  
InterCall, Inc. )  
 )  
Appeal of Decision of the Universal Service )  
Administrative Company and Request for )  
Waiver )  
 )  
\_\_\_\_\_ )

CC Docket No. 96-45

To: Wireline Competition Bureau

**IN THE MATTER OF REQUEST FOR REVIEW BY INTERCALL, INC.  
OF DECISION OF UNIVERSAL SERVICE ADMINISTRATOR**

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## Summary

InterCall submits this appeal to correct an erroneous contributor decision by the Universal Service Administrative Company. Since the inception of the Universal Service Fund (“USF”), stand alone providers of audio bridging services have not been classified as telecommunications service providers and have not filed FCC Form 499s as direct contributors to the Fund.<sup>1</sup> Instead, the audio bridging industry has contributed to USF as end users, paying substantial amounts to the IXCs providing them with the toll-free services customers use to connect to the audio bridge. InterCall has paid over \$20 million in end user USF surcharges to its telecommunications suppliers in the past three years.

The Administrator’s Decision abruptly reverses this long standing industry-wide practice. USAC’s radical change in the treatment of audio bridging services exceeds USAC’s authority as Administrator of the Fund and is contrary to FCC precedent and rules. The Commission’s rules explicitly bar USAC from making policy, from interpreting unclear statutes or rules and from addressing new applications of the Fund. USAC’s sole course of action in this instance was to seek guidance from the Commission on how to proceed.

Second, the Administrator’s Decision is clearly erroneous on the merits. As InterCall showed in its filings with USAC, the overwhelming evidence demonstrates that audio bridging services are not treated as telecommunications services and are not required to make direct contributions to the USF. Indeed, only 90 days before the Administrator’s Decision, the FCC, in a 5-0 vote of the Commissioners, concluded that conference call providers were end

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<sup>1</sup> As used herein, “stand alone” providers are those providers of audio bridging services that do not themselves own any underlying transmission capacity consumed in the provision of service. “Integrated” providers are those providers, such as IXCs, that self-provision transmission capacity and offer audio bridging services utilizing that capacity.

users, not carriers, under local exchange carrier access tariffs. USAC's decision upends this precedent, based solely on a misinterpretation of Instructions to the FCC form 499-A.

Finally, the Administrator's Decision errs by singling out one provider in an industry, and purporting to subject that provider to retroactive liability for USF contributions. The only way that InterCall and other audio bridging providers may be added to the contribution base is via a rulemaking using the FCC's permissive contribution authority under Section 254(d) of the Act. Such a rulemaking would apply new rules prospectively and uniformly throughout the industry.

Therefore, InterCall requests that the Commission vacate the Administrator's Decision and bar USAC from requiring InterCall to submit 499s.

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InterCall, Inc. (“InterCall”), through its undersigned counsel and pursuant to sections 1.3 and 54.719 through 54.722 of the Federal Communications Commission’s (“Commission”) rules, 47 C.F.R. §§ 1.3, 54.719-54.722, respectfully appeals the Universal Service Administrative Company’s (“USAC”) “Administrator’s Decision on Contributor Issue,” which ruled that InterCall’s audio bridging services are toll teleconferencing services as the term is used in the Form 499 Instructions and, based on that conclusion, ordered InterCall to complete and file FCC Form 499.<sup>2</sup> USAC lacks the legal authority to make the determinations contained in the Decision and, even if it did have authority, the conclusions in the Administrator’s Decision are clearly erroneous. Accordingly, InterCall hereby requests the Commission vacate the Administrator’s Decision.<sup>3</sup>

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<sup>2</sup> See Letter to Steven A. Augustino, Kelley Drye & Warren LLP, Counsel to InterCall, Inc. from USAC, Re: InterCall, Inc. (Jan. 15, 2008) (hereinafter “Administrator’s Decision”) (attached hereto as “Exhibit 1”).

<sup>3</sup> Due to USAC’s 60 day deadline for filing 499s, InterCall also will request that the Commission stay enforcement of the Administrator’s Decision, including the instruction to file 499s, while the instant request is pending before the Commission.

## Introduction

InterCall submits this appeal to correct an erroneous contributor decision by the Universal Service Administrative Company. Since the inception of the Universal Service Fund (“USF”), stand alone providers of audio bridging services have not been classified as telecommunications service providers and have not filed FCC Form 499s as direct contributors to the Fund.<sup>4</sup> Instead, the audio bridging industry has contributed to USF as end users, paying substantial amounts to the IXCs providing them with the toll-free services customers use to connect to the audio bridge. InterCall has paid over \$20 million in end user USF surcharges to its telecommunications suppliers in the past three years.

The Administrator’s Decision abruptly reverses this long standing industry-wide practice. Relying solely on a cryptic modification to the Instructions to the 499 Form, and dismissing all other evidence as beyond its discretion to consider, the Administrator’s Decision concludes that InterCall must file Form 499s and, if required by Commission rules, contribute directly to the USF based on those filings. USAC orders InterCall to submit those forms, including previously due forms, within 60 days of the Administrator’s Decision. In order to comply with the Administrator’s Decision, InterCall, and InterCall alone, would be forced to reverse its existing practice, cease paying its underlying telecommunications vendors, modify billing systems to identify interstate end user telecommunications revenues, file 499 forms, and contribute payments directly to the USF.

USAC’s radical change in the treatment of audio bridging services exceeds USAC’s authority as Administrator of the Fund and is contrary to FCC precedent and rules.

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<sup>4</sup> As used herein, “stand alone” providers are those providers of audio bridging services that do not themselves own any underlying transmission capacity consumed in the provision of service. “Integrated” providers are those providers, such as IXCs, that self-provision transmission capacity and offer audio bridging services utilizing that capacity.

First and most importantly, USAC acted *ultra vires* in issuing an Administrator's Decision. The Commission's rules explicitly bar USAC from making policy, from interpreting unclear statutes or rules and from addressing new applications of the Fund. USAC's sole course of action in this instance was to seek guidance from the Commission on how to proceed. By issuing a decision, USAC usurped the exclusive role of the Commission.

Second, the Administrator's Decision is clearly erroneous on the merits. As InterCall showed in its filings with USAC, the overwhelming evidence demonstrates that audio bridging services are not treated as telecommunications services and are not required to make direct contributions to the USF. Audio bridging and other conference calling services have been in existence since the early 1980s, yet they have never been subject to common carrier regulations, such as 214 authorizations, customer transfer requirements, billing requirements or any payment and support obligations. Indeed, only 90 days before the Administrator's Decision, the FCC, in a 5-0 vote of the Commissioners, concluded that conference call providers were end users, not carriers, under local exchange carrier access tariffs.

Moreover, USAC's sole rationale for the conclusion rests on a misinterpretation of Instructions to the FCC Form 499-A. As InterCall explained, the Instruction relied upon by USAC is itself ambiguous. It must be read in context and consistent with the overwhelming additional evidence showing that audio bridging providers are not telecommunications carriers. USAC's reliance on the Instruction, to the exclusion of all contrary evidence, is clear error.

Finally, the Administrator's Decision errs by singling out one provider in an industry, and purporting to subject that provider to retroactive liability for USF contributions. The Administrator's Decision impermissibly expands the base of contributors in an enforcement context when a rulemaking would be necessary. Indeed, the Administrator's Decision flatly

contradicts the result reached by the FCC Enforcement Bureau in two separate investigations of one of InterCall's largest competitors, Premiere Global Services, Inc. The Administrator's Decision acknowledges the inconsistency but (again) ignores the problem by declaring the information to be beyond its discretion to consider. The only way that InterCall and other audio bridging providers may be added to the contribution base is via a rulemaking using the FCC's permissive contribution authority under Section 254(d) of the Act. Such a rulemaking would apply new rules prospectively and uniformly throughout the industry.

Therefore, InterCall requests that the Commission vacate the Administrator's Decision and bar USAC from requiring InterCall to submit 499s. Further, if the Commission wishes to consider changes to the way stand alone providers contribute to the USF, it should initiate a proceeding to consider application of its permissive authority to classify audio bridging providers as "providers of telecommunications" subject to USF contribution obligations.

### **Statement of Facts**

InterCall is one of the largest providers of audio bridging services in the United States. The conferencing services industry consists of audio, web and video conferencing services that are marketed to businesses and individuals worldwide. Audio bridging service is a form of conferencing service that allows multiple end users to communicate and collaborate with each other using telephone lines. Audio bridging services employ a device – an audio bridge – that links multiple communications together and feeds to each station a composite audio input minus the user's own audio. The audio bridge also performs conference validation functions, collects billing and participant information for each bridged call and enables numerous conference control features, including recording, delayed playback, mute and unmute of callers and operator assistance. The most common forms of audio bridging services are operator-assisted conferences and on-demand "reservationless" conferencing services.

In a typical reservationless conference, the conference host is assigned a pre-established dial-in number, typically a toll-free 8YY number uniquely assigned to the host or the host's company for conferencing services. This dial-in number can also be an international number or a North American Numbering Plan ten-digit local number. Participants connect to the bridge using the dial-in number and, if enabled, enter a conference code/passcode assigned to the host. During a conference, the host has available a number of features, including operator assistance, the ability to poll participants, the ability to obtain a roll-call of participants, the ability to mute and unmute lines and the ability to lock or unlock the conference from additional participants.

To obtain the necessary telecommunications input, an audio bridging provider purchases toll-free, international and/or local number-based services from one or more telecommunications vendors. An audio bridging provider purchases these telecommunications inputs as an end user. That is, the audio bridging provider is the customer of record for each toll-free or telephone number used, and it is assessed all applicable taxes, surcharges and fees associated with the telecommunications services, including federal universal service fund charges assessed on interstate telecommunications services purchased by the provider.<sup>5</sup>

InterCall met with USAC on May 31, 2007 to discuss the proper treatment of audio bridging services under the FCC's rules. InterCall filed relevant information with USAC on June 5, 2007,<sup>6</sup> October 5, 2007<sup>7</sup> and November 1, 2007.<sup>8</sup> These pleadings are attached to this appeal and are incorporated herein by reference.

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<sup>5</sup> InterCall, for example, obtains telecommunications inputs from several vendors. Attached as Exhibit 2, are letters from several of InterCall's carriers attesting that they surcharge InterCall for USF contributions as an end user.

<sup>6</sup> Letter from Steven A. Augustino, Counsel to InterCall, Inc. to David Capozzi, Esq., Acting General Counsel, Universal Service Administrative Corporation (June 5, 2007) (attached hereto as "Exhibit 3").

By letter dated January 15, 2008, USAC issued the Administrator's Decision which is the subject of the instant appeal. In the Administrator's Decision, USAC concluded that audio bridging services were toll teleconferencing services and, InterCall, as an audio bridging provider, was required to file the Form 499.<sup>9</sup> USAC required InterCall to file the FCC Form 499, on a prospective basis, but also required filing "any and all previous FCC Form 499s that have come due since InterCall started providing interstate telecommunications."<sup>10</sup> USAC also concluded that toll teleconferencing services were not exempted from the Commission's USF reporting and contribution requirements.<sup>11</sup>

Commission rule 54.723 requires the Wireline Competition Bureau to conduct *de novo* reviews of Administrator Decisions.

### Argument

#### **I. USAC EXCEEDED ITS AUTHORITY WHEN IT CONCLUDED THAT AUDIO BRIDGING SERVICES WERE "TOLL TELECONFERENCING SERVICES" AND THAT INTERCALL WAS REQUIRED TO FILE THE FORM 499**

When section 254 was enacted, Congress charged the FCC with establishing the policies governing the universal service fund. The FCC created USAC as the "permanent Administrator of the federal universal service support mechanisms." 47 C.F.R. §54.701. The FCC delegated to USAC only the authority over the administrative functions necessary to carry out the FCC's policies. The question at issue here is whether providers of audio bridging

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<sup>7</sup> Letter from Steven A. Augustino, Counsel to InterCall, Inc. to David Capozzi, Esq., Acting General Counsel, Universal Service Administrative (Oct. 5, 2007) (attached hereto as "Exhibit 4").

<sup>8</sup> Letter from Steven A. Augustino, Counsel to InterCall, Inc. to David Capozzi, Esq., Acting General Counsel, Universal Service Administrative Corporation (Nov. 1, 2007) (attached hereto as "Exhibit 5").

<sup>9</sup> Administrator's Decision at 1, 3.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 2.

services are required to file FCC Form 499s and contribute directly to the universal service fund.

The response to this question requires interpretation of an unclear Commission rule and a determination of Commission policy, actions that clearly are beyond USAC's authority.

Consequently, the USAC Administrator's Decision is invalid and must be vacated.

**A. USAC Usurped the Commission's Policy-Making Authority and Violated Section 54.702(c) of the Commission's Rules When It Issued the Administrator's Decision Interpreting an Unclear Commission Rule**

Section 254 of the Communications Act, as amended (the "Act") identifies Congress's principles regarding universal service and directs the Commission to implement those principles.<sup>12</sup> The Commission has recognized that it alone is authorized to establish the policies governing the universal service program and that it may delegate to USAC only limited authority to conduct the administrative functions necessary to administer the program. As the Commission noted in a 1998 Report and Order revising the organizational structure of the universal service fund administrator, the entity chosen to administer the fund "may not administer the programs in any manner that requires the entity to interpret the intent of Congress in establishing the programs or interpret any rule promulgated by the Commission in carrying out the programs, without appropriate consultation and guidance from the Commission."<sup>13</sup>

The Commission further clarified USAC's role in administering the USF program as follows:

Consistent with Congress's directive that the combined entity 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. Where the Act or the Commission's rules are unclear, or do not address a

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<sup>12</sup> 47 U.S.C. §254 *et seq.*

<sup>13</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ¶15 (1998).

particular situation, USAC must seek guidance from the Commission on how to proceed.<sup>14</sup>

USAC's limited role as the universal service fund administrator was included in Commission rule 54.702(c) which states that "[t]he 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." 47 C.F.R. §54.702(c) (emphasis added). This requirement is mandatory where a policy decision is required or in any situation that goes beyond mere administration of the fund; USAC *must* seek the FCC's guidance.

The instant case provides a prime example of circumstances requiring USAC to seek Commission guidance – a requirement USAC failed to observe.<sup>15</sup> As discussed *infra* Commission has never classified audio bridging services as telecommunications services, audio bridging providers have not been subjected to common carrier regulations and the standard practice for the audio bridging industry has been to purchase telecommunications inputs as end users. As InterCall pointed out to USAC, FCC Rule 54.706 lists 19 separate services or service providers subject to USF contribution obligations but omits audio bridging, conferencing or similar services. This omission is evidence of Commission intent to exclude audio bridging services from direct USF contributions. InterCall also showed that revisions to the FCC Form 499-A Instructions made in 2002 were unclear and appeared to conflict with long-standing FCC precedent and industry practice. Accordingly USAC was *required* to seek Commission guidance the proper filing and contribution requirements.

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<sup>14</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ¶17 (1998).

<sup>15</sup> InterCall argued to USAC that if it could not interpret the rules so as to be consistent with Commission precedent and industry practice, it must seek guidance from the Commission. See Augustino letter to Capozzi, attached as Exhibit 3, at 7.

USAC exceeded its authority in two ways. First, USAC took it upon itself to supplement the obvious omission of conferencing services from Commission rule 54.706. In its Administrator’s Decision, USAC concluded that “[b]ecause the list in the regulation is meant to provide examples and not be inclusive . . . the list itself does not provide toll teleconferencing operators with an exemption from USF reporting and contribution requirements.”<sup>16</sup> Here USAC exercises impermissible discretion to read new services into a Commission rule, in effect opining on what the Commission’s policy should be.

Second, when presented with evidence that a different statement was unclear, USAC willingly blinded itself to contrary evidence. Here, USAC declared strict limitations that prevent it from interpreting the language used in the 2002 revisions to the Form 499-A Instructions:

Since 2002, the Form 499-A instructions have specifically stated: “Line 314 and Line 417 should include toll teleconferencing.” This language is clear and does not give USAC discretion to exclude these services from USF contribution requirements.<sup>17</sup>

USAC could declare the language “clear” only by ignoring other evidence InterCall provided, including the FCC’s conclusion in *Qwest v. Farmers* that conference call providers are end users and the Enforcement Bureau’s investigation of a competitor. USAC avoided section 54.702(c) by acting as if this other evidence did not exist.

In both of these instances USAC was required to seek Commission guidance on how to administer an uncertain Commission policy. Instead, USAC chose, in one instance to assert discretion to supplement a Commission list of contributing services and in the other disavowed any discretion to read language in context, thereby making another determination – that the Form 499 did not permit an exemption.

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<sup>16</sup> Administrator’s Decision at 2.

<sup>17</sup> Administrator’s Decision at 2.

USAC's response to evidence that NECA previously had stated that another audio bridging provider did not have to file the Form 499-A provides another example. Faced with NECA's contrary interpretation, USAC dismissed the NECA conclusion rather than seek further guidance:

“neither NECA nor USAC have the discretion to provide the exemption from universal service filing and contribution obligations to any party. Authority to do so rests solely with the Commission and the United States Congress.”<sup>18</sup>

USAC's dancing with respect to its authority is unavailing. Although USAC recognizes its limited authority, it in fact twisted three scenarios requiring interpretation so as to avoid seeking FCC guidance. In each instance, USAC was faced with an ambiguous statute or rule. In each instance, USAC interpreted the rule or statute to meet its preferred outcome – that an entity must contribute to the USF. These actions greatly exceed USAC's authority in contradiction of section 54.702(c) of the Rules. In short, the Administrator's Decision usurps the Commission's exclusive role to establish policies governing the USF program.

## **II. THE CONCLUSIONS IN THE ADMINISTRATOR'S DECISION ARE CLEARLY ERRONEOUS**

As noted above, USAC lacked authority to make the determination in its Administrator's Decision but even if had authority, it is clear that USAC reached an erroneous conclusion. The core conclusion in the Administrator's Decision is based on a single revision to the Form 499-A despite the fact that all other evidence – including Commission orders and industry practice – indicate that InterCall and other providers of audio bridge services are not

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<sup>18</sup> Administrator's Decision at 3.

required to file the Form 499-A or contribute directly to the universal service fund. USAC's reliance on this revision to the exclusion of contrary evidence is error.

Contributors to the USF are required to file a Telecommunications Reporting Worksheet ("Form 499-A"). 47 C.F.R. §54.711. For the first five years of the USF, reporting forms made no mention of audio bridging, conferencing or similar services. In 2002, the Common Carrier Bureau revised the Form 499-A to include a reference to teleconferencing services in two places of the Instructions to the Form 499-A.<sup>19</sup>

- Lines 303 and 404 (Fixed local services) – “This line should include charges for optional extended area service, dialing features, added exchange services such as automatic number identification (ANI) or teleconferencing, local number portability (LNP) surcharges, ....”<sup>20</sup>
- Lines 314 and 417 (All other long distance services) – “All other long distance services should include other revenues from providing long distance communications services. Line (314) and Line (417) should include toll teleconferencing. ...”<sup>21</sup>

The Form 499-A instructions do not define the term “teleconferencing” nor has the Commission explicitly included teleconferencing services as a service for which USF contributions must be made. Despite the uncertainty over the application of this revision particularly in light of the Commission orders and industry practice discussed *infra*, USAC chose to rely mechanically on the revisions, without reconciling the revisions with the contrary evidence.

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<sup>19</sup> See 2002 Form 499-A Worksheet and Instructions available at [http://www.usac.org/res/documents/about/pdf/499/499a\\_2002.pdf](http://www.usac.org/res/documents/about/pdf/499/499a_2002.pdf). (Relevant portions are attached hereto as “Exhibit 6”).

<sup>20</sup> 2002 Form 499-A Worksheet and Instructions, at 18 (instructions for lines 303 and 404) (*2002 499-A Instructions*) (emphasis added), available at: [http://www.usac.org/res/documents/about/pdf/499/499a\\_2002.pdf](http://www.usac.org/res/documents/about/pdf/499/499a_2002.pdf)

<sup>21</sup> *2002 499-A Instructions* at 20 (instructions for lines 314 and 417).

**A. Audio Bridging Services Have Never Been Subject to Common Carrier Regulations**

Standard industry practice among audio bridge providers currently is, and historically has been, not to file a Form 499 for those services or to contribute directly to the USF. The audio conferencing industry is robust and InterCall competes with numerous other providers of stand alone audio bridging service. Among these competitors are large entities such as Premier Global Services, Inc., WebEx Communications, Inc., Genesys Conferencing, Inc. and numerous smaller providers operating under trade names such as BudgetConferencing.com, AffordableConferenceCalls.com, Saveonconferences.com, Callaconference.com and Discountconferencecall.com. A review of the Commission's database of Form 499 filers did not identify any of these entities as having filed a Form 499.<sup>22</sup>

Premiere Global Services, Inc., for example, states in its 2007 10-K filing that it considers itself to be an information service provider.<sup>23</sup> Specifically, Premiere stated:

We believe that we operate as a provider of unregulated information services. Consequently, we do not believe that we are subject to Federal Communications Commission (FCC) or state public utility commission regulations applicable to providers of traditional telecommunications services in the U.S.<sup>24</sup>

InterCall's research also reveals that carriers that do contribute to the USF typically identify their audio conferencing services as information services. At least four publicly-traded large rural local exchange carriers that receive funds from the USF support

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<sup>22</sup> InterCall searched the Commission's FCC Database of Form 499 filers but was unable to find references to any of these entities. See <http://gullfoss2.fcc.gov/cib/form499/499a.cfm>. Based on research conducted by InterCall, it appears that only integrated conferencing providers (*i.e.*, only those providers that already are telecommunications carriers) file 499s. Of course, InterCall cannot tell from public data how these providers report, if at all, revenues from conferencing services.

<sup>23</sup> Premiere Global Services, Inc., Form 10-K at 9 (Mar. 15, 2007).

<sup>24</sup> Id.

mechanisms have identified their teleconferencing services as information services in their Securities Exchange Commission filings. For example, Fairpoint Communications, Inc.'s 2007 10-K contained the following statement:

Enhanced Services. Our advanced digital switch and voicemail platforms allow us to offer enhanced services such as . . . three-way calling, . . . teleconferencing, video conferencing [and other services].<sup>25</sup>

Further, the Commission has never subjected stand alone conferencing providers such as audio bridge providers to any other FCC regulations applicable to telecommunications carriers. For example, stand alone providers are not required to obtain section 214 authority, file tariffs or maintain price sheets pursuant to the FCC's detariffing rule. These providers have not been required to obtain authorization for transfers of control nor are they subject to the Commission's Truth-in-Billing requirements. In fact, in recent years, several telecommunications carriers have sold their teleconferencing business, including their customer bases to stand alone providers. Although telecommunications carriers are obligated to seek Commission approval before transferring their telecommunications customers and/or terminating a telecommunications service, none of the parties in these sales transactions sought or obtained Commission approval to transfer their customers. The absence of any such evidence supports the conclusion that the Commission does not consider audio bridging or teleconferencing services to be "telecommunications services" under the Act.

**B. Audio Bridging Service Providers Are End Users of Telecom Services**

Part 54 of the Commission's rules detail the telecommunications services for which providers are required to contribute to the USF and audio bridging service in particular and audio conferencing service in general are omitted from this list, thereby indicating that the

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<sup>25</sup> Fairpoint Communications, Inc., Form 10-K at 6 (Mar. 13, 2007).

Commission did not intend to subject providers of these services to USF contributions. Section 54.706 of the Commission's rules identifies 19 telecommunications carriers or providers required to contribute to the USF: (1) cellular telephone and paging services, (2) mobile radio services, (3) operator services, (4) personal communications services (PCS), (5) access to interexchange service, (6) special access service, (7) WATS, (8) toll-free service, (9) 900 service, (10) message telephone service (MTS), (11) private line service, (12) telex, (13) telegraph, (14) video services, (15) satellite service, (16) resale of interstate services, (17) payphone services, (18) interconnected VoIP services and (19) prepaid calling card providers.<sup>26</sup> This list does not include teleconferencing services despite the fact that such services have been available for over 25 years. Notably, the list does include services such as interconnected VoIP (added under the FCC's permissive authority) which were established long after teleconferencing services and also includes two services – telegraph and telex services – that were marginal or non-existent at the time of the USF Orders. These facts suggest that the Commission would have included teleconferencing services if it had intended for providers of those services to contribute to the USF. Why, for example, would the FCC list dying services such as telegraph and telex services but omit a vibrant industry such as conferencing services? It is hardly likely that the Commission merely overlooked the industry.

The most rational conclusion is that the FCC did not intend to classify audio bridging services as subject to USF. Indeed, only 90 days before the Administrator's Decision, the FCC, by a 5-0 vote of the Commissioners, confirmed that conferencing providers are end users, not telecommunications carriers under local exchange carrier access tariffs. In *Qwest v. Farmers and Merchants Mutual Telephone*, the Commission unanimously ruled that conference

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<sup>26</sup> 47 C.F.R. § 54.706(a).

bridging providers are end users, not telecommunications carriers, under interstate access tariffs.<sup>27</sup> In that case, Qwest claimed that traffic from conference calling services was not terminating access traffic because the traffic did not terminate in Farmer's exchange but instead passed through to terminate elsewhere.<sup>28</sup> Qwest also argued that the conference calling providers were not end users so delivering calls to them did not constitute terminating access traffic.<sup>29</sup> The Commission rejected both of Qwest's arguments, instead ruling that each call made by users of conference calling services represent separate initiation points and that each call terminates at the conference bridge where they subsequently are connected by the conferencing provider.<sup>30</sup> The Commission emphatically rejected Qwest's claims, stating: "[t]he record indicates . . . that the conference calling companies are end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with the tariff."<sup>31</sup> The Farmer's tariff defined "end user" as any customer that is not a carrier, and consequently, the Commission's ruling that conference bridging providers are end users must result in the conclusion that they are *not* carriers.

The Commission's determination in Qwest is directly on point and controlling in this proceeding because the Commission specifically was required to rule on whether conference bridge providers were telecommunications carriers or end users of telecommunications services. The Commission's decision affirming Farmers' tariff confirms that when a standalone

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<sup>27</sup> *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone*, 22 FCC Rcd 17973 (2007) *modified on recon.*, FCC 08-29 (rel. Jan. 29, 2008). The further factual investigation initiated in the Order on Reconsideration does not affect the legal conclusion that audio bridging providers are end users when they subscribe to service. See *Order on Reconsideration*, FCC 08-29, ¶ 7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, ¶30.

<sup>30</sup> *Id.* ¶32.

<sup>31</sup> *Id.* ¶35.

conference bridge provider establishes a bridge for conference calls, it is providing an unregulated bridging service. The Commission's conclusion necessarily means that conference bridge providers are not acting as telecommunications carriers nor are they providing telecommunications services. Similarly, the Commission must follow this precedent and conclude here that InterCall is operating as an unregulated information service provider, not as a carrier.

The FCC reached similar conclusions in two previous decisions that involved conferencing services. In *AT&T v. Jefferson Telephone Company*, the Commission found that providers of "multiple voice bridging service" which "connects incoming calls so that two or more callers can talk with each other simultaneously" are information service providers and thus end users of telecommunications services.<sup>32</sup> More recently, the Wireline Competition Bureau issued a *Declaratory Ruling* addressing call blocking that treated audio bridging providers as end users.<sup>33</sup> In that proceeding, the Bureau was responding to disputes regarding access rates charged for the termination of traffic to third party businesses "such as conference call services and chat lines, that result in significantly increased terminating interstate traffic."<sup>34</sup> The Bureau's Order described the calls as terminating in the local exchange carrier's exchanges, which description is consistent with the conclusion that conference call providers are end users under the Commission's rules.<sup>35</sup>

The logical implication of the Commission's conclusions is that audio bridging is an information service not subject to USF contribution requirements. The Commission's *USF*

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<sup>32</sup> *AT&T v. Jefferson Telephone Company*, 16 FCC Rcd 1610, 16131 (2001).

<sup>33</sup> *Establishing Just and Reasonable Rates for Local Exchange Carriers*, DA 07-2863 (June 28, 2007).

<sup>34</sup> *Id.*, ¶12.

<sup>35</sup> *Id.*, ¶2.

*Orders* explicitly excluded information service providers from USF contribution requirements.<sup>36</sup>

It should be noted that these exclusions for information service providers does not mean that these providers do not otherwise pay to support the USF. In fact, the Commission has noted in its 1998 *Universal Service Report to Congress* that information service providers often are large users of telecommunications services and thus contribute to the fund indirectly through charges levied by their telecommunications carriers.<sup>37</sup>

**C. The 2002 Revisions to the Form 499-A are not Substantive Changes or Rules on Which USAC Can Rely for Support for its Administrator’s Decision**

The Form 499-A was issued by the Common Carrier Bureau – now the Wireline Competition Bureau – in 2002. As discussed above, prior to this revision, no Order or rule required audio bridging providers to contribute to the USF. The 2002 revisions cannot be the source for adding such providers to the contribution base, because the Common Carrier Bureau lacked authority to make substantive changes to the universal service fund. In its 1999 *Carrier Contribution Reporting Requirements Order*, the Commission delegated authority to the Common Carrier Bureau to modify Commission reporting forms but the delegated authority was limited.<sup>38</sup> Specifically, the Commission explained the limitations on the authority delegated to the Common Carrier Bureau as follows:

These delegations extend to administrative aspects of the requirements, e.g., where and when worksheets are filed, incorporating edits to reflect Commission changes to the substance

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<sup>36</sup> See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) (“First USF Order”); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 10095 (1997) (“First USF Reconsideration Order”); *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) (collectively, “USF Orders”).

<sup>37</sup> *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11547-48 (1998).

<sup>38</sup> *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, 14 FCC Rcd 16602, 16621, ¶¶39-40 (1999) (“*Carrier Contribution Reporting Requirements Order*”).

of the mechanisms, and other similar details. . . . We reaffirm that this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.<sup>39</sup>

Because the Commission’s delegation to the Common Carrier Bureau was limited to administrative revisions, the Common Carrier Bureau’s 2002 revision to the Form 499-A could not effect the substantive change of adding audio bridging providers to the universal service fund contribution base nor could the revision be cited as authority for requiring audio bridging providers to file the Form 499-A. If (as it appears) USAC interpreted the Common Carrier Bureau’s revision to the Form 499 as a substantive change, it would be attributing to the Bureau an impermissible action.

The only interpretation of the 2002 revisions that is consistent with the other available evidence is that the revisions offer editorial clarifications for integrated providers of audio bridging – that is, it offers clarification for those providers that already file 499s because they also provide telecommunications services. The Bureau clearly declares a non-substantive purpose for the revisions, stating that it had “revised the worksheet based on Commission actions and court decisions as well as made editorial clarifications culminating in the current version, the April 2002 Worksheet.”<sup>40</sup> A review of court and Commission decisions at that time did not reveal any decisions requiring audio bridging providers or teleconference providers in general to contribute to the USF which would have necessitated revisions to the Form 499. Consequently the only explanation for the references to teleconferencing services are “editorial clarifications.”

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<sup>39</sup> *Carrier Contribution Reporting Requirements Order*, ¶¶39-40.

<sup>40</sup> *Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2002 Filing by All Telecommunications Carriers*, 17 FCC Rcd 4315, at 2 (2002) (attached hereto as “Exhibit 6”).

The only plausible clarification would relate to how integrated providers should treat services provided using their own local or long distance switches.

Specifically, because the term “teleconferencing” is not defined in the Act, in the Instructions, or in the Public Notice accompanying the 2002 revisions, its meaning is ambiguous. In context, the term appears to refer to switch-based three-way or multi-party calling traditionally offered by local exchange carriers, and not the audio conferencing service provided by entities such as InterCall.

As revised in 2002, the Instructions contain the following two statements regarding teleconferencing services:

- Lines 303 and 404 (Fixed local services) – “This line should include charges for optional extended area service, dialing features, added exchange services such as automatic number identification (ANI) or teleconferencing, local number portability (LNP) surcharges, ....”<sup>41</sup>
- Lines 314 and 417 (All other long distance services) – “All other long distance services should include other revenues from providing long distance communications services. Line (314) and Line (417) should include toll teleconferencing. ...”<sup>42</sup>

The language relating to lines 303 and 404 discusses teleconferencing as an “added exchange service” similar to ANI delivery. It is mentioned immediately after a reference to “dialing features” offered by a local exchange carrier, which, as with added exchange services, would be offered through the functionality of a local exchange switch. Accordingly, it appears that “teleconferencing” must be provided through a local exchange switch, presumably as part of

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<sup>41</sup> 2002 Form 499-A Worksheet and Instructions, at 18 (instructions for lines 303 and 404) (*2002 499-A Instructions*) (emphasis added), available at: [http://www.usac.org/res/documents/about/pdf/499/499a\\_2002.pdf](http://www.usac.org/res/documents/about/pdf/499/499a_2002.pdf)

<sup>42</sup> *2002 499-A Instructions* at 20 (instructions for lines 314 and 417).

a broader offering of exchange service. Only entities also offering local exchange services could provide “teleconferencing” as the term appears to be used.

Under this interpretation, LECs (who already are 499 filers) would report three-way calling revenues on lines 303 and 404 as local service. This is consistent with the historical treatment of “adjunct to basic” services, which the FCC rules classified as basic telecommunications services. On the other hand, stand alone audio bridging providers such as InterCall do not own local exchange switches and do not offer exchange services (nor any telecommunications services, for that matter). Its conferencing services are not switch-based features but are instead functionalities performed by equipment that InterCall connects to telecommunications services. Therefore, the services that InterCall offers would not be “teleconferencing” as that term is used in connection with lines 303 and 404 of the 499 Form.

If “teleconferencing” in lines 303 and 404 means local exchange switch-based services, then the reference to “toll teleconferencing” in lines 314 and 417 must mean a similar switch-based feature offered on a toll basis. That is, “toll teleconferencing” is the long distance equivalent of the local teleconferencing referred to in lines 303 and 404. This would require that any toll teleconferencing also be offered through the features and capabilities of a local exchange or IXC switch. Again, because stand alone providers such as InterCall do not operate local exchanges, they could not be providers of toll teleconferencing as the term is used in the 2002 changes.<sup>43</sup>

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<sup>43</sup> Alternatively, the reference to “toll teleconferencing” in connection with long distance services could refer to the toll component of a conferencing service. Stand alone providers of teleconferencing services would not be subject to a reporting requirement under this interpretation, provided they obtain the toll component from a telecommunications carrier and pay appropriate USF charges on the services. Carriers and carrier affiliates, on the other hand, might have to report a “toll teleconferencing” component in order to capture the imputed value of the toll service that is self-provisioned by a carrier in connection with a finished conferencing product. Without

This interpretation of “toll teleconferencing” is consistent with evidence recently submitted by AT&T in another proceeding. AT&T owns one of the largest telecommunications networks in the world and is an integrated provider of conferencing services. In the Traffic Stimulation docket, AT&T contrasted its conferencing services with those offered by stand alone providers of free conferencing services. AT&T explained that, unlike the stand alone providers, “AT&T’s conference bridges are associated with 4ESS and 5ESS switching systems within its own network.”<sup>44</sup> It appears that AT&T considers its bridges to be “associated” with switching systems in the sense that the bridge is an extension of the switch functionalities, with placement of bridging in the network based on “considerations of efficient network management, such as trunk capacity.”<sup>45</sup>

Accordingly, AT&T’s integrated conferencing service appears to be the type of “toll teleconferencing” referenced in the 2002 revisions. As a result, AT&T, which does not purchase telecommunications capacity for its conferencing product from third parties, could report the toll teleconferencing portion of its service on this line, and thus would pay USF on an equal footing with stand alone providers. By contrast, stand alone providers do not “associate” their conference bridges with network switches, do not provide “toll teleconferencing” as the term is used in the 2002 revisions, and correctly pay USF as an end user when they purchase telecommunications inputs.

Importantly, this interpretation of toll teleconferencing would also avoid a potential conflict with the 499-A Worksheet Instructions for line 418 of the Form. Line 418,

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such a report, integrated carrier providers would enjoy an artificial cost advantage compared to stand alone providers of conferencing.

<sup>44</sup> Comments of AT&T, Inc., WC Docket 07-135, at 7 n.9 (Dec. 17, 2007); *see also, id.*, Declaration of Adam Panagia, at 6, n.3.

<sup>45</sup> *Id.*

which addresses non-telecommunications revenues collected by 499 filers, states that information services should not be treated as telecommunications revenue. The Instructions provide "call moderation and call transcription services" as two examples of information services that are not subject to USF assessment.<sup>46</sup> Both call moderation and call transcription are features of the audio bridging services available to subscribers to InterCall's services.

**D. The Administrator's Decision Ignores the Enforcement Bureau's Treatment of Similarly Situated Competitors**

InterCall also produced to USAC evidence showing that the Commission knowingly approved the current method by which stand alone providers contribute to the USF. In 2004 and 2005, the Enforcement Bureau opened two investigations into Communications Network Enhancement, Inc. ("CNE"), a subsidiary of Premiere Global Services, Inc., a substantial competitor of InterCall. CNE's description of its services is typical of the conference calling industry, and substantially similar to InterCall's.

As shown by documents obtained by InterCall through a FOIA request,<sup>47</sup> when CNE contacted the FCC to discuss CNE's USF obligations, it was told by a staff member to contact the National Exchange Carrier Association ("NECA"), which in turn told CNE to contact USAC directly. USAC's Data Collection Group referred CNE back to NECA's Associate Manager of Revenue Administration. In an email, dated June 16, 2004, the NECA official informed CNE that:

Based upon your description below [that] "CNE does not supply transmission services; we use MCI, which provides CNE with toll free numbers for some of our participants to reach our bridges" and because MCI carries the call, MCI bills you as their [redacted] and

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<sup>46</sup> 499-A Instructions at 29 (Line 418).

<sup>47</sup> The documents were submitted to the Commission as Exhibit 1 to InterCall's October 5, 2007 letter to Mr. David Capozzi, Esq., Acting General Counsel, USAC. The October 5, 2007 letter is attached hereto as Exhibit 4.

you only provide the hardware for the conference call to take place, *you are not required to file the 499-A form.* (emphasis added).

CNE forwarded this advice to the Commission staff which were handling two proceedings into CNE's contribution requirements. The Commission closed both investigations without an order.

The Enforcement Bureau's actions are relevant for two reasons. First, they provide a contemporaneous interpretation of the Act and the rules showing that filing obligations do not apply to audio conferencing services provided by entities like InterCall. Second, they validate InterCall's contention that the 2002 revision to FCC Form 499-A does not (and as explained above could not) require stand alone audio conferencing providers to contribute to the Fund as carriers. The fact that the Enforcement Bureau closed the investigations in 2004 and 2005 belies the contention that the 2002 revision is controlling.

USAC ignored this precedent and issued an administrative decision that flatly contradicts the FCC's rules, orders, and the Enforcement Bureau's conclusions in its investigation into CNE. InterCall's services are substantially similar to CNE's, and thus, it would be arbitrary and capricious to impose filing obligations on InterCall alone. The Administrator's Decision errs by expanding the USF contributor base to include just one service provider in the conference call industry – InterCall – while not addressing the obligations of the hundreds of other providers with whom InterCall competes.

### **III. THE COMMISSION CAN MODIFY HOW AUDIO BRIDGING PROVIDERS CONTRIBUTE TO THE USF BUT MAY DO SO ONLY AFTER CONDUCTING A RULEMAKING PROCEEDING**

If the FCC determines as a policy matter that audio bridging providers should contribute directly to the Fund, it has authority to change the requirements via rulemaking.

Section 254(d) of the Act identifies two classes of contributors to the universal service fund: (i)

those telecommunications carriers providing interstate telecommunications services for which contribution to the USF is mandatory and (ii) other providers of interstate telecommunications services for which the Commission has authority to require to contribute to the USF. 47 U.S.C. §254(d). The Commission may include in this second category of “permissive” contributors those non-telecommunications carriers who provide “telecommunications” but such a classification may be made only after the Commission makes a determination that inclusion of this class of carriers in this category is in the public interest. As of today, the Commission has exercised this authority only to include private carriers, interconnected VoIP providers and payphone operators in the category of permissive contributors. Accordingly, audio bridging providers have not been included in the category of permissive contributors.

The need for the Commission to make an affirmative decision to include carriers in the category of permissive contributors was underscored by the Commission determination that interconnected VoIP providers were “providers of telecommunications” and the inclusion of these providers in the permissive contributor category. As the D.C. Circuit recently noted in its decision in *Vonage v. FCC*, information service providers are potentially “providers of telecommunications” for purposes of Section 254(d) and thus could be considered permissive contributors.<sup>48</sup> The Commission currently has excluded information service providers from the obligation to contribute directly to the USF – thus excluding audio bridging providers - although these providers do contribute to the USF indirectly through USF charges assessed by their underlying telecommunications service providers.

In this case, the first step in modifying how audio bridging providers contribute to the USF would be to open a proceeding considering whether audio bridging providers are

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<sup>48</sup> *Vonage Holdings Corp. v. FCC*, No. 06-1276 (D.C. Cir. June 1, 2007).

“providers of telecommunications” similar to interconnected VoIP providers, and whether the public interest would be best served by having these providers contribute directly to the USF instead of indirectly through charges assessed by their underlying telecommunications service carriers.

A rulemaking proceeding as described above would maintain the competitive environment in which audio bridging providers operate as any rules would apply uniformly to all such providers as opposed to the patchwork regulation that would result from individual determinations made on a case-by-case basis.

### Conclusion

For the reasons identified and addressed above, InterCall requests that the Commission vacate the Administrator's Decision and prohibit USAC from requiring InterCall to submit Form 499-A filings on both a retrospective and prospective basis. If the Commission deems it necessary to review the process by which stand alone audio bridging providers contribute to the USF, InterCall respectfully suggests the Commission initiate a formal rulemaking proceeding to determine whether it should exercise its permissive authority to classify audio bridging providers as "telecommunications providers" subject to USF contribution obligations.

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