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Federal Communications Commission
Office of the Secretary

February 25, 2008

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Re: Comments of Genesys SA
In the Matter of Request for Review of InterCall, Inc.
Of Decision of Universal Service Administrator
CC Docket No. 96-45

Dear Ms. Dortch:

Transmitted herewith on behalf of Genesys SA are the original and four copies of the Comments of Genesys SA in the matter of the Request for Review of InterCall, Inc. of Decision of Universal Service Administrator in CC Docket No. 96-45.

Should additional information be necessary in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,

James A. Stenger

Encl.

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FEB 25 2008
Federal Communications Commission
Office of the Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Request for Review of InterCall, Inc.	)	
of Decision of Universal Service	)	CC Docket No. 96-45
Administrator	)	
	)	

COMMENTS OF GENESYS SA

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February 25, 2008

SUMMARY

Genesys SA ("Genesys") is a leading provider of integrated Web, audio and video conferencing services. The teleconference service of Genesys offers customers the ability to transform participants' individual calls into a teleconference. The teleconference service also offers customers the ability to store, retrieve and interact with information. Because the teleconference service offers the capability to transform, store, retrieve and interact with information, it should be classified as an information service, not a telecommunications service. A competitive market exists for teleconference service and regulation thereof as a telecommunications service would stifle investment and innovation.

Under the Communications Act, the decision of the Supreme Court in *Brand X* and applicable Commission decisions, teleconference service is properly classified as an information service. Teleconference service effects a net protocol conversion of participants' calls. Like other information service providers, teleconference service providers use telecommunications to provide an information service. However, teleconference service providers do not resell telecommunications service. The toll-free 8xx service used by teleconference service providers is used only to enable customers and participants to access the teleconference service.

The Instructions to FCC Form 499-A provide no basis to classify teleconference service as a telecommunications service. Among 37 pages of Instructions the Administrator relies upon a single sentence that is not contained in the section of the Instructions that addresses who must file. The sentence relied upon references "toll teleconferencing," while Genesys primarily offers toll-free teleconferencing and the Instructions distinguish between toll and toll-free services.

The Commission should interpret its regulations in a manner that avoids retroactive rulemaking. Especially where novel issues are presented, the Commission should act only prospectively.

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Administrator	)	
	)	

COMMENTS OF GENESYS SA

Genesys SA ("Genesys"), by its undersigned counsel and pursuant to the Public Notice released February 14, 2008 (DA 08-371) , hereby submits these comments in support of the Request for Review (the "Appeal") of InterCall, Inc. ("InterCall") of a decision of the Universal Service Administrator (the "Administrator") of January 15, 2008 (the "Decision"), and in support hereof respectfully show as follows. [1]

I. Factual Background.

Genesys is a leading provider of integrated Web, audio and video conferencing services to organizations world wide.[2] The company's flagship product, Genesys Meeting Center, provides a single-platform multimedia conferencing solution that is easy to use and available on demand. Genesys uses specialized equipment, software and specially trained personnel to

[1] On February 19, 2008, Genesys and West Corporation, the parent of InterCall, announced that West has made a friendly tender offer to acquire Genesys and combine Genesys with InterCall. *See, e.g.*, http://biz.yahoo.com/iw/080219/0363348.html.
[2] Web refers to the World Wide Web accessible via the Internet.

provide conferencing services. For purposes of these comments, Genesys focuses on its audio conferencing service, referred to herein as teleconference service.[3]

Genesys customers and other participants can access the teleconference service of Genesys in several ways. A customer or participant can use its own local or long distance telephone service provider to access the Genesys teleconference service or use one of the toll-free 8xx numbers obtained by Genesys from telecommunications carriers to enable Genesys customers and teleconference participants to access the Genesys teleconference service. In addition, Genesys customers and participants can access the Genesys conference service via VoIP services. VoIP access can be accomplished using a VoIP service obtained by Genesys from a VoIP provider or via the VoIP service provider of the moderator or participant. While access via toll free 8xx numbers remains predominant, access via VoIP is expected to increase.[4]

Regardless of how the Genesys customer and other participants choose to access the teleconference service, the teleconference service transforms the separate calls into a teleconference. The transformation of the separate calls into a teleconference is accomplished by the information processing technology provided by Genesys. A participant in a teleconference does not merely transmit information of their choosing to points specified by them without change in the form or content of the information sent and received. On the contrary, participation in a teleconference enables the participant to send and receive information that is transformed by the Genesys information processing technology into a different form and substantive content and is distributed to points chosen by the moderator and other participants.

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[3] InterCall uses the term "audio bridging." Audio bridging or audio conferencing is commonly offered to the public as "teleconference service" or "teleconferencing."

[4] As the Commission is aware, interconnected VoIP providers are required to pay USF fees. Therefore, whether a teleconference provider purchases toll-free 8xx service or interconnected VoIP service to enable its customers to access its teleconference service, in either case USF fees would be collected by the carriers providing the access services.

The Web-linked features of the Genesys teleconference service provide additional information services using the Genesys information processing technology. Genesys teleconferences are automatically linked to websites provided by Genesys where teleconference participants can present, share and edit presentations, documents and other data, as well as monitor and control a variety of aspects of the teleconference.[5] The Genesys teleconference service also enables customers to record teleconferences, to synchronize the audio recording with the web-linked presentations made during the teleconference, and to store and access the information.[6] Thus, the Genesys teleconference service offers customers the capability to generate, acquire, store, transform, process, retrieve, utilize, and make available information via telecommunications.

The toll-free 8xx service purchased by Genesys from registered telecommunications carriers is used by Genesys to enable customers of Genesys and other teleconference participants to access the Genesys teleconference service. Importantly, the 8xx service can only be used to access the Genesys teleconference service. Genesys customers cannot use Genesys-provided 8xx service to enable third parties to call the Genesys customer. By contrast, the resale of toll-free 8xx service would involve the provision by Genesys of toll-free 8xx service to a customer that the customer could use to enable third parties to call the customer. Genesys does not resell toll-free 8xx service for such purpose.[7]

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[5] Genesys offers teleconference-linked websites with the Genesys brand and also creates branded websites for customers who outsource their teleconference service to Genesys.

[6] Genesys offers customers the option of having Genesys store the information or obtaining the information from Genesys in a variety of formats that can be self-stored by the customer.

[7] Genesys assigns one or more toll-free 800 numbers to each of its customers for the customer (and other call participants) to use to access the Genesys teleconference service. However, the same toll-free 800 number may be assigned to more than one customer. The Genesys system recognizes the customer and the call participants by the unique pin number that is assigned to the customer, and not by virtue of the toll-free 800 number being used to dial into the Genesys

The Commission, after inquiry and response, has not disputed that Genesys is the end-user of the toll-free 8xx service and not a reseller. In 2005 Genesys received a letter from the Commission directing Genesys to respond to a survey being conducted of companies identified by one or more telecommunications carriers as being resellers of telecommunications services ("the 2005 Reseller Survey").[8] The 2005 Reseller Survey explicitly directed respondents either to register as telecommunications service providers (resellers) or explain why they should not have to register. Genesys provided the requested explanation and did not register.[9]

In the over three years that have passed since Genesys responded to the 2005 Reseller Survey, Genesys has received no further correspondence from the Commission, and, in particular, Genesys has received no indication from the Commission, written or otherwise, that the Commission deems Genesys to be a reseller of telecommunications service or that Genesys should register and pay USF fees. Genesys did not register and did not pay USF fees directly in reliance upon the Commission's acceptance of Genesys' response to the 2005 Reseller Survey.

Genesys has not certified to third party carriers that Genesys is a carrier and is exempt from being charged USF fees on 8xx service purchased by Genesys from third party carriers. As the Commission is aware, carriers must pay USF fees on all revenue earned from the sale of

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recognizes the customer and the call participants by the unique pin number that is assigned to the customer, and not by virtue of the toll-free 800 number being used to dial into the Genesys conference service. Genesys retains the right to change at any time the 800 number(s) that Genesys directs a customer to use to access the Genesys conference service (although for ease of customer use of the Genesys teleconference service, Genesys attempts to avoid such reassignment). Genesys offers alternative teleconference service plans to its customers. Some plans charge the same rate for the teleconference service regardless of whether toll-free 800 service is used, while other plans impose variable charges depending upon the means used to access the teleconference service.

[8] Commission letter to Genesys dated June 22, 2005, corrected and reissued, July 5, 2005.

[9] Genesys, by letter of December 16, 2005, provided the Commission with a description of Genesys' business operations and explained the basis for Genesys' understanding that Genesys is an information services provider and end-user of telecommunications services and not a telecommunications services provider and reseller.

telecommunications services to end-users, but carriers do not pay USF fees on revenue earned from the sale of services to other carriers ("carrier's carrier revenue"). However, as the Commission also is aware, the exclusion of carrier's carrier revenue is conditioned upon the filer obtaining a certification from the customer that the customer is a carrier, has registered with USAC and is paying USF fees.[10] Third party carriers likely would refuse to refund USF fees collected from Genesys on the grounds that Genesys did not certify that Genesys purchased 8xx service as a carrier and that carriers are obligated to collect USF fees from any customer that fails to certify that it is a carrier, is registered and pays USF fees directly.[11]

Because Genesys likely could not obtain refunds from third party carriers, Genesys likely would suffer financial damage in the event that the Commission were to make a post-facto ruling that Genesys has been purchasing 8xx service as a carrier, rather than as the end-user, that Genesys retroactively must pay USF fees, and that no credit can be applied for payments made to other carriers. Genesys, therefore, has a substantial interest in the outcome of this proceeding.

II. Teleconference Service Should Be Classified As An Information Service And Should Not Be Regulated As A Telecommunications Service.

The Commission should find that teleconferencing is an information service, not a telecommunications service, and should reverse the Decision of the Administrator. Teleconference service providers should not be required to register with the Commission as

[10] *See* FCC Form 499-A (Feb. 2008), Instructions, Section III., C., 1., "Separating revenues from other contributors to the federal universal service support mechanisms (Block 3) from end-user and non-telecommunications revenues (Block 4) (carrier's carrier vs. end-user)," at page 19. The Commission also obligates the filer to take reasonable steps to verify that a carrier customer has registered to pay USF fees such as checking the website identified in the instructions. *Id.*

[11] Undetermined is whether the Commission would allow retroactive certification based upon a decision retroactively to require a customer to pay register as a carrier and retroactively pay USF fees. In addition, as InterCall notes, third party carriers face a one year limitation on backward revision of USF filings that would reduce their USF fee payments.

telecommunications carriers under Section 64.1195 of the Commission's Rules[12] or with the Universal Service Fund Administrator ("USAC"), or contribute directly to the Universal Service Fund ("USF") or other programs administered by USAC under Section 54.706 of the Commission's rules.[13]

The Decision holds that the list of entities that must contribute to the USF in Section 54.706 of the Commission's rules is "meant to provide examples and not be all inclusive."[14] Although the list of entities is not all inclusive, nevertheless the authority of the Administrator to require contributions is circumscribed by the language that precedes the list.[15] The Decision does not dispute that contributions may only be collected from "telecommunications carriers providing interstate telecommunications services."[16]

The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."[17] An "information service," on the other hand, is defined

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[12] 47 C.F.R. §64.1195. The requirement to register with the Commission applies to, "[a] telecommunications carrier that will provide interstate telecommunications service."

[13] 47 C.F.R. §54.706. Other fees are collected by USAC for Telecommunications Relay Service ("TRS"), North American Numbering Plan Administration ("NANPA") and Local Number Portability Administration ("LNPA"). These fees and the USF fee are referred to herein collectively as the USF fees for ease of reference.

[14] Decision at 2.

[15] *See* "Contributions,"47 C.F.R. §54.706. The list of examples of entities required to contribute is preceded by the following: "Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms. Interstate telecommunications include, but are not limited to:…."

[16] Decision at 1.

[17] The Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §153(43). The Act further defines a "telecommunications service" as "the offering of telecommunications for a fee

as, "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[18] The Commission's rules governing USF fees incorporate these same statutory definitions.[19]

Because the Act recognizes that an information service makes available information "via telecommunications," the use of telecommunications to provide an information service does not make the service into a telecommunications service. On the other hand, the use of information processing for the purpose of "management of a telecommunications service" does not turn a telecommunications service into an information service. Accordingly, the issue presented is whether teleconferencing service is an information service that uses telecommunications, or a telecommunications service that is merely being managed through the use of information processing. The Decision fails to adequately discuss or analyze this issue.

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directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §153(46). A "telecommunications carrier" is "any provider of telecommunications services [except aggregators]." 47 U.S.C. §153(44).

[18] 47 U.S.C. § 153(20).

[19] *See* Part 54, Universal Service, "Terms and Definitions," 47 C.F.R. §54.5, which contains definitions for "information service," "telecommunications," "telecommunications carrier," and "telecommunications service" that incorporate the definition of those terms provided in the Act.

A. Teleconference Service Meets The Criteria For An Information Service Set Forth In *Brand X.*

The Commission's decision to classify cable modem service as an information service was upheld by the Supreme Court in *Brand X* on several grounds that also are pertinent here.[20] Notwithstanding that the Ninth Circuit had decided that cable modem service was best classified as a telecommunications service, the Supreme Court held that the Commission retained the authority to decide the issue.[21] Given that the Commission was not bound by a prior decision of the Ninth Circuit with regard to the classification of cable modem service, the Commission certainly is not bound by the Administrator's Decision with respect to teleconference service.

The Supreme Court also held that the Commission properly considered the competitive environment for the service being classified. In the *Stevens Report* the Commission found that a competitive market exists for information services and, accordingly, information service providers should not be subjected to regulation as common carriers.[22] The Supreme Court upheld the Commission's decision to classify cable modem service as an information service based upon the competitive environment for broadband service.[23] Likewise, a competitive market exists for teleconference service and no need exists for common carrier regulation.

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[20] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 54 U.S. 967, 125 S.Ct. 2688 (2005)("*Brand X*").

[21] *Brand X*, 545 U.S. at 982. ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.")

[22] *Universal Service, Report to Congress*, 13 FCC Rcd 11501(1998) ("*Stevens Report*"), at para. 26.

[23] *Brand X*, 545 U.S. at 977 and 101. ("The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the 'fast-moving, competitive market' in which they were offered...The Commission concluded that 'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.' ")

Imposition of common carrier regulation on teleconference service likely would stifle investment and innovation.[24]

Although the offering of cable modem service includes a telecommunications component, the Court upheld the Commission's determination that the offering is properly classified as an information service. The Court rejected the contention that this construction of the Act would enable telephone companies to evade common carrier regulation by adding incidental features such as voice mail.[25] The Court also rejected the contention that cable modem service merely uses information processing to manage a telecommunications system or a telecommunications service.[26]

Likewise, teleconference service providers do not merely add an incidental feature to a telephone call or merely use information processing to manage a telecommunications system or service. Teleconference service providers transform the information received from each conference call participant and retransmit the transformed information to recipients chosen by

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[24] On the other hand, toll-free 8xx service is provided by a few major, incumbent, facilities-based carriers. Accordingly, it is appropriate to regulate the toll-free 8xx service as a telecommunications service and to treat teleconference service providers as end-users of the toll-free 8xx services. *E.g., Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone*, 22 FCC Rcd 17913 (2007), *recon.*, FCC 08-29 (Jan. 29, 2008)("*Qwest*"). In particular, it is important to ensure that toll-free 8xx service is made available on a non-discriminatory basis that does not favor vertically-integrated teleconference service offered by incumbent, facilities-based carriers.

[25] *Brand X*, 545 U.S. at 997-98. ("For instance, when a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability.")

[26] *Brand X*, 545 U.S. at 999, note 3. ("The dissent claims that access to DNS does not count as use of the information-processing capabilities of Internet service because DNS is 'scarcely more than routing information, which is expressly excluded from the definition of 'information service.'... But the definition of information service does not exclude 'routing information.' Instead, it excludes 'any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.' The dissent's argument therefore begs the question because it assumes that Internet service is a 'telecommunications system' or 'service' that DNS manages....")(citations omitted).

the moderator.[27] An information service offers "a capability for...transforming...information."[28] Because teleconference service providers offer the capability of transforming information, the service is properly classified as a information service.

The Commission has held those services that effect a "net protocol conversion" are information services.[29] In the *AT&T Video Conference Case* the Commission held that AT&T's video conference service is an information service because video conference service offers a net protocol conversion.[30] Audio teleconferencing also effects a net protocol conversion and therefore is an information service. In this respect, teleconference service is distinguishable from both the AT&T phone-to-phone IP telephony service and the AT&T calling card service.

The AT&T phone-to-phone IP telephony service converts a POTS phone call into an IP format and then reconverts the call back into a POTS call with no net change in the information sent and received and, as a result, the Commission classified the service as a telecommunications service.[31] The Commission also classified AT&T's calling card service as a telecommunications service because, "the advertising message provided to the calling party in this case is incidental to the underlying service offered to the cardholder and does not in any way alter the fundamental

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[27] Telecommunications service only transmits information "of the user's choosing, without change in form or content of the information as sent and received" and only transmits the information to "points specified by the user." 47 U.S.C. §153(44).
[28] 47 U.S.C. § 153(20).
[29] *Stevens Report*, 13 FCC Rcd 11501(1998) at paras. 50-52.
[30] *American Telephone and Telegraph Company, Comparably Efficient Interconnection Plan for Codec Conversion Service*, 3 FCC Rcd 4683 (July 29, 1988)("*AT&T Video Conference Case*"). The *AT&T Video Conference Case* uses the term "enhanced service," the predecessor term replaced in the 1996 amendments to the Act with the current term, "information service," but the terms have the same meaning according to *Brand X*, 545 U.S. at 977. While Genesys provides some video conference service, Genesys primarily provides teleconference service with web-linked features.
[31] *Petition for a Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (Apr. 21, 2004)("*AT&T's Phone-to-Phone IP Telephony*") at paras 6-7.

character of that telecommunications service."[32] Teleconference service, unlike the AT&T IP telephony and calling card services, alters the fundamental character of the separate calls and effects a net protocol conversion by transforming the participants' individual calls into an audio conference.

In addition, much of the teleconference service offered by Genesys is a web-linked service that offers teleconference participants the opportunity to present, share, jointly work on, store, and retrieve information. Genesys thus offers, "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."[33] The Supreme Court in *Brand X* held that the Commission properly considers the nature of the offering in classifying a service.[34] Genesys offers the capability to transform information as well as to store and retrieve it, among other capabilities, and as such Genesys offers an information service, notwithstanding that telecommunications is part of the offering.[35]

B. The Instructions To Form 499-A Provide No Basis For The Decision.

The Decision fails to offer a reasoned analysis of the regulatory classification of teleconference service under the Act, the rules and applicable decisions such as *Brand X.* Instead, the Decision is based solely upon a single sentence among the 37 pages of Instructions for Form 499-A that states, "Line 314 and Line 417 should include toll teleconferencing."[36] Even within this narrow context, the Decision is incorrect for several reasons.

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[32] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826 (Feb. 23, 2005)("*AT&T Calling Card Services*") at para. 16.
[33] 47 U.S.C. §153(20). As indicated in Note 2 above, the definitions of telecommunications and information services are discussed below.
[34] *Brand X*, 545 U.S. at 989-90. By contrast, the Commission found in *AT&T Calling Card Services* that AT&T merely offered ordinary telephone service and the advertising message was not even a part of the offering. *AT&T Calling Card Services* at para. 15.
[35] *Brand X*, 545 U.S. at 989-90; *Stevens Report*, 13 FCC Rcd 11501(1998) at para. 39.
[36] FCC Form 499-A (Feb. 2008)(hereafter "Form 499-A"), Instructions (hereafter "Instructions") at page 28.

The Instructions begin by identifying who must register and file Form 499-A.[37] The Instructions recite the definition of telecommunications contained in the Act and explicitly state that telecommunications consists of the transmission of information "without change in the form or content of the information as sent and received."[38] Teleconference service providers transform the information sent and received and therefore would take from this instruction that their service is not telecommunications and that they are not required to register and file.

A party that is not required to register and file according to Section II.A. of the Instructions ("Who Must File") would have no reason to review the remainder of the Instructions. In particular, a non-filer would have no reason to review the instruction for Lines 314 and 417 that is contained in Section III of the Instructions. Even if a party were held responsible for reading all 37 pages of the Instructions, notwithstanding that only Section II.A. addresses "Who Must File," the party would have no reason to conclude that the instruction relied upon in the Decision requires a teleconference service provider to register and pay USF fees.

The Instructions are for completing the Telecommunications Reporting Worksheet ("the Worksheet"). Therefore, the instruction relied upon in the Decision ("Line 314 and Line 417 should include toll teleconferencing"), must be read in conjunction with lines 314 and 417 of the Worksheet and the instruction has no independent meaning or significance other than as an instruction on completing those lines of the Worksheet.

Line 314 of the Worksheet is contained under Block 3, "Carrer's Carrier Revenue" where filers report, "Revenues from Service Provided For Resale as Telecommunications by Other Contributors to [the USF]." Carrier's carrier revenue is revenue from service offered for resale

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[37] Instructions, Section II.A., "Who Must File," at page 4.
[38] *Id.*

by other carriers.[39] Therefore, as to Line 314, the instruction relied upon in the Decision means that a carrier that offers toll teleconferencing service for resale by other carriers is to report the revenue from the sale of toll teleconference service to other carriers on Line 314.

Teleconference service providers such as Genesys do not purchase toll teleconference service from incumbent, facilities-based carriers. Rather, Genesys and other teleconference service providers purchase toll-free 8xx service that they use to offer teleconference service.[40] Since the instruction for Line 314 only relates to revenue from the sale of toll teleconference service to other carriers for the purpose of resale, the instruction for Line 314 is irrelevant to the issue of whether teleconference service providers must register and pay USF fees.

Line 417 of the Worksheet is contained under Block 4, "End-user and non-telecommunications revenue information." The Decision in effect asserts that teleconference service providers should have understood that they are required to register and pay USF fees on their revenue from providing teleconference service to end-users based upon the instruction that, "...Line 417 should include toll teleconferencing." However, teleconferencing companies primarily offer toll-free teleconferencing.[41] It is unreasonable to expect teleconferencing companies to conclude based upon an instruction referencing "toll teleconferencing" that they are required to register and pay USF fees where their primary service offering is toll-free

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[39] Instructions, Section III.C.1. ("carrier's carrier vs. end user") at pages 18-19. Carrier's carrier revenue is revenue on which the filer *does not* pay USF fees

[40] The Decision does *not* claim that teleconference service providers resell toll-free 8xx service. Teleconference service providers purchase toll-free 8xx service to enable their customer to access the teleconference service and not for resale to enable their customers to receive toll-free calls, as explained in the factual statement above. Consistent with those facts, the Commission held in *Qwest* that teleconference service providers purchase toll-free 8xx service as end-users. Line 311 of the Worksheet is used to report revenue from the sale of toll-free 8xx service to resellers and the Decision does not rely upon Line 311 or its instruction.

[41] Customers and participants can use toll service to access the teleconference service should they choose to do so, as discussed in the factual background section above.

teleconference service.[42] The reference to "toll teleconference service" would not be understood to encompass toll-free teleconference service since Form 499-A specifically refers to toll-free service where inclusion of toll-free service is intended.[43] A teleconference service provider reading Form 499-A and its Instructions would not infer that teleconference service providers primarily offering toll-free teleconferencing must register and pay USF fees.[44]

III. The Commission Should Interpret Its Rules In A Manner That Avoids Retroactive Rulemaking.

The Supreme Court held in *Bowen* that under the Administrative Procedures Act agencies may adopt rules only "of future effect."[45] The Commission has taken pains to ensure that its actions comply with the *Bowen* standard. The Commission has held that, "[b]y definition, a rule has legal consequences only for the future."[46] The Commission also has recognized that, "[i]mpermissible retroactivity involves, by definition, the application of a new rule to past occurrences."[47]

While *Bowen* stands as an absolute bar to retroactive *rulemaking,* the Supreme Court has distinguished *adjudication*, noting that administrative agencies, like courts, have the right to

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[42] *Brand X*, 545 U.S. at 989-90, upheld the Commission's determination to classify cable modem service based upon the nature of the service offering. In this case, the nature of the service offering primarily is toll-free teleconference service, not toll teleconference service.
[43] Lines 311 and 413 of the Worksheet refer to "customer toll-free (800/888 etc.) service" and the instruction for those lines refers to "subscriber toll-free 900, 'WATTS-like,' and similar switched service." Instructions, page 28.
[44] The situation here therefore is distinguishable from *AT&T Calling Card Services* where the Commission found that AT&T ignored substantial and explicit instructions with regard to calling card service. *AT&T Calling Card Services* at para. 32 and note 66.
[45] *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 216, 109 S.Ct. 468 (1988).
[46] *E.g., Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 23 CR 410, 15 FCC Rcd 25020 (Dec. 13, 2000), para. 37; *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1998* (Apr. 1, 2003), paras. 10-11.
[47] *E.g., In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures*, 19 FCC Rcd 2551 (Feb. 4, 2004), para. 22; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* 72 RR 2d 649, 8 FCC Rcd 3359 (April 30, 1993), paras. 118-121.

adjudicate disputes arising from past conduct.[48] However, *Bowen* further stands for the proposition that adjudication involves the application of rules to past conduct *where those rules were in effect at the time the conduct occurred.* In *Bowen* the Supreme Court rejected the position of the Secretary of Health and Human Services that, after promulgating a new rule, the Secretary could apply the rule retroactively under his authority to adjudicate adjustments to medicare reimbursements.[49]

Even where an agency is adjudicating an existing rule, the Supreme Court has held it inappropriate retroactively to apply a newly announced policy to past conduct where the issue presented is a new and novel one. The Supreme Court in *Chenery* held that administrative agencies should be more circumspect than courts in making new law through adjudications because administrative agencies, unlike courts, have the option of using rulemaking to make new law.[50] The Commission has recognized that when it announces a new policy through a decision in an adjudication, including a petition for a declaratory judgment, the Commission must consider whether it would be inequitable retroactively to apply the new policy.[51]

Teleconference service providers reasonably concluded based upon the Act, the rules and Form 499-A that they offer an information service, not a telecommunications service. Based

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[48] *Bowen,* 488 U.S. at 216. (The distinction between rulemaking and adjudication is "the entire dichotomy upon which the most significant portions of the APA are based.")
[49] *Bowen,* 488 U.S. at 220.
[50] *SEC v. Chenery*, 332 U.S. 194, 202, 67 S. Ct. 1575 (1947). ("Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct....")
[51] The Commission declined to apply retroactively its declaratory ruling in *AT&T's Phone-to-Phone IP Telephony* noting, "The D.C. Circuit has explained that whether to permit retroactive application of an agency decision 'boil[s] down to . . . a question grounded in notions of equity and fairness.' One relevant factor is whether there has been 'detrimental reliance' on prior pronouncements by the Commission." *Id.* at para. 22; *see also, Communications Vending v. Citizens Communications,* 17 FCC Rcd 24201 (Nov. 19, 2002), para. 33; *In re Gaco Communications,* 94 FCC2d 761 (June 21, 1983), para. 24.

upon their reasonable reading of applicable law, they did not certify that they are carriers when they purchased the toll-free 8xx service from other carriers. Teleconference service providers likely would be unable to obtain refunds of USF fees paid to the providers of toll-free 8xx service as those providers were obligated to collect USF fees from customers who did not certify that they are carriers.[52] The resulting double payment of USF fees would be inequitable, unfair, and contrary to the Act and the rules.

In *Vonage* the D.C Circuit recently held that the Commission could not suspend the carrier's carrier rule, even temporarily, as doing so would result in duplicative USF contributions.[53] The decision to apply retroactively the holding in *AT&T Calling Card Services* was based upon a finding that, "AT&T had no reasonable basis to expect to avoid these obligations merely by adding an unsolicited advertising message to its prepaid calling card service."[54] By contrast, teleconference service providers have a reasonable basis to believe that teleconference service falls within the statutory definition of an information service according to the court and Commission decisions. At a minimum the classification of teleconference service presents novel issues that should be considered only prospectively.

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[52] *See* note 10 of these Comments and accompanying text above.
[53] *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).
[54] *AT&T Calling Card Services* at para. 32, *affirmed*, *AT&T v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

IV. Conclusion

The Commission should find either that teleconference service is properly classified as an information service based on the record herein, or that a further rulemaking proceeding is necessary to resolve this issue prospectively.

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CERTIFICATE OF SERVICE

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