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FILED/ACCEPTED

JUN 30 2008

Federal Communications Commission
Office of the Secretary

June 30, 2008

By Hand

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **IDT Corporation and IDT Telecom - Request for Review of
Decision of the Universal Service Administrator, WC Docket
No. 96-45**

No. 06-122

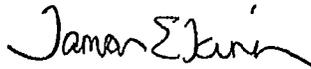
Dear Secretary Dortch:

On behalf of IDT Corporation and IDT Telecom ("IDT"), please find attached a redacted, public version and a confidential version of IDT's Request for Review of Decision of the Universal Service Administrator, WC Docket No. 96-45 ("Appeal").

IDT, by its counsel and pursuant to Sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457, 0.459, respectfully request confidential treatment of certain information provided in its Appeal because this information is competitively sensitive and its disclosure would have a negative competitive impact on IDT were it made publicly available. Accordingly, the attached Appeal has been marked "CONFIDENTIAL - NOT FOR PUBLIC INSPECTION." IDT provides justification for the confidential treatment of this information in Attachment 1 to this letter. IDT is also submitting, under separate cover, for inclusion in the Commission's public files, a redacted version of this Appeal. The redacted version is marked "REDACTED - FOR PUBLIC INSPECTION," with the confidential information redacted.

Should you have any questions please do not hesitate to contact us.

Respectfully submitted,



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Attachment 1

Request for Confidentiality

IDT Corporation and IDT Telecom (together, "IDT"), respectfully request confidential treatment of certain information provided in its Request for Review of Decision of the Universal Service Administrator, WC Docket No. 96-45 ("Appeal") because this information is competitively sensitive and its disclosure would have a negative competitive impact on IDT were it made publicly available. Such information would not ordinarily be made available to the public, and should be afforded confidential treatment under 47 C.F.R. §§0.457 and 0.459.

47 C.F.R. §0.457

Specific information in the Appeal is confidential and proprietary to IDT as "trade secrets and commercial or financial information" under Section 47 C.F.R. §0.457(d). Disclosure of such information to the public would risk revealing company-sensitive proprietary information in connection with IDT's ongoing business and operations.

47 C.F.R. §0.459

Specific information in the Appeal is also subject to protection under 47 C.F.R. §0.459, as demonstrated below.

Information for which confidential treatment is sought

IDT requests that specific information in the Appeal be treated on a confidential basis under Exemption 4 of the Freedom of Information Act. The information designated as confidential includes the sensitive USAC audit report (included as Exhibit 1) and information regarding IDT's USAC contribution amount and the degree to which such amount would change based on USAC's recommendations (marked within the Appeal between the signifiers "[BEGIN CONFIDENTIAL]" and "[END CONFIDENTIAL]"). This information is competitively sensitive information that IDT maintains as confidential and is not normally made available to the public. Release of the information would have a substantial negative impact on IDT since it would provide competitors with commercially sensitive information. The non-redacted version of IDT's filing is marked as "CONFIDENTIAL - NOT FOR PUBLIC INSPECTION." The redacted version of IDT's filing is marked as "REDACTED - FOR PUBLIC INSPECTION."

Commission proceeding in which the information was submitted

The information is being submitted in IDT's Request for Review of Decision of the Universal Service Administrator, WC Docket No. 96-45.

Degree to which the information in question is commercial or financial, or contains a trade secret or is privileged

The information designated as confidential includes the sensitive USAC audit report (included as Exhibit 1) and information regarding IDT's USF contribution amounts and the degree to which such amount would change based on USAC's recommendations. As noted above, the data is competitively sensitive information which is not normally released to the public as such release would have a substantial negative competitive impact on IDT.

Degree to which the information concerns a service that is subject to competition and manner in which disclosure of the information could result in substantial harm

The release of this confidential and proprietary information would cause IDT competitive harm by allowing its competitors to become aware of sensitive proprietary information regarding the operation of IDT's business at a level of detail not currently available to the public.

Measures taken by IDT to prevent unauthorized disclosure, and availability of the information to the public and extent of any previous disclosures of the information to third parties

IDT has treated and continues to treat the non-public information disclosed in this Appeal as confidential and has protected it from public disclosure to parties outside of the company. For instance, IDT identifies revenue it reports on its Form 499-A as confidential, by checking the applicable box on the Form 499-A.

Justification of the period during which IDT asserts that the material should not be available for public disclosure

IDT cannot determine at this time any date on which this information should not be considered confidential.

Other information IDT believes may be useful in assessing whether its request for confidentiality should be granted

Under applicable Commission decisions, the information in question should be withheld from public disclosure.

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

In the Matter of)
)
Request for Review of Decision of the)
Universal Service Administrator by)
) WC Docket No. 96-45
IDT Corporation)

**REQUEST FOR REVIEW OF DECISION
OF THE UNIVERSAL SERVICE ADMINISTRATOR BY
IDT CORPORATION AND IDT TELECOM**

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Dated: June 30, 2008

SUMMARY

Pursuant to Sections 54.719(c), 54.721 and 54.722 of the rules of the Federal Communications Commission ("FCC" or "Commission"), IDT Corporation and IDT Telecom (together, "IDT"), respectfully request that the Commission reverse audit decisions of the Universal Service Administrative Company ("USAC") regarding IDT's Universal Service Fund ("USF") contributions based on revenue reported on FCC Form 499-A for the filing years 2006 and 2007.

IDT appeals certain findings and recommendations in USAC's Final Audit Report for IDT Corporation and IDT Telecom, released April 30, 2008 ("USAC Audit Report"). Specifically, IDT appeals USAC's conclusions regarding: (1) IDT's reporting of prepaid calling card revenue, and (2) the reporting of reseller, or carrier's carrier revenue. As described in more detail below, the instructions to Form 499-A, under which USAC based its findings and recommendations, are plainly invalid because they conflict with the Commission's governing USF regulations. To the extent that the instructions are given precedence over existing FCC regulations, this substantive change was conducted without the requisite opportunity for public notice and comment as required by the Administrative Procedure Act. In addition, the Form 499-A instructions conflict with the Commission's USF regulations that require USF contributions only on end user telecommunications revenues. In contrast to the instructions to FCC Form 499-A regarding the definition of end user telecommunications revenue, the Commission's regulations support IDT's argument that revenues from the sale of prepaid calling cards to distributors and other wholesalers are not end user revenues and should not be included in the base used to compute USF contributions.

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Based upon the foregoing, and as is described herein, IDT respectfully requests that the Commission: (1) reverse findings 1 and 2 of the USAC Audit Report regarding IDT's prepaid calling card revenue and carrier's carrier revenue; and (2) reject USAC's decision to base IDT's USF contributions on revenues to non-end user distributors and retailers.

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recommendations regarding: (1) IDT's reporting of prepaid calling card revenue;³ and (2) the reporting of reseller, or carrier's carrier, revenue.⁴

This appeal is related to another USAC appeal IDT filed on April 10, 2006. That appeal is still pending before the FCC. As explained in the prior appeal, to the extent that the instructions to the Form 499-A regarding the calculation of end user telecommunications revenue are contrary to the Commission's binding regulations, the instructions are invalid and unenforceable. IDT reports its revenue in accordance with the FCC's Orders and regulations, rather than the contradictory and invalid Form 499-A instructions. The instructions, which were issued subsequent to adoption of the Commission's underlying regulations, are invalid because they created a substantive change in the underlying FCC regulations without the requisite opportunity for notice and comment as required by the Administrative Procedure Act ("APA").⁵ Moreover, even if the instructions are not subject to the APA's notice and comment requirements, they conflict with the Commission's USF regulations regarding the contribution of USF on only end user telecommunications revenues. As a result, the instructions are invalid and may not be used to alter IDT's USF obligations.

IDT submits the following information in support for its Request for Review.

II. BACKGROUND

A. Factual Background

IDT is a multinational telecommunications company that operates as a facilities-based and resold common carrier both domestically and internationally. The telecommunications services provided by IDT include prepaid calling cards, local and long-distance residential

3 See USAC Audit Report, Finding Number 1 at 7.

4 See USAC Audit Report, Finding Number 2 at 13-15.

5 5 U.S.C. § 551, et seq.

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services, prepaid wireless and wholesale carrier services. IDT was notified, by letter dated June 5, 2007, of USAC's intention to audit IDT's Form 499-A for filing years 2006 and 2007. IDT responded to USAC's initial requests on July 6, 2007. USAC staff conducted its on-site audit at IDT's headquarters during the week of July 16, 2007. USAC provided IDT with a draft report of its findings. IDT responded to the draft report on February 21, 2008. After approval of the report by USAC Board of Directors, the final audit report was released to IDT on May 30, 2008.

The USAC Audit Report contains six separate findings, each discussing a specific IDT product or service or line item from the Form 499-A. While IDT does not directly object to the majority of these findings, IDT objects to the findings regarding IDT's reporting of prepaid calling cards and IDT's carrier's carrier revenue. In both of these instances, USAC erred by attempting to reclassify wholesale revenue as end user revenue. IDT believes that both products do not constitute sales to "end users" that are subject to USF contributions under the Commission's duly enacted and legally-enforceable regulations.

IDT primarily sells a variety of prepaid calling cards. The vast majority of these sales are completed through a network of distributors and resellers before being purchased by the ultimate end user consumer. Typically, the card is sold by IDT to a distributor for a wholesale price (*i.e.*, a price less than that listed on the face of the card). That distributor, in turn, may sell the card to one or more "sub-distributors" before ultimately selling the cards to a retail store, typically an independent ethnic market, but also to large drug stores and supermarkets. These stores ultimately set the price of the cards (which are often, but not always, at the stated face value of the card) and sell the cards to the public.⁶

⁶ IDT also sells a limited number of minute-denominated cards. Whether the cards are minute-denominated or have a stated face value does not alter the analysis of the treatment of the sale of these cards to distributors.

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IDT's carrier's carrier service is actually two distinct products. The first is a wholesale switched minutes product whereby carriers can purchase minutes on a country-by-country basis. Resellers who lack their own direct connections to certain countries and international carriers who desire least cost routing through the U.S. may purchase these minutes to deliver the calls placed by their customers. In addition, minutes for domestic termination of international calls (typically, a "settlement-like" arrangement) are purchased by foreign carriers wishing to terminate traffic in the U.S. The second product is wholesale dedicated capacity. This service is typically purchased by domestic or foreign carriers who have their own switching equipment but need transmission capacity to send or receive calls or other telecommunications placed by their customers.

B. Legal Background

In its *First Report and Order*, the Commission adopted regulations regarding the assessment of, and contribution to, the USF.⁷ In the *First Report and Order*, the Commission ruled that a carrier's USF contribution shall be assessed on end user telecommunications revenues only.⁸ The Commission concluded that:

[USF] contributions will be based on revenues derived from end users for telecommunications and telecommunications service, or "retail revenues"...End user revenues would also include revenues derived from other carriers when such carriers utilize telecommunications services for their own internal uses because such carriers would be end users for those services. This methodology is both competitively neutral and relatively easy to administer.⁹

The Commission also noted that "[b]asing contributions on end user telecommunications revenues eliminates this potential economic distortion because contributions will be assessed at

7 See In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) ("First Report and Order").

8 *Id.* at ¶ 843.

9 *Id.* at ¶ 844 (emphasis added).

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the end user level, not at [both] the wholesale and end user level... regardless of how the services are provided, their contributions will be assessed *only on revenue derived from end users.*¹⁰ Similarly, the Commission's USF regulations provide that "every telecommunications carrier that provides interstate telecommunications services...shall contribute" to USF on the basis of its "interstate and international *end user* telecommunications revenues."¹¹ Such a focus on limiting USF contributions to end user revenues was essential to preventing anti-competitive effects of having USF assessed more than once on the same ultimate sale of telecommunications services.¹²

Nowhere in the regulations that govern USF or in the underlying orders is the term "end user" defined.¹³ As a result, the term "end user" should be afforded its ordinary and customary meaning. Newton's Telecom Dictionary defines end user as "[a]ny individual, association, corporation, government agency, or entity other than an IXC that subscribes to interstate service provided by an Exchange Carrier and does not resell it to others."¹⁴ Such a definition is also consistent with the common understanding of an end user in ordinary parlance.¹⁵

10 *Id.* at ¶ 850.

11 47 C.F.R. § 54.706(a) (emphasis added).

12 First Report and Order at 846.

13 See 47 C.F.R. § 54.1 et seq.

14 Newton's Telecom Dictionary (20th Ed.) at 301.

15 For example, Wikipedia defines "end user" as "the person who uses a product. The end-user or consumer may differ from the customer, who might buy the product, but doesn't necessarily use it; for example, a zookeeper, the customer, might purchase elephant food for an end-user: the elephant. In contracts, the term 'end-user' becomes a legal construct referring to a non-reseller. This definition characterises the store the zookeeper bought food from as a non-end-user, but the zookeeper as an end-user." See Wikipedia, definition of end-user, available at <http://en.wikipedia.org/wiki/End-user> (June 13, 2008). Additionally, Webopedia, an online encyclopedia dedicated to computer technology, defines "end user" as "the individual who uses the product after it has been fully developed and marketed." See Webopedia, definition of end-user, available at http://www.webopedia.com/TERM/E/end_user.html (June 13, 2008). In more general parlance, Answers.com defines "end user" as "the ultimate consumer of a product, especially the one for whom the product has been designed." See Answers.com, definition of end user, available at <http://www.answers.com/topic/end-user?cat=technology> (June 13, 2008).

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Furthermore, the Commission has identified the limited examples where sales of telecommunications services to non-end users would be included in the universal service support contribution base, even though these sales are not sales to end users.¹⁶ Such reseller revenues that are treated as end user revenues include revenues from (i) sales to resellers that claim exemption from universal service contribution requirements under the *de minimis* exception, (ii) sales to system integrators that receive less than five percent of their revenue from telecommunications, and (iii) sales to broadcasters.¹⁷ These specific examples are identified in the *First Report and Order*, and are mirrored in the Form 499-A instructions.¹⁸ By contrast, the reporting of sales to distributors or retailers, rather than actual consumers, is not identified as such an exception either in the rules or the *First Report and Order*. Thus, sales of prepaid calling cards should be treated as “end user” sales only when they are truly sales to “end users” under the ordinary and customary meaning.

Yet, in the FCC Form 499-A, there is a specific line for prepaid calling card revenue that includes “card sales to customers and non-carrier distributors.”¹⁹ The instructions for this line provide that such revenue includes “revenues from pre-paid calling cards provided either to customers or to retail establishments” and that “[a]ll prepaid card revenues are classified as end

16 See First Report and Order at ¶¶ 281, 284, 298.

17 *Id.*

18 2008 Form 499-A, Instructions at 5-8, 19. See also 2007 Form 499-A, Instructions at 5-8, 19. The original reporting form, the Form 457, also included this language.

19 2008 Form 499-A at Line 411. See also 2007 FCC Form 499-A at Line 411. By contrast, the original Form 457 which was attached to the First Report and Order, did not include this language, rather, it only included a statement that calling card sales should include sales to users or retail establishments.

user revenues.²⁰ The treatment of the sale of a calling card to distributors or retail sales outlets thus became, for the first time with the creation of the reporting Forms (either the original Form 457 or the Form 499-A), synonymous with the sale of a card to a consumer who actually uses the telecommunications service.

III. ARGUMENT

A. USAC's Attempt to Assess USF Contributions on the Basis of Wholesale Revenue Violates the Administrative Procedure Act Because the Form 499-A's Instructions Were Not Promulgated With Proper Notice and Comment.

The instructions to the Form 499-A, originally included as an attachment to a Commission Order,²¹ differ so significantly from the Commission's underlying precedent and rules that it constitutes a separate substantive ruling distinct from the *First Report and Order*. Since the instructions implement, interpret, and prescribe the Commission's policy with respect to the definition of end user revenue and also set forth the rights, duties, and obligations of contributors to the universal service support mechanisms, these instructions operate as a substantive rule under the APA.²² Indeed, during the audit and in the USAC Audit Report, the auditors refer primarily to the instructions on the Form as the basis for their decisions during the audit.²³ Such reliance indicates that USAC uses these instructions as substantive rules rather than as merely interpretative clarifications of the Commission's regulations. IDT maintains its

20 2000 FCC Form, Instructions at 17. See also 2007 Form 499-A, Instructions at 27, which includes, "revenues from pre-paid calling cards provided either to customers, distributors or to retail establishments."

21 See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, Report and Order and Second Order on Reconsideration, 12 FCC Red. 18400, 18498 (1997) ("NECA Order"). The original instructions were attached as Appendix A to the NECA Order.

22 See 5 U.S.C. §§ 551(4), 552(a)(1)(D); GMC v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

23 See, e.g., USAC Audit Report, at 4, 9.

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previously raised concerns that USAC is attempting to apply invalid Form 499-A instructions in direct contravention of FCC precedent.²⁴

As a result, the Commission was required to provide appropriate notice to the public and afford any interested persons an opportunity to comment before the instructions were promulgated and utilized as binding substantive rules.²⁵ By merely releasing the Form 499-A without going through the rigors of the APA, the Commission failed to put all aggrieved parties on reasonable notice of the instructions' content. Rather, the Commission merely attached the original draft of the instructions to a legally and conceptually distinct rulemaking proposal without any substantive discussion of the instructions and without inviting public comment on the instructions.²⁶ Were these instructions meant to merely interpret the underlying Order, such notice and comment would not be required. Where, as here, the instructions create substantive change, they must have been subject to the notice and comment procedures as set forth in the APA, in order to be valid and binding upon contributors to USF. Plainly put, the instructions were never subjected to the statutorily required procedures and are therefore not binding. IDT firmly objects to any requirement to change its reporting of revenues based solely on the illegally promulgated instructions.

After publication of these instructions without the appropriate notice and comment, the Commission declined to address the responsive comments in later proceedings.²⁷ The

24 See Request for Review of Decision of the Universal Service Administrator by IDT Corporation, USAC Audit Report No. CR2005CP005, filed on April 10, 2006.

25 5 U.S.C. § 553 (b)-(c). The only opportunity to comment ever provided on the instructions was for the limited purpose of addressing the Form's compliance with the Paperwork Reduction Act. See NECA Order, Appendix A at 18498.

26 See NECA Order at ¶ 80.

27 In re 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

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Commission has acknowledged the fact that it failed to raise the end user/reseller issue in the underlying Notice of Proposed Rulemaking.²⁸

It is axiomatic that federal regulations cannot be changed without the proper notice and comment required under the APA.²⁹ The absence of the appropriate notice and comment procedures in this instance renders the instructions to Form 499-A invalid. As discussed above, the Commission established in the *First Report and Order* that only sales to end users would be subject to USF. Yet, when the instructions to the Form 499-A were published, there was a different substantive rule established which is in direct conflict with the governing federal USF regulations. There can be no question that the change in the meaning of the term end user for the purposes of sales of prepaid calling cards substantively altered the way IDT would be required to report its services on the Form 499-A, and consequently, contribute to USF. As such, the instructions are unlawful and unenforceable for want of notice and comment.

Such a change in definition substantially impacts IDT's USF contribution amounts for years 2006 and 2007. USAC's improper interpretation results in the reallocation of [**BEGIN CONFIDENTIAL END CONFIDENTIAL**] for a total of [**BEGIN CONFIDENTIAL END CONFIDENTIAL**] from Line 310 to 411. Such a reallocation based on a misguided interpretation of "end user" results in a substantive change that has a significant impact on IDT.

In any event, it is clear from reading the governing USF regulations (aside from the invalid Form 499-A instructions) that revenue from calling card sales to distributors and resellers

Mechanisms, CC Docket No. 98-171, Report and Order, 14 FCC Rcd. 16602 (1999) at ¶26. ("July 1999 Order").

28 See July 1999 Order at ¶ 26. The FCC observed that certain issues, including the end user/ reseller issue was not, "highlighted in the Notice because [its] primary goal in [the] proceeding was to facilitate the consolidation of the various contributor reporting requirements into one worksheet, not to revisit each underlying decision."

29 5 U.S.C. § 551-553(c).

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is not end user revenue, and thus may not be included in a carrier's USF contribution base. Rather, this revenue is more properly categorized as wholesale revenue and thus should not serve as the basis for USF contribution. As virtually all of IDT's prepaid calling cards are sold through a distributor rather than directly to the public, IDT's calling card sales are almost exclusively wholesale, not retail, revenue.³⁰ The Commission must therefore reverse USAC's finding in the USAC Audit Report regarding IDT's calling card revenue. As a consequence, IDT's prepaid calling card revenue should continue to be reported in Line 310 of the Form 499-A, thereby reducing the additional contribution for the filing years 2006 and 2007.

Similarly, USAC's conclusions with regards to IDT's carrier wholesale business are also flawed. IDT's carrier's carrier revenue includes the sales of either wholesale switched minutes or dedicated circuits. These sales are made exclusively to other carriers, many of them licensed, either domestically or internationally. In the same way that sales to prepaid calling card distributors are not sales to end users, sales to other carriers do not meet the ordinary and common understanding of a sale to an end user. When a reseller purchases either raw minutes on IDT's network or dedicated circuits, the reseller is using that service to provide its own services and to sell them to the ultimate consumer, rather than actually using the services to place or receive calls, transmit data, or otherwise engage in telecommunications. Thus, the attempts to assess USF on IDT's carrier's carrier revenue rely on the same invalid Form 499-A instructions

30 As noted in the USAC Audit Report, IDT has only limited direct sales of calling cards to end users via the Internet. Only this limited amount of revenue qualifies as true "end user" sales. IDT has previously set forth its business relationship with Union Telecard Alliance ("UTA") as an example of the procedure through which prepaid calling cards are ultimately sold to "end users." The cards move through multiple layers going first to a large distributor, UTA in this case, then to smaller regional distributors, and finally to local outlets that directly sell the cards to the end user. Applying the term "end user" to UTA has no basis in commonsense since that company is simply the first stop in a three or four level distribution train until the card reaches the actual "end user." See USAC Audit Report, p. 6.

that effectively alter the definition of end user in a material and substantive (and thus unlawful) manner. As a consequence, USAC's *finding regarding the reclassification of this carrier's* carrier revenue should be reversed for filing years 2006 and 2007.

B. Even if the Instructions to Form 499-A are Deemed Interpretative Rules and Thus Immune from the APA's Notice and Comment Requirements, the Instructions are Still Invalid Because They Conflict with the Commission's USF Regulations That Impose USF Contributions Only On End User Revenues.

If the instructions to Form 499-A are deemed to be merely "interpretative" rules rather than "substantive" rules, in which case notice and comment are not required, the Form 499-A's instructions are still invalid because they conflict with the Commission's regulations providing that USF contributions will be assessed on the basis of end user revenues.³¹ In fact, The FCC Form 499-A essentially admits that it is only interpretative, and thus without binding force. The instructions to Form 499-A contains various disclaimers that the Commission's regulations and orders take precedence over the Form. For example, the instructions state that "[t]hese instructions contain an explanation of which carriers must contribute to particular mechanisms... but filers should consult the specific rules that govern contributions for each of the mechanisms."³² The instructions further state that "[f]ilers should consult the Commission's rules and orders to determine whether they must contribute to one or more of the mechanisms."³³ Compared to the Commission's rules, the instructions to FCC Form 499-A expand the definition of end user revenue. Such disclaimers are an admission that instructions are subordinate and subject to the Commission's regulations and precedent.

31 47 C.F.R. § 54.706(b).

32 2007 Form 499-A, Instructions at 4.

33 *Id.* at 30, n.38.

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In the *First Report and Order*, and in its regulations governing USF contained in Part 54 of its Rules,³⁴ the Commission did not specifically define "end user," thus relying on the ordinary and customary meaning. However, as outlined above, it is clear from the *First Report and Order* that the Commission made a distinct delineation between end user revenues and wholesaler revenue in the contribution methodology for the USF. Despite the clear and unambiguous language in the governing regulation regarding the term "end user", the instructions to Form 499-A unlawfully redefine the USF contribution base to include revenue from any customer who is not a contributor to the USF, including someone who is, by common parlance, a reseller or distributor.³⁵ The instruction's definition of "end user" is at odds with the common understanding of the definition of end user. Applying the common meaning of "end user" to IDT's prepaid calling card and carrier's carrier sales results in a determination that all such sales made to distributors or resellers are not made to "end users."

An agency is entitled to deference of its interpretation of an ambiguous regulation,³⁶ but is not entitled to deference if the regulation is unambiguous.³⁷ Instead, the plain reading of the regulation will prevail. There is nothing ambiguous about the definition of "end user," as demonstrated by the Commission's consideration in the *First Report and Order* that USF contributions should not be based on total sales, but rather, based only on end user sales. Indeed,

34 47 C.F.R. § 54.100, et seq.

35 2007 Form 499-A, Instructions at 19. Originally, this instruction appeared in the predecessor Form 457. See, FCC Public Notice (rel. Aug. 4, 1997), 62 Fed. Reg. 43165 (Aug. 12, 1997) (announcing OMB approval of the Form).

36 *Auer v. Robbins*, 519 U.S. 452, 461 (1997); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

37 *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). The Supreme Court held that Auer deference is warranted only when the language of the regulation is ambiguous, otherwise to defer to the agency's interpretation would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation. See id.

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in so finding, the Commission consciously and directly considered the definition of end user to be so unambiguous that nowhere in either the *First Report and Order* or in subsequent decisions did the Commission ever specifically address the definition of "end user."

This failure to define "end user" is understandable, as the meaning cannot reasonably be understood to refer to anything other than the actual final purchaser and consumer of a telecommunications service. In fact, within the same Form 499-A instructions, prepaid calling providers are instructed to report revenue based on the amount actually paid by the consumer (presumed to be the face value of the card), and not, by contrast, the price paid by the distributor or the retail outlet (priced at a wholesale discount).³⁸ This conflict within the same instructions indicates the absurdity of defining a distributor as an end user for USF reporting and contribution purposes. If the distributor was truly the end user, then the reporting would be done based on the revenue received from the distributor, not the ultimate price paid by the consumer. This anomaly can be easily rectified by simply applying the proper, common sense definition of end user as contemplated in the Commission's regulations and the underlying Orders rather than the instructions from the Form 499-A.

In contrast to the instructions to FCC Form 499-A, the Commission's regulations support the argument that revenues from the sale of prepaid calling cards to distributors and other wholesalers are not end user revenues and should not be included in the base used to compute universal service contributions. Therefore, USAC's Audit Report with respect to IDT's wholesale revenue, both prepaid calling card and other carrier's carrier revenue, should be

38 2007 Form 499-A, Instructions at 27. The instructions for Line 411 state that "[g]ross billed revenues should represent the amounts actually paid by customers and not the amounts paid by distributors or retailers...."

reversed and the unlawfully reclassified revenue returned to the appropriate wholesale lines of IDT's Form 499-A.

- C. IDT does not sell products to end users and is thus not a reseller but rather a wholesaler of these products. To hold otherwise would result in double contribution of revenues.**

USAC erred in its finding that IDT miscalculated its reseller's revenues. IDT operates as a wholesaler selling a variety of products to distributors, other carriers and VoIP providers. None of these customers are considered the ultimate end user of the product. These intermediate customers (and perhaps their customers) then provide services and products to the ultimate end user. It is the final seller to the end user that is liable for USF contributions on the revenues received.

USAC improperly shifted IDT's intermediate customers' USF obligations to IDT. If these customers fail to contribute to USF based on their end user revenue, it is not IDT's responsibility to pay for these end users, but rather the intermediate customer's responsibility. The Commission has made clear that it is the reseller's obligation to contribute to the USF directly since it is the reseller that receives revenue from the end user. To hold otherwise would be to give USAC the ability to recover the funds both from IDT and the reseller. The FCC has already ruled that USF fees should be assessed on end users of telecommunications revenues as a means to prevent such double contribution on revenue.³⁹

IV. CONCLUSION

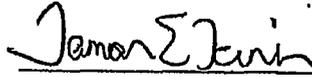
In light of the foregoing reasons, IDT respectfully requests that the Commission reverse USAC's findings 1 and 2 of the USAC Audit Report regarding wholesale prepaid calling card

³⁹ First Report and Order at 846.

**REDACTED
FOR PUBLIC INSPECTION**

revenue, carrier's carrier revenue and USF contributions based on end user revenues and its recommendation that IDT re-file its 2006 and 2007 Form 499-A.

Respectfully submitted,



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Counsel for IDT CORPORATION and IDT Telecom, Inc.

Dated: June 30, 2008

**REDACTED
FOR PUBLIC INSPECTION**

EXHIBIT 1

USAC AUDIT REPORT

CONFIDENTIAL & PROPRIETARY

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

In the Matter of)
Request for Review of Decision of the)
Universal Service Administrator by)
IDT Corporation and IDT Telecom, Inc.) WC Docket No. 96-45

AFFIDAVIT OF MARCELO FISCHER

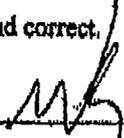
Marcelo Fischer, being first duly sworn according to law, does hereby depose and state as follows:

1. I, Marcelo Fischer have served as IDT Telecom's Chief Financial Officer since April 2007. I served as IDT Corporation's Chief Financial Officer and Treasurer from June 2006 until April 2007. I served as the IDT Corporation's Controller from May 2001 until June 2006 and as Chief Accounting Officer from December 2001 until June 2006. Prior to joining IDT, I was the Corporate Controller of Viatel, Inc. from 1999 until 2001. From 1998 through 1999, I was the Controller of the Consumer International Division of Revlon, Inc. From 1991 through 1998, I held various accounting and finance positions at Colgate-Palmolive Corporation. I am a Certified Public Accountant and received an M.B.A. degree in Finance and Accounting from New York University Stern School of Business and a B.A. in Economics from the University of Maryland.
2. I am responsible for overseeing all financial aspects of IDT, including the sale of IDT's telecommunications services.
3. IDT is a multinational telecommunications company that operates as a facilities-based and resold common carrier both domestically and internationally.

4. The telecommunications services provided by IDT include prepaid and rechargeable calling cards, local and long-distance residential services, prepaid wireless and wholesale carrier services.
5. IDT primarily sells a variety of prepaid calling cards. Typically, the card is sold by IDT to a distributor for a wholesale price (i.e., a price less than that listed on the face of the card). That distributor, in turn, may sell the card to one or more "sub-distributors" before ultimately selling the cards to a retail store, typically an independent ethnic market, but also to large drug stores and supermarkets. These stores ultimately set the price of the cards (which are often, but not always, at the stated face value of the card) and sell the cards to the public.
6. IDT's wholesale carrier service is actually two distinct products: a wholesale switched minutes product and wholesale dedicated capacity.
7. The first product, wholesale switched minutes, allows carriers to purchase minutes on a country-by-country basis. Resellers who lack their own direct connections to certain countries and international carriers who desire least cost routing through the U.S. may purchase these minutes to deliver the calls placed by their customers. In addition, minutes for domestic termination of international calls (typically, a "settlement-like" arrangement) are purchased by foreign carriers wishing to terminate traffic in the U.S.
8. The second product is wholesale dedicated capacity. This service is typically purchased by domestic or foreign carriers who have their own switching equipment but need transmission capacity to send or receive calls or other telecommunications placed by their customers.

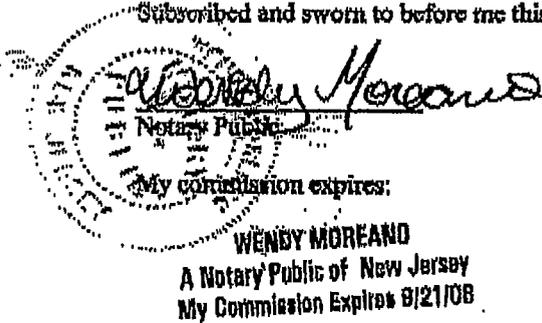
9. Both wholesale carrier products are sold exclusively to other carriers, many of them licensed, either domestically or internationally.
10. IDT operates as a wholesaler selling a variety of products to distributors, other carriers and VoIP providers. None of these customers are considered the ultimate end user of the product. These intermediate customers (and perhaps their customers) then provide services and products to the ultimate end user.

I affirm under penalty of perjury that the foregoing is true and correct.



Marcelo Fischer

Subscribed and sworn to before me this 27 day of June, 2008.



**REDACTED
FOR PUBLIC INSPECTION**

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2008, a copy of the foregoing REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY IDT CORPORATION AND IDT TELECOM, was served via Overnight Mail to the following:

Universal Service Administrative Company
Internal Audit Division
2000 L Street, Suite 200
Washington, D.C. 20036



Katie B. Besha