

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

In the Matter of)	
The Ad Hoc Coalition of International)	
Telecommunications Companies' Petition)	WC Docket No. 06-122
For Declaratory Ruling Regarding)	
Universal Service Fund Contributions)	

**REPLY COMMENTS OF THE AD HOC COALITION OF INTERNATIONAL
TELECOMMUNICATIONS COMPANIES**

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I. Introduction

On February 12, 2009, the Ad Hoc Coalition of International Telecommunications Companies (“Coalition”) filed a Petition for Declaratory Ruling (“Petition”) with the Federal Communications Commission (“FCC” or “Commission”) requesting declarations to rectify certain inequities in the Universal Service Administrative Company’s (“USAC”) administration of the Universal Service Fund (“USF”). This Petition is the first of several USF reform efforts planned by the Coalition. The Coalition is a grassroots organization comprised of both U.S. and non-U.S. corporations, including prepaid calling card providers, international transport carriers, and a broad spectrum of entities engaged in the provision of wholesale communications services.¹ It is a committed voice for telecommunications regulatory reform. The Coalition supports a sustainable, effective USF that meets the goals of assuring affordable telephone service for all Americans. However, the Coalition also believes that the Fund should be fair and non-discriminatory to all participants, as Congress envisioned.

Several parties filed comments supporting the Coalition’s Petition for Declaratory Ruling. To facilitate the development of a complete record upon which to grant the relief requested in the Petition, the Coalition hereby submits its Reply Comments.

A. Comments Unanimously Support Coalition

As an initial matter, the Coalition notes that all comments filed in response to the Petition were supportive. No adverse comments were filed. This unanimous support reflects the international telecommunications industry’s consensus regarding each of the specific

¹ www.telecomcoalition.com

inequities identified in the Petition. This unanimous support also reflects the industry's growing impatience with the status quo of unfairness and inherent uncertainty engendered by USAC's administration of the USF program. The Coalition urges the Commission to issue rulings consistent with the relief requested in its Petition, as clarified herein.

B. USAC Unlawfully Treats Distributor/Reseller Revenue as "End-User" Retail Revenue

In its Petition, the Coalition explained that USAC's instructions currently require prepaid calling card providers to report revenue from distributors, resellers and other "non-consumers" as retail "end-user" prepaid calling card revenue. This, despite the fact the direct purchasers would reasonably be expected to be reselling and not, themselves, consuming the telecommunications. Commenters suggested that such forced re-classification of "wholesale" revenue as "end-user" retail revenue, which subjects the revenue to USF contributions, is both unreasonable and unlawful. The Coalition agrees.

Ambess Enterprises, Inc. ("Ambess") notes that USAC unreasonably classifies carriers that "neither use nor consume the finished product or service" as "end users."² In order to address this issue, Ambess requests adoption of a more appropriate definition for "end-user" services.³ IDT Telecom, Inc. ("IDT") argues the "term end-user should be afforded its ordinary and customary meaning."⁴ The Coalition endorses these commenters.

² Ambess Comments at 7.

³ *Id.*

⁴ IDT Comments at 4.

IDT submits that USAC's instructions conflict with FCC regulations which allow USF assessments *exclusively* on the basis of a telecommunications provider's "end-user" revenues.⁵ IDT maintains, and the Coalition concurs, that USAC's instructions operate as a substantive rule. No matter how the issue is dissected, under the current USAC administrative scheme, the determination between carrier's carrier (i.e., wholesale) or "end-user" (i.e., retail) revenue unquestionably results in a material difference in a 499 filer's contribution obligation. The materiality and substance could not be any clearer – either the revenue gives rise to a contribution obligation or it does not.

IDT argues that the relevant USAC instructions cannot carry the weight of enforceable regulations, as they were issued without the appropriate notice and comment, in violation of the Administrative Procedures Act ("APA").⁶ IDT further argues that even if USAC's instructions were validly promulgated, they nonetheless conflict with FCC regulations which plainly authorize assessment of contributions on end-user revenues only.⁷ IDT reminds the Commission that USAC's instructions are non-binding, and in any event, are subordinate to FCC regulations.⁸ And the Coalition and IDT have demonstrated both in this proceeding and elsewhere⁹ that USAC's application of the term "end-user" to distributors, resellers, and other "non-consumers" of prepaid calling card services directly contradict the FCC's regulations. Ipso facto, the current instructions result in unlawful outcomes. The Commission is therefore

⁵ IDT Comments at 4-5.

⁶ *Id.* at 5-6.

⁷ IDT Comments at 8.

⁸ *Id.*

⁹ *Id.* at 2; See also *Request for Review of Decision of Universal Service Administrator by IDT Corporation and IDT Telecom*, WC Docket 96-45, filed June 30, 2008 ("IDT Petition")

bound to declare the current instructions invalid and unenforceable. The Coalition supports a declaration that is wholly consistent with IDT's position.

C. USAC's "Face Value" Revenue Reporting Requirement Is Unlawful

Several commenters support the Coalition's request for a declaration that USAC cannot require pre-paid calling card "(PPCC)" providers to report anything over or different from "actual receipts." USAC's current instructions require PPCCs to report the "face value" of cards sold.¹⁰ The Coalition argued that current USAC instructions are inequitable and unlawfully discriminate against PPCCs, in clear violation of Congress's mandate that "[a]ll providers of telecommunications services should make an **equitable and nondiscriminatory contribution** to the preservation and advancement of universal service."¹¹

Ambess supports the Coalition's efforts to invalidate USAC's instructions on this point.¹² Ambess explains that USAC does not require this reporting practice of any other 499-A filer.¹³ Further, Ambess correctly criticizes USAC's failure to "recognize the marketplace reality" of the prepaid market – the wholesale-distributor model.¹⁴ STiPrepaid, LLC ("StiPrepaid") agrees that the current system is inequitable and discriminatory and reminds the

¹⁰ The Coalition's position on actual receipts revenue reporting being the only fair, equitable, and non-discriminatory basis for determining the contributions of PPCCs (as opposed to "face value" of cards) was intended to guide the Commission prospectively. Contrary to IDT's interpretation, the Coalition's argument was not a red herring. As clarified herein, the Coalition supports IDT's comments.

¹¹ 47 U.S.C. Section 254(d).

¹² Ambess Comments at 3-4.

¹³ *Id.* at 19.

¹⁴ *Id.* at 4, 17.

FCC that in many cases, retail purchasers may not even pay face value for prepaid cards.¹⁵ iBasis, Inc. (“iBasis”) reminds the FCC that USF contributions have been historically based on collected end-user revenues and that the rules allow all other carriers to deduct uncollected revenues.¹⁶ iBasis also argues that this system increases the costs of prepaid cards offered to lower-income individuals, the common purchasers of the cards.¹⁷ The Coalition concurs with these commenters.

IDT argues that the FCC’s resolution of the issues set forth in its Petition for Review of USAC’s decision would negate the need to rectify this inequitable reporting disparity.¹⁸ The Coalition reiterates its support of IDT’s arguments. The Coalition agrees that the Form 499 instructions requiring PPCCs to report distributor and other non-consumer revenue as retail are invalid and ineffective because in promulgating the offensive instructions, USAC effected a substantive change to the Commission’s rules without following the procedural prerequisites of the APA.¹⁹ The Coalition also supports IDT’s contention that PPCC revenue from distributors and other resellers which reasonably should be expected to contribute is more appropriately classified as “carrier’s carrier” (wholesale) as opposed to “end-user” (retail). In other words, IDT’s analysis is entirely correct as applied to past service offerings, and the Coalition endorses IDT’s position. The goal of the Coalition, prospectively, is to encourage the FCC to eliminate all inequitable and discriminatory instructions.

¹⁵ STiPrepaid Comments at 2.

¹⁶ iBasis Comments at 2-3.

¹⁷ *Id.* at 4-5.

¹⁸ IDT Comments at 11.

¹⁹ *Id.* at 5-6.

D. Current USAC Instructions and Application of FCC Rules Prejudice *De Minimis* Contributors

In its Petition, the Coalition detailed a common marketplace experience of many international telecommunications companies who qualify for the *de minimis* exemption due to the application of another reporting exception, the so-called Limited International Revenue Exemption or “LIRE.” Companies fitting or who are likely to fit this fact pattern often find themselves facing a Catch-22 when establishing wholesale supplier contractual relationships. Wholesale suppliers, wary of the implications of the carrier’s carrier rule, will frequently interpret USAC instructions far too literally and conservatively. This often results in the scenarios discussed in the Coalition’s Petition, with *de minimis* companies being forced to choose between either accepting inequitable, excessive and disproportionate pass-through surcharges or engaging in questionable Form 499 reporting practices.

Ambess agrees with the Coalition’s assessment of the marketplace consequences of ill-conceived USAC instructions, observing that resellers are “at the mercy” of their wholesale suppliers because their suppliers decide whether and how to pass through USF fees based on *their* interpretations.²⁰ Ambess also argues that this system places resellers at a competitive disadvantage by allowing wholesalers to take advantage of the LIRE with respect to their reporting, without any controls to ensure the fair and equitable pass-through of savings to their *de minimis* reseller customers.²¹ The Coalition agrees that the existing system places *de minimis* reseller customers at a severe competitive disadvantage and encourages misrepresentation and

²⁰ Ambess Comments at 11.

²¹ *Id.* at 11-12.

other unfair practices by wholesale suppliers. To avoid being taken advantage of by marketplace forces, the Coalition implores the Commission to issue a declaration requiring wholesalers to permit their *de minimis* reseller customers to elect to take direct contributor status of their certification forms.

MVS USA, Inc. (“MVS”) supports the Coalition’s opt-out proposal for *de minimis* resellers.²² MVS accurately notes, however, that nothing in the FCC’s rules or USAC’s instructions currently prohibits a *de minimis* carrier from contributing directly to the USF. Rather, the Commission’s rules merely state that no contribution will be required of a *de minimis* carrier.²³ The Coalition agrees with MVS’s position that any construction of the FCC rules prohibiting *de minimis* providers from taking direct contributor status is inequitable and discriminatory.²⁴

The problem, therefore, does not exclusively reside in the instructions or Commission rules. Instead, the Commission must evaluate how the instructions and rules are being interpreted and applied in the marketplace. For example, some wholesale suppliers enforce internal policies requiring mandatory treatment of all customers as “end-users” unless the customer is identified as a “direct contributor” on the FCC’s website -- <http://fjallfoss.fcc.gov/cgb/form499/499a.cfm>. The problem with such rigid policies is that they depend on the FCC’s website providing two things: (1) accurate and timely information, and (2) information about all contributor status alternatives. Neither of which exists today.

²² MVS Comments at 1.

²³ *Id.*

²⁴ *Id.* at 2-3.

The FCC's website displays a snapshot of a 499 filer's contributor status that merely reflects the designation automatically assigned by USAC to each 499 filer based on a strict calculation of the amount of revenue reported on Form 499-Q. For example, if *de minimis* Company A decides to file the Form 499-Q and therein projects interstate revenue of only \$20,000 for the first quarter of the year, USAC will conclude that Company A is *de minimis* based on USAC's projection that Company A's annual interstate revenue is unlikely to trigger a contribution obligation of \$10,000. \$20,000 in first quarter revenue first quarter multiplied by four yields a USAC estimate that Company A will derive approximately \$80,000 in interstate revenue for the year. Apply the applicable contribution factor for the quarter or an average of the contribution factors from prior quarters (for our example, we will use 11%), and the resulting projected annual USF contribution is \$8,800. Under current practices, USAC will designate Company A as a "non-contributor" and will NOT render invoices for USF contributions. This "non-contributor" status is reflected on the FCC's website. Currently, there is no procedure available to Company A to avoid being tagged as a "non-contributor."

As the above illustration demonstrates, even if a filer chooses to file the Form 499-Q and report revenue on a quarterly basis, the filer will continue to be listed on the FCC website as a "non-contributor" due to the application of current USAC policies. In other words, current USAC and FCC practices, perhaps unwittingly, facilitate and perpetuate the discriminatory and inequitable treatment of *de minimis* resellers by certain wholesale suppliers.

The Coalition agrees with MVS that the FCC's rules currently support a right for exempt carriers to elect direct contribution. Yet, as demonstrated, USAC's instructions, policies and the

FCC's complicity have conspired to improperly direct wholesale carriers to ignore this right. Wholesalers, therefore, should be obligated to offer their *de minimis* resale customers the option to file directly or to bear the burden of pass-through charges. In order to implement this requirement effectively, the FCC must direct wholesalers to clearly and conspicuously make their reseller customers aware of their rights and options. USAC may no longer encourage wholesalers to ignore this right, and wholesalers may no longer hide behind USAC instructions and policies that have supported excessive pass-through fees.

MVS requests that the FCC instruct USAC to send USF invoices directly to *de minimis* resellers that do not claim exemption (in other words, which opt to contribute directly).²⁵ The Coalition supports this suggestion to the extent it can be swiftly implemented.

²⁵ *Id.* at 5.

II. Conclusion

The Coalition herein affirms its commitment to the establishment of a fair, equitable and non-discriminatory Universal Service Fund, consistent with the vision outlined by Congress. The record of this proceeding, however, is replete with evidence of inequities – inequities which unfairly discriminate and harm providers of predominantly international telecommunications services. The Coalition urges the Commission to consider the record evidence and issue declarations, post haste, which are consistent with the relief requested by the Coalition and other commenters.

Respectfully Submitted,

/s/

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