



The CommLaw Group

HELEIN & MARASHLIAN, LLC
1483 Chain Bridge Road
Suite 301
McLean, Virginia 22101

Telephone: (703) 714-1300

Facsimile: (703) 714-1330

E-mail: mail@CommLawGroup.com

Website: www.CommLawGroup.com

Writer's Direct Dial Number
703-714-1313

Writer's E-mail Address
jsm@CommLawGroup.com

September 4, 2009

Via Hand Delivery

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

Re: *Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings*

Dear Ms. Dortch:

Transmitted herewith is a Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings that (1) The Universal Service Administrative Company Lacks Authority to Indirectly Assess Universal Service Fund Fees on International Only Providers; and (2) The FCC Lacks Jurisdiction Over Certain Non-U.S. International Providers, or, in the Alternative, to Initiate a Rulemaking to Examine These Issues. An original plus nine (9) copies are enclosed.

An additional copy of this filing is also enclosed. Please date-stamp the copy and return in the postage-prepaid envelope provided.

Should there be any questions regarding this matter, kindly contact the undersigned.

Respectfully submitted,

/s/

Jonathan S. Marashlian

Enclosures

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

In The Matter of The Ad Hoc Coalition)
of International Telecommunications)
Companies For Declaratory Rulings)
That (1) The Universal Service)
Administrative Company Lacks)
Authority To Indirectly Assess Universal)
Service Fund Fees on International Only)
Providers and (2) the FCC Lacks)
Jurisdiction Over Certain Non-U.S.)
International Providers, or)
In The Alternative, To Initiate A)
Rulemaking Proceeding To Examine)
These Issues)

**PETITION OF THE AD HOC COALITION OF INTERNATIONAL
TELECOMMUNICATIONS COMPANIES FOR DECLARATORY RULINGS THAT (1) THE
UNIVERSAL SERVICE ADMINISTATIVE COMPANY LACKS AUTHORITY TO
INDIRECTLY ASSESS UNIVERSAL SERVICE FUND FEES ON INTERNATIONAL ONLY
PROVIDERS AND (2) THE FCC LACKS JURISDICTION OVER CERTAIN NON-U.S.
INTERNATIONAL PROVIDERS, OR, IN THE ALTERNATIVE TO INITIATE A
RULEMAKING PROCEEDING TO EXAMINE THESE ISSUES**

Jonathan S. Marashlian
Charles H. Helein
Jacqueline R. Hankins
HELEIN & MARASHLIAN, LLC
The *Comm*Law Group
1483 Chain Bridge Road, Suite 301
McLean, Virginia 22101
Telephone: (703) 714-1300
Facsimile: (703) 714-1330
jsm@commlawgroup.com
www.CommLawGroup.com

I. Introduction

The Ad Hoc Coalition of International Telecommunications Companies (“Coalition”)(www.telecomcoalition.com) submits this petition on behalf of its members, primarily pre-subscribed and prepaid international long distance service providers. The Coalition hereby requests that the Federal Communications Commission (“FCC” or “Commission”) issue a declaratory ruling that (1) the Universal Service Administrative Company (“USAC”) lacks authority to assess Universal Service Fund (“USF”) fees on international only providers, and that any such assessment violates federal law; and (2) the FCC lacks jurisdiction to impose USF obligations on non-U.S. entities, and that any attempt to achieve this goal either directly or indirectly is *ultra vires*. In the alternative, the Coalition requests that the Commission initiate a rulemaking proceeding to analyze and respond to the issues raised by this petition.

II. Background

A. The Universal Service Fund

The Telecommunications Act of 1996 (the “Act”) established the USF to promote universal access to communications services.¹ The Act demands contributions from communications service providers in an equitable and non-discriminatory manner.² To ensure equitable administration, the Commission expressly exempts certain providers, including “international only” carriers, from direct contribution obligations.³ A provider offers

¹ 47 U.S.C. § 151 *et. seq.*

² *Id.* at § 254(d).

³ See, e.g., *In the Matter of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, 19 F.C.C.R.

“international only” service if 100% of its traffic originates in the U.S. and terminates abroad or originates abroad and terminates in the U.S.⁴ Likewise, the rules exempt international-to-international service providers, whose traffic both originates and terminates abroad but merely traverses the U.S.⁵ However, due to unauthorized interpretations of the FCC’s rules, international carriers indirectly contribute to the USF as a result of pass-through charges. This illegality stems from an ill-advised interpretation of the FCC’s universal service rules, in general, and the Carriers’ Carrier Rule (“CCR”) in particular. To the extent that reporting instructions outlined by USAC may be interpreted to assess indirect contributions on exempt international only providers, the instructions contradict the spirit of the exemptions in contravention of USAC’s authority. Further, USAC’s actions are arbitrary and capricious and contrary to federal law. The FCC’s sanctioning of USAC’s actions is inexcusable. Not only do the assessments exceed USAC’s authority, they fall beyond the FCC’s jurisdiction.

B. USAC’s Limited Authority

While the FCC is charged with overseeing the Fund’s administration, its independent administrator, USAC, administers the Fund.⁶ USAC’s authority is limited to collection and

19295 endn. 2 (Rel. Sept. 25, 2008) (“A carrier will be considered a non-contributing ‘international only’ or ‘intrastate only’ carrier if neither it nor any of its affiliates provide any interstate telecommunications.”).

⁴ *Id.*; See also *In the Matter of Universal Service Contribution Methodology*, Declaratory Order, 23 FCC Rcd. 1411, 1418 para. 15 (noting the requirement to properly account for 100% international revenues); 43 C.F.R. § 43.61 (defining “international telecommunications service”).

⁵ See, e.g., *Universal Service Monitoring Report*, CC Docket No. 98-202 (Rel. May 2005) (“Universal service contribution base revenues consist of all interstate and international end-user telecommunications revenues except for international-to-international revenues reported on Line 412.”); Instructions to 2009 FCC Telecommunications Reporting Worksheet Form 499-A at 28 (“International calls that traverse the United States but both originate and terminate in foreign points are excluded from the universal service contribution base regardless of whether the service is provided to resellers or to end users.”) (“2009 Instructions”).

⁶ See USAC website at <http://www.usac.org/fund-administration/>; See also 47 C.F.R. §§ 54.701-707.

audit matters and is subject to review by the FCC.⁷ Among its functions, USAC proposes instructions to the annual and quarterly reporting forms filed by contributing providers. However, the instructions and the interpretation thereof must remain consistent with the rules and statutes governing the FCC. For example, USAC may not “make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress” and is required to seek guidance from the FCC on such matters.⁸ Further, USAC is accountable to the Commission in its actions.⁹ Because USAC’s instructions clearly conflict with the FCC’s rules, they exceed the scope of USAC’s authority. Since the FCC is responsible for oversight of USAC and the USF, it must reject USAC’s unlawful instructions and unauthorized interpretation of the FCC’s rules.

C. USAC’s Unlawful Interpretation of the Carrier’s Carrier Rule

The CCR exempts from USF liability wholesale providers whose reseller customers can be reasonably expected to contribute directly to the Fund.¹⁰ The purpose of the CCR is to ensure that, *to the extent USF contributions apply to the revenue at issue*, at least one entity in the supply chain is paying the contribution. However, out of sheer ignorance of the consequences of its procedural guidelines, USAC created a scheme whereby certain providers, who would be exempt if qualified as “direct” contributors, find themselves not exempt due to the marketplace’s implementation of the CCR.

⁷ “The FCC retains the authority to overrule USAC’s actions in administering the universal service support funds; those who are aggrieved by USAC, its committees, or its Board may seek review from the FCC.” *In re InComnet v. Post-Confirmation Committee of Unsecured Creditors of Incomnet Communications Corp.*, 463 F.3d 1064 (9th Cir. 2006); 47 C.F.R. § 54.702.

⁸ 47 C.F.R. § 54.702.

⁹ Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 F.C.C.R. 25,058, 25,067 (1998).

¹⁰ See Instructions to 2008 FCC Telecommunications Reporting Worksheet, Form 499-Q at 13, available at <http://www.universalservice.org/res/documents/fund-administration/pdf/form-499Q-fy2008-instructions.pdf>.

Specifically, USAC has skirted the spirit of the FCC's exemptions, including the international only exclusion, by indirectly imposing USF fees on exempt carriers. For example, USAC's 2008 instructions to Form 499-A read:

These exempt entities, including 'international only' and 'intrastate only' providers and providers that meet the *de minimis* universal service threshold, should not be treated as resellers for the purpose of reporting revenues...That is, filers that are underlying carriers should report revenues derived from the provision of telecommunications to exempt carriers and providers (including services provided to entities that are *de minimis* for universal service purposes) on Lines 403- 417...Underlying carriers must contribute to the universal service support mechanisms on the basis of such revenues.¹¹

The instructions later note that the contribution base "may contain revenues from some FCC Form 499 filers that are exempt from contributing directly to universal service support mechanisms. For example, these would include filers that meet the universal service *de minimis* exception or that provide 'international only' service."¹²

In application, USAC's instructions require "international only" revenue to be reported as end-user revenue, upon which underlying carriers must pay contributions. However, because underlying carriers are permitted by the FCC to pass USF obligations through to their end-user customers, the international only carrier customer will end up bearing the cost of

¹¹ Instructions to 2008 FCC Telecommunications Reporting Worksheet Form 499-A ("2008 Instructions") at 19, available at <http://www.fcc.gov/Forms/Form499-A/499a-2008.pdf> (emphasis added).

¹² 2008 Instructions at 32 (emphasis added); *See also* 2008 Instructions at 5 ("[S]ome carriers may be exempt from contributing directly to the universal service support mechanisms (e.g., because they are *de minimis*)...These noncontributors must be treated as end users by their underlying carriers and therefore may end up contributing"); *Telecommunications Industry Revenues 2005, Industry Analysis and Technology Division, Wireline Competition Bureau*, June 13, 2007 at *28 ("Sales to *de minimis* resellers, end-user customers, governments, non-profits, and any other non-contributors are treated as end-user revenues."). *See* FCC Public Notice, *Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2000 Filing By All Telecommunications Carriers*, DA 00-741, CC Docket No. 98-171 (Rel. March 1, 2000) (lines 403-417 "contain end-user revenues from carriers and telecommunications service providers that are exempt (e.g., carriers that meet the universal service *de minimis* exception, or that provide 'international only' service) from contributing to universal service support mechanisms.") (emphasis added).

supporting the USF one way or the other – either through surcharges or higher costs.¹³ The bottom line result is that the USF contribution burden is borne not by the underlying carrier, but by the customer. Thus, while in theory the CCR protects wholesale carriers from duplicative contribution, in practice, it subjects exempt carriers to unintended pass-through charges. It defies reason that the Commission would exempt international only providers from direct contribution obligations only to sanction indirect liability.

The Coalition, in its first petition to the Commission, highlighted the inequities of indirect USF contribution liability, with particular emphasis on LIRE-qualifying carriers.¹⁴ This petition aims to direct the Commission’s attention to the particular problems facing international only providers.

III. The Commission Should Halt USAC’s Indirect Assessment of USF Fees on International Only Providers

A. As Applied to Certain International Only Providers, USAC’s Carrier’s Carrier Rule Instructions are Arbitrary and Capricious and Violate the Administrative Procedures Act (“APA”)

USAC, as the permanent USF administrator chosen by the FCC, a federal agency, may not act in contravention of the rules which bind the FCC.¹⁵ The Administrative Procedures Act (“APA”) prohibits the FCC from acting in an arbitrary and capricious manner and, thus, so

¹³ See USAC website, “Each company makes a business decision about whether and how to assess customers to recover its Universal Service Fund costs.” <http://www.usac.org/about/universal-service/purpose-of-fund/>; 47 C.F.R. § 54.712.

¹⁴ See *Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings that Qualifying Downstream Carriers May Choose Either To Accept Supplier Pass-Through Surcharges or Pay Universal Service Fees Directly; and Prepaid Calling Card Providers’ Distributor Revenues Are Not “End-User” Revenues and Allowing Reporting of Actual Receipts Only, Or In The Alternative To Initiate A Rulemaking To Address These Issues*, Filed Feb. 12, 2009 (“First Petition”).

¹⁵ See *In the Matter of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Order (Rel. Aug. 1, 2000) (discussing USAC’s role as a data collection agent for the FCC).

restricts USAC.¹⁶ USAC's offensive CCR instructions, as complained of herein, are undeniably arbitrary and capricious, for they violate not just the FCC's rules, but yield results which are wholly inconsistent with appellate precedent, of which USAC is well aware.¹⁷

The offensive CCR instructions find no support in the Act, the Commission's rules or the Commission's policies, as articulated through various orders and decisions.¹⁸ The violation of an agency's own rules clearly qualifies as an arbitrary and capricious act.¹⁹ Because USAC's instructions are arbitrary and capricious and violate the Commission's rules, and thereby the APA, the Commission should strike the instructions.

In addition to facing limitations by virtue of the FCC's oversight, USAC is not authorized to substantively alter FCC regulations.²⁰ The APA mandates public notice and the opportunity to comment on substantive changes to FCC rules.²¹ However, USAC has effectively subjected international only carriers to USF contribution obligations, clearly a substantive change to the Commission's rules and orders. The FCC's failure to put this matter on public notice and allow interested parties to comment on a proposed substantive change in regulation is an unequivocal violation of the APA.

¹⁶ See 5 U.S.C. § 706(1)(A); *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 445 (3rd Cir. 2004) ("And, the Commission's rules and decisions are clearly governed by the arbitrary and capricious standard. In sum, the standard of review is governed foremost by the APA's requirement that the FCC's rules not be arbitrary and capricious.").

¹⁷ See *Texas Office of the Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*").

¹⁸ See previous discussion articulating how USAC's actions clearly violate the Act and the FCC's rules.

¹⁹ If an agency does not follow the unambiguous language of its own rules, we must consider its actions arbitrary and capricious. *Myers v. State*, 169 S.W.3d 731, 734 (Tex. App. 2005)(citing *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex.1999)); It is well settled that the failure of an agency to comply with its own rules and procedures is arbitrary and capricious, and a determination made in violation of such procedures will be reversed by the Courts. *Hall v. Van Amerongen*, 2008 WL 5501022 (Table) (N.Y.Sup.) (citing *Frick v. Bahaou*, 56 N.Y.2d 777 (1982)).

²⁰ 47 C.F.R. § 54.702.

²¹ 5 U.S.C. § 551, *et. seq.*

The purpose of the APA is to ensure that the public has an opportunity to vet a proposed rule, and in that process, to avoid the unforeseen and unintended harmful consequences of ill-conceived regulations. Had the FCC placed USAC's proposed instructions on public notice, the Commission could have avoided the unanticipated result, which has been the unjust and discriminatory imposition of indirect USF liability, and other administrative hardships and costs, on countless international only telecommunications providers.²² To remedy this error, the FCC should strike the offending USAC instructions and issue a declaration calling for the cessation of illegal USF pass-throughs on international only providers. In the alternative, the FCC must immediately suspend the complained of instructions whilst it opens a rulemaking proceeding to prevent further harm.

B. USAC Instructions Violate Federal Precedent

USAC's Form 499 instructions, resulting in the indirect imposition of USF obligations on providers of international only telecommunications, irreconcilably conflict with Federal Court precedent. In its *TOPUC* decision, the Court of Appeals for the Fifth Circuit held that imposing an assessment on a carrier's international services revenue in excess of the carrier's total interstate revenue violated the equitable and non-discriminatory contribution mandates of the FCC's universal service rules.²³ International only carriers derive no revenue from interstate services. Therefore, any universal service contribution obligation exceeds their interstate revenues (which amount to zero), whether imposed directly or indirectly. USAC simply may not achieve indirectly that which *TOPUC* prohibits the FCC from achieving directly.²⁴ For the

²² Further, this represents a change in Commission policies for which a reasoned decision is required. *Black Citizens for a Fair Media v. F.C.C.*, 719 F.2d 407 (D.C. Cir. 1983).

²³ *TOPUC*, 183 F.3d at 434-35.

²⁴ See *Comsat Corp. v. FCC*, 250 F.3d 931, 934 (5th Cir. 2001) ("In response to *TOPUC*, the Commission issued the Remand Order. The agency adopted a bright-line percentage rule for

Commission to permit USAC to continue to perpetuate this end around federal law is inexcusable. It therefore must be halted.

C. USAC's Instructions Contradict the Equitable and Non-discriminatory Mandates of the Act

USAC's instructions currently discriminate against "international only" providers vis-à-vis "mostly international" providers. The outcome is an inequitable and discriminatory USF contribution scheme which violates the Act's prohibition of discriminatory assessments.²⁵ Specifically, the current instructions favor "mostly" international carriers to the detriment of "international only" carriers as follows.

The FCC's international revenue exemption ("LIRE") exempts carriers whose international revenues account for over 88% of their total interstate and international end-user telecommunications.²⁶ A LIRE-qualifying carrier registered with USAC whose interstate revenue yields a \$10,000 or greater USF contribution will be designated by USAC as a direct contributor. As a direct contributor that can prove said status by referencing the FCC's website at <http://fjallfoss.fcc.gov/cgb/form499/499a.cfm>, this company will be exempted from supplier pass-throughs. Furthermore, because of the LIRE exemption, this company also avoids paying **any** universal service charges on its international revenue.²⁷

Compare this result with a company that derives 100% of its revenue from international only telecommunications, which is incapable of proving exemption because it derives no

when a carrier's international revenues would be included in the base from which the agency calculates the carrier's universal service contribution. Under the new rule, if a carrier derives less than 8 percent of its revenue from interstate services, its international revenues will not be used in calculating the contribution. For those carriers receiving 8 percent or more of their revenues from interstate services, the FCC will include their international revenue in the base for determining their contributions."); 47 C.F.R. § 54.706(c).

²⁵ 47 U.S.C. § 254(b)(4).

²⁶ 47 C.F.R. § 54.706(c).

²⁷ *Id.*

interstate revenue. The ultimate result is that while a carrier with international revenues accounting for more than 88% of its contribution-eligible revenues may avoid USF fees altogether, a carrier whose entire contribution base derives from international only service is subject to indirect USF pass-through fees on 100% of its telecommunications revenues. This outcome is absurd, yet it is happening in the marketplace thanks to USAC's ill-conceived instructions.

Today, international only providers are entirely at the mercy of their underlying carriers, which under normal circumstances may not be problematic since international only providers can still offer legitimate explanations as to why they are exempt from USF pass-throughs, such as FCC rules and the *TOPUC* precedent. Unfortunately, the present day circumstances are anything but normal given the devastating ramifications of yet another ill-conceived USAC instruction – the “vicarious liability” provision of the CCR.²⁸ Today, thanks to this vicarious liability provision, underlying carriers refuse to give any weight to their customers’ proof of exemption unless the proof strictly complies with the CCR (even if the proof resides in the FCC’s rules and appellate precedent, as previously explained). Underlying carriers are simply too fearful not only of USAC’s ability to reclassify their wholesale revenue as retail, but of USAC’s willingness to exercise this ability to extract contributions. The Commission has done little to quell such fears.²⁹ USAC’s CCR instructions, and the FCC’s heretofore willingness to uphold them against all challenges, result in horribly inequitable and discriminatory outcomes

²⁸ 2009 Instructions at 19 (“Filers that do not comply with the above [customer certification and verification] procedures will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users.”).

²⁹ See, e.g., *In the Matter of Federal-State Joint Board on Universal Service Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, CC Docket No. 96-45, USAC Audit Report No. CR2005CP007 (Aug. 17, 2009).

which counter the basic premise of the USF, particularly in the context of international only service providers.

IV. The Commission Should Stop the Indirect Imposition of its Jurisdictional Authority Over Non-U.S. Entities

As described, USAC's CCR instructions can and do result in the imposition of USF contribution obligations on providers of international only telecommunications. This outcome is particularly troubling when the provider is a non-U.S. corporation whose only connection or nexus to the United States is the hand-off of international traffic to and from a U.S. carrier. By permitting USAC to indirectly impose and collect USF contributions from such non-U.S. corporations by virtue of the CCR instructions herein complained of, the Commission is extending its long-arm jurisdiction beyond any conceivable lawful boundaries.

The FCC's regulatory jurisdiction is not unlimited nor is it boundless. The FCC may neither circumvent its jurisdictional limits nor the long-arm jurisdictional limits of the United States government by enlisting intermediaries, such as USAC and those corporations over which it does exercise jurisdiction, to do its bidding on its behalf. To the contrary, the FCC's jurisdiction is limited to interstate and foreign communications which originate or terminate within the United States.³⁰ Non-U.S. corporations without sufficient nexus to the United States remain outside the FCC's reach and the reach of the U.S. government, in general.

The Commission's actions are subject to Acts of Congress and judicial review.³¹ And although a mere extraterritorial consequence will not deprive the Commission of jurisdiction, the FCC may not deliberately target international providers or services.³² Likewise, while the

³⁰ 47 U.S.C. §152.

³¹ See, e.g., *F.C.C. v. ITT World Communications, Inc.*, 466 U.S. 463 (1984); *Regents of University System of Ga. v. Carroll*, 338 U.S. 586 (1950); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

³² See, e.g., *Cable & Wireless P.L.C. v. F.C.C.*, 166 F.3d 1224, 1230 (D.C. App. 1999).

FCC can extend its ancillary jurisdiction to cover activities “reasonably ancillary to the effective performance of [its] various responsibilities,” the Commission cannot ignore the limits on its authority in so doing.³³ The FCC has no authority to regulate non-U.S. corporations providing international only telecommunications indirectly through U.S. carriers. Wherefore, the FCC may not exceed this jurisdictional limitation indirectly through USAC artifices, such as its CCR instructions.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

³³ See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); 47 U.S.C. § 154(i).

V. In the Alternative, the Commission Should Initiate a Rulemaking Proceeding

In the event the Commission declines to issue a declaratory ruling on the matters herein addressed, it should commence a rulemaking proceeding to investigate USAC's instructions, particularly the Carrier's Carrier Rule and its negative impact on the free flow of commerce between providers of interstate and international telecommunications. The Coalition anticipates the public, including the suppliers and other U.S. carrier partners of various international only providers, would show great interest in such a proceeding. International carriers represent a large segment of the communications market, yet, due to the ill-advised application of the Commission's rules and unauthorized exercise of jurisdiction, they remain marginalized. Given the significance of the issues discussed, the Coalition respectfully requests that the Commission promptly take action on its petition.

Respectfully submitted,

/s/

Jonathan S. Marashlian
Charles H. Helein
Jacqueline R. Hankins
Helein & Marashlian, LLC
The *CommLaw* Group
1483 Chain Bridge Road, Suite 301
McLean, Virginia 22101
Telephone: (703) 714-1300
Facsimile: (703) 714-1330
jsm@commlawgroup.com
www.CommLawGroup.com

Counsel for the Ad Hoc Coalition of
International Telecommunications
Companies
www.telecomcoalition.com