function is quite similar to the "acquisition" features of pulver.com's FWD locator services.[144] Compass' software also creates tables and rules to modify and "store" call information to ensure accurate transmission of data over connecting networks.[145] Compass' network features custom routing of traffic in order to achieve specific goals for each customer's traffic, thereby allowing connecting users to "utilize" connection information.[146] Compass' software then instructs session processors, servers, and network equipment to manipulate and "process" transmission information based upon any errors that an originating party or network has made (e.g., Compass' software strips off bad information in countries where that information is inaccurate or extraneous and the software inserts missing information where countries have changed their dialing patterns or codes.)[147] None of the above could be accomplished but for Compass' ability to "acquire" information about other connected users; "store" member information; "utilize" password and connection information; and use "processes" to connect to other users defined the service as an information service.

Of significance here, the Commission has also made clear that

> "the fact that the information service Pulver is offering happens to facilitate a direct disintermediated voice communication, among other types of communications, in a peer-to-peer exchange cannot and does not remove it from the statutory definition of information service and place it within, for example, the definition of telecommunications service."[148] (emphasis added).

Thus, the pulver.com decision confirms that the mere routing of voice traffic between and among IP-based networks will not automatically classify a service as a telecommunications service. The Order goes further, however; it actually confirms that a service offering structured in the manner of Compass' would fall very neatly within the regulatory definition of "information services"

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144 *See*, Exhibit 28.
145 *See*, Exhibit 28.
146 *See*, Exhibit 28.
147 *See*, Exhibit 28.
148 *pulver.com FWD Order* ¶12.

if it were necessary to categorize such services at all. Quite the opposite is true. The functions within the network determine the regulatory classification of the service.

a. Compass is not Subject to USF Contribution under the Commission's 2006 VoIP USF Order Because it is Not Providing "Interconnected" VoIP Services

Compass' service is not interconnected VoIP; the service is incapable of offering a connection to the PSTN; thus, neither does the FCC's *USF VoIP Order* provide basis for imposing federal support mechanism funding obligations on Compass.[149] By definition, "interconnected" VoIP providers must provide a connection to the PSTN; mere providers of underlying IP transmission are not considered VoIP services. [150] In the *USF VoIP Order*, the Commission particularly stresses that "interconnected VoIP services are distinguished from services that do not supply connectivity to any PSTN user" because interconnected VoIP services either "self-provide or contract with underlying carriers or providers for transmission services" to provide a PSTN connection."[151] Essential here is the distinction between the actual interconnected VoIP service provider ("subject to USF contribution requirements") and the underlying transmission provider ("not subject to USF contribution requirements"). Given the nature of the Company's business model, Compass must be recognized as a mere VoIP transmission provider whose services fall outside of the definition of interconnected VoIP, and are not subject to those USF contribution requirements placed on conventional interconnected VoIP providers.[152]

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149 *2006 Interim Contribution Methodology Order.*

150 *2006 Interim Contribution Methodology Order* ¶ 15 (Defining "interconnected" VoIP as "category of IP-enabled services [as those] that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN." This definition was based upon the Commission's definition of interconnected VoIP in the *VoIP 911 Order*.).

151 *See, USF VoIP Order* at fn. 147, citing *pulver.com FWD Order*, 19 FCC Rcd at 3312, ¶ 9.

152 *See, E911 VoIP Order* fn. 78 ("The rules we adopt in today's Order also apply only to providers that offer a *single service* that provides the functionality" meeting the definition of interconnected VoIP. (emphasis added)).

7. The Commission's Categorization of Compass' Services as Telecommunications Services Overlooks the Regulatory Uncertainty Surrounding the Regulation of IP-Enabled Telephony

Beginning with the *Universal Service Report*, the FCC has refrained from affirmatively classify VoIP as either a telecommunications or information service under the Act. Indeed, it has continually declined to provide a solid regulatory classification for voice communication transmitted using IP-enabled services. As noted above, the Commission has specifically held that it is not "appropriate to make any definitive pronouncements [about the regulatory status of IP-telephony] in the absence of a more complete record focused on individual service offerings."[153] Since then, the Commission has repeatedly deferred a comprehensive classification of IP-enabled voice telephony-related issues to various ongoing rulemaking proceedings, specifically, dockets concerning IP-enabled Services, Intercarrier Compensation Reform, and the Universal Service Fund.[154]

In the IP-enabled Services docket, the Commission recognized that because IP-telephony services "are, both technically and administratively different than the PSTN" and therefore should not be regulated like "mere substitutes for traditional telephony services[. B]ecause the new networks [are] based on the Internet Protocol," the Commission must undergo a comprehensive rulemaking proceeding in order to address issues fundamental to the classification of VoIP services

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153 *Universal Service Report* ¶ 90.

154 *See, Minnesota Public Utilities Com'n. v. F.C.C.*, 483 F.3d 570, (8th Cir., Mar 21, 2007) ("The FCC deferred resolution of the regulatory classification of VoIP service ... because the issue was already "the subject of [its] IP-Enabled Services Proceeding where the Commission is comprehensively examining numerous types of IP-enabled services."); *See also, In The Matter Of Time Warner Cable Request For Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 Of The Communications Act Of 1934, As Amended, To Provide Wholesale Telecommunications Services To VoIP Providers*, 22 FCC Rcd. 3513 (Mar 01, 2007) ("Certain commenters ask us to reach other issues, including ... the classification of VoIP services. We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally ... that the Commission is currently addressing elsewhere on more comprehensive records. For example, the question concerning the proper statutory classification of VoIP remains pending in the IP-Enabled Services docket.").

generally.[155] And, in the *USF VoIP Order*, the Commission recognized the complex issues which continue to impact the regulation of VoIP; as a result, no affirmative regulatory classification of VoIP services has issued from the Agency.[156] The question of the regulatory classification of VoIP services remains stalled pending resolution as part of the anticipated, over-arching reform of the Universal Service regime.[157]

That this regulatory uncertainty remains in effect today is undisputed. AT&T (then SBC) and other carriers have filed numerous unanswered petitions before the Commission seeking clarification on the regulatory duties of IP-in-the-Middle transport providers similar to Compass, to no avail.[158] Indeed, as recently as January 8, 2008, AT&T filed a Petition for Declaratory Ruling with the Commission for resolution of this issue. As of May 21, 2008 the Commission had not answered AT&T's request.[159] Even the United States Congress has recently held hearings on the regulatory status of "IP-in-the-Middle" carriers,[160] and still no certainty exists for entities like Compass which find themselves facing sanctions for "apparent violations" of rules which the FCC has not seen fit to announce.

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155 *IP-Enabled Services NPRM* ¶ 4 and generally.

156 *USF VoIP Order* ¶ 35. ("[T]he Commission has not yet classified interconnected VoIP services as 'telecommunications services' or 'information services' under the definitions of the Act.")

157 *USF VoIP Order* ¶ 4 & 35.

158 *See*, WC Docket No. 05-276: *In the Matter of Petition for Declaratory Ruling that VarTec Telecom, Inc. is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination* (August 20, 2004); *Petition for Declaratory Ruling That USA Datanet Corp. is Liable for Originating Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Calls* (November 23, 2005); *SBC ILECs' Petition for Declaratory Ruling Petition for Declaratory Ruling That UniPoint Enhanced Services, PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges* (September 19, 2005).

159 *See, AT&T Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (January 8, 2008) (Requesting clarification of questions regarding the access-charge liability of carriers that use the Internet Protocol ("IP") to transmit ordinary PSTN-to-PSTN long distance calls), and Letter to Ms. Marlene Dortch (May 21, 2008) (Notifying Commission of AT&T's motion to vacate stay due to the FCC's ongoing failure to answer AT&T's Request for Declaratory Ruling on IP-in-the-Middle related issues).

160 Senate Commerce Committee Hearing on Phantom Traffic (Wednesday, April 23, 2008).

Punishing Compass for its inability to anticipate the policy which will eventually issue from the FCC is not only unfair, it affirmatively undermines the key provisions of Section 254(d) which mandate equitable and non-discriminatory treatment of contributors.[161] As the Commission has become fond of saying, regulatory classification of IP-enabled services should best be reserved for the numerous ongoing rulemaking proceedings, and not imposed haphazardly on individual carriers like Compass.

8. Liability Cannot Be Imposed on Compass for Following a Reasonable Interpretation of the Commission's Rules.

All of this regulatory uncertainty, coupled with the overwhelming factual support for Compass' classification as an information service, can lead to only one rational conclusion: Compass did not willfully violate FCC rules – as those rule have been announced by the FCC; nor did Compass adopt an unreasonable position that its services were not subject to USF contribution obligations. Indeed, as more fully addressed elsewhere in this Response, that conclusion flowed logically and directly from FCC actions and pronouncements. As a result, it is inequitable to attempt to impose any liability upon Compass as a result of the Company's reasonable interpretation of FCC rules and regulations as they existed -- and as they were applied by the FCC – throughout the relevant period.

It is well-established that, in reviewing the question of whether a party can be subject to a NAL, the issue is not whether the FCC reasonably interpreted its rules in light of deference it is accorded, but whether the interpretation of the Commission's rules by the company subject to NAL, Compass, was reasonable at the time.[162] Under the *Chevron* standard, the FCC's tentative

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[161] 47 U.S.C. § 254(d). *See also*, 47 U.S.C. § 254(b)(4), (5) (Commission policy on universal service shall be based, in part, on the principles that contributions should be equitable and nondiscriminatory, and support mechanisms should be specific, predictable, and sufficient).

[162] *See*, *Satellite Broad. Co.* v. *FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) ("The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation.").

conclusions, as set forth in the NAL will be accorded deference only when not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law";[163] this is certainly not the case here. Furthermore, it is axiomatic that a regulated entity may not be deprived of property where the agency's regulations are unclear, the agency itself struggles to provide a definitive reading of the regulatory requirements, and the regulated entity's interpretation is reasonable.[164]

There is no question, from the facts presented here, that Compass based its conduct during the relevant period on a valid interpretation of the Commission's Rules. As unmistakably established above, Compass is providing an IP-based session processing service intended to connect enhanced service providers globally, the main function of which is to provide protocol processing for interconnecting customers. Compass' service mirrors the definition of an information service and, thus, cannot be a telecommunications service under the Commission's rules.[165] Hence, Compass conformed to a reasonable reading of the Commission's Rules under existing, and often contradictory, precedent.

9. The Commission Cannot Unreasonably Impose Liability on Compass for Willfully Failing to Conform to Rules of Which it Had No Fair Notice

Even assuming that the Commission's previously promulgated standard could reasonably be interpreted to include IP-transport providers like Compass, the FCC cannot impose liability on Compass individually under this new standard unless Compass had fair notice of it. The Federal law is clear: "It is well settled that regulations cannot be construed to mean what an agency intended but

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163 *Time Warner Telecom, Inc. v. F.C.C.*, 507 F.3d 205, 214 (2007) ("Section 706 of the APA requires a court to 'hold unlawful and set aside agency action, findings, and conclusions' that are 'arbitrary, capricious or otherwise not in accordance with law.' 5 U.S.C. s. 706.")

164 *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333-1334 (D.C. Cir. 1995).

165 *Universal Service Report* at ¶ 54 ("[W]e conclude that an approach in which "telecommunications" and "information service" are mutually exclusive categories is most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service.").

did not adequately express."[166] The Commission could have issued new regulations during the relevant period subjecting all providers of IP-transport to Universal Service contribution requirements, but the plain language of the Commission's Rules contain no language regulating IP-in-the-Middle providers.

Nowhere is this principle clearer than the Commission's expansion of the definition of the term "internetworking conversions." In the NAL, the Commission readily admits that internetworking conversions have been traditionally limited to "conversions occurring within a carrier's network . . . ."[167] It then unduly expands this definition, however, well past the definition used in the *Non-Accounting Safeguards Order* and the *AT&T IP-in-the-Middle Order*. The NAL includes Compass' service within the scope of the definition, without benefit of evidentiary support, and in direct conflict to the holdings of these previous Orders (and the *Universal Service Report)* which expressly limit the "internetworking conversation" to those protocol conversions occurring within a carrier' network. Thus, only the issuance of the NAL provided Compass with any indication of the Commission's position on this issue. Even if the FCC had provided support for its change in direction (which it has not), it is wholly inappropriate to subject Compass to liability at this late date for actions which cannot be retroactively addressed.

It is well-established that "there is the need for a clear and definitive interpretation of all agency rules so that the parties upon which the rules will have an impact will have adequate and proper notice concerning the agency's intentions."[168] Indeed, a comprehensive body of administrative law has developed precluding agencies from depriving parties of their property based

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166 *L.R. Willson & Sons* v. *Donovan*, 685 F.2d 664,675 (D.C. Cir. 1982) (internal quotations omitted).

167 NAL, ¶ 83.

168 *FTC* v. *Atl. Richfield Co.*, 567 F.2d 96, 103 (D.C. Cir. 1977).

on new interpretations of its rules for which the party had no fair notice.[169] According to this precedent, the FCC cannot punish Compass for reasonably interpreting the Commission's rules as excluding IP-enabled transport service from USF contribution based upon the facts and applicable regulations, particularly given the Commission's decade long history of applying piecemeal regulatory classification to IP-telephony and the Internet.

Neither does a regulated entity have fair notice of agency action when the agency itself struggles to develop clear rules.[170] That certainly is the case here; as the Commission's record concerning the regulation of IP-Telephony demonstrates, the Commission has struggled to formulate a regulatory classification of VoIP services for years now and has taken every opportunity along the way to delay providing any real measure of guidance to entities which will be directly impacted by the FCC's ultimate determination.[171] And the very limited direction provided through the *USF VoIP Order* and the *AT&T IP-in-the-Middle Order* has not served to place such as Compass on notice that they might be sanctioned financially for failing to contribute to federal support mechanisms; indeed, the very text of those issues would logically have led such entities to the contrary conclusion.

Compass' interpretation of FCC rules and regulations in effect during the relevant period is completely consistent with the underlying goals of the Act: the development of advanced telecommunications networks and the Internet and increase opportunities for entrepreneurs and

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169 The fair notice requirement has been "thoroughly 'incorporated into administrative law.'" *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting *Satellite Broad., Co. v. FCC*, 824 F.2d 1,3 (D.C. Cir. 1987)); *see also Trinity Broad., Inc.*, 211 F.3d at 628; *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998).

170 *Trinity Broad.*, 211 F.3d at 628; *Gen. Elec. Co.*, 53 F.3d at 1333-1334.

171 *See, In the Matter of IP-Enabled Services*, Statement of Commissioner Martin ("Today's decision, [ ] raises many of the difficult questions that arise regarding VoIP's potential to displace traditional telephony services."); and Statement of Commissioner Copps (Commenting that the *pulver.com FWD Order* is "as silent on many [IP-telephony] issues, which strikes me as curiously dismissive given the magnitude of the responsibilities entrusted to us.").

small businesses in the telecommunication industry and to spur technological innovation.[172] By facilitating the connection of enhanced service providers, Compass' network does just that. In light of these policy goals, it was perfectly reasonable for Compass to interpret the Commission's rules as permitting Compass to develop a network free from traditional regulatory burdens placed on legacy carriers under Title II. Nonetheless, the FCC now seeks to punish the innovator, Compass, for deploying a technology that enabled enhanced service providers to process and transmit advanced communications between interconnected global Internet-based networks. It is all the more inappropriate to assess liability against Compass – an entity which despite a reasonable, good-faith belief that FCC rules and regulations did not compel it to assist in the funding of federal support mechanisms *nonetheless did so voluntarily.*

G. COMPASS HAS NOT VIOLATED FCC RULES BY FAILING TO TIMELY FILE FORMS FCC 499

In paragraph 9 of the NAL, the FCC states, "Compass also concedes that it did not register or file any of the required Form 499s until September 2006 when it filed its Form 499-A reporting revenue for the year 2005, five months late."[173] Compass has made no such "concession." It is undisputed that Compass did file Form 499-As for 2005 and 2006 on September 5, 2006. The mere filing of those forms, however, does not constitute a "concession" that the Company was obligated to do so, and any intended suggestion in the NAL to the contrary is unfounded.

Indeed, Compass has demonstrated above that it does not have any such filing or contribution obligation and all filings of Forms 499-A and 499-Q, starting with the Company's 499-As for 2005 and 2006 and continuing through the Company's most recent filing (submitted to USAC on May 1, 2008), have been voluntarily made. Since Compass was not legally obligated to file

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172 *See, Internet Policy Statement*, ¶ 2 ("It is the policy of the United States... to promote the continued development of the Internet" and "Congress charges the Commission with encouraging the development . . . of advanced telecommunications capability.") (Internal citations omitted) citing Section 230(b) and Section 706(a). *See also*, SEN. REP. No. 104-230, at 1 (1996) (Conf. Rep.).

173 NAL, ¶9.

Forms 499-A for 2005 and 2006 at any time, the filing dates which applied to entities which were within the scope of the FCC's reporting and contributions rules are of no effect as to Compass.

Even if it were not the case that Compass is not legally required to submit FCC Forms 499 and contribute to the support of the federal support mechanisms, Compass has been granted a waiver by the FCC of the April 1, 2005 and April 1, 2006 filing deadlines applicable to all other carriers. That waiver was granted on August 30, 2006, by Mr. Nand Gupta, the individual specifically identified in the compliance audit letters as IHD's contact point, and the FCC's representative throughout the several month period during which Compass attempted to resolve the IHD's inquiries in 2006. Mr. Gupta first reminded Mr. Cary of the filing deadline which had heretofore been established for Compass' anticipated Form 499-As for 2005 and 2006 -- August 25, 2006. Mr. Gupta then extended that filing deadline, establishing the ultimate due date for the filing of Compass' Forms 499-A for 2005 and 2006 -- September 5, 2006. Compass made its 499-A filings on the date established by Mr. Gupta. On August 30, 2006, Mr. Gupta made clear that Compass would only be considered in noncompliance with FCC rules if the Company did not conclude its completion and forwarding of the forms until after that September 5th date. Thus, there is no question that Compass' original Forms 499-A, as filed on September 5, 2006, are timely under the Commission's rules. Compass submitted Forms 499-A for 2005 and 2006 by that deadline, and has continued to file Forms 499-A and 499-Q on a timely basis thereafter.[174]

Furthermore, all of Compass' submissions of FCC Forms 499-Q and 499-A since that time have been timely made. At paragraph 28 of the NAL, the FCC states that, "[A]lthough Compass has been providing telecommunications services since at least 2005, it failed to filed FCC Form 499

[174] All Form 499-A and 499-Q filings made by Compass are attached to this Response at Exhibit 3 hereto.

Worksheets until September 7, 2007."[175] This assertion is directly contradicted by Compass' filings resident on the USAC website, http://www.usac.org/fund-administration/forms, "E-File Forms 499-Q. . ." These filings commence with Compass' September 2006 filings and reflect timely submission of each form thereafter in accordance with the filing dates set forth in the instructions to Forms 499-A and 499-Q. Compass' filings are a matter of public record for the FCC and the filing dates thereof dispositively refute the NAL's tentative conclusion that Compass has failed to timely file FCC Forms 499.

H. COMPASS HAS NOT VIOLATED FCC RULES BY UNDER-PAYING CONTRIBUTIONS TO FEDERAL SUPPORT MECHANISMS

The NAL also tentative concludes that Compass has violated Commission rules by failing "to contribute fully and timely to the Universal Service Fund ("USF"), Telecommunications Relay Service ("TRS") Fund, and cost recovery mechanisms for the North American Numbering Plan ("NANP") administration and Local Number Portability ("LNP")."[176] This tentative conclusion is also incorrect. Notwithstanding the inapplicability of Sections 1.1154, 1.1157, 52.17(a), 52.32(a), 54.706(a) and 64.604(c)(5)(iii)(A) of the FCC's rules to Compass, the Company has made substantial payments in support of the various federal support mechanisms and regulatory fees. These payments have been made on a voluntary basis; thus, the totality of such contributions constitute overpayments to the respective funds and the FCC.

Compass has advised USAC that "[d]espite the FCC's lack of legal authority to regulate Compass' service offerings as either "telecommunications" or "telecommunications services," Compass remains willing to remain a registered ITSP."[177] Compass is not willing, however, to compensate the federal support mechanisms and the FCC at a level which exceeds the contributions

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175 NAL, ¶28. As explained in Section IV.A through E of this Response, the first part of the FCC's statement, that "Compass has been providing telecommunications services since at least 2005" is also incorrect.

176 NAL, ¶ 1.

177 September 4, 2007, revised 2005 Form 499-A transmittal letter, p. 2.

it would rightfully make if the above FCC rules actually had application to the Company. As Compass demonstrated to USAC in its November 6, 2007 appeal, the unlawful refusal of USAC to process Compass' revised Forms FCC 499-A for 2005 and 2006 has had the following estimated impact on the Company's voluntary contributions:

> with respect to Form 499-A for 2005 -- over $10,000 in USF contributions, over $18,000 in TRS payments and over $7,000 in regulatory fees;
>
> with respect to Form 499-A for 2006 – over $36,000 in USF contributions, over $56,000 in TRS payments, and over $25,000 in regulatory fees.[178]

In addition, Compass has yet to receive the full adjustments to its 2007 contributions which will result from the full processing of the Company's revised 499-A for 2007. Compass' overpayments to the federal support mechanisms are not limited to the above-referenced programs; these overpayments affect Compass' LNP, SOW and NANP contributions as well.

With respect to USF contributions, section 54.706(a) of the FCC's rules provides:

> "Entities that provide interstate telecommunications to the public, or to such class 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."[179]

As demonstrated in Sections IV.A through F hereof, Compass does not fall within this class of "contributing entities." Nonetheless, the Company has supported the FCC's commitment to the promotion of universal service to consumers in all regions, and it has done so to the extent of voluntary contributions in excess of $350,000.00 overall. At the most fundamental level, then, the totality of this amount is an overpayment, not an underpayment as the NAL suggests. As described in

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178 Compass USAC Appeal, November 6, 2007, pp. 7-8.

179 47 C.F.R. §54.706(a).

Section II hereof, Compass has paid the USF invoices received by it at the full invoiced amounts.[180] Thus, even after the full and final resolution by the FCC of the issues raised in Compass' USAC appeal, the USF payments already made by the Company will still exceed amounts which should have been remitted per the revised contribution amounts for the identified period.

With respect to NANP contributions, section 52.17(a) of the FCC's rules provides:

> "Contributions to support numbering administration shall be the product of the contributors' end-user telecommunications revenues for the prior calendar year and a contribution factor determined annually by the Chief of the Common Carrier Bureau."[181]

As demonstrated in Sections IV.A through F hereof, Compass does not have "telecommunications revenues" upon which NANP contributions might be based. Nonetheless, the Company has supported the FCC's policy goals of universal service; and as noted, *supra*, it has done so to the extent of more than $350,000.00 in total voluntary contributions. As with the Company's USF contributions, the totality of this amount is an overpayment, not an underpayment. As described in Section II hereof, Compass has paid the NANP invoices received by it at the full invoiced amounts. Thus, even after the USAC Administrator resolves Compass' pending appeal by directing the processing of the Company's revised Forms 499-A for 2005 and 2006, the NANP payments already made by the Company will still exceed amounts which should have been remitted per the revised contribution amounts for the identified period.

The NAL's assertion that "Compass failed to make a[n NANP] payment until April 12, 2007,"[182] is also incorrect. By that date, Compass had paid 11 invoices from the various funding entities; these payments totaled $125,550.50 in the aggregate and included payment in full of the three invoices related to NANP charges which Compass had received to that point in time.

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180 Indeed, per USAC's own documentation, during certain periods of time Compass actually maintained significant credit balances. See Section II, *supra*.

181 47 C.F.R. §52.17(a).

182 NAL, ¶ 24.

With respect to LNP, section 52.32(a) of the FCC's rules provides that:

> "The local number portability administrator . . . shall recover the shared costs of long-term number portability attributable to that regional data base from all telecommunications carriers providing telecommunications services in areas that regional database serves."[183]

Compass is not a telecommunications carrier and does not provide telecommunications services to end-users for a fee. Thus, Section 52.32(a) has no application to it. Nonetheless, Compass has paid in full all LNP and SOW charges invoiced to it by Neustar, all of which may be considered overpayments. These payments total $21,814.29 through the date of the issuance of the NAL. This amount will exceed amounts which should have been remitted per the revised contribution amounts for the identified period.

I. COMPASS HAS NOT VIOLATED FCC RULES BY FAILING TO MAKE TIMELY REGULATORY FEE PAYMENTS

The NAL's assertion that "Compass was required to pay regulatory fees"[184] is premised upon the faulty conclusion that the Company is a "telecommunications carrier" with "telecommunications revenues."[185] Section 1.1154 of the FCC's rules specifically refers to "Interstate Service Providers," a classification which Compass did not (and does not) believe applies to it. Nothing in the Commission's Public Notices, Notices of Proposed Rulemakings or Report & Orders concerning regulatory fee assessment provided Compass with persuasive notice that such fees would be applicable to a service model structured in the manner of the Company's. Furthermore, FCC Rule section 1.1157(b)(1) provides for "[p]ayments of standard regulatory fees applicable to certain wireless radio, mass media, common carrier, and cable and international services,"[186] service classifications which Compass did not (and does not) believe appropriately characterize its particular service model. Thus, it is Compass' position that, even now, when the Company has agreed to

183 47 C.F.R. §52.32(a).
184 NAL, ¶25.
185 *Id.*
186 47 C.F.R. §1.1157(b)(1).

voluntarily file FCC reports and contribute to federal support mechanisms as if it were an ITSP, since as a legal matter Compass is *not* an ITSP, it is not subject to the regulatory fee payment obligations set forth in FCC Rule sections 1.1154 and 1.1157.

Notwithstanding the inapplicability of those sections against it, however, on September 19, 2007, Compass submitted through Fee Filer a payment in the amount of $92,587.00 in fulfillment of regulatory fees for FY 2007, once again evidencing the Company's good faith efforts to be fully supportive of FCC funding programs.

The NAL also inappropriately faults Compass for failing to make TRS contributions, even as it admits that "[a] carrier's contribution to the TRS Fund is based upon subject revenues for the prior calendar year."[187] Those "subject revenues," pursuant to FCC Rule section 64.604(c)(5)(iii)(A), are "interstate end-user telecommunications revenues" (of which Compass has none). Section 64.604(c)(5)(iii)(A) also makes clear that the TRS contribution obligation is applicable to carriers "providing interstate telecommunications services" (which Compass does not).

Notwithstanding the above, however, it is inequitable to fault the Company for failing to satisfy a purported debt, the amount of which has yet to be adequately determined by NECA, the entity specifically tasked with this responsibility by the FCC.[188] Compass' persistent efforts to ascertain the amount which is actually outstanding in TRS funding are well-known to the Commission.

Approximately three months prior to the issuance of the NAL, the FCC was provided with a copy of Compass' first TRS Appeal; approximately one month later, copies of Compass' second TRS appeal were provided to the FCC's Office of the Secretary, the FCC's Office of Financial

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[187] NAL, ¶23.

[188] As explained in Section II hereof, however, it is without question that the FCC retains ultimate responsibility for full satisfaction of the administrative functions which it has delegated to NECA and, thus, may not allow this unquantified debt to form the basis of either a collection action under the Debt Collection Improvement Act or any attempt to impose an administrative forfeiture against Compass.

Operations, the Chief of the FCC Revenues and Receivables Operations Group, the NECA TRS Collections Department and the Universal Service Administrative Company. These appeals placed into controversy not only the FCC's January 9, 2008 Notice of Debt Transfer of allegedly unpaid TRS Fund contributions, interest and penalties, but also the FCC's February 28, 2008 Notice of Debt Transfer, NECA's mid-year adjustment invoice to Compass and any and all subsequent attempts to transfer a TRS-related debt for collection against Compass. Compass' TRS appeals described in detail the inaccuracies of the purported debt, the amount(s) of which varied widely in FCC documents issued only a month apart, and which differences NECA has declined to explain to the purported debtor or the FCC. The TRS appeals also provided ample legal justification for an embargo on the application of Debt Collection Improvement Act procedures against Compass until all issues identified had been adequately resolved. Compass' TRS appeals are attached hereto as **Exhibit 17** and **Exhibit 21**, and incorporated herein by reference.

Even assuming that Compass falls within the class of entities subject to the FCC's TRS payment rules (which it does not), a review of those submissions will reveal that the purported TRS obligation cited in the NAL – indeed, at this point in time *any* TRS obligation against Compass – has yet to be reduced to a legally enforceable debt. Furthermore, the FCC itself has held that:

> "where an applicant has filed a timely administrative appeal, or a contested judicial proceeding, challenging either the existence of, or the amount of, a debt, such debt shall not be considered delinquent."[189]

Thus, the mere existence of Compass' pending TRS appeals effectively removes any purported TRS obligation from the scope of this NAL proceeding. And the Company has paid in full all other amounts assessed against it notwithstanding the inflated contribution amounts set forth on all such invoices. Accordingly, any purported forfeiture set forth in the NAL is without basis.

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[189] *In the Matter of Amendment of Parts 0 and 1 of the Commission's Rules, Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, Report and Order*, MD Docket No. 02-339 (rel. April 13, 2004), ¶ 6.

And, until such time as the FCC affords Compass the full measure of its administrative appeal rights, the Agency's obligation to adhere to its own rules and regulations prevent the imposition of any forfeiture against the Company.

V. THE PROPOSED 22-MONTH FORFEITURE IS UNLAWFUL, ARBITRARY, CAPRICIOUS AND EXCESSIVE AND MUST BE REDUCED.

Assuming *arguendo* that the Commission concludes that: (1) Compass is a telecommunications carrier; and (2) it did "underpay" its contributions, the proposed forfeiture must be reduced to include only those alleged violations not barred by the statute of limitations in Section 503(b)(2)(B) of the Communications Act. 47 U.S.C. § 503(b)(6)(B).

A. THE APPLICABLE STATUTE OF LIMITATIONS IS ONE YEAR.

Section 503(b)(6)(B) of the Act provides in pertinent part that:

> No forfeiture penalty shall be determined or imposed against any person under this subsection ... if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.[190] *Id.*

The societal benefits of statutes of limitations have been long recognized. As the Supreme Court observed in *Wood v Carpenter*, 101 U.S. 135, 139 (1879) and quoted in *Cole v Kelley*, 438 F.Supp. 129, 145 (C.D. Ca. 1977):

> Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

Following these principles, the Commission and the courts strictly construe the statutory limitations period set forth in section 503(b)(6)(B)[191] Notwithstanding this, in a most remarkable

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[190] The NAL was issued on April 9, 2008.

[191] *See, New Jersey Coalition for Fair Broadcasting v FCC*, 580 F2d 617, 188 App. DC 354 (1978) (Recognizing that as the legislative history noted, forfeiture was intended to be rapid, with a one-year

fashion, the Commission exceeds its statutorily mandated limitations period and proposes forfeitures against Compass for alleged violations that clearly fall outside the applicable statute of limitations. To the extent that the NAL purports to fine Compass for alleged liability that has been destroyed by operation of law vis-à-vis the express limitations in Section 503(b)(6)(B), the Commission's actions are unlawful, arbitrary and capricious, discriminatory and in violation of the APA.

B. THE PROPOSED FORFEITURE'S APPROACH TO ESTABLISHING PERIOD OF LIABILITY.

In its NAL, the Commission proposes to dramatically increase the standard base forfeiture by extending the one-year period to 22-months. In particular, the NAL proposes to:

> find that Compass is apparently liable for 22 continuing violations for failure to make timely and full monthly payments to the USF. ... find Compass apparently liable for a base forfeiture of $440,000 for its willful or repeated failure to contribute fully and timely to the USF on 22 occasions between May 2005 and December 2005 as well as between January 2006 and December 2006 and again in January and March 2007. Consistent with our approach for assessing liability for apparent USF violations, and taking into account all the factors enumerated in section 503(b)(2)(E) of the Act, we also propose an upward adjustment of $79,503, approximately one-half of Compass' untimely paid USF contributions, to our proposed base forfeiture. We therefore issue a total proposed forfeiture of $519,503 against Compass for its apparent willful or repeated failures to contribute fully and timely to the USF.
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> We also find that Compass has failed to make timely TRS contributions in 2005, 2006 and 2007. ... For the reasons discussed above regarding Compass' failure to make universal service contributions and consistent with Commission precedent, we find that an upward adjustment in an amount of approximately one half of the carrier's estimated unpaid TRS contributions (approximately $438,340.89) is appropriate for Compass' apparent failure to make TRS contributions. Taking into account the factors enumerated in section 503(b)(2)(E) of the Act, we conclude that a $219,110.44 upward adjustment is reasonable.
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> We also conclude that Compass apparently failed to make timely contributions toward NANP administration and LNP cost recovery mechanisms on the basis of its actual end-user telecommunications revenues since 2005. ... we find that Compass is apparently liable for the base forfeiture of $20,000 for failing to timely pay

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limitation period. The court stated that there was a need when the forfeiture provisions were added for such a swift, simple, comparatively temperate penalty procedure.)

contributions toward NANP administration cost recovery mechanisms for 2005 and 2006. With respect to Compass' failure to make its LNP contributions, we find that this violation is sufficiently analogous to the failure to pay NANP administration contributions and establish the same base forfeiture amount -- $10,000. Accordingly, we find that Compass is apparently liable for a forfeiture of $20,000 for failing to timely pay LNP contributions for 2005 and 2006.

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Finally, we conclude that Compass has apparently failed to make any regulatory fee payments to the Commission in 2005 or 2006.... As with failure to make universal service, TRS, NANP administration and LNP contributions, we find failures to make regulatory fee payments to be continuing until they are cured by the payment of all monies owed.

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Accordingly, consistent with our previous statements that nonpayment of USF, TRS, and other obligations constitute continuing violations, and to effectively deter companies like Compass from violating our rules governing payment into the USF, TRS, and other programs, our forfeiture calculations will reflect not only the violations that began within the last twelve months, but all such continuing violations. By including such violations in our forfeiture calculations, our enforcement actions now will provide increased deterrence and better reflect the full scope of the misconduct committed. As in previous orders, we warn carriers that if the forfeiture calculation methodology described here does not adequately deter violations of our rules, we will consider larger penalties within the scope of our authority, including substantially higher forfeitures and revocation of carriers' operating authority.[192]

C. THE COMMISSION LACKS AUTHORITY TO AMEND OR EXTEND THE STATUTE OF LIMITATIONS.

It is well-established that the Commission cannot waive a statutory requirement. As such, the Commission may not, through the issuance of an NAL, amend, extend or otherwise waive the one-year limitations period. *See Commonwealth Telephone, et al.*, Memorandum Opinion and Order, 4 FCC Rcd 5299, ¶ 14 (1989) (the Commission cannot waive the Section 405 deadline for filing reconsideration petitions); *Request for Waiver St. Helen School*, Order, 17 FCC Rcd 23520, ¶ 8 (2002) (the Commission "does not have authority to waive a requirement imposed by statute"). Therefore, if, for arguments sake, the Commission finds Compass is liable for certain violations, the forfeiture

[192] *Citing Globcom Forfeiture Order*, 21 FCC Rcd at 4724, ¶ 38 & n.105. Notably, paragraph 38 cited by the Commission says nothing about extending the statute of limitations. Rather, it merely affirms the NAL's forfeiture calculation methodology wherein the base forfeiture amount was increased.

period must be reduced to the one-year period preceding the issuance of the NAL.

D. THE COMMISSION'S RELIANCE ON *GLOBCOM* IS MISPLACED AND IN ERROR.

It appears the Commission misapplied its own precedent to justify its disregard for the statute of limitations. Specifically, the support for the proposed 22-month forfeiture hinges on the "methodology" applied in the *Globcom Forfeiture Order*. In so doing, the Commission misstates the import of *Globcom* and, in turn, inappropriately proposes forfeitures for alleged liabilities that have been extinguished as a matter of law.

The Commission in *Globcom*[193] issued a forfeiture against the carrier for its willful and repeated violations of section 254(d) of the Act and sections 54.706(a), 54.711(a), and 64.604 of the Commission's rules. The significance of *Globcom* is that the Commission announced a change in policy by increasing the base forfeiture amounts and the number of potential violations included in the forfeiture, but these policy changes were all applied within the one-year period preceding the issuance of the *NAL*.

The Commission concluded that "substantially larger forfeiture amounts are needed to deter carriers from violating [the] universal service contribution and reporting rules."[194] As a result, the Commission found that the time had come to implement a substantially greater forfeiture amount in order to deter carriers from violating its universal service contribution and reporting rules because "[c]learly, our method of assessing forfeitures prior to *Globcom* was not a sufficient deterrent."[195] Therefore, relying on prior "warnings," the Commission increased the number of months of USF nonpayment on which its assessed forfeiture amounts and the discretionary upward adjustment

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[193] *Globcom, Inc.*, Order of Forfeiture, 21 FCC Rcd 4710, 4721-24, ¶¶ 29-38 (2006) ("*Globcom Forfeiture Order*"); *Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture & Order, 18 FCC Rcd 19893, 19902-05, ¶¶ 22-32 (2003) ("*Globcom NAL*").

[194] *Globcom Forfeiture Order*, 21 FCC Rcd at 4723-24, ¶ 36; *Globcom NAL*, 18 FCC Rcd at 19903, ¶¶ 25-26.

[195] *Globcom Forfeiture Order*, 21 FCC Rcd at 4724, ¶ 37; *Globcom NAL*, 18 FCC Rcd at 19903, ¶ 26.

could apply.[196] The import of *Globcom* is clearly limited and the Commission cannot now bootstrap *Globcom* to justify an unauthorized, *ultra vires* extension of the statute of limitations established by Congress.

Indeed, support for a cancellation and reduction of the 22-month forfeiture proposed against Compass can be gleaned from what the *Globcom Forfeiture Order* says and does not say. In particular, after concluding that past forfeitures were falling short in deterring carriers from their contribution responsibilities, the Commission changed the forfeiture methodology by "increasing the number of months of nonpayment on which we assess the forfeiture amount. We will now propose substantial forfeitures for each of Globcom's universal service-related violations within the past year."[197]

Nowhere in *Globcom*, or in any other rulemaking proceeding or rule, has the Commission been given authority to extend the one-year limitation period within which to find liability.[198] It would be an error to do so here in the total absence of statutory authority.

E. THE PROPOSED FORFEITURE COVERING A 22-MONTH PERIOD VIOLATES THE APA AND SECTION 503(B)(6)

The proposed forfeiture, based as it is on a 22-month period, must be reduced because the Commission failed to consider the express limitations period of Section 503(b)(6)(B), failed to

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[196] *Globcom Forfeiture Order*, 21 FCC Rcd at 4723-24, ¶¶ 36-38; *Globcom NAL*, 18 FCC Rcd at 19903-04, ¶¶ 25-27.

[197] *Id.* at 19904 (emphasis added). The Commission's forfeiture against Globcom consisted of two components. First, applying the base forfeiture amount of $20,000 per violation for the previous twelve months of non-payment and second, the addition of an amount equal to approximately one-half of the unpaid universal service contributions. *Id.* The Commission has observed, the latter component of the forfeiture "illustrate[s] that a delinquent carrier's culpability and the consequential damage it causes to the goal of universal service may vary with the size of the contribution it fails to make." *See culpability discussion, infra.*

[198] Statute of limitations periods are meant to provide certainty to parties. Certainty relating to the extent of claims that may be brought against them. The Commission's imposition of a 22-month limitations period in the NAL provides absolutely no guidance to carriers regarding how "far back" the Commission may go in proposing forfeitures. This is yet another example of the arbitrary and capricious nature of the NAL and its proposed forfeitures spanning 22-months.

consider its forfeiture guidelines, which are in effect binding rules, and failed to properly explain why Compass' alleged conduct in particular justified a departure from the statutorily mandated limitations period. As a result, the liability proposed by the Commission for Compass' alleged violations spanning over the 22- month period prior to the issuance of the NAL is arbitrary and capricious under the Administrative Procedure Act ("APA").[199]

1. The Commission Provided No Basis For Departing From The Established 12-Month Limitations Period.

As articulated by the Supreme Court, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[200]

The "relevant factors" here are set forth in Section 503(b)(6)(B) of the Act: "[n]o forfeiture penalty shall be determined or imposed ... if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability."[201] As set forth above, there are numerous decisions by the Commission where the appropriate one-year limitations period was applied despite the fact that the apparent violations had been on-going for years outside the one-year period.[202] There can be no doubt that the Commission is bound by the one-year limitations period, the same limitations period that has been consistently followed by the Commission and the same limitations period that the Commission has provided utterly no basis for departing from here.

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199 *See*, 5 U.S.C. § 706(2002).

200 *See*, Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted).

201 47 U.S.C. § 503(b)(6)(B).

202 *See supra at Section V.F-G.*

2. The Commission Provided No Notice That It Would Extend The 12-Month Statutory Period.

The Commission's self-proclaimed "warnings" do not provide the requisite "notice" under the APA. In the NAL, the Commission vaguely asserts that it has "warned" carriers (vis-à-vis the *Globcom Forfeiture Order*) that if the given forfeiture methodologies do not adequately deter violation of FCC Rules, it has authority to impose larger penalties. *See NAL* at ¶ 31. This touted warning is not notice that the Commission may now disregard, at its leisure, the established 12-month limitations period. Indeed, no matter what notice was provided, no notice could be sufficient enough to amend or alter a statutory limitations period.

> Although the Commission in *Globcom* may have been providing "notice" that the "amount" of the forfeiture could be increased in the future, the Commission provided absolutely no notice that the "liability period" would or could be expanded such as to "result" in an increased forfeiture amount. Moreover, even if the FCC made its intentions clear, those intentions – if implemented or left to stand – violate the statute. Consider the Commission's express language in *Globcom*
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> ... Moreover, delinquent carriers may obtain a competitive advantage over carriers complying with the Act and our rules. Universal service nonpayment threatens a key goal of Congress and one of the Commission's primary responsibilities; therefore, **we properly increased the number of months of nonpayment on which we assess forfeiture amounts** and the discretionary upward adjustment. (para 37)(emphasis added).
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> .... We again warn carriers that if the forfeiture methodology described herein is not adequate to deter violations of our USF and TRS rules, **our statutory authority permits the imposition of much larger penalties and we will not hesitate to impose them.** (para. 38) (emphasis added).

There is absolutely nothing in this language that provides forewarning of an "expanded liability period." The underscored statements above are not *per se* incorrect, but the Commission is misconstruing these statements in an attempt to justify its expansion of the liability period, to which there is no justification. For instance, the statement, "We properly increased the number of

months" is correct in that the Commission increased the number of months up to the statutory maximum of 12. The statement, "Our authority permits imposition of larger penalties" is correct but, and this is big but, statutory authority does not allow the Commission to achieve its objective of "larger penalties" through an *ultra vires* expansion of the statutory liability period to which no adequate notice was provided.

F. THE COMMISSION'S METHODOLOGY FAILS TO DISTINGUISH BETWEEN DETERMINING LIABILITY AND THE DEGREE OF CULPABILITY.

In imposing the 22-month forfeiture period, the Commission fails to distinguish between the relevant limitations time period for determining liability and the relevant period of time to determine culpability. When establishing a forfeiture, Section 503(b)(2)(D) directs the Commission to consider certain factors about both the purported violation itself and certain factors about the alleged violator.[203] Specifically, section 503(b)(2)(D) states:

> In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. 47 U.S.C. 503(b)(2)(D).

Compass acknowledges that the Commission may properly consider prior offenses that occurred more than one-year before a violation to establish the context for determining an appropriate forfeiture amount. *Id.* at ¶ 26, fn. 77 (e.g., *Roadrunner Transp., Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-72, ¶ 8 (2000) ("While the Commission may not ... find the Licensees liable for violations committed prior to [the NAL], it may lawfully look at facts arising before that date in determining an appropriate forfeiture amount."); *Cate Communications Corp.*, Memorandum Opinion & Order, 60 Rad Reg 2d 1386, 1388, ¶ 7 (1986) (holding that facts prior to the statute of limitations period may be used to place "the violations in context, thus establishing the licensee's degree of

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203 *See InPhonic Forfeiture Order* at ¶ 24.

culpability and the continuing nature of the violations"); *Eastern Broadcasting Corp.*, Memorandum Opinion & Order, 11 FCC2d 193, 195, ¶ 6 (1967) ("Earlier events may be utilized to shed light on the true character of matters occurring within the limitations period.").

However, the Commission's proposed forfeiture in the Compass NAL errs in its failure to "distinguish between conduct the Commission may consider in determining a licensee liable for a forfeiture and conduct or other matters the Commission may consider in determining the degree of culpability." *InPhonic* at 26, *citing Eastern Broadcasting Corp.*, 11 FCC2d at 193, ¶ 2 (1967). Therefore, the Commission's approach of considering the alleged 22-months of violations for purposes of "culpability" as well as imposing liability for the 22-months is improper, as the statute of limitations bars the imposition of any "liability" beyond the one-year period.

G. IMPOSITION OF THE 22-MONTH FORFEITURE PERIOD IS CONTRARY TO COMMISSION PRECEDENT

The Commission purports that the imposition of a 22-month liability period is "consistent" with its prior statements.[204] This is absolutely and unequivocally untrue, as shown below in a review of the methodologies employed in recent forfeitures issued by the Commission post-*Globecom*. Even if it were true, the Commission's extension of the one-year statute of limitations in Section 503(b)(6)(B) of the Act remains *ultra vires*.

- *OCMC, Inc., Forfeiture Order*, EB-04-IH-0454 (Rel. Sept. 15, 2006)

The Commission's methodology found liability for only those violations occurring within one-year of the NAL's release. However, the Commission looked beyond the one-year period to determine the carrier's culpability pursuant to 503(b)(2)(D). *Id.* at ¶ 18. In calculating the penalty, the Commission noted that the record is clear that between September 2003 and the date of the

[204] *NAL* at ¶¶ 33-34.