

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

In the Matter of Universal Service)	
Administrative Company's Request)	WC Docket No. 06-122
For Universal Service Fund Policy)	
Guidance)	CC Docket No. 96-45

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

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Introduction

The Ad Hoc Coalition of International Telecommunications Companies (“Coalition”)¹ is a grassroots organization comprised of both U.S. and non-U.S. companies, including prepaid calling card providers, international transport carriers, and a broad spectrum of entities engaged in the provision of wholesale communications services. The Coalition submits these comments on behalf of its members in response to USAC’s request for guidance. USAC presents the question whether it may base an “audit finding” (evidence of a rule violation) on post-dated reseller certificates submitted by contributing wholesalers to support their expectation that a reseller would contribute directly to the Universal Service Fund (“USF”).²

USAC is begging the question. Implicit in USAC’s request for guidance is an assumption that the rigid way it enforces the carrier’s carrier rule through audits is clearly settled. USAC’s question rests on the faulty premise that the standard of proof a wholesale contributor must submit to pass the “reasonable expectation” test is a bright-line rule. It is not. USAC’s interpretation of the carrier’s carrier rule is controversial and has resulted in numerous appeals, many of which have been pending for years before the Commission.³ Now, however, USAC

¹ www.telecomcoalition.com

² See Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, Wireline Competition Bureau, Federal Communications Commission, WC Docket No. 06-122, CC Docket No. 96-45, at 1-2 (filed Mar. 1, 2011). See also *Comment Sought on Universal Service Administrative Company’s Request for Universal Service Fund Policy Guidance*, Public Notice, WC Docket No. 06-122, CC Docket No. 96-45, DA 11-432 (rel. Mar. 7, 2011).

³ See, e.g., AT&T Inc., Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, CC Docket No. 96-45 (filed Oct. 10, 2006) (challenging USAC’s audit finding that “it should reclassify certain of AT&T’s 2005 reseller revenue to end user revenue because several of AT&T’s resellers did not contribute to [USF] despite AT&T ‘having received signed USF certifications from its resellers’”); XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator, CC Docket No. 06-122 (filed Dec. 29, 2010) (appealing USAC’s decision to reject as inadequate evidence XO submitted to support its classification of resellers’ revenues as carrier’s carrier revenues). The standard that wholesale carriers must satisfy in order to classify revenues as reseller revenue has also been questioned in *Request for Review by ILD Telecommunications, Inc. and Intellicall Operator Services, Inc.*, WC Docket No. 96-45 (filed March 31, 2006) (supplemental appeal filed June 5, 2006); *Request for Review of Decision by the Universal Service Administrative Company by IDT Corporation and IDT Telecom*, WC Docket No. 96-45 (filed June 30, 2008); see also *In the Matter of Request for Review of Decision by the Universal Service Administrator by IDT Corporation*, WC Docket No. 96-45 (filed April 10, 2006) (similar appeal related to filing years 2003, 2004 and 2005).

asks the Wireline Competition Bureau (the “Bureau” or “WCB”) to overlook the larger questions and get into the weeds of whether the date on a set of forms in and of itself could rise to evidence of a rule violation.

The Coalition urges the Commission to resolve the larger questions currently pending before it concerning USAC’s enforcement of the carrier’s carrier rule before jumping ahead to USAC’s instant request for guidance. In particular, the Coalition requests that the Commission act on its petition for rulemaking to address the inequities in USAC’s interpretation and application of the carrier’s carrier rule.⁴

The Carrier’s Carrier Rule

The FCC has recognized that while all end-user interstate telecommunications *revenues* are assessable for universal service contributions, not all telecommunications *carriers* would be assessed based on that revenue.⁵ To recover contributions for the same end user revenues from multiple carriers along the chain would be “double counting,” and double assessments conflict with the federal policy of competitive neutrality.⁶ The “carrier’s carrier rule” was meant to avoid such “double counting”⁷ by allowing wholesale carriers to report revenue derived from services sold to resellers who themselves were required to contribute directly to universal service separately from all the rest.⁸

To justify reporting revenue from these resellers separately from all other sources, underlying carriers must have procedures in place to establish a “reasonable expectation” that

⁴ See *Petition of the Ad Hoc Coalition of International Telecommunications Companies for Rulemaking to Address Inequities in USAC’s Interpretation and Application of the Carrier’s Carrier Rule*, WC Docket No. 06-122 (filed Feb. 16, 2010) (“Coalition Petition”).

⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶ 846 (1997) (“Universal Service First Report and Order”) (“Basing contributions on end-user revenues . . . will relieve wholesale carriers from contributing directly to the support mechanisms” because these carriers do not earn revenues directly from end users.).

⁶ Universal Service First Report and Order, 12 FCC Rcd at 8801-03, ¶¶ 46-51.

⁷ See *NetworkIP Order*, ¶ 7.

⁸ Universal Service First Report and Order, 12 FCC Rcd 8776, ¶ 848.

those resellers will contribute to the USF.⁹ The FCC has reinforced that its guidance on how a contributor may validate a reseller's status is not a bright-line rule.¹⁰ It has instructed USAC instead that it must consider all evidence a contributor presents in applying the "reasonable expectation standard."¹¹

USAC has turned the carrier's carrier rule on its head. The rule was intended to avoid the inequities of collecting from several carriers for the same revenue. Yet, in its audits, USAC has created a presumption that each and every carrier along the chain must contribute unless they can meet a high burden of proving that someone else will pay. If the carrier cannot meet the burden of proof in a particular way, the carrier faces the threat of revenue reclassification. Further, even if a wholesale carrier has conducted appropriate due diligence and received assurances that a reseller will pay, USAC has asserted that authority to impose a contribution obligation on that carrier if the reseller fails to pay.¹²

USAC has effectuated this policy drift with the stamp of approval of the WCB through changes to Form 499 instructions.¹³ USAC's function is to be *exclusively administrative*; USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.¹⁴ Nor does the WCB have authority to effect policy changes affecting universal

⁹ See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18508 (1997).

¹⁰ NetworkIP Order, ¶ 8 ("While the Commission does not dictate what procedures a carrier must implement to meet the 'reasonable expectation' standard, the agency has provided guidance in the FCC Form 499-A instructions to assist wholesale carriers regarding how to satisfy the reasonable expectation standard.").

¹¹ See *Universal Service Contribution Methodology; Request for Review of a Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, Order, WC Docket No. 06-122, DA 10-2005, n.51 (rel. Oct. 19, 2010) ("NetworkIP Order; *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, 24 FCC Rcd 10824, 10828, ¶ 12 (Wireline Comp. Bur. 2009).

¹² In 2004, Bureau staff modified the Form 499 instructions: "Filers will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users." 2004 499-A Instructions at 17.

¹³ See *id.*

¹⁴ See 47 C.F.R. § 54.702(c).

service. While the FCC has delegated limited authority to the WCB to “waive, reduce, modify, or eliminate reporting requirements” and “require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms,”¹⁵ this authority is limited. The Bureau does not have authority to make *substantive* changes to reporting requirements that would affect the underlying support programs; it may only effectuate administrative changes to the reporting requirements, such as “where and when worksheets are filed.”¹⁶ Such policy changes are reserved for the FCC, which has “ultimate responsibility over the universal service support mechanisms.”¹⁷ To the extent the FCC seeks to make changes altering the rights and interests of affected parties, it may do so only after notice and an opportunity to comment.¹⁸

The Coalition’s Petition for Rulemaking

The Coalition supports a sustainable, effective Universal Service Fund that meets the goals of assuring affordable telephone service for all Americans.¹⁹ But the Coalition also believes the Fund should be fair and non-discriminatory to all participants, as Congress envisioned.²⁰ In its petition for rulemaking, the Coalition urges the Commission to invite public

¹⁵ Universal Service Second Order on Reconsideration, 12 FCC Rcd at 18442, para. 81; 47 C.F.R. § 54.711(c).

¹⁶ *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order, CC Docket Nos. 96-45, 98-171, 90-571, 92- 237, 99-200, 95-116, 98-170, FCC 99-175, ¶ 39 (rel. July 14, 1999).

¹⁷ USAC Third Report and Order, ¶ 69.

¹⁸ *See* 5 U.S.C. § 553(c).

¹⁹ *See* 47 U.S.C. § 254(b)(5), (d).

²⁰ *See id.* § 254(d). The Coalition has also filed petitions for declaratory rulings on Universal Service Fund administration issues that affect not only the Coalition’s members but all industry participants. *See* Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings that: (1) Qualifying Downstream Carriers May Choose Either To Accept Supplier Pass-Through Surcharges or Pay Universal Service Fees Directly; and (2) 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, WC Docket No. 96-45, CC Docket No. 06-122 (rec. Mar. 5, 2009); Petition of the Ad Hoc Coalition of

input and evaluate the variety of deficiencies and inequities that have cropped up from USAC's use of performance audits to impose vicarious liability on wholesale carriers under the name of the carrier's carrier rule.

As noted above, the carrier's carrier rule was originally conceived to avoid double-counting; USAC is enforcing this rule as if it were a presumption that everyone along the chain is liable for contributions unless they can prove otherwise. As the Coalition explains in its petition, USAC's Instructions have confused the industry and lead to carrier disputes that could be avoided in the future with clarification from the Commission, taking into account the views of affected parties.²¹

The Coalition has asked the Commission to develop a simple, uniform, and easily administered carrier-to-carrier USF exemption process, including a standard USF Exemption Certification Form. As it is, the Form 499 Instructions have confused wholesale providers because, while the FCC has stated that they constitute mere "guidelines," USAC has rejected wholesaler's application of these guidelines. In addition, as detailed in the Coalition's petition, the Instructions have confused the industry regarding wholesale suppliers' obligations to honor FCC exemptions. The Coalition has recommended that the FCC clarify wholesale providers' responsibilities to their resale customers, including the recognition and application of valid exemptions in the assessment of pass-through fees.

These issues impact the entire industry and warrant consideration in a rulemaking context rather than the piecemeal evolution of the carrier's carrier rule by USAC through its audits.

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, CC Docket No. 06-122 (filed Sept. 4, 2009).

²¹ See Coalition Petition at 5-8.

Conclusion

USAC's request for guidance is nothing more than a request to be given an easy means to reclassify revenues as assessable, even at the risk of double counting. The Coalition urges the Commission to set aside this request until it has resolved the looming questions about USAC's interpretation and application of the carrier's carrier rule. The Commission can do this either by acting on each of the petitions pending before it or by initiating a rulemaking proceeding to bring them all to light at once and develop a full public record for consideration. In the meantime, Coalition renews its request that the Commission suspend all pending and future enforcement of the carrier's carrier rule as interpreted by USAC and embodied in its Form 499-A Instructions.

Respectfully submitted,



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