

March 8, 2012

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Universal Service Contribution Methodology, WC Docket No. 06-122

Dear Secretary Dortch:

On behalf of its impacted members and countless unknown service providers, the Ad Hoc Coalition of International Telecommunications Companies ("Coalition")¹ hereby requests that the Federal Communications Commission ("Commission" or "FCC") take immediate action to prevent the inequitable and discriminatory consequences resulting from the Universal Service Administrative Company's ("USAC") policy forbidding *de minimis* contributors from electing to become direct Universal Service Fund ("USF") contributors.² As explained herein, FCC rules that are intended to mitigate administrative costs and burdens on USAC and service providers whose USF contributions are *de minimis* (under \$10,000 annually) have been misapplied by USAC.

USAC enforces a policy that precludes *de minimis* contributors from voluntarily electing direct contributor status. This policy minimizes USAC's burdens. However, it either has the unintended or, worse, intended consequence of foisting excessive costs onto *de minimis* contributors in the form of wholesale supplier USF surcharge pass-throughs which are eventually contributed to the Fund. As described in this submission, all too frequently the amount of USF surcharges billed by wholesale suppliers to their *de minimis* reseller customers (particularly *de minimis* customers also qualifying for the Limited International Revenue Exemption ("LIRE")), can exceed the contribution amount the *de minimis* customer would be required to contribute if USAC allowed them to contribute directly. This inequitable and discriminatory situation arises as a direct consequence of USAC's interpretation and enforcement of the FCC's Carrier's Carrier Rule ("CCR").

¹ Ad Hoc Coalition of International Telecommunications Companies. For more information, visit: <http://www.telecomcoalition.com>.

² The Coalition is comprised of a wide variety of international long distance service providers, including domestic and non-U.S. corporations, wholesale carriers and retailers, subscribed and pre-paid providers, as well as Internet-based and IP-in-the-Middle providers that facilitate the transmission and routing of international communications over traditional switched networks and advanced, IP-based networks. The Coalition is committed to the fair and equitable treatment of its predominantly international and international only service providers ("ITCs") who must operate under particularly adverse circumstances as *de minimis* resellers of telecommunications service due to the Limited International Revenue Exemption ("LIRE").

Pursuant to the CCR, wholesale providers of telecommunications are exempt from making USF contributions on revenue from reseller customers who already contribute to the USF.³ This exemption was intended to prevent the “double counting” of revenues, which contravenes universal service contribution methodology and conflicts with the federal policy of competitive neutrality.⁴ USAC instructions further find wholesalers liable for revenue from non-contributing resellers who are treated as end-users for purposes of calculating USF liability.⁵ Resellers who fail to meet or exceed the \$10,000 threshold of interstate revenue are *de minimis* and not required to contribute directly to universal service, so subsequently, *de minimis* resellers are considered non-contributors and end users of underlying wholesale service.⁶ Because a carrier’s USF contribution is tied to end-user revenues, this scenario expands the underlying carrier’s contribution eligibility. And, since underlying carriers are permitted by the FCC to pass their contribution obligations along to end-user customers, *de minimis* resellers ultimately find themselves responsible for USF contributions, only in an indirect rather than direct manner.⁷

The situation just described, in and of itself contravenes the FCC’s original intent. The FCC intended for *de minimis* providers to be wholly exempted from any contribution obligations whatsoever; indeed, the FCC made it clear that *de minimis* providers would not even be required to file Worksheets, i.e., Form 499s. See *Fourth Order on Reconsideration*, ¶ 293 (“The Commission found that, if a contributor’s annual contribution would be less than \$100.00, it is **not required to contribute to universal service or comply with Commission Worksheet filing requirements.**”); citing *Report and Order*, 12 FCC Rcd at 9187. To our knowledge, no FCC rulemaking ever resulted in a change to the proposition set forth in both the original *Report and Order* and *Fourth Order on Reconsideration*; that proposition plainly being that *de minimis* contributors are not required to contribute to the USF, without qualification or condition as to whether the contribution duty is imposed “directly” or “indirectly.” Today, however, as a result of USAC’s use of the CCR to impose indirectly that which it is legally barred from imposing directly, great numbers of *de minimis* providers find themselves subject to the same administrative burdens and contribution liabilities as their direct contributing brethren.

This unfair and clearly unintended situation is aggravated by what the Coalition refers to as the “LIRE Trap.” Under the LIRE, a carrier that derives under 12 percent of its end-user telecommunications revenue from interstate telecommunications services and the remaining 88 percent from international services will contribute to the USF solely on the basis of interstate revenue.⁸ However, ITCs have little to no interstate revenue, and therefore, are *de minimis*. Underlying wholesale suppliers, wary of their vicarious liability under USAC’s strict liability approach

³ 2011 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A), at 21 (2011) (“2011 FCC Form 499-A Instructions”); *Universal Service Contribution Methodology; Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, WC Docket No. 06-122; USAC Audit CR2008CP001, 25 FCC Rcd 14533, ¶¶ 6-8 (2010) (“NetworkIP Order”).

⁴ NetworkIP Order, ¶ 7; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶¶ 43-55, 846-49 (1997) (“Report and Order”).

⁵ 2011 FCC Form 499-A Instructions at 22.

⁶ 47 CFR § 54.708; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318, ¶¶ 293-98 (1997) (“Fourth Order on Reconsideration”).

⁷ 47 CFR §§54.706(b), 54.712.

⁸ 47 CFR § 54.706(c).

to enforcing the CCR, have little choice but to resort to interpreting the CCR far too conservatively and in ways which distort marketplace realities. Consequently, some ITCs, including Coalition supporters, have experienced underlying carriers who bill pass-through USF surcharges on the entirety of both interstate and international revenues. Thus, instead of having the option to pay direct contributions based on their interstate revenues alone, to the exclusion of international revenue (as contemplated by the LIRE), these providers have faced the prospect of paying indirect USF contributions to their suppliers in amounts which ignore the intended effects of the LIRE. More commonly, however, Coalition members are billed more in USF pass-through surcharges than their direct contribution liability would entail due to more subtle differences between the underlying carrier's perceived contribution liability for revenue derived from their *de minimis* reseller customers vs. the actual contribution liability owed, if only USAC permitted *de minimis* resellers to elect direct contributor status.

The conditions described above ultimately result in the double counting of revenues for USF contribution calculations, thus generating higher USF contributions through indirect means than USAC is entitled to impose through direct means – a glaring contradiction to the universal service contribution methodology contemplated by the FCC. Furthermore, this situation pits nervous wholesale service providers against their *de minimis* reseller customers, thus creating unnecessary, costly and yet entirely avoidable disputes over the nature, accuracy and legality of USF pass-through surcharges.

The Coalition has already filed three petitions with the FCC seeking comprehensive reform of the USF contribution regime, in general, and in particular, the CCR.⁹ The first petition sought abolition of indirect USF contributions resulting from USAC's treatment of revenues from non-contributors as end users. In its second petition, the Coalition requested a declaration that USAC lacks authority to assess USF fees on international only providers and that the FCC lacks jurisdiction to impose USF obligations on non-U.S. entities either directly or indirectly. Finally, in its third petition, the Coalition urged Commission action on its previous petitions and other pending industry requests for relief from inequitable application of the CCR. These various petitions and appeals amongst others have remained pending for years at the Commission.¹⁰

⁹ *Ad Hoc Coalition of International Telecommunications Companies' Petition 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. 06-122, Petition for Declaratory Ruling (filed Feb. 12, 2009) ("First Coalition Petition"); *Ad Hoc Coalition of International Telecommunications Companies' Petition 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*, WC Docket No. 06-122, Petition for Declaratory Ruling; *Petition for Rulemaking* (filed Sept. 4, 2009); *Ad Hoc Coalition of International Telecommunications Companies' Petition for Rulemaking to Address Inequities in USAC's Interpretation and Application of the Carrier's Carrier Rule*, WC Docket No. 06-122, Petition for Rulemaking (Feb. 16, 2010).

¹⁰ *Request for Review of Decision by the Universal Service Administrative Company by IDT Corporation*, CC Docket No. 96-45, Request for Review of Decision by the Universal Service Administrative Company by IDT Corporation and IDT Telecom (filed June 30, 2008); *Request for Review of Decision by the Universal Service Administrative Company by IDT Corporation*, CC Docket No. 96-45, Request for Review of Decision by the Universal Service Administrative Company by IDT

In petitioning the FCC, the Coalition has advocated that ITCs should be entitled to opt-out of *de minimis* treatment and voluntarily contribute according to the same formula as all other carriers.¹¹ Despite this simple and equitable request, USAC is presently constrained by concerns over the potential waste resulting from *de minimis* contributions as USAC's administrative costs of collecting such voluntary contributions could possibly exceed the contributions collected.¹² This state of affairs presents those *de minimis* ITCs caught in the "LIRE Trap" with severe administrative, commercial, and economic burdens and inevitably results in inequitable and discriminatory contributions that are contrary to the principles of universal service and in stark contrast to the FCC's original intent, which was to exempt *de minimis* contributors from all USF-related obligations, both financial and administrative.

To rectify the current inequitable situation, the Coalition is not advocating for a return to the FCC's original intent. Instead, the Coalition seeks relatively simple modifications to policies and procedures that would allow companies falling into the "LIRE Trap" to leverage FCC-sanctioned, publicly-available evidence of their unique regulatory status to rebut and fend off a wholesale supplier's attempt to impose USF contribution pass-through surcharges in an amount that unreasonably exceeds the would be direct USF contributions of a "trapped" *de minimis* reseller.

The Coalition recommends that the Commission take the following simple, but effective steps in order to provide wholesale providers with accurate and timely information about the unique status and consequences of being a "LIRE-eligible, de minimis" filer:

1. Modify the Telephone Company Locator database to have a notation that indicates a particular Form 499 filer is *de minimis*, but only **by virtue of the LIRE**;
2. Direct USAC to send a data field over to the FCC database that indicates a company is listed as a "NO" (non-contributor to the USF), but only **by virtue of the LIRE**; and
3. Include in the next iteration of Form 499 instructions a notation that, for purposes of the CCR, any company that is a non-contributor **by virtue of the LIRE** should be treated by their suppliers as end-users, ***but for the sole purpose of the U.S. interstate telecommunications revenue derived by the supplier from the end-user reseller, exempting any and all USF recoupment associated with international revenue.***

In enacting the *de minimis* and LIRE exemptions, the Commission exempted small carriers with limited revenue pools from the crippling burdens of USF contribution. The current application of these exemptions in the marketplace, however, is inconsistent with Congressional intent and with

Corporation and IDT Telecom (filed Apr. 10, 2006); *Request for Review by AT&T Inc. of Decision of Universal Service Administrator*, CC Docket 96-45, Request for Review by AT&T Inc. of Decision of Universal Service Administrator (filed Oct. 10, 2006); *XO Communications Services Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122, Request for Review of Decision of the Universal Service Administrator (filed Dec. 29, 2010).

¹¹ First Coalition Petition at 7, 10-11.

¹² Report and Order, ¶ 802; Fourth Order on Reconsideration, ¶ 295.

the goals of universal service. ITCs must endure inequitable and discriminatory contribution obligations and be placed at a competitive disadvantage to larger providers. To remedy the situation, the FCC must take into consideration the challenges confronted by not only ITCs who qualify as *de minimis* by virtue of the LIRE but also underlying wholesale providers and USAC. These challenges can be easily overcome if additional information is provided to wholesalers about resellers who are *de minimis* by virtue of the LIRE. By adopting the Coalition's solution, the Commission would work towards realizing the vision outlined by Congress of a fair, equitable, and non-discriminatory USF.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JSM', with a long horizontal flourish extending to the right.

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