

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

In the Matter of)	
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)	
InComm Solutions, Inc.)	CC Docket No. 06-122
(Filer ID No. 828883))	
Request for Review of Decision)	
of the Universal Service Administrator)	
)	

**REQUEST FOR REVIEW OF DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR**

PETITION FOR WAIVER

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SUMMARY

The Federal Communications Commission's ("FCC" or "Commission") long-standing policy against double-counting reseller revenues for the purposes of determining federal universal service fund ("USF") contributions is both uncontested and sound, based as it is on fairness and competitive neutrality. The issues presented in this case are (1) whether double-counting of reseller revenue has been established as a factual matter, (2) if so, whether it is unreasonably burdensome on USAC to provide a remedy, and (3) whether any actual alternative remedy is available.

InComm Solutions, Inc. ("InComm") is a provider of stand-alone audio-bridging (teleconferencing) services. InComm's clients are predominantly from the financial industry and the company was thus battered by the 2008 financial meltdown – just as it was attempting to come into compliance with the Commission's 2008 Order holding that audio-bridging providers such as InComm are required to contribute to the USF. After being in non-compliance for over two years, in June 2011, InComm came forward on its own initiative, remitting more than \$598,000 in prior period USF contributions and penalties. At specific issue, however, is over \$2.2 million in double-counted revenue. This revenue was double counted because it was previously reported by InComm's underlying wholesale carrier during the period InComm initially failed to comply with its revenue reporting obligations. InComm's underlying carrier was assessed and paid USF contributions based on this revenue. InComm has now been assessed over \$260,000 in USF contributions based on this same revenue.

Notwithstanding Commission policy against such double-counting, the Wireline Competition Bureau ("Bureau") has previously held that relief was not available where establishing the fact of alleged double-counting imposed an unreasonable burden on USAC. In

this prior case, multiple requestors had sought USF exemptions, refunds of USF surcharges remitted to underlying carriers, and refunds of late penalties. In each situation USAC had not been able to determine the amount of the USF double-assessment without a contributor revenue audit to determine the amount of double-counted revenues. InComm does not challenge this holding. In this case, however, InComm *is not* seeking an exemption from its USF obligations and *is not* seeking a credit for USF surcharges paid to its underlying carrier. Nor is InComm contesting the penalties it has paid for late filing its Form 499s – penalties which were calculated based in part on the double-counted revenue.

Rather, InComm has provided USAC the revenue information needed to calculate the actual amount of the USF double-assessment – thereby eliminating the need for a revenue audit. InComm requests that USAC carry out this calculation, confirm the double-assessment, and take the steps necessary to ensure that InComm is not required to make any contributions based on the double-assessment.

Failure to grant InComm’s request will effectively impose a further and much more substantial penalty than the late fees already imposed: the USF double-assessment of more than \$260,000. Because InComm has certified the accuracy of the double-counted revenue information, and no reason has been suggested to doubt its validity or accuracy, there is no practical or policy objective served by denying this request. Indeed, InComm has presented a straightforward case, and failure to provide relief will impose a *de facto* rule of punitive double-counting of revenues in contravention of Commission policy.

Finally, to the extent a waiver of the rules is required to permit InComm to submit revised Form 499 filings reclassifying the previously reported revenue as exempt reseller revenue, thereby removing it from InComm’s USF contribution base, InComm respectfully

requests such a waiver. Because InComm was required to double-report this revenue when it filed its Form 499s, there is good cause to grant such a waiver.

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InComm Solutions, Inc. (“InComm”), by its attorneys and pursuant to sections 54.719(c), 54.720, 54.721, and 54.722 of the rules of the Federal Communications Commission’s (“FCC” or “Commission”), files this Request for Review (“Request”) of a decision by the Universal Service Administrative Company (“USAC”) dated December 9, 2011 (“Decision”) (Attached as Exhibit 1.) The Decision was issued in response to InComm’s request for USAC to take administrative notice that InComm reported \$2.2 million of interstate telecommunications revenue to USAC as end-user revenue that had been previously reported as end-user revenue by InComm’s underlying wholesale carrier. This double-reporting of the end-user revenues used to calculate USF contribution obligations resulted in an over-assessment of USF contributions against InComm, in contravention of the Commission’s long-standing policy against double-counting revenue from resold services.¹

¹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9206-07 (1997) (“*First Report and Order*”) (subsequent history omitted); *cf. id.* at 9207 (rejecting USF assessment of gross revenue because it “creates a double-payment problem for resold services and thus is not competitively neutral”).

Pursuant to section 54.720(a) of the Commission's Rules, this Request is filed within 60 days of the issuance of the USAC Decision. *See also* 47 C.F.R. § 1.4(j). This Request is supported by an affidavit as required by section 54.721(b)(2) of the rules.² (Attached as Exhibit 2.) The Wireline Competition Bureau ("Bureau"), which will review this Request, must apply a *de novo* standard of review to the Decision.³ InComm requests the Commission direct USAC to take into account the double-reported revenue and reverse the corresponding USF obligations imposed by USAC against InComm.

I. BACKGROUND

During the relevant times, InComm was a family-owned business engaged in providing conference call services encompassing audio, video, and web-based platforms to clients in multiple industries and organizations. By emphasizing total quality and the highest level of client service, InComm developed a loyal client base of small to medium sized businesses for their event conferencing and investor relations conferencing services. However, during and after the 2008 financial meltdown, InComm's heavy reliance on clientele in the financial industry caused the company to suffer severely.

Meanwhile, effective October 1, 2008, the FCC ordered providers of audio bridging services such as InComm to begin making USF contributions.⁴ In response, InComm sought to comply with the new rule, submitting to USAC required Telecommunications Reporting Worksheets⁵ on August 1, 2008, and November 3, 2008, respectively. (Attached as Exhibit 3.)

² Declaration of E. Paul Cooke, Co-President, InComm Solutions, Inc. ("*Cooke Affidavit*").

³ *See* 47 C.F.R. §§ 54.722(1), 54.723(a)

⁴ *See Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731, 10739 (2008) ("*InterCall Order*"), *recon. pet. denied*, WC Docket No. 06-122, CC Docket No. 96-45, Order on Reconsideration, FCC 12-10 (rel. Jan. 27, 2012).

⁵ Also referred to herein as "Form 499s" which includes, unless specifically indicated, FCC Forms 499-A and 499-Q.

However, the submitted forms were not processed by USAC, apparently due to missing information. Unfortunately, InComm's management team was by this time overwhelmed as it struggled to keep the company going in the continuing aftermath of the financial crisis.⁶

InComm provides its conferencing solutions based on services it obtains from an underlying telecommunications provider. FCC rules required InComm's underlying carrier to obtain a certification from InComm that InComm was contributing to the USF based on the resold services.⁷ Because InComm failed to successfully file its revenue reports, InComm was not able to provide this required certification. As a result, between October 2008 and June 2011, the underlying carrier, as required by FCC rules, treated revenue from the services it provided to InComm as "end-user" revenue – which is subject to USF assessment – rather than "reseller" revenue, which is not.⁸ In so doing, the underlying carrier assumed an obligation to contribute to the USF based on that revenue. InComm's underlying carrier in turn assessed InComm USF surcharges to recoup these USF contributions. InComm paid in excess of \$276,000 in these USF surcharges to its underlying carrier through June 2011.⁹

As a result of InComm's payment of USF surcharges beginning in October 2008, InComm believed, albeit erroneously, that it was in partial compliance with its USF

⁶ See *Cooke Affidavit* at 3. Management did establish in November 2008, a separate bank account for the sole purpose of accumulating funds to satisfy expected USF contribution obligations. *Id.* at 4.

⁷ See, e.g., Instructions to the Telecommunications Reporting Worksheet, Form 499-A, at 19 (2009) (requiring annual reseller certifications).

⁸ In order to exempt reseller revenue from its contribution base, a carrier must have a reasonable expectation that the reseller itself is contributing to the USF. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP*, USAC Audit Report No. CR2008CP001, Order, 25 FCC Rcd 14533, 14536 (Wireline Comp. Bur. 2010) ("*NetworkIP*"). Failure to obtain a reseller certification generally prevents a carrier from establishing such a reasonable expectation and so the revenue is not considered exempt.

⁹ *Cooke Affidavit* at 4.

obligations.¹⁰ Notwithstanding, InComm understood the importance of full compliance and maintained the intention of coming into full compliance. This was demonstrated by management's establishment in November 2008 of a bank account that it used to accumulate the funds needed to come into full compliance.¹¹ Finally, in June 2011, without prompting, InComm retained counsel, formally contacted USAC and, on June 30, 2011, filed all required current and prior Telecommunications Reporting Worksheets. InComm has since remitted over \$591,000 in USF obligations from prior periods (*i.e.*, through June 2011), \$6,666.94 in late filing penalties, and has remained otherwise current on new USF obligations.¹²

In September 2011, InComm obtained a letter from its underlying wholesale carrier providing a statement of wholesale revenues that the underlying carrier received from InComm between October 2008 and June 2011 and that the underlying carrier had previously reported as end-user revenue in its Telecommunications Reporting Worksheet filings.¹³ (Attached as Exhibit 4.) The underlying carrier indicated the revenue information was compiled from "records . . . used in connection with . . . preparation of certified quarterly and annual [Form

¹⁰ *Id.* InComm was not represented by regulatory counsel during this period. *Id.*

¹¹ *Id.*

¹² *See id.* at 2. InComm has not paid the disputed USF contribution amounts and has instead chosen to exercise rights provided to it under the Debt Collection Improvement Act of 1996 ("DCIA"). The Commission's rules implementing the DCIA provide certain due process protections including the "the opportunity . . . for [the debtor to seek] review within the Commission of the determination of the indebtedness." *See, e.g.*, 47 C.F.R. §§ 1.1912(b)(4), (c)(2); *see also* 47 C.F.R. § 1.1912(b)(5) (requiring FCC Office of Managing Director to certify compliance with 31 U.S.C. § 3716(a), which requires federal agencies to provide "an opportunity for review within the agency of the decision of the agency related to the claim [for repayment]" before collection of a debt through administrative offset); *cf.* 31 U.S.C. § 3711(e)(2) ("Before disclosing information to a consumer reporting agency . . . the head of an . . . agency shall provide, on request of a person alleged by the agency to be responsible for the claim, for a review of the obligation of the person, including an opportunity for reconsideration of the initial decision on the claim."). InComm recognizes that under USAC's so-called "pay and dispute rule" for contested USF obligations, interest and penalties may not be refundable unless the Commission concludes that USAC acted erroneously. *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, USAC Audit Report No. CR2005CP007, Order, 24 FCC Rcd 10824, 10830-31 (Wireline Comp. Bur. 2009) ("*Global Crossing*").

¹³ *See* Letter from Norina T. Moy, Director, Government Affairs, Sprint, to E. Paul Cooke, President, InComm Solutions, Inc. (September 27, 2011) ("*Sprint Letter*"); *Cooke Affidavit* at 4.

499s] submitted . . . to [USAC].”¹⁴ This revenue information provided by InComm’s underlying carrier, which quantifies the precise amount of double-counted revenue, is corroborated by InComm’s records and InComm’s Co-President has certified its truth and accuracy.¹⁵

On October 14, 2011, InComm formally contested the attempted over-collection of USF funds from InComm and conveyed to USAC the double-counted revenue information, as corroborated by InComm’s underlying carrier.¹⁶ (Attached as Exhibit 5.) InComm also provided detailed supporting calculations for the amount of the double-assessment of USF obligations against InComm based on the double-counted revenue. InComm requested that USAC take administrative notice of the double-counted revenue, validate InComm’s USF calculations, and issue a USF credit to InComm corresponding with the double-assessment.

On November 16, 2011, InComm’s assets were acquired by another conference call service company.¹⁷ This acquisition does not affect the legal or factual basis for InComm’s appeal. In addition, pursuant to the transaction, the parties established an escrow account with sufficient funds to address all of InComm’s potential pre-acquisition USF liabilities.¹⁸ On December 9, 2011, USAC issued its Decision denying InComm’s request.¹⁹

¹⁴ *Sprint Letter*.

¹⁵ *Cooke Affidavit* at 5. Although the revenue information was supplied by InComm’s underlying carrier, the information reflects the total services obtained and paid for by InComm during the relevant period. As such, InComm is in a position to validate and certify the information as reseller revenue *from* InComm.

¹⁶ Letter from Jeffrey Mitchell and John Cimko, Counsel for InComm, to Michelle Garber, Director of Financial Operations, USAC (October 14, 2011).

¹⁷ This transaction was disclosed to USAC in a conference call that occurred December 5, 2011. *See Cooke Affidavit* at 2.

¹⁸ *Id.*

¹⁹ *See* USAC Administrator’s Decision USF Contributor Issue, InComm Solutions, Inc. (Filer ID No. 828883); Alleged Overpayment of Universal Service Contributions (December 9, 2011). *See* Exhibit 1.

II. FAILURE TO ACCEPT PROOF OF DOUBLE-COUNTED REVENUE UNDERMINES LONG-STANDING COMMISSION POLICY

Although the double-collection of over \$260,000 of USF contributions from InComm would be grossly unfair and cause substantial hardship, the principal basis for InComm's request is not this unfairness or hardship. Rather, this case presents an opportunity for USAC and the Commission to give substance to the Commission's stated policy against double-counting revenue, to accurately reflect the size of the USF contribution base, and to accurately assess contributions on that base.²⁰ Indeed, given the Commission's policy that contribution obligations should not be assessed more than once for the same revenue, the central question here is whether InComm has provided USAC and the Commission with accurate and reliable information regarding revenues on which USF assessments may properly be made. We believe it has.

InComm recognizes that this situation arose due to InComm's initial failure to comply with the Commission's rules as they were applied to conference calling companies such as InComm beginning in October 2008. Therefore, InComm has paid and is not contesting penalties assessed by USAC for InComm's late filings. However, over \$260,000 in USF contributions based on double-counted revenue should not be imposed as a *de facto* further penalty – above and beyond the thousands of dollars in penalties InComm has already paid. Nothing in the rules or the Commission's stated policies supports such an imposition.

²⁰ The Commission's rules generally require that USAC keep accurate accounts. *See* 47 C.F.R. § 54.702(h). USAC has a responsibility to carry out this task efficiently, effectively, and in a competitively neutral manner. *See id.*, § 54.702(a) (providing that "[USAC] is appointed the permanent Administrator of the federal universal service support mechanisms, subject to a review after one year by the Federal Communications Commission to determine that the Administrator is administering the universal service support mechanisms in an efficient, effective, and competitively neutral manner"). This ongoing duty to report collected amounts efficiently and effectively includes an obligation to accurately account for contribution base revenues. *Cf.* Memorandum of Understanding between the Federal Communications Commission and the Universal Service Administrative Company, at 32 ("MOU") (generally requiring a USAC officer to "certify to the accuracy of the data provided" to the FCC pursuant to the MOU), available at <http://transition.fcc.gov/omd/usac-mou.pdf>.

A. The Commission’s Policy Against Double-Counting and the *ATS Decision*

The current USF contribution methodology requires assessment of all end-user telecommunications revenues. The Commission chose to base USF contributions on end-user revenues precisely to avoid collecting “from the same services twice.”²¹ As the Commission explained, “double counting of revenues distorts competition because it disadvantages resellers.”²² The Commission has established strong rules that ensure that revenue “from the same service” is included in the contribution base at least once, but not more than once. Thus, although wholesale (or “carrier’s carrier” or “reseller”) revenue is generally exempt from USF assessment, wholesale carriers must treat their revenue as end-user revenue when the wholesale carrier lacks a reasonable expectation that its reseller customers are contributing to the USF.²³ Similarly, the Bureau indicated in a decision five years ago that resellers have an independent obligation to report their revenue from end-user customers and to contribute to the USF irrespective of any USF surcharges already assessed and paid to their underlying carrier.²⁴

Notwithstanding these strong protections and the Commission’s general policy against assessing revenue from resold services twice, in the *ATS Decision*, the Bureau refused to grant relief to several contributors alleging double-collection of USF contributions. Among other things, the Bureau concluded that contributors cannot contract their USF contribution obligations

²¹ See *First Report and Order*, 12 FCC Rcd 8776, 9206-07; cf. *id.* at 9207 (rejecting USF assessment of gross revenue because it “creates a double-payment problem for resold services and thus is not competitively neutral”).

²² *Id.* at 9207.

²³ See, e.g., *Global Crossing*, 24 FCC Rcd at 10825-26.

²⁴ *Federal-State Joint Board on Universal Service, American Telecommunication Systems, Inc., Equivoice, Inc., Eureka Broadband Corporation, TON Services, Inc., Value-Added Communications, Inc.*, CC Docket No. 96-45, Order, 22 FCC Rcd 5009, 5011 (Wireline Comp. Bur. 2007) (“*ATS Decision*” or “*ATS*”) (“Petitioners generally seek a credit against their USAC bills for payment made to their underlying carriers, and a credit for late payment fees assessed by USAC”).

to their underlying wholesale carriers,²⁵ and resellers in those cases had to look to their underlying carriers rather than to USAC to resolve asserted USF double-payments.²⁶ In addition, the Bureau found that USAC had lacked “sufficient information upon which to verify the extent of the alleged double-payment.”²⁷ The Bureau explained: “[USAC] generally does not have the ability to determine with any certainty whether and *on what revenues* a ‘double payment’ was received.”²⁸ Finally, the Bureau noted that recourse was properly to the underlying carriers for double payments because the underlying carriers had erred in treating petitioners as end-user customers.²⁹

In every significant way, InComm’s situation differs from those of the *ATS* petitioners. Foremost, *ATS* petitioners all argued they were exempt from their USF contribution obligations during the period that their underlying carriers had reported revenue from petitioners as end-user revenue.³⁰ Among other things, the effect of such an exemption would have been to exclude the retail markup of *ATS* petitioners’ services from inclusion in the contribution base. InComm claims no such exemption and seeks only to avoid the double-counting of revenue previously reported by InComm’s underlying carrier as end-user revenue and thus previously included by USAC in the contribution base.

Nor is InComm seeking a credit from USAC equal to the USF surcharges paid to its underlying carrier – as *ATS* petitioners had sought. Notably, InComm remitted substantially

²⁵ *Id.* at 5012.

²⁶ *Id.*

²⁷ *Id.* at 5011.

²⁸ *Id.* at 5013 (emphasis added).

²⁹ *Id.* (finding that “proper recourse . . . is with those underlying carriers” who “may have erred” in treating petitioners as end-user customers).

³⁰ *See id.* at 5011, n.14.

more in USF surcharges to its underlying carrier than the double-assessment amount at issue here.³¹ Indeed, the fact that the amount of USF surcharges paid by InComm to its underlying carrier is different than the actual double-assessment amount illustrates one reason why the *ATS Decision* was correct and why an audit would have been needed in those cases to determine the actual double assessment amounts. It also illustrates why the Bureau’s reasoning in *ATS* is not relevant here and therefore should not determine the result in this case.

As discussed further in the sections below, InComm has shown, and certified to the truth and accuracy of the double-reported revenue information.³² Thus, in the absence of some indicia of risk that USAC has not identified in the Decision, there is no reason for an audit, and no basis to ignore this information.

Moreover, InComm cannot recoup the double-assessed USF contributions from its underlying carrier. Unlike the underlying carriers in *ATS* who incorrectly treated petitioners’ reseller revenue as “end-user,” InComm’s underlying carrier was required to and did report InComm’s revenue as “end-user.” InComm’s underlying carrier thus has no fault. Because InComm’s underlying carrier filed correctly, there is no basis for it to now revise its revenue filings to reclassify InComm’s revenue as exempt reseller revenue (even assuming it was not time-barred from doing so³³). Thus it is both insufficient and incorrect for USAC to cite *ATS* for

³¹ InComm remitted over \$276,000 in USF surcharges to its underlying carrier. See Cooke Affidavit at 4; Sprint Letter at 2. USF surcharges are unlikely to correspond precisely to the double payment because they are not calculated using the same methodology as USF obligations (e.g., no circularity factor is applied).

³² See Cooke Affidavit at 5.

³³ The Bureau has established a one-year deadline for filing Form 499 revisions that result in a decrease in USF contributions. See *Federal-State Joint Board on Universal Service; 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 Mechanism; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 98-171, 97-21, Order, 20 FCC Rcd 1012 (Wireline Comp. Bur. 2004).

the simple proposition that InComm has recourse against its underlying carrier.³⁴ Critically, the lack of any basis for recourse against InComm’s underlying carrier means that the Commission’s failure to provide relief in this case – in the absence of an unreasonable burden on the Administrator – would impose double-counting as a *de facto* policy. Such a result would directly conflict with a Commission policy against double payments that dates back fifteen years to the *First Report and Order*.

B. Relief from Double-Counting is Warranted in Situations that Do Not Impose an Unreasonable Burden on the Administrator

USAC’s inability in *ATS* to verify the amount of the claimed double-payments was a key consideration in the Bureau’s decision. *ATS* petitioners had sought refunds for the USF surcharges they had remitted to their underlying carriers. Although USF surcharges may be imposed by carriers on end-user customers to recoup their USF contribution obligations, carriers do not calculate USF surcharges the same way USAC calculates contribution obligations. More importantly, surcharges that are collected are not remitted to USAC. Therefore, USAC was correct in *ATS* that, for each of the petitioners, the amount paid in USF surcharges was irrelevant and an audit was necessary to determine the exact amount of the double-assessment of USF contributions that had occurred. This would have required an audit not only of each *ATS* petitioner, but of each underlying carrier to determine how much reseller revenue they had reported as end-user revenue.³⁵

³⁴ See Decision at 4 (footnote omitted) (finding that “to the extent InComm contests the contribution amounts it already has been assessed by its underlying carrier, its recourse lies with the underlying carrier”).

³⁵ As the Bureau noted:

To make such a determination, USAC would need to not only audit the revenues reported (or not reported) by Petitioners, but it would also need to audit the revenues of the underlying carriers to determine whether the revenue was first, reported as end-user revenue for all accounts, including Petitioners, as opposed to carrier’s carrier revenue; and second, whether a contribution was made based on those revenues. Because of the complications associated with making such determinations, USAC has rightly left such matters for the entities involved in the transaction to determine.

Seeking to avoid an unreasonable burden on USAC, and cognizant of the concerns raised by the Bureau in the *ATS* case, InComm specifically provided USAC with the type of information that avoids the need for an audit. This information was provided by InComm's underlying carrier, was corroborated by InComm's own records, and has been certified by an officer of InComm. In the *ATS* case, USAC did not have any relevant revenue information before it. In this case, USAC has all the relevant revenue information before it. Moreover, the double-reported revenue information InComm offered is as accurate and reliable as any information submitted on a typical FCC Form 499, which is required to be certified as true by an officer of the reporting company. The information InComm has provided thus enables a precise calculation of the USF double-assessment amount and negates the need for an audit of either InComm or its underlying carrier. Absent the need for a burdensome audit, there is no practical or policy reason for the Commission or USAC to refuse to take notice of the double-counted revenue that InComm has identified.

C. The Administrator Failed to Explain Why a Burdensome Audit Is Required

Notwithstanding clear differences between InComm's request and those of the *ATS* petitioners, USAC asserts that a burdensome audit is nevertheless required. Thus USAC, in addressing the fact that InComm provided the revenue information needed to calculate the USF double-assessment responds: "USAC would still need to audit the revenue information provided by both InComm and its underlying carrier to confirm the accuracy of the information provided, as well as the alleged double-payment amounts as calculated by InComm."³⁶ But nowhere has

ATS Decision, 22 FCC Rcd at 5013.

³⁶ *See Decision* at 5.

USAC questioned or suggested any basis to question the accuracy of the revenue information submitted by InComm.

USAC asserts that its decision to refrain from conducting the “complex determinations” necessary to confirm the accuracy of information submitted by InComm, is “[c]onsistent with the *ATS Order . . .*”³⁷ But, as InComm has explained, there is no basis for this reflexive application of *ATS*. In the *ATS* case, USAC would have needed to conduct an audit to obtain and review relevant information; in this case, USAC has the relevant information and can rely on its accuracy. InComm’s calculations, rather than being “complex,” were performed using USF calculation formulas available from USAC. Validating these calculations requires a simple calculator, not an audit.

The double-counted revenue information submitted by InComm is no different than the other revenue information submitted by InComm on its 499 forms. Indeed, once its accuracy is certified by a corporate officer under penalty of perjury – as it has been here – the double-counted revenue InComm has identified is no different than the almost \$300 *billion* in total revenue reported to USAC each year,³⁸ all of it certified under penalty of perjury as accurate by a corporate officer of each contributor.³⁹ USAC audits a tiny fraction of this revenue⁴⁰ – either randomly or selectively based on audit risks that USAC identifies.⁴¹

³⁷ *Decision* at 5.

³⁸ *See, e.g.*, FEDERAL AND STATE STAFF FOR THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE IN CC DOCKET NO. 96-45, UNIVERSAL SERVICE MONITORING REPORT, CC Docket No. 98-202, at 1-7 (2011) (“UNIVERSAL SERVICE MONITORING REPORT”). Total revenue includes intrastate and international revenue as well as non-telecommunications revenue.

³⁹ *See, e.g.*, 2011 Form 499-A, at line 606.

⁴⁰ For example, during 2006-2007 USAC performed 90 random Contributor audits, an unprecedentedly high number. *See Comments of the Universal Service Administrative Company* at 18 (“*USAC NOI Comments*”), in *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service*, WC Docket No. 05-195, Notice of Inquiry, FCC 08-189 (2008). However, even this unprecedented number of audits covered only about \$459 million of the almost \$300 billion reported to USAC that

In InComm’s case, nowhere does USAC identify an audit risk that would justify an audit – with or without the asserted double-counting of revenue. Indeed, USAC’s *Decision* suggests an audit is not required for the revenue InComm has already reported on its Form 499s – but is required for the double-counted revenue. But USAC offers no explanation for why this would be so. At the very least, USAC’s apparent claim that an audit is automatically required in every alleged double-counting situation is not supported and ignores the difference between InComm’s case and the situation in *ATS*, where the revenue information needed to determine the actual double payment amount was unavailable.

D. InComm Cannot Recoup the USF Double-Assessments from Its Underlying Carrier

In order for revenue from resellers to be exempt from USF assessment, FCC rules require underlying carriers to establish a reasonable belief that resellers are contributing to the fund. When they cannot establish such a reasonable belief, typically through a certification, they must report and contribute based on revenue from resellers.⁴² As a result, not only did InComm’s underlying carrier have a USF obligation with respect to InComm’s revenue, it had a right under

year – less than 0.2%. See *USAC NOI Comments*, Appendix A at 1; UNIVERSAL SERVICE MONITORING REPORT at 1-7.

⁴¹ See *Comments of the Universal Service Administrative Company*, Appendix at 8, in *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Schools and Libraries Universal Service Support Mechanism*, CC Docket 02-6, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, *Lifeline and Link-Up*, WC Docket No. 03-109, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 70 FR 41658, FCC 05-124 (2005) (“USAC combats potential fraud and abuse of this self-certifying reporting mechanism based on its familiarity and experience with FCC Form 499 and the telecommunications industry in general. When issues are identified, contributors may be referred to USAC’s Internal Audit Division, the FCC for enforcement activity, and/or other appropriate action may be taken.”)

⁴² See, e.g., 2011 Form 499-A Instructions, at 21-22 (requiring wholesale carriers to classify reseller revenue as USF assessable end-user revenue where wholesale carriers lack reasonable expectation that reseller is contributing to USF); see also *Global Crossing*, 24 FCC Rcd at 10829 (wholesaler failed to meet reasonable expectation standard based on reseller customer certifications, contract provisions, and company website and product information);

the rules to pass through USF surcharges to InComm to recoup those contribution obligations.⁴³ Thus, under Commission rules, InComm has no recourse to its underlying carrier.

USAC maintains that *ATS* stands for the proposition that in every case alleging double-counting, the responsibility is with the affected carriers to resolve the situation.⁴⁴ But this ignores the fact that, in this case, there is nothing for InComm and its underlying carrier to resolve. The underlying carrier has supplied the revenue information that reflects the double payment, and InComm has certified this information. InComm and its underlying carrier are in complete agreement. This also ignores rule clarifications the Commission has provided since *ATS* which further tighten the responsibility of underlying wholesale carriers to report reseller revenue as end-user revenue when wholesalers lack reseller certifications.⁴⁵

The Bureau in *ATS*, in justifying its holding that resellers and wholesalers resolve the double-counting among themselves, found the underlying wholesale carriers in that case specifically at fault. That is, because *ATS* petitioners improperly attempted to contract USF obligations away, their underlying carriers *wrongfully* reported and contributed on petitioners' revenue.⁴⁶ In contrast, InComm's underlying carrier correctly reported and contributed based on InComm's revenue. The underlying carrier here thus has no fault. Just as importantly, there is

⁴³ See 47 C.F.R. § 54.712 (permitting recovery of USF contributions from end-user customers).

⁴⁴ Thus, USAC indicates that it “refrains from making these types of complex determinations [*i.e.*, ascertaining the accuracy of revenue information and double-payment amounts] and leaves such matters to the entities involved in the transaction to resolve.” *Decision* at 5 (footnote omitted).

⁴⁵ See, *e.g.*, *Global Crossing*, 24 FCC Rcd at 10829 (wholesaler failed to meet reasonable expectation standard based on reseller customer certifications, contract provisions, and company website and product information); Moreover, the 499 Instructions pertaining to reseller revenue have changed since the *ATS Decision* was issued in March 2007. See *e.g.*, *id.*, 25 FCC Rcd at 14540, n.50 (noting imposition of an annual reseller certification requirement in the 2007 FCC Form 499-A Instructions (effective for the April 1, 2007 filing)).

⁴⁶ See *ATS Decision* at ¶ 12.

no basis for the underlying carrier to restate prior period revenues once InComm was able to certify compliance as to those prior periods.⁴⁷

In theory, an underlying carrier could revise its Form 499s to reclassify as exempt revenue previously reported as non-exempt and thereby obtain USF credits (which it could then pass back through to a reseller). However, in this case, because the underlying carrier correctly reported InComm's revenue at the time it was reported and in accordance with FCC rules, it would not be appropriate to make such a revision. In addition, Commission filing deadlines for Form 499 revisions prevent downward revisions in a carrier's contribution base after one year.⁴⁸ For all of these reasons, it is not correct legally or factually to assert that InComm can or should obtain relief from its underlying carrier.⁴⁹ Therefore, in the event the Commission refuses to recognize that the USF is being paid twice for the same revenue, no relief will be available to InComm from its underlying carrier.

E. Double-Counting Reseller Revenue Should Not Be Imposed on InComm as a De Facto Further Penalty

Having established that granting relief to InComm would be consistent with applicable rules and precedent, would not impose an unreasonable burden on USAC, and cannot be obtained from the underlying carrier, it should also be noted that granting relief to InComm will not erode incentives for compliance with Form 499 filing requirements or contribution obligations. Indeed, after the *ATS Decision*, in 2007 the Commission significantly strengthened late-filing penalties in order to provide a "remedial, consistent, sanction necessary to encourage

⁴⁷ Cf. Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC (March 1, 2011) (requesting policy guidance regarding whether wholesalers can obtain post-dated reseller certificates to meet "reasonable expectation" standard for prior periods).

⁴⁸ See *supra*, at fn. 33.

⁴⁹ See *Decision* at 4 (citing *ATS Decision*, 22 FCC Rcd at 5012-13).

complete and timely payment and filing.”⁵⁰ InComm is not seeking relief from these penalties, which provide a substantial deterrent to similar actions by other resellers. While the imposition of such penalties serves as a reasonable means of enforcing the Commission’s USF rules, any conclusion that InComm must also make duplicative contributions as a kind of further punishment must be rejected.

Moreover, in addition to late penalties, InComm has suffered further harm as a result of this situation. This is because the \$276,000 in surcharges InComm remitted to its underlying carrier is more than \$15,000 greater than relief InComm is seeking from the Commission. Again, InComm recognizes there are consequences to its initial non-compliance and has not asked USAC or the Commission to make it “whole” (as was the case by the *ATS* petitioners). But there is no policy reason to impose double-counting of reseller revenue as a *de facto* penalty in this case. InComm has accepted responsibility, has paid all assessed penalties, and has suffered materially in other respects.

InComm has acted in good faith to come into compliance with USF obligations first imposed on it in 2008 by the *InterCall Order*. That good faith has been further shown by full payment of over \$699,000 in current and prior period USF obligations and late penalties.⁵¹ Accordingly, and for the reasons above, InComm respectfully suggests that it has paid the required penalties for non-compliance and that the Commission should, on these narrow facts, apply its policy against double-counting reseller revenue and grant the relief requested.

⁵⁰ *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, Report and Order, 22 FCC Rcd 16372, 16375-79 (2007).

⁵¹ *Cooke Affidavit* at 2.

III. GOOD CAUSE EXISTS FOR A WAIVER OF POTENTIALLY APPLICABLE REVENUE REVISION DEADLINES

The Commission may waive its rules under special circumstances and when strict compliance would be inconsistent with the public interest.⁵² For example, in *ABC Cellular*, the Commission waived Form 499-Q filing deadlines because, due to an acquisition, the requesting carrier was deprived of an opportunity to submit a revised Form 499-Q filing, resulting in significant hardship.⁵³

In InComm's case, in June 2011 when InComm filed its Form 499s covering prior periods, Commission rules compelled InComm to report revenue that had been previously reported as end-user revenue by InComm's underlying carrier. In the event the Commission concludes that relief from the double-counting of revenue is warranted in this case, an appropriate vehicle for such relief could be the revision of InComm's previously filed Form 499s to reflect reclassification from end-user (Block 4) to reseller (Block 3) of the double-reported revenue. If so, InComm respectfully submits that a waiver of the appropriate Form 499-A revision deadlines is warranted.

Applying the factors identified by the Commission in *ABC Cellular*: First, special circumstances are present insofar as InComm would not have been permitted to file the Form 499s reclassifying the double-reported revenue in the first instance. Assuming the Commission agrees with InComm on the merits of the Request, without a waiver of the filing deadlines, relief may not be able to be effectuated. Waiver of the filing deadlines would be in the public interest because it would ensure InComm is able to make USF contributions on an equitable basis – by

⁵² See 47 C.F.R. § 1.3; see, e.g., *Request for Review by ABC Cellular Corporation, et. al*, CC Docket Nos. 96-45, 97-21, Order, 17 FCC Rcd. 25192, DA 02-3474 (2002) ("*ABC Cellular*").

⁵³ See *id.* at 25195; see also *id.* at 25196 ("although ABC Cellular had the ability to meet the first [filing] deadline, it did not have the ability to meet the second deadline.").

avoiding double-counting its revenue, and on a non-discriminatory basis – by avoiding unfair or punitive impacts on InComm due to its reseller status. InComm has also shown that over \$260,000 in double-assessed USF liability would work a substantial hardship on InComm.⁵⁴ Finally, like the requestor in *ABC Cellular* where the Commission granted a Form 499-Q revision deadline waiver, for the reasons already noted InComm “had the ability to meet the first [filing] deadline [but] did not have the ability to meet the second deadline.” Accordingly, InComm respectfully requests waiver of any Form 499 deadlines necessary to effectuate a remedy in this case.

IV. REQUEST FOR RELIEF.

InComm respectfully requests that the Commission grant this Request and instruct USAC to take the actions sought above.

V. CONCLUSION

InComm has presented sufficiently reliable revenue information that warrants a grant of relief from the double-counting of its revenue for purposes of calculating its USF contribution obligations. Granting relief will not undermine program compliance; however, failure to grant such relief will undermine the Commission’s stated policy against such double counting.

⁵⁴ See *Cooke Affidavit* at 6.

WHEREFORE, InComm Solutions, Inc., requests that the Commission grant this Request for Review and issue an Order instructing USAC to take notice of the double-reported revenue, either administratively or through submission of re-certified FCC Form 499 revenue reporting forms, and to issue a full credit to InComm representing the double-assessment of USF contribution obligations on such revenue.

Respectfully submitted,



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February 6, 2012

CERTIFICATE OF SERVICE

I certify that in accordance with § 54.721(c) I served a copy of this Request for Review on the USAC Administrator consistent with the requirement for service of documents set forth in § 1.47 on February 6, 2012.



Jeffrey A. Mitchell, Esq.