

November 16, 2012

**VIA ELECTRONIC FILING**

Julie Veach, Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: InComm Solutions, Inc.  
Request for Review of Decision of the Universal Service Administrator  
WC Docket No. 06-122**

Dear Ms. Veach:

We represent InComm Solutions, Inc. (“InComm”) in connection with the request for review of a decision of the universal service administrator (“USAC”) and petition for waiver filed by InComm on February 6, 2012 (“Request”). At all times relevant to the *Request*, InComm was a conference call provider that incorporated resold telecommunications into its services. InComm’s *Request* provided documentation establishing that InComm had been assessed universal service fund (“USF”) contribution obligations on revenue that had been previously reported as end-user revenue by its underlying wholesale carrier. This double-reporting of assessable end-user revenue created a classic USF double-collection situation that InComm is seeking to remedy through its *Request*.<sup>1</sup>

We are writing you because the Federal Communications Commission (“FCC” or “Commission”) recently clarified the policies and standards that apply when considering whether unnecessary double-collection of USF contributions has occurred in certain situations.<sup>2</sup> Among other things, the Commission reaffirmed the long-standing policy against USF double-collection and held among other things that USAC “should not double-collect [USF contributions] if clear and convincing evidence shows that another provider actually contributed on the subject

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<sup>1</sup> Because the double-reporting was caused by InComm’s failure to timely report its revenues in the first instance (thereby forcing the wholesale carrier to report the revenue as assessable end-user instead of exempt reseller), InComm’s Request did not seek refund of late penalties that resulted from its error.

<sup>2</sup> See *Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122, Order, FCC 12-134 (rel. Nov. 5, 2012) (*USAC Guidance Order*).

revenues.”<sup>3</sup> As explained further below, while the *USAC Guidance Order* addressed various double-collection situations faced by wholesalers, the standards and guidance the Commission provided are applicable to the double-collection situation which is the subject of InComm’s *Request*.

The Commission Adopted a “Clear and Convincing” Evidentiary Standard for USF Contributors Seeking to Establish Double Collection

The Commission in the *USAC Guidance Order* for the first time articulated the evidentiary standard that should be applied when considering whether a USF contributor has established a double collection situation:

We note that the burden of proof is on the provider claiming double collection to demonstrate actual contributions were made to the Fund based on the relevant services through clear and convincing evidence. Such a standard is necessary to ensure that the no-double-collection exception does not swallow the rule of complying with universal service contribution obligations in the first instance. . . . We clarify that USAC, beyond checking its own records, is not required to conduct additional independent investigations of the wholesale provider’s customers in making this determination; however, USAC should consider the evidence offered by the wholesale provider . . . .<sup>4</sup>

Certain wholesalers in this case had failed to maintain valid reseller certificates which are required to establish the reasonable expectation that resellers are contributing to the USF. Failure to maintain the certificates resulted in USAC assessing USF contributions on revenue the wholesalers originally reported as reseller revenue and thus exempt from the contribution base. The Commission found, however, that even in the absence of valid reseller certificates, wholesalers should be permitted to submit other evidence showing that reseller customers had in fact contributed based on the questioned revenue.

This decision represents a triumph of common sense insofar as it explicitly authorizes consideration of reasonable evidence in ensuring that the USF is at all times made whole – while at the same time protecting against the over-collection of USF contributions driven by overly formalistic applications of the rules.<sup>5</sup>

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<sup>3</sup> See *id.*, at p.20 (Heading III.C).

<sup>4</sup> See *id.* at ¶ 45.

<sup>5</sup> The *USAC Guidance Order* in part addressed a request for clarification regarding whether USAC should double-collect from wholesalers based on reseller revenue in cases where USAC was already in possession of information establishing that USF contributions had in fact been made by those resellers. See *id.* at ¶ 44.

### InComm's Request Meets the Clear and Convincing Standard

While the *USAC Guidance Order* expressly applied to wholesalers, there is no practical or policy reason why the “clear and convincing” standard of proof should not also apply to InComm who is facing an analogous double-collection situation. In InComm’s case, the wholesaler’s inability to establish (through no fault of its own) a reasonable expectation that InComm (as reseller) was a contributor, caused the wholesaler to report and contribute based on InComm’s revenue for the period of time that InComm was out of compliance.

Subsequently, InComm came forward on its own to report to USAC that it was out of compliance. After InComm had caught up on its revenue reporting obligations, InComm was assessed contribution obligations in part based on revenue already reported as USF assessable end-user revenue by its wholesaler. InComm through its *Request* sought merely to present evidence demonstrating the fact and amount of this end-user revenue double reporting.<sup>6</sup>

Indeed, central to InComm’s *Request* was the recognition that InComm had the burden of proof to show double USF assessment – and the demonstration that InComm had met that burden. Moreover, InComm expressly recognized that USAC should not be expected to “conduct additional independent investigations” to validate asserted double assessment situations.<sup>7</sup>

InComm provided the following evidence establishing which specific revenue amounts had been previously reported as end-user revenue and thus previously assessed for USF contributions by USAC:

- A letter from InComm’s underlying wholesale carrier identifying the revenue amounts received from InComm by quarter and stating that such revenue had in fact been reported as end-user revenue in the underlying carrier’s FCC Form 499 filings;
- A sworn statement from InComm’s Co-President certifying and corroborating the precise amount of revenue remitted to its underlying wholesale carrier.

The fact that InComm’s underlying wholesale carrier reported InComm’s revenue as end-user establishes that this revenue was previously included in the USF contribution base and thus assessed. Note also that previously reported revenue by quarter, which is what InComm has

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<sup>6</sup> InComm’s approach of focusing on the appropriate reporting of *revenue* – rather than on USF surcharges paid to its underlying carrier – ensures that the USF is made whole. Specifically, this approach ensures that InComm’s revenue from the retail mark-up of the wholesale services received from its underlying carrier got reported and captured in the contribution base.

<sup>7</sup> See *Request* at 10-13 (asserting that relief from double-counting revenue is appropriate only in situations that do not impose an unreasonable burden on USAC and arguing that InComm provided sufficient evidence which avoided the need for audit or investigation by USAC).

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provided, is what is needed to apply the appropriate quarterly contribution factors and run the USF contribution calculations to determine the precise double-collection amounts.

In summary, InComm has provided certified, corroborated, and uncontested revenue information to USAC that is sufficient to determine the double collection amounts at issue. Such evidence meets the clear and convincing standard and imposes no obligations on USAC other than to run the appropriate USF calculations.

#### Conclusion and Request

We respectfully request that InComm's *Request* be decided using the clear and convincing evidentiary standard set forth in the *USAC Guidance Order*. We submit that the evidence provided by InComm provides a clear example of what clear and convincing evidence looks like. Having the Commission determine that InComm's evidence meets that standard would have the added benefit of providing USAC a specific application of the clear and convincing standard that USAC could easily apply in future cases. Accordingly, we urge the Bureau to decide the *Request* without remand to USAC.

Sincerely,



Jeffrey A. Mitchell  
Counsel for InComm Solutions, Inc.

cc Trent Harkrader, Chief, TAPD  
Vickie S. Robinson, Esq.  
Carol Pomponio, Esq.