

**REDACTED – FOR PUBLIC DISCLOSURE**

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

In the Matter of )  
)  
)  
Request for Review by Five9, Inc. ) WC Docket No. 06-122  
of Decision of Universal Service )  
Administrator and Request for Stay of )  
Decision of Universal Service Administrator )  
)

FILED/ACCEPTED

FEB 22 2013

Federal Communications Commission  
Office of the Secretary

**REQUEST FOR REVIEW OF DECISION OF UNIVERSAL SERVICE  
ADMINISTRATOR AND EMERGENCY REQUEST FOR STAY OF DECISION OF  
UNIVERSAL SERVICE ADMINISTRATOR**

**EXPEDITED ACTION REQUESTED**

Five9, Inc. (“Five9”), by and through its attorneys and pursuant to Sections 54.719(c), 54.721, and 54.722 of the rules of the Federal Communications Commission (“FCC” or “Commission”),<sup>1</sup> respectfully requests review of the January 18, 2013 decision (“January Decision”)<sup>2</sup> of the Universal Service Administrative Company (“USAC”) which requires Five9 to file FCC Forms 499-A (“499-A” or “Annual Worksheet”) for calendar years 2003-2007 and make contributions to the Universal Service Fund (“USF”) covering the same time period.<sup>3</sup> Five9 also respectfully requests, on an emergency basis, a stay of the January Decision until this request for review is complete. As discussed below, the Commission, pursuant to Section 1.3 of the FCC’s rules,<sup>4</sup> should waive any requirement that Five9 contribute to the USF and file Annual Worksheets for calendar years 2003-2007<sup>5</sup> as it will

<sup>1</sup> 47 C.F.R. §§ 54.719(c), 54.721 & 54.722.

<sup>2</sup> See Response to Letter dated December 17, 2012 regarding the Federal Universal Service Filing and Contribution Obligations of Five9, Inc., from USAC, dated January 18, 2013, attached as Exhibit A.

<sup>3</sup> The January Decision also addresses the issue of whether Five9 should receive a rebate for USF and TRS fees paid to its wholesale carriers. January Decision, at 2-5. Five9 is not asking the Commission to review this portion of the January Decision in this request. Five9, however, reserves its rights to appeal that separate issue at a later time.

<sup>4</sup> 47 C.F.R. § 1.3.



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serve the public interest and special circumstances exist in this case. An expedited review and ruling on this emergency request for a stay of the January Decision is necessary given the timeframe USAC has given Five9 to file Form 499-As for calendar years 2003-2007. For the reasons provided below, Five9 respectfully requests that the Wireline Competition Bureau (“Wireline Bureau”) of the Commission grant the requested waivers.

**I. STATEMENT OF FACTS**

Five9 is a cloud-based provider of software services headquartered in California whose services are used by its customers both in the United States and in other countries to create virtual call centers in the cloud. In connection with its provision of virtual call center software services, Five9 also provides telecommunication services to virtually all of its customers, which are used by the customers to access Five9’s servers to support inbound and outbound calls between the customer’s agent and the consumer. Five9 maintains no telecommunications facilities of its own, but instead buys telecommunications services from wholesale carriers and resells them to its customers. In no case does Five9 provide telecommunications services to customers who are not subscribers to its software.

Founded in 2001, the company began to sell its software and provide supporting telecommunications service in 2003. As Five9’s business grew, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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(continued...)

[REDACTED]

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[REDACTED]

Although Five9 was not registered with USAC, its wholesale carriers from the outset charged Universal Service fees and certain other FCC support mechanisms for interstate and international telecommunications services provided to Five9. Five9 paid such fees to its providers as an end user of telecommunications services. Therefore, even though Five9 did not consider itself to be a telecommunications provider at the time, Five9 contributed from 2003 through 2012 to the USF and to the Telecommunications Relay Service (“TRS”) fund via the Universal Service fees it was charged by its wholesale carriers.

[REDACTED]

[REDACTED]

[REDACTED] Just one month later, Five9 made its initial registration with

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<sup>6</sup> 47 C.F.R. § 64.1195.

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USAC, filing a 2012 499-A for calendar year 2011 and 499-Qs covering calendar year 2012 and the first quarter of calendar year 2013. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It also filed an application for registration under Section 214 of the Communications Act as an international reseller of common carrier services and filed a request for special temporary authorization (“STA”) of this status.

[REDACTED]

[REDACTED]

[REDACTED]<sup>7</sup>, the year that Five9 started operations, and gave Five9 30 days within which to comply with this requirement. USAC confirmed this instruction in the January Decision, which rejected Five9’s request that the time period for which it would have to register be limited to 2008 through 2012, and required the company to file registrations back to the date it had commenced operations. [REDACTED]

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<sup>7</sup> See January 11, 2013 email from USAC to Lorrie Bernstein and Michael Burkland, attached as Exhibit B.



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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Five9 has provided USAC with 499-A filings for calendar years 2008-2011. Five9 has further provided USAC with 499-Q filings for 2012 and the first quarter of 2013, and Five9 intends to meet all 499-Q and 499-A filing deadlines in the future. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Five9 is presently preparing to pay all regulatory fees due for calendar years 2008 to the present. In addition to the filings listed above, Five9 will bring itself current on all USF payment requirements for calendar years 2008-2011 once invoiced by USAC.

2. [REDACTED]

Although Five9 has not made direct contributions to the USF or other FCC support mechanisms, since it started to resell telecommunications services it has in fact been an indirect contributor to these funds by reimbursing its supplying carriers for the services supplied to it since those carriers' treated Five9 as their end user. [REDACTED]

Unless the Commission instructs USAC to give a credit to Five9 for the indirect USF contributions it has already made, Five9's efforts to bring itself into compliance with its obligations [REDACTED]

[REDACTED]

through double payments for the same services.

While Five9 is prepared to bring itself into compliance with the Commission's rules,

[REDACTED]

[REDACTED] (most of whom are located in the United States) necessitated by this belated, but good faith, compliance undertaking. [REDACTED]

[REDACTED]

[REDACTED]

**3. FIVE9'S WAIVER REQUEST IS CONSISTENT WITH THE COMMISSION'S RECORD RETENTION POLICY AND APPROPRIATE.**

Limiting Five9's filing obligation to the last five years is consistent with the Commission's requirement that contribution records be maintained for only five years.

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Section 54.706(e) of the FCC rules<sup>14</sup> requires entities that contribute to the USF to retain all records related to USF contributions for five years from the date of contribution. This rule reflects the Commission’s policy recognition that a five-year record retention period is reasonable. If USAC or the Commission were to impose any longer retention period on a contributor, it could place an undue burden on the reporting company.

**B. THE UNIQUE CIRCUMSTANCES OF FIVE9’S CASE JUSTIFY GRANT OF ITS WAIVER REQUEST IN THE PUBLIC INTEREST.**

The Wireline Bureau has recognized that, when special circumstances arise and the public interest would be served, it is appropriate to waive its rules when a company, acting in good faith, voluntarily alerts USAC to filing deficiencies. In the *AT&T Review Order*,<sup>15</sup> AT&T took swift action to correct 18 filing deficiencies once they were discovered by the company.<sup>16</sup> In order to correct the filing deficiencies, however, AT&T had to file revised forms after the deadline for revision had passed. The revised filings, in sum, increased AT&T’s contribution obligation by several million dollars, even though six filings individually decreased AT&T’s contribution obligation. After reviewing the late filings, USAC only accepted the filings that increased AT&T’s contributions and rejected the six filings that decreased AT&T’s contributions.<sup>17</sup> On review, the Wireline Bureau waived the FCC rule restricting carriers from amending their 499-A filings more than one year after they are originally filed, and required USAC to also accept the six late filings that decreased AT&T’s contribution obligations because it found that special circumstances existed and it

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<sup>14</sup> 47 C.F.R. § 54.706(e) (2012).

<sup>15</sup> *Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; Requests for Review of Decisions of Universal Service Administrator by AT&T, Inc., Eureka Broadband Corporation*, WC Docket No. 06-122, CC Docket No. 96-45, Order, 25 FCC Rcd 10855 (Wireline Comp. Bur. 2010) (“*AT&T*”), ¶¶ 1 & 4.

<sup>16</sup> AT&T ¶ 4.

<sup>17</sup> AT&T ¶ 4.

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was not equitable to only accept the late filings which increased AT&T's contribution obligation.<sup>18</sup>

As in the *AT&T Review Order*, Five9's case arises from special circumstances. [REDACTED]

[REDACTED]

[REDACTED] Five9 was treated as an end user by its supplying carriers and paid fees to those carriers for contributions to the USF. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In order to achieve compliant status under the Commission's rules, Five9 has agreed to make direct contributions to the USF for the five year period from 2008-2012. In essence, by agreeing to make direct USF contributions for 2008-2012, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition to the special circumstances that exist in this case, the public interest would be better served by granting this request than strict adherence to the general rule that USAC seeks to follow. If the Commission grants this waiver, similarly situated companies

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<sup>18</sup> AT&T ¶ 8.

<sup>19</sup> See Exhibit A at 3-5. See n. 3, supra.

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will be encouraged to voluntarily come forward and work with the Commission to reach compliance. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As a result, by granting this request, the Commission will encourage voluntary compliance and thus more effectively implement the overall policy of compliance by demonstrating that a company's voluntary and cooperative actions will be an important factor used by the Commission in determining the outcome of compliance proceedings.

Finally, this request is consistent with the Commission's five-year record retention policy for records related to contributions.<sup>20</sup> USAC, however, asserts that there is no relationship between the above mentioned record retention policy and Five9's obligation to file 499-As back to when Five9 began providing telecommunications services.<sup>21</sup> To support this proposition, USAC relies in the January Decision on two cases, *Compass Global*<sup>22</sup> and *OMNIAT International Telecom*,<sup>23</sup> both of which fail to support USAC's proposition and are distinguishable from the present facts.

First, the two cases relied on by USAC fail to support the proposition that a contributor must submit annual worksheets outside of the five-year retention policy. In *Compass Global*, the contributor began providing telecommunications services in 2005 but failed to file an Annual Worksheet until September 2007.<sup>24</sup> The five year record retention policy was never at issue in that case because the contributor was still within the required

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<sup>20</sup> 47 C.F.R. § 54.706(e).

<sup>21</sup> See Exhibit A at 6.

<sup>22</sup> *Compass Global, Inc., Notice of Apparent Liability for Forfeiture*, 23 FCC Rcd 6125, 6138, ¶¶ 3, 29 (2008) ("*Compass Global*").

<sup>23</sup> *OMNIAT International Telecom, LLC d/b/a OMNIAT Telecom, Notice of Apparent Liability for Forfeiture and Order*, 24 FCC Rcd 4254, 4255, ¶ 1 (2009) ("*OMNIAT International Telecom*").

<sup>24</sup> *Compass Global*, 23 FCC Rcd 6125, 6138, ¶ 28.

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five-year retention period. Similarly, in *OMNIAT International Telecom*, the contributor filed an Annual Worksheet in July 2002 but failed to file Annual Worksheets beginning in 2003.<sup>25</sup> USAC sent detailed information concerning the contributor's filing obligations and deficiencies to the contributor in October 2007.<sup>26</sup> Therefore, the contributor was on notice of its filing deficiencies within the five year retention policy time frame. It was only because the contributor failed to respond to any USAC or Wireline Bureau communications that the proceedings lasted so long and exceeded the five year retention policy period.<sup>27</sup>

Second, and strikingly, in rejecting Five9's position, USAC relies only on cases that involved Notice of Apparent Liability enforcement proceedings<sup>28</sup> and, therefore, were very different from [REDACTED] the present case. *Compass Global* is a case where the target of the enforcement proceeding was found to have willfully or repeatedly failed to pay contributions or fees due to the Commission.<sup>29</sup> OMNIAT reportedly resisted responding to both USAC and the Wireline Bureau when contacted regarding its deficiencies.<sup>30</sup> Unlike the parties in *Compass Global* and *OMNIAT International Telecom*, Five9 voluntarily reported itself to the Commission, voluntarily filed its 499-As back to 2008, has applied for Section 214 authorization and has received special temporary authorization, as of February 15, 2013, to expedite its approval, and is making arrangements to pay all regulatory fees and contributions owed by the company beginning in calendar year 2008.

**C. FIVE9 SHOULD NOT BE OBLIGATED TO MAKE USF CONTRIBUTIONS FOR CALENDAR YEARS 2003-2007.**

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<sup>25</sup> *OMNIAT International Telecom*, 24 FCC Rcd 4254, 4255, ¶ 9.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* ¶¶ 9-10.

<sup>28</sup> *Compass Global*, 23 FCC Rcd 6125, 6138, ¶ 1; *OMNIAT International Telecom*, 24 FCC Rcd 4254, 4255, ¶ 1.

<sup>29</sup> *Compass Global*, 23 FCC Rcd 6125, 6138, ¶ 1.

<sup>30</sup> *OMNIAT International Telecom*, 24 FCC Rcd 4254, 4255, ¶¶ 9-10.

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It is not enough for the Commission to grant Five9's waiver request of the reporting requirements under Section 54.711(a) without also granting Five9's waiver request for USF contributions under Section 54.706(a) and 54.709(d) <sup>31</sup>. Under Section 54.709(d), if a contributor fails to file a required 499-A, USAC shall bill the contributor based on whatever relevant data is available. Based on this provision, if the Commission grants Five9's waiver of the reporting requirements, Five9 could still be invoiced for USF contributions by USAC.

In order to invoice Five9 for calendar years 2003-2007, USAC would be forced to estimate Five9's USF contributions without reliable data. The only data available to USAC is from calendar years 2008-2011, which are not indicative of calendar years 2003-2007. Five9 was founded in 2001 and started operations two years later. [REDACTED]

[REDACTED]

[REDACTED] There is no way for USAC to fairly determine what Five9's USF contributions should have been during calendar years 2003-2007 without Five9 providing data from outside the five year record retention period. In order for a waiver of the USAC requirement for Five9 to file its 499-A forms for the 2003-2007 time period to be meaningful, the Commission should for the same reason waive Five9's contribution requirement and USAC's assessment authority during this period. Any adverse impact of such a waiver on the public interest will be mitigated by the fact that Five9 was an indirect contributor to the USF and associated support mechanisms throughout this period.

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<sup>31</sup> 47 C.F.R. § 54.709(d).

### III. REQUEST FOR EMERGENCY STAY OF USAC DECISION

Unless and until the Commission grants Five9's request for a stay of the January Decision, Five9 will be forced into the inequitable quandary of filing 499-As for calendar years 2003-2007 or face being in violation of the January Decision.<sup>32</sup> In order to avoid this unseemly interplay of USAC reporting procedures and Commission appeal rules, Five9 requests that the Commission issue an emergency stay of the USAC January Decision before its effective date. Forcing Five9 to choose between pursuing its appeal rights or facing assessment and the need to pay for a period of time it is challenging is not even a procedure embodied in the Commission's rules.<sup>33</sup> Expedited consideration and action is appropriate because it will protect Five9 from violating the January Decision while the merits of this request for review are being considered by the Commission. Five9 requests that the Commission act on this emergency request prior to March 28, 2013, the deadline established by USAC for Five9's filing of its earlier 499-As.

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<sup>32</sup> See Exhibit A at 7; see Exhibit B, stating that "if the required 499 filings are not submitted to USAC within 30 days an estimate will be created based on available information."

<sup>33</sup> See *In the Matter of Universal Service Contribution Methodology A National Broadband Plan For Our Future Further Notice of Proposed Rulemaking*, April 30, 2012 at ¶ 360 (seeking comment on adopting "pay-and-dispute" as a Commission policy or rule).

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**IV. CONCLUSION**

For the foregoing reasons, a waiver of Sections 54.706(a), 54.709(d) and 54.711(a) of the FCC's rules is appropriate to prevent undue hardship and to serve the policy underlying the Commission's rules. Five9 also requests that, in the interest of fairness and procedural uniformity, the Commission grant an order staying the January Decision by USAC until the Commission rules on this request.

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Respectfully Submitted,

**FIVE9, INC.**

/s/ Delbert D. Smith

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February 22, 2013

cc: Theresa Z. Cavanaugh (FCC)  
Pam Slipakoff (FCC)  
Kristin Berkland (USAC)

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**EXHIBIT A**

**REDACTED**

**REDACTED – FOR PUBLIC DISCLOSURE**

**EXHIBIT B**

**REDACTED**

**REDACTED – FOR PUBLIC DISCLOSURE**

**EXHIBIT C**

**REDACTED**

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**CERTIFICATE OF SERVICE**

I, Marvin A. Liang, hereby certify that on this 22<sup>st</sup> day of February 2013, I caused a copy of the foregoing Request for Review of Universal Service Administrator Decision by Five9, Inc. in WC Docket No. 06-122 to be sent to Theresa Z. Cavanaugh (FCC), Pam Slipakoff (FCC), and Kristin Berkland (USAC).

/s/ Marvin A. Liang  
Marvin A. Liang