

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

In the Matter of)	
)	
Request for Review by IVANS, Inc. of)	WC Docket No. 06-122
Decision of the Universal Service)	
Administrator)	
)	
Petition for Declaratory Ruling on the)	
Assessability of Certain Information Services)	
)	

REPLY COMMENTS

I. INTRODUCTION AND SUMMARY

Commenters in this proceeding unanimously support the IVANS, Inc. (“IVANS”)¹ Request for Review of the USAC decision to (1) confirm that the Commission’s prohibition on double collection in the *Wholesaler-Reseller Clarification Order* applies to both resellers and wholesalers; (2) determine that a statute of limitations of no more than five years applies to the Form 499 filings; and (3) clarify the USF assessability status of enterprise services using Multi-Protocol Label Switching (“MPLS”). IVANS’ Request for Review provides a ready vehicle for the Commission to resolve these important matters both reasonably and expediently.

II. AT&T’S COMMENTS FURTHER BUTTRESS IVANS’ CLEAR AND CONVINCING DEMONSTRATION THAT USAC IS DEMANDING A DOUBLE COLLECTION

The Commission clearly articulated its policy against double collection of Universal Service Fund (“USF”) contributions in its *Wholesaler-Reseller Clarification Order* by finding

¹ As indicated in the underlying Request for Review, subsequent to the April 16, 2013 filings IVANS made with USAC that are at issue here, IVANS was acquired by ABILITY Network, Inc. (“ABILITY”) and then merged into ABILITY in a transaction that closed on May 1, 2013. ABILITY now stands in the shoes of IVANS. The IVANS name is used throughout this pleading for consistency.

that USAC cannot “double collect if clear and convincing evidence shows that **another provider** actually contributed on the subject revenues.”² This prohibition is a continuation of the Commission’s long-standing recognition of the need to “eliminate[] the problem of counting revenues derived from the same services twice,” which “distorts competition because it disadvantages resellers.”³ While USAC attempted to read the Commission’s directive narrowly by focusing on the fact that IVANS is a reseller and not a wholesaler, AT&T correctly points out that this “is a distinction without difference.”⁴ As AT&T explains, the Commission’s *Wholesaler-Reseller Clarification Order* requires “USAC to consider ‘clear and convincing evidence’ that shows a reseller’s wholesale provider already contributed on the subject revenues.”⁵

IVANS has already made that showing. IVANS provided USAC with considerable detail prior to its 499-A filings, and in its Petition for Review, on its calculations of the amounts included as assessable on Line 406 its FCC Form 499-As. In addition the letter from AT&T submitted by IVANS with its Form 499 filing is sufficiently clear and convincing, standing alone, for USAC to have accepted IVANS’ filings at face value.⁶

AT&T has graciously offered to “review the revenue figures supplied by IVANS and confirm or correct the amounts IVANS states were the revenues that AT&T reported in its

² Universal Service Contribution Methodology, *Order*, 27 FCC Rcd. 13780, 13799 (2012) (“*Wholesaler-Reseller Clarification Order*”) (emphasis added).

³ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, 9207 ¶ 845 (1997).

⁴ AT&T Comments at 3.

⁵ *Id.*

⁶ See Letter from John Malone, AT&T, to Jeff Dobish, IVANS, Inc., at 1 (Mar. 19, 2013).

contribution base,”⁷ and to “certify under penalty of perjury that it did indeed report those amounts in its USF contribution base.”⁸ That extraordinary measure provides the Commission with an avenue to obtain incontrovertible evidence that goes significantly beyond the mere confirmatory certificates that the Commission determined were clear and convincing evidence in the *Wholesaler-Reseller Clarification Order*.

III. THE COMMISSION SHOULD APPLY A STATUTE OF LIMITATIONS OF NO MORE THAN FIVE YEARS

Commenters vigorously support IVANS’ request that a statute of limitations be applied in this (and indeed every) case. USAC’s demand that IVANS file Forms 499-A back fifteen years, to 1998, ignores all limitations, Commission precedent and practice. As IVANS established in its Request, and as AT&T and the Ad Hoc Coalition confirm, application of an indefinite filing requirement is inconsistent with the Commission’s five-year recordkeeping requirements and past enforcement practices.⁹

AT&T and the Ad Hoc Coalition go further than IVANS, contending a shorter filing requirement should apply. They establish that USAC’s unlimited filing requirement would also be inconsistent with the general statute of limitations applicable to defaults on federal debts, which limits collection to four years.¹⁰ In addition, the Ad Hoc Coalition points out that there are significant due process concerns with USAC’s demand that IVANS back file for fifteen years without first having obtained clear guidance from the Commission.¹¹ Finally, the Ad Hoc

⁷ AT&T Comments at 3-4.

⁸ *Id.* at 4.

⁹ IVANS Request for Review at 19-24; AT&T Comments at 4; Ad Hoc Coalition Comments at 4-7.

¹⁰ AT&T Comments at 4-5; Ad Hoc Coalition Comments at 7-8.

¹¹ Ad Hoc Coalition Comments at 9-12.

Coalition also proposes that the Commission adopt prospectively a three-year statute of limitations period analogous to the one applicable generally to IRS claims for federal taxes.¹²

IVANS generally supports adoption of a shorter period. If such a period is adopted, however, IVANS requests that it be adopted in this case, as well as prospectively. Because the Commission has not provided clear guidance to USAC on the subject, any subsequent Commission decision restricting the scope would necessarily be a clarification of its current policy. In that case, there is no public interest justification for holding IVANS to a longer statute of limitations period than a similarly situated provider would be.

In any event, the Commission should clarify that at most there is a five-year limitation, consistent with the Commission's record-keeping requirement and enforcement practices.

IV. MPLS-BASED ENTERPRISE SERVICES SHOULD BE ASSESSED, IF AT ALL, ON A PROSPECTIVE BASIS ONLY

In its Request for Review, IVANS asked the Commission for a declaratory ruling that its MPLS- and Frame Relay-based services were information services not subject to USF contribution or, alternatively, that the ambiguity surrounding the Commissions' policy on those services justifies prospective only application of a contribution requirement. Commenters fully support this view.¹³

As Sprint, U.S. Telepacific, and IVANS have all indicated, the Commission's and USAC's treatment of enterprise services has created significant regulatory uncertainty for providers resulting in a "Wild Wild West atmosphere" that is "anything but 'equitable.'"¹⁴ The uncertain regulatory status of those services forces providers to choose between two untenable

¹² *Id.* at 12-13.

¹³ Telepacific Comments at 5-6; Sprint Comments at 1.

¹⁴ Telepacific Comments at 3; Sprint Comments at 3; IVANS Request for Review at 25-28.

options by requiring them, in Sprint's words, to either: "(1) treat MPLS revenues as information services and risk USAC audit findings and Commission enforcement actions, or (2) treat MPLS revenues as telecommunications and operate at a competitive disadvantage that results from a 15%-17% tax that most other providers do not pay."¹⁵

Clarification of the regulatory status of these services is therefore necessary to ensure a level competitive playing field for all providers, and to increase regulatory compliance. The current uncertainty, however, requires that, if the Commission were to determine that these services are subject to the requirement, it is only on a prospective basis.

V. CONCLUSION

USAC should have simply accepted the IVANS 499-A filings. Upholding its rejection of those filings would result in an inappropriate double collection for an unreasonable amount of time. Underlying this point is the fact that it is unclear as to whether IVANS should even have filed in the first place since the assessability of any of its services is in doubt. The Commission should promptly grant the IVANS Request for Review and order USAC to accept the filings as they were made or clarify that MPLS- and Frame Relay-based enterprise services are not assessable.

¹⁵ Sprint Comments at 3. Sprint notes that "uncertainty has left IVANS in the unfortunate position of having reported – and presumably having made associated contributions" based on its filings. *Id.* IVANS confirms that it has been invoiced by USAC on the 499-As it filed and will have made all of the associated payments under USAC's pay-and-dispute procedures as of October 15, 2013.

Respectfully submitted,

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