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

In the Matter of Universal Service Fund Reform	)))))))	**WC Docket No. 06-122**

COMMENTS, AND IN THE ALTERNATIVE, PETITION FOR RULEMAKING OF THE AD HOC COALITION OF INTERNATIONAL TELECOMMUNICATIONS COMPANIES

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INTRODUCTION AND SUMMARY

The Ad Hoc Coalition of International Telecommunications Companies ("Coalition"), by its attorneys, hereby submits Comments, and in the alternative, petitions the Federal Communications Commission (the "Commission" or "FCC") to open a rulemaking proceeding to adopt new rules related to the administration of the Universal Service Fund ("USF") by the Universal Service Administrative Company ("USAC"). As described herein, the proposed new rules would enhance the fairness and stability of the USF program while simultaneously broadening the contribution base through increased participation. To achieve these goals, the Coalition hereby petitions the Commission to adopt rules to: (1) allow telecommunications carriers to request guidance from USAC on an anonymous and hypothetical basis; (2) establish a five-year "look-back" period for all USAC audits and contribution obligations; and (3) create amnesty and voluntary disclosure agreement programs for well-intentioned telecommunications and interconnected VoIP service providers (hereafter, collectively referred to as "telecommunications carriers" or "carriers") who may not be in compliance with the Commission's USF regulations.

Currently, even well intentioned telecommunications carriers find it incredibly challenging to keep up with the changing regulatory landscape. As a consequence of the lightning speed of technological changes and rapid evolution of legal precedent governing USF-assessable services,

many such providers may not be fully aware of their USF obligations. Under the current system, these providers are unable to seek regulatory guidance from USAC, either directly or even through counsel, without enduring burdensome and sometimes arbitrary treatment by USAC. Many telecommunications carriers have avoided seeking USAC guidance for fear that USAC will instruct them to make revisions to contribution filings going back as far as 1998 – far longer than the FCC's established document retention period of five years.[1] Such treatment could potentially cause many companies to go out of business, or push many international companies to avoid doing business in the United States all together. Both consequences could lower long-term USF contribution levels by deterring participation and fomenting increased avoidance.

In addition to establishing a definite and certain "look-back" period through FCC regulations, the Coalition urges the Commission to adopt rules that create appropriate and time-tested incentives that enhance fund participation. Implementing an amnesty program (similar to those adopted in the vast majority of states for tax purposes) and voluntary disclosure agreement programs (akin to those adopted by many states and the Internal Revenue Service ("IRS")) would invite many companies to become USF compliant while concurrently increasing USF contribution levels on a more equitable basis.

Not only does the Coalition believe that adopting these simple, prudent measures will lead to increased participation and USF funding, Section 254 of the Telecommunications Act of 1996 requires the Commission to adopt the proposed recommendations to ensure the equitable and non-discriminatory administration of the USF.

COALITION

The Ad Hoc Coalition of International Telecommunications Companies ("Coalition")[2] is a grassroots organization comprised of both U.S. and non-U.S. companies, including prepaid calling card providers, international transport carriers, and a broad spectrum of entities engaged in the

[1] *See* 47 C.F.R. § 54.706(e) (2006).
[2] www.telecomcoalition.com

provisioning of wholesale communications services.[3] The Coalition submits this petition calling upon the Commission to institute a rulemaking proceeding, or in the alternative, as comments in the open USF Contribution Reform proceeding on behalf of its members and supporters.

BACKGROUND

A. USAC's Refusal to Allow Telecommunications Carriers to Request Anonymous or Hypothetical Guidance Without Threat of Audit Violates Section 254 of the Telecommunications Act of 1996.

Current USAC policy prevents well-intentioned telecommunications carriers from requesting either hypothetical or anonymous guidance regarding USF contribution obligations. Presently, USAC requires a carrier to disclose its company name and assigned Filer ID for all guidance requests related to FCC Form 499 reporting.[4] This includes requests related to clarification of FCC Form 499 Instructions.[5] As the Coalition stated in its May 20, 2013 letter to the FCC, "USAC's policies vis-à-vis . . . requests for guidance have created a palpable aura of fear among well-intentioned service providers, who . . . fear that, in coming forward and expressing their confusion, they may be singled out for recrimination or otherwise subjected to undue penalties simply for being bold enough to seek USAC guidance."[6]

Recently, several filers have requested guidance from USAC to confirm their exemption status from USF fees per the Commission's rules. USAC not only disagreed with reasonable interpretations of the Form 499 Instructions and underlying FCC rules, it subjected these well-intentioned providers to retroactive exposure dating, in some cases, as far back as 1998.[7] Most

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[3] Supporters of the Coalition have included providers representing over 50% of calling card revenue derived in the United States.

[4] Letter from the Coalition to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, Request for Guidance, at 1 (filed May 20, 2013) [hereinafter Ad Hoc Coalition's Request for Guidance Letter].

[5] *Id.*

[6] *Id.*

[7] *See, e.g.*, *In the Matter of Universal Service Contribution Methodology, Request for Review by Coaxial Cable Television Corporation of Decision of Universal Service Administrator*, WC Docket No. 06-122, Request for Review of Decision of Universal Service Administrator, at 1-3 (filed Mar. 7, 2014) (stating that the company, a *de minimis* USF contributor, was permitted by USAC to revise only 2013, but not 2011 and 2012 Form 499-A/Q filings, resulting in two years of assessment as a non-*de minimis* USF contributor); *In the Matter of Request For Review by American*

notably, the FCC concluded in June 2013 that IVANS, Inc. (an electronic communications service provider for insurance and healthcare companies) submitted invalid Forms 499-A between 2009 and 2013 because "IVANS had not reported as assessable the revenue on which AT&T," the company's wholesale service provider, "had already contributed to the USF."[8] USAC also ordered IVANS to file Form 499 worksheets dating back to 1998, when the company began operations.[9] USAC cited no justification for its demand other than a lack of any "statutory or regulatory limitation on an entity's obligation" to report assessable revenue, and prior enforcement practices by the Commission.[10]

USAC's refusal to respond to anonymous or hypothetical requests for guidance violates the predictability directive of Section 254. Without the ability to request either hypothetical or anonymous guidance from USAC, on matters that primarily concern clarification of Form 499 Instructions, carriers cannot be certain of their USF reporting obligations;[11] nor can carriers accurately assess their USF contribution exposure in a predictable manner.[12] Furthermore, an inability to request general guidance from USAC inhibits well-intentioned carriers from coming forward to ensure that they are in compliance with USF regulations for the fear that they will be

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Teleconferencing Services, Ltd. d/b/a Premiere Global Services of Decision of Universal Service Administrator, WC Docket No. 06-122, Request for Review, at 1-5 (filed Oct. 29, 2013) (stating that following an audit, USAC rejected a timely filed amended 2012 Form 499-A causing the company to be assessed for normally non-assessable, revenue created from foreign-to-foreign traffic); *In the Matter of Request for Review by US Link, Inc. of Universal Service Administration Decision*, WC Docket No. 06-122, Request for Review, at 2-3 (filed Sep. 30, 2013) (stating that after an audit, USAC concluded that the company must report 100% of private line revenue as interstate, despite documentation via customer certifications that 90% of the company's private line revenue was *intrastate*).

[8] *In the Matter of Request for Review by IVANS, Inc. of Decision of the Universal Service Administrator,* WC Docket No. 06-122, at 2 (filed Aug. 6, 2013) (citing Letter from Kristin Berkland, Universal Service Administrative Company, to Alfred Mamlet, Steptoe & Johnson LLP, Counsel for IVANS, at 2 (June 7, 2013) [hereinafter IVANS USAC Letter]).

[9] *Id.*

[10] *Id.* (quoting IVANS USAC Letter at 4).

[11] Ad Hoc Coalition's Request for Guidance Letter at 1.

[12] *Id.*

slapped with burdensome, retroactive contribution obligations followed by years of endless appeals.[13]

1. The IRS Private Letter Ruling Process is Instructive on the Type of Model that the FCC/USAC Should Follow in Providing Anonymous/ Hypothetical Guidance to Telecommunications Providers.

The "private letter ruling" process employed by the IRS is informative on the type of process that should be adopted by the Commission. A private letter ruling is a written determination issued by the IRS in response to a taxpayer's written request regarding the tax applicability of prospective factual situations.[14] The federal government has offered such hypothetical guidance for individual taxpayers since the inception of the modern income tax regime in 1913.[15] By the 1930's, the demand for such guidance was so great that Congress authorized the IRS to enter into "closing agreements" with individual taxpayers.[16] These agreements, later referred to as private letter rulings, were deemed to be legally binding on the IRS with respect to the specific, prospective transaction at issue.[17]

A private letter ruling is legally binding only with respect to the requesting taxpayer – not third parties.[18] The Internal Revenue Code expressly states, "[u]nless the Secretary otherwise

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[13] Many requests for review were not taken up by the Commission within the baseline assumption of 90 days as per the Commission's rules, which implies that it does not plan to take up such appeals anytime soon. *See generally In the Matter of Request for Review of a Decision of the USAC Administrator by Vycera Communications, Inc.*, CC Docket Nos. 96-45 and 97-21, Request for Review (filed Aug. 16, 2006); *In the Matter of Request for Review of Decision of the Universal Service Administrator by IDT Corporation*, CC Docket No. 96-45, Request for Review (filed Apr. 10, 2006); *In re Request for Review by ILD Telecommunications, Inc. and Intellicall Operator Services, Inc. of Decision of the Universal Service Administrator*, Request for Review, WC Docket No. 96-45 (March 31, 2006) (supplemental appeal filed June 5, 2006).

[14] ¶ 8.02 RULINGS, IRS PROC. FORMS ¶ 8.02[1] (WestLaw 2014); 26 C.F.R. § 601.201(a)(2) (2006).

[15] Dale F. Rubin, *Private Letter and Revenue Rulings: Remedy or Ruse?*, 28 N. KY. L. REV. 50, 51 (2001).

[16] *Id. See also* Revenue Act of 1938, ch. 289, § 801, 52 Stat. 447, 573 (codified as amended at I.R.C. § 7121 (2013)).

[17] Rubin, *supra* note 15, at 51.

[18] 13 MERTENS LAW OF FED. INCOME TAX'N, § 49A:36 LETTER RULINGS AND DETERMINATION LETTERS, at 1 (WestLaw 2014).

establishes by regulations," private letter rulings, "may not be used or cited as precedent."[19] However, courts are willing to cite private letter rulings as evidence of the IRS's administrative practice.[20] Despite the rulings' lack of binding precedential effect on third parties,[21] some commentators note that, due to their high quality,[22] and public nature, private letter rulings largely serve as markers of the IRS's general perspective on tax issues.[23] Thus, third parties can reliably follow such rulings in predicting future treatment by the IRS.[24]

The IRS has established guidelines as to whether to respond to a taxpayer's private letter ruling.[25] Specifically, the IRS will issue a ruling if: (1) the answer is clear from the application of the relevant tax code or regulation to the individual facts; or (2) the answer seems reasonably certain, but not entirely clear, and the case involves an emergency or exceptional hardship.[26] However, the IRS will not issue a private letter ruling if the case can be adequately resolved by pending regulation.[27] The IRS periodically publishes a list of specific areas and topics that the Service will or will not consider through a private letter ruling.[28] Generally speaking, the issue

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[19] I.R.C. § 6110(k)(3) (2013). However, letter rulings may be cited as precedent by the taxpayer for whom the original ruling was issued. *See* 13 MERTENS LAW OF FED. INCOME TAX'N, at 1.

[20] Rubin, *supra* note 15, at 55 (citing *ABC Rentals of San Antonio v. Commissioner*, 142 F.3d 1200, 1207, n. 5 (10th Cir. 1998)).

[21] Private letter rulings are still considered to have a precedential effect for the requesting taxpayer. *See* 13 MERTENS LAW OF FED. INCOME TAX'N, at 1.

[22] *See* Rubin, *supra* note 15, at 54 (stating that "'notwithstanding the limited review to which letter rulings are subject, they generally are of high quality' and 'likely to reflect the present position of the Service when one has been established . . . .'" (quoting James P. Holden & Michael S. Novey, *Legitimate Uses of Letter Rulings Issued to Other Taxpayers-A Reply to Gerald Portney*, 37 TAX LAW 337, 338 (1984)).

[23] *See id.* (stating that "even when the Service has not taken an established position, letter rulings usually reflect the position the Service eventually will take . . . .").

[24] *See id.*

[25] ¶ 8.02 RULINGS, IRS PROC. FORMS ¶ 8.02[3][a] (WestLaw 2014).

[26] *Id.* at ¶ 8.02[3][a][ii] (citing 26 C.F.R. § 601.201(b)(5)).

[27] *Id.*

[28] *Id.* at ¶ 8.02[3][a][iii] (stating that Section 9 of the Revenue Procedure "lists checklists, guideline revenue procedures, safe-harbor revenue procedures, and automatic-change revenue procedures that apply to certain ruling requests").

presented by the taxpayer must be more than merely hypothetical, must not principally involve the outright avoidance of a tax liability, and is part of a prospective transaction or occurrence.[29]

The IRS's private letter ruling mechanism serves as a model for the FCC to adopt and direct USAC in responding to providers. The individualized aspect of the private letter ruling mechanism is likewise applicable in the context of USF contributions. However, the FCC should also permit providers to file anonymous and hypothetical requests for guidance to clarify their USF obligations. This will incentivize carriers to seek clarification from the Commission about their individual USF obligations without the threat of reclassification. Thus, the adoption of such a framework by the Commission would provide carriers with long-needed clarity regarding their USF obligations, and create more transparency with regards to USF requirements.

B. Consistent with the Commission's Rules, USAC Should Abide by a Five-Year Look-back Period When Performing Audits on Telecommunications Providers.

The current language of 47 C.F.R. § 54.706(e) requires carriers to maintain documents related to USF contributions for "at least five years from the date of contribution."[30] The Commission treats Section 54.706(e) as an upper limit on a carrier's document retention obligations.[31] By requiring carriers to submit revised Forms 499 as far back as ten years, USAC

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[29] *See id.* at ¶ 8.02[3][a][iv].

[30] 47 C.F.R. § 54.706(e) (2006).

[31] Section 54.706(e) states that carriers must adhere to a document retention period of "at least five years." The Commission does not penalize carriers for failure to adhere to the document retention policy beyond a five-year period. *See, e.g.*, *In the Matter of Carrera Communications, LP Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, FCC 05-147, July 25, 2005 and *In the Matter of Teletronics, Inc. Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture and Order*, FCC-146, July 25, 2005 (proposing a forfeiture for missed filings within the past year, even though the carrier missed filings dating back several years and instructing the carrier to submit past Forms for the four years prior to the LOI); *In the Matter of InPhonic, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, FCC 05-145, July 25, 2005 (proposing a forfeiture for missed filings within the past year only, even though InPhonic failed to file worksheets for several years); *In the Matter of Telecom House, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, FCC 05-168, Sept. 13, 2005 (requiring Telecom House to file missed Forms 499-A for 2001 - 2005 and proposing a forfeiture for failures to file within the last year); *In the Matter of Communication Services Integrated, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, FCC 05-185, Oct. 31, 2005 (requiring CSI to file missed Forms 499-A for 2002 - 2005 and proposing a forfeiture for failures to file within the last year).

thereby requires carriers to maintain supporting documentation well beyond the five-year period outlined in Section 54.706(e). Any USAC interpretation of Section 54.706(e) without Commission guidance violates the Communications Act. To the extent USAC reads Section 54.706(e) to require document retention beyond five years, USAC has improperly interpreted an FCC rule. At the very least, USAC's policy, without the FCC's explicit acquiescence, is inconsistent with the Commission's document retention policies, and thus violates Section 254.

C. State Tax Amnesty and Voluntary Disclosure Agreement Programs are Instructive on the Treatment USAC Should Apply to Telecommunications Providers.

State tax amnesty and voluntary disclosure agreement programs aim to increase revenue and tax compliance by providing incentives for delinquent filers. These include waivers of civil or criminal penalties. State tax amnesty programs are temporary schemes designed to provide the state with an infusion of cash during economic downturns in exchange for limited amnesty.[32] In contrast, voluntary disclosure agreements are ongoing programs targeting businesses that have neither registered to do business, nor previously filed tax returns in a state, allowing them to come into tax compliance without fear of civil or criminal penalties.[33] Almost every state has adopted one or both of these programs during the last decade.[34] While amnesty programs have not historically been adopted at the federal level, the IRS does employ a voluntary disclosure agreement program.[35]

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[32] *See* Hari S. Luitel & Russell S. Sobel, *The Revenue Impact of Repeated Tax Amnesties*, 27 PUB. BUDGETING & FIN. 19, 22-23 (2007).

[33] *See, e.g.*, MASS. DEP'T OF REVENUE, TIR 03-17: LIMITATIONS PERIOD FOR TAXPAYERS FAILING TO FILE TAX RETURNS (2003), *available at* http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2003-releases/tir-03-17-limitations-period-for-taxpayers.html; MASS. DEP'T OF REVENUE, TIR 09-7: LOOK-BACK POLICY APPLICABLE TO CERTAIN CORPORATIONS AND FINANCIAL INSTITUTIONS FAILING TO FILE TAX RETURNS (2009), *available at* http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2009-releases/tir-09-7-look-back-policy-applicable-to.html.

[34] Nevada and Wyoming are the only states that have adopted neither an amnesty program nor voluntary disclosure agreement program for business entities as they lack a corporate income tax regime. *See* 1-4 BENDER'S STATE TAXATION: PRINCIPLES AND PRACTICE, § 4.08 OFFERS IN COMPROMISE, at Table 1 (LexisNexis 2013).

[35] Leandra Lederman, *Taxation of Offshore Accounts: The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499, 502 (2012).

States have found these programs more effective than robust auditing efforts, which historically extended resources beyond the point of diminishing returns.[36]

1. Tax Amnesty Programs.

Typically, states implement tax amnesty programs during economic recessions to stimulate tax revenue. For example, during the 2008-2009 recession, fifteen states offered an amnesty program.[37] States also offer tax amnesty programs with the implementation of changes in their tax regimes due to the confusion that may arise with the new provisions.[38]

Amnesty programs can be quite lucrative for a state. For example, Illinois reaped $314 million during a five-week program commenced in February 2011, exceeding the state's goal of raising $250 million.[39] New Jersey collected $746 million from a 2010 amnesty program.[40]

Tax amnesty programs are generally offered within a limited time period, and typically last for two to three months.[41] However, some programs have been offered for as long as six months or as short as six weeks.[42] To encourage delinquent taxpayers to come forward, many states offer a limited "look-back" period similar to a statute of limitations. These "look-back" periods limit the

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[36] Luitel, *supra* note 32, at 19-21; William J. Comiskey, *New York's Voluntary Disclosure and Compliance Program Strikes Gold*, 53 ST. TAX NOTES 669, 671 (2009).
[37] Karen Setze, *2009 Ties State Tax Amnesty Record: Will 2010 Follow Suit?*, 53 ST. TAX NOTES 429, 429-30 (2009); Karen Setze, *Many States Offer Amnesty, Some Maybe Too Often*, 57 ST. TAX NOTES 479, 479 (2010).
[38] Luitel, *supra* note 32, at 21.
[39] Officer of Governor Pat Quinn, *Press Release: Tax Amnesty Program Exceeds State Budget Goal*, ILLINOIS.GOV (Feb. 7, 2011), http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=3&RecNum=9206.
[40] Letter from NJ Office of Legislative Services to Chris Christie, Governor of NJ, Audit Report for July 1, 2007 to June 18, 2010 (Oct. 8, 2010); *available at* http://www.njleg.state.nj.us/legislativepub/auditor/82019.pdf. *See also* Setze, *2009 Ties State Tax Amnesty Record: Will 2010 Follow Suit?*, *supra* note 36, at 429-30 (stating that Massachusetts, Hawaii, and Arizona reported unexpectedly high revenues during recent amnesty programs).
[41] LeAnn Luna et al., *State Tax Amnesties: Forgiveness is Divine – and Possibly Profitable*, 41 ST. TAX NOTES, 499 (2006).
[42] *Id.*

years in which a state tax authority will assess past due taxes for delinquent taxpayers. Most programs have a "look-back" period averaging three to four years.[43]

2. Voluntary Disclosure Agreement Programs.

Voluntary disclosure agreement ("VDA") programs have historically been offered at both the state and federal levels in the United States. At the federal level, as early as 1919, the IRS permitted delinquent taxpayers to make voluntary disclosures in lieu of criminal prosecution.[44] However, the agency stopped offering immunities during the 1950's due to the overbroad scope of the protection.[45] Yet, the IRS continues to offer both general and targeted VDA programs today – with limited incentives.[46] At the state level, all states have historically offered VDA programs at some point in time.[47]

Unlike amnesty programs, VDA programs are typically permanent, but are not intended to overlap with amnesty programs.[48] Additionally, states offer limited "look-back" periods of between three to seven years on average for their VDA programs.[49] These limited look-back periods are particularly beneficial for out-of-state businesses that unknowingly have tax liabilities with a foreign state extending back beyond the look-back period, and thus prevent such companies from going out of businesses due to burdensome and unpredictable tax liabilities.[50]

Many states offer delinquent taxpayers the opportunity to come forward, either anonymously or through an intermediary (*e.g.*, legal counsel), to bring their outstanding tax obligations into

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[43] *See, e.g.*, North Carolina Department of Revenue, North Carolina Voluntary Disclosure Program, DORNC.COM (last visited Mar. 2, 2010), http://www.dornc.com/practitioner/voluntary.html (look-back period of four years).
[44] Lederman, *supra* note 35, at 502.
[45] *Id.*
[46] *Id.* at 503 (stating that the Internal Revenue Manual provides a framework for VDAs, and that the IRS has periodically offered VDAs for offshore tax evasion).
[47] *See* 1-4 BENDER'S STATE TAXATION: PRINCIPLES AND PRACTICE, § 4.08 OFFERS IN COMPROMISE, at Table 13 (LexisNexis 2013).
[48] *See* LAW JOURNAL PRESS, STATE BUSINESS TAXES § 12.01, at [1] (LexisNexis 2013) ("Taxpayers are generally precluded from entering into both an amnesty and a voluntary disclosure agreement with a state for the same tax type and same tax period.").
[49] *Id.* at [1][e].
[50] *See id.* at [5].

compliance.[51] Delinquent taxpayers are then free to negotiate a waiver or agreement with the state tax authorities in which the taxpayer voluntarily agrees to pay either a portion or a full share of its outstanding taxes in exchange for the state's pledge not to impose civil or criminal penalties.[52]

In many states, tax authorities still retain discretion over whether to enter into a VDA with a delinquent taxpayer, and may still pursue civil or criminal prosecution.[53] Typically, in determining whether to agree to a VDA, a state tax authority analyzes the: (1) non-filer's history of tax delinquency; (2) amount of tax liability at issue; and (3) audit history of the non-filer.[54]

State tax amnesty and VDA programs are models for resolving delinquent USF contribution issues. These programs are widely popular with both authorities and private entities, and can be quite lucrative for the governments that employ them. They have also been shown to increase trust and approval in tax authorities at times when faith in government authority is at an all-time low. Such programs would benefit the USF given recent increases in the level of frustration with the USF administration among telecommunications providers. Implementing both an amnesty and VDA program could shrink the current gap between telecommunications carriers and regulatory authorities regarding USF administration.

PROPOSED RULES AND POLICIES

A. The Commission Should Instruct USAC to Permit Telecommunications Carriers to Request Guidance From USAC on an Anonymous and Hypothetical Basis.

Permitting carriers to seek both anonymous and hypothetical guidance from USAC regarding their USF contribution obligations would: (1) ensure more accurate USF contributions; (2) provide predictability for carriers; and (3) encourage many carriers to approach USAC voluntarily in assessing their compliance with USF obligations. As discussed above, USAC's current policy of requiring detailed information from a carrier requesting guidance on its USF obligations has caused

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[51] LAW JOURNAL PRESS, STATE BUSINESS TAXES § 12.03, at [2][a] (LexisNexis 2013).
[52] 1-4 BENDER'S STATE TAXATION: PRINCIPLES AND PRACTICE, § 4.08 OFFERS IN COMPROMISE, at [2][b] (LexisNexis 2013).
[53] *Id.*
[54] *Id.*

well-intentioned service providers to fear coming forward given the threat of undue penalties. Such a policy is counterintuitive, as carriers request guidance to enable them to make minor adjustments to their revenue reporting procedures. It should not entice carriers to forgo making minor adjustments, thus causing them to face more burdensome and problematic sanctions later on. Thus, in the interest of efficiency and predictability, the FCC should instruct USAC to permit carriers to request guidance on both anonymous and hypothetical bases.

1. Proposed USF Contribution Request for Guidance Program.

The Coalition encourages the FCC to adopt a USAC USF Contribution Request for Guidance program modeled on the IRS's established private letter ruling program. However, the FCC should further permit requests to be made both anonymously and hypothetically. This would encourage participation in the program by well-intentioned carriers who would otherwise hesitate in coming forward for fear of retaliation by USAC. Like the IRS's private letter ruling program, the new USAC USF request for guidance program must be based on factual situations specific to the requesting carrier, and thus would not have precedential effect on third-party carriers. Instituting such a program would have the ancillary benefit of providing third-party carriers with a modicum of predictability of future treatment by USAC and the Commission due to the public, consistent, and high-quality nature of the rulings. Moreover, as with the IRS's private letter ruling program, USAC may refrain from responding to a request for guidance when pending Commission regulations would resolve the issue for that specific carrier. Finally, in order to ensure the effectiveness of the program, the Commission must direct USAC to respond to carriers' requests for guidance in a timely fashion – not to exceed 90 days.

B. <u>The Commission Should Amend 47 C.F.R. § 54.706(e) to Limit USAC's Auditing Scope to a Five-Year "Look-Back" Period</u>.

To alleviate the confusion surrounding a filer's document retention obligations, the Coalition recommends that the Commission amend Sections 54.706(e) and 54.707 to create consistency

between FCC rules and USAC policies. Specifically, Section 54.706(e) should be amended as follows:

> Any entity required to contribute to the federal universal service support mechanisms shall retain, for ~~at least~~ *no more than* five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions made were in compliance with the Commission's universal service rules. These records shall include without limitation the following: Financial statements and supporting documentation; accounting records; historical customer records; general ledgers; and any other relevant documentation. This document retention requirement also applies to any contractor or consultant working on behalf of the contributor. (changes are italicized).

In addition, the Commission should amend Section 54.707[55] to clarify that USAC's auditing authority is explicitly subject to the provisions of Section 54.706(e) as amended. Specifically, Section 54.707 should be amended as follows:

> The Administrator shall have authority to audit contributors and carriers reporting data to the administrator *pursuant to § 54.706(e) of this chapter*. The Administrator shall establish procedures to verify discounts, offsets, and support amounts provided by the universal service support programs, and may suspend or delay discounts, offsets, and support amounts provided to a carrier if the carrier fails to provide adequate verification of discounts, offsets, or support amounts provided upon reasonable request, or if directed by the Commission to do so. The Administrator shall not provide reimbursements, offsets or support amounts pursuant to part 36 and § 69.116 through 69.117 of this chapter, and subparts D, E, and G of this part to a carrier until the carrier has provided to the Administrator a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier in accordance with § 54.201. (changes are italicized).

These changes to Sections 54.706(e) and 54.707 would: (1) provide consistency between both USAC and the FCC's USF guidelines; and (2) cure multiple legal issues raised by USAC's current auditing practices. These amendments would prevent well-intentioned telecommunications carriers from being put out of business by a burdensome USAC reclassification of ten-year old revenues.

C. <u>The Commission Should Instruct USAC to Establish Amnesty and Voluntary Disclosure Agreement Programs for Telecommunications Carriers Not in Compliance with USAC Policies</u>.

The Coalition recommends that the Commission adopt not only a temporary amnesty program, but also a permanent voluntary disclosure program to benefit both the Fund and

[55] 47 U.S.C. § 54.707 (2006).

contributions. A USF Amnesty/Voluntary Disclosure Program would bring many well-intentioned international carriers, who are unaware of their specific obligations under the Fund, into USF compliance.

1. Proposed USF Amnesty Program.

The Coalition recommends that the Commission adopt a temporary amnesty program modeled on the various existing state tax amnesty programs. The temporary amnesty program would allow the Commission to assess the effectiveness of such a program in encouraging well-intentioned carriers to enter into USF compliance voluntarily before the implementation of a permanent VDA program. The Coalition proposes the following parameters for the USF Amnesty Program:

i. *Duration*: The USF Amnesty Program should last no longer than six months, and be offered only once. Although most state tax amnesty programs are offered for no more than a few weeks, a longer duration is appropriate since the USF Amnesty Program would be offered only once. Also, the longer duration would allow USAC and the Commission to gauge the level of interest among carriers in voluntarily entering into USF compliance before the implementation of a permanent program.

ii. *Scope*: The amnesty program should be limited to any outstanding USF obligations that have not been disclosed to the FCC or USAC. The purpose of this program is for carriers to clear up any past, outstanding USF obligations, as opposed to planning for future non-compliance. Also, the USF Amnesty Program must be subject to a limited look-back period of five years so that it will be in compliance with 47 C.F.R. § 54.706(e) as amended by this petition.

iii. *Eligibility*: While many carriers may benefit from the USF Amnesty Program, the program would be particularly beneficial for foreign international telecommunications carriers having limited exposure to American telecommunications regulations. These carriers are predominately well intentioned. But due to their limited involvement in the American telecommunications industry, these carriers are unaware of their USF contribution obligations. Also, the Commission, after

consulting industry and other interested parties, should impose a limit on the amount of outstanding USF contributions that are eligible for mitigation through the program. As the program is designed for well-intentioned telecommunications carriers who are not thoroughly aware of their USF obligations, carriers who are grossly negligent in withholding USF contributions should be ineligible for the program.

iv. *Incentives*: Limiting the USF Amnesty Program to a one-time offering would be the most effective way to encourage carriers to join. Coupled with this, carriers should be able to discuss their interest in the program anonymously until they fully agree to the program's terms and conditions. Furthermore, in order to encourage carriers' enrollment, a carrier's participation in the amnesty program should be penalty-free, and repayment of outstanding USF obligations should not be subject to unduly burdensome interest rates. Additionally, carriers should not be subject to any future penalties or discrimination by the FCC and/or USAC due to their participation in the program – as this cuts against the notion of "amnesty."

v. *Payment Plans*: Methods of repaying outstanding USF obligations should be determined by negotiation between the carrier and the FCC and/or USAC. Carriers and the FCC and/or USAC should be able to negotiate a reasonable payment plan in the best interests of both parties. All payment terms should be subject to negotiation – including interest rates and method of payment.

2. Proposed USF Voluntary Disclosure Agreement Program.

If the FCC and USAC deem the USF Amnesty Program to be successful, then the FCC should launch a permanent amnesty program in the form of a Voluntary Disclosure Agreement Program. The Coalition proposes the following parameters for this program:

i. *Duration*: The program should be a permanently available option, allowing carriers to enter into proper USF compliance without the threat of undue USAC penalties. In order to activate the USF Voluntary Disclosure Agreement Program, carriers must come forward voluntarily to request enrollment in the program. The length of involvement in the VDA should be subject to negotiation by the individual carrier, as well as the FCC and/or USAC.

ii. *Eligibility*: Due to the program's permanence, the USF Voluntary Disclosure Agreement Program should be subject to rigorous eligibility requirements. First, if a carrier has already participated in the one-time offering of the USF Amnesty Program, then that carrier is ineligible for participation in the VDA program. Second, once a carrier enters into such an arrangement, it is ineligible for participation in any future VDA programs. However, this should not prevent a carrier from re-negotiating the parameters of an active VDA due to unforeseen circumstances. Finally, the Commission, after consulting industry and other interested parties, should impose a limit on the amount of outstanding USF contributions that are eligible for mitigation through the program. As the program is designed for well-intentioned telecommunications carriers who are not thoroughly aware of their USF obligations, carriers who are grossly negligent in withholding contributions should be ineligible for the program.

iii. *Scope*: The amnesty program should be limited to any outstanding USF obligations that have not been disclosed. The purpose of this program is for carriers to clear up any outstanding USF obligations, as opposed to planning for future non-compliance. The scope of the USF Voluntary Disclosure Agreement Program is the same as the USF Amnesty Program because it is intended for carriers who did not participate in the one-time offering of the amnesty program. Also, as with the USF Amnesty Program, the VDA program should be subject to a limited look-back period of five years.

iv. *Payment Plans*: Methods of repaying outstanding USF obligations should be determined by negotiations between the carrier and the FCC and/or USAC. Carriers and the FCC and/or USAC should be able to negotiate a payment plan that is both reasonable, and in the best interests of both parties. All payment terms should be subject to negotiation – including interest rates and method of payment.

Conclusion

The proposed rules and policies in this petition for rulemaking are aimed at bringing a greater amount of clarity and predictability to the USF. The FCC, USAC, and carriers would all benefit from these proposals, as they would bring about a greater level of functionality and efficiency to the administration of the Fund.

Respectfully submitted,

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[56] Mr. Marashlian and the Coalition were assisted by Keenan Adamchak, Law Clerk and a 2014 Juris Doctor candidate, currently attending the George Washington University Law School. Mr. Adamchak is not licensed to practice law in any jurisdiction.