REDACTED – FOR PUBLIC INSPECTION

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

In the Matter of	)		
	)		
Request for Review by	)	Docket Nos.	WC 06-122
DOW Management Co., Inc. of	)		WC 96-45
Decision of the	)		WC 97-21
Universal Service Administrator	)		

REQUEST FOR REVIEW OF A DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

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I. Introduction

Pursuant to sections 54.719(c) and 54.720 of the rules of the Federal Communications Commission ("FCC" or "Commission"), DOW Management Co., Inc. ("DOW" or the "Company") (Filer ID 821968) hereby respectfully requests review of the Final Audit Report ("USAC Audit Report") issued by the Universal Service Administrative Company ("USAC") on April 29, 2014.[1] The report stemmed from a compliance audit conducted by USAC's Internal Audit Division ("IAD") of DOW's completion of the 2012 Telecommunications Reporting Worksheet, FCC Form 499-A, reporting calendar year 2011 revenues.

Specifically, DOW seeks review of Finding #2 concerning federal Universal Service Fund ("USF" or "Fund") recovery charges. USAC concluded that DOW had assessed federal USF recovery charges in excess of amounts permitted by Commission rules. USAC concluded that, because DOW qualified for the Limited International Revenues Exemption ("LIRE"),[2] FCC rules prohibited DOW from applying a USF surcharge to the international portion of its customers' invoices. USAC recommended that the carrier refund [redacted]

[1] *See* USAC Internal Audit Division Report on the Audit of Dow Management Co., Inc. -2012 FCC Form 499-A Rules Compliance (USAC Audit No. CR2012CP018), adopted by the Board on April 24, 2014, attached hereto as Exhibit 1 ("USAC Audit Report").
[2] *See* 47 C.F.R. § 54.706(c).

[redacted] including amounts remitted to the Fund.

USAC has overstepped the bounds of its limited administrative role to reach this oversimplified conclusion. USAC interprets distinct methodologies established by the Commission for contribution and cost recovery as direct counterparts of one another. In doing this, USAC ignores and even undermines Commission policies. And, USAC seeks to expand its authority to recommend refunds to include amounts remitted to the Universal Service Fund. In this request for review, DOW asks that the Commission reverse USAC's finding and recommendation.

II. Factual Background

In April 2014, the USAC Board of Directors approved the Final Audit Report for DOW. The audit involved the Company's 2012 FCC Form 499-A filing (covering the period January 1, 2011 through December 31, 2011).[3] The USAC Audit Report addressed two findings and two other matters.[4] For the purposes of this appeal, DOW seeks review of Finding #2 only.

DOW operates as an interconnected Voice over Internet Protocol ("VoIP") provider and a toll reseller, predominantly offering services to call centers overseas. Because the Company's collected end user interstate telecommunications revenues comprised less than 12% of its combined interstate and international telecommunications revenues, the auditors found that DOW qualified for the limited international revenue exemption ("LIRE").[5]

During calendar year 2011, DOW chose to assess a 12.3% surcharge on interstate/international call usage.[6] This percentage was below the contribution factors in effect for each quarter of that year.[7] Accordingly, the auditors did not find that DOW

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[3] USAC Audit Report at 2.
[4] *See* USAC Audit Report at 19.
[5] *Id.* at 2-3; 47 C.F.R. §54.706(c).
[6] *Id.* at 13.
[7] *See* Proposed First Quarter 2011 Universal Service Contribution Factor, CC Docket No. 96-45, *Public Notice*, 25 FCC Rcd 17175 (2010) (15.5%); Proposed Second Quarter 2011

applied a multiplier in excess of the allowable contribution factor.[8] They did not find that DOW mislabeled its USF pass-through charge or impermissibly combined it with other fees or taxes.[9] Nonetheless, USAC concluded that any pass-through charge assessed on international revenues by a LIRE-qualifying carrier would constitute an overcharge "in the first instance."[10] USAC ordered DOW to refund to its customers [redacted] including amounts remitted to the Fund.[11]

III. Argument

The Commission reviews USAC Board decisions *de novo*.[12] The USAC Board's actions are entitled to no deference, and Commission rules provide for resolution of requests for review within 90 days.[13]

The auditors concluded that DOW was not in compliance with the Universal Service cost recovery rules.[14] The auditors reached this conclusion by interpreting the Commission's cost recovery rules methodology as one that "*directly relates* a contributor's recovery of Universal Service costs from end users to a contributor's contribution obligation."[15] By supplying this interpretation in order to reconcile the contribution methodology and the cost recovery methodology, USAC ignores Commission precedent and policy designed to keep those two methodologies distinct. The Commission has clearly established its policy that

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Universal Service Contribution Factor, CC Docket No. 96-45, *Public Notice*, 26 FCC Rcd 3755 (2011) (14.9%); Proposed Third Quarter 2011 Universal Service Contribution Factor, CC Docket No. 96-45, *Public Notice*, 26 FCC Rcd 8461 (2011) (14.4%); Proposed Fourth Quarter 2011 Universal Service Contribution Factor, CC Docket No. 96-45, *Public Notice*, 26 FCC Rcd 12943 (2011) (15.3%).

[8] USAC Audit Report at 13.

[9] *Id.*

[10] *Id.* at 10-12.

[11] *Id.*

[12] 47 C.F.R. § 54.723.

[13] 47 C.F.R. § 54.724.

[14] USAC Audit Report at 12.

[15] *Id.* at 18 (emphasis added).

Universal Service shall not be funded by way of a collect-and-remit system.[16] Yet USAC has developed just such a policy in recommending a refund in this audit. It is well established that USAC may not make policy or interpret Commission rules.[17]

Even if Commission rules addressed this situation directly and USAC's application of the rules was correct, USAC's authority to order refunds is limited. USAC does not have authority to order refunds of surcharges collected from customers including amounts remitted into the Universal Service Fund. USAC's reliance on the Clear World Order to justify its recommendation is misplaced. In Clear World, USAC ordered a refund where the audited company had applied a factor in excess of the allowable assessment amount and had combined federal and state universal service charges; there, the carrier retained collected surcharges in their entirety as revenues.[18] Here, even if USAC had authority to develop a policy and methodology for reconciling the cost recovery rules and the contribution methodology, it cannot require a carrier to refund to customers amounts the carrier has paid into the Fund.

A. USAC Overstepped Its Authority by Interpreting Commission Rules, Overriding Express Commission Policy, and Expanding the Scope of Commission Rules.

If the Commission decides the USAC Audit Report is based on interpretation of the Commission's rules, it must reject USAC's finding. The Commission's rules expressly prohibit USAC from interpreting the rules,[19] and the Commission has also unambiguously said USAC's

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[16] *See In re* Federal-State Joint Board on Universal Service, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952, ¶ 38 (2002) ("2002 Contribution Methodology Order").

[17] *See* 47 C.F.R. § 54.702(c) ("The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.").

[18] USAC Audit Report at 12. *See also In re* Universal Service Contribution Methodology Request for Review of Decision of the Universal Service Administrator by Clear World Communications Corp., WC Docket No. 06-122, *Order*, 26 FCC Rcd 6234 (2011) ("Clear World Order").

[19] *Id.*

authority extends only to administrative matters.[20] "USAC may not make policy, *interpret unclear provisions of the statute or rules*, or interpret the intent of Congress."[21] Yet USAC's interpretation of Commission rules runs counter to the language of the rules and the Commission's policies.

1. USAC has adopted a collect-and-remit methodology that the Commission explicitly rejected years ago in favor of a revenue-based system.

USAC overstepped its authority when it found that DOW had violated Commission rules and recommended that DOW refund [redacted] This recommendation is based on an attempt to reconcile Commission rules that are not mirror images of one another. To reconcile (1) rules for calculating contribution obligations, which are based on a filer's total gross billed revenues[22] with (2) the USF cost recovery rule, which allows contributors to recover costs based on individual end users' invoices,[23] requires interpretation and policy-making. As discussed below, the Commission deliberately and thoughtfully distinguished these two frameworks.

In making its finding, USAC argues that the assessable portion of a bill is only the portion of the bill directly linked to revenues on which the contributor will ultimately be assessed its contribution.[24] In supporting this argument, USAC cites a Notice of Proposed Rulemaking in which the Commission described the cost recovery rule as limited by the

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[20] *In re* Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 97-21 and 96-45, *Third Report and Order*, 13 FCC Rcd 25058, 25067 (1998).
[21] *Id.* (emphasis added); 47 C.F.R. § 54.702(c) ("Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.").
[22] 47 C.F.R. § 54.706(b), (c) (contributions are based on "projected collected interstate and international end-user telecommunications revenues").
[23] 47 C.F.R. § 54.712(a) ("If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.")
[24] USAC Audit Report 18-19.

"assessable portion of the bill times the contribution factor."[25] USAC goes on to supply its own interpretation of this rule, that the assessable portion of a bill "is directly related to the contributor's contribution obligation."[26] However, none of the decisions USAC cites limit the assessable portion of a customer's bill other than by the language in the rule, which limits the assessment to the "interstate telecommunications" portion of the bill. Nor do Commission orders "directly relate" cost recovery to contribution obligations. On the contrary, the two frameworks differ by design.

The Commission has clearly established its policy that the USF contribution mechanism is not a collect-and-remit system.[27] Contributions are calculated on a revenue-based methodology. A carrier's contribution obligation is not relieved if its customer fails to pay the USF surcharge.[28] While carriers have no choice but to contribute a set percentage of end user interstate telecommunications revenues into the Universal Service Fund,[29] carriers may choose whether or not to recover these costs from customers through a separate line item on invoices.[30]

The Commission expressly decided not to adopt a collect-and-remit system for USF contributions,[31] but the interpretation provided by the USAC Audit Report would create a *de facto* collect-and-remit system for predominantly international carriers with the added

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[25] *In re* Universal Service Contribution Methodology, WC Docket No. 06-122 and GN Docket No. 09-51, *Further Notice of Proposed Rulemaking*, 27 FCC Rcd 5357, 5490-91 (2012) ("2012 Universal Service Contribution Methodology FNPRM"). USAC also cites the "Clear World Order," which also states that a service line-item charge may not exceed the assessable portion of a customer's bill times the relevant contribution factor. Clear World Order, 26 FCC Rcd at 6236, ¶ 6.

[26] USAC Audit Report 19.

[27] *See* 2002 Contribution Methodology Order, 17 FCC Rcd 24952, ¶ 38.

[28] *See* 2002 Contribution Methodology Order ¶ 39. In that Order, the Commission explained that adopting a revenue-based contribution methodology would avoid "complex implementation details" related to parsing customer payments of Universal Service Fund contributions and connecting them to a carrier's contribution obligation. *See id.*

[29] *See* 47 U.S.C. § 254(d).

[30] 47 C.F.R. § 54.712 (providing that whether to recover contribution costs through a separate line item is a choice).

[31] *See* 2002 Contribution Methodology Order, 17 FCC Rcd 24952, at ¶ 38.

detriment for the carrier that it would be liable for any amount not remitted by a customer. This kind of inflexible approach, where a carrier's contribution is tied directly to the revenue generated by each individual customer, is not what the Commission had in mind when it crafted its contribution rules. The Commission decided that dictating how a carrier collects pass-through charges would limit a carrier's ability to provide flexible service or price offerings to consumers.[32] The Commission also recognized that tying each contribution dollar to an individual customer revenue dollar could cause significant implementation and accounting problems for carriers.[33] Yet the USAC Audit Report would do just that by requiring a carrier to be able to trace each pass-through line item dollar of revenue to a corresponding customer revenue dollar, so the carrier could keep from collecting any contribution pass-through charge on international revenue if it qualifies for the LIRE at the end of the year.

USAC, in characterizing DOW's response, states: "The Carrier effectively suggests that the FCC's federal Universal Service cost recovery rule should be considered apart from the FCC's federal Universal Service contribution rules."[34] Indeed, considering these frameworks apart from one another is exactly what the Commission did when it decided after notice and comment that it would not adopt a collect-and-remit system and would not base a contributor's contribution obligations on amounts it collected from its customers.[35]

These two frameworks also differ with regard to application of a contribution factor across a contributor base or a customer base. While the contribution factor adopted each quarter is uniform for all contributors, contributors who choose to avail themselves of a separate line item surcharge may adopt a flat rate or a different percentage so long as that amount does not exceed the relevant contribution factor times the interstate

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[32] *Id.* at ¶ 10.
[33] *Id.* at ¶ 39.
[34] USAC Board Report at 18.
[35] *See* 2002 Contribution Methodology Order, 17 FCC Rcd 24952, ¶ 38.

telecommunications portion of a customer invoice.[36] And, whereas the revenue-based contribution methodology looks to cumulative revenues, carriers may not average their USF contribution obligation across the customer base; the surcharge is applied per invoice, per customer. Further, contributors have the flexibility to apply a surcharge to some, but not all, customers, and the FCC has not addressed whether a surcharge must be applied in the same manner across all customer classes.[37]

Another discrepancy between contribution calculations and the cost recovery framework is the application of safe harbors for certain services. Whereas carriers may allocate overall revenues among jurisdictions based on safe harbor percentages, those percentages may not be used to allocate revenues from USF pass-through surcharges.[38]

In sum, the Commission has made its policy clear: a contribution obligation does not directly correlate to the permitted amount of cost recovery. Therefore, any guidance as to how to reconcile two frameworks that the Commission established as distinct from one another after notice and comment must come from the Commission itself. Yet the auditors reached a conclusion based on tracing dollar-for-dollar customer USF surcharge payments to a carrier's ultimate contribution obligation. To make this leap requires creating policy and interpretation beyond what is specified in the rules and contrary to the policy expressed in Commission orders.

2. USAC's methodology undermines Commission policies underlying the LIRE and the cost recovery rules

USAC's refund recommendation oversimplifies a complex situation. The Commission's cost recovery rule does not prohibit a carrier that might qualify for the LIRE at

[36] *See id.* ¶ 49.
[37] *See id.* ¶ 61.
[38] *See* 2014 FCC Form 499-Q Instructions at 15 ("These safe harbor percentages may not be applied to universal service pass-through charges, fixed local service revenues, or toll service charges. All filers must report the actual amount of interstate and international revenues for these services. For example, toll charges for itemized calls appearing on mobile telephone customer bills should be reported as intrastate, interstate or international based on the origination and termination points of the calls.").

the end of the year from recovering universal service contribution costs through an assessment on both interstate and international services. Rule 54.712(a)'s limitations on permissible cost recovery do not specify such contingencies; instead, the rule provides that if a contributor chooses to recover its contribution costs through a line item charge on a customer's bill, the charge may not exceed the "interstate telecommunications portion of that customer's bill times the relevant contribution factor."[39] The rule restricts cost recovery to the "interstate telecommunications portion;" USAC would restrict cost recovery to portions of an invoice directly "associated with" a contribution obligation.[40]

USAC does not contend that the cost recovery rule generally prohibits application of a pass-through surcharge to international telecommunications services. The rule itself only uses the term "interstate."[41] However, the Commission has construed "interstate" broadly to include international telecommunications.[42] The "assessable portion," therefore, of any customer's bill, includes interstate as well as international telecommunications.

Whereas the Commission does not have authority to include *intrastate* revenues in a carrier's contribution base,[43] international revenues are included in determining a carrier's contribution obligation, including determining whether that contribution obligation will be reduced to the interstate portion of a carrier's overall revenues. The LIRE exists to ensure that a carrier who provides predominantly international telecommunications services will not

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[39] 47 C.F.R. § 54.712(a).
[40] USAC Audit Report at 17-18.
[41] 47 C.F.R. § 54.712(a).
[42] *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 9174-75, ¶ 779 (1997) ("Universal Service First Report and Order").
[43] *See* Federal-State Joint Board on Universal Service, *Sixteenth Order on Reconsideration*, CC Docket No. 96-45, *Eighth Report and Order*, CC Docket No. 96-45, *Sixth Report and Order*, Docket No. 96-262, 15 FCC Rcd 1679, 1687-1692, ¶ 15 (1999) ("Fifth Circuit Remand Order").

be required to make an overall contribution obligation that exceeds the amount of its interstate revenues.[44]

The Commission has recognized that there is a distinction between the terms interstate and international. It acknowledged as much in its decision to include international revenue within the scope of USF contributions.[45] The Commission also uses both interstate and international in its rules when it seeks to distinguish between the two terms. For example, in establishing the LIRE, the Commission uses both terms to make clear what a LIRE-eligible carrier's ultimate contribution burden will be.[46] The absence, therefore, of the term international in the Commission's cost recovery rule in section 54.712(a) is conspicuous. Even if the Commission agrees with USAC that LIRE-eligible carriers should be prohibited from collecting pass-through charges on international revenue, it takes an interpretive leap to reach such a conclusion. In the context of the cost recovery rule, USAC must rely on the Commission's unambiguous directions that "interstate" revenue encompasses international revenue.[47]

USAC's adaptation of the cost recovery rules in this situation, if applied generally to carriers who might qualify for the LIRE, will lead to the sort of "complex implementation details"[48] that the Commission sought to avoid when it set up the revenue based contribution methodology. Based on USAC's Audit Report decision, a LIRE-eligible carrier cannot assess a pass-through charge on international revenue[49] However, this interpretation could force a carrier on the cusp of LIRE eligibility to contribute to the USF based on all of its revenue with pass-through charges collected only on non-international revenue if the end of the year accounting reveals the carrier did not qualify for the LIRE. In

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[44] *See* Fifth Circuit Remand Order ¶¶ 17-29.
[45] *Id.*
[46] 47 C.F.R. § 54.706(c).
[47] Universal Service First Report and Order at 9174-75, ¶ 779.
[48] *See id.* ¶ 39.
[49] USAC Audit Report at 10-12.

addition to the negative impact to LIRE-eligible carriers near the edge of the exemption, a carrier contemplating a merger or acquisition could be discouraged from pursuing its preferred course of business. A company that loses its LIRE eligibility due to a change in its corporate structure would face full USF contribution responsibility, but based on the USAC Audit Report, it could achieve only partial cost recovery because of its prior LIRE eligibility. USAC's decision runs counter the Commission's policy rationale for maintaining flexibility in allowable cost recovery practices: to "balance the duty to make sure the collection process is fair and reasonable to consumers with the need to give carriers the maximum flexibility to respond to market forces."[50]

USAC's interpretation of the rules could also cause a carrier to lose its LIRE eligibility by availing itself of cost recovery on only the interstate (not international) revenues. USAC's methodology would put carriers who might qualify for the LIRE in a "Catch 22." A carrier's USF pass-through surcharges are counted as revenue for purposes of determining LIRE qualification. A carrier that projects that it will qualify for the LIRE, expecting to contribute based on interstate revenues only, would be allowed to impose a USF surcharge only on its interstate revenues under USAC's interpretation of the rules. Adding revenues from the USF surcharge would then increase the proportion of interstate revenue above the LIRE threshold, meaning the carrier would no longer be eligible for the LIRE.[51] This brings the carrier full circle; without the surcharge the carrier qualifies for the LIRE but cannot avail

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[50] 2002 Contribution Methodology Order, 17 FCC Rcd 24952, ¶ 43.

[51] If, for example, a carrier had $1 million in revenues, 89% from international telecommunications services and 11% from interstate revenue, the carrier would be eligible for the LIRE. However, if as USAC suggests LIRE-eligible carriers cannot pass-through charges on international revenue, this carrier would no longer qualify for the LIRE if it assessed a pass-through charge equal to the contribution factor on the interstate portion of a customer's invoice. If the carrier's total gross billed interstate revenues amounted to $110,000 and international revenues were $890,000, a pass-through on interstate revenue using a 15.7% contribution factor would total $17,270. This would bring total revenue to $1,017,270, with total interstate revenue including pass-through charge rising to $127,270, or 12.5%. By applying a surcharge to the interstate portion not including international services, the carrier would no longer qualify for the LIRE.

itself of the option to apply a line item USF surcharge on any portion of a customer's invoice.[52]

These potential outcomes would place LIRE-eligible carriers at a significant competitive disadvantage and undermine the purpose of the LIRE. Before the Commission adopted the LIRE, predominantly international carriers argued that assessing a USF contribution in excess of the revenue they generated on interstate telecommunications was unfair.[53] The Commission adopted the LIRE after the Fifth Circuit held that the Commission's methodology did not meet the standards of Section 254 that contributions be "equitable and nondiscriminatory" because predominantly international carriers could have contribution obligations that exceeded interstate revenues.[54] The Commission continues to recognize the LIRE's role in ensuring it does not unfairly burden predominantly international carriers, and it encourages carriers that would not qualify for the LIRE but have interstate revenues below the Commission's contribution factor to apply for waivers of the LIRE threshold.[55] Therefore, it makes little sense for the Commission to allow USAC to adopt a policy that could cause predominantly international carriers to be unfairly prohibited from utilizing the Commission's cost recovery rule as the examples above illustrate.

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[52] *See* 2014 Telecommunications Reporting Worksheet, FCC Form 499-Q, Instructions for Completing the Quarterly Worksheet for Filing Contributions to Universal Service Support Mechanisms, at 18 ("Line 120 should show the interstate and international revenues that the filer anticipates collecting from customers during the projection quarter. For this purpose "collected end-user" revenues refers to gross billed end-user interstate and international telecommunications revenues, including any pass-through charges for federal universal service contributions, less estimated uncollectibles.") (citing Federal-State Joint Board on Universal Service, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 13 FCC Rcd 21252, 21258-60 (1998)); Contribution Methodology Order, 17 FCC Rcd at 24970, ¶ 32.)

[53] *In re* Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45 and 96-262, *Report and Order*, 15 FCC Rcd 1679, 1687-89, ¶¶ 19-22 (1999); *see also In re* Federal State Board on Universal Service *et al.*, CC Docket No. 96-45 *et al.*, *Further Notive of Proposed Rulemaking and Report and Order*, 17 FCC Rcd 3752, 3806, ¶ 125 (2002) (raising the LIRE threshold from 8 to 12 percent).

[54] *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 434-35 (5th Cir. 1999).

[55] *See e.g.*, Proposed Fourth Quarter 2013 Universal Service Contribution Factor, CC Docket No. 96-45, *Public Notice*, 28 FCC Rcd 12998, 13002 (2013).

It is well established that USAC may not make policy or interpret Commission rules where the rules "do not address a particular situation."[56] Here, USAC's decision rests on its reconciliation of two separate methodologies and devising a new policy as to how LIRE-eligible providers may recover their Universal Service Fund ("USF") contributions. The FCC rules for USF cost recovery do not address this situation, and USAC cannot establish such a policy on its own initiative. If the Commission leaves USAC's finding in place, the Commission will abdicate its responsibility to oversee USAC's administration of the USF, and it will adopt a *de facto* policy that could significantly undermine the purpose of the LIRE.

3. USAC overstepped its authority in extending the Commission's Truth-in-Billing Rules to Interconnected VoIP services.

In addition to interpreting the Commission's cost recovery rules to support its recommendation, USAC cites as a criterion the Commission's 2005 Truth-in-Billing Order.[57] The Commission has considered, but not yet extended, its truth-in-billing requirements to VoIP services, which means the truth-in-billing rules are inapplicable to DOW as an interconnected VoIP provider.[58] In its response to DOW's argument that the Commission has considered, but not yet extended, certain consumer protection requirements imbedded in the truth-in-billing rules to interconnected VoIP providers, USAC appears to acknowledge that the Commission has not extended the truth-in-billing requirements to interconnected

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[56] *See* 47 C.F.R. § 54.702(c) ("The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.").

[57] *See* USAC Audit Report at 10-11 (citing *In re* Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, CC Docket No. 98-170, CG Docket No. 04-208, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6448, 6449, ¶ 29 (2005)) ("2005 Truth-in-Billing Order").

[58] *In re* IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863, at ¶72 (2004); *In re* Consumer Information and Disclosure, CG Docket No. 09-158, *Notice of Inquiry*, 24 FCC Rcd 11380 (2009).

VoIP providers.[59] Nonetheless, USAC's overreaching to apply rules to a category of services where the Commission has expressly raised this question for public notice and comment is one more example of USAC stepping into a policy making role. Where the Commission has issued notice and is seeking comment on a question, it is not USAC's place to run ahead and implement a policy or expand the reach of Commission rules.

Regardless, DOW's billing practices do not violate the cost recovery rules. In support of its claim that DOW violated the Commission's cost recovery rules, USAC cites the 2002 Contribution Methodology Order in saying that a customer's bills must "accurately reflect the extent of a carrier's contribution obligations."[60] However, USAC ignores the remainder of the sentence it cites, which says the cost recovery rules also retain flexibility in how carriers bill pass-through charges to customers.[61]

Contrary to USAC's assertion that the Commission's cost recovery rules clearly prohibit DOW's billing practices, the Commission itself questioned whether it should require a carrier to indicate the contribution factor or what portion of a bill is subject to the contribution factor when assessing a line-item surcharge,[62] and in the same proceeding, the Commission questioned whether it has the statutory authority to impose less flexible billing rules on USF contributors.[63] The Commission is clearly aware of the potential for confusion among customers caused by pass-through charges; however, unless the Commission adopts new rules, USAC may not impose more stringent truth-in-billing rules on a LIRE-eligible carrier than the Commission imposes on other carriers.

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[59] *See* USAC Board Report at 17 (citing Notices of Inquiry and Notices of Proposed Rulemaking proceedings in which the Commission seeks comment on whether to extend billing-related consumer protection rules to interconnected VoIP providers).
[60] 2002 Contribution Methodology Order, 17 FCC Rcd 24952, at ¶45.
[61] *Id.*
[62] 2012 Universal Service Contribution Methodology FNPRM, 27 FCC Rcd at 5489-90, ¶ 390.
[63] *Id.* at 5491, ¶ 396.

B. USAC Overstepped Its Authority in Ordering the Refund of Pass-Through Charges Remitted to the Fund.

USAC also overstepped its authority in ordering DOW to refund [redacted] pass-through revenue, including revenue DOW remitted to USAC, based on USAC's interpretation of the Commission's rules. USAC does not have the authority to order a carrier to refund to customers amounts remitted to the Fund.

In its report, USAC incorrectly asserts that DOW "retained" the surcharges it collected based on international services.[64] USAC recommends that DOW refund [redacted] notwithstanding other findings regarding the Company's overall contributions to the Universal Service Fund. At the same time, USAC suggests that a carrier should only be required to refund any amounts it retained in excess of remittances.[65]

DOW's cost recovery practice was to apply a contribution factor of 12.3% only to the usage portion of the customer invoice, a percentage below the contribution factor for each quarter of the year. DOW chose to apply a factor below the allowable cap for administrative simplicity and to take a conservative approach.

USAC's Audit Report argues that the Commission's decision in the Clear World Order supports USAC's ability to order a carrier to issue a refund.[66] However, the facts at issue in Clear World differ significantly from the facts at issue here. In Clear World, USAC found that a carrier billed certain interstate charges as international revenue to qualify for the LIRE,[67] marked-up its pass-through charge above the allowable contribution factor,[68] and combined federal and state universal service charges on its call detail records.[69] However, the

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[64] USAC Audit Report at 19-20.
[65] *See, e.g.,* USAC Audit Report at 11 [redacted]
[66] USAC Audit Report at 12.
[67] Clear World Order, 26 FCC Rcd at 6238, ¶ 10.
[68] *Id.* at 6241, ¶ 18.
[69] *Id.*

Commission did not approve a broad authority for USAC to issue refunds outside of its authorized area of competence, and the Commission should reject USAC's reliance on Clear World in ordering DOW to issue a refund because USAC is clearly operating outside its authority.

The Commission should also reject USAC's claim that it has the authority to order a carrier to issue a refund in excess of the difference between the amount collected by the carrier and the amount remitted to USAC by the carrier. Again, USAC relies on the Clear World Order in requiring DOW to refund [redacted] pass-through charges DOW collected in 2011 to its customers.[70] This refund would include payments DOW remitted to USAC to satisfy its USF contribution obligation. In Clear World, USAC ordered and the Commission upheld USAC's authority to order the refund of the *overages* to its customers.[71] The Clear World Order does not give USAC the authority to order refunds out of a carrier's own pocket of amounts that the carrier remitted to the Fund. If the Commission allows USAC to take such action, it will allow USAC effectively to issue forfeitures against carriers at its discretion, which is not a part of USAC's role as Fund administrator.[72]

IV. Conclusion

DOW respectfully requests that the Commission reverse Finding #2 of the USAC Audit Report recommending that DOW refund [redacted] USF surcharges it collected during the audit period, including amounts it remitted to the Universal Service Fund. The Commission has carefully crafted distinct methods for calculating contribution obligations and for cost recovery, expressly rejecting a collect-and-remit system. USAC has acted beyond its authority as Fund Administrator by supplying interpretations of rules that do not address the situation before the auditors. And USAC has acted beyond its authority by ordering DOW to refund amounts it did not retain as revenues, but remitted to the Fund.

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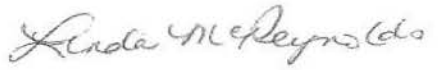
[70] USAC Audit Report at 12.
[71] Clear World Order, 26 FCC Rcd at 6237, ¶ 7 (emphasis added).
[72] *See* 47 C.F.R. § 54.701.

If left to stand, USAC's determination that a carrier that ends up qualifying for the LIRE at the end of the year has violated the Commission's cost recovery rules throughout the year by assessing a surcharge in an amount below the relevant contribution factor to the interstate telecommunications portion of customers' invoices, including international services, would create market distortions and unfairness that both the cost recovery rule and the LIRE were designed to correct. DOW respectfully requests that the Commission reverse USAC's decision and provide guidance and a mechanism that would uphold the statutory mandate that contributions into the Fund be "specific, predictable, and sufficient."[73]

Respectfully submitted,



Linda McReynolds
Seth L. Williams
Marashlian & Donahue, LLC
1420 Spring Hill Road
Suite 401
McLean, VA 22102
Tel: (703) 714-1318
Fax: (703) 714-1330

Dated: June 30, 2014

[73] 47 U.S.C. § 254(d).

REDACTED – FOR PUBLIC INSPECTION

CERTIFICATE OF SERVICE

I, Sherry Reese, certify that in accordance with 47 C.F. R. § 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 47 C.F.R. § 1.47 on June 30, 2014.

Sherry A. Reese

Sherry Reese

VERIFICATION

State of Georgia)
) ss.
County of Forsyth)

I, Weston Edmunds, Executive Vice President of DOW Management Co., Inc. ("DOW"), am authorized to and do make this Verification on DOW's behalf. The statements and facts in the foregoing Request for Review of Decision of the Universal Service Administrator are true and correct to the best of my knowledge, information, and belief.

Weston Edmunds, Executive Vice President
DOW Management Co., Inc.

Subscribed and sworn before me this 30 day of June, 2014.

BRITTANY WILHELMS
MY COMMISSION EXPIRES
NOTARY
PUBLIC
FEBRUARY 27, 2018
FORSYTH COUNTY, GEORGIA

Notary Public

My Commission expires: February 27, 2018

EXHIBIT

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PAGES INTENTIONALLY OMITTED