ATTACHMENT 4

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VIA E-MAIL

Universal Service Administrative Company
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Re: **LETTER REQUESTING BOARD REVIEW:** Administrator's Decision on High Cost Program Beneficiary Appeal; (USAC Audit No. HC2011BE011)

To the High Cost and Low Income Committee of the Board of Directors:

This Request for Review is submitted by Aventure Communication Technology, L.L.C. ("Aventure"), by its undersigned counsel, in response to the Administrator's Decision on High Cost Program Beneficiary Appeal, dated October 29, 2013 ("*Administrator's Decision*"), and pursuant to the rules of the Universal Service Administrative Company (USAC) and Sections 54.719-54.725 of the rules of the Federal Communications Commission (FCC), 47 C.F.R. §§ 54.719-54.725.

This letter asks the High Cost and Low Income Committee of the USAC Board of Directors ("the Committee"), or if the Committee deems it appropriate, the full USAC Board of Directors, to review the *Administrator's Decision*. The *Administrator's Decision* denies Aventure's appeal seeking reversal of conclusions of the Internal Audit Division (IAD) made in an Independent Auditor's Report dated May 15, 2012 ("*IAD Report*"). A copy of the Administrator's Decision is appended to this letter at Attachment 1.

As discussed below, the *Administrator's Decision*, and the underlying *IAD Report* are characterized by a fundamental misreading of the Commission's rules and policies. As Aventure has demonstrated, the *Administrator's Decision* and *IAD Report* are not supported by precedent, and constitute novel statements of policy and interpretation of the Commission's rules. As such, they are *ultra vires* and merit reversal.

AFDOCS/10620007.1

I. REVIEW BY THE COMMITTEE OR THE BOARD IS APPROPRIATE

Aventure has chosen to seek review by the High Cost and Low Income Committee of the Board of Directors, rather than an immediate appeal to the FCC's Wireline Competition Bureau because the findings of the IAD are so fundamentally flawed that even a cursory review by the experts on the Committee should be able to verify the legitimacy of Aventure's challenges.

The FCC has recognized that review by a Committee or the full Board can be an efficient means of seeking redress while minimizing the burden on FCC Staff:

> We also agree with USAC . . . that affected parties should be encouraged to bring issues to the attention of the division head or the USAC CEO to determine whether the matter can be handled without a formal appeal to the Commission. We anticipate that, under certain circumstances, a party may prefer to seek redress initially from the appropriate Committee of the Board or the full USAC Board. Accordingly, we conclude that affected parties should have the option of seeking redress from a Committee of the Board or, if the matter concerns a billing, collection, or disbursement matter that falls outside of the jurisdiction of a particular committee, from the full USAC Board. We encourage parties to seek redress in the first instance from Committees of the Board for matters that involve straightforward application of the Commission's rules. To the extent that affected parties can obtain prompt resolution of such disputes, support mechanism participants will be better served and limited Commission resources will be conserved.[1]

Aventure believes that this request for review falls squarely within the jurisdiction of the High Cost and Low Income Committee, which among other things, is tasked with "making decisions concerning: . . . (iii) Administration of the application process, including activities to ensure compliance with Federal Communications Commission rules and regulations; [and] (iv) Performance of audits of beneficiaries under the high cost, low income, interstate access universal service and interstate common line support mechanisms . . . ."[2]

II. BACKGROUND AND OVERVIEW

This letter asks the Committee to reverse the conclusions set forth in the *IAD Report*, which consists of an Independent Auditor Report, issued by USAC and the Internal Audit

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[1] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 25058, 25092 ¶ 67 (1998). Submitting this request for Committee review tolls the time period for filing an appeal with the Commission. *Id.* at 25093 ¶ 70.

[2] 47 U.S.C. § 54.705(c)(1).

Division, dated May 15, 2012, and the USAC Management Response appended to that same document at pages 71-82. Because of the size of that document, Aventure will not append it to this letter, but rather refers to the *IAD Report* by reference.

In November 2011, IAD initiated an audit of Aventure. On May 8, 2012, IAD provided Aventure with a draft Detail Exception Worksheet (DEW) and conducted an Exit Conference with representatives of Aventure and their counsel. On May 15, 2012, Aventure, through counsel, submitted its Opposition to Internal Audit Division Draft Detail Exception Worksheet ("*DEW Opposition*"). That *Opposition* is appended to this letter at Attachment 2 (because its attachments are voluminous, Aventure does not append them, but will provide copies upon request). The *DEW Opposition* made the following points:

- The DEW conclusions are not supported by any precedent, and fail to comport with long-established industry practices. *DEW Opposition* at 2-4, 12-13.

- The DEW conclusions that Aventure's lines are not "working loops" and are special access lines are wrong as a matter of law and fact. *DEW Opposition* at 4-6.

- The DEW conclusions that the calls to Aventure's conference operators do not "terminate" in Aventure's service territory, and do not terminate to "end users" are unsupported and ignore relevant precedent. *DEW Opposition* at 7-9.

- The DEW relies on an order by the Iowa Utilities Board that is based on state law, and is inconsistent with FCC rules. *DEW Opposition* at 10-12.

- The DEW refuses to consider factors that mitigate the damages it asserts. Imposing a retroactive refund obligation on Aventure would cause irreparable harm. *DEW Opposition* at 13-14.

Also on May 15, 2012, the IAD issued its *IAD Report*. The *Report* concludes that Aventure incorrectly reported lines associated with calls to conference operators on the Aventure network as USF-eligible lines. The *Report* bases this conclusion on five findings:

1. The Aventure lines do not carry supported services.
2. The Aventure lines are not "revenue producing."
3. The Aventure lines are dedicated, high capacity Special Access circuits.
4. No calls terminated to locations within the Aventure service area, because the conference bridge locations cannot be defined as "end user" premises.
5. Aventure's designation as an Eligible Telecommunications Carrier ("ETC") is in doubt.

May 15, 2012 was also the day Aventure initiated a Freedom of Information Act (FOIA) request to USAC, asking that USAC produce any USAC or FCC decisions that it used as precedent to support any of the conclusions of the *IAD Report*. This initiated a series of correspondence between USAC and Aventure's counsel, clarifying the FOIA Request and reaching agreement on the amounts that Aventure would pay to cover the cost of USAC's research into the issue. The final letter in that stream of correspondence reflects the final agreement between Aventure and USAC. That letter is dated September 19, 2012, and is appended to this latter at Attachment 3. To date, USAC has not produced any of the materials requested in the FOIA request, or otherwise responded to it.

On December 18, 2012, the USAC High Cost and Low Income Division sent a letter to Aventure, asserting a claim for [redacted] for virtually all high cost funds received by Aventure between 2007 and 2011. On February 18, 2013, Aventure filed with USAC a *Letter of Appeal*, asking the High Cost and Low Income Division to reverse the findings of the *IAD Report*. A copy of the *Letter of Appeal* is appended at Attachment 4. The *Administrator's Decision* denied the Aventure appeal, and affirmed the conclusions of the *IAD Report* without modification. In doing so, it provided no new precedent or arguments, but simply reiterated the conclusions of the *IAD Report*.

As Aventure demonstrated in its *DEW Opposition* and *Letter of Appeal*, and further demonstrates in this letter, the *IAD Report* and *Administrator's Decision* are premised on a fundamental misunderstanding of the FCC's rules and policies and reach conclusions that are demonstrably inconsistent with the FCC's rules and orders. Moreover, they largely ignore the showings made by Aventure.

Also, as will be discussed in detail below, USAC has failed for over a year to respond to the Aventure FOIA request, which was expressly designed to identify <u>any</u> precedent that supported the *IAD Report's* conclusions. USAC's failure – or inability – to provide the most basic support for its conclusions demonstrates that the *IAD Report* is not, and cannot be, supported by precedent, and is *ultra vires* the enumerated powers designated to USAC by the FCC.

III. THE *IAD REPORT* AND *ADMINISTRATOR'S DECISION* ARE *ULTRA VIRES* THEAUTHORITY GRANTED USAC BY THE FCC

Section 54.702(c) of the FCC's rules restricts USAC to applying established FCC precedent, and prohibits USAC from making new policy or interpreting unclear policies:

> 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.[3]

In the discussions of specific decisions in the *IAD Report* and the *Administrator's Decision* below, Aventure will identify numerous instances in which USAC has made new policy decisions, and made decisions in areas where the law clearly has not been settled by the Commission. In these instances, the *IAD Report* and the *Administrator's Decision* are *ultra vires* USAC's delegated authority, and must be reversed.

IV. THE *IAD REPORT* AND *ADMINISTRATOR'S DECISION* DISREGARD THE FCC'S STATEMENT OF THE LAW, AND INSTEAD RELY ON A RULING BY THE IOWA UTILITIES BOARD THAT IS DEMONSTRABLY INAPPOSITE

The bulk of the findings in the *IAD Report* and the *Administrator's Decision* are taken from an order issued by the Iowa Utilities Board (IUB).[4] Specifically, they take the *IUB Order* as controlling precedent for the findings that: Calls to Aventure's conference bridge did not "terminate" within Aventure's service area (*Administrator's Decision* at 3, 8); Aventure's conference customers were not "end users" (*id.* at 4, 8-10); that failure to receive payment from the conference operators disqualifies the service as access service (*id.* at 8-9); that Aventure entered into non-tariffed agreements with its conference operators, and that this somehow affects the eligibility of its lines as switched access (id. at 9); that Aventure did not provide the IUB with sufficient documentation to show that it billed its conference customers for end user common line charges or other charges (*id.* at 9-10). The *Administrator's Decision* repeatedly states that it "concurs" with the *IUB Order*. *Id.* at 9-10.

Aventure has shown that the *IUB Order* was limited to an analysis of Aventure's intrastate tariff, using Iowa state law; that the *IUB Order* was expressly rejected as precedent by the FCC in the *Connect America Order*; that the *IUB Order* is otherwise inconsistent with FCC

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[3] 47 C.F.R. § 54.702(c).

[4] *Iowa Utilities Board, Qwest Comms. Corp. v. Superior Tel. Coop. et al.*, Docket No. FCU-07-2, Final Order (issued September 21, 2009) ("*IUB Order*").

rulings; and that the *IUB Order* has been superseded by subsequent proceedings at the IUB. *DEW Opposition* at 10-12; *Letter of Appeal* at 12-13, Attachment 1.

The *Administrator's Decision* does not address these arguments, other than to say that inconsistencies between the *IUB Order* and the *Connect America Order* will not be taken into account because the *Connect America Order's* new rules had prospective effect. Aventure has demonstrated that the *IUB Order* is fundamentally inconsistent with established FCC precedent from 2000 to the present, and cannot be used as controlling, or even indicative authority by USAC.

V. THE SPECIFIC FINDINGS OF THE *IAD REPORT* AND THE *ADMINISTRATOR'S DECISION* ARE NOT SUPPORTED BY EVIDENCE OR PRECEDENT AND ARE UNSUSTAINABLE

A. The Finding That Aventure's Calls Do Not Terminate Within Its Service Area Ape An Argument That Has Been Expressly Rejected By The FCC

The *IAD Report* and the *Administrator's Decision* hold that calls to Aventure's conference customers do not "terminate" in Aventure's service area. *IAD Report* at 62-63; *Administrator's Decision* at 3-4. Their argument is that the location of the "customer" is not the conference bridge, but either the locations of the users of the conference bridge, or the headquarters of the conferencing company. As Aventure has demonstrated in its *DEW Opposition* (at 6-7) and *Letter of Appeal* (at 10-12), this finding has been expressly rejected by the FCC. In its *Connect America Order,* the FCC addressed and rejected the same argument made by Qwest:

> Qwest argues that calls to the conference calling companies are ultimately connected to -- and terminate with -- users in disparate locations. According to Qwest, when a caller dials one of the conference calling companies' telephone numbers, the communication that he or she initiates is not with the conference calling company, but with other people who have also dialed in to the conference calling company's number. Qwest argues that such calls terminate at the locations of those other callers, and that Farmers is providing a transiting service, not termination. Farmers' view of the calls, however, is that users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point. We find Farmers' characterization of the conference calling services to be more persuasive than Qwest's.
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> * * *

> Qwest's view of how to treat a conference call leads to anomalous results. For instance, suppose parties A, B, C, and D dial in to a conference bridge. According to Qwest, A has made three calls, one terminating with B, one with C, and one with D. But in fact, B, C, and D have actually initiated calls of their own in order to communicate with A. What Qwest calls the termination points are actually call initiation points. Moreover, under Qwest's theory, the exchange carriers serving B, C, and D would all be entitled to charge terminating access. In fact, each of those carriers would be entitled to charge terminating access three times -- B's carrier could charge for terminating calls from A, C, and D, and so forth. This conference call with four participants would incur terminating access charges twelve times. Qwest has not addressed this logical consequence of its theory, nor has it offered any evidence that conference calls are treated as terminating with the individual callers for any purpose beyond the circumstances of this case.[5]

The *Connect America Order* both confirms that calls to conference operators are switched access services, and disposes of the IAD's findings regarding the locus of the terminating calls.

B. <u>The Finding That Aventure's Conference Operators Are Not "End Users" Is Wrong As A Matter Of Law And Is *Ultra Vires*</u>

The *IAD Report* and *Administrator's Decision* hold that Aventure's conference operators cannot be defined as "end users" and so the switched access calls to them do not "terminate," and so the calls do not constitute "supported services." *IAD Report* at 62-63; *Administrator's Decision* at 7-8. In so finding, they cite the *IUB Order*, which as discussed above, cannot be used as precedent by USAC because it is inconsistent with established FCC precedent. The *Administrator's Decision* also relies on several recent decisions issued by the FCC over the past four years: Decisions in formal complaints in *Qwest v. Farmers and Merchants*, *Qwest v. Northern Valley*, *Qwest v. Sancom* and *AT&T v. All American*. *Administrator's Decision* at 6-8. The Administrator attempts to take the rulings from these four party-specific adjudications and create a per se rule of law that conference and chat operators cannot be end users.

The *Connect America Order* expressly refused to establish a per se rule against sending traffic to high volume conference and chat operators:

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[5] *Connect America Fund*, 26 FCC Rcd 17663, 17985-86, ¶¶ 32-33 (footnotes omitted) (emphasis in original).

> As proposed in the USF/ICC Transformation NPRM, we do not declare revenue sharing to be a per se violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.[6]

Moreover, each of the fact-specific and party-specific formal complaint rulings cited in the *Administrator's Decision* emphasizes that the rulings are limited to the facts of that specific case. In each case, the FCC conducted an analysis of the language of specific tariffs and the conduct of the individual carrier, and confined its decision to the party-specific facts of the case. *E.g.*: "Accordingly, based upon the totality of the circumstances and facts of this case, we conclude that the conference calling companies do not constitute 'end users' within the meaning of the tariff provisions at issue."[7] "As discussed above, based on our interpretation of Sancom's filed Tariff, and Sancom's relationship with the Free Calling Companies, we find that Sancom's interstate access charges are unlawful because Sancom was not providing service under the Tariff."[8]

No review of the language of the Aventure tariff, in the context of its relationship with its conference operator customers has been undertaken by USAC or the FCC. The establishment of a per se rule of law by USAC, based on these clearly inapposite FCC decisions, is impermissible and *ultra vires*, and must be reversed.[9]

C. <u>The Conclusion That Access Stimulation Service Is Special Access Is Wrong As A Matter Of Law, And Demonstrates A Lack Of Understanding Of Basic Network Design</u>

The *IAD Report* and *Administrator's Decision* find that the services at issue are wideband Special Access services, which are not eligible for USF support. *IAD Report* at 7, 61; *Administrator's Decision* at 5-8. This finding reflects a profound lack of understanding of basic telephone network design, and directly conflicts with multiple FCC decisions, and as such must be reversed.

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[6] *Id.*, 26 FCC Rcd at 17879 ¶ 672.

[7] *Qwest Comms. Corp. v. Farmers and Merchants Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801, 14813, ¶ 25 (2009).

[8] *Qwest Comms. Co. v. Sancom Inc.*, 28 FCC Rcd 1982, 1993 ¶ 25 (2013).

[9] This is particularly the case because Aventure has provided cites to several cases in which the FCC expressly found that calls to conference and chat operators were subject to access charges. The *Administrator's Decision* has no reply, other than to dismiss these cases because "this specific issue was not discussed" in those cases. *Administrator's Decision* at 7 & n. 49.

Aventure informed IAD that it used interoffice DS3 trunks to transfer the voice grade calls from the tandem switch to the Aventure end office where the conference bridges were located. This is, of course, standard industry practice, given the volumes of calls delivered to the bridges. Aventure explained at length that the conference bridges were analogous to Centrex switches and remote switches used to carry voice traffic, and were fully consistent with USAC's filing instructions and the NECA Loop Count Guide (*DEW Opposition* at 4-6; *Letter of Appeal* at 10), but these arguments were completely ignored in the *IAD Report* and *Administrator's Decision.*

Moreover, Aventure briefed three FCC decisions that found that local exchange carriers that delivered very high volumes of voice traffic to chat and conference operators were providing switched access service, subject to tariffed switched access rates. *Letter of Appeal* at 9-10. The *Administrator's Decision* ignores this precedent, saying only that those cases because "this specific issue was not discussed" in them. *Administrator's Decision* at 7 & n.49.

IAD and the Administrator ignore evidence to the contrary, in favor of their interpretation of service definitions. Yet, they provide no precedent showing that such determinations have been made by USAC or the FCC in the past (as confirmed by their inability to respond to Aventure's FOIA request). These findings by the *IAD Report* and *Administrator's Decision* are novel and unprecedented – and so are *ultra vires*. They are also nonsensical – the majority of voice traffic is transported to end offices over high capacity links, without changing the traffic's character as switched access service. These conclusions of the *IAD Report* and *Administrator's Decision* must be reversed.

D. The Finding That Aventure's Lines Are Not "Revenue Producing" Is Wrong As A Matter Of Law, And Is *Ultra Vires*

The *IAD Report* and *Administrator's Decision* find that the circuits used to deliver voice calls to conference bridges located in Aventure's end office are not "revenue producing" and so do not qualify for High Cost support. *IAD Report* at 62-63, 76; *Administrator's Decision* at 10-11. IAD and the Administrator base this conclusion on a finding that Aventure has not yet collected fees from its conference operator customers, and on their assertion that Aventure is unable to collect access fees from its interexchange carrier customers.

Aventure has demonstrated in detail that several FCC decisions from 2000 and 2001, and the *Connect America Order* of 2011, hold that calls to chat and conference operators constitute switched access service, billable at tariffed access rates, regardless of whether the chat/conference operator pays a fee to the local exchange cararier. Aventure also demonstrated that the treatment of such calls as supportable switched access service is supported by NECA

materials and industry practice. *DEW Opposition* at 8-9; *Letter of Appeal* at 16-17 and Attachment 1, slide 11.

E. The IAD's Stated "Lack Of Confidence" That Aventure Billed Its Customers Ignores Record Evidence And Sets An Unprecedented Standard Of Review

As stated in the *DEW Opposition*, the *IAD Report* and *Administrator's Decision* ignore massive amounts of documentation showing that Aventure billed all of its conference operator customers for services, including the end user common line charge. *DEW Opposition* at 7-8. This shortcoming was never cured. Rather, the *IAD Report* simply states that IAD "does not have reasonable confidence that [Aventure] assessed . . . any fees related to these lines." *Id.*, citing DEW at 5. This appears to be a legal conclusion – IAD does not even attempt to show that the actual bills and customer lists provided by Aventure were inaccurate. In any event, the IAD Report's assertion of a lack of "reasonable confidence" is unexplained, and no standard of review for reaching this conclusion is stated. As such, the finding is unsupported and must be reversed.

F. The Conclusion That USF Recipients Must Actually Provide Every Supported Service To Every Customer Is Unprecedented And Impractical

The *IAD Report* and *Administrator's Decision* establish a new per se rule – no service is eligible for High Cost USF support unless the carrier actually provides each and every supported service to the customer. *Administrator's Decision* at 4-5 & nn. 22, 24, citing *IAD Report* at 71. Aventure made the point that IAD was conflating the "offering" of the supported services with the "provision" of those services, and demonstrated that the Commission's rules required only that the supported services be offered. *DEW Opposition* at 2-4; *Letter of Appeal* at 3-5.

As Aventure stated in those pleadings, Aventure is a full-service carrier that provides long distance and local voice calling to residential and business customers, as well as access termination service to conference operators. As such it operates a full-function Class 4-5 Taqua switch that is capable of providing all supported services listed in 47 C.F.R. § 54.101. But its access termination circuits to conference operators are one-way, inbound circuits – the conference operators have no need of outbound emergency calling or other outbound services, and choose not to pay for such services. But under the new rule adopted in the *IAD Report* and *Administrator's Decision*, no inbound-only circuit can ever qualify for USF. Indeed, under IAD's new ruling, a carrier cannot receive USF support unless it provides (as opposed to offer) toll blocking (one of the enumerated supported services) to every customer.

This has never been the position of the FCC, and USAC has produced no precedent to support such a ruling. Because this is either an unprecedented new ruling, or the clarification of

unclear rules, USAC may not make such findings without guidance from the FCC, and its rulings are *ultra vires*. Moreover, as Aventure has demonstrated, the IAD/Administrator conclusions are patently inconsistent with NECA instructions and standard industry practice.

G. The *IAD Report* and *Administrator's Decision* Ignore Or Summarily Dismiss Evidence Demonstrating The Veracity Of Aventure's Arguments

In supporting the conclusion that calls to conference operators on Aventure's network are switched access calls, fully eligible for High Cost support. Aventure cites to the FCC's *Connect America Order*.[10] That order adopted new rules governing "access stimulation" – *i.e.* the provision of voice access service to high-volume conference operators, which is a significant amount of the Aventure service at issue in this case. The *Connect America Order* confirmed that access stimulation services are – and always have been – access services, subject to the same tariff and "benchmark rate" regulatory structure that the FCC established in 2001:

> We maintain the benchmarking approach to the regulation of the rates of competitive LECs. . . . There is insufficient evidence in the record that abandoning the benchmarking approach for competitive LEC tariffs . . . . Instead, we believe it is more appropriate to retain the benchmarking rule but revise it to ensure that the competitive LEC benchmarks to the price cap LEC with the lowest rate in the state, a rate which is likely most consistent with the volume of traffic of an access stimulating LEC.[11]

As this *Connect America Order* language makes clear, this recent FCC statement of the law is diametrically opposed to the IUB decision that IAD accepts as controlling authority. *DEW Opposition* at 9; *Letter of Appeal* at 13-16, 18. The *IAD Report* and *Administrator's Decision* simply dismiss this argument by stating that the *Connect America Order's* new rules had prospective effect, and so did not apply during the audit period. *Administrator's Decision* at 2. But as Aventure has shown, only the new rates prescribed in the *Connect America Order* have prospective effect – the language quoted above on its face confirms that calls to conference operators have at all times been classified as switched access service.

Similarly, Aventure has cited numerous FCC decisions that ruled in favor of the collection of access charges for calls to conference and chat operators. *Letter of Appeal* at 15-16. Indeed, the FCC has even prescribed switched access rates for calls terminating to a chat/conference operator.

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[10] *Connect America Fund*, 26 FCC Rcd 17663 (2011).
[11] *Id.* at 17887-88 ¶ 694 (emphasis added).

The *Administrator's Decision* also completely ignores an order by the IUB that initiates a proceeding for the express purpose of prescribing intrastate switched access rates for calls terminating to conference and chat operators. *Letter of Appeal* at 16-17 & Attachment 2. Indeed the full order is appended to the *Letter of Appeal*. The IUB prescription order was provided to demonstrate that the *IUB Order* upon which the *IAD Report* and *Administrator's Decision* relies was superseded by subsequent proceedings at the IUB. It also demonstrates that, at all times relevant to the audit, Aventure was designated by the IUB as an eligible telecommunications carrier, another fact that the *IAD Report* and *Administrator's Decision* have chosen to ignore.

The evidence cited above demonstrates that: 1) Aventure's conference operator customers are "end users," 2) that the access lines are "revenue producing;"and 3) that they are switched access lines; 4) that the calls "terminate" at the conference bridge.

In its *Letter of Appeal*, Aventure proffers a copy of a NECA presentation that demonstrates that voice grade services carried over high capacity interoffice trunks are fully eligible for USF support. *Letter of Appeal* at 7-8 and Attachment 1. This evidence also supports the conclusion that Aventure's lines are "revenue producing" switched access lines. The *Administrator's Decision* summarily dismisses this showing as "unpersuasive" without any further discussion. *Administrator's Decision* at 11.

In its *DEW Opposition*, Aventure details a massive amount of data and documentation provided by Aventure showing that it sent bills to its conference operator customers for local service and the end user common line charge. *DEW Opposition* at 7-8. This evidence is wholly ignored by both the *IAD Report* and the *Administrator's Decision*.

The *IAD Report* and *Administrator's Decision* find that the traffic in question does not terminate at the location of the conference bridge within Aventure's end office. In its *DEW Opposition*, Aventure cites to rules of the Iowa Public Utilities Commission that the location of facilities determine where calls terminate, and argues that this rule contravenes USAC's findings. USAC does not respond to this showing.

Aventure testified that it asked for, and obtained advice from USAC Staff regarding the appropriate way to account for access lines to conference bridges, and identified the Staffer who provided the advice. *DEW Opposition* at 12. This argument has been ignored by IAD and USAC.

H. The Failure Of USAC To Respond To Aventure's FOIA Request Demonstrates That No Precedent Exists To Support It's Findings

As noted in the Background section above, early in the audit process Aventure, through its counsel, submitted a FOIA request to USAC in an attempt to determine if the *IAD Report's* conclusions were novel findings, or if they applied established precedent. The final letter to USAC, which states the request following several rounds of clarification, requested the following:

> 1. Search for USAC decisions related to the classification of voice-grade circuits carried over high-capacity facilities to terminating or originating equipment, how they should be reported in the line count sections of the FCC Form 525 and whether voice-grade circuits delivered over high-capacity facilities are eligible to receive High Cost support. . . .
>
> 2. Search for records reflecting USAC Staff communications with members of the industry on how to report such circuits of the FCC Form 525 . . . .

Attachment 3, at 1-2. To date, 15 months after the scope of research and estimated costs were agreed upon by Aventure and USAC, USAC has not responded to these very basic requests. Aventure posits that this lack of response reflects the fact that there is no operative precedent, and that the *IAD Report's* findings are in fact novel and unprecedented. Aventure has not been able to find FCC, USAC or NECA precedent to support IAD's conclusions, and neither the *IAD Report* nor the *Administrator's Decision* provides any such precedent.

Because the findings of the IAD Report are new rulings or interpretations of unclear FCC rules and orders, they are *ultra vires* – USAC may not make such findings absent guidance from the FCC. Because these rulings are novel and unprecedented, they may not be given retroactive effect.

VI. CONCLUSION

For the reasons stated herein, Aventure requests that the High Cost and Lifeline Committee, or the full Board, reverse the findings of the *IAD Report*, and to withdraw its assertion that Aventure is liable for refund of USF support amounts received between 2007 and 2011.

Because the record of this audit demonstrates that the *IAD Report* is a case of first impression, there is no basis for determining that Aventure should have acted differently than it

did in the past. Indeed, Aventure has demonstrated that it did everything possible to determine the correct way to report its lines – including talking to NECA Staff and USAC Staff. Retroactive application of this novel determination would violate the notice and comment provisions of the Administrative Procedures Act, would result in a discriminatory application of a new rule retroactively, would be arbitrary, capricious and biased, and would impose irreparable harm on Aventure. For these reasons, Aventure requests that the Committee or the Board reverse the IAD decision, and make its application prospective only.

Respectfully submitted,

Jonathan E. Canis

ATTACHMENT 5

USAC
Universal Service Administrative Company

High Cost and Low Income Division

By Certified Mail, Return Receipt Requested

March 4, 2014

Jonathan E. Canis, Esq.
Arent Fox LLP
1717 K Street, NW
Washington, DC 20036-5342

Re: Action to be Taken Resulting from High Cost Audit of Aventure Communication (SAC 359094) Audit Report No. HC2011BE011

Dear Jonathan E. Canis:

An audit of Aventure Communication for Study Area Code (SAC) 442153 was conducted by USAC Internal Audit Division. The final report from that audit was sent to the company in November of 2012.

Subsequent to the denial of Aventure's appeal, dated December 24, 2013, requesting Board review as outlined in the letter from USAC dated January 21, 2014, USAC will recover [redacted] High Cost Program support previously disbursed to Aventure for SAC 359094. Please refer to the audit report for details on the funds being recovered. USAC will recover these funds in the April 2014 High Cost support month, which will be disbursed at the end of May 2014.

Consistent with current administrative practice, if the recovery amount exceeds the company's disbursement for that month, USAC will continue to offset the remaining recovery amount balance against subsequent High Cost support disbursements until such time as the full amount is recovered. If necessary, USAC reserves the right to invoice and collect any remaining amounts owed.

If you wish to appeal this decision, you may file an appeal pursuant to the requirements of 47 C.F.R. Part 54 Subpart I. The appeal must be filed within 60 days of the date of the date of this letter as required by 47 C.F.R. § 54.720(a). Detailed instructions for filing appeals are available at:

http://www.usac.org/hc/about/program-integrity/appeals.aspx

Sincerely,

//s// Universal Service Administrative Company

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INSPECTION

REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of the Request for Review by Aventure Communication Technology, L.L.C. of Decision of Universal Service Administrator	))))	WC Docket No. 06-122

REQUEST FOR REVIEW BY AVENTURE COMMUNICATION TECHNOLOGY, L.L.C. OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

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Date: May 5, 2014

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I. GENERAL SUMMARY STATEMENT OF INTEREST, ISSUES FOR REVIEW AND RELIEF REQUESTED.

Pursuant to Sections 54.719(c), 54.721, and 54.722 of the Federal Communications Commission ("Commission") rules, Aventure Communication Technology, L.L.C. ("Aventure") seeks review of findings by the Internal Audit Division of the Universal Service Administrative Company ("USAC") in an audit of Aventure's compliance with High Cost Support Mechanism Rules (USAC Audit No. HC2011BE011) of May 15, 2012.

The IAD report of May 15, 2012 concluded that Aventure incorrectly reported lines associated with calls to conference operators on the Aventure network as USF-Eligible Lines. The report based this conclusion on five findings:

1. The Aventure lines do not carry supported services.
2. The Aventure lines are not "revenue producing".
3. The Aventure lines are dedicated, high capacity Special Access circuits.
4. No calls terminated to locations within the Aventure service area, because the conference bridge locations cannot be defined as "end user" premises.
5. Aventure's designation as an Eligible Telecommunications Carrier (ETC) is in doubt.

On December 18, 2012, the USAC High Cost and Low Income Division sent a letter to Aventure asserting a claim for **begin confidential....end confidential** for virtually all high cost funds received by Aventure between 2007 and 2011. (Attachment 1) On February 18, 2013, Aventure filed with USAC a letter of appeal asking the High Cost and Low Income Division to reverse the findings

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of the IAD report. (Attachment 2) In a decision of October 29, 2013, the USAC administrator denied Aventure's letter of appeal of February 18, 2013. The administrator's decision of October 29, 2013 is appended as Attachment 3. On December 24, 2013, Aventure filed with USAC a "Letter requesting Board review" of the administrator's decision of October 29, 2013. The letter requesting Board review is appended as Attachment 4. On January 21, 2014, USAC denied Aventure's letter requesting Board review.

On March 4, 2014, USAC seeks to recover **begin confidential....end confidential** in High Cost program support previously dispersed to Aventure. The letter of March 4, 2014 is appended as Attachment 5. In response to the USAC letter, Aventure has filed the instant appeal.

Aventure seeks review and reversal of the IAD report and USAC administrator's decision on the following grounds:

1. The IAD report and administrator's decision are ultra vires the authority granted USAC by the FCC.

2. The specific findings of the IAD report and the administrator's decision are not supported by evidence or precedent.

3. A substantial portion of the forfeiture or reimbursement sought by USAC is barred by the one year statute of limitations set forth at 47 USC§503(b)(6).

II. SPECIFIC ISSUES FOR REVIEW

A. Background and Final Audit Report

In November 2011, IAD initiated an audit of Aventure. On May 8, 2012, IAD provided Aventure with a draft Detail Exception Worksheet (DEW) and conducted an Exit Conference with representatives of Aventure and their counsel. On May 15, 2012, Aventure, through

counsel, submitted its opposition to Internal Audit Division Draft Detail Exception Worksheet ("DEW Opposition"). The DEW Opposition made the following points:

1. The DEW conclusions are not supported by an precedent and fail to comport with long established industry practices.

2. The DEW conclusions that Aventure's lines are not "working loops" and are special access lines are wrong as a matter of law and fact.

3. The DEW conclusions that the calls to Aventure's conference operators do not "terminate" in Aventure's service territory, and do not terminate to "End Users" are unsupported and ignore relevant precedent.

4. The DEW relies on an order of the Iowa Utilities Board is based on state law, and is inconsistent with FCC rules.

5. The DEW refuses to consider factors that mitigate the damages it asserts. Imposing a retroactive refund obligation on Aventure would cause irreparable harm.

On May 15, 2012, the IAD issued its IAD Report (USAC Audit No. HC2011BE011). The report concluded that Aventure incorrectly reported lines associated with calls to conference operators on the Aventure network as USF - Eligible Lines. The report based this conclusion on 5 findings:

1. The Aventure lines do not carry supported services.

2. The Aventure lines are not "revenue producing".

3. The Aventure lines are dedicated, high capacity Special Access circuits.

4. No calls terminated to locations within the Aventure service area, because the conference bridge locations cannot be defined as "End User" premises.

5. Aventure's designation as an Eligible Telecommunications Carrier ("ETC") is in doubt.

On December 18, 2012, the USAC High Cost and Low Income Division sent a letter to Aventure asserting a claim for $6,454,952.00 in Federal Universal Service High Cost Program support dispersed for the 2007 - 2011 program years. On February 18, 2013, Aventure filed with USAC a letter of appeal asking the High Cost and Low Income Division to reverse the findings of the IAD report. (Attachment 2) On October 29, 2013, the USAC Administrator denied Aventure's appeal. (Attachment 3) On March 4, 2014, USAC sent Aventure an action letter indicating that USAC would seek to recover **begin confidential....end confidential** in High Cost Program support previously dispersed to Aventure for 2007 - 2011 program years. (Attachment 5)

On December 24, 2013, Aventure appealed the October 29, 2013 Administrative's decision to the USAC Board. (Attachment 4) By letter of January 21, 2014, the USAC Board denied Aventure's December 24, 2014 Request for Review. In response to USAC's March 4, 2014, action letter to Aventure (Attachment 5), Aventure has filed this instant appeal.

B. The IAD Report and Administrative's Decision are ultra vires the authority granted USAC by the FCC.

Section 54.702(c) of the FCC's rules restricts USAC to applying established FCC precedent, and prohibits USAC from making new policy or interpreting unclear policies:

> **"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".** 47 C.F.R.§54.702(c)

In discussions of specific decisions in the IAD Report and Administrative's Decision below, Aventure will identify numerous instances in which USAC has made new policy

decisions, and made decisions in areas where the law clearly has not been settled by the Commission. In these instances, the IAD Report and Administrative's Decision are ultra vires USAC's delegated authority, and must be reversed.

1. The IAD Report and Administrative's Decision disregard the FCC's Statement of the Law.

Aventure's letter requesting Board review of December 24, 2013, appended hereto as Attachment 4, at pages 5-6 discuss USAC's disregard of the FCC's Statement of the Law and is incorporated by reference.

2. The specific findings of the IAD Report and the Administrative's Decision are not supported by evidence or precedent and are unstainable.

Aventure's argument to USAC, which it incorporates here, is set forth in its letter requesting Board review of December 24, 2013, appended hereto as Attachment 4, at pages 6-13, set forth Aventure's arguments as to why the IAD Report and the Administrative's Decision are not supported by evidence or precedent.

3. A substantial portion of USAC's refund claim against Aventure is barred by the one year statute of limitations under 47 USC §503(b)(6).

Section 503(b)(6) of the Communications Act imposes a one year statute of limitations on actions for forfeiture or penalty. The USAC action letter of March 4, 2014, (Attachment 5) seeks forfeiture of USAC's payments made to Aventure between 2007 and 2011. The IAD audit was initiated in November 2011. Any recovery by USAC for USF payments made prior to November 2010, one year before institution of the audit, would be barred by this one year statute statute of limitations.