

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of: )
Federal-State Joint Board on ) CC Docket No. 96-45
Universal Service )
Schools and Libraries Universal Service ) CC Docket No. 02-6
Support Mechanism )
Petition for Review )
American Cyber Corp. )
Petition for Review )
Coleman Enterprises, Inc. )
Petition for Review )
Inmark, Inc., d/b/a Preferred Billing )
Petition for Review )
Lotel, Inc., d/b/a Coordinated Billing )
Petition for Review )
Protel Advantage, Inc. )

ORDER

Adopted: March 12, 2007

Released: March 12, 2007

By the Acting Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny the petitions filed by American Cyber Corp. (ACC), Coleman Enterprises, Inc. (Coleman), Inmark, Inc., d/b/a Preferred Billing (Inmark), Lotel, Inc., d/b/a Coordinated Billing (Lotel), Protel Advantage, Inc. (Protel) (collectively, Petitioners) seeking review of the Universal Service Administrative Company's (the Administrator) Decision on Contributor Appeal.<sup>1</sup> Specifically,

<sup>1</sup> Petition for Review by American Cyber Corp., CC Docket No. 02-6 (filed July 22, 2003); Petition for Review by Coleman Enterprises, Inc., CC Docket No. 02-6 (filed July 22, 2003); Petition for Review by Inmark, Inc., d/b/a Preferred Billing, CC Docket No. 02-6 (filed July 22, 2003); Petition for Review by Lotel, Inc., d/b/a Coordinated Billing, CC Docket No. 02-6 (filed July 22, 2003); Petition for Review by Protel Advantage, Inc., CC Docket No. 02-6 (filed July 22, 2003) (collectively, Petitions for Review); Petitions for Review at Exhibit A (Letter from the Universal Service Administrative Company to Lawrence M. Benton, Counsel to Petitioners (dated May 22, 2003) (Administrator's Decision on Contributor Appeal)). The Petitions for Review, including the Exhibits thereto, are substantively identical.

We note that all five petitions were filed in the wrong docket, CC Docket Number 02-6, which concerns the Schools and Libraries program. For this reason, we also include in the caption CC Docket Number 96-45, which is the docket for, among other things, universal service contributor appeals.

Petitioners challenge the Administrator's decisions to bill Petitioners for universal service contributions from January through June 2001 and to reject Petitioners' Forms 499-A for 2001. For the reasons set forth below, we affirm the Administrator's Decision on Contributor Appeal.

## II. BACKGROUND

### A. The Act and the Commission's Rules

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.<sup>2</sup> To this end, the Commission has determined that any entity that provides interstate telecommunications services to the public for a fee must contribute to the Universal Service Fund (USF or Fund).<sup>3</sup> The Commission further directed that contributions should be based on contributors' interstate and international end-user telecommunications revenues.<sup>4</sup>

3. Although the Commission declined to exempt from contribution "any of the broad classes of telecommunications carriers that provide interstate telecommunications services,"<sup>5</sup> not all carriers that provide interstate telecommunications service contribute directly to universal service. In particular, the Commission recognized that "[b]asing contributions on end-user revenues ... will relieve wholesale carriers from contributing directly to the support mechanisms" because these carrier's carriers do not earn revenues directly from end-users.<sup>6</sup> Instead, the reseller that provides the service to the end-user and thereby earns end-user revenues will contribute directly to universal service.<sup>7</sup>

4. Moreover, the Act and the Commission's rules exempt certain carriers from the contribution requirement. For example, carriers are not required to contribute directly to the universal service fund in a given year if their contribution for that year would be less than \$10,000.<sup>8</sup> Likewise, carriers with purely intrastate or international revenues are not required to contribute.<sup>9</sup> Certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers are also

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<sup>2</sup> 47 U.S.C. § 254(d).

<sup>3</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8797, para. 787 (1997) (*Universal Service First Report and Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000). The Commission also requires certain other providers of telecommunications to contribute to the Fund. See, e.g., *Universal Service Contribution Methodology*, WC Docket Nos. 06-122 and 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237,99-200, 95-116, and 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

<sup>4</sup> *Id.*; see also 47 C.F.R. § 54.706.

<sup>5</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 8797, para. 787.

<sup>6</sup> *Id.* at 9207, para. 846.

<sup>7</sup> *Id.*

<sup>8</sup> 47 C.F.R. § 54.708.

<sup>9</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 9174, para. 779; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Sixteenth Order on Reconsideration, 15 FCC Rcd. 1679, 1685, para. 15 (1999).

exempt from the contribution requirement.<sup>10</sup> Unless a carrier meets one of the exemptions, however, it must contribute to universal service.

5. Contributors report their revenues by filing Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q) with the Administrator.<sup>11</sup> The Administrator reviews these filings and verifies the information provided by the contributors.<sup>12</sup> The Administrator also bills contributors for their universal service contributions.<sup>13</sup>

## **B. Petitions for Review**

6. Petitioners are resellers of long distance communications services.<sup>14</sup> They contracted with QAI, Inc. (QAI) for the wholesale provision of the underlying long distance service.<sup>15</sup> They allege that the contract obligated QAI to report the end-user revenues that Petitioners earned from reselling long distance service to end-users and to contribute to the USF based on those revenues.<sup>16</sup>

7. In 2001, after QAI ceased reporting Petitioners' end-user revenues and contributing to the USF, Petitioners filed FCC Forms 499-A.<sup>17</sup> On their forms, Petitioners failed to report any revenues for calendar year 2000.<sup>18</sup> Instead, Petitioners attached an addendum stating that QAI was responsible for all filings and payments related to the filings.<sup>19</sup>

8. On September 12, 2001, the Administrator issued a letter to Petitioners directing them to "submit completed April 1, 2001 FCC form 499-A filings" as soon as possible.<sup>20</sup> The Administrator noted that "[e]ach legal entity is required to file their own 499-A filing reporting their own revenue."<sup>21</sup>

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<sup>10</sup> 47 C.F.R. § 54.706(d).

<sup>11</sup> *Id.* § 54.711(a) (setting forth reporting requirements in accordance with Commission announcements in the Federal Register). Contributors report historical revenue on the annual Telecommunications Reporting Worksheet (FCC Form 499-A), which is generally filed on April 1 each year. *See* 47 C.F.R. Universal Service Administrative Company, Schedule of Filings, at <http://www.universalservice.org/fund-administration/contributors/revenue-reporting/schedule-filings.aspx> (last visited March 5, 2007). Contributors project future quarters' revenue on the quarterly Telecommunications Reporting Worksheets (FCC Form 499-Q), which are generally filed on February 1, May 1, August 1, and November 1. *Id.*

<sup>12</sup> 47 C.F.R. § 54.711(a).

<sup>13</sup> *Id.* § 54.702(b).

<sup>14</sup> Petitions for Review at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> *Id.* at Exhibit H (Petitioners' Forms 499-A for 2001).

<sup>18</sup> *Id.* As noted above, carriers use Form 499-A to report revenues from the prior calendar year. *See supra* n.11. Therefore, Petitioners were required to report revenues from calendar year 2000 on the 2001 Form 499-A.

<sup>19</sup> Petitions for Review at Exhibit H.

<sup>20</sup> *Id.* at Exhibit B (Letter from Lori S. Terraciano, Universal Service Administrative Company to Patrick D. Crocker, Counsel to Petitioners (dated Sept. 12, 2001)).

<sup>21</sup> *Id.*

The Administrator also explained that, unless Petitioners meet one of the exemptions, they owe a direct contribution obligation, which cannot be assumed by underlying carriers.<sup>22</sup> Petitioners appealed the decision to the Administrator by letter dated October 9, 2001.<sup>23</sup>

9. On May 22, 2003, the Administrator issued a Decision on Contributor Appeal, denying Petitioners' appeal.<sup>24</sup> The Administrator noted that "while a third party may provide a service and file forms on another's behalf, the obligation to file remains the obligation of each entity."<sup>25</sup> A third party "does not assume the responsibility [of] the obligation for payment for any of its resellers."<sup>26</sup> The Administrator also defended its decision to reject Petitioners' FCC Forms 499-A, noting that it is empowered to verify information reported on FCC Forms 499-A and that the FCC-approved instructions that accompanied the FCC Form 499-A provide that "each entity is required to report and contribute."<sup>27</sup>

10. On July 22, 2003, Petitioners filed Petitions for Review, pursuant to section 54.719(b) of the Commission's rules, which permits persons aggrieved by an action taken by the Administrator to seek review by the Commission.<sup>28</sup> Petitioners claim that the Administrator erred in two respects. First, Petitioners assert that the Administrator should have billed QAI from January through June 2001 instead of Petitioners for the universal service obligations resulting from Petitioners' end-user revenues.<sup>29</sup> Second, Petitioners allege that the Administrator lacked authority to reject Petitioners' Forms 499-A for 2001.<sup>30</sup> Petitioners ask the Commission to reverse the Administrator's decisions and determine that QAI is liable for all payments, interest, and late charges.<sup>31</sup>

11. The Commission has delegated authority to the Wireline Competition Bureau to consider petitions for review of decisions by the Administrator.<sup>32</sup> Section 54.723 of the Commission's rules specifies that the standard of review is *de novo*.<sup>33</sup>

### III. DISCUSSION

12. For the reasons set forth below, we find that the Administrator properly billed Petitioners from January through June 2001 for the USF obligations resulting from Petitioners' provision of interstate

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at Exhibit I (Letter from Lawrence M. Benton, Counsel to Petitioners to the Universal Service Administrative Company (dated Oct. 9, 2001)).

<sup>24</sup> *See generally* Administrator's Decision on Contributor Appeal.

<sup>25</sup> *Id.* at 3.

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

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *See generally* Petitions for Review.

<sup>29</sup> *Id.* at 1, 2, 5.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 1.

<sup>32</sup> 47 C.F.R. § 54.722(a).

<sup>33</sup> *Id.* § 54.723.

and international telecommunications services to end-users in calendar year 2000. We further conclude that USAC appropriately rejected the Petitioners' FCC Forms 499-A for 2001. We therefore deny the Requests for Review.

**A. Resellers' Obligation to Contribute to Universal Service**

13. Petitioners generally contend that wholesalers, rather than resellers, are responsible for reporting resellers' end-user revenues and contributing to the Fund based on those revenues.<sup>34</sup> Petitioners' base their argument on the Instructions for completing FCC Form 499-A, which state that "if the [wholesaler] does not have independent reason to know that the [reseller] will, in fact, resell service and contribute to the federal universal service support mechanisms, then the [wholesaler] should either obtain a signed statement to that effect or report those revenues as end user revenue."<sup>35</sup> Petitioners, however, misunderstand the Instructions and their interpretation of resellers' and wholesalers' contribution obligations conflicts with the Act and the Commission's rules.

14. As noted above, the Act and the Commission's rules require that every telecommunications carrier that provides interstate telecommunications services contribute to the universal service support mechanisms based on end-user telecommunications revenues. The Commission expressly declined to exempt resellers from this general rule.<sup>36</sup> Rather, the Commission explained that, in a wholesaler-reseller relationship, resellers generally bear the obligation to contribute directly to universal service because resellers earn revenues directly from end-users.<sup>37</sup>

15. Even though wholesalers generally do not contribute directly to the USF, the Commission requires wholesalers to perform due diligence to help ensure that all end-user revenues are captured. As Petitioners point out, the Commission-approved Instructions that accompany FCC Forms 499 require wholesalers to determine that their customers are resellers and are contributing to the universal service fund.<sup>38</sup> Otherwise, wholesalers must treat those customers as end-users, report revenues from those customers as end-user revenues, and contribute directly to the fund based on those end-user-revenues.<sup>39</sup>

16. However, the fact that the Instructions require a wholesaler to prove that it is providing service to a contributing reseller rather than an end-user does not alter *resellers'* fundamental obligation, under the Act and the Commission's rules, to report their end-user revenues and contribute to the Fund.

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<sup>34</sup> Petitions for Review at 2-3, 5 and Exhibit D, *citing* Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, at 15 (2001) (Instructions).

<sup>35</sup> Instructions at 15.

<sup>36</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 8797, para. 787 ("We ... find no reason to exempt from contribution any of the broad classes of telecommunications carriers that provides [sic] interstate telecommunications services, including satellite operators, resellers, wholesalers, paging companies, utility companies, or carriers that serve rural or high cost areas, because the Act requires 'every telecommunications carrier that provides interstate telecommunications services' to contribute to the support mechanisms.").

<sup>37</sup> *Id.* at 9207, para. 846.

<sup>38</sup> Instructions at 15; *see also* Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-Q, at 12 (2001).

<sup>39</sup> Instructions at 15.

Regardless of how QAI completed its forms, Petitioners maintained an independent obligation to report all end-user revenues on their FCC Forms 499 and to contribute to the fund based on those revenues.<sup>40</sup>

17. Petitioners further assert that, in this particular case, QAI assumed the obligation to report Petitioners' end-user revenues and contribute to the Fund based on those revenues through its contracts with Petitioners.<sup>41</sup> In support of this claim, Petitioners' attach marketing agreements and correspondence with QAI.<sup>42</sup> Petitioners argue that the Administrator should have followed the arrangements in the marketing agreements and billed QAI.<sup>43</sup> Petitioners are incorrect. Regardless of what the agreements may provide, both federal and Commission precedent make clear that legal duties to comply with a federal regulatory scheme cannot be "contracted away."<sup>44</sup>

18. Both the Supreme Court and the Commission have stated, "[i]f a regulatory statute is otherwise within the powers of Congress ... its application may not be defeated by private contractual provisions."<sup>45</sup> Because the Act and the Commission's rules require resellers to contribute to universal service, resellers cannot, by contract, shift this obligation to a third-party. A third-party may agree to pay on behalf of a reseller, and the Administrator may accept payments from the third-party, but if the third-party does not pay on the reseller's behalf, the reseller must pay.<sup>46</sup> Here, even though QAI may have contracted to pay Petitioners' universal service obligations, Petitioners retained the contribution obligation. We therefore conclude that the Administrator properly billed the Petitioners during January through June 2001 for the universal service obligations resulting from Petitioners' end-user telecommunications revenues.

19. We note that if QAI failed to comply with the terms of the contracts, Petitioners may be able to recover their universal service payments from QAI. We have consistently indicated, however, that

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<sup>40</sup> 47 C.F.R. §§ 54.706, 54.711(a).

<sup>41</sup> Petitions for Review at 6-7.

<sup>42</sup> Petitioners also point to the fact that the Administrator billed QAI and received and accepted payments from QAI for several years as evidence that QAI was responsible for the universal service obligations resulting from Petitioners' end-user revenues. *Id.* at 6. We note, however, if QAI was reporting Petitioners' revenues, the Administrator may have been unaware of Petitioners' existence until Petitioners began filing their own forms.

<sup>43</sup> *Id.* at 1, 4.

<sup>44</sup> Petitioners allege that the Administrator's web site advised that contractual agreements between carriers at least in situations involving the transfer of customers will be honored in terms of the allocation of responsibility for payment of universal service fund charges. *Id.* at 4. Petitioners therefore argue that the Administrator must honor its marketing agreement with QAI. *Id.* Petitioners' argument is irrelevant because the contract at issue concerns billing arrangements, not the transfer of customers.

<sup>45</sup> *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986); *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 19276, 19304, para. 45 (1996); *Review of the Commission's Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 and 87-8, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1087, para. 54 & n.118 (2001).

<sup>46</sup> See, e.g., *Request for Review by Homer Community Consolidate*, File No. NEC.70C.03-10-00.09700014, CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Rcd 9353 (Com. Car. Bur. 2001) (rejecting a claim by an applicant that it should be excused for its failure to timely file its form with the Administrator because it relied upon a third-party that filed the form late).

we will not adjudicate claims arising out of private contractual agreements.<sup>47</sup> Rather, the appropriate forum for private litigation is the courts.<sup>48</sup>

## **B. The Administrator's Authority to Reject FCC Form 499-A Filings**

20. Petitioners also contend that the Administrator exceeded the authority delegated to it by the Commission when it rejected Petitioners' Forms 499-A for 2001. Petitioners argue that section 54.702(c) Commission's rules, which denies the Administrator the authority to act independently in doubtful situations, bars the Administrator from rejecting FCC Forms 499-A without first seeking Commission guidance.<sup>49</sup> Petitioners' argument is contrary to Commission rules and orders.

21. The Commission's rules allow the Administrator "to verify any information" reported by carriers on their FCC Forms 499-A and determine whether the information is "untruthful or inaccurate."<sup>50</sup> This authority to review information provided on the forms necessarily includes the discretion to reject forms containing incomplete or inaccurate information. When Petitioners failed to report interstate revenues on their FCC Forms 499-A, the Administrator appropriately returned the filings to Petitioners and instructed Petitioners to return completed filings as soon as possible.

22. Moreover, the Administrator's decision to reject Petitioners' FCC Forms 499-A is consistent with prior Commission orders. For example, we have allowed the Administrator to reject FCC Forms 499-A and 499-Q—and to do so without first seeking guidance from the Commission—as long as the Instructions provide sufficient guidance for the Administrator's actions.<sup>51</sup> In their filings, Petitioners failed to report their revenues and claimed instead that QAI was responsible for reporting the revenues. But, as explained above, the Instructions make clear that, unless exempted by the Commission, each legal entity must report its revenues.<sup>52</sup> We find that the Administrator properly relied on these Instructions in reaching its decision.

23. We further note that, irrespective of the Administrator's authority to act on universal service filings, the Commission may, on review, decide that an applicant's filing was incorrect or incomplete and should be rejected. As explained above, Petitioners were required to report their own revenues on their FCC Forms 499-A. They failed to comply with the Commission's rules and the Instructions. We therefore conclude that Petitioners' Forms 499-A for 2001 should be rejected.

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<sup>47</sup> See, e.g., *Metromedia Company*, File Nos. 29700-CL-TC-1-86 *et al.*, Memorandum Opinion and Order, 1 FCC Rcd 1227, 1232, para. 33 (Com. Car. Bur. 1986).

<sup>48</sup> *Id.*

<sup>49</sup> Petitions for Review at 4 (citing 47 C.F.R. § 54.702(c)).

<sup>50</sup> 47 C.F.R. §§ 54.711(a), 54.713.

<sup>51</sup> See, e.g., *ABC Cellular Corp.*, CC Docket No. 97-21, Order, 17 FCC Rcd 25192, 25196-97, para. 12 (Com. Car. Bur. 2002) (concluding that the Administrator could reject an applicant's Form 499-Q without first consulting the Commission because the Instructions for the Form 499-Q provided sufficient guidance for the Administrator to conclude that the applicant had not complied with the Instructions).

<sup>52</sup> Instructions at 7 ("Each legal entity that provides interstate telecommunications service for a fee, including each affiliate or subsidiary of an entity, must complete separately and file a copy of the attached Telecommunications Reporting Worksheet."); *id.* at 15 ("In the Telecommunications Reporting Worksheet, filers must report revenues using two broad categories: (1) Revenues from other contributors to the federal universal service support mechanisms; and, (2) Revenues from all other sources. Taken together, these revenues should include all revenues billed to customers and should include all revenues on the reporting entities' books of account.").

**V. ORDERING CLAUSES**

24. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in Sections 1, 4(i), 4(j) and 254 of the Communications Act of 1934, as amended, 47 USC §§ 151, 154(i), 154(j) and 254 and pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Petitions for Review filed by American Cyber Corp., Coleman Enterprises, Inc., Inmark, Inc., d/b/a Preferred Billing, Lotel, Inc., d/b/a Coordinated Billing, Protel Advantage, Inc. ARE DENIED.

25. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 1.102 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Renee R. Crittendon  
Acting Deputy Chief  
Wireline Competition Bureau