

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
American Telecommunication Systems, Inc.)	
)	
Equivoice, Inc.)	
)	
Eureka Broadband Corporation)	
)	
TON Services, Inc.)	
)	
Value-Added Communications, Inc.)	

ORDER

Adopted: March 14, 2007

Released: March 14, 2007

By the Acting Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny the petitions filed by American Telecommunication Systems, Inc. (ATS), Equivoice, Inc., (Equivoice), Eureka Broadband Corporation (Eureka), TON Services, Inc. (TON) and Value-Added Communications, Inc. (VAC), collectively Petitioners.¹ Petitioners, all resellers of telecommunication services, challenge the Universal Service Administrative Company’s (USAC’s or Administrator’s) decisions not to recognize the Universal Service Fund (USF or Fund) contributions which Petitioners contend that they made indirectly through underlying carriers. The time periods at issue vary by case, but all fall within the years 1999-2003. For the reasons set forth below we deny the petitions and direct that all outstanding payments, including late fees, penalties, or other monies owed be made not later than 30 days

¹ Request for Review by American Telecommunication Systems, Inc., CC Docket 96-45 (filed Feb. 22, 2005) (*ATS Request for Review*); Request for Review by Equivoice Inc., CC Docket 96-45 (filed May 18, 2005) (*Equivoice Request for Review*); Appeal of Decision of the Universal Service Administrative Company Concerning Eureka Broadband Corporation’s Revision to FCC Form 499-A and Application of Charges, CC Docket Nos. 96-45, 94-21, Request for Review, filed Sept. 30, 2004 (*Eureka Request for Review*); Appeal of TON Services, Inc. CC Docket 96-45 (filed Jan. 7, 2005) (*TON Services Request for Review*); Request for Review of Value-Added Communications, Inc., CC Docket 96-45 (filed June 17, 2005) (*VAC Request for Review*). In this Order, we use the term “appeals” to generically refer to requests or petitions for review of decisions, or waivers related to such decisions, issued by the Commission, the Wireline Competition Bureau, or the Administrator. Section 54.719(c) of the Commission’s rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

from release of this Order.

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.² 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).³ The Commission further directed that contributions should be based on contributors' interstate and international end-user telecommunications revenues.⁴

3. Although the Commission declined to exempt from contribution "any of the broad classes of telecommunications carriers that provide interstate telecommunications services,"⁵ 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.⁶ Instead, the reseller that provides the service to the end-user and thereby earns end-user revenues will contribute directly to universal service.⁷

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 Fund in a given year if their contribution for that year would be less than \$10,000.⁸ Likewise, carriers with purely intrastate or international revenues are not required to contribute.⁹ Certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers are

² 47 U.S.C. § 254(d).

³ 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 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000). The Commission also requires certain other providers of interstate 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) (requiring interconnected Voice over internet protocol providers to contribute to the Fund because they are providers of interstate telecommunications).

⁴ *Id.*; see also 47 C.F.R. § 54.706.

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

⁶ *Id.* at 9207, para. 846.

⁷ *Id.*

⁸ 47 C.F.R. § 54.708.

⁹ *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).

also exempt from the contribution requirement.¹⁰ Unless a carrier meets one of the exemptions, however, it must contribute to the Fund.

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

B. Petitions for Review

6. Petitioners generally seek reversal of USAC's Decision on Contributor Appeal or, in the alternative, a waiver of Petitioners' obligations to contribute directly to the USF for end-user revenue earned by Petitioners.¹⁴ Each petitioner contends that their USF contribution obligations during the disputed periods were paid on their behalf by their underlying, wholesale carrier as provided for in their individual resale agreements as resellers.¹⁵ The Petitioners generally seek a credit against their USAC bills for payments made to their underlying carriers, and a credit for late payment fees assessed by USAC on the underlying claims.¹⁶

7. In each case, USAC found that, as the entity with end-user revenues, Petitioners had the primary obligation to report such revenues and contribute to the USF and found that, to the extent that Petitioners also paid their underlying carriers USF pass-through charges, a refund of such charges to Petitioners, if due, must be obtained from the underlying carriers. USAC observed that, as a general matter, and in each of these cases, it lacks sufficient information upon

¹⁰ 47 C.F.R. § 54.706(d).

¹¹ *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.*

¹² 47 C.F.R § 54.711(a).

¹³ *Id.* § 54.702(b).

¹⁴ *See generally* *ATS Request for Review* (ATS contends that its USF contribution obligations from July 1999 through December 2001 were paid on its behalf by its underlying, wholesale carrier, Tel-Save); *Equivoice Request for Review* (Equivoice contends that it was a reseller of telecommunications services from MCI which billed and treated it as an end user customer throughout 2001); *Eureka Request for Review* (Eureka contends that Gillette Global Network (GGN), a company Eureka acquired, was a reseller and that fees based on GGN's end-user revenues were paid to USAC through MCI, GGN's underlying carrier); *TON Services Request for Review* (TON asserts that during 2001-2003 it was invoiced and treated as an end-user by and paid universal service fees to its underlying carriers MCI, Global Crossing and Touch America.); *VAC Request for Review* (VAC contends that the underlying carrier for the Federal Bureau of Prisons inmate telephone system, Sprint Corporation (Sprint), treated VAC as an end-user and assessed USF pass through charges on VAC, which it paid in full).

¹⁵ *See generally* *ATS Request for Review*; *Equivoice Request for Review*; *Eureka Request for Review*; *TON Services Request for Review*; *VAC Request for Review*.

¹⁶ *Id.*

which to verify the extent of alleged double-payment.¹⁷

8. Petitioners' appeals to the FCC reiterate their claims to USAC. Petitioners again assert that in agreements entered into with their underlying carriers, they made contributions to the USF through their underlying carriers.¹⁸ Petitioners seek review of USAC's decision denying their claim and credit for payments made to their underlying carriers.

III. DISCUSSION

9. We deny Petitioners' appeals. We conclude that to the extent Petitioners allege a double payment of USF obligations, it is a result of fees assessed by their underlying carriers, not incorrect billing by USAC. As such, Petitioners' relief, to the extent appropriate, lies with the underlying carriers, not a refund or credit from the USF.

10. 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.¹⁹ 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.²⁰

11. At all times relevant to the petitions, FCC revenue reporting forms and instructions provided direction regarding the proper definition of reseller and the proper reporting of reseller revenue, *i.e.* the entity with end user revenues reports and contributes.²¹ To assist underlying carriers and their resellers, the Commission has a certification procedure in place that underlying carriers may use to determine whether the entities to whom they offer telecommunications or telecommunications services for resale are in fact direct contributors.²² Through this certification procedure, both parties to the reselling transaction have the information they need to determine whether the USF obligation should be collected by the underlying carrier or whether the reseller

¹⁷ *Id.* "For many situations, it is difficult if not impossible for USAC to verify the precise extent of alleged double-payment situations. For example, even if the underlying carrier in this case had revised its Telecommunications Reporting Worksheet to reflect reclassification of American's revenue as wholesale, USAC would have no way of distinguishing revisions associated with this reclassification from revisions for other reasons. Indeed, we doubt that we could ever conclusively establish whether an underlying carrier in fact reported and paid on a particular carrier's revenues without data carefully correlated by both carriers (hence the requirement that carriers resolve these issues among themselves)." *Id.*

¹⁸ See *ATS Request for Review* at 1; *Equivoice Request for Review* at 5-7; *Eureka Request for Review* at 4; *TON Services Request for Review* at 2-3; *VAC Request for Review* at 1-2.

¹⁹ *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 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.").

²⁰ *Id.* at 9207, para. 846.

²¹ See *e.g.*, Telecommunications Reporting Worksheet, 2006 FCC Form 499-A, Subsection C.1 at 12. Prior year FCC Form 499-A Telecommunications Reporting Worksheet contain the same requirements, and are available at <http://www.usac.org/fund-administration/forms/default.aspx#prior-year-forms> (visited Mar. 7, 2007).

²² See *e.g.*, Telecommunications Reporting Worksheet, 2006 FCC Form 499-A, Subsection C.1 at 12.

has an independent obligation to contribute. Here, Petitioners had an obligation to contribute based on their end user revenues.

12. Moreover, this obligation to directly contribute cannot be contracted away as Petitioners would have us decide. As 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.”²³ 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.²⁴ Here, even though the various underlying carriers may have contracted to pay Petitioners’ universal service obligations, Petitioners retained the contribution obligation. We therefore conclude that the Administrator properly billed the Petitioners for the universal service obligations resulting from Petitioners’ end-user telecommunications revenues.

13. Finally, as USAC explained in its denial of Petitioners requests, it generally does not have the ability to determine with any certainty whether and on what revenues a “double payment” was received.²⁵ To make such a determination, USAC would need to not only audit the revenues reported (or not reported) by Petitioners, but it would also need to audit the revenues of the underlying carriers to determine whether the revenue was first, reported as end-user revenue for all accounts, including Petitioners, as opposed to carrier’s carrier revenue; and second, whether a contribution was made based on those revenues. Because of the complications associated with making such determinations, USAC has rightly left such matters for the entities involved in the transaction to determine.

14. To the extent that Petitioners’ underlying carriers charged them as end-user customers, the underlying carriers may have erred. As such, the proper avenue for recourse for Petitioners is with those underlying carriers. As we have consistently indicated, we will not adjudicate claims arising out of private contractual agreements.²⁶ The appropriate forum for private litigation is the courts.²⁷ For these reasons, the petitions are denied.

IV. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED, pursuant to authority contained in sections 1-4

²³ *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.117 (2001).

²⁴ *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).

²⁵ *See e.g., Equivoice Request for Review* at Exhibit A.

²⁶ *See e.g., Airtouch Paging, Inc., For Consent to Partial Assignment of Station KCC485 to Schuykill Mobile Fone, Inc.*, File No. 0000002165, Order, 14 FCC Rcd 9658, 9660, para. 5 (1999); *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).

²⁷ *Id.*

and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petitions filed by American Telecommunication Systems, Inc. Equivoice, Inc., Eureka Broadband Corporation, TON Services, Inc. and Value-Added Communications, Inc., are DENIED.

16. IT IS FURTHER ORDERED that all outstanding payments, including late fees, penalties, or other monies owed to the USF by American Telecommunication Systems, Inc. Equivoice, Inc., Eureka Broadband Corporation, TON Services, Inc. and Value-Added Communications, Inc., ARE TO BE PAID not later than 30 days from the effective date of this Order.

17. 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

Renée R. Crittendon
Acting Deputy Chief, Wireline Competition Bureau