THE MIS-ADMINISTRATION AND MISADVENTURES OF THE UNIVERSAL SERVICE FUND: A STUDY IN THE IMPORTANCE OF THE ADMINISTRATIVE PROCEDURE ACT TO GOVERNMENT AGENCY RULEMAKING

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I. INTRODUCTION

Either as a policy or statutory mandate, the laudable concept of "universal communications service" has existed since the Communications Act of 1934. The 1934 Act references universal service in its preamble, calling for "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" to "all the people of the United States."[1] Congress furthered this concept in the Telecommunications Act of

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[1] *See* Communications Act of 1934, ch. 652 § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2006)).

1996 ("1996 Act") by authorizing the Federal Communications Commission ("FCC" or "Commission") to establish mechanisms to preserve and advance universal service.[2] The 1996 Act implicitly contemplated the creation of what is now known as the Universal Service Fund ("USF").[3]

Significantly, the FCC delegated the day-to-day management and administration of the USF to the Universal Service Administrative Company ("USAC"), a private corporation.[4] As a quasi-governmental body, USAC could not and did not receive authority to create, change or interpret substantive rules and regulations.[5] USAC could *only* adopt and follow administrative processes and procedures to implement the Commission's substantive rules.[6]

For some time after its creation, USAC properly limited its role to implementing the FCC's substantive rules and orders. However, USAC began to expand its limited role when consumers quickly embraced the advanced IP-based communications services entering the communications market. These services drew consumers away from traditional interstate telecommunications service providers, causing their revenues to plummet.[7] As the USF was supported only by these dwindling revenues, the USF correspondingly shrank in size. Despite clear and convincing evidence that interstate telecommunications revenues were on a death spiral which threatened the sustainability of the $7 billion Fund, the Commission failed to reform the universal service system to keep pace with the rapid evolution of the industry.

The Commission faced regulatory gridlock when the industry's quick transformation collided with political prerogatives and fears of anti-regulatory back-

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2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 254(a)(1)).

3 47 U.S.C. § 254(d) (2006) ("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.").

4 *See In re* Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, 12 F.C.C.R. 18400, ¶ 11 (July 17, 1997) [hereinafter *USAC Order*]. The FCC designated USAC as the interim USF Administrator in 1997. USAC became permanent Fund Administrator in 1998. *See In re* Changes to the Board of Directors of the National Exchange Carrier Association, *Third Report and Order*, CC Docket No. 97-21, *Fourth Order on Reconsideration* in CC Docket No. 97-21 and *Eighth Order on Reconsideration in* CC Docket No. 96-45, 13 F.C.C.R. 25058, 25069-70, ¶ 20 (Nov. 19, 1998).

5 *See, e.g.*, 47 C.F.R. § 54.702(c)(2010); *see also USAC Order*, *supra* note 4, at 18425-18428, ¶¶ 41-51.

6 *See, e.g.*, 47 C.F.R. § 54.702(c)(2010); *see also USAC Order*, *supra* note 4, at 18423-18428, ¶¶ 41-51.

7 THE BOSTON CONSULTING GROUP, THE VOICE REVENUE CHALLENGE A FRAMEWORK FOR SUCCESS IN THE ERA OF VOIP 2-3 (2006), *available at* http://www.bcg.com/documents/file14718.pdf.

lash. For example, earlier Commissions had grappled with the idea of extending access charge regulations to enhanced communications services, only to face a maelstrom of grassroots protests urging against premature regulation of "the Internet."[8] Also, in 1996, an association of telecommunications carriers filed a petition[9] asking the FCC to assert its authority over providers of "Internet phone" software and hardware and to declare regulatory authority over telecommunications services using the Internet.[10] For much of the ensuing decade and a half, the FCC found shelter in its earlier series of *Computer Inquiry* decisions and the 1996 Act's statutory embodiment of the information services-telecommunications services dichotomy.[11] With limited exception, the FCC held tight to these distinctions, resulting in inevitable declines in revenue from traditional telecommunications services, as consumers migrated to enhanced communications services.[12] Confronted with the dilemma of either clarifying

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[8] *See, e.g., In re* Access Charge Reform, *Reply Comments of the Internet Access Coalition*, CC Docket No. 96-262 (Feb. 14, 1997); *In re* Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, *First Report and Order*, 12 F.C.C.R. 15982 (May 7, 1997).

[9] *See In re* Provision of Interstate and International Interexchange Telecommunications Service via the "Internet" by Non-tariffed, Uncertified Entities, *America's Carriers Telecommunications Association Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking*, CC Docket No. 96-10 (Mar. 26, 1996) [hereinafter *ACTA Petition*].

[10] *See* Common Carrier Bureau Clarifies and Extends Request for Comment on ACTA Petition Relating to "Internet Phone" Software and Hardware, RM No. 8775, *Public Notice*, DA 96-414, 11 F.C.C.R. 22169 (Mar. 25, 1996).

[11] *See, e.g.,* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service Facilities, *Notice of Proposed Rulemaking and Tentative Decision*, 28 F.C.C.2d 291 (1970); *Final Decision and Order*, 28 F.C.C.2d 267 (1971), *aff'd in part sub nom.* GTE Serv. Corp. v. FCC (Computer I), 474 F.2d 724 (2d Cir. 1973), *decision on remand, Order*, 40 F.C.C.2d 293 (1973); Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry): *Tentative Decision*, 72 F.C.C.2d 358 (1979); *Final Decision*, 77 F.C.C.2d 384 (1980), *recon., Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1981), *Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon., Memorandum Opinion and Order*, 56 Rad. Reg. 2d (P&F) 301 (1984) (Computer II); Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report & Order*, 104 F.C.C.2d 958 (1986), *Phase I Reconsideration Order*, 2 F.C.C.R. 3035 (1987), *Order on Further Reconsideration*, 3 F.C.C.R. 1135 (1988), *Order on Second Further Reconsideration*, 4 F.C.C.R. 5927 (1989), *Report & Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *decision on remand,* Computer III Remand Proceedings, *Report and Order*, 5 F.C.C.R. 7719 (1990) (Computer III).

[12] *In re* Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review–Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North

its existing rules to capture a broader audience of contributors and face accusations of "regulating the Internet"; or standing idle as the USF contribution base continued to shrink—the FCC responded only by authorizing increases to the USF contribution factor.

In a classic "non-decision," the FCC found another "solution" to the dilemma. It found a way to avoid protests to expanding the enhanced communication services subject to USF while abating the shrinkage in the USF. It did so essentially by "passing the buck" to USAC.[13] Without public notice or awareness and without legal authority, the Commission abandoned its congressionally-delegated authority to adopt, interpret, modify and enforce properly adopted rules, and allowed USAC to create and enforce substantive measures resulting in multiple violations of its own statute, as well as the Administrative Procedure Act ("APA"). Not only did the FCC's clandestine delegation of substantive rulemaking and decision-making to USAC violate the APA; but so too did USAC's implementations of that illegitimately delegated authority by its adopting, announcing and enforcing rules and decisions for which it had no legal authority.

Coextensive with its external abandonment of authority and statutory obligations to USAC, the Commission also did so internally by allowing its Wireline Competition Bureau ("WCB" or "Bureau") to make policy decisions and to act on facts never presented to the Commission in order to preserve the dwindling USF Fund. The WCB had only to affirm USAC's *ultra vires* actions by its own unauthorized actions.

The reasons behind the Commission's continued abandonment of its authority to USAC and its bureaus remain the same today. Yet, ultimately, whatever the reasons for the FCC's surrender of its authority to unrestrained delegated agents (politics, public outcry, budget constraints, etc.), they cannot justify what amounts to the unlawful actions of a major federal agency. While Congress may be indifferent to the Commission's failure to uphold its statutory obligations, the public, its constituents, may have a strong reaction. The reality is that for years, the public has been paying a "tax" on its communications services that now routinely runs in the lofty neighborhood of 15%.[14] In addition, a large part of the industry - while bearing the costs and burdens of billing, collecting and paying the USF- receives no benefit from doing so. On the other

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American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services, *Report and Order and Notice of Proposed Rulemaking*, 21 F.C.C.R . 7518, 7536-7537, ¶ 2, ¶¶ 34-36 (June 21, 2006) (extending USF contribution requirements to interconnected VoIP service providers).

[13] *See* discussion *infra* Part II.

[14] *See e.g., In re* Proposed First Quarter 2011 Universal Service Contribution Factor, *Public Notice*, 25 F.C.C.R. 17175 (Dec. 13, 2010).

hand, a small segment of the industry reaps the rewards of subsidies up to 90% for providing communications services and products to schools, hospitals and libraries and the associated goodwill.[15]

Reaching a point where tolerance with USAC and FCC bureaus' expansion of jurisdiction over their services was no longer possible, a number of carriers appealed USAC and bureau decisions to the Commission. Rather than acknowledge its own failure to restrain USAC or to enforce its own limits of delegated authority on its bureaus, the Commission extended its abandonment of authority by refusing to rule on these appeals. As such, the Commission now faces an impossible Hobson's choice. First, it could deny the appeals, thereby triggering immediate appeals to the D.C. Circuit. This action would likely lead to decisions adverse to the Commission (admonishing it for sanctioning USAC and the WCB's actions). Alternatively, the FCC could grant the appeals and reconsider USAC and WCB actions. This action would likely result in Commission decisions against USAC and the WCB for exceeding their authority, and invalidating the basis for millions in illegally collected contributions over the past several years. The FCC is not likely to select the former choice as it poses significant risks such as exposing to judicial scrutiny the unfettered expansion of rulemaking authority through USAC and the WCB. As for the latter, payouts for illegitimately collected contributions could bankrupt the Fund, necessitating a plea to Congress to replenish it or other extraordinary action.

The ultimate outcome of the Commission's refusal to deal with a plethora of unauthorized, *ultra vires* actions by its delegated agents remains to be seen. The industry could continue to be part of the stalemate by simply refusing to comply with decisions, rulings and instructions arising out of USAC and the Bureau, file administrative appeals and permit the matters to sit indefinitely. Or, one or more carriers could take independent legal action. The more promising would seem to be to file writs of mandamus to compel the FCC to act on their appeals from USAC and Bureau decisions.

Alternatively, some might consider pursuing a class action against USAC. Currently, the more than 6,000 registered direct USF contributors, as well as an unknown number of indirect contributors who have paid pass-through charges to their suppliers compose a large potential pool of class members.[16] Unfortu-

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[15] *See* Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report*, CC Docket No. 98-202, p. 4-1 (footnotes omitted) (2005).

[16] *See* UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, FEDERAL UNIVERSAL SERVICE SUPPORT MECHANISMS QUARTERLY CONTRIBUTION BASE FOR THE FIRST QUARTER 2011 , 7 (Dec. 2, 2010) [hereinafter Q1 2011 CONTRIBUTION BASE], *available at* http://www.universalservice.org/about/governance/fcc-filings/2011/Q1/1Q2011%20Contribution%20Base%20Filing.pdf. USAC distributed FCC Form 499-Q notifications to 6,306 carriers in October 2010; USAC included complete revenue data from 3,678 carriers and estimated revenue from past contributors who failed to file

nately, because adverse Commission decisions typically have prospective only application, carriers have little incentive to dedicate the resources necessary to initiate a class action. Moreover, the existing USF system allows carriers to pass through USF fees to end-user customers, shifting the burden of USAC and the WCB's actions to consumers, further stalling any incentive on the part of the industry to collaborate and challenge USAC and the WCB.[17]

This Article will explore these issues. Part II outlines the FCC's rulemaking authority, restrictions on USAC and the WCB's authority and the mandates of the APA. Next, it discusses the USF and USAC's role in administering the Fund. Part III addresses USAC's unlawful rulemaking actions in violation of the APA and its charter, including a discussion of several specific unauthorized actions. It likewise addresses WCB decisions that exceed the scope of its delegated authority and the Commission's acquiescence to USAC and the Bureau's unauthorized actions. The Article offers alternatives to the FCC's inaction, opining on possible implications of USAC's actions and the Commission's inaction. It details the impact on the industry in general, the USF in particular, and possible future consequences. Further, the Article comments on aggrieved parties' potential entitlement to relief for USAC's illegal collection of USF contributions. The Article discusses whether only direct contributors could seek damages, or if indirect contributors should also be entitled to compensation. Part IV concludes with a discussion on the legal ramifications of the Commission and USAC's actions, demonstrating that the Commission has abdicated its statutory duties mandated by Congress, allowing USAC to continue unabated, and denying the public the relief to which it is entitled.

II. THE FCC'S LIMITED DELEGATION OF AUTHORITY TO USAC AND THE WIRELINE COMPETITION BUREAU TO ADMINISTER UNIVERSAL SERVICE PROGRAMS

A. Section 254

Congress opened new markets to competition with the passage of the Tele-

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a 499-Q for the quarter. *Id.*

[17] Exceptions may apply. For instance, large users paying an additional 13% on multi-million dollar communications services may think it worthwhile to challenge the USF regime as many did the federal excise tax on communications services. *See* America Online, Inc. v. United States, 64 Fed. Cl. 571 (2005); Honeywell Int'l, Inc. v. United States, 64 Fed. Cl. 188 (2005); Reese Bros., Inc. v. United States, No. 03-745, 2004 WL 2901579 (W.D. Pa. Nov. 30, 2004); Nat'l R.R. Passenger Corp. v. United States, 338 F.Supp.2d 22 (D.D.C. 2004); Fortis, Inc. v. United States, No. 03-5137, 2004 WL 2085528 (S.D.N.Y. Sept. 16, 2004); Office Max, Inc. v. United States, 309 F.Supp.2d 984 (N.D. Ohio 2004).

communications Act of 1996 ("the 1996 Act")[18]. With competition came the need to reform the FCC's universal service subsidy system, which depended on a Labyrinth of cross-subsidies made possible by the then-existent oligopolistic market.[19] Therefore, in the 1996 Act, Congress "affirmed and expanded" the FCC's responsibility to direct the administration of universal service[20] to ensure that all Americans, in all regions of the nation, would have access to affordable telecommunications and information services.[21]

In so doing, Congress set forth broad directives and guiding principles for the "preservation and advancement" of universal service.[22] Congress also directed the FCC to institute a Joint Board to make recommendations about changes to FCC regulations,[23] and contemplated that the Board and the FCC "might adopt additional principles necessary and appropriate for the protection of the public interest, convenience, and necessity."[24]

Recognizing that, with competition come advances in communications technologies and other developments in business methods,[25] Congress gave the

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[18] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

[19] Competition would make it possible for competitors to serve customers exclusively in lower-cost areas and undercut above-cost rates. *See* S. REP. NO. 103-367, at 34 (1994).

[20] *See In re* Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, *Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45,* 13 F.C.C.R . 25058, 25065-25066, ¶ 14 (Nov. 19, 1998) [hereinafter *USAC Third Report and Order*].

[21] *See* 47 U.S.C. § 254(b)(2)-(3)(2006).

[22] 47 U.S.C. § 254(b)(1)-(6) sets forth the following Universal service principles:

(1) Quality services should be available at just, reasonable, and affordable rates,

(2) Access to advanced telecommunications and information services be provided in all regions of the Nation,

(3) Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas, *see id.* § 254(b)(3)

(4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service,

(5) There be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service, and

(6) Elementary and secondary schools and classrooms, health care providers, and libraries have access to advanced telecommunications services.

[23] 47 U.S.C. § 254(a)(1) (2006).

[24] 47 U.S.C. § 254(b)(7) (2006).

[25] 47 U.S.C. § 254(c) (2006). Though it must be said that even Congress, in all its wisdom, is unlikely to have predicted the pace and scale of the technological "revolution" and upheaval witnessed in the fifteen years since it passed the Act. Nevertheless, the authority to address these changes, regardless of pace or scope, were bestowed primarily upon the FCC.

FCC broad and adaptable authority to make critical public policy decisions. Section 254 of the 1996 Act defines "universal service" as "an *evolving* level of telecommunications services that the Commission *shall establish periodically* under this section, *taking into account advances* in telecommunications and information technologies and services."[26] Congress expected the FCC "periodically" to revisit the definitional scope of services provided under universal service to keep up with these advances.[27]

B. Creation of Universal Service Support Mechanisms

The 1996 Act mandated that the FCC establish "*explicit*," "*specific*," and "*predictable*" universal service support mechanisms so that the resulting support would be "sufficient" to achieve the guiding principles listed in Section 254.[28] Accordingly, the FCC created four support programs; the high cost support program, the rural health care program, the low-income program, and the schools and libraries program. USF support is disbursed to telecommunications service providers through these mechanisms and also in certain instances to Internet service providers in order to meet the statutory goals of universal service specific to each program.[29] According to USAC's website, from 1998 through December 31, 2009, more than $65 billion in universal service funds have been disbursed to eligible service providers, $39 billion via the high cost support program.[30]

Disbursements through all four USF support programs are made from a single Fund comprised of contributions collected from telecommunications providers across the nation.[31] The Communications Act authorizes the Commis-

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[26] 47 U.S.C. § 254(c)(1) (2006) (emphasis added).

[27] *See* 47 U.S.C. § 254(c)(1); *see also* H.R. REP. NO. 104-458, at 142-3 (1996) (Conf. Rep.).

[28] 47 U.S.C. § 254 (a)(1), 47 U.S.C. § 254 (b)(5)(e) (2006) (emphasis added); *see also USAC Third Report and Order*, *supra* note 20, ¶ 14.

[29] Beneficiaries of high cost support must be designated as eligible telecommunications carriers ("ETCs"), and are typically telecommunications carriers serving customers in areas where building a telecommunications network is more costly because of unusual terrain or a sparse population. The rural health care program and its pilot program reimburse providers for telecommunications services and Internet access services provided to eligible rural health care suppliers to support telemedicine initiatives. The low-income support program disburses funds to ETCs each month to reimburse them for the foregone revenue of providing discounted telecommunications services to low-income consumers through Lifeline, Link Up or Toll Limitation Services. The schools and libraries program reimburses telecommunications providers, Internet access providers, and internal connections providers for discounts on certain eligible service provided to schools and libraries. *See* 47 C.F.R. §§ 54.301-54.625 (2010).

[30] *See* Universal Service Fund Facts, UNIVERSAL SERVICE ADMINISTRATIVE COMPANY (June 16, 2010), http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx.

[31] *See* 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate

sion to extend contribution obligations to "any other provider of interstate telecommunications,"[32] and to deem certain classes of telecommunications providers exempt,[33] so long as contributions are "equitable and non-discriminatory."[34] Once the FCC imposes USF liability on a class of carriers, these carriers must contribute a percentage of their projected end-user interstate telecommunications revenues or risk Commission forfeitures or criminal enforcement actions.[35] Contributors may pass these costs on to consumers by charging more for interstate telecommunications services or through a separate line-item surcharges on customer bills.[36]

C. Designation of USAC as Administrator, its Governance and Functions

Congress did not expressly direct the FCC to hand off the day-to-day minis-

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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."); 47 C.F.R. § 54.706 (2010).

32 47 U.S.C. § 254(d) ("Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires."). The FCC has required both common carriers and private service providers to contribute to the USF. *See In re* Federal-State Board on Universal Service, *Report and Order*, 12 F.C.C.R. 9, 183-9, 184, ¶ 795 (May 8, 1997) [hereinafter *Universal Service First Report and Order*]. It has extended contribution obligations to interconnected VoIP providers as well. *See, e.g., In re* Universal Service Contribution Methodology, *Report and Order and Notice of Proposed Rulemaking*, 21 F.C.C.R . 7525-7527, ¶¶ 13-15 (June 27, 2006).

33 *See* 47 U.S.C. § 254(d) (providing that the FCC "may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis").

34 47 U.S.C. § 254(d) (2006).

35 *See* 47 C.F.R. § 54.713 (2010); 47 U.S.C. § 503(b)(1) (2010); Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Board on Universal Service, 62 Fed. Reg. 41294, 41301, ¶ 40 ("Failure to file the Telecommunications Reporting Worksheet or to submit required contributions may subject the contributor to the enforcement provisions of the Act and any other applicable law. The permanent administrator or USAC will advise the Commission of any enforcement issues that arise and provide any suggested response."). *See, e.g., In re* Globalcom, Inc., *Notice of Apparent Liability for Forfeiture*, 25 F.C.C.R . 3479, 3482-3483, ¶¶ 1-2, 9-11 (2010) (finding that Globalcom had willfully and repeatedly failed to make timely and accurate disclosures and contributions); *In re* Telrite Corporation, *Notice of Apparent Liability for Forfeiture and Order*, 23 F.C.C.R . 7231, ¶ 1 (2008) (imposing liability for forfeiture for underreporting interstate revenues and failing to contribute fully to the Fund).

36 47 C.F.R. § 54.712(a) (2010) ("Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recovers 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.").

terial functions associated with managing universal service to a separate entity. However, because the FCC had used the National Exchange Carrier Association ("NECA") to manage the universal service support mechanisms prior to the 1996 Act, the FCC found no "statutory impediment" or prohibition to using an independent entity to administer the universal service programs.[37] The FCC found Congressional acquiescence to the FCC's designation of a separate entity to perform these administrative functions "implicit" in the 1996 Act's statutory provision.[38]

Thus, in 1997, the Commission designated an independent, not-for-profit subsidiary of NECA to be the administrator of the universal service mechanisms, and made that designation permanent one year later.[39] The corporation, USAC, was tasked with universal service functions for all of the programs. The FCC believed that consolidating all of the administrative functions within a single entity would "establish[] *clear lines of accountability*."[40]

1. USAC Governance and Structure

These intended lines of accountability run deep into the governance of USAC. The FCC designated that USAC be composed of leaders from various sectors to "assure significant industry-wide representation in the administration of the universal service support mechanisms."[41] Accordingly, USAC is managed by a 19-member board of directors representing a variety of universal service constituents.[42] These interest groups include sectors of the telecommu-

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37 *See USAC Third Report and Order*, *supra* note 20, ¶ 14.

38 *See id.*

39 At the outset, the support programs were administered by different subsidiaries of NECA, but in 1998, in connection with supplemental appropriations legislation enacted on May 1, 1998, Congress directed the FCC to consolidate administrative responsibilities over all of the universal service support mechanisms within a single entity. Accordingly, in 1998, the FCC followed Congressional guidance and vested all administrative responsibilities for universal service support programs within USAC, still an independent not-for-profit private corporation. In a May 8, 1998, Report to Congress, the Commission proposed that USAC would serve as the single entity responsible for administering all of the universal service support mechanisms, subject to FCC oversight. *See USAC Third Report and Order*, *supra* note 20, ¶ 16.

40 *See USAC Third Report and Order*, *supra* note 20, ¶ 12 (emphasis added).

41 *See USAC Order*, *supra* note 4, ¶ 1. The FCC wanted to safeguard against one sector of the industry being favored over another. *See id.*, ¶ 29 ("USAC's Board will be comprised of diverse participants representing a wide variety of industry and beneficiary interests and, therefore can be expected to ensure that USAC will be operated in a competitively neutral and unbiased manner.").

42 *See USAC Order*, *supra* note 4, ¶ 25. *See* 47 C.F.R. § 54.703(b) (2010) (describing the board's composition). The directors are nominated by their respective interest groups and approved by the Chairman of the FCC. If an industry or non-industry group fails to nominate a candidate, the Chairman of the FCC may select the representative for that group.

nications and information services industry, state telecommunications regulators, state consumer advocates, low-income consumers, the education and library community, and the USAC Chief Executive Officer. Three members of the board represent Incumbent Local Exchange Carriers ("ILECs"), two directors represent Interexchange Carriers ("IXCs"), three represent eligible schools, one represents eligible libraries, two represent eligible rural health care providers, seven represent each of the following telecommunications and information industry sectors: wireless providers, competitive local exchange carriers, cable operators, information service providers, low-income consumers, state telecommunications regulators, state consumer advocates. To ensure that USAC remains "directly accountable" to the Commission, the Commission may remove one or more directors if USAC violates FCC rules or if its administrative expenses are unreasonable.[43] The Board of Directors may establish committees to oversee the support mechanisms,[44] but the Board may not "substantially [alter] the power or authority of the committees without prior FCC approval." [45]

2. Public Accountability of USAC

The Commission also addressed public accountability, as USAC was selected under the Federal Advisory Committee Act (the "FACA")[46] which, among other things, requires that administrative proceedings and hearings be public knowledge.[47] USAC accordingly is required to hold open meetings to allow public input and promote accountability.[48] Board meetings are also required to be open to the public.[49]

The FCC has charged USAC with administering the universal service support mechanisms "in an efficient, effective, and competitively neutral manner."[50] The specific functions and responsibilities of USAC are delimited in Part 54 of the FCC's regulations and include: [51]

See 47 C.F.R. § 54.703(c) (2010). Directors serve for staggered three-year terms. *See* 47 C.F.R. § 54.703(d) (2010).

43 *See USAC Order*, *supra* note 4, ¶ 41.

44 *See, e.g.*, 47 C.F.R. § 54.705(a)(1) (2010) (describing the oversight committee functions for the school and libraries committees); 47 C.F.R. § 54.705(b)(1) (describing the oversight functions for the rural health care committee).

45 47 C.F.R. § 54.701(b) (2010).

46 Federal Advisory Committee Act, 5 U.S.C. App. 2 (2010).

47 *See* Federal Advisory Committee Act, 5 U.S.C. App. 2 § 10 (2010); *see USAC Order*, *supra* note 4, ¶ 59.

48 *See* 47 C.F.R. § 54.703(e) (2010) ("All meetings of the Administrator's Board of Directors shall be open to the public and held in Washington, D.C.").

49 *See id.*; *USAC Order*, *supra* note 4, ¶¶ 71-72.

50 47 C.F.R. §54.701(a) (2010).

51 *See USAC Order*, *supra* note 4, ¶ 42; 47 C.F.R. § 54.702(b). *See* Part II for a more

(1) collection of information regarding contributing entities' end-user telecommunications revenues;

(2) calculation of quarterly universal service contribution factors;[52]

(3) calculation of individual entities' contributions;

(4) billing of contributors; and

(5) receipt of universal service contributions.

USAC also has responsibility for data collection and the authority to audit contributors and carriers reporting data to USAC.[53] USAC conducts random audits of recipients of funds from each of the four programs as well as contributors.[54] Audits may be performed by USAC audit staff, offices of another agency, or by a contractor, such as a national accounting firm.[55] The costs associated with such audits are among the administrative expenses covered by the Fund.[56]

3. Limits and Oversight of USAC

In keeping with Congressional intent,[57] the FCC established clear limits on

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detailed description of USAC's delegated functions. The contours of USAC's ministerial role in administering universal service mechanisms are also outlined in a memorandum of understanding between USAC and the FCC. *See* Memorandum of Understanding between the Federal Communications Commission and the Universal Service Administrative Company, (Sept. 9, 2008), *available at* http://www.fcc.gov/omd/usac-mou.pdf.

[52] The contribution factor is based on a ratio of the quarterly costs of the support mechanisms, including administrative expenses, to the projected sum of proposed universal service contribution base (subject to funding caps). Administrative expenses may include "but are not limited to, salaries, equipment costs, costs associated with borrowing funds, operating expenses, directors' reimbursement for expenses, and costs associated with auditing contributors or support recipients, should be commensurate with the administrative expenses of programs of similar size." *USAC Order*, *supra* note 4, ¶ 78. *See also* 47 C.F.R. § 54.715 (2010).

[53] *See* 47 C.F.R. § 54.707 (2010) (USAC "shall establish procedures to verify discounts, offsets, and support amounts provided by the universal service support programs, and may suspend or delay discounts, offsets, and support amounts provided to a carrier if the carrier fails to provide adequate verification of discounts, offsets, or support amounts provided upon reasonable request, or if directed by the Commission to do so.").

[54] *See* "Understanding Audits," USAC, *available at* http://www.usac.org/fund-administration/about/understanding-audits.aspx.

[55] *See* "Audits of Beneficiaries Fact Sheet," USAC, *available at* http://www.universalservice.org/sl/about/audits/audit-fact-sheet.aspx.

[56] *See* 47 C.F.R. § 54.715(a) (2010); *see also* USAC 1Q2011 Budget, available at http://www.universalservice.org/about/governance/fcc-filings/2011/quarter-1.aspx.

[57] The FCC interpreted the Congressional intent that all administrative functions be consolidated within a single entity. Specifically, it interpreted language in the Senate's amendment of H.R. 3579, finding that Congress intended that the single entity that would administer universal service support mechanisms would not be permitted to "administer the programs in any manner that requires that entity to interpret the intent of Congress in estab-

USAC's authority.[58] Despite the number of functions that the FCC has assigned to USAC to administer the universal service support mechanisms, those "responsibilities are conditioned on its compliance with Commission rules and orders" such as the FCC's universal service rules, audit requirements and coordination with staff and filing of projected expenses.[59] "In addition, the Commission will continue to oversee the structure and content of the annual independent audit that USAC is required to undertake."[60] USAC acknowledges, as well, that it remains subject at all times to FCC oversight, rules, regulations, and guidance.[61]

These rules and regulations also prohibit USAC from stepping into a policy-making role.[62] In designating USAC as the single entity that would administer all of the federal universal service support mechanisms, the FCC emphasized that USAC's function is to be *exclusively administrative*; USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.[63] Furthermore, USAC may advocate positions before the Commission and Commission staff only on administrative matters relating to the universal service support mechanisms.[64]

The FCC has provided affected parties multiple avenues for review of USAC decisions. Parties may appeal decisions by divisions of USAC to a USAC committee, the Board, or the Administrator. The FCC acknowledged

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lishing the programs or interpret any rule promulgated by the Commission in carrying out the programs, without appropriate consultation and guidance from the Commission." *USAC Third Report and Order*, *supra* note 20, at 25066, ¶ 15 and n.41 (quoting H.R. 3579, 105th Cong. § 2005(b)(2)(a)(ii) (1998)).

[58] *See USAC Third Report and Order*, *supra* note 20, ¶¶ 15-17. *See also* 47 C.F.R. § 54.701(a) (2010) ("The Universal Service Administrative Company is appointed the permanent Administrator of the federal universal service support mechanisms, subject to a review after one year by the Federal Communications Commission to determine that the Administrator is administering the universal service support mechanisms in an efficient, effective, and competitively neutral manner.").

[59] *See USAC Third Report and Order*, *supra* note 20, ¶ 17.

[60] *Id.*

[61] *See* UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, USAC 2009 ANNUAL REPORT 2 (2009) (stating that "USAC administers the Universal Service Fund (USF) . . . under terms defined by the Telecommunications Act of 1996 as well as regulations, orders and directives issued by the Federal Communications Commission . . . ."), *available at* http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2009.pdf.

[62] *See* 47 C.F.R. § 54.702(c) (2010) ("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."); *USAC Third Report and Order, supra* note 20, ¶ 16. *See also* By-Laws of Universal Service Administrative Company, http://www.usac.org/_res/documents/about/pdf/usacbylaws.pdf (last visited May 14, 2011).

[63] 47 C.F.R. § 54.702(c) (2010).

[64] *USAC Third Report and Order*, *supra* note 20, ¶ 16. *See also* 47 C.F.R. §§ 54.702(c)-(d) (2010).

that adequate oversight requires an expedited review process.[65] Thus, parties have the choice to take their appeals straight to the Commission.[66] The WCB has delegated authority to act on appeal only in cases that do not raise novel issues of fact, law, or policy. .[67] Once the Bureau has acted, parties may file a petition for review by the Commission.[68] Unless otherwise extended by the Bureau or the Commission, FCC rules provide that the Bureau or the Commission must take action within 90 days.[69]

Because the FCC has recognized that it has "ultimate responsibility over the universal service support mechanisms,"[70] the FCC reviews appeals of USAC decisions *de novo*.[71] Thus, the Commission accords no deference to USAC in reviewing its decisions. The Commission has stated that it will not automatically uphold a USAC decision without review just because USAC was found to be acting within its authority.[72]

When the FCC designated USAC as the single entity that would handle the day-to-day administrative functions of universal service support mechanisms, it made absolutely clear:

> The Commission *retains ultimate control* over the operation of the federal universal service support mechanisms through its authority to establish the rules governing the support mechanisms and through its review of administrative decisions that are ap-

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[65] *See USAC Third Report and Order, supra* note 20, ¶ 66. In adopting the process for review of USAC decisions, the FCC agreed that parties affected by decisions at any level within USAC should have the right to appeal directly to the Commission. The FCC found that:

Commission oversight will be strengthened by an appeals process that ensures that matters are brought promptly to the Commission. Requiring affected parties to seek review from a Committee of the Board or the full USAC Board in the first instance might cause unnecessary delay in the appeals process without . . . any identifiable benefit.

Id.

[66] All appeals must be filed within 60 days. 47 C.F.R. § 54.720 (2010).

[67] *See* 47 C.F.R. § 54.722(b). *See, e.g.,* 47 C.F.R. § 0.291(a)(2) (2010); 47 C.F.R. § 54.722(a) (2010) ("Requests for review of Administrator decisions that are submitted to the Federal Communications Commission shall be considered and acted upon by the Wireline Competition Bureau; provided, however, that requests for review that raise novel questions of fact, law or policy shall be considered by the full Commission."; *In re* Federal-State Joint Board on Universal Service, *Third Report and Order*, 12 F.C.C.R . 22485, 22488-89, ¶ 6 (Oct. 10, 1997); *USAC Third Report and Order, supra* note 20, ¶ 68.

[68] 47 U.S.C. § 155(c)(1)(2010); 47 C.F.R. § 1.115(a) (2010).

[69] *See* 47 C.F.R. § 54.724(a) (2010).

[70] *USAC Third Report and Order, supra* note 20, ¶ 69.

[71] 47 C.F.R. § 54.723(b) (2010). *See also USAC Third Report and Order, supra* note 20, ¶ 69.

[72] *USAC Third Report and Order, supra* note 20, ¶ 69 ("USAC decisions, whether considered by the Bureau or the Commission, should be subject to de novo review. Accordingly, we decline to adopt USAC's and SLC's recommendation that the Commission uphold USAC decisions without considering the merits of the appeal if the Commission finds that USAC has not exceeded its authority and has acted consistently with the Commission's rules . . . .").

pealed to the Commission.[73]

The FCC has never relinquished its own paramount responsibility to make policies and direct the administration of universal service,[74] *nor could it.* Although the Commission's rules state that the FCC reviews appeals of USAC decisions *de novo*, courts have held that "vague or inadequate assertions of final reviewing authority [cannot] save an unlawful sub-delegation."[75]

The unlawful administrative sub-delegation doctrine prohibits a federal entity from delegating decision-making authority to "outside entities–private or sovereign–absent affirmative evidence of authority to do so."[76] Whereas agency sub-delegation of authority to a subordinate entity, such as the WCB, is presumed valid absent a showing of contrary Congressional intent;[77] and relying on an outside entity for non-discretionary tasks like fact-gathering or compiling technical information has been held to be permissible, even desirable;[78] delegating *decision-making* authority to an outside entity, such as USAC, is "assumed to be improper absent an affirmative showing of congressional authorization."[79]

In *USTA*, the FCC argued for the opposite proposition. It asserted that because a statute did not expressly *foreclose* the option to sub-delegate its statutory authority, the FCC delegation of certain Section 251 decision-making authority to the states was presumptively valid. The court disagreed:

Delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of *policy drift* inherent in any principal-agent relationship.[80]

As noted above, the FCC found no statutory *impediment* in Section 254 to its designation of USAC as USF administrator, but that does not make the del-

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73 *USAC Third Report and Order*, *supra* note 20, ¶ 17 (emphasis added).

74 *See generally* 47 U.S.C. § 254 (a)(2) (2006).

75 *See* United States Telecom Ass'n. v. FCC, 359 F.3d 554, 568 (D.C. Cir. 2004) (referencing the sub-delegation doctrine as it developed in Nat'l Park & Conservation Ass'n v. Stanton, 54 F.Supp.2d 7, 19 (D.D.C. 1999)).

76 United States Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004).

77 *See* United States v. Giordano, 416 U.S. 505, 512-13 (1974); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 121-122 (1947); United States v. Mango, 199 F.3d 85, 90-91 (2d Cir. 1999); Halverson v. Slater, 129 F.3d 180, 185-186 (D.C. Cir. 1997); Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 702-703 (9th Cir. 1996); United States v. Widdowson, 916 F.2d 587, 592 (10th Cir. 1990), *vacated on other grounds*, 502 U.S. 801 (1991); United States v. Giordano, 416 U.S. 505, 512-514 (1974).

78 *See* Nat'l Ass'n of Psychiatric Treatment v. Mendez, 857 F. Supp. 85, 91 (D.D.C.1994) (finding nothing improper with the delegation of authority consistent with the statute).

79 United States Telecom Ass'n, 359 F.3d at 565.

80 *Id.* at 565-66 (citations omitted) (emphasis added).

egation presumptively valid. To mitigate the risk that USAC will take actions that are "inconsistent with those of the agency and the underlying statutory scheme,"[81] the FCC must remain at the helm and steer universal service policy.

D. Limits on FCC's Authority

The scope of the FCC's responsibility over USF policy is fairly expansive, but not limitless. It must adhere to the principles for the advancement and preservation of universal service that Congress set forth in Section 254.[82] The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it."[83]

Importantly, as with all administrative agencies of the federal government, the FCC's actions are governed and restricted by the Administrative Procedure Act ("APA").[84]

Modifications of FCC rules that effect substantive changes are subject to the notice and comment rulemaking requirements of the APA.[85] The notice requirement "improves the quality of agency rulemaking" by exposing regulations "to diverse public comment" ensures "fairness to affected parties," and provides a well-developed record that "enhances the quality of judicial review."[86]

The APA also establishes the process for federal courts to review agency

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[81] *Id.* at 566.

[82] *See* 47 U.S.C. § 254(b) (2006) (providing an overview of USF principles).

[83] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). *See also* Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001); Am. Library, 406 F.3d 689, 691 (D.C. Cir. 2005) ("[A]dministrative agencies may [act] only pursuant to authority delegated to them by Congress.").

[84] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). The APA applies to every agency, or authority, of the United States, with certain specified exceptions such as the Congress and the courts. *See* 5 U.S.C. § 551(1) (2010). The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1) (2010). The basic purposes of the APA are:

(1) to require agencies to keep the public informed of their organization, procedures and rules;

(2) to provide for public participation in the rulemaking process;

(3) to establish uniform standards for the conduct of formal rulemaking and adjudication;

(4) to define the scope of judicial review.

TOM C. CLARK, U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

[85] 5 U.S.C. §§ 552(a), 553(b); Sprint Corp. v. FCC, 315 F.3d 369, 373-374 (D.C.Cir 2003) (distinguishing rulemaking from clarification of existing rules).

[86] Small Refiner Lead Phase-Down Task Force, et. al, v. U.S. EPA, 705 F.2d 506, 547 (D.C.Cir. 1983) (citations omitted).

decisions.[87] Until the FCC has issued a final order, however, parties have nothing to appeal, and the court lacks jurisdiction to hear the appeal.[88] Any petition for review of non-final agency action is incurably premature.[89]

Thus, until the FCC acts on a petition for review of a USAC decision, there is no order from which a party could take an appeal. Still, if the agency fails to make a decision, judicial remedies are available to compel agency action. The APA mandates that agencies decide matters in a reasonable time,[90] and Congress has instructed courts to compel agency action that has been unreasonably delayed.[91] Once a proceeding has been instituted with an agency that might lead to an appeal, courts may issue writs of mandamus to compel agency action and to preserve the court's prospective jurisdiction.[92]

III. USAC HAS CREATED AND ENFORCED MULTIPLE SUBSTANTIVE MEASURES IN VIOLATION OF FCC REGULATIONS, THE COMMUNICATIONS ACT, AND THE ADMINISTRATIVE PROCEDURE ACT

The FCC has not acted on a number of appeals of USAC decisions that relate to funding years going back almost a decade. This Part discusses a few examples of these appeals and identifies the degree to which USAC is effectuating policy changes via audits and technicalities, policy changes that should be made through a notice-and-comment rulemaking proceeding. This Part discusses not only the unreasonable passage of time since these appeals were filed, but also the industry-wide impact of the matters brought before the Commission. The FCC's inaction with regard to the issues raised in these appeals persists despite the FCC's own insistence on the importance of timely review of USAC decisions[93] and its duty under the APA to act within a reason-

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87 *See* 5 U.S.C. § 706 (describing the courts' scope of review). *See* also 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *see also* 47 U.S.C. § 402(b).

88 Under the APA, aggrieved parties can appeal *final* orders of the FCC to a court *See* Council Tree Commc'ns Inc., v. FCC, 503 F.3d 284, 287 (3d Cir. 2007).

89 *See* Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002).

90 *See* 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.").

91 *See* 5 U.S.C. § 706(1) (the reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed"). The D.C. Circuit has found it beyond dispute that it has jurisdiction over claims of unreasonable FCC delay. *See* Telecom Research & Action Ctr v. FCC (*TRAC*), 750 F.2d 70, 76 (D.C. Cir. 1984).

92 *See, e.g., TRAC*, 750 F.2d at 76.

93 *See USAC Third Report and Order*, *supra* note 20, ¶ 66.

able time.[94]

The subject of many of these appeals, paradoxically, is the need for stricter FCC oversight of USAC. These appeals seek to rein in USAC's misuse of its limited functions, and to stop the Commission and its subordinate Bureau from allowing USAC's actions to serve as a proxy for substantive rule changes. USAC has abrogated to itself the role of establishing, implementing and enforcing modified universal service reporting and contribution requirements. These modifications are substantive in nature and effect and should have been made by the FCC, if at all, after a notice-and-comment rulemaking proceeding.

As detailed in Part I, pursuant to its FCC charter, USAC is permitted to carry out the day-to-day functional tasks necessary to administer the four universal service support programs.[95] The permissible USAC functions are limited to "billing contributors, collecting contributions . . . and disbursing universal service support funds."[96] USAC is not expected, or even *permitted,* to make judgment calls; if FCC rules do not address an issue with particularity, USAC must promptly direct the question to the Commission.[97] Timely guidance is necessary because, as the FCC has recognized, its own rules might not keep pace with rapid changes in the telecommunications industry:

> *[A] specific rule may never be specific enough to adequately address all situations. In addition, a specific rule may not remain perfectly up-to-date, especially in such a dynamic industry as telecommunications, e.g., changes in technology, corporate struc-*

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[94] *See* 5 U.S.C. § 555(b) (2006) (stating each agency will conclude matters "within a reasonable time").

[95] *See In re* 1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, CC Docket 98-171, *Report and Order*, 14 F.C.C.R. 16602, ¶ 1 (1999) [hereinafter *Consolidated Reporting Order*]

> ([W]e direct the Universal Service Administrative Company (USAC) to be responsible for administration, processing, and management of future filings of the Telecommunications Reporting Worksheet and for the distribution of essential contributor revenue data to the administrators of the: (1) Telecommunications Relay Services Fund; (2) the cost recovery mechanism for numbering administration; (3) the cost recovery mechanism for long-term local number portability; and (4) the universal service support mechanisms. These actions ensure that the administrators of these support and cost recovery mechanisms will each have access to reliable and timely data on which to base contributions to these mechanisms and that filers of the consolidated Telecommunications Reporting Worksheet will be able to file only one copy of their completed worksheets).

Id.

[96] *See* 47 C.F.R. § 54.702 (2010) (listing the "[a]dministrator's functions and responsibilities").

[97] *See* 47 C.F.R. § 54.702(c) (2010) (stating that USAC may not make policy or interpret statutes or rules and if the Act or the rules are unclear USAC "shall seek guidance from the Commission").

> *tures, etc.* We recognize the need of an administrator to be able to effectively implement our rules in such a fast-changing environment.[98]

The Commission has advised that *anyone*, not just USAC, may request guidance from the Commission, or its subordinate Bureau, at any time.[99] As experience has proven and as detailed herein, however, actually receiving guidance in a timely manner—if at all—has proven elusive.

USAC has expressed that drawing the line between a purely administrative matter and a policy matter that should be brought before the Commission is a difficult task.[100] Yet the rules are clear; if USAC tries to interpret existing rules to apply them to new factual situations without first seeking guidance, USAC has acted beyond its authority.[101]

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[98] *In re* the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight, *Notice of Inquiry*, 23 F.C.C.R. 13583, ¶ 30 (2008) (emphasis added).

[99] *Id.* ¶ 3. The FCC has designated the Bureau to be the "primary point of contact" on any questions USAC (or other interested parties) might have about how to apply FCC rules and communications laws to particular situations. *See id.*

[100] *See In re* Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., *Comments of Universal Service Administrative Company* (USAC), WC Docket No. 05-195, CC Docket 96-45 (filed Oct. 18, 2005) (*available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6518170574); In *re* Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 11308, ¶ 50 (June 14, 2005).

[101] A Memorandum of Understanding between the FCC and USAC reflects an effort on the part of both parties to "codify" a formal process for seeking Commission guidance when required. *See* MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY (June 4, 2007); MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY (Sept. 9, 2008) (MOU) (*available at* http://transition.fcc.gov/omd/usac-mou.pdf). The MOU provides, in Part L:

> In any situation in which USAC intends to seek guidance from the Commission pursuant to section III.A of this MOU, USAC shall first inform the WCB Chief of USAC's intent to do so during the course of regular meetings between Commission Bureau or Office Chiefs or their respective designees, including at a minimum the WCB Chief or his/her expressly authorized designee(s), and USAC officers (including at least one of the following USAC officers: the Chief Executive Officer, the Chief Operating Officer, or the General Counsel). If, subsequent to such a meeting, USAC intends to seek Commission guidance, USAC shall do so by formally requesting guidance in a letter or other written submission to the WCB Chief his/her expressly authorized designee. Any USAC letter or other written submission requesting guidance shall be signed by the USAC Chief Executive Officer, Chief Operating Officer, or General Counsel. The Commission or its appropriate official (acting through delegated authority) shall respond in writing to USAC's request for

The limits on USAC's decision-making authority are far stricter than the APA's "substantive/procedural" distinction between rulemakings that require a notice-and-comment process and those that do not. For example, under the APA, interpretive rules that do not alter the rights or interests of parties fall within a procedural exception to the notice-and-comment process.[102] USAC is not permitted to even "interpret" the statute or rules, but must leave that to the Commission. In other words, USAC's actions do not need to rise to the level of a substantive rule change requiring notice-and-comment before they become *ultra vires*.

USAC has entered into gray areas without seeking FCC guidance. The Bureau, like USAC, lacks authority to engage in rulemaking.[103] Yet despite these clearly defined limits on their respective authority, as illustrated below, USAC has effectuated policy changes under the guise of technical application of preexisting rules, and the Bureau has given its stamp of approval to these actions over the course of the past decade.[104] Left to its own devices, USAC has had to make judgment calls about whether new technologies and services fit within preexisting categories, even when existing FCC rules do not "address [the] particular situation."[105]

At minimum, USAC's actions constitute impermissible interpretation of FCC rules and the Act, violating the terms of its charter and FCC regulations. At worst, to the extent that USAC's actions have imposed new duties and obligations on carriers, USAC's actions constitute impermissible rulemaking in violation of the APA and Commission rules.

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guidance.

It is worth highlighting the glaring absence of such procedures prior to the June 4, 2007 MOU. For as will be shown, many pending appeals now before the FCC have their genesis in USAC decisions which predate the MOUs.

[102] The procedural exception covers agency actions that do not themselves alter rights or interests of parties, such as "agency housekeeping rules." *See* Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980); JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320, 328 (D.C. Cir. 1994); 5 U.S.C. § 553(b)(3)(A) (2006).

[103] Commission rules do not permit the Bureau to engage in rulemaking. *See* 47 C.F.R. § 0.291(e) (2010).

[104] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-546T, APPLICATION OF THE ANTIDEFICIENCY ACT AND OTHER FISCAL CONTROLS TO FCC'S E-RATE PROGRAM 16 (2005); Wireline Competition Bureau Announces Release of the 2009 Form 499-Qand Accompanying Instructions, *Public Notice*, DA 09-817 (Apr. 10, 2009) (adding multi-protocol label switching and audio bridging services to reporting categories).

[105] 47 C.F.R. § 54.702(c) (2010).

A. The Telecommunications Reporting Worksheet and Instructions—FCC Form 499-A

USAC and the Bureau have overstepped the bounds of their delegated authority most significantly by making substantive changes to the instructions to the Telecommunications Reporting Worksheet, FCC Form 499. Even though the instructions themselves are not rules,[106] USAC has characterized the instructions as "binding" as if they have the force of rules.[107] USAC does this by basing audit findings on asserted failures to follow form instructions.[108] As a consequence, changes to the instructions have the practical effect of altering the regulatory obligations of almost all telecommunications carriers and service providers.[109] Contributors face severe potential penalties for failures to file and contribute.[110]

Indeed, the scope of harmful consequences arising from USAC's misdeeds

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[106] The instructions to Form 499 make clear that the information contained in them is not "intended to serve as legal guidance or precedent." Instead, the instructions refer filers to *FCC rules* to determine their contribution obligations. *See* Telecommunications Reporting Worksheet, FCC Form 499-A (2010), Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms, at n.58 (revised Feb. 2010), *available at* http://www.fcc.gov/Forms/Form499-A/499a-2010.pdf.

[107] USAC has rejected the "contention that the Instructions are merely guidance . . . Indeed, in nearly every instance, the Instructions can be traced to the FCC's rules or applicable precedent. . . . The FCC has consistently treated the instructions as binding. *See In re* XO Communication Services, Inc., Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122, at vi (Dec. 29, 2010) (accessible via FCC Electronic Comment Filing System) (quoting USAC decision; internal quotations omitted). *But see In re* Matter of Universal Service Contribution Methodology Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP, *Order*, 25 F.C.C.R. 14533, ¶ 8 (Oct. 19, 2010) [hereinafter *NetworkIP Order*] (referring to the instructions as "guidance").

[108] *See id.; In re* Request for Review of Decision by the Universal Service Administrator by IDT Corporation, WC Docket No. 96-45 (Apr. 10, 2006) [hereinafter IDT Petition 1].

[109] *See* 47 C.F.R. §§ 54.711, 54.713. In 2006, the FCC extended the annual reporting requirement to interconnected VoIP providers. *See* Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, *Report and Order and Notice of Proposed Rulemaking and Report and Order*, 21 F.C.C.R. 7518 (2006).

[110] *See* 47 C.F.R. § 54.713 (2010); 47 C.F.R. § 54.711(a) (2010) (FCC or USAC "may verify any information contained in the Telecommunications Reporting Worksheet . . . Inaccurate or untruthful information contained in the Telecommunications Reporting Worksheet may lead to prosecution under the criminal provisions of Title 18 of the United States Code.").

extends well beyond the universal service program. In its capacity as the data collection agent for various other FCC programs,[111] USAC's reliance on the Form 499 instructions has also materially altered regulatory obligations and even statutory duties vis-à-vis a wide variety of programs and regulatory schemes unrelated to universal service.[112] In fact, even entities which are not subject to the long-arm jurisdiction of the United States have felt the impact of USAC abuses.[113]

FCC Form 499 and its accompanying instructions specify the types of revenue contributors must disclose, and how those revenues must be classified into categories of assessable revenue and other revenue.[114] Assessable revenue, according to FCC rules, primarily consists of end-user interstate telecommunications revenues.[115] The form also treats as end-user revenues, revenues from

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[111] *See FCC Form 499-A and Instructions*, http://www.fcc.gov/formpage.html. The problems discussed in this section arising from the FCC's deferral to USAC's interpretation of contributor disclosure requirements extend beyond universal service to other programs. USAC also acts as the FCC's data collection agent for other funds, including interstate Telecommunications Relay Service (TRS), administration of the North American Numbering Plan (NANP), and shared costs of local number portability (LNP). As discussed in this section, USAC's Form 499 A does not exempt companies who clearly do not act as "common carriers" from making disclosures and contributions on the basis of being a "private" or non-common carrier. Thus it is possible that non-common carriers, either directly or indirectly, have been required to make contributions to these programs.

[112] *See* Petition of the Ad Hoc Coalition of International Telecommunications Companies' Petition for Declaratory Rulings that: (1) Qualifying Downstream Carriers May Choose Either to Accept Supplier Pass-through Surcharges or Pay Universal Service Fees Directly; and (2) Prepaid Calling Card Providers' Distributor Revenues are Not "End-user" Revenues and Allowing Reporting of Actual Receipts Only, or in the Alternative, to Initiate a Rulemaking to Address these Issues, WC Docket No. 06-122, at 4 (Feb. 12, 2009) [hereinafter First Ad Hoc Coalition Petition] (accessible via FCC Electronic Comment Filing System) (implying that USAC instructions applicable to prepaid calling card services impute "common carrier" status on otherwise private service providers, thus exposing a class of providers to a host of regulatory obligations arising under Title II of the Act, including, but not limited to the duty to contribute to the Telecommunications Relay Services fund).

[113] *See* Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings that: (1) the Universal Service Administrative Company Lacks Authority to Indirectly Assess Universal Service Fund Fees on International Only Providers and (2) the FCC Lacks Jurisdiction Over Certain Non-U.S. International Providers, or, in the Alternative to Initiate a Rulemaking Proceeding to Examine These Issues, WC Docket No. 06-122, 11-12 (Sept. 4, 2009) [hereinafter Second Ad Hoc Coalition Petition], *available at* http://ecfsdocs.fcc.gov/filings/2009/09/04/6015189422.html. ("The FCC's regulatory jurisdiction is not unlimited nor is it boundless. The FCC may neither circumvent its jurisdictional limits nor the long-arm jurisdictional limits of the United States government by enlisting intermediaries, such as USAC and those corporations over which it does exercise jurisdiction, to do its bidding on its behalf.").

[114] *See FCC Form 499-A and Instructions*, FCC, http://www.fcc.gov/formpage.html.

[115] *See* 47 C.F.R. § 54.706(b) (2010) (noting that contributors "shall contribute on the basis of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions"). *See also* 47 C.F.R. § 54.706(c) (providing exemption from assessment on international revenue where interstate end-user revenues com-

sales to *de minimis*[116] resellers, end-user customers, governments,[117] non-profits, and other non-contributors, such as revenues from end users and telecommunications providers that will not, themselves, make contributions into the Fund.[118] Filers must separately disclose revenue that is not assessable, including: intrastate revenues and "carrier's carrier" revenues,[119] more commonly referred to as wholesale revenues.

The FCC has delegated limited authority to the WCB with respect to disclosures contributors must make. FCC rules allow the Bureau to "waive, reduce, modify, or eliminate reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms."[120] The Bureau does not have authority to make *substantive* changes to reporting requirements that would affect the underlying support programs; it may only effectuate administrative changes to the reporting requirements, such as "where and when worksheets are filed."[121]

The decision whether to extend contribution obligations to other classes of carriers,[122] or indeed to impose duties on otherwise unreachable entities through indirect means,[123] are substantive changes affecting the rights and in-

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prise less than 12% of combined projected collected interstate and international revenues); *but see In re* Federal State Joint Board on Universal Service, *Report and Order*, 12 F.C.C.R. 8776, ¶¶ 842-857 (May 8, 1997).

[116] *See* 47 C.F.R. § 54.708 (2010) (explaining the *de minimis* exemption for entities whose universal service contribution would be less than $10,000 in a given year).

[117] *But see* In re Matter of Federal State Joint Board on Universal Service, 12 F.C.C.R. 8776, ¶ 800 (May 8, 1997) ("[I]f an entity exclusively provides interstate telecommunications to public safety or government entities and does not offer services to others, that entity will not be required to contribute.").

[118] *See* 47 C.F.R. § 54.711 (describing the contribution reporting requirements into the fund); *see also* FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, UNIVERSAL SERVICE MONITORING REPORT IN CC DOCKET NO. 98-202, at Table 1.1 (Oct. 2001).

[119] Those revenues billed to universal service contributors for resale. FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, UNIVERSAL SERVICE MONITORING REPORT IN CC DOCKET NO. 98-202, at 1-2, 1-7 (Oct. 2001)

[120] 47 C.F.R. § 54.711(c) (2010).

[121] *See also* 1998 Biennial Regulatory Review–Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, *Report and Order*, 14 F.C.C.R. 16,602, ¶¶ 39-40 (July 14, 1999).

[122] *See* 47 U.S.C. § 254(d) (2010) (providing that "[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires").

[123] *See* Second Ad Hoc Coalition Petition, *supra* note 113, at 11.

terests of parties, necessitating that the FCC provide an opportunity for those affected to weigh in on the decision.[124] What has happened instead is a "policy drift," as USAC extends its reach to more and more entities, carrier or other, through instructions, which are enforced by threat of audit, FCC enforcement, and other coercion.[125]

B. The Carrier's Carrier Rule

Of the many harms arising from USAC's *ultra vires* decisions, embodied in the Form 499 Instructions, perhaps the most significant and far-reaching arise from the so-called "Carrier's Carrier Rule" ("CCR")[126] As noted above, the FCC's rules specifically limit each carrier's contribution liability to end-user revenues and exclude wholesale revenues, such as revenues from resellers.[127] This is known throughout the industry as the carrier's carrier rule. The FCC devised this rule to avoid duplicative contributions from both wholesalers and retailers.[128] Essentially, the CCR is a supply chain enforcement mechanism ensuring that upstream providers of telecommunications require resellers and other carrier customers to offer proof of exemption from pass-through USF surcharges, typically through a USF exemption certificate.[129]

The CCR has been unofficially part of the Commission's rules from the beginning of the USF reporting requirements,[130] but up until 2004, rules governing reporting and contribution only required wholesale providers to report actual end-user revenue, and services provided to resellers were excluded from

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[124] *See* 5 U.S.C. § 553(c) (2006) (mandating that the agency "give interested persons an opportunity to participate in the rule making").

[125] *See* FCC Form 499 Instructions, *supra* note 114, at 12-13.

[126] *See* Petition of the Ad Hoc Coalition of International Telecommunications Companies Petition for Rulemaking to Address Inequities in USAC's Interpretation and Application of the Carrier's Carrier Rule, Petition for Rulemaking, WC Docket No. 06-122, at 1-2 (Feb. 16, 2010) (accessible via FCC Electronic Comment Filing System) [hereinafter Third Ad Hoc Coalition Petition] (requesting the initiation of an open rulemaking proceeding in which to evaluate public and industry comments regarding an assortment of deficiencies, complexities, and injustices associated with the Carrier's Carrier Rule ("CCR") and calling upon the FCC to suspend enforcement of the CCR indefinitely, pending the outcome thereof).

[127] *See* 47 C.F.R. § 54.706(b) (2010).

[128] *See In re* Matter of Federal State Joint Board on Universal Service, 12 F.C.C.R. 8776, 9207, ¶ 845 (May 8, 1997) ("Basing contributions on end-user revenues, rather than gross revenues, is competitively neutral because it eliminates the problem of counting revenues derived from the same services twice. The double counting of revenues distorts competition because it disadvantages resellers.").

[129] *See* FCC Form 499-A Instructions, *supra* note 114, at 18-19.

[130] *See In re* Federal-State Joint Board on Universal Service, *Report and Order*, 12 F.C.C.R. 8776, ¶ 845 (May 8, 1997).

reporting and contribution requirements.[131] The reporting instructions as originally drafted by USAC specifically indicated that wholesale carriers were not required to contribute based upon services which they independently believed were being provided for resale.[132] As a result, wholesale providers were responsible only for contributions based on actual end-user revenue and were not liable for resellers who failed to contribute to the Fund.

USAC changed the pre-2004 CCR via the 2004 Telecommunications Reporting Worksheet (Form 499-A) by inserting the following language: "Filers will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users" (also referred to as the "vicarious liability" provision).[133]

This added language effectively made wholesale carriers vicariously liable for the payment of all USF contribution amounts sold if the wholesale carrier did not adequately police the regulatory status of its resellers.[134]

As noted above, the Commission originally devised the CCR to avoid duplicate contributions by both wholesalers and retailers. However, USAC created the potential for duplicate contributions by adopting mandatory compliance obligations for wholesale carriers and instituting the threat of vicarious liability. Specifically, USAC threatened to forcibly reclassify incorrectly identified wholesale revenues in violation of the FCC's rules. Furthermore, by accepting USAC's interpretation of the Form 499 instructions, the FCC has, allowed USAC to impose new substantive rules without the notice and comment proce-

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[131] *See In re* Matter of 1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated With Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, 14 F.C.C.R. 16602, ¶¶ 21-22 (July 14, 1999).

[132] *See id.*

[133] *See* Telecommunications Reporting Worksheet, *Instructions for completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms*, FCC Form 499-A (2006), 17 (Aug. 2006), http://www.universalservice.org/_res/documents/fund-administration/pdf/499/499ai_2006_030806.pdf.

[134] *See, e.g., Request for Review of Decision of the Universal Service Administrator by Grande Communications Networks LLC*, WC Docket No. 06-122, at 34-37 (Dec. 28, 2009) (challenging as ultra vires USAC's rejection of its "reliable proof" demonstrating that its reseller customers would be reasonably expected to contribute directly to the USF and unilateral reclassification of its resale revenues); *In re* Matter of Federal-State Joint Board on Universal Service, Request for Review of Decision by the Universal Service Administrator by Global Crossing Bandwidth, Inc., CC Docket No. 96-45, Order, DA 09-1821 (Aug. 17, 2009) [hereinafter Global Crossing Order] (denying *Request for Review of Decision of the Universal Service Administrative Company by Global Crossing Bandwidth, Inc.*, CC Docket No. 96-45 (June 22, 2007)) (challenging the standard USAC had applied for classification of revenues as "carrier's carrier" revenues); *Request for Review of Network Enhanced Telecom, LLP of a Decision of the Universal Service Administrator in a Contributor Audit*, WC Docket No. 06-122 (June 29, 2009) [hereinafter Network IP Petition] (appealing a finding by USAC that its reseller certifications were invalid).

dures required by the APA and in contradiction to USAC's limited authority.

One of the largest impacts of USAC's interpretation and enforcement of the CCR was the destruction of the line, which had once clearly divided the regulatory and statutory duties of common carriers, which are bountiful, from the sparse duties imposed on private carriers. Consistent with the mandates of the Communications Act of 1934 and applicable precedent on the definition of common carriage, the FCC long ago determined that the term "telecommunications service" only includes telecommunications provided by a "common carrier" that holds itself out "to service indifferently all potential users," and does not include carriers whose "practice is to make individualized decisions in particular cases whether and on what terms to serve."[135]

While there are many examples of businesses that fulfill the definition of a private carrier, none are more obvious than a pure wholesale service provider—a company that picks and chooses its customers, that individually negotiates the terms and conditions of its services, including price, and that does not sell directly to the public or, in such a manner as to be effectively available directly to the public.[136] These are the defining factors of communications common carriage and have been upheld by the Supreme Court.[137]

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[135] *In re* Matter of Federal-State Joint Board on Universal Service Universal Service, *Memorandum Opinion and Order*, CC Docket No. 96-45, ¶ 3, (Sept. 30, 1999) (accessible via FCC Electronic Comment Filing System).

[136] *See* Frontier Broadcasting Co. v. Laramie Community TV Co., *Memorandum Opinion and Order*, 24 F.C.C. 251, 254, ¶ 7 (Apr. 2, 1958); *see In re* Amendment of Parts 2, 91, and 99 of the commission's Rules Insofar as They Relate to the Industrial Radiolocation Service, *Report and Order*, 5 F.C.C.2d 197, ¶¶ 19-20 (Oct. 5, 1968) ("[T]he fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and points on the systems of other carriers connecting with it."). *See also* Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC I*), 525 F.2d 630, 641 (D.C. Cir.), *cert. denied,* 425 U.S. 992 (1976) (finding that the essential elements of common carriage to be (1) "that the carrier undertakes to carry for all people indifferently"); Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC (*NARUC II*), 533 F.2d 601, 609 (D.C. Cir. 1976) (finding that a common carrier's system is "such that customers 'transmit intelligence of their own design and choosing.'").

[137] FCC v. Midwest Video Corp., 440 U.S. 689, 701 & n. 10 (1979). Note, the 1996 Act does not use the term "common carrier." This term is defined in the 1934 Communications Act and encompasses the entities that are governed by that Act's Title II regulation. The statutory language in the 1996 Act refers to "telecommunications carriers." Specifically, Section 153(44) states that "a telecommunications carrier shall be treated as common carrier only to the extent that it is engaged in providing telecommunications services. . . ." 47 U.S.C. § 153(44). There is some dispute as to whether the term "telecommunications carrier" means substantially the same as the pre-1996 Act term "common carrier." Nonetheless, the Commission has concluded that based on the legislative history, the phrase "directly to the public" means only telecommunications provided on a common carrier basis. *See* S. REP. NO. 104-230, at 115 (1996); *In re* Federal State Joint Board on Universal Service, Re-

Because a non-common carrier or private carrier is not providing telecommunications service as defined by the FCC, many of the regulatory obligations imposed on common-carrier providers of telecommunications service are simply not imposed on private carriers, such as the wholesale service provider described above. For example, whereas the FCC requires contributions to the USF from *both* common carriers and private carriers pursuant to authority vested in Section 254(d) of the Act, which authorizes the Commission to extend contribution obligations to "any other provider of interstate telecommunications,"[138] private carriers remain outside the reach of regulatory duties associated with other programs for which USAC is the data collection agent (the "Non-USF Programs").[139] However, ever since the introduction of vicarious liability through unsanctioned changes to the 2004 Form 499 Instructions, USAC has enforced the CCR in a manner that indirectly imposes regulatory contribution duties, which the FCC is precluded from directly applying to a variety of private carriers, including international wholesale providers.[140]

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port to Congress (Rel. Apr. 10, 1998) (explaining that the term telecommunications service "is defined as those services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings that are provided to the public . . . and private services.").

[138] *See Universal Service First Report and Order*, *supra* note 32, at 9183-9184, ¶ 795. The Commission also requires certain other providers of interstate telecommunications to contribute to the USF. *See, e.g.*, *In re* Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, IP-Enabled Services, *Report and Order and Notice of Proposed Rulemaking*, 21 F.C.C.R. 7518 (June 27, 2006) [hereinafter *Interim Contribution Methodology Order*] (requiring interconnected voice over Internet protocol (VoIP) providers to contribute to the USF). Although the Commission has not addressed the regulatory classification of interconnected VoIP services as "telecommunications services" or "information services" under the Act, the Commission has concluded that interconnected VoIP providers are "providers of interstate telecommunications" for purposes of universal service. *Id.* ¶ 35; 47 U.S.C. § 254(d).

[139] *See, e.g.*, 47 C.F.R. § 64.604 (2010); 47 C.F.R. §54.706 (2010) (stating the mandatory minimum standards for common carriers associated with Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities); 47 C.F.R. §54.706 (2010) (providing that "[e]ntities that provide interstate telecommunications to the public . . . for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms").

[140] *See First Ad Hoc Coalition Petition*, *supra* note 112, at 3; *see also Second Ad Hoc Coalition Petition*, *supra* note 113, at 3.

C. Exclusion of Satellite from Definition of Private Service Provider

USAC has also dismantled the distinction between private and common carriers in the satellite industry, making substantive changes to the Form 499-A without any notice and comment process. Specifically, USAC removed satellite providers from the definition of Private Service Providers in the FCC Form 499-A Instructions between the 2008 and 2009 Forms. The 2008 instructions read as follows:

> Private Service Provider – offers telecommunications to others for a fee on a non-common carrier basis. This would include a company that offers excess capacity on a private system that it uses primarily for internal purposes. This category does not include SMR operators.[141]

The 2009 instructions read as follows:

> Private Service Provider – offers telecommunications to others for a fee on a non-common carrier basis. This would include a company that offers excess capacity on a private system that it uses primarily for internal purposes. This category does not include SMR *or Satellite Service Providers.*[142]

Although USAC only amended the FCC Form 499-A Instructions in recent years, it appears that the FCC has been requiring both common carriers and private satellite providers to contribute to the USF for quite some time. In 1997, the FCC stated that satellite service providers categorically must contribute to universal service, and, to the extent those satellite providers also offer interstate telecommunications, " on a common carrier or non-common carrier basis," they would be required to contribute to universal service as an "other provider[] of interstate telecommunications."[143]

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[141] Telecommunications Reporting Worksheet, *Instructions for completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms*, FCC Form 499-A (2008), 15 (Feb. 2008) [hereinafter 2008 instructions], *available at* http://www.fcc.gov/Forms/Form499-A/499a-2008.pdf.

[142] Telecommunications Reporting Worksheet, *Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms*, FCC Form 499-A (2009), 15 (Feb. 2009) [hereinafter 2009 instructions], *available at* http://www.fcc.gov/Forms/Form499-A/499a-2009.pdf (emphasis added).

[143] *In re* Federal-State Joint Board on universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72*, 13 F.C.C.R. 5318, 5478, ¶ 288 (Dec. 30, 1997) [hereinafter *Fourth Order on Reconsideration*].

D. Prepaid Calling Card Providers

USAC has similarly ignored the private carrier nature of the "wholesale calling card services market," imposing additional regulatory liabilities on classes of prepaid calling card providers. The Form 499-A instructions neglect to provide an option for reporting actual receipts as retail private carrier revenue. Therefore, revenues from these prepaid services are included in gross end-user revenues used to calculate universal service contributions[144], particularly as it pertains to wholesalers of transmission services to distributors and other resellers who themselves set the retail price of the service. USAC and the FCC cannot deny that wholesalers individually negotiate the terms of the transmission services with distributors and resellers, and yet USAC has essentially declared all prepaid services to be "retail common carrier services."

Prepaid calling card providers are crippled in another way by the reporting instructions developed by USAC. In a 2006 order, the Commission announced that all prepaid calling card providers ("PCCPs") qualify as contribution-eligible telecommunications carriers.[145] The Commission's Form 499-A reserves a line for "revenues from prepaid calling cards provided either to customers, distributors or to retail establishments."[146] However, USAC imposes a discriminatory universal service obligation on PCCPs who are directed to report prepaid calling card revenues from distributors as end-user revenues and at "face value."[147] Yet, the sale price to distributors reflects a *deduction* from the face value of the card. USAC requires PCCPs to ignore the discounted rate, noting that revenues "should not be reduced or adjusted for discounts provided to distributors or retail establishments."[148] Therefore, wholesale PCCPs actually receive less than the value of the card, but nonetheless must report the entire value of the card as if it were received.[149] Once multiplied over thousands

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[144] *See* 2011 Instructions to the Telecommunications Reporting Worksheet, Form 499-A, at 18, 25, *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0301/DA-11-400A3.pdf.

[145] *In re* Matter of Regulation of Prepaid Calling Card Service, *Declaratory Ruling and Report and Order*, 21 F.C.C.R. 7,290, ¶ 68 (June 1, 2006); *see also In re* Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services, 20 F.C.C.R. 4826, ¶ 4 (2005).

[146] *See* Telecommunications Reporting Worksheet, *Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal service, Number Administration, and Local*; 2008 Instructions to the Telecommunications Reporting Worksheet, Form 499-A at 27, available at http://www.fcc.gov/Forms/Form499-A/499a-2008.pdf ("2008 Instructions").

[147] *See* 2008 Instructions, *supra* note 141, at Line 411 ("All prepaid card revenues are classified as end-user revenues.").

[148] *See id.* at 27.

[149] *See, e.g., In re Matter of Request for Review of Decision by the Universal Service Administrative Company by IDT Corporation and IDT Telecom*, WC Docket No. 96-45 (June 30, 2008) [hereinafter IDT Petition 2] (accessible via FCC Electronic Comment Filing

of cards, the additional assessable revenue quickly becomes substantial.

Notably, USAC has accomplished this change by ordering PCCPs to report distributor revenues as end-user revenues without first obtaining FCC guidance. The instructions to the 2008 Form 499-A define PCCPs' services as follows: "selling prepaid calling cards to the public, to distributors or to retailers" recognizing that "[p]repaid card providers typically resell the toll service of other carriers."[150] However, despite this acknowledgement of the resale nature of PCCPs' services, the instructions continue, "[a]ll prepaid card revenues are classified as end-user revenues" and warn carriers that revenues "should not be reduced or adjusted for discounts provided to distributors or retail establishments."[151]

As discussed above, the CCR restricts universal service contribution obligations to end-user revenue.[152] Many PCCPs resell cards at a wholesale discount to distributors and resellers who sell the cards to end-user customers. In this scenario, the distributor is not the end user as contemplated by the FCC. Likewise, distributors are also resellers as they ultimately sell cards to end-user customers. Therefore, the instructions should treat as end-user revenues only those PCCP sales that actually fit within the definition of "end user" according to the Commission's intent and the ordinary and customary meaning of the term. Sales to distributors and resellers should be excluded as distributors and resellers are not end users. Rather, distributors should rightfully be classified as resellers rather than end users.

In addition to substantially increasing a provider's total contribution liability, USAC's reporting instructions directly counter basic accounting under Generally Accepted Accounting Principles ("GAAP").[153] GAAP accounting does not permit the recognition of revenue on the books unless the revenue is actually earned. Since PCCPs never actually "earn" the difference between face value and the discounted sale value, reporting the entire face value as revenue does not comport with GAAP. To properly comply with both GAAP and USAC's instructions, a PCCP would be required to maintain two sets of books, an expensive, time-consuming and unnecessary venture.

USAC's current rules discriminate exclusively against PCCPs as they are the only group that must report as USF-contribution-eligible revenues that they never collect. Other carriers are entitled to deduct uncollected debt from their

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System) (appealing USAC's audit conclusions regarding IDT's reporting of prepaid calling card revenue from sales to distributors and retail sales outlets); *see also* IDT Petition 1, *supra* note 108 (appealing filings in years 2003, 2004 and 2005).

[150] *See* 2008 Instructions, *supra* note 141, at 14-15.

[151] *Id.* at 27.

[152] End-user, as the term is commonly understood, refers to users of communications services, excluding all resellers of such services.

[153] *See* 47 C.F.R. § 54.702(n).

total reported revenues.[154]

It is painfully clear that USAC imposed these contribution obligations on PCCPs even though the Commission's rules did not address this situation with adequate particularity.[155] For example, since 2003[156] USAC conducted audits relating to funding years, but it was not until the summer of 2009 that USAC formally requested FCC guidance on several policy issues related to the universal service high-cost support mechanism and universal service contribution methodology—including guidance on revenue reporting obligations for PCCPs.[157] USAC asked that the FCC develop an alternative method to "face value" reporting for providers who either do not know the face value of the cards sold[158], or whose cards are measured in units of time rather than dollars.[159] Further, USAC asked the Commission to determine when prepaid calling card revenue should be reported in cases where the carrier is unable to determine when a card is sold to an end user.[160]

The confusion and frustration with the FCC's failure to provide guidance extended to the industry as well. Taking matters into its own hands, Verizon filed an *ex parte* letter with the FCC discussing Verizon's universal service contribution obligations related to its prepaid calling card revenues.[161] Verizon also announced that, going forward, it "will report in its assessable base of universal service revenues only those revenues that Verizon actually receives from selling prepaid calling cards—not the ultimate retail price of those cards when they are resold."[162] But for limited circumstances where the company sells directly to the public, Verizon will cease reporting prepaid calling card revenue at face value. Verizon's shift in policy comes on the heels of AT&T's

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[154] *See* 2008 Instructions, *supra* note 141, at 30-31 (describing how to calculate total reported revenues on Lines 420-421 of the Form).

[155] *See* First Ad Hoc Coalition Petition, *supra* note 112, at 11-12 (noting that the FCC did not intend USF assessment at the wholesale level).

[156] *See, e.g.*, IDT Petition 1, *supra* note 108, at i.

[157] *See* Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, Wireline Competition Bureau, Federal Communications Commission, WC Docket Nos. 06-122, 05-337 (Aug. 19, 2009) (accessible via FCC Electronic Comment Filing System) (listing six outstanding matters on which USAC had requested FCC guidance).

[158] *See id.* at 1 ("Reporting requirements need to be clarified to assist carriers with an alternative method that can be used to determine the revenue amount that should be reported on Line 411 of the FCC Form 499-A when the face value or the amount paid by the customer is not known by the original selling carrier.").

[159] *Id.* at 2.

[160] *Id.*

[161] *See* Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, *In re* Prepaid Calling Card Universal Service Contributions; Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service, *Notice of Exparte*, CC Docket No. 96-45 (April 30, 2010) (accessible via FCC Electronic Comment Filing System).

[162] *Id.*

December 2009 announcement that it would "cease contributing on the basis of its non-contributing resellers' revenues" for prepaid calling card revenue.[163]

E. Reclassification of Information Services as Telecommunications Services

In the area of prepaid calling card services, USAC has sought (albeit after-the-fact) a clear directive from the FCC as to how to classify revenues all along the distribution chain. In the area of the regulatory treatment of information versus telecommunications services, however, USAC has defied clear directives from the FCC, imposing contribution obligations on carriers that contradict FCC rules and orders.

Originally, the regulatory framework set forth in the Communications Act of 1934 anticipated that communications services would be classified as either telecommunications services or information/enhanced services.[164] Information/enhanced services remain largely unregulated, and providers of such services generally are not required to register with the FCC,[165] make federal universal service contributions,[166] or comply with many of the FCC's other regulatory obligations. Telecommunications service providers, on the other hand, are subjected to FCC jurisdiction and the accompanying panoply of federal regulations pursuant to Title II of the Act.[167]

In the 2005 Wireline Broadband Order, [168] the Commission concluded, con-

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[163] *See* Letter from Jamie M. Tan, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, *In re* High-Cost Universal Service Support; Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service, *Re: Notice of Exparte Communications*, CC Docket No. 96-45 (Dec. 18, 2009) (accessible via FCC Electronic Comment Filing System.

[164] *See* Nat'l Cable and Telecommc'ns Ass'n v. Brand X Internet Serv. (*Brand X*), 545 U.S. 967, 975 (2005)(stating only telecommunication carriers are regulated as common carriers under the Act). *See* 47 U.S.C. § 153(20) (2010) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"). Prior to the Telecommunications Act of 1996, the Commission used the term "basic service" instead of "telecommunications service" and "enhanced service" instead of "information service." *See In re* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, 13 F.C.C.R. 11501, 11541, para. 81 (Apr. 10, 1998) [hereinafter Report to Congress]; *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *recon.*, 84 F.C.C.2d 50 (1980), *further recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

[165] *See* 47 C.F.R. § 64.1195 (2009).

[166] 47 C.F.R. § 54.706 (2009).

[167] *See* H. Russell Frisby & David A. Irwin, *The First Great Telecom Debate of the 21st Century*, 15 COMMLAW CONSPECTUS 373, 387 (2007) (describing the regulations of telecommunications service providers under Title II of the 1996 Act).

[168] *In re* Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R.

sistently with its prior findings for cable modem service, that "wireline broadband Internet access service provided over a provider's own facilities is...an information service."[169] The Commission defined wireline broadband Internet access as "a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities."[170] The categorization would not depend on the type of wireline facility over which the service is provided, or on whether the service provider owns or leases the transmission inputs.[171]

Based on this precedent, there is no requirement that providers of Internet access service contribute to the USF on the transmission component of their services.[172] Despite this clear directive from the FCC, USAC has reclassified revenue from Internet access service as USF-assessable telecommunications service.

For example, on April 30, 2010, the Bureau granted a request for review of USAC's decision reclassifying TelePacific Communications' Internet access service as a USF-assessable interstate telecommunications service.[173] TelePacific challenged USAC's decision as contrary to the FCC's rules and its 2005 Wireline Broadband Order, which identified "*functionally integrated* wireline broadband Internet access services as information services beyond the FCC's jurisdiction."[174] TelePacific argued that USAC incorrectly focused on the T-1 facilities the company used to provide its Internet access service, arguing that it provided a "functionally integrated" Internet access service exempt from USF obligations under the Order.[175] On appeal, the Bureau agreed that TelePacific's Internet access service escapes USF contribution requirements.[176] It concluded that the 2005 Order exempts from USF liability revenues derived by entities "purchas[ing] or leas[ing] transmission from telecommunications carriers to

14853 (Aug. 5, 2006) [hereinafter *2005 Wireline Broadband Order*].

169 *Id.* ¶ 12.

170 *Id.* ¶ 9.

171 *Id.* ¶ 9, n.15.

172 *See In re* Universal Service Contribution Methodology Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications, 25 F.C.C.R. 4652, 4655, ¶ 8 (Apr. 30, 2010).

173 *See id.* (granting U.S. TelePacific Corp. d/b/a TelePacific Communications Request for Review and Reversal of Universal Service Administrator Decision, WC Docket No. 06-122 (filed January 8, 2010)).

174 *See* U.S. TelePacific Corp. d/b/a TelePacific Communications Request for Review and Reversal of Universal Service Administrator Decision, 25 F.C.C.R. 4652, 4655, ¶ 13 (Apr. 30, 2010).

175 *Id.* at 5-6, 14-15.

176 *See In re* Universal Service Contribution Methodology Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications, 25 F.C.C.R. 4652, 4655, ¶ 13 (Apr. 30, 2010).

provide wireline broadband Internet access services."[177]

In another instance, USAC reclassified all of the revenues Grande Communications Networks ("Grande") received before August 13, 2006 from DSL-based Internet access as interstate telecommunications revenues.[178] According to Grande, USAC agreed with Grande's assessment that its service is a wireline broadband Internet access service, and therefore, also an information service.[179] Grande argued that the revenue included on the company's filed FCC Form 499-A was accurate, concluding that it provided an information service to customers.[180] Grande further argued that it did not separately offer to end users a transmission service.[181] Moreover, Grande asserted that the 2005 Wireline Broadband Order, on which USAC relied for its reclassification, does not retroactively alter the classification of DSL services that were offered solely as information services. According to Grande, the Wireline Broadband Order required carriers that already were offering a separate transmission component to "continue" to do so, but it did not require carriers that did not offer a separate transmission component to begin reporting their revenues for the transition period. The Bureau issued a Public Notice seeking comment on Grande's petition, but has not yet issued a decision.[182]

F. Reclassification of Carrier Charges

The instructions to FCC Form 499-A state that Line 405 is to include only "[l]ine . . . charges to end users specified in access tariffs."[183] During several audits, USAC has reclassified various access and line charges as revenue re-

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[177] *Id.* ¶¶ 7-8. The WCB instructed USAC to accept TelePacific's revised 2008 Form 499-A classifying its Internet access service revenues as information services, exempt from USF contribution obligations. However, the WCB concluded that it had insufficient information to determine whether USF contributions must be assessed on revenues derived from the sale of T-1 lines to TelePacific. To resolve the issue, the WCB ordered TelePacific to provide the WCB with a detailed explanation of its method of apportionment and reporting of revenues derived from the sale of voice telephony services and Internet access and other services over T-1 lines within 60 days. The WCB further directed TelePacific to provide USAC with a list of its wholesale suppliers of transmission services.

[178] *Request for Review of Decision of the Universal Service Administrator by Grande Communications Networks LLC*, WC Docket No. 06-122 (filed Dec. 28, 2009).

[179] *See In re* Grande Communications Request for Review of Decision of the Universal Service Administrator, *Request for Review of Decision of the Universal Service Administrator*, 24 F.C.C.R. 14,415 (Dec. 28, 2009).

[180] *Id.*

[181] *Id.*

[182] *See* Comment Sought on Petition of Grande Communications Networks to Appeal a Universal Service Contribution Decision of the Universal Service Administrative Company, *Public Notice*, WC Docket No. 06-122, DA 10-87, 25 F.C.C.R. 350 (Jan. 19, 2010)) (allowing interested parties to file comments and reply comments up until March 5, 2010).

[183] *See* 2008 Instructions, *supra* note 141, at 25–26.

quired to be reported on line 405. Several telecommunications providers have objected to these reclassifications as improper and contrary to Form 499-A instructions.

For example, ILD Telecommunications ("ILD") challenged USAC's determination that ILD had deducted Presubscribed Interexchange Carrier Charges ("PICC") from Line 414 and did not include these charges on Line 405.[184] In its petition, ILD notes that the instructions to Form 499-A state that revenues included in Line 405 "should include charges to end users *specified in access tariffs,* such as tariffed subscriber line charges *and PICC charges levied by a local exchange carrier.*"[185] ILD argues that revenues from its PICC charges should not be included in Line 405, because they are not charges stemming from a tariff and ILD itself is not a LEC.[186]

Grande similarly challenged USAC's reclassification of its per-line "customer access charge" as a federal Subscriber Line Charge ("SLC"), even though Grande did not have a federal SLC in its interstate access tariff.[187] According to Grande, its per-line charge was a component of its local exchange service charge and was reported by Grande as intrastate revenue. As a CLEC, Grande asserted that it had "significant latitude to structure and assess local service charges to end users."[188] Grande maintained that was not "obligated to assess a federal SLC" under FCC rules, and in fact did not assess a federal SLC under its FCC Tariff. According to Grande, it properly treated its customer line charge as a monthly local service revenue and correctly reported its revenue as intrastate local exchange revenue on line 404.1.[189]

In all of these instances, USAC has acted without obtaining Commission guidance on the application of existing regulations, or worse, has acted in direct contradiction to FCC orders and rules. Since USAC did not seek the requisite clarification before-the-fact, now affected contributors must get help from the FCC the only way they can after-the-fact: by appealing USAC decisions. Yet the FCC and the Bureau have failed to resolve the issues before them, inaction that has become a tacit acceptance of USAC's policy-making.

G. The Contribution Factor

While the frustration and confusion has accumulated with each additional is-

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184 *In re* the Matter of Request for Review by ILD Telecommunications, Inc. and Intellicall Operator Services, Inc., WC Docket No. 96-45, (Mar. 31, 2006) [ILD Petition] (supplemental appeal filed June 5, 2006), at 32-33.

185 *See id.*

186 *Id.* at 32-33.

187 *See e.g.*, Grande Petition, at 6-15.

188 *Id.*

189 *Id.*

sue pending before it, the FCC has passively addressed universal service policy by another route: allowing increases to the contribution factor rather than taking a hard look at the scope of the contribution base. The FCC has expressed a determination "[to take action] to preserve existing levels of universal service funding" and avoid a "precipitous drop in fund levels,"[190] but this is not a part of its statutory mandate, nor is simply maintaining a fund level a Congressional goal of Section 254. Any action the FCC might take to "preserve existing fund levels" must fall squarely within its delegated authority, the specifically enumerated principles of Section 254 for the advancement and preservation of universal service, and the procedures mandated by the APA

Contributors report their revenue data to USAC, which collects the data, and reports it to the Commission.[191] USAC submits both fund size and administrative cost filings to the FCC based on revenue projections from Forms 499, projected administrative costs of USAC, projected needs of the four programs; USAC files projected carrier revenue (based on interstate and international telecommunications revenue[192]) and proposes a contribution factor based on a ratio of the quarterly costs of the support mechanisms, including administrative expenses, to the projected sum of the proposed universal service contribution base (subject to funding caps) with the FCC.[193]

The Commission reviews program requirements and revenue data, and determines the appropriate contribution factor. The Commission's Office of the Managing Director releases a public notice stating the proposed contribution factor for the upcoming quarter. If, after 14 days, the Commission takes no action regarding the proposed contribution factor, the factor becomes final.[194] At that point, carriers can use this factor to recover universal service costs from

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[190] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R . 14853, ¶ 113 (2005).

[191] The primary source of data comes from the Telecommunications Reporting Worksheet, FCC Form 499, filed annually and quarterly. The annual report on Form 499-A is due April 1 of each year for the previous calendar year's revenues, and the quarterly Form 499-Q is due one month after the close of each calendar quarter to report billed revenues for the previous quarter and both projected collected and projected billed revenue for the upcoming quarter. *See* Telecommunications Reporting Worksheet, FCC Form 499-A (2010); Telecommunications Reporting Worksheet, FCC Form 499-Q (2010); *see also Information for Firms Providing Telecommunications Services,* FED. COMMC'NS COMM'N, http://www.fcc.gov/wcb/filing/html (last visited May 14, 2011).

[192] 47 C.F.R. § 54.709(a)(3) (2010) ("[T]he administrator shall apply the quarterly contribution factor, once approved by the Commission, to contributor's interstate and international end-user telecommunications revenues to calculate the amount of individual contributions.").

[193] USAC Order, *supra* note 4, ¶ 45. In the USAC Order, the FCC determined that the Administrator would calculate, in the first instance, a proposed contribution factor and submit it to the Commission for approval. *See also id.* ¶ 2.

[194] *See* 47 C.F.R. §54.709(a)(3) (2010).

their customers.[195]

Since its inception in 1988, the contribution factor has increased over the years as the assessable revenue base declined.[196] The contribution factor changes quarterly, but has been between 12-15% over the last two years.[197] It can fluctuate significantly from quarter to quarter. In 2010, the contribution factor was 9.5% in the first quarter, 11.3% in the second quarter, 12.9% in the third quarter, and 12.3% in the fourth quarter.[198] The proposed contribution factor for the first quarter 2011 is 15.5%,[199] higher than any quarter in 2010, which means that carriers may mark up their bills to customers with line items of up to 15.5% of the total interstate telecommunications charges.[200] Meanwhile, from the first quarter of 2009[201] to the projected revenues for 1Q 2011,[202] telecommunications revenues have declined by about 12%.

The FCC's announcement of quarterly contribution factor, which effectively mandates what charges carriers may pass on to their customers, is a tacit acceptance of the status quo – allowing USAC to determine that enhanced telecommunications services garner categories of assessable revenue.

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[195] *See* 47 C.F.R. § 54.712(a) (2010).

[196] *See, e.g.,* Third Quarter 1998 Universal Service Contribution Factors Revised and Approved, *Public Notice*, DA 98-1130, 13 F.C.C.R. 16617, 16620 (June 12, 1998) (providing separate contribution factors for the schools and libraries and rural health care support mechanisms (0.0075%) and the high cost and low income support mechanisms (0.0314%)). It was not until later in 1998 that the FCC consolidated administration of all of the support mechanisms under USAC's umbrella. *See* discussion *supra* in Section 1.

[197] *See* Steve Augustino, *Universal Service Contribution Factor Continues Roller Coaster Ride*, TELECOM LAW MONITOR (June 10, 2010), http://www.telecomlawmonitor.com/articles/universal-service-fund/ (arguing that the universal service fund needs reform).

[198] *See also* FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, UNIVERSAL SERVICE MONITORING REPORT IN CC DOCKET NO. 98-202, at Table 1.10 (Oct. 2001), *available at* http://www.fcc.gov/daily_releases/daily_business/2010/db1230/DOC-303886A1.pdf.

[199] *See In re* Proposed First Quarter 2011 Universal Service Contribution Factor, *Public Notice*, 25 F.C.C.R. 17,175 (Dec. 13, 2010). Administrative expenses for all of the programs would equal more than $29 million in 1Q 2011. *Id.*

[200] *See* 47 C.F.R. § 54.712(a) (2010).

[201] *See* FEDERAL UNIVERSAL SERVICE SUPPORT MECHANISMS QUARTERLY CONTRIBUTION BASE FOR THE FIRST QUARTER 2009, UNIVERSAL SERVICE ADMINISTRATIVE COMPANY 7 (Dec. 2, 2008), *available at* http://fjalfoss.fcc.gov/ecfs/document/view?id=6520189578 ("The total projected collected interstate and international end-user revenue base to be used in determining the contribution factor for the Universal Service Support Mechanisms for 1Q 2009 is: $18,871,046,860.19.").

[202] *See* FEDERAL UNIVERSAL SERVICE SUPPORT MECHANISMS QUARTERLY CONTRIBUTION BASE FOR THE FIRST QUARTER 2011, UNIVERSAL SERVICE ADMINISTRATIVE COMPANY 7 (Dec. 2, 2010), *available at* http://fjalfoss.fcc.gov/ecfs/document/view?id=7020921957 ("The total projected collected interstate and international end-user revenue base to be used in determining the contribution factor for the Universal Service Support Mechanisms for 1Q 2011 is: $16,674,393,375.15.").

G. Billing and Payment

Once the FCC establishes the contribution factor, USAC bills carriers for amounts due based on reported revenues and the contribution factor each quarter. With regard to disputes of its invoices, USAC applies an internal "pay and dispute" policy that requires carriers to pay potentially erroneous invoices while the carrier's appeal of the invoice is pending.[203] As a result, carriers often face the difficult decision to either pay an erroneous inflated invoice or incur significant interest and penalties.[204] USAC unilaterally created the pay and dispute policy.[205] The Commission has never adopted the policy through a formal rulemaking proceeding and instead simply refers to it as a "USAC principle" or "USAC policy."[206]

The FCC's apparent endorsement of USAC's pay and dispute policy despite USAC's clear lack of authority to adopt such policies flies in the face of the FCC's own rules and the laws governing the Commission. For example, the FCC's rules clearly prohibit USAC from "mak[ing] policy, interpret[ing] unclear provisions of the statute or rules, or interpret[ing] the intent of Congress."[207] Furthermore, similar to USAC's interpretation of the CCR, by endorsing USAC's pay and dispute policy, the FCC has, in effect, allowed USAC to create another new substantive rule without formal notice and comment procedures in violation of the APA.

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[203] *See Paying USAC Bill during Appeal Process*, UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, http://www.usac.org/fund-administration/contributors/file-appeal (last visited May 14, 2011).

[204] *See e.g., In re* Universal Service Contribution Methodology Emergency Request for Review of Universal Service Administrator decision by Level 3 Communications, LLC, et al., *Application for Review of Level 3 Communications, LLC, et al.*, WC Docket No. 06-122 (Mar. 1, 2010), http://fjallfoss.fcc.gov/ecfs/document/view?id=7020392809 (appealing *In re* Universal Service Contribution Methodology Emergency Request for Review of Universal Service Administrator decision by Level 3 Communications, LLC, et al., *Order*, 25 F.C.C.R. 1115 (Jan. 29, 2010)). After discovering errors in its own filings, Level 3 revised its form 499, resulting in a significantly lower universal service contribution obligation; the Bureau nonetheless ordered Level 3 to pay the higher amount. Level 3 challenged that order on the basis that the pay and dispute policy should not be given the force of a Commission rule.

[205] *See id.* at 13-14.

[206] *See id.* at 14, n. 54 (citing *In re* Request for Review by InterCall, Inc. of Decision of Universal Service Administrator, *Order*, 23 F.C.C.R . 10731, ¶ 6, n.17 (June 30, 2008) (referring to the "general USAC principle of 'pay and dispute'")); *In re* Federal-State Joint Board on Universal Service, Universal Service Contribution Methodology, Aventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline, *Order*, 23 F.C.C.R. 10096, ¶ 5, n.16 (June 26, 2008) (referencing "USAC's 'pay and dispute' policy").

[207] 47 C.F.R. §54.702(c) (2010).

IV. IMPLICATIONS AND POTENTIAL ENTITLEMENT FOR RELIEF

USAC has left confusion and frustration in the industry in the wake of its substantive changes to universal service, most of which came as a surprise to the industry. Section 254 requires that the universal service mechanisms and the contributions into them be "predictable."[208] From its initial implementation of Section 254, the FCC has sought "to avoid a contribution assessment methodology that distorts how carriers choose to structure their businesses or the types of services that they provide."[209] Yet the FCC has allowed USAC to make ad hoc, case-by-case decisions when what is needed is Commission guidance on the application of its rules, if not new rules altogether. These USAC decisions have come without warning or public input, creating market distortions and unpredictability. Carriers cannot predict when a new duty or obligation will befall a line of business that they formerly believed was subject to different regulatory treatment.

The FCC has at its disposal numerous avenues to rein in USAC's *ultra vires* actions. Most urgently, the Commission must review the numerous appeals of USAC decisions now pending before it, and not allow its inaction to rise to the level of a denial of relief. Instead, the FCC has stood by to watch as USAC has extended its contribution obligations to classes of carriers, services and revenue that were previously understood to be beyond the reach of the Fund. The FCC has not provided adequate rulemaking and definitional clarity, as it must under its statutorily mandated regulatory responsibilities over universal service. [210] The FCC essentially has abdicated its oversight responsibilities to review decisions of USAC and to review appeals of USAC decisions, letting them languish for in some cases years, denying the affected parties final orders from which they could seek relief.

A. Technological Advances and the Need for Regulatory Action

Throughout the time that USAC has been broadening the Universal Service contributor base, the FCC has undoubtedly been in a period of transition. Technological developments and shifts in the way consumers perceive telecommunications and information services have forced the FCC to reconsider its traditional classifications of telecommunications and information services for a variety of regulatory purposes.[211] The FCC has struggled to keep pace

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[208] 47 U.S.C. § 254(b)(5) (2006); § 254(d).

[209] *In re* Matter of Federal-State Joint Board on Universal Service, *Report and Order*, 12 F.C.C.R. 8776, ¶ 846 (May 7, 1997).

[210] 47 U.S.C. § 254(a)(2) (2006); § 254(g); § 254(g)(2).

[211] *See e.g.*, *In re* Implementation of the Net 911 Improvement Act of 2008, *Report and Order*, 23 F.C.C.R. 15884, ¶¶ 2-3, 20 (Oct. 21, 2008) (enacting regulations to extend to

with changes in the industry and to carry out the duties Congress has assigned to it without overstepping the bounds of its statutory mandates.[212] More than a decade ago, then-Commissioner Susan Ness remarked on the rapid pace of dynamic technological advances and said of the Commission: "we must think creatively and rapidly. By the time we complete a rulemaking, its time may have come and gone."[213]

This struggle to keep pace with rapid technological development is manifest in the area of universal service, as well. With limited exceptions,[214] the FCC has maintained distinctions between traditional telecommunications providers and enhanced or information service providers[215] as more and more customers migrate from one to the other.[216]

VoIP providers obligations to provide 911 and enhanced 911 services in accordance with the New and Emerging Technologies 911 Improvement Act of 2008); *see* Jason Oxman, *The FCC and the Unregulation of the Internet* 18-21 (Fed. Commc'ns Comm'n Office of Plans and Policy, Working Paper No. 31, 1999) [hereinafter OPP White Paper]. *See also In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R . 14853, ¶¶ 1-3 (Sept. 23, 2005); *In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R . 4798, ¶¶ 1-8 (Mar. 15, 2002).

[212] For example, the scope of the FCC's authority has been called into question in issue regulations that touch the Internet, even incidentally. *See* Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (ruling that the FCC does not have express statutory authority or ancillary authority to regulate an Internet service provider's network management practices).

[213] *See* Susan Ness, Commissioner, Fed. Commc'ns Comm'n, Remarks Before the IRTS Foundation: The Net Effects on Communications Policy 4 (June 7, 2000), *available at* http://www.fcc.gov/Speeches/Ness/2000/spsn006.html ("This world of digital technology and distributed intelligence over the Internet is turning the old regulatory world upside down.").

[214] *See e.g., In re* Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, IP-Enabled Services, *Report and Order and Notice of Proposed Rulemaking and Report and Order*, 21 F.C.C.R . 7518 (June 27, 2006) (extending Universal Service obligations to VoIP providers).

[215] *See* Universal Service, *Report to Congress,* 13 F.C.C.R. 11501, 11529, ¶57 (Apr. 10, 1998) [hereinafter *Universal Service Report*] (explaining that if the Commission "interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category").

[216] The Boston Consulting Group, *The Voice Revenue Challenge A Framework for Success in the Era of VoIP*, 2-3 (2006).

Also to maintain the status quo, the FCC has expressed a determination "to take whatever action is necessary to preserve existing funding levels" and avoid a "precipitous drop in fund levels."[217] As demonstrated in Part II above, the Fund sufficiency has been maintained through aggressive USAC actions, upending what has been practice and common understanding of universal service contribution obligations in the industry. For far too long the FCC has sat back and watched as USAC—with or without the Wireline Competition Bureau's blessing—has repeatedly used ministerial functions and technical rules as vehicles to effectuate substantive changes to carrier rights. One need not dig terribly deep to understand the FCC's motivation, especially in light of the fact that the vast majority of USAC's *ultra vires* substantive changes have been intended and have had the effect of maintaining a sufficient stream of contribution revenue into the Fund. While disappointing, the FCC's inaction is not surprising given the Hobson's choice it has purposefully delayed confronting.

The FCC is keenly aware of the deficiencies with the current system, and over the years has proposed countless reforms to the USF "to increase accountability and efficiency."[218] Currently, the FCC is considering reforming the Universal Service mechanisms[219] to add broadband Internet access as a service supported by the USF, in keeping with its obligation under Section 706 of the 1996 Act to determine whether "broadband is being deployed to all Americans in a reasonable and timely fashion."[220] Yet, by allowing the Universal Service regime to remain plagued by problems for so many years and adopting little reform in a piecemeal fashion, the FCC has steered away from its responsibility to ensure *both* that consumers across the nation have access to advanced telecommunications and information services and that contributors pay into the Fund in an "equitable and nondiscriminatory manner."[221]

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[217] *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R . 14853, ¶ 113 (2005).

[218] *In re* Joint Statement on Broadband, *Joint Statement on Broadband*, 25 F.C.C.R. 3420, ¶ 3 (Mar. 16, 2010).

[219] *See e.g.*, FED. COMMC'NS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 140-151 (2010), *available at* http://www.broadband.gov/download-plan [hereinafter NATIONAL BROADBAND PLAN]; *In re* Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support, *Notice of Inquiry and Notice of Proposed Rulemaking*, 25 F.C.C.R. 6657 (Apr. 21, 2010).

[220] *See In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act A National Broadband Plan for Our Future, *Sixth Broadband Deployment Report*, 25 F.C.C.R. 9556, ¶ 1 (July 20, 2010).

[221] 47 U.S.C. § 254(b)(2) (2006); § 254(b)(4).

B. The FCC's Announced Intention to Reform Universal Service Provides No Excuse for Administrative Delay in Acting on Appeals from USAC Decisions

As discussed below, the fact that the FCC finds itself considering an overhaul to the universal service system is *no excuse* for administrative delay in acting on individual appeals from parties affected by USAC's decisions and the multitude of rubber stamped Bureau-level rulings. Since USAC has carried out virtually all aspects of administration of universal service support mechanisms with only limited direction and nominal oversight from the FCC, contributors into the Fund and their end-user customers ultimately bear the burden and expense of this unlawful policy drift.[222] By not acting, the FCC has been spared the administrative costs necessarily associated with having to address the numerous pending appeals of USAC decisions and WCB rulings. Perhaps more important than internal administrative cost savings, the FCC's stasis has saved the Executive Branch from having to pay the ultimate consequences of adverse judicial determinations declaring final agency decisions to be based on violations of the APA, *ab initio*, and therefore ineffective.

All this is happening outside of the democratic checks and protections provided in the APA, which provides that substantive rule changes must be made publicly, and on the record, with an opportunity for notice and comment;[223] requires that an agency act on matters before it in a reasonable amount of time;[224] and provides avenues for judicial review of agency action as a further check on agency authority.[225] The FCC's own rules call for the Commission or the Bureau to take action on a request for review within 90 days, but allow for extensions.[226] The FCC's reluctance to rule on appeals has rendered USAC decisions *de facto* rules and bolstered USAC's confidence that it can arrogate to itself the authority to make decisions concerning novel factual situations and questions of policy.

As discussed in more detail below, the FCC's acquiescence in the face of USAC's substantive modifications of its own regulations has harmed the industry and, in turn, consumers who bear the cost of universal service contributions. The FCC has left the industry in a state of uncertainty and unpredictabil-

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222 *See* 47 C.F.R. §§ 54.709(a)(2) (2010).

223 *See* 5 U.S.C. § 552(a)(1)(d)-(e) (2006); § 553(b).

224 *See* 5 U.S.C. § 555(b) (2006).

225 *See* 5 U.S.C. § 706 (2006).

226 47 C.F.R. § 54.724(a) (2010) (giving the Bureau ninety days to "take action in response to a request for review of an Administrator decision that is properly before it" unless the Bureau extends the time period "up to ninety days"); (b) (providing that the FCC "shall issue a written decision in response to a request for review of an Administrator decision that involves novel questions of fact, law, or policy within ninety (90) days" unless the FCC extends the time period).

ity, contrary to the Congressional mandate that telecommunications carriers contribute to "*specific, predictable* and *sufficient* mechanisms" established *by the Commission* to preserve and advance universal service."[227]

C. The Aggrieved Parties and How They Each Have Been Harmed

Contributors who are audited by USAC find the process to be time intensive and costly.[228] They are required to meet standards of proof above and beyond what FCC rules require.[229] Contributors that are subjected to forfeitures and high payments through the USAC audit process often shoulder more than their fair share of the costs, putting them at an economic disadvantage vis-à-vis their competitors. [230]

The audit process itself is often so burdensome and costly that some carriers have little choice but to follow what has become USAC-created "precedent" to avoid the risk (and cost) of an audit. Avoiding the cost and expense of an audit also creates a strong incentive for Carriers to use a conservative approach to classifying their revenue as USF assessable. As such, they end up classifying a higher percentage of revenue as USF assessable, which ultimately is passed on

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227 47 U.S.C. § 254(d) (2006) (emphasis added).

228 Furthermore, the expense of the audit process is not only borne by the contributor being investigated, it is also born by all contributors to the Fund, and ultimately their end-user customers, as resources from the Fund are used to cover USAC's expense of the audit.

229 For example, USAC has required carriers to conduct extensive and expensive traffic studies to counter USAC's presumption that more than 10% of traffic over particular lines is interstate. *See In re* XO Communication Services, Inc., Request for Review of Decision of the Universal Service Administrator, WC Docket No. 06-122, at 22, 23 & n.46 (filed Dec. 29, 2010) (accessible via FCC Electronic Comment Filing System). However, the FCC has explained that a contrary presumption exists under the rule: "mixed-use lines would be treated as interstate *if the customer certifies that more than ten percent of the traffic on those lines consists of interstate calls. In re* MTS WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, *Opinion,* 16 F.C.C.R . 11167, ¶ 2 (2001) (emphasis added). Also, USAC has rejected filers' evidence that would create a reasonable expectation that reseller customers would directly contribute to universal service even though the FCC rules do not "dictate" what procedures carriers must implement. *See* Request for Review of Network Enhanced Telecom, LLP of a Decision of the Universal Service Administrator in a Contributor Audit, WC Docket No. 06-122, at 15 (filed June 29, 2009) (accessible via FCC Electronic Comment Filing System) (rejecting signed certifications because they had not been renewed annually); *but see In re* Universal Service Contribution Methodology Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLP, *Order*, WC Docket No. 06-122, ¶ 8, 16 (rel. Oct. 19, 2010), www.tminc.com/support_docs/FC20101021b.pdf ("direct[ing] USAC to re-evaluate its determination as to the validity of NetworkIP's reseller certificates")

230 For example, in assessing retroactive payment obligations on telecommunications carriers and other communications service providers during the audit process, it is USAC's policy to assess the highest yearly contribution factor on the total revenue for that fiscal year, rather than assessing the average of the quarterly contribution factors on the total annual revenue.

to their end-user customers.

On the flip side, carriers that follow a less conservative revenue classification approach charge lower prices and garner greater market share, risking audit, investigation and appellate costs and lengthy delays for the short-term gain. These carriers can reap significant competitive advantages over their more risk-averse competitors. Granted, the uncertainty can be seen as driving the migration toward enhanced services because of this price differential, which can have some public interest benefit as more consumers adopt and benefit from these services.[231]

But this comes at a price for all service providers, regardless of how clear their regulatory status may seem to them. Those providers who structured their business on the traditional categories of regulated and non-regulated industries are left to wonder if their regulatory status—and accompanying regulatory obligations—is going to be the next that gets turned on its head by USAC. All registered telecommunications carriers must prepare for the real prospect that they will have to bear the cost and burden of appealing an adverse USAC finding.[232]

During the pendency of an appeal, the industry segment affected is left in a state of uncertainty. Carriers must decide whether to follow USAC's novel interpretations of reporting and contribution requirements or continue to look to FCC regulations and orders as they wait for the appeal to be decided. Perhaps more significantly for the industry as well as consumers, as USAC has expanded its reach beyond specific services or core technologies to those that involve a convergence of types of traffic and features and services, the uncertainty spreads further and affects a larger universe of carriers, far beyond the more than 6,000 registered telecommunications service providers.[233] The effect can be paralyzing and costly to some, and worse, the uncertainty becomes an invitation to others to take advantage of the uncertainty.

The FCC's delay in resolving issues before it defeats its fundamental objectives to uphold the "certainty" and "sufficiency" of the universal service support mechanisms and to ensure that carriers make contributions on an "equitable and non-discriminatory" basis.[234]

As mentioned, ultimately the biggest harm is to end users who pay pass-throughs or through line item charges or higher rates for interstate telecommunications services. The FCC "recogniz[es] that consumers across America ul-

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[231] For a discussion of how regulatory action can "pave the way" for nationwide growth of new services, *see* OPP White Paper, *supra* note 211, at 15-16 (crediting the ESP exemption for access charges for rapid and nationwide growth of ISPs).

[232] NetworkIP, LLC v. FCC, 548 F.3d 116, 122 (2008).

[233] *See* Q1 2011 CONTRIBUTION BASE, *supra* note 16, at 7.

[234] *See* discussion *supra* Part II *and accompanying notes*.

timately pay for universal service,"[235] and it is clear that they ultimately pay for USAC's unlawful and unpredictable assessments on carriers.

D. What the FCC Should Do

The FCC must rein in USAC and the Wireline Competition Bureau to prevent them from further arrogating to themselves the role of making policy shifts in universal service administration to chase the migration of customers throughout the telecommunications and information services industry. The policy-making role is expressly reserved for the FCC.

The first step would be to prevent USAC from causing further harm by making decisions beyond the scope of its authority[236] while the FCC catches up on the backlog of appeals before it. Particularly, the FCC could issue a standstill order, a form of interim injunctive relief, prohibiting USAC from making any further decisions on issues related to those pending on appeal.[237] Further, the FCC could issue a standstill order to prevent USAC from conducting audits and investigations until the FCC has reviewed USAC's procedure and the scope of permissible inquiries, the appropriateness of presumptions that USAC should apply when evaluating contributors' disclosures, and the standards of proof USAC may apply to contributors.

In determining whether to issue temporary injunctive relief, the FCC would be required to balance four criteria: the likelihood of success on the merits; the threat of irreparable harm absent the grant of preliminary relief; the absence of a showing of injury to other parties if relief is granted; and that issuance of the order will further the public interest.[238] In balancing these factors, the FCC has determined that no single factor is dispositive, and a strong showing with regard to any of the criteria may lessen the showing required for others.[239]

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[235] *In re* Matter of Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support, *Notice of Inquiry and Notice of Proposed Rulemaking*, 25 F.C.C.R. 6657, ¶ 50 (Apr. 21, 2010).

[236] *See* 47 C.F.R. § 54.702(c) ("[USAC] 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.") (emphasis added).

[237] *See e.g.*, AT&T Corp. v. Ameritech Corp., *Memorandum Opinion and Order*, 13 F.C.C.R . 14508, ¶¶ 1, 13-14 (June 30, 1998) (setting forth factors to balance in determining whether to issue interim injunctive relief).

[238] Virginia Petroleum Jobbers Assoc. v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1959).

[239] *See* AT&T Corp. v. Ameritech Corp., *Memorandum Opinion and Order*, 13 F.C.C.R . 14508, ¶ 14 (June 30, 1998).

In this instance, the merits to be examined are not so much the merits of each individual appeal, but rather the likelihood of success of a challenge to whether USAC's *ultra vires* actions have violated the Administrative Procedure Act and the Commission's rules. USAC has ventured into unchartered territory, addressing novel factual situations as the industry has evolved without awaiting, as it must, Commission guidance on how to treat the dynamic array of services now available in the market. Absent the grant of preliminary relief, ongoing and irreparable competitive and economic harm will come to carriers unable to plan for the future, and to consumers who must bear the cost of increasing and imbalanced universal service obligations. No other parties will be harmed if the FCC reins USAC in from making decisions that go beyond the scope of its authority. USAC would not be shut down, of course, and could still carry out its data collection and billing and disbursement functions: contributors would still make required disclosures on Forms 499-A and –Q, and to make timely contributions. A standstill order would not foreclose the possibility of future audits once the FCC has acted on appeals and provided necessary guidance, and therefore reporting and contributing carriers would still have every incentive to provide accurate reports and make full and timely contributions. Finally, issuance of the order would certainly further the public interest. The public, affected carriers and consumers alike could have renewed confidence in the agency's ability to act. Clarity and guidance from the duly appointed policy-making authority, the Commission, would further the statute's goals of ensuring "predictab[ility]" in telecommunications carriers' contributions.[240]

Under this proposal, once the FCC has stopped USAC from causing further confusion into the universal service support mechanisms, the FCC would review the appeals currently pending before it to resolve the uncertainty that is hindering sectors in the industry from moving forward with business plans. The FCC's unreasonable delay in resolving appeals from parties adversely affected by USAC's decisions evidences its disregard of its duty to carry out the basic requirements of Section 254 of the Act, and its strict oversight responsibility over USAC. "Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and *creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision-making into future plans*."[241] Refunds of contributions or reinstatements of disallowed credits may be due to contributors or classes of consumers, and failure to act on the appeals is tantamount to a denial of requested relief for refunds or credits. For efficiency's sake, the FCC could consider appeals concurrently in time and remand to USAC for consideration of similarly situated

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[240] 47 U.S.C. § 254(d) (2010).

[241] Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

contributing filers as provided in any order the FCC would issue, and that USAC further address any issues before it consistently with the FCC's order.

The FCC should also further assess whether a formal rulemaking is necessary to properly address the range of issues affected parties have brought before it, such as whether a notice and comment process would be appropriate to revisit changes to Form 499-A and its instructions that the Bureau has concluded to be simply "nonsubstantive modifications."[242]

The FCC, by its own rules, may take additional actions to sharpen its oversight of USAC, such as to order an audit of USAC,[243] dismantle the board by removing one or more directors, if it finds that USAC is acting beyond the scope of its limited delegated authority.[244]

F. What the Courts Must Do

If, however, the FCC continues to abrogate its statutory responsibilities to direct the administration of universal service, and its duty to oversee USAC, the duty then falls to the courts to catalyze agency action. Despite the jurisdictional requirements of the "finality doctrine,"[245] the FCC's failure to act on appeals does not act as a complete barrier for affected parties to seek redress in the courts. Appellate courts do have jurisdiction to review claims of unreasonable agency delay.[246]

The FCC's failure to act on requests for review for years beyond the 90 days provided for in its rules constitutes an unlawful withholding or unreasonable delay of agency action under Section 706(1) of the APA.[247] The APA gives administrative agencies the *duty* to decide issues presented to them within a reasonable time,[248] and reviewing courts have a concomitant duty to compel

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[242] *See, e.g.,* Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions, Public Notice, DA 09-454 (rel. Feb. 25, 2009).

[243] *See* 47 C.F.R. § 54.717 (2010). The Office of the Inspector General may review final audit reports of USAC and "take any action necessary to ensure that the universal service support mechanisms operate in a manner consistent with the requirements of this Part, as well as such other action as is deemed necessary and in the public interest." 47 C.F.R. § 54.717(k) (2010).

[244] *See USAC Order, supra* note 4, ¶ 41.

[245] The "finality doctrine" gives federal courts of appeals exclusive jurisdiction to enjoin, set aside, or suspend *final* orders of the FCC, reviewable under Section 402. *See* 28 U.S.C. § 2342(1) (2010); 47 U.S.C. § 402(a) (2010).

[246] *See, e.g.,* Public Citizen Health Res. Group v. FDA, 740 F.2d 21, 30 (D.C. Cir. 1984).

[247] *See* 5 U.S.C. § 706(1) (2010); 47 C.F.R. § 54.727 (2010).

[248] § 706(1) requires "some reasonably prompt decision-making point." *See also* MCI Telecoms' Corp. v. FCC, 627 F.2d 322, 340. In *MCI*, the court further explained: "[D]elay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires." *Id.* at 341.

agency action unlawfully held or unreasonably delayed.[249]

A writ of mandamus compelling the FCC to act is an appropriate remedy for administrative delay.[250] A court could issue a writ of mandamus compelling the FCC to act on pending requests for review of USAC decisions within 90 days of a court order, in keeping with the 90-day baseline time for review set forth in the Commission's own regulations.[251] Alternatively, courts have required the agency to develop a schedule and a plan for resolving issues before it, and for the agency to provide status reports to the court as to its progress.[252]

The FCC may argue that it should wait to decide the individual USAC appeals until it addresses overall universal service reform. It might suggest that it is the better part of valor to revisit the overall scheme rather than risk ruling on appeals in the interim; the ultimate outcome of a USAC appeal might be different under new rules. Courts have rejected such arguments in the past.[253] Harms that come from administrative delay and the denial of due process outweigh the chance that an affected party might have had a different result under different rules that the FCC imagines it might adopt at some future date.[254] As one court previously noted "[agency inaction can be as harmful as wrong ac-

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[249] *See* 5 U.S.C. § 555(b); § 706(1) ("The reviewing court *shall* (1) compel agency action unlawfully withheld or unreasonably delayed.") (emphasis added). Telecomm. Research and Action CTR. V. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984) ("Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction."). *See also* 28 U.S.C. § 1651(a) (providing that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions"); Nader v. FCC, 520 F.2d 182, 207 (D.C. Cir. 1975) (noting that excessive delay can lead to a "breakdown of the regulatory process").

[250] *See* Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983) ("[E]xcessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties."). *See, e.g.*, Marathon Oil Co. v. Lujan, 937 F.2d 498, 500 (10th Cir. 1991) (ordering mandamus to compel agency completion of administrative review of application for patents within 30 days); All Writs Act, 28 U.S.C. § 1651(a). Courts have also issued writs under their general equity powers. Amer. Broadcasting Co., Inc. v. FCC (*ABC*), 191 F.2d 492 (D.C. Cir. 1951).

[251] *See* 47 C.F.R. § 54.724 (2009) ("The Commission shall issue a written decision in response to a request for review of an Administrator decision that involves novel questions of fact, law, or policy within ninety (90) days. The Commission may extend the time period for taking action on the request for review of an Administrator decision.").

[252] *See* MCI Telecomm. Corp. v. FCC, 627 F.2d 322, 345 (D.C. Cir. 1980) (stating that the court has "authority under § 10(e) of the Administrative Procedure Act (APA) to compel agency action unlawfully withheld or unreasonably delayed").

[253] *See ABC*, 191 F.2d at 500 ("We cannot agree that the Commission can maintain the status quo indefinitely and in effect semi-permanently by offering the argument that the ultimate determination of KOB's status must depend upon the outcome of the clear channel proceedings.").

[254] *See* MCI Telecomm. Corp. v. FCC, 627 F.2d 322 at 344; *see also* Telecommc'ns Res. and Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

tion."[255]

The FCC might also point to Congressional mandates, such as the requirement that the FCC develop a National Broadband Plan,[256] that have forced the FCC to divert its resources to fulfill enormous directives in a short period of time. Although courts have held that the FCC has the authority to regulate its own caseload under the Communications Act,[257] that discretion is "not unbounded."[258] A failure to act to resolve pending issues within its responsibility is inexcusable, particularly where doing nothing has the same effect as an outright denial of relief.[259]

Courts recognize that administrative delay undermines public confidence in an agency, harms parties to administrative proceedings when uncertainty affects their ability to make future plans, and can undermine a statutory scheme.[260] In reviewing a claim of unreasonably administrative delay, courts apply a "rule of reason" when examining the pace and length of time an agency is taking to resolve issues before it.[261] A court will consider a number of factors. First, the length of time that has elapsed since an agency came under a duty to act, the prospect of early completion. Second, the degree of discretion given to the agency by a statutory mandate, the extent to which delay is undermining a statutory scheme "either by frustrating the statutory goal or by creating a situation in which an agency is losing its ability to effectively regulate at all."[262] Third, a court will examine the consequence of an agency's delay, including the "important consideration" of economic harm.[263] Finally, an agency must satisfy the court with a justification for the delay, but a court will scrutinize and balance any claims of limited resources, administrative convenience or other practicalities against the potential for any harm.

As noted above in Part II, some of the petitions for review now pending before the Commission go back as long as five years[264] and relate to filing

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255 *ABC*, 191 F.2d at 500.

256 *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009).

257 *See* Nader v. FCC, 520 F.2d 182, 195 (D.C. Cir. 1975) (citing 47 U.S.C. § 154(j)).

258 Cutler v. Hayes, 818 F.2d 879, 896-97 (D.C. Cir. 1987).

259 *See* Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

260 *See Cutler*, 818 F.2d at 897-98; *see also Potomac Elec. Power Co.*, 702 F.2d at 1035.

261 *See Cutler*, 818 F.2d at 897 (outlining factual considerations and factors for assessing the reasonableness of agency delay).

262 *Id.* at 897-98 (internal quotations and citations omitted).

263 *See id.* at 898; *MCI Telecommunications*, 627 F.2d at 341-42; *Nader*, 520 F.2d at 206; *ABC*, 191 F.2d 501.

264 *See, e.g.*, Request for Review of Decision by the Universal Service Administrator by IDT Corporation, WC Docket No. 96-45 (April 10, 2006) (accessible via FCC Electronic Comment Filing System); *In re* Request for Review by ILD Telecommunications, Inc. and Intellicall Operator Services, Inc. of Decision of the Universal Service Administrator, *Request for Review*, WC Docket No. 96-45 (March 31, 2006) (supplemental appeal filed June

years back to 2003.[265] Considering that FCC rules provide a baseline assumption that the Commission will issue a written decision on appeals within 90 days, five years is an inordinately long time, and the FCC has not indicated that it plans to act on individual appeals anytime soon.

In examining the degree of discretion given to the agency by any particular statutory mandate, a court would consider the APA's directive that agencies act within a reasonable time.[266] More importantly, however, is the FCC's paramount obligation to make policies "for the preservation and advancement of universal service" under Section 254.[267] This is an ongoing obligation,[268] and one that the FCC cannot delegate away to an independent corporation, such as USAC.[269] The longer the FCC allows USAC to assess contribution obligations without clear guidance from the FCC, the longer the FCC will frustrate the statutory scheme that universal service mechanisms, *and* contributions to support those mechanisms, be "specific, predictable and sufficient."[270]

The consequences of the FCC's delay in terms of economic harm to telecommunications carriers as well as those whose regulatory status now may seem unclear are increasing over time. These include the market distortions discussed above, as some carriers charge their customers more than others who take the risk of an adverse audit finding; adverse competitive effects on those who would choose not to enter into a line of business because they cannot with any certainty factor in the potential cost of their regulatory obligations, significant costs of complying with USAC audits and standards of proof that run counter to existing FCC precedent.[271] As the court in *NetworkIP* stated, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[272]

The FCC's potential claims of lack of administrative resources, efficiency or convenience, or otherwise being "too busy" to address these issues now pending on appeal cannot outweigh the overall harms from delay. Although the parties named in the appeals are few in number, the effect on the industry is widespread and reaches beyond the regulated industry. While the court, of course, would not mandate a particular outcome for these cases, resolution, one way or

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5, 2006) (accessible via FCC Electronic Comment Filing System).

265 *See id.*

266 *See* 5 U.S.C. § 555(b) (2006).

267 47 U.S.C. § 254(b) (2006).

268 *See* 47 U.S.C. § 254(c)(1) (2006).

269 *See* discussion *supra* Part I.C and accompanying notes (describing the administrative subdelegation doctrine).

270 47 U.S.C. § 254(b)(5) (2006); § 254(d).

271 *See generally* Cutler v. Hayes, 818 F.2d 879, 896-898.

272 NetworkIP, LLC v. FCC, 548 F.3d 116, 122 (D.C. Cir. 2008).

the other, would go a long way toward supporting the statutory goals of Section 254.

V. CONCLUSION

The FCC's inertia can no longer serve as a roadblock to resolving issues that have left the telecommunications, information services and enhanced communications services industries in a state of confusion and, in some cases, paralysis. Since the FCC will not act on its own to arrive at a decision-making point, it may ultimately fall to the courts to force the FCC to carry out its statutorily mandated responsibilities.

First and foremost, the FCC has an obligation to act on the appeals now pending before it. Reviewing individual USAC decisions *de novo* is one of the most basic and essential means by which the FCC can maintain strict oversight over the universal service administrator. The public interest benefits that would stem from resolution of the issues raised in the various appeals are significant. USAC itself, and filers and contributors, would have the guidance they need to implement the rules consistently. Contributors would have more certainty and predictability as to what their future contribution obligations would be, and for what services.

The real beneficiaries of decisive Commission action would be the end-users, the consumers of telecommunications, information and enhanced communications services. Consumers would benefit from real competition and not disparate prices that are based more on the market distortions produced by USAC's haphazard and ill-conceived patchwork of policies.

It is partly because the FCC's rules allow carriers to their pass universal service contribution obligations on to their consumers in the form of end-user surcharges that groups of carriers have had little incentive to band together to challenge USAC's actions and the Commission's inactions. Yet—we have reached a tipping point. Patience has expired among carriers and consumers alike; neither is capable of making further accommodations due to the Commission's incapacity to stare down the multitude of Hobson's choices it must be willing to make in order to right the wrongs which have been committed by USAC over the course of the past decade. Carriers with long-pending appeals before the FCC, if they so choose, have the means to pursue judicial intervention.