

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Application for Review by American Cyber Corp.,)	
Coleman Enterprises, Inc., Inmark, Inc., Lotel,)	
Inc., and Protel Advantage, Inc.)	

ORDER ON RECONSIDERATION

Adopted: June 23, 2014

Released: June 23, 2014

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. This Order on Reconsideration addresses a request filed by American Cyber Corp. (American Cyber), Coleman Enterprises, Inc. (Coleman Enterprises), Inmark, Inc. (Inmark), Lotel, Inc. (Lotel), and Protel Advantage, Inc. (Protel).¹ These parties seek review by the Commission, under section 1.115 of the Commission’s rules,² of a 2007 order by the Wireline Competition Bureau (Bureau) in which the Bureau found that they were resellers of telecommunications services, and had a direct obligation to contribute to the federal universal service fund (USF or Fund).³ Based on further consideration of the record, we find that when the Bureau issued the *2007 Inmark Order*, it overlooked certain facts identified in the initial requests for review that establish that these parties were telemarketers, not resellers of telecommunications service, during the relevant time period.⁴ Accordingly, on our own motion, we are treating the instant request as a petition for reconsideration of

¹ Application for Review by American Cyber Corp., Coleman Enterprises, Inc., Inmark, Inc. d/b/a Preferred Billing, Lotel, Inc. d/b/a Coordinated Billing, and Protel Advantage, Inc., CC Docket Nos. 96-45, 02-6 (filed Apr. 11, 2007) (Petition).

² 47 C.F.R. § 1.115.

³ *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 02-6, Order, 22 FCC Rcd 4925 (Wireline Comp. Bur. 2007) (*2007 Inmark Order*).

⁴ Petition for Review by Inmark, Inc., d/b/a/ Preferred Billing, CC Docket No. 02-6 (filed July 22, 2003) (Inmark Request for Review); Petition for Review by Lotel, Inc., d/b/a/ Coordinated Billing, CC Docket No. 02-6 (filed July 22, 2003) (Lotel Request for Review); Petition for Review by Protel Advantage, Inc., CC Docket No. 02-6 (filed July 22, 2003) (Protel Request for Review) (collectively, Requests for Review); Petition for Review by American Cyber Corp., CC Docket No. 02-6 (filed July 22, 2003); Petition for Review by Coleman Enterprises, Inc., CC Docket No. 02-6 (filed July 22, 2003). Unless otherwise noted, each of the petitions for review, including the exhibits thereto, is substantively identical.

the 2007 *Inmark Order* under section 1.106 of the Commission's rules.⁵ As discussed more fully below, we grant the Petition as to Inmark, Lotel, and Protel (hereinafter, collectively Petitioners), concluding that they were not required to contribute to the Fund for the time period at issue. We dismiss the Petition with respect to American Cyber and Coleman Enterprises pursuant to section 1.1910 of the Commission's rules.⁶

II. BACKGROUND

A. The Act and the Commission's Rules

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."⁷ Section 254(d) further provides 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."⁸ To this end, the Commission has determined that common carriers and some private carriage providers that provide interstate telecommunications to others for a fee generally must contribute to the USF based on their interstate and international end-user telecommunications revenues.⁹ Although the Commission declined to exempt from contribution "any of the broad classes of telecommunications carriers that provide interstate telecommunications services," not all carriers that provide interstate telecommunications

⁵ Consistent with our decision here, we dismiss as moot the request for stay that accompanied the Petition. See Request for Stay by American Cyber Corp., Coleman Enterprises, Inc., Inmark, Inc., d/b/a Preferred Billing, Lotel, Inc., d/b/a Coordinated Billing, and Protel Advantage, Inc., CC Docket No. 96-45 (filed Apr. 11, 2007).

⁶ 47 C.F.R. § 1.1910. Pursuant to the "red light rule," the Commission withholds action on applications or requests for benefits from any entity that has failed to timely meet its contribution obligations for universal service, the Telecommunications Relay Services, North American Numbering Plan Administration, and Local Number Portability funding mechanisms or to pay its regulatory fees when due, and ultimately dismisses such applications or other requests if the delinquencies are not resolved. On July 18, 2013, the Commission sent Notices of Withholding of Action letters to American Cyber and Coleman Enterprises, notifying them that under section 1.1910(b)(3), the Commission would dismiss their request within 30 days of the date of the notice if they did not pay their delinquent debts. The Commission's records indicate that American Cyber and Coleman Enterprises have remaining delinquent debts for unpaid regulatory fees.

⁷ 47 U.S.C. § 254(d).

⁸ *Id.*

⁹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183-84, para. 795 (1997) (subsequent history omitted) (*Universal Service First Report and Order*). Although the Commission has exercised its permissive authority to assess some private carriage providers, it has exempted certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers from the contribution requirement. 47 C.F.R. § 54.706(d). The Commission also has exercised its permissive authority to require certain other providers of interstate telecommunications to contribute to the USF. See, e.g., *Universal Service Contribution Methodology et al.*, CC Docket Nos. 96-45 et al., Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7544, para. 52 (2006) (*2006 Contribution Methodology Order*) (requiring interconnected voice over Internet protocol (VoIP) providers to contribute to the USF).

service contribute to the Fund.¹⁰ Providers with direct contribution obligations may pass through their contribution assessments to their customers.¹¹

3. The Commission has designated the Universal Service Administrative Company (USAC) as the entity responsible for administering the universal service support mechanisms under Commission direction.¹² Pursuant to the Commission's rules, contributors report their revenues by filing Telecommunications Reporting Worksheets (FCC Forms 499-A and 499-Q), which are released annually by the Bureau on delegated authority,¹³ with USAC.¹⁴ USAC reviews these filings and verifies the information provided by the contributors.¹⁵ USAC also bills contributors for their universal service contributions.¹⁶

4. The Commission's rules presently require contribution only once along the distribution chain (when a contributor provides telecommunications to an "end user"), so a contributor also must apportion its telecommunications revenues between two categories: (1) revenues derived from sales by one carrier or provider to another carrier or provider that is expected to contribute, known as "carrier's carrier" or wholesale revenues; and (2) revenues derived from sales to all other entities, known as "end-user" or retail revenues.¹⁷ "Carrier's carrier" revenues are not currently assessed. "End-user"

¹⁰ *Universal Service First Report and Order*, 12 FCC Rcd at 9179, para. 787. Telecommunications service providers are not required to contribute to the USF in a given year if their contribution for that year would be less than \$10,000. 47 C.F.R. § 54.708.

¹¹ See 47 C.F.R. § 54.712(a) (authorizing contributors to recover federal universal service contribution costs from their customers); 2014 FCC Form 499-A Instructions at 13.

¹² *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18423-24, para. 41 (1997) (*Universal Service Second Order on Reconsideration*); see 47 C.F.R. § 54.701.

¹³ The Wireline Competition Bureau, formerly the Common Carrier Bureau, has delegated authority to revise the FCC Forms 499 and accompanying instructions to ensure "sound and efficient administration of the universal service programs." See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18442, para. 81 ("Because it is difficult to determine in advance precisely the information that will be needed to administer the new universal service programs, the [Common Carrier] Bureau will have delegated authority to waive, reduce, or eliminate contributor reporting requirements that may prove unnecessary. The Bureau also will have delegated authority to require any additional contributor reporting requirements necessary to the sound and efficient administration of the universal service programs."). Consistent with this authority, the Bureau annually revises the Telecommunications Reporting Worksheet Instructions to provide instructions and guidance for complying with existing rules and requirements. 47 C.F.R. § 54.711(c). The FCC Form 499 instructions are modified based on experience in administering the universal service program and explicit rulings by the Commission. See, e.g., *2006 Interim Contribution Methodology Order*, 21 FCC Rcd at 7531-50, paras. 23-64.

¹⁴ 47 C.F.R. § 54.711(a) (setting forth reporting requirements in accordance with Commission announcements in the Federal Register). Contributors report historical revenue on the annual Telecommunications Reporting Worksheet (FCC Form 499-A), which is generally filed on April 1 each year. See USAC, Schedule of Filings, <http://www.usac.org/cont/499/filing-schedule.aspx> (last visited May 7, 2014). Contributors project future quarters' revenue on the quarterly Telecommunications Reporting Worksheets (FCC Form 499-Q), which are generally filed on February 1, May 1, August 1, and November 1. *Id.*

¹⁵ 47 C.F.R. § 54.711(a).

¹⁶ 47 C.F.R. § 54.702(b).

¹⁷ *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A.

telecommunications revenues include revenues from sales to carriers or providers that do not contribute to USF, such as *de minimis* carriers and exempted providers of interstate telecommunications.¹⁸

5. To assist contributors, the Commission has clarified the distinction – for contributions purposes – between revenues from “resellers” (or “carrier’s carrier” revenues) and revenues from “end users.” In 1997, the Commission defined a “reseller” as “a telecommunications service provider that 1) incorporates the purchased telecommunications services into its own offerings and 2) can reasonably be expected to contribute to support universal service based on revenues from those offerings.”¹⁹ Thus, a wholesale provider should exclude revenues from its contribution base only if it has “affirmative knowledge” or a “reasonable expectation” that its carrier customer is contributing to the Fund on the revenues derived from the offering that incorporates the wholesale input.²⁰ If a wholesale provider has a customer that does not contribute directly to the Fund, that customer must be treated as an end user rather than as a reseller for contributions purposes. For a number of years, the FCC Form 499 Instructions have included language stating that marketing agents are not required to file the FCC Form 499.²¹ Thus, marketing agents are distinguished from resellers in the FCC Form 499 Instructions.

B. The Petition

6. Each of the Petitioners entered into contracts with QAI, Inc. or its affiliates (QAI) to telemarket QAI’s long distance telecommunications service.²² The contracts provided that QAI would directly bill end-user customers, collect revenues, and remit the USF contributions, and would pay Petitioners a “commission” or “margin” calculated after deducting all expenses allocated to the customers solicited by Petitioners.²³ In 2001, each of the Petitioners filed FCC Forms 499-A, in which they reported no end-user revenues for January through December 2000, but instead attached an addendum stating that the Petitioners’ carrier, QAI, was responsible for the USF contribution filing and payment obligations.²⁴ USAC informed Petitioners that an underlying carrier cannot assume the

¹⁸ See *id.*; *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Fourth Order on Reconsideration et al., 13 FCC Rcd 5318, 5482, para. 298 (1997) (“Entities that resell telecommunications and qualify for the *de minimis* exemption must notify the underlying facilities-based carriers from which they purchase telecommunications that they are exempt from contribution requirements and must be considered end users for universal service contribution purposes.”).

¹⁹ See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A; see also 2014 FCC Form 499-A Instructions at 22-23. (“For purpose of completing Block 3, a ‘reseller’ is a telecommunications carrier or telecommunications provider that: 1) incorporates purchased telecommunications services into its own telecommunications offerings; and 2) can reasonably be expected to contribute to federal universal support mechanisms based on revenues from those offerings.”).

²⁰ See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18508, App. A (noting that the underlying contributor may have reason to know that its customer may, in fact, be a contributing reseller); *Federal-State Joint Board on Universal Service; Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, CC Docket No. 96-45, Order, 24 FCC Rcd 10824, 10829, para. 14 (Wireline Comp. Bur. 2009) (Wholesale provider should have “affirmative knowledge that its customer is contributing to the universal service fund as a reseller” or a “reasonable expectation that its customer is contributing as a reseller.”).

²¹ See, e.g., 2005 FCC Form 499 Instructions at 5 (“Marketing agents, i.e., entities that market services on behalf of a telecommunications provider, are not telecommunications providers and are not required to file this Worksheet.”); 2014 FCC Form 499 Instructions at 3.

²² Requests for Review Exh. C (“Independent Marketing Agreement”). Inmark signed an agreement with QAI’s affiliate, Pathfinder Capital, Inc. (PCI). Petition at 4 n.1. Because the provisions of all PCI and QAI marketing agreements are virtually identical, we include PCI in all references to “QAI.”

²³ Petition at 4.

²⁴ *Id.* at 6; Requests for Review Exhs. A at 1-2, H.

contribution obligation on behalf of a contributor and that the Petitioners had an obligation to contribute directly to the Fund.²⁵ On October 9, 2001, Petitioners appealed USAC's decision, challenging USAC's authority to reject their FCC Forms 499-A.²⁶ On May 22, 2003, USAC issued its decision denying Petitioners' appeal,²⁷ and Petitioners filed requests for review with the Commission.²⁸ In 2007, the Bureau issued the *2007 Inmark Order*, denying Petitioners' Requests for Review.²⁹

7. In the *2007 Inmark Order*, the Bureau affirmed USAC's decision, concluding that in a wholesale-reseller relationship, resellers have the obligation to contribute directly to the Fund under the Commission's rules and regulations, and the obligation cannot be shifted to a third-party through a contract.³⁰ At that time, the Bureau stated that to the extent QAI failed to comply with the terms of the contracts, the proper recourse for Petitioners was through private litigation in the courts.³¹ The Bureau based its decision on the Petitioners' representation that they were resellers.³²

8. On April 11, 2007, Petitioners filed the instant petition.³³ Among other arguments, Petitioners contend that the Bureau erred in affirming USAC's decision because Petitioners had submitted sufficient evidence to support their position that QAI collected the end-user revenues and had the obligation to contribute to the Fund.³⁴ Petitioners further argue that the Bureau's decision in the *2007 Inmark Order* was inconsistent with Commission policy, rules and requirements.³⁵

III. DISCUSSION

9. As discussed below, we conclude that the Bureau erred in upholding USAC's decision with respect to the Petitioners in this case. Based on reconsideration of the record, we conclude that the Bureau overlooked certain evidence, which, after further review, established that during the relevant time period, Petitioners were not "resellers" as contemplated by existing universal service contribution requirements, and therefore were not obligated to report revenue or contribute to the Fund.³⁶ Accordingly, we grant the Petition on this limited basis, and we need not address Petitioners' other arguments.

10. The contracts between Petitioners and QAI established that: 1) Petitioners contracted with QAI as telemarketers to market QAI's long distance service products on behalf of QAI;³⁷ 2) QAI had

²⁵ Petition at 6-7; Requests for Review Exh. B.

²⁶ Requests for Review Exh. I.

²⁷ Petition at 1; Requests for Review Exh. A (letter from USAC denying the Petitioners' appeal). USAC assessed Petitioners USF contributions of approximately \$1.4 million based on estimated revenue. Petition at 7.

²⁸ See *supra* note 4.

²⁹ See generally *2007 Inmark Order*, 22 FCC Rcd 4925.

³⁰ *Id.* at 4930, para 18.

³¹ *Id.* at 4930-31, para 19.

³² *Id.* at 4927, para 6.

³³ See *supra* note 1.

³⁴ See Petition at 11-12, 18.

³⁵ *Id.* at 14-18.

³⁶ See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A.

³⁷ See Requests for Review Exh. C, Schedule 3 (describing Petitioners as marketers and stipulating that Petitioners were to provide telemarketing services for the purpose of acquiring telephone usage customers for QAI).

control of the customers and the telecommunications products sold to the end-user customers solicited by Petitioners;³⁸ 3) QAI earned, billed and collected the revenues from end users and paid Petitioners “commissions” or “margins” that were calculated after deducting costs allocated to the customers acquired by Petitioners;³⁹ and 4) Petitioners were prohibited from marketing the services or products of other carriers while under contract with QAI.⁴⁰

11. A full review of the record (including a review of the contracts entered into between the Petitioners and QAI) thus indicates that the Petitioners were marketing agents for a telecommunications carrier.⁴¹ As stated above, the Commission has defined a reseller for contributions purposes as “a telecommunications service provider that: 1) incorporates the purchased telecommunications services into its own offerings; and 2) can reasonably be expected to contribute to support universal service based on revenues from those offerings.”⁴² In the instant matter, evidence in the record establishes that Petitioners did not purchase telecommunications services for incorporation into an offering that they sold to end users. Rather, by the terms of the contracts, Petitioners were hired to market the telecommunications service as defined and provided by QAI.⁴³ The contracts further stipulated that QAI reserved the right to establish the price of the service and to change, at its discretion, the underlying provider of its service and the rates charged.⁴⁴ In addition, Petitioners did not earn revenues from end users, but instead, were paid a “commission” or “margin” that QAI calculated by deducting all expenses from the “retail billing collections” that QAI collected from customers for the provision of its long distance service.⁴⁵ We therefore conclude that the Petitioners’ self-characterization of themselves as resellers should not be viewed as controlling.⁴⁶ Based on the evidence in the record, we conclude that

³⁸ See, e.g., Inmark Request for Review Exh. C at Sec. 1(a) (stating that “[QAI] may change the Products from time to time in its discretion”); Lotel and Protel Requests for Review Exh. C at Sec. 1(a) (providing that “Marketer may not change the Products in any way for any Customer”), Sec. 3(b)(ii) (providing that QAI “may, without penalty or payment, accept or reject any Customer or potential Customer, and may terminate service to any Customer, at any time, in its discretion”).

³⁹ See, e.g., Inmark Requests for Review Exh. C at Sec. 2(a) (providing that “[QAI] will pay Marketer the “Commissions” as detailed in Schedule 2 to this Agreement, provided that [QAI] makes no guarantees or assurances to Marketer of Marketer’s earnings hereunder”), Sec. 3(a)(iii) (providing that “Marketer will cooperate fully with [QAI] in its efforts to Provision Customers’ service orders, collect Customer debt and provide customer service to Customers”); Lotel and Protel Requests for Review Exh. C at Sec. 2(a) (providing that “Margins in respect of each Customer, defined in Schedule 2, belong to Marketer and will be paid by QAI to Marketer as provided in this Agreement and in Schedule 2”), Sec. 3(b)(ii) (providing that “QAI will serve as Marketer’s exclusive billing and collection agent with respect to Customers of Marketer, having the sole right and responsibility to bill and collect from those Customers”).

⁴⁰ See, e.g., Inmark Request for Review Exh. C at Sec. 1(b), Lotel and Protel Requests for Review Exh. C at Sec. 1(c) (prohibiting Petitioners from converting or transferring any customer from the use of QAI’s products or utilizing information relating to their customers for any reason other than those stipulated in the contract); Inmark Request for Review Exh. C at Sec. 3 (placing conditions on Petitioners’ acquisition of customers on behalf of other parties).

⁴¹ The contracts establishing Petitioners’ status as marketing agents were included in the Petitioners’ Requests for Review. However, the 2007 *Inmark Order* did not indicate whether the Bureau reviewed these contracts.

⁴² See *supra* para. 5; *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A.

⁴³ See generally Requests for Review Exh. C.

⁴⁴ See Requests for Review Exh. C, Schedule 1 (stating that QAI reserved the right to “choose any Carrier as the underlying provider of Products”).

⁴⁵ Inmark Request for Review Exh. C, Schedule 2; Lotel and Protel Requests for Review Exh. C at Sec. 1(a).

⁴⁶ Petition at 4.

the Petitioners were not resellers for contribution purposes, and that the Bureau erred in finding that Petitioners had an obligation to contribute to the Fund during the time period at issue.

12. Our conclusions are limited to the unique circumstances of the case at hand and do not alter the USF contribution obligations of wholesale carriers and their carrier customers. The evidence presented here establishes that the relationship between Petitioners and QAI was neither a wholesale/reseller relationship nor a third-party billing arrangement.⁴⁷ Although it appears from the terms of the contracts that Petitioners provided some level of customer service for the end users they solicited, on reconsideration, our review of the contracts indicates that the weight of the evidence establishes that Petitioners were marketing the telecommunications service for QAI. And, as a result, the obligation to report and contribute to the Fund rested with QAI.⁴⁸

13. We also emphasize that our conclusion in no way lends support to Petitioners' argument that USAC lacked the authority to reject their FCC Forms 499-A.⁴⁹ We find that the Bureau correctly found that the Commission's rules and precedent permit USAC to "verify any information" reported by carriers on their FCC Forms 499-A and to determine whether the information is "untruthful or inaccurate," and that this authority necessarily includes the discretion to reject forms containing incomplete or inaccurate information.⁵⁰ Although the specific facts of this case warranted further inquiry, we find no merit in Petitioners' argument that USAC acted outside of its authority when it rejected their 2001 FCC Forms 499-A.

14. Based on our findings above, we conclude that Petitioners were marketing QAI's long distance telecommunications service, did not earn revenues from end users for the relevant time period, and were not resellers of telecommunications services for contributions purposes as established in our relevant requirements. Petitioners therefore were not obligated to contribute to the Fund for the time period at issue. Accordingly, we reverse the Bureau's disposition in the *2007 Inmark Order* as to the Petitioners' contribution obligation under their particular circumstances, and grant the Petitioners' requests as provided herein.

IV. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1–4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151–154, 254, and sections 1.106 and 1.1910 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.1910, that the Petition IS GRANTED as to Inmark, Inc., d/b/a/ Preferred Billing, Lotel, Inc., d/b/a/ Coordinated Billing, and Protel Advantage, Inc. to the extent described herein, and IS DISMISSED as to American Cyber Corp. and Coleman Enterprises, Inc.

16. IT IS FURTHER ORDERED that the Request for Stay filed on April 11, 2007 by American Cyber Corp., Coleman Enterprises, Inc., Inmark, Inc., d/b/a/ Preferred Billing, Lotel, Inc., d/b/a/

⁴⁷ See *2007 Inmark Order*, 22 FCC Rcd at 4930, para. 18 (stating that a third party may agree to pay on behalf of a reseller, and USAC may accept payment from the third party, but if the third party does not pay on the reseller's behalf, the reseller must pay).

⁴⁸ See, e.g., Lotel and Protel Requests for Review Exh. C at Sec. 3(b)(ii) (providing that "During the term of this Agreement, QAI shall have the right to oversee and control Marketer's provision of customer service to its Customers and the right to take over the provision of customer service to any or all of Marketer's Customers if QAI determines, in its reasonable discretion, that Marketer is unable to perform customer service effectively").

⁴⁹ See Petition at 17-18 (arguing that USAC lacked the authority to reject Petitioners' timely-filed FCC Forms 499 that accurately reported no revenue).

⁵⁰ *2007 Inmark Order*, 22 FCC Rcd at 4931, para. 21.

Coordinated Billing, and Protel Advantage, Inc., IS DISMISSED as moot.

17. IT IS FURTHER ORDERED that this Order on Reconsideration SHALL BE TRANSMITTED to the Universal Service Administrative Company.

18. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), that this Order on Reconsideration SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Acting Chief
Wireline Competition Bureau