

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 Universal Service ) CC Docket No. 96-45
American Telecommunications Systems Inc. )
Application for Review )
Eureka Broadband Corporation )
Petition for Reconsideration )
Value-Added Communications, Inc. )
Petition for Review )
InComm Solutions, Inc. )
Request for Review )
Five9, Inc. )
Request for Review )

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 2017

Released: January 13, 2017

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. Consistent with precedent,<sup>1</sup> in this Order, we remand to USAC for further consideration five appeals involving resellers seeking a credit for contributions to the universal service fund (USF or Fund) that the resellers claim were made by their underlying providers or an adjustment to their revenue reporting for revenue they claim was reported by their underlying providers. At issue are petitions filed by American Telecommunications Systems Inc. (ATS), Value-Added Communications, Inc. (VAC), and Eureka Broadband Corporation (Eureka) seeking reconsideration or review of decisions by the Wireline Competition Bureau (Bureau) denying their requests for review of Universal Service Administrative Company (USAC) decisions that found inadequate evidence that USF contributions that Petitioners owed were made on their behalf by their underlying providers.<sup>2</sup> Also at issue are petitions filed by InComm

<sup>1</sup> Universal Service Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau filed by Global Crossing Bandwidth, Inc., et al., WC Docket No. 06-122, Order, 27 FCC Rcd 13780 (2012) (2012 Wholesaler-Reseller Clarification Order) (clarifying how USAC should proceed when a wholesale provider demonstrates that it had a reasonable expectation that a customer is a reseller, but the resale provider did not in fact contribute to the Fund, and conversely, when the underlying provider did not demonstrate a reasonable expectation and the resale provider did in fact contribute).

<sup>2</sup> Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, 22 FCC Rcd 5009 (WCB 2007) (2007 Reseller Contribution Order); 2012 Wholesaler-Reseller Clarification Order 27 FCC Rcd 13780, 13786, para. 12; Application for Review by American Telecommunications Systems, Inc., CC Docket No. 96-45 (filed Apr.

(continued....)

Solutions, Inc.<sup>3</sup> and Five9, Inc.<sup>4</sup> seeking review of USAC decisions regarding universal service fees paid to their respective wholesale providers. Consistent with the Commission's *2012 Wholesaler-Reseller Clarification Order*, we direct USAC to consider whether each reseller can demonstrate by a preponderance of the evidence that its underlying wholesale provider has contributed on the amounts at issue. If a reseller makes such a showing, USAC should not attempt to recover contributions for the subject amounts from the reseller, even if the reseller had the obligation to contribute.

## II. BACKGROUND

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

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."<sup>5</sup> 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."<sup>6</sup> To this end, the Commission has determined that common carriers and 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.<sup>7</sup> 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 service contribute to the Fund.<sup>8</sup> Rather, as explained more fully below, only carriers that provide service to end user customers are required to contribute. Providers with contribution obligations may pass through their contribution assessments to their customers.<sup>9</sup>

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12, 2007) (ATS Application); Petition for Review of Value-Added Communications, Inc., CC Docket No. 96-45 (filed Apr. 13, 2007) (VAC Application); Petition for Reconsideration of Eureka Broadband Corporation, CC Docket No. 96-45 (filed Apr. 13, 2007) (Eureka Petition). On our own motion, we are treating the requests by ATS and VAC as petitions for reconsideration of the *2007 Reseller Contribution Order* under sections 1.106 and 1.115 of the Commission's rules. 47 CFR §§ 1.106(c)(2), 1.115(c).

<sup>3</sup> Request for Review by InComm Solutions, Inc., WC Docket No. 06-122 (filed Feb. 6, 2012) (InComm Request for Review).

<sup>4</sup> Request for Review by Five9, Inc., WC Docket No. 06-122 (filed Mar. 15, 2013) (Five9 Request for Review).

<sup>5</sup> 47 U.S.C. § 254(d).

<sup>6</sup> *Id.*

<sup>7</sup> 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) (*Universal Service First Report and Order*) (subsequent history omitted). Although the Commission exercised its permissive authority to assess private carriage providers, it exempted certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers from the contribution requirement. 47 CFR § 54.706(d).

<sup>8</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 9179, para. 787. Telecommunications service providers are not required to contribute to the Fund in a given year if their contribution for that year would be less than \$10,000. 47 CFR § 54.708.

<sup>9</sup> See 47 CFR § 54.712(a) (authorizing contributors to recover federal universal service contribution costs from their customers); 2012 FCC Form 499-A Instructions at 21-22; see also *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Proposed Rulemaking, 23 FCC Rcd 1467, 1469, para. 4 & n.10 (2008) (noting that providers almost always pass contribution obligations through to their customers).

3. The Commission has designated USAC as the entity responsible for administering the universal service support mechanisms under Commission direction.<sup>10</sup> 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,<sup>11</sup> with USAC.<sup>12</sup> USAC reviews these filings and verifies the information provided by the contributors.<sup>13</sup> USAC also bills contributors for their universal service contributions.<sup>14</sup>

4. Because Commission rules require contribution only once along the distribution chain -- when a contributor provides telecommunications to an "end user"-- 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.<sup>15</sup> "Carrier's carrier" revenues are not assessed. "End-user" 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.<sup>16</sup>

5. To assist contributors, the Commission has clarified the distinction between revenues from "resellers" (or "carrier's carrier" revenues) and revenues from "end users." In 1997, the Commission 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."<sup>17</sup> Thus, a wholesale provider should exclude revenues from its contribution base only if it has

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<sup>10</sup> *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 CFR § 54.701.

<sup>11</sup> The Commission has delegated authority to the Wireline Competition Bureau, formerly the Common Carrier Bureau, to revise the Forms 499 and accompanying instructions to facilitate "sound and efficient administration of the universal service programs." See *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18442, para. 81. 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 CFR § 54.711(c). The FCC Forms 499 instructions are modified based on experience in administering the universal service program and explicit rulings by the Commission. See, e.g., *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7533-50 (2006) (*2006 Contribution Methodology Order*).

<sup>12</sup> 47 CFR § 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 Universal Service Administrative Company, When to File, <http://www.usac.org/cont/about/when-to-file.aspx> (last visited October 18, 2016) (USAC Form 499 Filing Schedule). Contributors project future quarters' revenue on the quarterly Telecommunications Reporting Worksheets (FCC Form 499-Q), which are generally filed on February 1, May 1, August 1, and November 1. *Id.*

<sup>13</sup> 47 CFR § 54.711(a).

<sup>14</sup> 47 CFR § 54.702(b).

<sup>15</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507.

<sup>16</sup> *Id.*; *Fourth Order on Reconsideration* 13 FCC Rcd at 5482, para. 298 ("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.").

<sup>17</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18507, App. A; *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13786, para. 12; see 2012 FCC Form 499-A Instructions at 21 ("For purpose of completing Block 3, a "reseller" is a telecommunications carrier or telecommunications provider that: 1)

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“affirmative knowledge” or a “reasonable expectation” that its customer is contributing to the Fund on the revenues derived from the offering that incorporates the wholesale input.<sup>18</sup> If a wholesale provider cannot meet this standard for a particular customer, the provider should treat that customer as an end user rather than as a reseller for contributions purposes.<sup>19</sup>

6. The Commission adopted the wholesale exemption in part as a means of addressing concerns that the same revenue should not be assessed twice for USF contributions purposes.<sup>20</sup> In the *2012 Wholesaler-Reseller Clarification Order*, the Commission provided further clarity on how USAC is to treat claims of double payment to the Fund.<sup>21</sup> The Commission clarified that where there is a preponderance of the evidence that the wholesale provider’s customer actually paid into the Fund, USAC should not attempt to recover contributions from the wholesale provider on the subject revenues, even where the wholesale provider had not demonstrated a reasonable expectation at the time it filed its revenue data that its customer would contribute to the Fund.<sup>22</sup> The Commission also clarified that USAC is not required to conduct additional independent investigations, beyond checking its own records, of the wholesale provider’s customers in making this determination.<sup>23</sup> Thus, the burden of proof is on the provider claiming double collection to demonstrate, by a preponderance of the evidence, that contributions actually were made to the Fund.<sup>24</sup> The Commission has stated that requiring such a showing is necessary to ensure that the no-double-collection exception does not swallow the rule of complying with universal service contribution obligations in the first instance.<sup>25</sup>

## B. Petitions for Relief

7. *Petitions Arising From 2007 Reseller Contribution Order*. ATS, Eureka and VAC are self-identified resellers.<sup>26</sup> In a series of actions, USAC determined that each carrier was required to contribute to the USF.<sup>27</sup> In response, each carrier filed an appeal with the Commission seeking review of USAC’s decisions, arguing that its respective universal contribution obligation was paid on its behalf by

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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 such offerings when provided to end users”).

<sup>18</sup> 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); *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13786, para. 12.

<sup>19</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13786, para. 12.

<sup>20</sup> See *id.* at 13786, 13799, paras. 11, 44.

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

<sup>22</sup> *Id.* at 13799, para. 44. The Commission subsequently clarified that the standard of proof when establishing a reasonable expectation that a reseller customer is contributing to the Fund is “by a preponderance of evidence.” See *Universal Service Contribution Methodology, Petition for Clarification and Partial Reconsideration by XO Communications Services, LLC*, WC Docket No. 06-122, Order on Reconsideration, 29 FCC Rcd 9715, 9719-21, paras. 12-14 (2014) (*Burden of Proof Clarification Order*).

<sup>23</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13799, para. 45.

<sup>24</sup> *Burden of Proof Clarification Order*, 29 FCC Rcd at 9720, para. 14.

<sup>25</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13799, para. 45.

<sup>26</sup> See ATS Application at 2; Eureka Petition at 4-6; VAC Application at 2-3, 15-17.

<sup>27</sup> See ATS Application at 1-3; Eureka Petition at 1-5; VAC Application at 3-5.

its wholesale provider.<sup>28</sup> In March 2007, the Bureau released the *2007 Reseller Contribution Order*, denying appeals of various resellers, including those of ATS, Eureka, and VAC.<sup>29</sup>

8. ATS, Eureka, and VAC sought reversal of the Bureau's decision in the *2007 Reseller Contribution Order*.<sup>30</sup> The Petitioners contended, *inter alia*, that the Bureau's decision was arbitrary and capricious because the Bureau failed to consider certain evidence or did not adequately consider evidence and arguments presented in their appeals.<sup>31</sup> These Petitioners also asserted that the Bureau's order requires them in effect to make double payments to the USF because of the limited recourse against their underlying carriers.<sup>32</sup> ATS requested a refund for amounts it alleges resulted in double contributions to the Fund and which it paid under protest.<sup>33</sup> VAC requested credit for the contributions it claims were made by its underlying carrier.<sup>34</sup> Eureka argued it should not make direct USF contributions for the relevant time period.<sup>35</sup> These Petitioners also made several arguments, discussed below, asserting that the *2007 Reseller Contribution Order* was procedurally defective.<sup>36</sup>

9. *InComm*. On February 6, 2012, InComm filed a request for review and waiver of a USAC decision that denied a request to take administrative notice of certain interstate telecommunications revenue InComm reported as end-user revenue that had been previously reported by its underlying wholesale carrier as end-user revenue.<sup>37</sup> InComm argued that this double reporting of end-user revenues used to calculate USF contribution obligations resulted in over-assessment of InComm's contribution obligation.<sup>38</sup>

10. *Five9*. On March 15, 2013, Five9 filed a request for review of a USAC decision denying by Five9's request for a credit for universal service fees paid to its wholesale carriers for interstate and

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<sup>28</sup> Request for Review by American Telecommunications Systems, Inc., of Decision of Universal Service Administrator, CC Docket No. 96-45 (filed Feb. 22, 2005) (ATS Request for Review); Appeal of Decisions of the Universal Service Administrative Company Concerning Eureka Broadband Corporation's Revision to FCC Form 499-A and Application of Charges, CC Docket Nos. 96-45, 97-21 (filed Sept. 30, 2004) (Eureka Request for Review); Request for Review of Decision of the Universal Service Administrator by Value-Added Communications, Inc., CC Docket No. 96-45 (filed June 17, 2005) (VAC Request for Review).

<sup>29</sup> *2007 Reseller Contribution Order*, 22 FCC Rcd 5009.

<sup>30</sup> See generally ATS Application; Eureka Petition; VAC Application.

<sup>31</sup> See ATS Application at 1-4 (stating that the Bureau's order "mischaracterize[d] ATS's clear explanation of its position"); Eureka Petition at 1-6 (arguing that the Bureau ignored evidence and did not address its arguments); VAC Application at 7-8 (arguing that the Bureau failed to consider all relevant factors and arguments presented).

<sup>32</sup> ATS Application at 5-7; Eureka Petition at 4-6; VAC Application at 9-21.

<sup>33</sup> ATS Application at 7 (requesting a refund of all "double payments," together with interest). ATS states that its main objection was "double billing and double payment, not payment of a billing by its carrier Tel-Save/Talk.com." *Id.* at 2.

<sup>34</sup> VAC Application at 23 (requesting that the Commission direct USAC to process VAC's request for credit for USF payments that VAC claims were submitted to its underlying carrier).

<sup>35</sup> Eureka Request for Review at 4-5 (asking the Commission to reject USAC's decision to impose USF obligations, late fees, and penalties).

<sup>36</sup> Additionally, VAC asserts that it is entitled to the government-only exemption. VAC Application at 7, 9-10. We do not address this issue here because it is beyond the scope of the *2012 Wholesaler-Reseller Clarification Order*.

<sup>37</sup> InComm Request for Review at 1.

<sup>38</sup> *Id.*

international telecommunications services for years 2008-2012.<sup>39</sup> Five9 also requested that the Commission waive late payment penalties on the amount in controversy.<sup>40</sup>

### III. DISCUSSION

11. Consistent with the Commission's *2012 Wholesaler-Reseller Clarification Order*, we conclude in this Order that the resellers, as the providers claiming double collection, have the burden to demonstrate that their wholesale providers made actual contributions to the Fund based on the relevant revenues. We remand these matters back to USAC so that it can evaluate whether this standard was met. We also find that the *2007 Reseller Contribution Order* was not procedurally defective.

#### A. Applying the 2012 Wholesaler-Reseller Clarification Order to Resellers

12. In 2012, the Commission clarified how USAC should proceed when a wholesale provider demonstrates that it had a reasonable expectation that a customer is a reseller, but the resale provider did not in fact contribute to the Fund, and conversely, when the wholesale provider did not demonstrate a reasonable expectation and the resale provider did in fact pay.<sup>41</sup> Central to the Commission's analysis in the *2012 Wholesaler-Reseller Clarification Order* was the underlying contribution principle that USAC should not double collect if another provider actually contributed on the relevant revenue.<sup>42</sup>

13. Applying that principle to the appeals before us, we conclude that the underlying tenet of the Commission's current contribution system—that universal service contributions should be assessed only once in the distribution chain—applies equally to resale providers as it does to their underlying providers. Consistent with the *2012 Wholesaler-Reseller Clarification Order*, USAC should not attempt to recover contributions from a *resale* provider to the extent that a preponderance of the evidence demonstrates that its wholesale provider contributed on the revenue from the telecommunications input at issue. By applying the principle previously established by the Commission to the circumstances at issue promotes equity and non-discrimination in the administration of the contribution system. As the Commission explained in the *2012 Wholesaler-Reseller Clarification Order*, the burden is on the provider claiming double collection to demonstrate that contributions were made to the universal service fund based on revenue from the relevant services.<sup>43</sup> To be clear, USAC is not required to conduct an independent investigation of the resale provider's underlying provider, but must consider evidence produced by the resale provider (and the underlying provider) of the wholesale-resale provider relationship, including evidence of services billed, amounts paid by the resale provider to the wholesale provider, and amounts reported to and paid into the Fund by the wholesale provider.<sup>44</sup>

14. If the preponderance of the evidence demonstrates that the wholesale provider did in fact contribute to the Fund, even though its reseller-customer had the primary obligation to contribute, USAC should not attempt to recover that portion of contributions from the reseller on the subject revenues. In such cases, USAC should establish the total contribution obligation of the reseller and then credit the reseller for the actual contributions of the wholesale provider on the subject revenues.

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<sup>39</sup> Five9 Request for Review at 1. On February 22, 2013, Five9 filed a separate request for review that requests a waiver of the universal service filing requirement for years 2003-2007 because Five9 claims it does not have revenue data for these years. We do not address this request in this order.

<sup>40</sup> *Id.*

<sup>41</sup> See generally *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd 13780.

<sup>42</sup> *Id.* at 13799, para. 44.

<sup>43</sup> *Id.* at 13799, para.45; *Burden of Proof Clarification Order*, 29 FCC Rcd 9715.

<sup>44</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13799, para. 45. The *2007 Reseller Contribution Order* recognized that USAC cannot determine with any certainty whether or on what revenues a "double payment" may have been made based on the routine reporting by the resale and wholesale providers.

15. Even so, resellers must exercise due diligence in meeting the requirements of the universal service contribution system. Our conclusion that USAC should not attempt to recover contributions from a resale provider to the extent its underlying provider contributed on the revenue from the telecommunications input at issue does not diminish a resale provider's fundamental obligation to contribute. We are not persuaded by ATS's argument that, by contractual agreement, its underlying carrier collected end-user revenues from customers, and therefore had the obligation to contribute to the Fund based on those revenues.<sup>45</sup> The Commission's rules set forth the contribution obligations of both resellers and wholesale providers and do not permit the party with the primary USF contribution obligation to shift its contribution obligation to a third-party through private contractual arrangements.<sup>46</sup> We affirm, as discussed in the *2007 Reseller Contribution Order*, that the contribution obligation of the resale (or wholesale) provider cannot be contracted away.<sup>47</sup> The Bureau previously noted that "[a]s the Supreme Court and the Commission have stated, '[i]f a regulatory statute is otherwise within the powers of Congress ... its application may not be defeated by private contractual provisions.'"<sup>48</sup> Thus, although the wholesale provider may pay on the resale provider's behalf, the resale provider retains the obligation to contribute. USAC's recognition of the payment by the wholesale provider on behalf of the resale provider may reduce the resale provider's payment obligation, but the ultimate contribution obligation remains with the resale provider.

16. ATS contends that this finding is inconsistent with the Commission's rules and requirements, which, it claims, place the USF reporting and contribution obligations on the wholesale carrier "unless and until it confirms with the retailer that the retailer will discharge these obligations."<sup>49</sup> ATS's arguments are premised on an incorrect reading of the Commission's universal service contribution rules and requirements. As explained above, in a wholesaler-reseller relationship, resellers generally bear the obligation to contribute to USF because resellers have the direct relationship with the end-user.<sup>50</sup> Although the wholesale provider has an independent obligation to perform a requisite level of due diligence to determine whether it reasonably expected that its reseller customer was contributing to the Fund, this obligation does not relieve a reseller, as the provider with the end-user relationship, from its obligation to contribute to the Fund.<sup>51</sup> The Commission's reseller certification procedure provides both parties to the resale transaction the information they need to determine whether the USF obligation

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<sup>45</sup> ATS Application at 1-3.

<sup>46</sup> *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986); *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, 19304, para. 45 (1996); *Review of the Commission's Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221, 87-8, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1087, para. 54 & n.118 (2001).

<sup>47</sup> *2007 Reseller Contribution Order*, 22 FCC Rcd at 5012, para. 12.

<sup>48</sup> *Id.* (citing *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986)); *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 19276, 19304, para. 45 (1996); *Review of the Commission's Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 and 87-8, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1087, para. 54 & n.117 (2001).

<sup>49</sup> ATS Application at 4.

<sup>50</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 9207, para. 846.

<sup>51</sup> The wholesale carrier may be obligated to contribute if it fails to perform the appropriate due diligence. *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13799, para 44; *see, e.g.*, 2012 FCC Form 499-A Instructions at 21-22.

resides with the underlying carrier or the resale provider.<sup>52</sup> The fact that the wholesale provider is required to demonstrate that its claimed wholesale revenues came from providing service to a contributing reseller rather than to an end user does not alter the reseller's fundamental obligation, under the Act and the Commission's rules, to contribute to the Fund based on the end-user revenues earned.

17. We agree with Petitioners that relief for double payment should be a refund or credit from USAC,<sup>53</sup> but only to the extent the party alleging double payment demonstrates that double payments are being required on the same revenue. Beyond checking its own records, USAC is not required to conduct independent investigations to assist the resale provider.<sup>54</sup> Given the size of the Fund, the number of contributors, and the complexity of the relationship between resellers and their wholesale carriers, additional investigations to verify the amounts of alleged double collection would be excessively burdensome and onerous to USAC.<sup>55</sup> It is the provider's responsibility to ensure that its contribution obligation is paid and properly accounted for.<sup>56</sup>

18. VAC suggests the Commission adopt a procedure whereby the provider making the claim of double payment would provide USAC with proof of the USF payments to the underlying provider, which USAC would then submit to the underlying provider for verification.<sup>57</sup> We reject this proposal. As discussed above, we limit USAC's investigative responsibility to checking its own records, and reiterate that, in the cases before us in this order, it is the resale provider claiming double collection that bears the burden of proving that the underlying provider paid on its behalf. The resale and wholesale providers will likely need to work cooperatively to establish that the wholesale provider contributed to the universal service fund on revenues from the telecommunications input provided to the resale provider.

#### **B. Requests for Review of the 2007 Reseller Contribution Order**

19. We now turn to the specific matters before us. ATS argues that the *2007 Reseller Contribution Order* mischaracterized ATS's position, which ATS claims was supported by "voluminous records and documentation" demonstrating that USAC billed ATS for USF contributions that had already been paid by ATS's underlying carrier.<sup>58</sup> As evidence of double payment, ATS provided copies of invoices from USAC, copies of checks for payments made by ATS to USAC, a spreadsheet summarizing USF payments made to USAC by ATS during the relevant time period, correspondence from ATS to USAC explaining why ATS was making contribution payments under protest, and a declaration of the

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<sup>52</sup> *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13786-87 paras. 12-13; 2012 FCC Form 499-A Instructions at 21-22.

<sup>53</sup> Eureka and ATS, as well as VAC, argue that the relief for double payment should be a refund or credit from USAC, not recourse against the underlying carrier. ATS Application at 4; Eureka Petition at 7-8; VAC Application at 3-4, 7-8. See *Comments of InterCall, Inc. in Support of Petition for Reconsideration*, CC Docket No. 96-45 (filed June 1, 2007) (arguing in support of a credit to indirect contributor in the amount of the underlying carrier's contribution). Petitioners argue that recovering double payments from their underlying carriers is impractical, if not impossible. Eureka Petition at 7-8; VAC Application at 7-8, 11-14.

<sup>54</sup> See *2012 Wholesaler-Reseller Clarification Order*, 27 FCC Rcd at 13799, para. 45 (clarifying that USAC, beyond checking its own records, is not required to conduct additional independent investigations of the wholesale provider's customers).

<sup>55</sup> For example, Eureka argues that the amount of its contribution into the fund is the amount of overpayment and, therefore, the amount can be determined with certainty. Eureka Petition at 4-5.

<sup>56</sup> *2007 Reseller Contribution Order*, 22 FCC Rcd at 5013, para. 14.

<sup>57</sup> VAC Application at 20.

<sup>58</sup> ATS Application at 1-3.

company president testifying to the facts stated in ATS's petition.<sup>59</sup> ATS also submitted a letter from its underlying provider, Talk.com, to USAC in which Talk.com acknowledges that it reported revenues received from ATS as end-user revenue on Talk.com's FCC Form 499 filings and asks that USAC "credit the ATS invoices."<sup>60</sup> The letter from Talk.com states that "ATS may have reported their revenue directly to USAC which has resulted in ATS contributing twice to USAC (once indirectly through Talk.com and once directly via a direct invoice from USAC to ATS)."<sup>61</sup> These documents, however, do not demonstrate that its underlying provider, Talk.com, made duplicative payments on the same revenue. Notably, in its letter Talk.com does not identify the amount of USF contributions Talk.com claims it made on ATS's behalf. Taken as a whole, the evidence in the current record is insufficient to support ATS's claim that Talk.com did, in fact, make the necessary contributions on the same end-user revenues for which ATS was assessed.<sup>62</sup>

20. Eureka argues that the Bureau ignored record evidence that, it contends, proves its underlying carrier paid universal service obligations on behalf of Eureka's predecessor, Gillette Global Network (GGN).<sup>63</sup> Eureka argues that even though GGN was a reseller, it was treated as an end user by its underlying carrier, MCI, and that MCI charged USF payments to GGN.<sup>64</sup> Eureka asserts that it provided "ample record evidence" to demonstrate that GGN's underlying carrier had made USF payments on GGN's behalf.<sup>65</sup> In its original application for review, Eureka submitted as evidence an FCC Form 499-A filed by GGN in 2000, in which GGN made the following notation: "Gillette Global Network, doing business primarily as a long distance reseller, has been contributing to the universal service fund through the underlying carriers."<sup>66</sup> Eureka also submitted correspondence from Eureka to USAC and the Commission disputing the amounts of its USF contribution obligation and outlining Eureka's voluntary USF payment plan.<sup>67</sup> Eureka, however, did not submit any evidence from its wholesale provider establishing that the wholesale provider contributed on revenue from Eureka and the amounts of such contribution. The evidence submitted by Eureka, by itself, does not establish that GGN's underlying

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<sup>59</sup> See generally ATS Application; ATS Request for Review and Attachments. ATS made payments to USAC "under protest" while they settled the dispute of purported double payments. See Letters from ATS to USAC included as attachments to ATS' Request for Review.

<sup>60</sup> ATS Application at Exh. 2.

<sup>61</sup> *Id.*

<sup>62</sup> USAC explained to ATS it would be unable to verify the extent of alleged double payments unless it had data "carefully correlated by both carriers." See Letter from USAC to Bill Stathakaros, American Telecommunications Systems, Inc. (dated Dec. 21, 2004), attached to ATS Request for Review.

<sup>63</sup> Eureka Petition at 5. In its original application, Eureka also challenged USAC's rejection of a revised Form 499-A for GGN, because the revision was submitted more than one year after the filing deadline. Eureka Request for Review at 2-3. In 2010, the Bureau granted this part of Eureka's appeal, finding that Eureka showed good cause to justify waiving the deadline at issue. See *Universal Service Contribution Methodology et al., Requests for Review of Decisions of Universal Service Administrator by AT&T, Inc. et al.*, WC Docket No. 06-122 *et al.*, Order, 25 FCC Rcd 10855 (WCB 2010).

<sup>64</sup> Eureka Request for Review at 5.

<sup>65</sup> Eureka Petition at 6.

<sup>66</sup> Eureka Request for Review at Exh. 1.

<sup>67</sup> *Id.* at Exh. 4. Eureka also submitted copy of the minutes of a meeting of the USAC Board of Directors, in which the Board adopted a one-year limitation on downward revisions to FCC Form 499-A, and an email from USAC to Eureka, explaining why it had rejected Eureka's revised FCC Forms 499-A for 2001 (reporting 2000 revenues). *Id.* at Exhs. 2-3. This evidence relates to the one-year deadline, and does not relate to the proposition that an underlying carrier paid USF contributions on Eureka's behalf. Eureka's request for waiver of the one-year deadline was granted.

carrier contributed to the Fund based on revenue from the telecommunications input it provided to GGN.<sup>68</sup>

21. VAC claims that the Bureau refused to allow for a credit for USF payments that VAC had submitted to its underlying carrier,<sup>69</sup> but provides no evidence to support the conclusion that the underlying carrier satisfied VAC's USF contribution obligations. VAC accordingly has failed to support its claim.

22. In light of the discussion in this Order, the *2012 Wholesaler-Reseller Clarification Order*, and the *Burden of Proof Clarification Order*, we remand to USAC the ATS, Eureka, and VAC matters. Each resale provider may provide additional evidence to USAC to establish that its underlying provider contributed to the universal service fund on revenues from the telecommunications inputs used by the resale provider to provide telecommunications or telecommunications services to its end-user customers. In order to satisfy the preponderance of the evidence standard, the resale provider must establish that the underlying provider contributed on its behalf, and the amount it contributed (or the amount of assessable revenue reported by quarter). Such evidence could include, for instance, a sworn affidavit from its wholesale provider attesting to the revenue received from the reseller and the universal contributions paid to USAC on that revenue by quarter compiled from a review of its books and records, together with certification from the reseller that it attests to the veracity of the underlying provider's statement based upon a review of its own books and records. If, based on the proffered evidence, it is more likely than not the underlying provider contributed to the universal service fund on revenues from the relevant telecommunications input provided to the resale provider, USAC should provide a credit to the resale provider against the resale provider's contribution obligation in the amount paid by the underlying carrier on the relevant revenues.

### C. Requests of InComm and Five9

23. *InComm*. InComm requests that USAC take administrative notice that InComm reported interstate telecommunications revenue to USAC as end-user revenue that had been previously reported as end-user revenue by its underlying wholesale provider.<sup>70</sup> InComm argues that the double-reporting of end-user revenue resulted in an over assessment of InComm's contribution obligation.<sup>71</sup> InComm states that the "central question" in its appeal is whether it "provided USAC and the Commission with accurate and reliable information regarding revenues on which USF assessments may properly be made."<sup>72</sup> InComm argues that the *2007 Reseller Contribution Order* is distinguishable from its appeal,<sup>73</sup> and that the issues presented there that supported the Bureau's denial Order would be avoided here by the Commission directing USAC to take into account the double-reported revenue and reversing the corresponding USF obligations.<sup>74</sup>

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<sup>68</sup> See Eureka Petition at 4-5 (arguing that because USAC recognized the amount of revenues reported by Eureka's predecessor-in interest, GGN, in its 2000 FCC Form 499-A to establish Eureka's contribution obligation, this submission was also adequate to identify the amounts Eureka claims were paid on its behalf by the underlying carrier); see Eureka Request for Review at 14 & n.22.

<sup>69</sup> VAC Application at 4.

<sup>70</sup> InComm Request for Review at 5.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 6. InComm recognizes that it failed to timely comply with our rules, does not contest that the late fees were properly assessed by USAC, and states that it has paid the late filing fees in full. *Id.*

<sup>73</sup> *Id.* at 8-9 (InComm contends that it is not excluding its retail mark up from the contribution base, unlike the ATS petitioners, nor is it seeking a credit for USF fees paid to its underlying provider, as the ATS petitioners sought).

<sup>74</sup> *Id.* at 2.

24. In support of its position, InComm provided a letter from its wholesale provider that compiled the quarterly interstate wholesale revenue and federal universal service fund surcharge billed by the wholesale provider to InComm and reported to USAC for the relevant period.<sup>75</sup> The wholesale provider states that it compiled the data through a search of its records used in connection with the preparation of the certified FCC Forms 499-A and -Q, and that the letter is intended to provide InComm with “a record of the wholesale revenue received from InComm that [the wholesale provider] previously reported to USAC as part of [its] quarterly and annual FCC Form 499 filings during the referenced period.”<sup>76</sup> InComm also submits an affidavit from its Co-President whose responsibilities include oversight of InComm’s reporting and remittance activities with respect to the universal service fund.<sup>77</sup> In the affidavit, the Co-President attests to the accuracy of the revenue data reported in the wholesale provider’s letter based on the books and records of InComm, including the invoices received from the wholesale provider during the relevant period.<sup>78</sup> InComm argues that this – the information provided by its wholesale provider, corroborated by InComm’s records, and certified by an officer of the company – provides USAC with all the information it needs to make the necessary determination without the need for an audit.<sup>79</sup> Specifically, InComm contends that the revenue information provided is “as accurate and reliable as any information submitted on a typical FCC Form 499” and thus enables USAC to conduct a “precise calculation of the USF double-assessment amount and negates the need for an audit of either InComm or its underlying carrier.”<sup>80</sup> Based on the letter from the wholesale provider, and the affidavit from an officer of InComm, which corroborates the wholesale provider’s letter, we find that the evidence submitted by InComm establishes by a preponderance of the evidence that its underlying carrier contributed to the universal service fund on the relevant revenues. We remand this matter to USAC to confirm that USAC’s records are consistent with the evidence submitted by InComm and for further action consistent with our finding.<sup>81</sup>

25. InComm also requests a waiver of potentially applicable revision deadlines for its FCC Forms 499.<sup>82</sup> We deny this request as unnecessary because, on remand, USAC will confirm the amounts and issue the appropriate credits against InComm’s contribution obligation consistent with this order.

26. *Five9*. Five9 requests that the Commission direct USAC to apply a credit for universal service fees Five9 paid to its underlying providers for interstate and international telecommunications services for filing years 2008-2012.<sup>83</sup> As discussed above, we agree that the resale provider should be afforded relief to the extent the wholesale provider contributed on the relevant revenues, and to the extent

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<sup>75</sup> *Id.* Exh. 4.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* Exh. 2.

<sup>78</sup> *Id.*; see Letter from Jeffrey Mitchell, Counsel for InComm, to Marlene Dortch, FCC, WC Docket No. 06-122, dated Sept. 27, 2013.

<sup>79</sup> InComm Request for Review at 11-13.

<sup>80</sup> *Id.* at 11.

<sup>81</sup> InComm further argues that it does not have recourse against its wholesale provider to recoup the universal service fees that InComm paid to its provider. *Id.* at 13. InComm acknowledges that it failed to provide its underlying provider with the necessary assurances that it was contributing to the universal service fund (because it was not, in fact, contributing), and that its underlying provider, not having a reasonable expectation that InComm would contribute, had the obligation to treat revenue from InComm as end-user revenue and to contribute on it. *Id.* InComm contends that because of this, its only relief from the double payment conundrum is to allow a credit for its underlying provider’s reporting and contribution on its behalf. *Id.* at 15. Due to the relief provided in this order, InComm’s argument is moot.

<sup>82</sup> *Id.* at 17.

<sup>83</sup> Five9 Request for Review at 1.

that the resale provider can adequately establish such contribution. Five9 also argues that the finding in the *2007 Reseller Contribution Order* that a provider cannot contract away its regulatory obligation is flawed.<sup>84</sup> As discussed above, we disagree with Five9's assessment and affirm the finding in the *2007 Order* that a provider may not contract away its regulatory obligation to contribute.<sup>85</sup>

27. Like InComm, Five9 further argues that audits of it and its wholesale providers are not necessary to establish the revenue subject to double assessment.<sup>86</sup> Five9 submits that it has met the burden of proof necessary to establish the amount of contributions made by its wholesale providers on its behalf by securing confirmatory certificates from its underlying providers.<sup>87</sup> In the certificates submitted by Five9, the underlying providers attest, under penalty of perjury, to the total universal service fees billed to and collected from Five9 on an annual basis and that the total fees billed and collected were remitted to USAC.<sup>88</sup> The certificates include the filer identification number for both Five9 and its underlying carrier to assist USAC in its confirmation of the information.<sup>89</sup> Five9 seeks a credit for the universal service fees it paid to its wholesale providers against its universal service obligation.<sup>90</sup> Unlike InComm, however, Five9 does not attest to the accuracy of the revenue data submitted by its underlying provider based on Five9's own books and records. We believe that such an attestation is important to corroborate the information submitted by the underlying provider. We remand this matter to USAC to evaluate the information submitted and to permit Five9 the opportunity to submit an affidavit and any additional evidence if needed to establish its claim.

28. Five9 also requests that we waive the late fees associated with its universal service contribution obligation associated with its request for review.<sup>91</sup> Five9 argues that there is good cause for waiver because it contributed to the universal service fund indirectly through its underlying providers, and because it believed it was an end user and not subject to direct contribution obligations. We do not find good cause exists to waive the late filing fees. Contributors are required to pay the amount shown on an invoice even if the contributor disagrees with USAC's assessment of its universal service contributions obligation and has filed an appeal with USAC or the Commission; USAC has formalized this as the pay-and-dispute policy.<sup>92</sup>

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<sup>84</sup> *Id.* at 6.

<sup>85</sup> *See supra.*

<sup>86</sup> *Id.* at 6-7.

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.* at 7-8, Exh. B (confidential).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 9.

<sup>91</sup> *Id.* at 10.

<sup>92</sup> 47 CFR § 54.713(a)-(b) (contributors that fail to make full payment on or before the due date of a monthly USF assessment are subject to late fees, penalties, and interest); Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996); 47 CFR Part 1, Subpart O; 31 U.S.C. § 3711(a); *Amendment of Parts 0 and 1 of the Commission's Rules*, MD Docket No. 02-339, Report and Order, 19 FCC Rcd 6540 (2004). *See Universal Service Contribution Methodology; Emergency Request for Review of Universal Service Administrator Decision by Level 3 Communications, LLC, et al.*, WC Docket No. 06-122, Order, 25 FCC Rcd 1115, 1120, para. 9 (WCB 2010) (noting that the contributor could have avoided incurring late fees, interest charges, and penalties by paying the full invoiced amount in compliance with the pay-and-dispute policy); *Universal Service Contribution Methodology; Requests for Waiver of Decisions of the Universal Service Administrator by Achieve Telecom Network of Massachusetts, LLC, et al.*, WC Docket No. 06-122, Order, 23 FCC Rcd 17903 (WCB 2008) (denying petitioners separate requests for waiver of the late filing fees by failing to comply with the USAC's pay-and-dispute policy).

#### D. The Bureau's 2007 Reseller Contribution Order Was Procedurally Proper

29. Each of the three *2007 Reseller Contribution Order* petitioners raise a procedural issue associated with that Order. We dismiss the issues raised by ATS and Eureka but also conclude that if we were instead to address them on the merits, we would deny reconsideration of the Bureau's prior decision. With respect to the issue raised by VAC, we deny reconsideration of the Bureau's decision.

30. Eureka contends that the *2007 Reseller Contribution Order* is *ultra vires* under the notion that it requires double payment to the Fund.<sup>93</sup> As we discussed above, the Commission's rules and requirements do not require double payment in contravention of the Act. The *2012 Wholesaler-Reseller Clarification Order* clarified that if the provider claiming double recovery can establish that its wholesale (or resale) provider contributed to the universal service fund on its behalf, USAC shall provide for a credit against the provider's contribution obligation in that amount. Eureka's procedural argument therefore is without merit.

31. ATS argues that the issues addressed in the *2007 Reseller Contribution Order* were novel and should have been ruled on by the Commission, not the Bureau on delegated authority.<sup>94</sup> We disagree. The Commission's *2012 Wholesaler-Reseller Clarification Order* applied the overarching principles that have been applicable to the wholesaler-reseller relationship in the contribution mechanism since its inception, including during the relevant time period in ATS's Request for Review.

32. VAC argues that it was denied due process because the *2007 Reseller Contribution Order* consolidated its request with the requests of others without notice and an opportunity to comment.<sup>95</sup> Under sections 4(i) and 4(j) of the Communications Act, the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions," and to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."<sup>96</sup> Consolidating matters can be administratively efficient and is appropriate when the Bureau is presented with the same or similar issues.<sup>97</sup> Given the volume of pending matters before the Bureau and the similarity of issues presented in the underlying petitions, it was well within the Bureau's discretion to consolidate VAC's request with other similar requests. VAC does not explain why the Bureau's consolidation of decisions violated due process. Insofar as it claims that the Bureau made errors when handling the cases in a consolidated manner, those arguments are addressed above.

#### IV. ORDERING CLAUSES

33. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 5, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 155, 254, and sections 1.106 and 1.115 of the Commission's rules, 47 CFR §§ 1.106 and 1.115, the Applications for

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<sup>93</sup> Eureka Petition at 8. *Ultra vires* is defined as "an act performed without authority to act on the subject." Black's Law Dictionary, 1522 (6th ed. 1990).

<sup>94</sup> ATS Application at 5; 47 CFR § 0.291(a)(2) (excluding from delegated authority "applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.").

<sup>95</sup> VAC Application at 8.

<sup>96</sup> 47 U.S.C. § 154(i), (j). See 47 CFR § 1.1 ("Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings.").

<sup>97</sup> The Commission itself will issue a single order to address multiple pending requests for review when the circumstances warrant it. See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School New Orleans, LA, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 15 FCC Rcd 5316 (2006) (consolidating 196 appeals involving the schools and libraries support mechanism).

Review filed by American Telecommunications Systems, Inc. and Value-Added Communications, Inc., and the Petition for Reconsideration filed by Eureka Broadband Corporation, are hereby GRANTED in part, DISMISSED in part, and DENIED in part, consistent with this Order. Pursuant to section 54.722 of the Commission's rules, 47 CFR § 54.722, the underlying requests for review of USAC's decisions are REMANDED in part to USAC for further consideration consistent with this Order.

34. IT IS FURTHER ORDERED that pursuant to authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, and section 54.722 of the Commission's rules, 47 CFR § 54.722, that the Requests for Review filed by InComm Solutions, Inc. and Five9, Inc. are hereby REMANDED in part to USAC for further consideration and DENIED in part, consistent with this Order.

35. IT IS FURTHER ORDERED that this Order SHALL BE transmitted to the Universal Service Administrative Company.

36. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith  
Acting Chief  
Wireline Competition Bureau