



inContact's application for review. Under these circumstances, mandamus is unwarranted.

## BACKGROUND

1. Section 254 of the Communications Act, 47 U.S.C. § 254, requires telecommunications carriers to contribute to the support mechanisms established by the Commission to preserve and advance universal service. A key goal of universal service “is to ensure affordable telecommunications services to consumers living in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers.” *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Report and Order, 22 FCC Rcd 16372, 16373 ¶ 2 (2007). Under the Commission's rules, USAC administers universal service support mechanisms that are paid out of the Universal Service Fund (“USF”), with payments totaling approximately \$8 billion annually.<sup>2</sup> See generally 47 C.F.R. §§ 54.701-54.705. The Administrator's duties include “billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds” to telecommunications carriers eligible to receive universal service support. 47 C.F.R. § 54.702(b).

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<sup>2</sup> See <http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx#Disbursements>.

As a provider of telecommunications services, inContact is obligated to contribute to the USF. Petition for Mandamus (“Pet.”) at 4; *see* 47 U.S.C. § 254(d). On January 23, 2009, USAC issued an invoice billing inContact for \$316,447.38 in required USF contributions. Pet. Exh. A.<sup>3</sup> On April 13, 2009, inContact filed with the Commission a “Petition for Special Relief and Waiver” in which the company disputed \$298,410.50 of the charges as “untimely” and asked the Commission to “instruct USAC to remove such amounts from any future USAC invoice.” Pet. Exh. C at 2.

2. The Commission’s Wireline Competition Bureau (“Bureau”) denied inContact’s request. The Bureau found that inContact’s petition was procedurally defective because, under the Commission’s rules, any request for review of a USAC decision is required to be filed “with the Commission within sixty days of the decision,” *i.e.*, by March 24, 2009, in this instance. *Bureau Order*, Pet. Exh. F at ¶ 2 (citing 47 C.F.R. § 54.720(a)).<sup>4</sup> inContact filed its request for review on April 13, 2009, “20 days late.” *Ibid.* The Bureau accordingly denied the request for review as untimely. *Id.* ¶ 4.

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<sup>3</sup> The invoice was issued to UCN, Inc., the name under which inContact did business. Pet. Exh. B (Declaration of Kimm Partridge).

<sup>4</sup> “An affected party requesting review of an Administrator decision by the Commission . . . shall file such request within sixty (60) days of the issuance of the decision by . . . the Administrator.” 47 C.F.R. § 54.720(a).

3. On June 7, 2010, inContact applied to the full Commission for review of the *Bureau Order*. inContact contended that the Bureau erred in finding that the company's request for review of USAC's invoice was untimely. Pet. Exh. B at 2. inContact further urged the Commission to "review the Bureau's Order *de novo*," find it "invalid and of no effect" and "then take up and consider the merits of inContact's Petition, considering the substance of its requests." *Ibid. See also id.* at 17. The company did not ask the Commission to stay the effect of the *Bureau Order* while it considered inContact's application for review.<sup>5</sup>

The FCC sought public comment on the application for review, with initial comments due by July 26, 2010, and reply comments due by August 9, 2010. *See* Public Notice, 25 FCC Rcd 8171 (WCB June 25, 2010). No comments were received.

On July 29, 2011, eleven months after the pleading cycle closed on its application for review, inContact filed with the Court a petition for a writ of mandamus compelling the FCC to act on its application for review "within 90 days," or, in the alternative, "to develop a schedule for resolution of the pending controversy within a reasonable time." Pet. at 1-2.

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<sup>5</sup> *See* 47 C.F.R. § 1.102(b)(3) ("If an application for review of . . . action [taken pursuant to delegated authority] is filed, . . . the Commission may in its discretion stay the effect of any such action until its review of the matters at issue has been completed.").

On September 30, 2011, Commission staff circulated to the FCC Commissioners for their vote a draft order addressing inContact's application for review. To date, inContact has failed to pay the disputed amount (approximately \$300,000).

### ARGUMENT

1. The Commission is "entitled to considerable deference in establishing a timetable for completing its proceedings." *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) ("*Cutler*"). The "threshold a litigant must pass to obtain judicial review of ongoing agency proceedings [is] a high one." *Telecomm. Research & Action Center v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*"). In the context of a claim of unreasonable delay in an ongoing proceeding, the Court will intervene only where "the agency's delay is . . . egregious." *Id.* at 79.

"[M]andamus is 'drastic'; it is available only in 'extraordinary situations'; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Here, inContact has failed to establish that this is "one of the exceptionally rare cases" in which the extraordinary remedy of mandamus is warranted. *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991).

2. inContact is not entitled to extraordinary relief because it has failed to show any unreasonable delay by the agency, much less a delay that is “so egregious” as to warrant mandamus. *TRAC*, 750 F.2d at 79. In assessing claims of agency delay, “the time agencies take to make decisions must be governed by a ‘rule of reason.’” *Id.* at 80 (citation omitted). Here, as inContact recognizes, “Congress has not adopted a specific timeframe within which the Agency must act on Applications for Review” (Pet. at 21), and that might “supply content” for the rule of reason in this case. *TRAC*, 750 F.2d at 80 (citation omitted).

Moreover, “[a]n agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing.” *Cutler*, 818 F.2d at 896; *see also TRAC*, 750 F.2d at 80 (considering “the effect of expediting delayed action on agency activities of a higher or competing priority.”). In this case, fourteen months is not an unreasonable amount of time for the agency to act on inContact’s application for review. Nor does the importance of the “USF program” in general (*see* Pet. at 25), mean that the agency’s review of a decision denying a challenge to a portion of a single USAC invoice, which the challenging party has not yet paid, must be prioritized over other pressing matters before the Commission.

A grant of mandamus is doubly unwarranted because, on September 30, 2011, the agency’s staff presented to the Commissioners a proposed order

addressing inContact's pending application for review. The agency's consideration of inContact's application for review is proceeding apace and so there is no need for the Court to intervene to "spur" (Pet. at 4) the FCC's decision-making in this proceeding. Once the Commission has issued a final order, if inContact is aggrieved, it may timely seek judicial review of that order.

3. Citing 47 C.F.R. § 54.724, inContact asserts that "FCC rules provide a baseline expectation for how long it should take the Agency to issue a written decision – 90 days." Pet. at 17. Not so. Rule 54.724(b) applies only to cases in which the Commission is reviewing "an Administrator decision" (*i.e.*, a decision by USAC), 47 C.F.R. § 54.724(b); it does not impose (or imply) a time limit for Commission action on applications to review a decision of a subordinate Bureau. Moreover, the rule by its terms applies to appeals that are *properly* before the Commission, 47 C.F.R. § 54.724(a). Here, the Bureau found that inContact's appeal of the invoice was procedurally defective. *Bureau Order*, Pet. Exh. F at ¶ 1. inContact's reliance on Rule 54.724 is thus unavailing.

inContact also argues that issuance of a writ of mandamus is warranted because the company is assertedly "in a perpetual state of uncertainty as to its USF payment obligations." Pet. at 11. The *Bureau Order*, however, was "effective upon release" (47 C.F.R. § 1.102(b)(1)); and although the Commission, in its discretion, may stay the effect of action taken under delegated authority while it

considers an application for review of that action (47 C.F.R. § 1.102(b)(3)), the Commission did not do so here – nor did inContact request such relief. Thus, inContact’s payment obligation is clear.

In sum, there is no reason for this Court to intrude into the Commission’s allocation of its scarce resources by ordering the agency to expedite its disposal of an application for review involving inContact’s challenge to a portion of its January 23, 2009 invoice from USAC.

### **CONCLUSION**

For the above reasons, the Court should deny inContact’s petition for writ of mandamus.

Respectfully submitted,

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**11-1272**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**In re: inContact, Inc., et al., Petitioner,**

**v.**

**Federal Communications Commission, Respondent.**

**CERTIFICATE OF SERVICE**

I, Pamela L. Smith, hereby certify that on October 6, 2011, I electronically filed the foregoing Opposition of Federal Communications Commission to Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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