

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. 47 U.S.C. § 254(d).

The relevant regulation is 47 C.F.R. § 54.706, which specifies:

Entities that provide interstate telecommunications to the public or to such classes of users as to be effectively available to the public, for a fee . . . must contribute to the universal service support programs. 47 C.F.R. § 54.706.

In order to comply with the USF contribution rules, providers of the telecommunications services must undertake two essential acts. First, eligible providers must report their actual and projected revenue to the Universal Service Administrative Corporation ("USAC"), the USF Administrator, on a quarterly and annual basis. Second, providers must make the appropriate contributions to the USF.

a. Telecommunications Reporting Worksheet Filing Requirements.

Commission rules require that, upon entry or anticipated entry into interstate telecommunications markets, telecommunications carriers register by submitting information on Form 499-A, also known as the annual Telecommunications Reporting Worksheet ("Worksheet"). 47 C.F.R. § 64.1195.

A telecommunications carrier is required to file the Form 499-A, for the purpose of determining its USF payments, and, with certain exceptions, to file quarterly short-form Worksheets to determine monthly universal service contribution amounts. Upon submission of a Form 499-A registration, the carrier is issued a filer identification number by USAC, which is then associated with further filings by the company and is used to track the carrier's contributions and invoices.

There are three instances where non-common carrier telecommunications providers are not required to file the Form 499-A (and, likewise, Form 499-Q). In particular, non-common carriers are exempt from filing Worksheets if they are: (1) *de minimis* telecommunications providers; (2)

government, broadcasters, schools and libraries; and (3) systems integrators and self-providers. The only exemption relevant for Compass' purposes is the *de minimis* exemption. A carrier is deemed *de minimis*, and need not file a Worksheet (nor even register as an ITSP in the first instance), when its contribution to the USF in a given year would be less than \$10,000.

b. Contributions to the Fund

As indicated above, contribution obligations arise when "telecommunications services" are provided and billed to the public. Thus, carriers that do not provide telecommunications services, or offer them on a common carrier basis, are not required to contribute to the Fund.

For those common carriers offering telecommunications services, contribution amounts are determined by applying the effective USF Contribution Factor to the applicable fund or program Revenue Base. The Commission's contribution methodology generally requires covered telecommunications carriers to make monthly contributions based on a percentage of their interstate and international revenues from end-user telecommunications services.⁶⁹ The Revenue Base subject to USF contributions is a telecommunication provider's gross, billed and collected interstate and international end-user telecommunications revenue.

Revenue from reseller customers generally is excluded from the underlying wholesale provider's USF contribution base, as it is generally presumed that resellers, who themselves sell to the public, are direct contributors on their retail revenue. This contribution methodology was adopted to avoid "double-counting" of the same revenue. Therefore, as a general matter, wholesale providers that sell exclusively to resellers (or to other classes of statutorily exempt customers, such as "international only" or "intrastate only" carriers) are not subject to USF contributions.⁷⁰

⁶⁹ This methodology is subject to certain exceptions. Individual universal service contribution amounts that are based upon quarterly filings are subject to an annual true-up. See *Federal-State Joint Board on Universal Service*, Petition for Reconsideration filed by AT&T, Report and Order and Order on Reconsideration, 16 FCC Rcd. 5748 (2001); 47 C.F.R. § 54.709(a).

⁷⁰ See discussion of Carrier's Carrier Rule at Section IV.D.3-4, *infra*.

Telecommunications carriers (*i.e.*, entities that provide telecommunications services on a common-carriage basis) that meet the *de minimis* exemption also need not contribute to the universal service mechanisms. In addition, telecommunications providers (*i.e.*, entities providing telecommunications on a non-common carrier basis) that are *de minimis*, are not required to file a Worksheet or contribute to the Fund (or, indeed, to even register as an ITSP). As will be shown, Compass is and has always been a *de minimis*, non-common carrier that is and always has been wholly exempt from the Commission rules and communications laws the NAL concludes were violated.

2. Compass Is Not Required To File A Worksheet or Contribute To The Fund.

Compass does not provide “telecommunications services” to end-users for a fee. Rather, the Company’s two service offerings, EWS and EPS, are offered on a private, non-common carrier basis. In addition to being a provider of telecommunications on a non-common carrier basis, Compass is a *de minimis* provider. Compass is a *de minimis* provider based on the fact that it exclusively derives revenue from other carriers and has complied with the Carrier’s Carrier Rule. The fact that Compass provides its services on a non-common carrier *de minimis* basis means that Compass is not required to file a Form 499, contribute to federal support mechanisms, or pay regulatory fees. As a result, Compass cannot be liable for the proposed forfeitures and the NAL is entirely in error.

This result cannot be avoided merely because, under duress from the IHD, Compass voluntarily registered in September, 2006. As a matter of law, Compass’ registration and all subsequent Form 499 filings have been made in error and therefore may be withdrawn.

B. COMPASS IS NOT A "COMMON CARRIER" SUBJECT TO FCC REGISTRATION, FORM 499 FILING OR FEDERAL SUPPORT MECHANISM FUNDING OBLIGATIONS

1. Compass Is Not Providing Services on a Common Carrier Basis and, Therefore, As a *De Minimis* Provider, Is Not Required to File Form 499 or Contribute to the Fund.

a. Common Carrier Defined

A "common carrier" is defined as "any person engaged as a common carrier for hire." 47 U.S.C. § 153(10). Due to the obvious circularity of this definition, the Commission fashioned its own definition of the term in 1958. It held that the legislative history of the Act made it clear that the regulatory provisions of Title II "should not apply to persons who are not common carriers in the *ordinary* sense of the term." *Frontier Broad. Co. v. Collier*, 24 F.C.C. 251, 254 (1958). The Commission set forth its sense of the term:

Fundamental to the concept of a communications common carrier is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who chose to employ such facilities and to compensate the carrier there-for may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and other carriers connecting with it. In other words, the carrier provides the means or ways of communication for the transmission of such intelligence as the subscriber may choose to have transmitted. *Frontier*, 24 F.C.C. at 254 (footnote omitted), see *Industrial Radiolocation Serv.*, 5 F.C.C. 2d 197, 202 (1958).

The Commission's definition of a communications common carrier was adopted by the D.C. Circuit in 1976. See *National Ass'n of Regulatory Util. Commrs. v. FCC*, 525 F.2d 630, 641 & n.58 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*"). In *NARUC I* the court succinctly stated that, "What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier undertakes to carry for all people indifferently." *NARUC I*, 525 F.2d at 641 (emphasis added). The same year, the D.C. Circuit held: "A second prerequisite to common carrier status ... is the requirement formulated by the FCC and with peculiar applicability to the communications field, that the system be such that customers 'transmit intelligence of their own

design and choosing.” *National Ass’n of Regulatory Utility Commrs v FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976)(*NARUC II*). These two defining factors of communications common carriage were later upheld and applied by the Supreme Court. *FCC v Midwest Video Corp.*, 440 U.S. 689, 701 & n. 10 (1979).

A new communications venture can sometimes choose between (1) accepting regulation as a common carrier, or (2) avoiding regulation almost entirely by providing service as a private carrier. See e.g., James H. Lister, *The Rights of Common Carriers and the Decision Whether to be a Common Carrier or a non-regulated Communications Provider*, 53 FCLJ 91 at 92 (Dec. 2000)(hereafter, “Lister”).

b. A Common Carrier Must Hold Itself Out To Serve All People Indiscriminately.

Under *NARUC I*, the key determinant whether an entity is a common carrier is “the characteristic of holding oneself out to serve indiscriminately,” *NARUC I*, 525 F.2d at 642; see also *Sprint Communications Company, LP v Nebraska Public Service Commission*, 2007 WL 2682181 (D. Neb.) (2007). A carrier will not be a common carrier where its practice is to make individualized decisions in particular cases, whether and on what terms to deal. See e.g., Lister at 96-97 (“The “holding oneself out” element of the definition of common carrier sets up a straightforward choice—offer service on standardized terms and accept common carrier status, or negotiate individually with each buyer (ideally over the specifications of the service as well as price) and claim private carrier status. Where the number of potential buyers is reasonably limited, so that the transaction costs of individualized negotiations are not prohibitive, the choice is very real. Many wholesale level activities, such as the building and provision of service over fiber cables, and some retail activities involving marketing to a relatively small number of large end users (e.g., the provision of high speed data networks) can be structured either way”). It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so. *Id* at 641(footnotes omitted); see

also, *VITCO*, 198 F.3d at 925. As demonstrated herein, this is not and never has been Compass' practice.

In determining a company's common carrier status, examination must be given to the particular practice or provisioning of service at issue and the FCC must flatly reject any notion of an indelible common carrier "status" under the Communications Act.⁷¹ See *Southern Bell Tel. Co. v FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (explaining that "[w]hether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance" and that the FCC "is not at liberty to subject [an] entity to regulation as a common carrier" if the entity "is acting as a private carrier for a particular service"); see also *NARUC II*, 533 F.2d at 608 ("[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others."); *In re Audio Comm'nc, Inc.* 1993 WL 525815, 8 FCCR 8697, 8698-99, ¶ 12 (1993) ("[A] single firm that is a common carrier in some roles need not be a common carrier in other roles."); *FTC v Verity Int'l, Ltd.*, 194 F.Supp.2d 270 (2002). Therefore, common carrier status turns on the activity involved, not on the entity. *NARUC II*, 533 F.2d 601, 608 ("common carrier ... indicates not an entity but rather an activity as to which an entity is a common carrier."); see, e.g., *Computer & Comm. Inc. Ass'n v FCC*, 693 F.2d 198, 209 n.59 (D.C. Cir. 1982) (using term "common carrier" to "indicate not an entity but rather an activity as to which an entity is a common carrier"), *cert. denied*, 461 US 938, 103 S.Ct. 2109, 77 L.Ed. 2d 313 (1983); *In re Audio Comm. Inc.*, 1993 WL 525815, 8 FCCR 8697, at ¶ 12 (1993); see also *FCC v Midwest Video Corp.*, 440 US 689, 701 n.9, 99 S.Ct. 1435, 59 L.Ed. 2d 692 (1979).

⁷¹ The D.C. Circuit has specifically found that even a tariff filing with the Commission was not dispositive of whether a service was a common carrier offering. See *Southern Bell Telephone Co. v FCC*, 19 F.3d at 1483 (holding that "the Commission short-circuited any analysis of whether petitioners held themselves out indifferently to all potential users of dark fiber," by relying on an "insupportable *per se* rule" that a tariff filing with the Commission constitutes a common carrier offering).

c. Differences Between Private Carriers and Common Carriers.

Common carriers and private carriers have distinct obligations and characteristics. See generally, Lister. A private carrier may choose its clients on an individual basis, determining in each particular case whether and on what terms to serve, and may design its system to meet its own needs rather than those of its customers. *Southwestern Bell*, 19 F.3d at 1481, accord, *Independent Data Communications*, 10 FCC Rcd. at 13724; see also, Lister at 96-97.⁷² Courts have noted that unlike common carriers, private carriers have: (1) no legal compulsion to serve the public indiscriminately; (2) insignificant carrier market power; (3) medium-to-long range service contracts, that ensure a relatively stable clientele, and (4) may tailor its service contracts to the particular needs of its customers. See *NorLight*, 2 FCC Rcd. 132, 134 (1986). However, both the courts and the Commission consistently recognize that the terms and conditions of a carrier's particular service and the way it holds itself out to the public are the key determinants as to whether a carrier is a common or private carrier. Because Compass does not offer its services to the public on an indiscriminate basis and because Compass has elected to construct its business as a private carrier, it cannot be treated as a common carrier by the Commission.

2. Compass' Service Offerings

Both of Compass' services, its Enhanced Wholesale Service and its Enhanced Platform Service, function essentially in the same manner. The customers' inbound information is received in TDM and then converted to IP before being routed by the enhanced service to the proper destination (with respect to EWS, the customer is responsible for making the inbound IP conversion prior to the hand-off, whereas, with respect to its EPS, Compass performs the TDM-to-

⁷² See also, *In the Matter of Federal-State Joint Board of Universal Service*, 13 FCCR 11501, ¶ 124, 1998 WL 166178 (FCC 1998) ("Common carriers can be distinguished from private network operators, which serve the internal telecommunications needs of, for example, a large corporation, rather than selling telecommunications to the general public.... [A] carrier may be a common carrier if it holds itself out to service indifferently all potential users.").

IP conversion of inbound local or toll-free access transmissions). Both types of the Company's service offerings are provided on a private carriage, pre-selected and highly discriminatory basis.

a. Compass' Enhanced Wholesale Services

Compass' primary business is its Enhanced Wholesale Services. The EWS system builds and operates international IP voice and data networks between the U.S. and selected countries in South America, Africa, Asia, and the Middle East. It builds its routes in conjunction with in-country partners who are responsible for operating the foreign portion of the international network. See Lister at 96-97 ("Many wholesale level activities, such as the building and provision of service over fiber cables, and some retail activities involving marketing to a relatively small number of large end users (eg, the provision of high speed data networks) can be structured either way... If it finds a common carrier partner, a communications provider can attempt to go further and indirectly serve the retail mass market while asserting private carrier status. The common carrier partner would have the direct relationship with the customers, but it would procure the services it offers the public from the private carrier"). Compass sells its EWS to the world's major communications companies who utilize the service as an integrated network element that they then use to transmit *their* international voice and data calls on behalf of *their* wholesale customers or end users. As described in more detail below, EWS is neither offered to the public nor to such classes of users as to be effectively available directly to the public. Instead, the EWS is offered on a private, non-common carrier basis to unaffiliated entities which are themselves telecommunications carriers, enhanced service providers or private service providers.⁷³

⁷³ Moreover, regardless of whether the EWS are or are not "telecommunications services," Compass is exempt from USF and other federal support contributions and regulatory fees on revenue derived from customers of its EWS because all such customers are either direct contributors themselves or are statutorily-exempt. See Section IV.D.5-6 *supra*.

b. Compass' Enhanced Platform Services

The Company also provides local and toll-free access to an Enhanced Platform Service to unaffiliated companies that incorporate the EPS into their own distinct distributions and sales of privately labeled, serviced and supported prepaid calling cards. Compass' EPS business can be described as one where the Company owns and operates a session processing platform and offers other companies a package of telecommunications, information, non-telecommunications and management services that enables those companies to provide prepaid calling cards to end-user customers.⁷⁴ Importantly, Compass does not use its PIN Platform to sell calling card services directly to the public for a fee. Instead Compass sells exclusively to other companies, who in turn sell prepaid calling cards directly to the public or through their own distribution channels. Compass is neither identified as the prepaid calling card provider nor listed as the network services provider on the calling cards sold to the public.

Like its EWS offerings, Compass provides EPS on a private, non-common carrier basis. Accordingly, Compass is not obligated to pay federal support contributions and fees based on revenue derived from EPS.⁷⁵

⁷⁴ In many respects Compass' EPS business is similar to Network IP: Compass "is a telecommunications carrier that owns switches and that offers other companies a package of telecommunications [, information, and non-telecommunications & management] services that enables those companies to provide prepaid calling cards to end-user customers." See *Id.* at 2074. Compass' package includes (i) internet access to traffic and billing records, (ii) toll-free and local inbound access to a PIN Accessible Prepaid Platform, (iii) enhanced call routing, and (iv) IP call transport to terminating carriers via a variety of peering arrangements. See *In the Matter of APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Invera Communications Corp. v Network IP, LLC, and Network Enhanced Telecom, LLP*, Memorandum Opinion and Order, 20 FCC Rcd. 2073 (Feb. 1, 2005) ("*Network IP MO&O*"). Unlike Network IP, however, Compass Global does not dispute it is a switched based reseller, as that term is defined by the Commission's Payphone Compensation Rules, as it is the last facilities-based carrier responsible for completing payphone originated calls.

⁷⁵ See Section II, *supra*, where it is shown that under even the broadest and most conservative interpretation of Commission rules, which is the interpretation Compass applied in preparing its 2005 and 2006 Form 499-A revisions, 2007 Form 499-A revision and all timely filed Forms 499 since July 2007, certain "access" revenue from EPS might be considered "toll services" revenue, EPS

3. Compass Does Not Offer Its Services on a Non-Common Carrier Basis.

Compass fails to hold itself out to the public and instead serves only a pre-selected, stable customer base. As a result, it cannot be considered a common carrier. *See, NARUC I*, 525 F.2d at 643; *In the Matter of Norlight, Declaratory Ruling*, 2 FCC Rcd. 132, ¶ 23, *recon. denied*, 2 FCC Rcd. 5167 (1987). As a provider of telecommunications on a non-common carrier basis, Compass is neither required to file Worksheets nor contribute to the fund.⁷⁶

a. Compass does not offer its services indiscriminately to the public.

Compass does not offer or sell its services to the general "public." In fact, Compass is very particular in selecting the entities to which it will sell its EWS and EPS. In a discriminate and wholly subjective basis, Compass conducts a unique evaluation and makes deliberate findings before choosing which customers it will serve. For instance, it will not sell to those carriers that it deems have insufficient quality standards, those that "cut corners" in provisioning, those that use unreliable, inexpensive equipment, and those that do not invest in having redundancy. Moreover, rarely does Compass sell its services to its competitors and when it does, it is done at Compass' discretion and at terms dictated by Compass, as the Company deems appropriate based on the carrier customer at issue.

b. Compass Does Not Make its Rates or Terms of Service Public.

In order to hold itself out indiscriminately to the public, a common carrier must not only provide a single set of rates to all customers for the same service, but also it must make those rates known to the public by publishing those rates in a tariff, having them on file with the appropriate regulatory agency, placing them on the carrier's website or otherwise publishing them somewhere where they are available for public viewing. Clearly, a common carrier's rates cannot be proprietary

revenue could in no uncertain terms be treated as prepaid calling card revenue subject to "face value" reporting.

⁷⁶ See discussion on Compass' *de minimis* status at Section IV.E.

or classified. However, maintaining confidential and non-public rates, pricing and terms of service is exactly what Compass does. Indeed, Compass' standard operating procedures include the mandatory execution of a Non-Disclosure Agreement ("NDA") by all potential customers. The NDA specifically precludes either party from ever disclosing the rates and terms of the contract to anyone outside of the two parties (Compass and the Carrier Customer). Every NDA and every subsequent individualized contract further provides language establishing the rates, pricing plans and terms of service as proprietary and confidential information. *See Sample Contract (Telecom Italia)*.

c. Compass' Service Contracts are Individualized

Compass enters into individually-tailored service contracts that are designed to foster long-term relationships with carriers that meet those standards Compass deems appropriate at the time and under the given circumstances. The individually tailored contracts are drafted to meet the unique needs of both Compass and each Carrier Customer.

d. Established Case Law and Commission Precedent Mandate Compass Being Treated as A Private Carrier

Case law and Commission precedent lead to only one conclusion, that is, Compass offers its services on a private carrier basis.⁷⁷ Generally speaking, this conclusion is warranted by Compass' overall differential treatment of its customers. Specifically, Compass is deemed a private carrier by virtue of the fact that it pre-selects its customers, it has discriminatory recruitment policies and procedures; it maintains confidential rates, prices and terms of service, it subjectively and unilaterally determines whether or not to provide its services to a potential customer, it refuses to offer services to competitors and other Carrier Customers, it hand-tailors its services to meet specific customer needs, it does not provide a set term of service, it services a limited and stable clientele, and it is its

⁷⁷ See e.g., *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *NARUC II*, 533 F.2d ___; *FTC v. Verity Int'l, Ltd.*, 194 F.Supp.2d 270 (2002); *FCC v. Midwest Video Corp.*, 440 US 689, 701 n.9, 99 S.Ct. 1435, 59 L.Ed. 2d 692 (1979); *Independent Data Communications*, 10 FCC Rcd. at 13724; See also *In the Matter of Federal-State Joint Board of Universal Service*, 13 FCCR 11501, ¶ 124, 1998 WL 166178 (FCC 1998); *NorLight*, 2 FCC Rcd. 132, 134 (1986).

practice to enter into relatively long-term contracts. Because it is Compass' practice to discriminatingly serve its customers and not to hold itself out to the public, let alone indifferently, Compass must be characterized as a private carrier. No other conclusion is possible.

4. **Compass Does Not Allow Customers to Transmit Intelligence of Their Own Design And Choosing.**

The second requirement for common carriage is that a carrier provision its service in a manner which customers can "transmit intelligence of their own design and choosing." *Southern Bell Tel. Co. v FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (citing *NARUC II*, 533 F.2d at 608-09); see also, *World Communications, Inc. v FCC*, 735 F.2d 1465, 1471 n.10 (D.C. Cir. 1984); *Computer and Communications Incls. Ass'n v FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983)("CCIA"). Thus, common carriers may not have or exert control over the content that they carry, regardless of the types of customers that use their services. This characteristic is consistent with the requirement that common carriers must "carry for all people indifferently." See *NARUC I*, 525 F.2d at 641, n. 58. Likewise, common carriers may not modify or restrict its customers' transmitted information. See *NARUC II*.

Both Compass' EWS and EPS offerings are predicated on the fact that the Company's customers (the next immediate transferor of end user-generated information) lose all control over the information once the communication is handed off to Compass. In fact, Compass' customers have no control over what happens to the "transmission of intelligence" once Compass has control over it. Once within the Company's control, Compass essentially takes a "communication" that might be broken and that might not otherwise be capable of termination, and ensures that the communication is modified, to the extent necessary, to guarantee a termination to the called party. At no point can Compass' customers access the Company's system to "communicate or transmit intelligence of their own choosing." This accentuates further the subtle, yet significant, nuance between the Company and its customers' respective roles of non-common carrier and common

carrier. The common carrier customers of Compass need the Company's private carriage in the middle of the call path in order to successfully offer its common carrier services to the public. The common carrier customer could not offer the "end-to-end" ability to transmit a call without Compass' alteration of the information transmitted or a net change in format. While Compass surely assists its common carrier customers to serve on a common carrier basis, this fact does not make Compass a common carrier. *See eg*, Lister at 96-97. Rather, Compass' practice of altering the transmission of intelligence and its control and manipulation of the intelligence only supports further Compass' argument for characterization as a non-common carrier under *NARUC II* and its progeny.

5. The Commission May Not Arbitrarily Classify Compass as a Common Carrier in Order to Fix a Shrinking Fund.

The above facts show that, without a doubt, Compass' offerings are provided on a non-common carrier basis. Despite this, the Commission is over-zealously pursuing the imposition of fines against Compass on a misguided premise that is completely at odds with the facts and reality. The reality is that because Compass is providing wholesale telecommunications on a non-common carrier basis, it is not required to file Worksheets or contribute to the Fund. Therefore, the NAL's underlying premise is flawed and the NAL must be cancelled.

There is a transparent "purpose" underlying the Commission's misguided and faulty classification of Compass as a "common carrier" providing "telecommunications services." Namely, the NAL may be seen as a means to present a diligent staff that is taking extreme measures to fix a flawed universal support regime. However, the Commission may not arbitrarily classify a private carriage service as common carriage in order to achieve its pre-determined regulatory goals of

increasing the shrinking USF contribution base.⁷⁸ See *Southwestern Bell*, 19 F.3d at 1481; *AT&T Co. v FCC*, 572 F.2d 18 26 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1979); *NARUC I*, 525 F.2d at 644. The definition of “common carrier” and its required elements are sufficiently definite to mandate a finding that Compass is not a common carrier. The Commission cannot now “augment its regulatory domain ... by redefining the elements of common carriage” and impose common carrier contribution requirements on Compass when it is operating as anything but a common carrier. *Southwestern Bell*, 19 F.3d at 1484.

C. COMPASS DOES NOT PROVIDE A “TELECOMMUNICATIONS SERVICE”

The Communications Act specifically states that “a telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services,” implying that an entity can be treated as a common carrier for certain activities and not as a common carrier for non-telecommunications activities. 47 USC § 153(44) (emphasis added). Compass is not providing “telecommunications services” and therefore must be considered a non-common carrier.

1. Telecommunications Services Must Be Effectively Available To The Public

The 1996 Act, among other things, introduced the term “telecommunications service” and defined it as follows:

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. *Id.* § 153(46) (emphasis added).⁷⁹

⁷⁸ *USF reform nears shakedown*, RCR Wireless News (November 9, 2007) (<http://rcrnews.com/apps/pbcs.dll/article?AID=/20071109/SUB/71109019/1021>); See also, *Financing Universal Telephone Service*, 2005 Congressional Budget Report (March 2005), page 6.

⁷⁹ As one court noted, “The upshot of the various definitions under the [Act] is that the statute applies only to telecommunications services offered on a common carrier basis.” See *Howard v America Online, Inc.*, 208 F.3d 741, 751-53 (9th Cir. 2000); *Joni v FCC*, 218 F.3d 756, 758 (D.C. 2000) (“[A] carrier that provides a service on a non-common carrier basis is not a ‘telecommunications

Thus, whether a carrier will be subject to common carrier regulation turns on whether it offers “telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.” *Id.* § 153(46)(emphasis added). Courts have acknowledged that the phrase “to such classes of users as to be effectively available directly to the public” is sufficiently vague and open-ended. *See, Virgin Islands Telephone Corp. v FCC*, 198 F.3d 921 (1999) (“*VITCO*”). *See, VITCO* at 179. The legislative history offers little additional guidance because it simply states that the definition of telecommunications service “recogniz[es] the distinction between common carrier offerings that are provided to the public ... and private services.” H.R. Conf. Rep. No. 104-458, at 115 (1996).

a. Interpreting “effectively available”

Guidance in interpreting the meaning of “effectively available” is found in the Commission’s interpretation of similar language contained in Section 332 of the Communications Act.⁸⁰ *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCCR 1411 ¶ 265 (1994) (“*CMRS Order*”).

As part of its analysis in the *CMRS Order*, the Commission considered whether services are “effectively available” if they are “available to a substantial portion of the public,” despite limitations on the eligibility of end users. *See CMRS Order*, 9 F.C.C.R. at 1437-38, ¶ 61. The Commission concluded that whether a service is offered to “such classes of eligible users as to be effectively available to a substantial portion of the public” depends on the “type, nature, and scope of users for

carrier and hence is ineligible [under § 254 of the FCA.]”); *Southern Bell Telephone Co. v FCC*, 19 F. 3d 1475, 1480 (D.C. Cir. 1994); *In re Federal-State Joint Board on Univ. Servs. Report and Order*, 12 FCCR 8776, 9177, ¶ 785, 1997 WL 236383 (FCC 1997) (FCC has determined that “telecommunications services” means “only telecommunications provided on a common carrier basis.”).

⁸⁰ Here “Commercial mobile service” in that Act means: “any mobile service ... that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.”

whom the service is intended.” *Id.*, 9 F.C.C.R. at 1440, ¶ 67. If the service is provided only for internal use or only to a specified class of eligible users, the Commission found, the service will not satisfy the “public availability” part of the commercial mobile service definition. *Id.* (emphasis added).

Weight to the Commission’s conclusions in the *CMRS Order* must be given because the *Order* was released in March 1994, almost two years before passage of the 1996 Act. Congress, therefore, presumably was aware of the Commission’s interpretation of the term commercial mobile service when it used virtually identical language to define the new term telecommunications service in the 1996 Act.

- b. Effectively Available To The Public Depends In Part On The Type, Nature And Scope Of Users To Whom A Carrier Provides Its Services.

The Commission and courts have followed the reasoning found in the *CMRS Order* and determined that under the 1996 Act, “whether a service is effectively available directly to the public depends on the type, nature, and scope of users for whom the service is intended and whether it is available to a significantly restricted class of users.” *See VITCO*. In *VITCO*, the court agreed with the Commission’s application of the above criteria to AT&T-SSI’s proposed facility and found that:

AT&T-SSI ... will make available bulk capacity in its system to a significantly restricted class of users, including common carrier cable consortia, common carriers, and large businesses. Potential users are further limited because only consortia, common carriers, and large businesses with capacity in interconnecting cables or other facilities and, in many cases, operating agreements with foreign operators, will be able to make use of the cable as a practical matter.

The Court flatly rejected the argument that AT&T-SSI will be making a service “effectively available” directly to the public because AT&T-SSI’s customers will use the capacity to provide a service to the public, noting that “[s]uch an interpretation is contrary to the plain language of the [1996 Act] by focusing on the service offerings AT&T-SSI’s customers may make rather than what AT&T-SSI will offer.” *Id.* ¶ 26. Therefore, AT&T-SSI will not be offering a service “directly to the

public, or to such classes of users to be effectively available directly to the public” and consequently, AT&T-SSI is not a “telecommunications carrier” providing “telecommunications service” under the 1996 Act. *Id.* ¶ 29.

1. The Provider’s ‘Offering’ of Telecommunications Assists In Determining Whether Or Not It Is Effectively Available.

Under the Act, the triggering event for purposes of defining a “telecommunications service” is the “offering” of telecommunications, not the act of providing telecommunications. 47 USC § 153(46). Thus, determining whether the offering of telecommunications is “effectively available to the public,” requires a focus on “the manner and terms by which [a company] approach[es] and deal[s] with [its] customers,” not on the *customers* of those customers. *NARUC I*, 525 F.2d at 642; *See VITCO, Commission Order*, 13 F.C.C.R. at 21587-88, ¶ 6 (J.A. 3-4).⁸¹

Consider also the Commission’s explicit rejection of the Joint Board on Universal Service’s recommended interpretation of “telecommunications service” which included carrier-to-carrier wholesale services to be “telecommunications services” because they are “indirectly” available to the public. In analyzing the statutory definition of telecommunications services, including the phrase “directly to the public,” the Commission found that telecommunications services “encompass only telecommunications provided on a common carrier basis.” 12 F.C.C.R. at 9177, ¶ 785. And while the Commission recognized that wholesale services to other carriers may qualify as common carrier services and thus as providers of telecommunications services, what matters is whether the carrier “holds itself out ‘to service indifferently all potential users.’”⁸² *Id.* (emphasis added). In

⁸¹ Here the Commission endorsed the Bureau’s analysis, stating: “We disagree with VITCO that the activities of AT&T-SSI’s customers are relevant to a determination of whether AT&T-SSI is a telecommunications carrier or a common carrier. As the Commission has previously held, the term “telecommunications carrier” means essentially the same as common carrier. It does not, as VITCO suggests, introduce a new concept whereby we must look to the customers’ customers to determine the status of a carrier.” *Id.*

⁸² This echoed the Commission’s earlier findings in the *Non-Accounting Safeguards Order* where it was recognized that “the term ‘telecommunications service’ was not intended to create a

so holding, the Commission reconfirmed that "a carrier will not be a common carrier 'where its practice is to make individualized decisions in particular cases whether and on what terms to serve.'" *Id.* (emphasis added) (internal citation omitted).⁸³

So, the focus returns to the issue of whether or not Compass holds itself out to service indifferently all potential users. The answer to this question is a resounding no. See Section IV.B.3, *supra*. Compass' practice of choosing customers on an individual basis, its practice of determining whether and on what terms to serve, its practice of confidentially treating its rates and terms of services, its practice of arbitrarily refusing to offer service to other carriers and its practice of entering into long-term, tailored-made service contracts leaves no doubt that Compass is not a provider of telecommunications services.

D. COMPASS PROVIDES WHOLESALE SERVICES TO RETAIL COMMON CARRIERS THAT SELL TO THE PUBLIC AND THEREFORE, IS NOT SUBJECT TO FEDERAL SUPPORT PROGRAM CONTRIBUTION BASES.

1. Including Wholesale Revenue In The USF Contribution Obligations Would Be Unfair And Result in Double-Counting.

The Commission and courts have long recognized the "unfairness" of double-counting revenues for USF contribution purposes. As such, the Commission is required to take steps to affirmatively avoid double contributions for the same service and wholesale revenues derived from the provision of service for resale (commonly referred to as "carrier's carrier revenue" or "wholesale revenue"). Accordingly, wholesale revenues are not subject to USF contribution obligations where the retail provider contributes.

retail/wholesale distinction, but rather a distinction between common and private carriage." The Commission went on to iterate that "the indiscriminate offering of a service to the public is an essential element of common carriage."⁸² *Non-Accounting Safeguards Order*, 11 FCC Rcd 11230 at 22033, ¶ 265.

⁸³ The Commission explicitly found that private lessors of network capacity are not "telecommunications carriers" if they do not offer services indifferently, and rejected the Joint Board's contrary interpretation.

Compass provides wholesale services to common carriers that sell telecommunications to the public. As a result, it is Compass' customers that have an obligation to contribute to the Fund, not Compass. To count Compass' wholesale revenues along with the Company's common carrier customers' would contravene the contribution methodology established to avoid double-counting.

2. The Fund's Contribution Methodology is Based on Retail Revenues Derived From End Users of Telecommunications Services.

Section 254 of the Act requires all providers of interstate telecommunications services to contribute to universal service on an equitable and nondiscriminatory basis. Requiring contributions on an equitable basis mandates that only retail revenues be included in the Fund's contribution base. The Commission recognized that to do otherwise -- and to count wholesale revenues -- would result in a "double-counting" problem that would in turn competitively disadvantage resellers.⁸⁴ *In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776, 12 FCC Rcd. 8776, 7 Communications Reg. (P&F) 109, 1997 WL 236383 (F.C.C.). As the FCC concluded:

[w]e agree with the Joint Board's recommendation that we must assess contributions in a manner that eliminates the double payment problem, is competitively neutral and is easy to administer. To address the Joint Board's concerns, we find that contributions should be based on end-user telecommunications revenues...we find that this basis for assessing contributions represents a basis for our universal service support mechanisms more administratively efficient than the net telecommunications revenues method recommended by the Joint Board while still advancing the goals embraced by the Joint Board. *Id.* at ¶ 843.

Assessing contributions based on telecommunications revenues derived from end users serves the dual purpose of administrative ease and competitive neutrality. Accordingly, the contribution methodology is "based on revenues derived from end users of telecommunications and telecommunications services, or 'retail revenues.'" *Id.* at ¶ 844 (emphasis added).

⁸⁴ Or here, the Commission's NAL competitively disadvantages Compass, a wholesale provider that is apparently liable for amounts not collected on its services provided due to the Company's good faith belief that its common carrier customers were contributing directly to the Fund.

It makes complete sense to base contributions on end-user revenues, rather than wholesale revenues. Namely, it:

is competitively neutral because it eliminates the problem of counting revenues derived from the same services twice. [and the Commission] seek[s] to avoid a contribution assessment methodology that distorts how carriers choose to structure their businesses or the types of services that they provide. Basing contributions on end-user revenues eliminates the double-counting problem and the market distortions assessments based on gross revenues create because transactions are only counted once at the end-user level. Although it will relieve wholesale carriers from contributing directly to the support mechanisms, the end-user method does not exclude wholesale revenues from the contribution base of carriers that sell to end users because wholesale charges are built into retail rates. *Id.* at ¶ 845.

3. Revenue Reporting and the "Carrier's Carrier Rule."

Providers of interstate and international telecommunications services subject to the FCC's jurisdiction must report revenues using two broad categories:

- (1) Revenues from other contributors to the federal universal service support mechanisms (referred interchangeably as "wholesale" revenue, "Carrier's Carrier" revenue or "revenues from resellers"); and
- (2) Revenues from all other sources, including all retail telecommunications services revenue (generally referred to as "retail" revenue).

Again, revenue under the former category (wholesale revenue) is not subject to the USF contribution base provided the provider complies with the Carrier's Carrier Rule.

a. Form 499-A Instructions on Compliance With the Carrier's Carrier Rule.

Form 499-A provides that in order to comply with the Carrier's Carrier Rule, wholesale companies must have documented procedures in place that ensure the wholesale revenue reported only includes those amounts that reasonably would be expected to be included in the carrier's carrier USF contributions. Specifically, the rules require the wholesale provider to obtain a signed statement from the reseller certifying that it will contribute directly to the Fund or that each entity to which the company provides resold telecommunications is itself a Form 499 filer and a direct

contributor to the Fund ("Exemption Certificates"). Also, the wholesale provider must use the FCC website to verify the continuing validity of a reseller's certification.⁸⁵

4. The Carrier's Carrier Rule's Imposition of Vicarious Liability on Wholesale Providers is Invalid and a Violation of the APA.

The "Carrier's Carrier Rule," as it has become known, has been unofficially part of the Commission's Rules from the beginning of the Universal Service Fund reporting requirements, but up until 2004, rules governing reporting and contribution only required wholesale providers like Compass to report actual end-user revenue⁸⁶ and services provided to resellers were excluded from reporting and contribution requirements.⁸⁷ The Reporting Instructions drafted by USAC specifically indicated that wholesale carriers were not required to contribute based upon services for which they independently believed were being provided for resale.⁸⁸ As a result, wholesale providers like Compass were responsible only for contributions based on actual end-user revenue, and were not liable for resellers who failed to contribute to the Fund. As Compass derived no revenue from common carrier services sold either directly to, or effectively to, the public, Compass had absolutely no duty to file Forms 457 or 499, for it had no retail, interstate telecommunications revenue to speak of – either directly or by possible application of the "post-2003" Carrier's Carrier Rule.

⁸⁵ In some instances, wholesale providers are not required to comply with the Carrier's Carrier Rule because their retail customers are non-US entities. See Instructions to Form 499 providing that, "[r]evenue from certain carrier-to-carrier sales of telecommunications services to non-US entities is exempt from USF/RAF due to jurisdictional limitations, i.e., the FCC lacks jurisdiction over the carrier and/or end customer." The FCC has no jurisdiction over the actions or inactions of non-US customers that do not sell directly to US end users (i.e., those non-US entities deriving no US-billed revenue).

⁸⁶ See, *In The Matter Of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated With Administration Of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, And Universal Service Support Mechanisms*, 16 Communications Reg. (P&F) 688 (July 14, 1999) at C. Block 3.

⁸⁷ *Id.*

⁸⁸ *Id.* ("If the underlying contributor does not have independent reason to know that the entity will, in fact, resell service and contribute to the federal universal service support mechanisms, then the underlying carrier should either obtain a signed statement to that effect or report those revenues as end user revenues.")

The pre-2004 Carrier's Carrier Rule was changed vis-à-vis the 2004 Telecommunications Reporting Worksheet, when USAC inserted the following language, "[f]ilers will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users" (also referred to as the "vicarious liability" provision).⁸⁹ This added language effectively made the wholesale carriers vicariously liable for the payment of all USF contribution amounts sold if the wholesale carrier did not adequately police the regulatory status of its resellers.

a. Certain Procedures Must Be Followed Under the APA Before a New Rule Can Be Adopted.

The Commission cannot impose vicarious liability on Compass under the Carrier's Carrier Rule because this policy was not adopted in accordance with procedures required by the APA. Specifically, the revised Carrier's Carrier Rule imposing vicarious liability was not promulgated in accordance with the notice provisions mandated by Section 553 of the APA. The imposition of vicarious liability on wholesale carriers for all of their resellers' contribution requirements was material and substantive and should have been adopted and enforced in accordance with formal notice and rulemaking procedures. Since the Commission did not engage in these procedures when adopting the new policy and requirements, but instead relies solely on USAC's mere "insertion" of language in the 499 instructions, the Carrier's Carrier Rule is invalid as applied to wholesale carriers, like Compass.

The vicarious liability language crafted by USAC essentially imposed a categorization of end-user status on all services sold by wholesale providers, even if the wholesaler had a reasonable and good-faith belief that the services sold were for resale. As applied, these rules impose significant and unrealistic compliance obligations on wholesale providers like Compass (eg, wholesale providers are

⁸⁹ See, *Instructions to the Telecommunications Reporting Worksheet*, Form 499-A, March 2006 at page 17.

required to ensure its resellers are accurately contributing on an ongoing basis). The vicarious liability imposed by USAC's new rule effectively changed the entire regulatory relationship between wholesalers and resellers. And, because it did so in violation of the APA, it is an invalid and unlawful rule.

b. The Newly Added Vicarious Liability Provision Materially Impacts Wholesale Providers.

The new heavy compliance burdens implemented in 2004 make it clear that this policy change was much more than a mere administrative or organizational measure. Rather, adoption of the vicarious liability provision was a decisional rule with a materially adverse impact on contributors, as well as on the Fund as a whole.⁹⁰ Notwithstanding these factors, in a most remarkable fashion, the Commission (through an improper delegation to USAC) imposed this new rule on wholesale carriers without engaging in any of the formal procedural protections guaranteed under the APA.⁹¹

c. USAC May Not Institute a Vicarious Liability Provision on its Own Volition.

Under the Commission's rules, USAC has the authority only to adopt and impose rules pursuant to the authority delegated to it by the Commission.⁹² USAC does not possess any authority

⁹⁰ The FCC's adoption and imposition of such a rule, without public notice or comment that results in the confiscation of a carrier's property without just cause, also violates of basic notions of due process under the Fifth Amendment of the U.S. Constitution.

⁹¹ Section 553(b) of the APA requires federal agencies to provide notice of all proposed rules in the Federal Register. There was no notice or explicit rulemaking proceeding or authorization from the Commission regarding a change in the regulatory status of wholesale providers. Instead, the new vicarious liability language was slipped into the Form 499 Instructions, without any notice or formal rulemaking procedures. And, since 2004, the Commission has improperly relied on the revised Carrier's Carrier Rule to justify its imposition of vicarious liability on wholesale carriers, regardless of the wholesale carrier's customer's regulatory status.

⁹² Section 254 of the Act provides, generally, for the equitable and nondiscriminatory contribution by telecommunications carriers to mechanisms established by the Commission and the Federal-State Joint Board to preserve and advance universal service. Although its existence was not mandated by the Act, USAC was established at the direction of the FCC as an independent not-for-

to create decisional or interpretative rules governing USF programs independently. Instead, the Commission and the Federal-State Joint Board retain full authority and control over the USF programs, and USAC remains subject to FCC oversight at all times.⁹³

In addressing early concerns over the role of USAC, the Commission has emphasized that USAC's functions are to be "exclusively administrative,"⁹⁴ noting that Section 54.702(c) expressly limits USAC's power. As a result, USAC:

"may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."⁹⁵

It follows that USAC cannot adopt new rules without express authorization from the Commission. The Commission has not authorized USAC to create a rule whereby wholesale providers are vicariously liable for contributions based on its carrier's carrier retail revenue simply because the wholesale provider did not affirmatively confirm its carrier customer was contributing directly to the Fund.

Since both USAC and the Commission exceeded their authority when adopting and imposing the vicarious liability provision of the carrier's carrier rule, Compass cannot be found vicariously liable for the actions -- or inactions -- of its reseller customers.

profit entity with the sole function of administering the Universal Service Fund ("USF") and other universal service support programs.

⁹³ See *In the Matter of Federal State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9192 at ¶¶ 813-815 (1997) ("1997 Joint Board Order"); 1998 Joint Board Order at 25065 at ¶ 14; see also 47 U.S.C. § 254, et seq.

⁹⁴ 47 U.S.C. §§ 54.702(a)-(b).

⁹⁵ 1998 *Joint Board Order* at 25067 at ¶ 16 (responding to comments of BellSouth, Sprint, and US WEST).

5. **Compass, as a Wholesale Provider, is Not Obligated to Contribute to the Fund.**

Compass provides two distinct service offerings: its EWS and EPS. In both instances, Compass does not provide telecommunications services to end-users for a fee or a *retail* telecommunications service. See Section IV.A, *supra*. Rather, Compass is a wholesale provider and as such, the Company is not subject to USF contribution obligations. Compass took reasonable efforts to comply with the Carrier's Carrier Rule, both with respect to its EWS and EPS. Whenever feasible, Compass documented the status of its customers as either "revenues from resellers" or revenue from statutorily exempt entities and booked all such revenue as being wholesale, "carrier's carrier" revenue exempt from Funds and regulatory fees.

6. **Compass Can Demonstrate Absolute Compliance with the Post-2004 Carrier's Carrier Rule With Respect to Its EWS Offerings.**

As shown above, the infirmities surrounding the creation of the vicarious liability provision in the Carrier's Carrier Rule are fatal. As such, the vicarious liability provision is unlawful. Wholesale carriers cannot be liable for not following an unlawful rule. However, this issue is moot as it relates to Compass' EWS because, with regard to these revenues, Compass has complied with the Carrier's Carrier Rule in complete and absolute terms.

EWS is two things: (1) enhanced/information service; and (2) wholesale. What it is not is "telecommunications service" or a retail telecommunications service subject to federal support program contribution bases. Compass offers and sells its EWS to common carrier customers that in turn sell their services to the public. It has always been Compass' business practice to obtain Exemption Certificates⁹⁶ from customers that were subject to FCC jurisdiction.⁹⁷ In support of its

⁹⁶ True and accurate copies of Exemption Certificates obtained from the Company's retail customers are attached at **Exhibit 1**.

⁹⁷ There is widespread acceptance that organizations typically operate in a repetitive manner. As a result, there is some assurance of the reliability of an organization's 'routine' as proof that a