

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

In the Matter of	)	File No. EB-05-IH-0158
	)	
InPhonic, Inc.	)	NAL/Acct. No. 200532080139
	)	
Apparent Liability for Forfeiture	)	FRN No. 0012-5999-16
	)	

**NOTICE OF APPARENT LIABILITY  
FOR FORFEITURE AND ORDER**

**Adopted: July 25, 2005**

**Released: July 25, 2005**

By the Commission:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that a telecommunications provider, operating since August 2002 and at least indirectly benefiting from the federal programs supporting the telecommunications industry since that time, apparently failed to meet its statutory and regulatory obligations relating to those programs. Based upon the facts and circumstances surrounding this matter we conclude that this company is apparently liable for a total forfeiture of \$819,905.

2. We specifically find that InPhonic, Inc. (“InPhonic”) has apparently violated section 64.1195 of the Commission’s rules by willfully and repeatedly failing to register with the Commission until January 2005.<sup>1</sup> We also find that InPhonic has apparently violated sections 54.711(a) and 64.604(c)(5)(iii)(B) of the Commission’s rules by failing to submit certain Telecommunications Reporting Worksheets (“Worksheets”) from 2002 to 2004.<sup>2</sup> Finally, we find that InPhonic has apparently violated section 254(d) of the Communications Act of 1934, as amended (the “Act”),<sup>3</sup> and sections 54.706(a) and 64.604(c)(5)(iii)(A) of the Commission’s rules by willfully and repeatedly failing to contribute to the Universal Service Fund (“USF”) and Telecommunications Relay Service (“TRS”) Fund.<sup>4</sup>

**II. BACKGROUND**

3. The Commission is charged by Congress with regulating interstate and international telecommunications and ensuring that providers of such telecommunications comply with the

<sup>1</sup>47 C.F.R. § 64.1195.

<sup>2</sup>47 C.F.R. §§ 54.711(a), 64.604(c)(5)(iii)(B).

<sup>3</sup>47 U.S.C. § 254(d).

<sup>4</sup>47 C.F.R. §§ 54.706(a), 64.604(c)(5)(iii)(A).

requirements imposed on them by the Act and our rules.<sup>5</sup> The Commission also has been charged by Congress to establish, administer and maintain various telecommunications regulatory programs, which are described in more detail below, and to fund these programs through assessments on the telecommunications providers that benefit from them. In order to accomplish these goals, the Commission established “a central repository of key facts about carriers” through which it could monitor the entry and operation of interstate telecommunications providers to ensure, among other things, that they are qualified, do not engage in fraud, and do not evade oversight.<sup>6</sup> Commission rules require that, upon entry or anticipated entry into interstate telecommunications markets, telecommunications carriers register by submitting information on an FCC Form 499-A, also known as the annual Telecommunications Reporting Worksheet.<sup>7</sup> The Commission also requires telecommunications providers to submit financial information on annual and, with some exceptions not applicable to InPhonic, quarterly short-form Worksheets to enable the Commission to determine and collect the statutorily mandated program assessments.<sup>8</sup>

4. The Telecommunications Act of 1996 codified Congress’ historical commitment to promote universal service to ensure that consumers in all regions of the nation have access to affordable, quality telecommunications services.<sup>9</sup> In particular, section 254(d) of the Act requires, among other things, that “[e]very telecommunications carrier [providing] interstate telecommunications services . . . 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>10</sup> In implementing this Congressional mandate, the Commission directed all telecommunications carriers providing interstate telecommunications services and certain other providers of interstate telecommunications to contribute to the Universal Service Fund based upon their interstate and international end-user telecommunications revenues.<sup>11</sup> Failure by some providers to pay their share into the Fund skews the playing field by giving non-paying providers an economic advantage over their competitors who must shoulder more than their fair share of the costs of the Fund.

5. Section 225(b)(1) of the Act, which codifies Title IV of the Americans with Disabilities Act of 1990, directs the Commission to “ensure that interstate and intrastate telecommunications relay

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<sup>5</sup>See, e.g., 47 U.S.C. § 151.

<sup>6</sup>See *Implementation of the Subscriber Carrier Selection Provisions of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, 16024 (2000) (“*Carrier Selection Order*”).

<sup>7</sup>47 C.F.R. § 64.1195.

<sup>8</sup>See 47 U.S.C. §§ 225(d)(3); 254(d). In 1999, to streamline the administration of the programs and to ease the burden on regulatees, the Commission consolidated the information filing requirements for multiple telecommunications regulatory programs into the annual Telecommunications Reporting Worksheet. See *1998 Biennial Regulatory Review*, Report and Order, 14 FCC Rcd 16602 (1999). The next year the Commission revised the Telecommunications Reporting Worksheet slightly to collect the additional information necessary to achieve its goal of establishing a central repository for interstate telecommunications providers by the least provider-burdensome method. *Carrier Selection Order*, 15 FCC Rcd at 16026.

<sup>9</sup>The Telecommunications Act of 1996 amended the Communications Act of 1934. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>10</sup>47 U.S.C. § 254(d).

<sup>11</sup>47 C.F.R. § 54.706(b). Beginning April 1, 2003, carrier contributions were based on a carrier’s projected, rather than historical, revenues. *Id.* The Commission has appointed the Universal Service Administrative Company (“USAC”) as permanent administrator of federal universal service support mechanisms and has made it responsible for billing and collection of USF contributions. 47 C.F.R. §§ 54.701(a), 54.702(b).

services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.”<sup>12</sup> To that end, the Commission established the TRS Fund to reimburse TRS providers for the costs of providing interstate telecommunications relay services.<sup>13</sup> Pursuant to section 64.604(c)(5)(iii)(A) of the Commission’s rules, every carrier that provides interstate telecommunications services must contribute to the TRS Fund based upon its interstate end-user revenues.<sup>14</sup>

6. The Commission has established specific procedures to administer the programs for universal service and telecommunications relay services. A carrier must file Worksheets for the purpose of determining its USF, TRS, and other regulatory fee program payments.<sup>15</sup> These periodic filings trigger a determination of liability, if any, and subsequent billing and collection by the entities that administer the regulatory programs. For example, USAC uses the revenue projections submitted on the quarterly filings to determine each carrier’s universal service contribution amount.<sup>16</sup> The TRS Administrator uses the prior year’s revenue information provided on the annual Worksheet to determine amounts owed for the TRS.<sup>17</sup> Carriers are required to pay their monthly USF contribution by the date shown on their invoice.<sup>18</sup> The Commission’s rules explicitly warn contributors that failure to file their forms or submit their payments potentially subjects them to enforcement action.<sup>19</sup> Further, under the Commission’s “red light

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<sup>12</sup>47 U.S.C. § 225(b)(1).

<sup>13</sup>See *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Third Report and Order, 8 FCC Rcd 5300, 5301, ¶ 7 (1993). Telecommunications relay services enable persons with hearing and speech disabilities to communicate by telephone with persons who may or may not have such disabilities. Such services provide telephone access to a significant number of Americans who, without it, might not be able to make or receive calls from others. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 15 FCC Rcd 5140, 5143, ¶ 5 (2000). NECA currently is responsible for administering the TRS Fund.

<sup>14</sup>47 C.F.R. § 64.604(c)(5)(iii)(A).

<sup>15</sup>Upon submission of a Form 499-A registration, the carrier is issued a filer identification number by USAC. The filer identification number is then to be included on all further filings by the company and is used by the Commission and its administrators to track the carrier’s contributions and invoices. With certain exceptions that do not apply to InPhonic, interstate telecommunications carriers must file FCC Form 499-Q quarterly, reporting revenue information by February 1, May 1, August 1 and November 1 of each year, and FCC Form 499-A annually, by April 1 of each year. See *Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration and Local Number Portability Support Mechanisms*, FCC Form 499, April 2004, at 9.

<sup>16</sup>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).

<sup>17</sup>See 47 C.F.R. § 64.604(c).

<sup>18</sup>See *Globcom, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, 19896, ¶ 5 (2003); 47 C.F.R. § 54.711(a) (“The Commission shall announce by Public Notice published in the Federal Register and on its website the manner of payment and the dates by which payments must be made.”). See, e.g., “Proposed Third Quarter 2003 Contribution Factor,” *Public Notice*, 18 FCC Rcd 11442 (WCB 2003) (“Contribution payments are due on the date shown on the [USAC] invoice.”) The Act and our rules, however, do not condition payment on receipt of an invoice or other notice from USAC. See 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(b). A carrier that does not file may fail to receive an invoice from USAC, but is nonetheless required to contribute to the universal service fund, unless its revenues are considered *de minimus*. *Globcom, Inc.*, 18 FCC Rcd at 19896, ¶ 5 & n.22. The instructions for the Telecommunications Reporting Worksheet include tables for carriers to determine their annual contributions. InPhonic does not qualify for the *de minimus* exception.

<sup>19</sup>47 C.F.R. § 54.713.

rule,” action will be withheld on any application to the Commission or request for authorization made by any entity that has failed to pay when due its regulatory program payments, such as USF contributions, and if payment or payment arrangements are not made within 30 days from notice to the applicant, such applications or requests will be dismissed.<sup>20</sup>

7. InPhonic, through its wholly-owned subsidiary, Star Number, Inc., began providing mobile virtual network operator (“MVNO”) service in August, 2002.<sup>21</sup> InPhonic states that “[t]he Company’s MVNO segment provides wireless services for consumers through wireless airtime service that it purchases wholesale from Sprint Corp. The Company provides the wireless resale services under the Company’s Liberty Wireless brand name.”<sup>22</sup>

8. In 2004, the Enforcement Bureau (“Bureau”) audit staff sought to identify resellers of telecommunications service that failed to register as telecommunications service providers with the Commission, and, thus, may also have failed to satisfy various Commission program requirements.<sup>23</sup> In order to identify such resellers, the Bureau audit staff compared lists of resellers provided by wholesale service providers against the Commission’s central repository of registered telecommunications service providers with filer identification numbers. If a reseller did not appear to have an identification number, the audit staff sent an inquiry to that reseller.

9. On March 30, 2004, the Bureau’s audit staff sent a letter to InPhonic requesting information pertaining to InPhonic’s compliance with section 64.1195 of the Commission’s rules.<sup>24</sup> On January 18, 2005, more than nine months after the March 30, 2004 Audit Letter, InPhonic stated that it still had not submitted a Form 499-A, but it intended to submit by January 31, 2005 all appropriate filings due since the company’s incorporation in August, 2002.<sup>25</sup> On January 28, 2005, InPhonic untimely filed its Form 499-Q for May 1, August 1 and November 1, 2004. On January 31, 2005, InPhonic finally registered by filing its 2003 Form 499-A and also untimely filed its 2004 Form 499-A.<sup>26</sup>

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<sup>20</sup>47 C.F.R. § 1.1910. The rule went into effect on November 1, 2004. See “FCC Announces Brief Delay in Enforcement of Red Light Rule,” *Public Notice*, 19 FCC Rcd 19452 (2004).

<sup>21</sup>InPhonic Inc.’s Response to the Enforcement Bureau’s March 2, 2005 Inquiry Regarding Federal Regulatory Fee Payments, EB-05-IH-0158 at 1 (“LOI Response”). InPhonic also provides “wireless information services and activation” and “data services.” *Id.*

<sup>22</sup>*Id.*

<sup>23</sup>See 47 C.F.R. § 64.1195(a).

<sup>24</sup>See Letter from Hugh Boyle, Chief Auditor, Investigations and Hearings Division, Enforcement Bureau, to InPhonic dated March 30, 2004 (“March 30, 2004 Audit Letter”). The audit staff followed up the March 30, 2004 Audit Letter on August 9, 2004 with an information request concerning InPhonic’s FCC Form 499-A Registration Requirement.

<sup>25</sup>Letter from Karly E. Baraga, Esq., Kelly Drye & Warren, LLP, counsel to InPhonic, Inc., to Hugh L. Boyle, Chief Auditor, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, dated January 18, 2005.

<sup>26</sup>On April 1, 2005, InPhonic filed its 2005 Form 499-A on a timely basis. InPhonic provided the Bureau no other Form 499-A or Form 499-Q filings. InPhonic stated however that it filed its Form 499-Q for February 1, 2005 in a timely manner. LOI Response at 2.

10. On March 2, 2005, the Bureau issued a letter of inquiry to InPhonic.<sup>27</sup> The LOI directed InPhonic, among other things, to submit a sworn written response to a series of questions relating to InPhonic's apparent failure to register and file Telecommunications Reporting Worksheets and to make mandated federal telecommunications regulatory program payments. On March 18, 2005, InPhonic paid USAC \$889,189 for USF contributions it owed based on its 2002, 2003 and 2004 revenue.<sup>28</sup> InPhonic responded to the LOI on April 8, 2005.<sup>29</sup>

### III. DISCUSSION

11. Under section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>30</sup> To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>31</sup> The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.<sup>32</sup> As set forth below, we conclude under this standard that InPhonic is apparently liable for a forfeiture for its apparent willful and repeated violations of section 254(d) of the Act<sup>33</sup> and sections 54.706(a), 54.711(a), 64.604(c)(5)(iii), and 64.1195 of the Commission's rules.<sup>34</sup>

12. The fundamental issues in this case are whether InPhonic apparently violated the Act and the Commission's rules by: (1) willfully or repeatedly failing to register pursuant to section 64.1195 of the Commission's rules;<sup>35</sup> (2) willfully or repeatedly failing to file Telecommunications Reporting Worksheets; and (3) willfully or repeatedly failing to make requisite contributions toward the Universal

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<sup>27</sup>Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Darius B. Withers, Esq., Kelley Drye & Warren, LLP, counsel to InPhonic, Inc., dated March 2, 2005 ("LOI").

<sup>28</sup>LOI Response, Exhibit I. According to USAC, InPhonic owed \$917,251.59 for USF contributions, which was due on March 15, 2005.

<sup>29</sup>See *supra* note 21.

<sup>30</sup>47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9; *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5.

<sup>31</sup>47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>32</sup>See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) ("*SBC Forfeiture Order*") (forfeiture paid).

<sup>33</sup>47 U.S.C. § 254(d).

<sup>34</sup>47 C.F.R. §§ 54.706(a), 54.711(a), 64.604(c)(5)(iii), 64.1195.

<sup>35</sup>47 C.F.R. § 64.1195.

Service and TRS Funds. We answer these questions affirmatively. Based on a preponderance of the evidence, we conclude that InPhonic is apparently liable for a forfeiture of \$819,905 for apparently willfully and repeatedly violating section 254(d) of the Act,<sup>36</sup> and sections 54.706(a), 54.711(a), 64.604(c)(5)(iii), and 64.1195 of the Commission's rules.<sup>37</sup>

13. Specifically, we propose the following forfeitures for apparent violations within the last year: (1) \$100,000 for failure to register pursuant to section 64.1195 of the Commission's rules;<sup>38</sup> (2) \$100,000 for failure to file two Telecommunications Reporting Worksheets; (3) \$598,626 for failure to make seven monthly USF contributions on a timely basis; and (4) \$21,279 for failure to timely make its 2004 TRS Fund contribution. Although we propose forfeitures only for apparent violations within the last year, we discuss below the history of InPhonic's noncompliance in prior years as useful background and to demonstrate the scope of InPhonic's misconduct and the context of the misconduct that is within the statute of limitations period and thus covered by this NAL.

#### A. Registration with the Commission

14. We conclude that InPhonic has apparently violated section 64.1195(a) of the Commission's rules by failing to register with the Commission from when it began providing interstate telecommunications services in 2002 until January 31, 2005.<sup>39</sup> InPhonic's failure to register constitutes a clear violation of a vital Commission rule. Section 64.1195(a) of the Commission's rules unambiguously requires that all carriers that provide, or plan to provide, interstate telecommunications services register with the Commission by submitting specified information.<sup>40</sup> Although InPhonic has been providing interstate telecommunications services since 2002, it failed to register in accordance with section 64.1195(a) until January 31, 2005, approximately 10 months after it received the Bureau's March 30, 2004 Audit Letter. As a result of its misconduct, InPhonic operated for over two years without participation in any of the programs tied to registration. As an interstate telecommunications carrier, InPhonic had a clear and affirmative duty to apprise itself of, and satisfy, its federal obligations.<sup>41</sup>

15. We view InPhonic's apparent failure to register for over two years as a serious dereliction of its responsibilities under the Act and our rules. A carrier's compliance with the Commission's registration requirement is critical to the administration of the USF and TRS programs, and accomplishment of Congress' objectives in sections 254(d) and 225(b)(1) of the Act. As we noted above, a carrier's duty to register upon entry, or anticipated entry, into interstate telecommunications markets is essential to the fulfillment of the USF and TRS program missions because it identifies the company to the various program administrators and brings the company within the purview and oversight of those

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<sup>36</sup>47 U.S.C. § 254(d).

<sup>37</sup>47 C.F.R. §§ 54.706(a), 54.711(a), 64.604(c)(5)(iii), 64.1195.

<sup>38</sup>47 C.F.R. § 64.1195.

<sup>39</sup>47 C.F.R. § 64.1195(a).

<sup>40</sup>*Id.* The Commission adopted the registration requirement in section 64.1195(a) after finding that such a requirement would enable it to better monitor the entry of carriers into the interstate telecommunications market and any associated increases in slamming activity, and, among other things, would enhance the Commission's ability to take appropriate enforcement action against carriers that have demonstrated a pattern or practice of slamming. *See Carrier Selection Order*, 15 FCC Rcd at 16024 ¶ 62.

<sup>41</sup>*See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, Report and Order, 12 FCC Rcd 17087, 17099, ¶ 22 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999) ("[t]he Commission expects, and it is each licensee's obligation, to know and comply with all of the Commission's rules.")

administrators. If a carrier never identifies itself as a telecommunications provider by properly registering under the Commission's rules, then neither the Commission nor the various program administrators can ascertain whether that carrier has fulfilled other regulatory obligations, including the requirement that carriers file Worksheets and contribute to USF, TRS, and other regulatory programs. Moreover, the program administrators have no basis upon which to invoice the carrier for contributions. A telecommunications carrier that fails to register thus can operate outside of the Commission's oversight and evade its federal obligations to contribute toward the vital programs linked to registration.

16. The impact of a carrier's failure to register is no less severe where, as here, a carrier delays its registration for an extended period of time until after it is identified by Bureau enforcement efforts. Although InPhonic registered on January 31, 2005, has apparently filed some of the required Worksheets in the last several months, and "is prepared to make all future filings, remit all resulting obligations, and is committed to remaining fully compliant with the Commission's rules and regulations,"<sup>42</sup> InPhonic took no action until more than nine months after receiving a letter from the Bureau.<sup>43</sup> The Commission has repeatedly stated that subsequent corrective measures to address a violation do not eliminate a licensee's responsibility for the period during which the violation occurred.<sup>44</sup> InPhonic's substantial delay in registering after receiving the Bureau's letter raises serious questions about its intention to do so absent threat of Commission action. Based on a preponderance of the evidence, therefore, we find that InPhonic apparently has violated section 64.1195(a) of the Commission's rules by willfully and repeatedly failing to register from 2002 until January 31, 2005.<sup>45</sup>

#### **B. Submission of Telecommunications Reporting Worksheets**

17. We conclude that InPhonic apparently has violated sections 54.711(a) and 64.604(c)(5)(iii)(B) of the Commission's rules by willfully and repeatedly failing to file annual and quarterly Telecommunications Reporting Worksheets, on a timely basis, from when it began providing telecommunications services in 2002 through January 31, 2005.<sup>46</sup> On January 28, 2005, InPhonic untimely filed its Form 499-Q for May 1, August 1 and November 1, 2004. On January 31, 2005, InPhonic finally registered by filing its 2003 Form 499-A and also untimely filed its 2004 Form 499-A. InPhonic has apparently not filed any other Worksheets that were due before January 31, 2005. Within the past year, InPhonic has failed to file, on a timely basis, the quarterly Worksheets due August 1 and November 1, 2004.

18. Sections 54.711(a) and 64.604(c)(5)(iii)(B) of the Commission's rules each clearly establish a carrier's obligation to file periodic Telecommunications Reporting Worksheets.<sup>47</sup> A carrier's failure to file these Worksheets as required has serious implications for the USF and TRS programs. As discussed above, the filing of a Telecommunications Reporting Worksheet prompts a determination of liability for, and subsequent billing and collection of, regulatory fees and contributions by the various administrators of the Universal Service and TRS Funds. With regard to the federal universal service program in

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<sup>42</sup>LOI Response at 3.

<sup>43</sup>See March 30, 2004 Audit Letter. Further, InPhonic made no apparent efforts to pay its long overdue USF obligations until after receiving a second letter from the Bureau.

<sup>44</sup>*AT&T Wireless Services, Inc.*, Forfeiture Order, 17 FCC Rcd 21866, 21870-71, (2002); *America's Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22350, 22355, ¶ 15 (2001); *Coleman Enters., Inc. d/b/a/ Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24388, ¶ 8 (2000).

<sup>45</sup>The proposed forfeitures in this NAL relate only to the portion of that period within a year of release of this NAL.

<sup>46</sup>47 C.F.R. §§ 54.711(a), 64.604(c)(5)(iii)(B).

<sup>47</sup>See 47 C.F.R. §§ 54.711(a), 64.604(c)(5)(iii)(B).

particular, the failure of a carrier such as InPhonic to abide by its federal filing obligation has a direct and profound detrimental impact by removing from the base of USF contributions telecommunications revenues that otherwise should be included, thereby shifting to compliant carriers additional economic burdens associated with the federal universal service program.<sup>48</sup> Consequently, a carrier's failure to file required Worksheets thwarts the very purpose for which Congress enacted section 254(d) – to ensure that every interstate carrier “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>49</sup> Viewed in this context, the Telecommunications Reporting Worksheet is not only an administrative tool, but a fundamental and critical component of the Commission's Universal Service and TRS programs.

19. Based on a preponderance of the evidence, we find that InPhonic apparently has violated section 254 of the Act<sup>50</sup> and sections 54.711 and 64.604 of the Commission's rules<sup>51</sup> by willfully and repeatedly failing to file required information with the Commission on multiple occasions since 2002, including failure to make two filings, on a timely basis, within the last year, the time period covered by this NAL. The NAL proposes a forfeiture for InPhonic's failure to file, on a timely basis, the Worksheets due August 1 and November 1, 2004.

### C. Universal Service Contributions

20. We further conclude that InPhonic apparently violated section 254(d) of the Act and section 54.706 of the Commission's rules by willfully and repeatedly failing to contribute to universal service support mechanisms.<sup>52</sup> Section 54.706(c) of the Commission's rules unambiguously directs that “entities [providing] interstate telecommunications to the public . . . for a fee . . . contribute to the universal service support programs.”<sup>53</sup> Although InPhonic has been providing interstate telecommunications services to end-users since 2002, InPhonic made no universal service contributions until March 18, 2005.<sup>54</sup> During the relevant period, InPhonic was required, pursuant to section 54.706(b) of the Commission's rules, to contribute to universal service mechanisms based upon either its historical or projected revenues.<sup>55</sup> As we previously have stated,

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<sup>48</sup>Sixty days prior to the start of each quarter, USAC is required to provide the Commission with a projection of the high cost, low income, schools and libraries, and rural health care funding requirements for the following quarter. See [www.universalservice.org/overview/filings](http://www.universalservice.org/overview/filings). Based on USAC's projection of the needs of the USF, and revenue projections from the registered carriers subject to universal service requirements, the Commission establishes a specific percentage of interstate and international end-user revenues that each subject telecommunications provider must contribute toward the USF. This percentage is called the contribution factor. The contribution factor, and, consequently, the amount owed to the USF by each affected telecommunications company, changes each quarter, depending on the needs of the USF and carrier-provided revenue projections. See [www.fcc.gov/wcb/universal\\_service/quarter](http://www.fcc.gov/wcb/universal_service/quarter). Thus, in cases where a carrier, such as InPhonic, fails to file required Worksheets reporting its revenue projections in a timely fashion, its revenues are excluded from the contribution base from which universal assessments are derived, and the economic burden of contributing falls disproportionately on carriers that have satisfied their reporting obligations.

<sup>49</sup>47 U.S.C. § 254(d).

<sup>50</sup>47 U.S.C. § 254.

<sup>51</sup>47 C.F.R. §§ 54.711, 64.604.

<sup>52</sup>47 U.S.C. § 254(d); 47 C.F.R. § 54.706.

<sup>53</sup>47 C.F.R. § 54.706(c).

<sup>54</sup>See LOI Response at 2.

<sup>55</sup>See 47 C.F.R. § 54.706(c).



[c]arrier nonpayment of universal service contributions undermines the efficiency and effectiveness of the universal service support mechanisms. Moreover, delinquent carriers may obtain a competitive advantage over carriers complying with the Act and our rules. We consider universal service nonpayment to be a serious threat to a key goal of Congress and one of the Commission's primary responsibilities.<sup>56</sup>

Based on a preponderance of the evidence, we find that InPhonic apparently has violated sections 254(d) of the Act and 54.706 of the Commission's rules by willfully and repeatedly failing to make its monthly universal service contribution payments for a period of years, including seven such failures within the past year.

#### **D. Telecommunications Relay Service Contributions**

21. We also find that InPhonic apparently has violated section 64.604(c)(5)(iii)(A) of the Commission's rules by failing to make required contributions to the interstate TRS Fund.<sup>57</sup> As an interstate telecommunications carrier, InPhonic was obligated to contribute to the TRS Fund on the basis of its interstate and international end-user telecommunications revenues.<sup>58</sup> A carrier's contribution to the TRS Fund is based upon its subject revenues for the prior calendar year and a contribution factor determined annually by the Commission.<sup>59</sup> Subject carriers must make TRS contributions on an annual basis, with certain exceptions that are not applicable to InPhonic.<sup>60</sup>

22. InPhonic made its first TRS Fund payment of \$22,455.04 on April 25, 2005,<sup>61</sup> approximately nine months after its 2004 TRS contribution became due on July 26, 2004, and 13 months after it first received a letter from the Bureau regarding its compliance with the Commission's rules.<sup>62</sup> Based on a preponderance of the evidence, we therefore find that InPhonic apparently has violated section 64.604 of the Commission's rules by willfully and repeatedly failing to pay its TRS contributions when due, including its failure to make on a timely basis the payment due on July 26, 2004.

#### **E. Proposed Forfeiture**

23. Section 503(b)(1)(B) of the Act provides that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.<sup>63</sup> For the apparent violations in this case, section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$120,000 for each

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<sup>56</sup>*Globcom, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, 19903, ¶ 26 (2003).

<sup>57</sup>47 C.F.R. § 64.604(c)(5)(iii)(A).

<sup>58</sup>*Id.* Each subject carrier must contribute at least \$25 per year. Carriers whose annual contributions are less than \$1,200 must pay the entire amount at the beginning of the contribution period. 47 C.F.R. § 64.604(c)(5)(iii)(B). Otherwise, carriers may divide their contributions into equal monthly payments. *Id.*

<sup>59</sup>47 C.F.R. § 64.604(c)(5)(iii)(B).

<sup>60</sup>*See id.*

<sup>61</sup>NECA, the TRS Fund Administrator, has stated that the Company still owes \$102 for a finance charge and late fee on its April 25, 2005 payment.

<sup>62</sup>*See* March 30, 2004 Audit Letter.

<sup>63</sup>47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

violation or each day of a continuing violation, up to a statutory maximum of \$1.2 million for a single act or failure to act before September 7, 2004, and up to \$130,000 for each violation or each day of a continuing violation, up to a statutory maximum of \$1.325 million for a single act or failure to act for violations occurring on or after September 7, 2004.<sup>64</sup> In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>65</sup>

24. Under section 503(b)(6) of the Act, we may only propose forfeitures for apparent violations that occurred within one year of the date of this NAL.<sup>66</sup> Nevertheless, section 503(b) does not bar us from assessing whether InPhonic’s conduct prior to that time period apparently violated the Act or our rules in determining the appropriate forfeiture amount for those violations within the statute of limitations.<sup>67</sup> Therefore, although we find that InPhonic apparently violated the Act and our rules for over two years, we propose forfeitures here only for violations that occurred within the last year.

25. In contrast to previous cases in which we have taken enforcement action for failure to satisfy universal service obligations,<sup>68</sup> this case involves a carrier’s failure both to register and submit any Telecommunications Reporting Worksheets from the time it commenced providing telecommunications services until after it received a letter from the Bureau – in this case, a period of over two years. We find InPhonic’s failure to discharge its federal reporting obligations to be particularly egregious. As we stated above, the registration and filing of Telecommunications Reporting Worksheets are fundamental to the implementation of our central repository of carriers and to the administration of multiple statutorily-derived programs – including the USF and the TRS Fund. Where, as here, a carrier ignores its obligations by wholly failing to register -- thereby affecting the time and manner in which these important federal programs are funded -- it undermines the programs and thwarts the purposes for which Congress and the Commission established them.

26. The Commission’s *Forfeiture Policy Statement* and implementing rules prescribe a base forfeiture of \$3,000 for failure to file required forms or information.<sup>69</sup> In the past, we have held that a substantial upward adjustment to \$50,000 is warranted for a carrier’s failure to file its Telecommunications Reporting Worksheets for revenue reporting purposes.<sup>70</sup> We find that failure to register is an even more egregious violation. By ignoring its registration obligation, InPhonic not only has violated our rules with significant ramifications for federal telecommunications policies, but has also

<sup>64</sup>47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2).

<sup>65</sup>47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100, ¶ 27; 47 C.F.R. § 1.80(b).

<sup>66</sup>47 U.S.C. § 503(b)(6)(B); *see also* 47 C.F.R. § 1.80(c)(3).

<sup>67</sup>*See, e.g., Globcom, Inc.*, 18 FCC Rcd at 19903; *Roadrunner Transp., Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671 (2000); *Liab. of E. Broad. Corp.*, Memorandum Opinion and Order, 10 F.C.C. 2d 37 (1967).

<sup>68</sup>*Cf., Globcom, Inc.*, 18 FCC Rcd 19893; *America’s Tele-Network Corp.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 20903 (2000); *Matrix Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 13544 (2000); *ConQuest Operator Services Corp.*, Order of Forfeiture, 14 FCC Rcd 12518 (1999). Each carrier in these cases had registered and filed Telecommunications Reporting Worksheets prior to the Commission’s inquiry and, in some cases, had paid contributions in part.

<sup>69</sup>*See* 47 C.F.R. § 1.80(b)(4).

<sup>70</sup>In the *Globcom NAL*, the Commission proposed a \$50,000 forfeiture for each instance within the statute of limitations that Globcom failed to file a required Worksheet. *Globcom, Inc.*, 18 FCC Rcd at 19905, ¶ 32. We note, however, that, unlike InPhonic, Globcom had registered with the Commission and submitted multiple Worksheets prior to our investigation.

hampered efficient and effective Commission enforcement by delaying detection of, and action against, its behavior. Moreover, carriers' failure to register imposes a substantial burden on the Commission, which can only identify such carriers through compliance review programs that require significant amounts of staff time and resources. This egregious behavior strikes at the core of our ability to implement and enforce the Act and our rules effectively, thus warranting a substantial forfeiture. Taking into account all of the factors enumerated in section 503(b)(2)(D) of the Act, we conclude that a proposed forfeiture of \$100,000 is warranted.

27. In the past, we have held that a substantial forfeiture of \$50,000 is warranted for a carrier's failure to file a Telecommunications Reporting Worksheet for revenue reporting purposes. We find that InPhonic's willful and repeated failure to file periodic Telecommunications Reporting Worksheets is egregious. As we noted above, a carrier's obligation to file these Worksheets is directly linked to, and thus has serious implications for, administration of the USF, TRS, and other regulatory programs. By ignoring its reporting obligations, InPhonic has unilaterally shifted to compliant carriers and their customers the economic costs associated with the universal service, TRS, and other regulatory programs. Therefore, we find that InPhonic is apparently liable for a \$100,000 forfeiture for its failure to file, on a timely basis, two Worksheets within the last year; *i.e.*, those due August 1 and November 1, 2004.

28. Based on the facts above, it also appears that InPhonic has failed to make the requisite contributions into the Universal Service Fund for a period of over two years. Again, nonpayment of universal service contributions is an egregious offense that bestows on delinquent carriers an unfair competitive advantage by shifting to compliant carriers the economic costs and burdens associated with universal service. A carrier's failure to make required universal service contributions hampers realization of Congress' policy objective in section 254(d) of the Act to ensure the equitable and non-discriminatory distribution of universal service costs among all telecommunications providers.<sup>71</sup> The Commission has established a base forfeiture amount of \$20,000 for each month in which a carrier has failed to make required universal service contributions.<sup>72</sup> Consequently, we find InPhonic apparently liable for a base forfeiture of \$140,000 for its willful and repeated failure to make seven universal service contributions within the past year.

29. In the past, we have calculated upward adjustments to forfeitures for failure to make USF and TRS payments based on half of the company's unpaid contributions.<sup>73</sup> On March 15, 2005, InPhonic owed \$917,251.59 for USF contributions.<sup>74</sup> Therefore, taking into account all of the factors enumerated in section 503(b)(2)(D) of the Act, we propose an upward adjustment of \$458,626 -- half the amount InPhonic paid for outstanding USF contributions on March 18, 2005 -- for InPhonic's apparent failure to make universal service contributions. We thus find InPhonic liable for a total proposed forfeiture of \$598,626 for its apparent willful and repeated failure to make contributions into the Universal Service Fund.

30. We also find that InPhonic apparently has failed to make any TRS contributions from 2003 until April, 2005.<sup>75</sup> InPhonic's 2004 TRS obligation was due on July 26, 2004, and InPhonic made this payment in April, 2005 only after it received Bureau inquiries into its compliance with the related rules. Where a carrier fails to satisfy its TRS obligations for an extended period of time, it thwarts the purpose

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<sup>71</sup>See 47 U.S.C. § 254(d).

<sup>72</sup>See *Globcom, Inc.*, 18 FCC Rcd at 19903-19904, ¶¶ 25-27.

<sup>73</sup>See, *e.g.*, *id.*

<sup>74</sup>See *supra* note 28.

<sup>75</sup>InPhonic stated on April 8, 2005 that it was "processing" its TRS Fund payment. LOI Response at 8.

for which Congress established section 225(b)(1) of the Act and its implementing regulations -- to ensure that telecommunications relay services “are available to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.”<sup>76</sup>

31. The Commission has established a base forfeiture amount of \$10,000 for each instance in which a carrier fails to make required TRS contributions.<sup>77</sup> In light of InPhonic’s failure to pay timely its TRS obligation for the 2004-2005 funding period, we find it apparently liable for a base forfeiture in the amount of \$10,000. For the reasons discussed above regarding InPhonic’s failure to make universal service contributions and generally consistent with Commission precedent,<sup>78</sup> we find that an upward adjustment, in an amount approximately one-half of the carrier’s estimated unpaid TRS contributions (\$22,557)<sup>79</sup> at the time it made its first payment in April, 2005, is appropriate for InPhonic’s apparent failure to make TRS contributions. Taking into account the factors enumerated in section 503(b)(2)(D) of the Act, we conclude that an upward adjustment of \$11,279 is reasonable. Consequently, we find InPhonic liable for a total proposed forfeiture of \$21,279 for its willful and repeated failure to satisfy its TRS obligations for the 2004-2005 funding period.

#### IV. CONCLUSION

32. In light of the seriousness, duration and scope of the apparent violations, and to ensure that a company with substantial revenues such as InPhonic does not consider the proposed forfeiture merely “an affordable cost of doing business,”<sup>80</sup> we find that a proposed forfeiture in the amount of \$819,905 is warranted. As discussed above, this proposed forfeiture amount includes: (1) a total proposed penalty of \$100,000 for failing to register pursuant to section 64.1195 of the Commission’s rules;<sup>81</sup> (2) a total proposed penalty of \$100,000 for failing to file two Telecommunications Reporting Worksheets within the past year; (3) a total proposed penalty of \$598,626 for failing to make seven monthly universal service contributions within the past year; and (3) a proposed total penalty of \$21,279 for failing to make its 2004 TRS program contribution when due.

33. We caution that additional violations of the Act or the Commission’s rules could subject InPhonic to further enforcement action. Such action could take the form of higher monetary forfeitures and/or possible revocation of InPhonic’s operating authority, including disqualification of InPhonic’s principals from the provision of any interstate common carrier services without the prior consent of the Commission.<sup>82</sup> In addition, we note that, to the extent InPhonic is ever found to be delinquent on any debt owed to the Commission (e.g., has failed to pay all of its USF contributions), the Commission will not act on, and may dismiss, any application or request for authorization filed by InPhonic, in accordance with the agency’s “red light” rules.<sup>83</sup>

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<sup>76</sup>47 U.S.C. § 225(b)(1).

<sup>77</sup>See *Globcom, Inc.*, 18 FCC Rcd at 19904, ¶ 29.

<sup>78</sup>See *id.*

<sup>79</sup>See LOI Response at 8.

<sup>80</sup>*Forfeiture Policy Statement*, 12 FCC Rcd at 17099; see also 47 C.F.R. § 1.80(b)(4).

<sup>81</sup>47 C.F.R. § 64.1195.

<sup>82</sup>See *Business Options, Inc.*, Consent Decree, 19 FCC Rcd 2916 (2003); *NOS Communications, Inc., Affinity Network Incorporated and NOSVA Limited Partnership*, Consent Decree, 2003 WL 22439710 (2003).

<sup>83</sup>47 C.F.R. § 1.1910.

## V. ORDERING CLAUSES

34. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended,<sup>84</sup> and section 1.80 of the Commission's rules,<sup>85</sup> that InPhonic is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of \$819,905 for willfully and repeatedly violating the Act and the Commission's rules.

35. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's Rules,<sup>86</sup> within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, InPhonic SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

36. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

37. The response, if any, to this NOTICE OF APPARENT LIABILITY must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-A237, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above.

38. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

39. Requests for payment of the full amount of this NAL under an installment plan should be sent to Chief, Credit and Management Center, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554.<sup>87</sup>

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<sup>84</sup>47 U.S.C. § 503(b).

<sup>85</sup>47 C.F.R. § 1.80.

<sup>86</sup>See 47 C.F.R. § 1.80(f)(3).

<sup>87</sup>See 47 C.F.R. § 1.1914.

40. IT IS FURTHER ORDERED that a copy of this NOTICE OF APPARENT LIABILITY AND ORDER shall be sent by certified mail, return receipt requested, to Darius B. Withers, Esq., Kelley Drye & Warren, LLP, 1200 19<sup>th</sup> Street, N.W., Suite 500, Washington, D.C. 20036; and Aaron Daniels, Senior Vice-President and Corporate Treasurer, InPhonic, Inc., 1010 Wisconsin Avenue, N.W., Suite 600, Washington, D.C. 20007.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary