

FINAL BRIEF FOR RESPONDENTS

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

No. 12-1133

INCONTACT, INC.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioner is inContact, Inc. The respondents are the Federal Communications Commission and the United States of America.

2. Rulings under review.

*In the Matter of Universal Service Contribution Methodology
Application for Review by the Wireline Competition Bureau by inContact,
Inc., 27 FCC Rcd 632 (2012) (JA 75).*

3. Related cases.

The order on review has not previously been before this Court. Counsel is not aware of any related cases that are pending before this Court or any other court.

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GLOSSARY

Administrator or USAC	Universal Service Administrative Company
Bureau	Wireline Competition Bureau, Federal Communications Commission
<i>Bureau Order</i>	<i>In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator, Order, 25 FCC Rcd 4739 (Wireline Comp. Bur. 2010) (JA 48)</i>
Commission or FCC	Federal Communications Commission (respondent)
inContact	inContact, Inc. (petitioner)
<i>Order on Review</i>	<i>In the Matter of Universal Service Contribution Methodology Application for Review of a Decision by the Wireline Competition Bureau by inContact, Inc., Memorandum Opinion and Order, 27 FCC Rcd 632 (2012) (JA 75)</i>
USF	Universal Service Fund

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FINAL BRIEF FOR RESPONDENTS

JURISDICTION

The Federal Communications Commission (“FCC” or “Commission”) order that is the subject of this petition for review was released on January 5, 2012. The petition for review was timely filed on March 5, 2012. *See* 28 U.S.C. § 2344. The Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTION PRESENTED

The FCC designated the Universal Service Administrative Company (“USAC”) to administer federal universal service support programs. Under

the FCC's rules, any person aggrieved by an action taken in a decision by USAC may ask the Commission to review that decision, but must do so within 60 days. 47 C.F.R. §§ 54.719(c), 54.720(a). Believing that USAC erroneously billed it for universal service contributions, inContact asked the FCC to review USAC's invoice approximately 80 days after it was issued.

The question presented is whether the FCC lawfully exercised its discretion when it affirmed a staff decision dismissing as untimely inContact's request for review because inContact filed its request outside the prescribed 60-day filing period.

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the appendix to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

Section 254(d) of the Communications Act, 47 U.S.C. § 254(d), requires every telecommunications carrier that provides interstate telecommunications to contribute to the support mechanisms established by

the Commission to preserve and advance universal service.¹ A key goal of universal service “is to ensure affordable telecommunications services to consumers living in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers.” *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Report and Order, 22 FCC Rcd 16372, 16373 at ¶ 2 (2007) (citing 47 U.S.C. § 254(b)).

The Commission has established various programs to support universal service. These programs are funded by the Universal Service Fund (“USF”), which currently provides approximately \$8 billion annually in universal service subsidies.² The FCC designated USAC (also referred to as the “Administrator”), an independent, not-for-profit corporation, to administer these programs. *See generally* 47 C.F.R. §§ 54.701-54.705. The Administrator’s duties include “billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds” to eligible telecommunications carriers. *Id.* § 54.702(b). The

¹ Section 254(d) also vests the Commission with broader, permissive authority to assess contributions, such that “[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.” 47 U.S.C. § 254(d).

² *See* <http://www.usac.org/about/about/universal-service/fast-facts.aspx>.

Administrator has a 19-member board of directors, which is broken into three committees (each of which oversees a corresponding division). *See id.* §§ 54.701, 54.703 & 54.705.

Under the FCC’s rules, any person “aggrieved” by an “action taken” by the Administrator (or one of its divisions or a committee of the board) has a choice of two remedies: It may appeal internally within USAC, *see id.* § 54.719(a) & (b); or it may seek direct review by the FCC without first pursuing an appeal at USAC, *see id.*, § 54.719(c). Under either option, an aggrieved person must file a request to review the “action taken” within 60 days of the issuance of a “decision” by the Administrator, division, or committee of the board. *Id.* § 54.720(a), (b) & (c). If a person elects to pursue an appeal with USAC, the filing of its request for internal USAC review tolls the time period for seeking review from the FCC. *Id.* § 54.720(d). When the relevant USAC committee or its board of directors rules on the appeal, the party that filed the request then has 60 days to file an appeal with the Commission. *Id.*

Requests for review of Administrator decisions that are submitted to the FCC are typically “considered and acted upon” by the agency’s Wireline

Competition Bureau (“Bureau”). *Id.* § 54.722(a).³ The Bureau conducts “*de novo* review of request[s] for review of decisions issue[d] by the Administrator.” *Id.* § 54.723(a). An affected party may seek review by the full Commission of the Bureau’s decision. *See id.* § 54.722(b). The Commission “may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor.” *Id.* § 1.115(g).

The FCC’s rules governing Commission review of staff-level action contain an exhaustion requirement: The Commission will not grant an application for review of the Bureau’s decision if that application “relies on questions of fact or law upon which the [Bureau] has been afforded no opportunity to pass.” *Id.* § 1.115(c). Rather, a party seeking to introduce new questions of fact or law not raised below must first present them “to the [Bureau] in a petition for reconsideration,” subject to the requirements of section 1.106 of the Commission’s rules. *Id.* § 1.115(c) NOTE.

³ Requests for review of Administrator decisions “that raise novel questions of fact, law or policy shall be considered by the full Commission,” 47 C.F.R. § 54.722(a), and the Commission “shall conduct *de novo* review of requests for review of decisions by the Administrator that involve novel questions of fact, law or policy.” *Id.* § 54.723(b). Where no such questions are presented, “the Commission shall not conduct *de novo* review.” *Id.*

II. FACTUAL BACKGROUND

As a provider of telecommunications services, inContact is obligated to contribute to the USF. 47 U.S.C. § 254(d); *see* Brief of Petitioner (“Br.”) at 2-5. On January 23, 2009, USAC issued an invoice to inContact,⁴ seeking \$316,447.38 in USF contributions. Invoice No. UBDI0000340915 (JA 5). inContact’s Corporate Secretary (Kimm Partridge) acknowledged “receiv[ing] and review[ing]” the invoice. Decl. at ¶ 6 (JA 73). She also stated that she “contacted USAC seeking an explanation of the timing and items invoiced,” “asked for permission from USAC to have time to review the invoice,” and was “informed by a representative of USAC that inContact could take some time to consider the invoice before paying.” Decl. at ¶¶ 7-9 (JA 73).⁵

On April 13, 2009, inContact filed with the FCC a “Petition for Special Relief and Waiver” in which it disputed \$298,410.50 of the charges on the invoice and asked USAC to “remove such amounts from any future USAC

⁴ The invoice was issued to UCN, Inc., the name under which inContact did business. *See* Declaration of Kimm Partridge (“Decl.”) (JA 73).

⁵ The Commission is not aware of any evidence in the administrative record – and inContact cites none – that supports inContact’s assertions in its brief that USAC informed inContact that it “could take a ‘couple of months’ to review the Invoice” (Br. at 19). Although Petitioner cites to Kimm Partridge’s declaration for support (*see* Br. at 5 n.8), the declaration does not, in fact, support that assertion.

invoice.” Petition for Special Relief and Waiver (“Request for Review”) at 2 (JA 18 & 79). “In addition,” inContact sought from the Commission “[w]aiver of penalties and fees” and “confirmation” that inContact “has a right to dispute the assessment without first appealing to USAC.” *Ibid.* (JA 18 & 79). A day later, “in lieu of a formal Letter of Appeal,” inContact filed with USAC the same pleading it had filed the previous day with the FCC. Letter of Appeal dated April 14, 2009 at 1 (JA 39).⁶

A. The Bureau’s Order.

On May 7, 2010, the FCC’s Wireline Competition Bureau dismissed inContact’s request for review of the invoice “as procedurally defective” and its request for waiver “as moot.” *In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator*, Order, 25 FCC Rcd 4739, ¶ 1

⁶ On July 31, 2009, USAC denied inContact’s appeal “that USAC hold in abeyance interest charges, penalties and debt transfers while the FCC considers inContact’s appeal related to its contribution assessment.” *Administrator’s Decision on Contributor Appeal* at 1 (JA 46). USAC also closed the appeal “as moot before USAC,” explaining that, “in matters where an appeal of the same issue is simultaneously before USAC and the FCC, which is the case for this matter, USAC defers to the FCC to decide the matter.” *Id.* at 2 (JA 47).

(Wireline Comp. Bur. 2010) (“*Bureau Order*”) (JA 48).⁷ The Bureau noted that “[a]lthough inContact frames its filing as a petition for special relief and waiver, the petition is actually a request for review of an action taken by USAC pursuant to sections 54.719 through 54.725 of the Commission’s rules.” *Id.* n.1 (JA 48).

In dismissing inContact’s request for “review of a January 23, 2009 invoice from USAC,”⁸ the Bureau explained that “inContact was required to file a request for review by March 24, 2009” but inContact “did not file its appeal until April 13, 2009, [or] 20 days late.” *Id.* ¶ 2 (citing 47 C.F.R. § 54.720(a)) (JA 48). The Bureau further dismissed as moot inContact’s request for ““a waiver of the rules requiring contributors to first dispute USAC’s assessments with USAC,””⁹ because “parties may seek review of USAC decisions with either USAC or the Commission.” *Id.* ¶ 3 (JA 48).

⁷ In the order, the Bureau used the term “deny” rather than “dismiss” in describing the action it took. As the Commission explained on subsequent administrative review, however, the context of the Bureau’s discussion makes clear that the Bureau meant to dismiss inContact’s request for review for untimeliness (rather than reaching the merits of inContact’s arguments and denying the request for review). *See In the Matter of Universal Service Contribution Methodology Application for Review of a Decision by the Wireline Competition Bureau by inContact, Inc.*, Memorandum Op. and Order, 27 FCC Rcd 632, n.5 (2012) (“*Order on Review*”) (JA 76).

⁸ *Bureau Order* ¶ 2 (JA 48) (citing Request for Review at 4 (JA 20 & 81)).

⁹ *Bureau Order* ¶ 3 (JA 48) (quoting Request for Review at 16 (JA 32 & 93)).

The Bureau further explained that, under the Commission’s rules, “there is no requirement that parties first go to USAC before requesting review from the Commission.” *Ibid.* (JA 48).

B. The Commission’s *Order on Review*.

On June 7, 2010, inContact sought review by the full Commission of the *Bureau Order*. Application for Review (JA 50). In its application for review, inContact contended, *inter alia*, that the Bureau erred in dismissing as untimely its request for review of the “January 23, 2009 true-up invoice” because “USAC’s invoice does not qualify as a decision, and therefore, the 60-day deadline does not apply.” Application for Review at 1 (JA 54).

In the *Order on Review*, released January 5, 2012, the Commission dismissed in part and denied in part inContact’s application for review. The FCC dismissed the application to the extent that it relied on “questions of facts or law not previously presented to the Bureau,” explaining that the exhaustion requirement of 47 C.F.R. § 1.115(c) bars such arguments. *Order on Review* ¶ 3 (JA 75). In all other respects, the Commission denied inContact’s application for review and upheld the Bureau’s decision “for the reasons stated in its Order.” *Id.* ¶ 2 (JA 75); *see* 47 C.F.R. § 1.115(g) (Commission may deny an application for review “with or without specifying reasons therefor”).

Based “[u]pon review of the Application for Review and the entire record,” the Commission concluded that “inContact ha[d] failed to demonstrate that the Bureau erred” in dismissing, as procedurally defective, inContact’s request for review. *Order on Review* ¶ 2 (JA 75). The Commission upheld the Bureau’s decision to dismiss as moot inContact’s request for waiver of the “require[ment]” that it “first dispute USAC’s assessments with USAC, before seeking review by the Commission” because there was no such requirement. *Id.* ¶ 2 & n.4 (JA 75). The Commission further upheld the Bureau’s decision that inContact’s request for review was untimely, explaining that “[f]or purposes of 47 C.F.R. § 54.720, USAC’s invoice is a decision by the Administrator” that marks the beginning of the 60-day period for seeking Commission review of USAC action under the FCC’s rule. *Id.* n.3 (JA 75). The Commission also pointed to an earlier case in which the Bureau had made a similar finding – *In the Matter of Federal-State Joint Board on Universal Service Request for Review by Big River Telephone Co.*, Order, 22 FCC Rcd 4974 (Wireline Comp. Bur. 2007) (“*Big River*”). *See ibid.* (JA 75).

This petition for review followed.

SUMMARY OF ARGUMENT

The sole issue properly before the Court is whether the Commission abused its discretion when it upheld the Bureau's dismissal of inContact's underlying request for review of an action taken by the Administrator because inContact's request was filed out of time. The Commission did not abuse its discretion or otherwise act unlawfully when it concluded that inContact's request had been properly dismissed on procedural grounds.

The Commission reasonably determined that the issuance of an invoice by USAC constitutes a "decision" of the Administrator that must be appealed within 60 days under 47 C.F.R. § 54.720(a). Because inContact did not file its request for review until 80 days after issuance of the invoice, it was too late.

The Commission's interpretation of its own rules was reasonable, and inContact's request for review of the USAC invoice was clearly untimely. The petition for review should be denied.

STANDARD OF REVIEW

The Court must affirm the *Order on Review* unless inContact demonstrates that the challenged agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.

§ 706(2)(A). This “[h]ighly deferential” standard of review “presumes the validity of agency action,” *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000), and applies where, as here, the Court reviews “an agency’s dismissal of pleadings on procedural grounds.” *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003).

Moreover, the courts owe substantial deference to an agency’s construction of its own rules. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260-61 (2011). Indeed, the FCC’s construction of its own rules is controlling unless that construction is “‘plainly erroneous or inconsistent with the regulation[]’ or there is any other ‘reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.’” *Talk Am.*, 131 S. Ct. at 2261 (quoting *Chase Bank, N.A., v. McCoy*, 131 S. Ct. 871, 881 (2011)); *see also Star Wireless LCC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008). Ultimately, the Court sits “not to judge the wisdom of the FCC’s . . . rules but to determine whether [the] decision was an abuse of discretion.” *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 901 (D.C. Cir. 2004).

ARGUMENT

I. THE FCC REASONABLY INTERPRETED AND APPLIED ITS OWN PROCEDURAL RULES WHEN IT DISMISSED INCONTACT’S UNTIMELY REQUEST FOR REVIEW OF AN INVOICE ISSUED BY USAC.

A. The Commission’s Interpretation of Sections 54.719 and 54.720 of its Rules Is Reasonable and Carries Controlling Weight.

Section 54.719(c) of the Commission’s rules provides that “[a]ny person aggrieved by an action taken by [USAC]” may seek review from the FCC, 47 C.F.R. § 54.719(c). The opportunity to seek review, however, is limited by the filing deadlines set forth in section 54.720, 47 C.F.R. § 54.720. Specifically, an aggrieved party requesting review of USAC action “by the Commission pursuant to § 54.719(c)” “shall file such a request within sixty (60) days of the issuance of the decision by [USAC].” *Id.* § 54.720(a).

The Commission reasonably determined in this context that, “[f]or purposes of 47 C.F.R. § 54.720, USAC’s invoice is a decision by the Administrator” that triggers the 60-day limitations period in the rule. *Order on Review* n.3 (JA 75). USAC issued the invoice on January 23, 2009. Thus, inContact’s request for review was due no later than March 24, 2009. *See id.* ¶ 2 (JA 75) (upholding the Bureau’s finding “that inContact’s request was procedurally defective because it was filed more than sixty days after USAC’s decision,” *id.* ¶ 1 (JA 75)). Because inContact missed that deadline,

the Commission did not adopt a “plainly erroneous” reading of its rule, *Talk Am.*, 131 S. Ct. at 2261, or one “inconsistent with the regulation[],” *ibid.*, when it upheld the Bureau’s conclusion that inContact’s request for review was time-barred. *See Order on Review* ¶¶ 2 & 3 (JA 75).¹⁰

The Commission’s understanding of its rule also makes sense as a practical matter. When an aggrieved party appeals an invoice directly to the FCC, as occurred here, there is not necessarily anything other than the invoice itself that the agency is being asked to review. So it makes logical sense to treat the issuance of the invoice as the “decision” that starts the 60-day limitations period for seeking review. Indeed, inContact acknowledged this in its request for review. *See Request for Review* at 16 (JA 32 & 93) (the “FCC’s rules mandate a contributor first address its disputes regarding

¹⁰ inContact never presented to the Bureau its primary argument on appeal – that a USAC invoice may not be properly treated as an Administrator “decision” within the meaning of the Commission’s rule, 47 C.F.R. § 54.720, which specifies the deadline for seeking review of “action taken” by USAC, 47 C.F.R. § 54.719(c). *See e.g.* Br. at 15 (an invoice does not “qualify[y] as a decision for the purpose of establishing the timeframe for USAC appeals”). The Commission properly dismissed this portion of inContact’s application for review of the *Bureau Order* because it was barred by section 1.115(c) of its rules, 47 C.F.R. § 1.115(c). *See Order on Review* ¶ 2 (JA 75). The Commission also acted well within its discretion when it otherwise denied inContact’s procedurally defective application for review and clearly was under no obligation to address “each and every argument presented by inContact” (Br. at 24). *See id.* ¶ 3 (JA 75) (*citing* 47 C.F.R. § 1.115(g), which provides that the Commission may deny an application for review “with or without specifying reasons therefor”).

contribution obligations to USAC in the form of an appeal [;] [t]he appeal must be filed with USAC within 60 days of the issuance of USAC’s assessment decision”) (*citing* 47 C.F.R. § 54.720; footnote omitted).

inContact’s argument to the contrary in its brief presupposes that there would be another “decision” to appeal. *See* Br. at 19 (“USAC issued no written decision that inContact could have appealed”). But there is only another “decision” when the aggrieved party *first* seeks review of the invoice by USAC. In that situation, the rules expressly provide that “[t]he filing of a request for review with [USAC] . . . under § 54.719(a) or . . . under § 54.719(b), shall toll the time period for seeking review from the [FCC]” and that “the party that filed the request for review” with USAC “shall have sixty (60) days from the date [USAC] . . . issues a decision to file an appeal with the Commission.” 47 C.F.R. § 54.720(d). But inContact did not first seek review of the invoice by USAC.¹¹ Thus, the 60-day limitations period was not tolled, and so there was no occasion for a new 60-day clock for seeking FCC review to start. Consequently, inContact’s appeal was simply too late.

¹¹ inContact filed its request for review by USAC the day *after* it filed its request for Commission review of the January 23, 2009 invoice, *see* Br. at 6 n.9, and USAC properly disposed of that later (and duplicative) request because inContact had an earlier request for review pending before the FCC. *See Administrator’s Decision on Contributor Appeal* at 2 (JA 47).

B. inContact Has Failed to Meet Its Heavy Burden of Showing that the Commission Abused Its Discretion.

inContact is wrong in contending that the Commission cannot lawfully interpret its rules in the absence of “adopt[ing] a substantive rule declaring invoices to be ‘decisions,’ either generally or specifically in regards to USAC invoices.” *See* Br. at 16. It is neither unusual nor improper for an agency to interpret its own rules (as well as the statute it administers) in the context of an adjudication – as the FCC does when it reviews actions taken by USAC. Indeed, this Court has affirmed such FCC interpretations in a variety of adjudicatory contexts.¹² Contrary to inContact’s apparent position, an agency need not explicate every possible contingency or issue through rulemaking before answering an interpretive question regarding an existing rule through adjudication.

¹² *See, e.g., Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006) (affirming FCC interpretations contained in an adjudicatory declaratory ruling); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007) (same); *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (affirming FCC interpretations in granting an application to provide service); *Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184 (D.C. Cir. 2009) (affirming FCC’s denial of waiver on basis of an interpretation of FCC’s payment deadline rules); *Minnesota Christian Broadcasters, Inc. v. FCC*, 411 F.3d 283, 310 (D.C. Cir. 2005) (deferring to the FCC’s reasonable interpretation of its rule when “language of [the rule] does not compel the FCC’s reading, neither is the language inconsistent with that reading”).

inContact’s suggestion of unfair surprise caused by the Commission’s decision is also unpersuasive. *See* Br. at 18. The Commission cited a consistent Bureau order that pre-dated by three years the Bureau’s dismissal of inContact’s request for review in this case. *Order on Review* n.3 (JA 75) (citing Bureau’s finding in *Big River*, 22 FCC Rcd at 4976 n.17, that “[f]or purposes of 47 C.F.R. § 54.720, USAC’s invoice is a decision by the Administrator”); *see also Big River*, 22 FCC Rcd at 4976 (“Commission regulations require that an appeal of an Administrator’s decision be filed with USAC within 60 days of the issuance of *that* decision,” *citing* 47 C.F.R. § 54.720) (emphasis added; footnote omitted).¹³

Finally, the Bureau-level order in *Dorial Telecom*¹⁴ does not assist inContact. *See* Br. at 18-19. In that case, “Dorial appealed the invoices at issue to USAC on November 24, 2009, and USAC addressed Dorial’s appeal on May 18, 2010.” *Dorial Telecom*, 26 FCC Rcd at 3799, ¶ 3. Unlike

¹³ Contrary to inContact’s contention (Br. at 12-16), the Bureau’s action in *Big River* – upholding USAC’s dismissal of a request for review of an invoice that was filed more than 60 days after the invoice was issued – is fully consistent with the Commission’s action in this case – upholding the Bureau’s dismissal of a request for review of an invoice that was filed more than 60 days after the invoice was issued.

¹⁴ *In the Matter of Universal Service Contribution Methodology Dorial Telecom, LLC Request for Review of a Decision of the Universal Service Administrator*, Order, 26 FCC Rcd 3799 (Wireline Comp. Bur. 2011).

inContact, Dorial did not seek direct review by the Commission of an USAC invoice; instead, it sought internal review with USAC, which resulted in a written USAC opinion. As inContact itself acknowledges, Dorial then “appealed USAC’s *written decision* to the FCC on December 15, 2010.” Br. at 18 (emphasis added). In contrast, inContact sought direct review from the FCC in this case, thus eliminating the possibility of a written decision concerning the invoice from USAC. In these circumstances, it is sensible to interpret issuance of the invoice by USAC as the action taken which triggers the 60-day limitations period under the FCC’s rule.

II. INCONTACT’S REMAINING ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT.

inContact also argues on appeal that the “FCC’s decision to uphold the Bureau’s Order conflicts with federal law and FCC rules” (*see* Br. at 25-28) and that the “FCC’s decision to uphold the Bureau’s Order is unreasonable, unsound and an abuse of discretion” (*see* Br. at 28-30). inContact, however, did not make these arguments to the Commission and thus is precluded from raising them on appeal. 47 U.S.C. § 405(a). *See also In re Core Communications*, 455 F.3d 267, 276 (D.C. Cir. 2006) (under section 405 of the Communications Act, the filing of a petition for reconsideration is a “condition precedent to judicial review of any FCC order where the party seeking such review . . . relies on questions of fact or law upon which the

Commission . . . has been afforded no opportunity to pass,” and thus the Court “generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission”) (internal quotation and citation omitted).

In addition, this Court has held that, “even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file ‘a petition for reconsideration’ with the Commission before it may seek judicial review.” *Id.* at 276-77, quoting 47 U.S.C. § 405(a); accord, *Qwest Corp. v. FCC*, 482 F.3d 471, 474 (D.C. Cir. 2007).

Moreover, to the extent inContact has invited the Court to consider the validity of the USAC invoice for the purpose of deciding whether the Commission abused its discretion in denying review of the Bureau’s dismissal action, the Court must decline. *See BDPCS*, 351 F.3d at 1183 (noting the lack of citation to “any case in which [the Court] granted relief on the merits, notwithstanding the fact that the Commission had *properly* dismissed the pleading on procedural grounds”) (emphasis in original).

CONCLUSION

The Court should deny the petition for review.

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

INCONTACT, INC.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

No. 12-1133

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby
certify that the accompanying Final Brief for Respondents in the captioned
case contains 4,184 words.

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STATUTORY APPENDIX

Communications Act Provision:

47 U.S.C. § 405

FCC Rules:

47 C.F.R. § 1.115

47 C.F.R. § 54.719

47 C.F.R. § 54.720

47 U.S.C.

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under [section 155\(c\)\(1\)](#) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under [section 155\(c\)\(1\)](#) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which [section 402\(a\)](#) of this title applies, or within which an appeal must be taken under [section 402\(b\)](#) of this title in any case, shall be computed from the date upon which

the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under [section 204\(a\)](#) of this title or concluding an investigation under [section 208\(b\)](#) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under [section 402\(a\)](#) of this title.

47 C.F.R.

§ 1.115 Application for review of action taken pursuant to delegated authority.

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

(b)(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

(2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.

(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

(d) Except as provided in paragraph (e) of this section, the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in [section 1.4\(b\)](#). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

(e)(1) Applications for review of interlocutory rulings made by the Chief Administrative Law Judge (see [§ 0.351](#)) shall be deferred until the time when exceptions are filed unless the Chief Judge certifies the matter to the Commission for review. A matter shall be certified to the Commission only if the Chief Judge determines that it presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The request to certify the matter to the Commission shall be filed within 5 days after the ruling is made. The application for review shall be filed within 5 days after the order certifying the matter to the Commission is released or such ruling is made. Oppositions shall be filed within 5 days after the application is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested. A ruling certifying or not certifying a matter to the Commission is final: *Provided, however,* That the Commission may, on its own motion, dismiss the application for review on the ground that objections to the ruling should be deferred and raised as an exception.

(2) The failure to file an application for review of an interlocutory ruling made by the Chief Administrative Law Judge or the denial of such application by the Commission, shall not preclude any party entitled to file exceptions to the initial decision from requesting review of the ruling at the time when exceptions are filed. Such requests will be considered in the same manner as exceptions are considered.

(3) Applications for review of a hearing designation order issued under delegated authority shall be deferred until exceptions to the initial decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. In addition, the Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the hearing designation order be deferred and raised when exceptions in the initial decision in the case are filed. A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge within 5 days after the designation order is released. Any application for review authorized by the Administrative Law Judge shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested.

(4) Applications for review of final staff decisions issued on delegated authority in formal complaint proceedings on the Enforcement Bureau's Accelerated Docket (see, e.g., [§ 1.730](#)) shall be filed within 15 days of public notice of the decision, as that date is defined in [§ 1.4\(b\)](#). These applications for review oppositions and replies in Accelerated Docket proceedings shall be served on parties to the proceeding by hand or facsimile transmission.

(f) Applications for review, oppositions, and replies shall conform to the requirements of [§§ 1.49](#), [1.51](#), and [1.52](#), and shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554. Except as provided below, applications for review and oppositions thereto shall not exceed 25 double-space typewritten pages. Applications for review of interlocutory actions in hearing proceedings (including designation orders) and oppositions thereto shall not exceed 5 double-spaced typewritten pages. When permitted (see paragraph (e)(3) of this section), reply pleadings shall not exceed 5 double-spaced typewritten pages. The application for review shall be served upon the parties to the proceeding. Oppositions to the application for review shall be served on the person seeking review and on parties to the proceeding. When permitted (see paragraph (e)(3) of this section), replies to the opposition(s) to the application for review shall be served on the person(s) opposing the application for review and on

parties to the proceeding.

(g) The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor. A petition requesting reconsideration of a ruling which denies an application for review will be entertained only if one or more of the following circumstances is present:

(1) The petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(2) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(h)(1) If the Commission grants the application for review in whole or in part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which review is sought;

(ii) Remand the matter to the designated authority for reconsideration in accordance with its instructions, and, if an evidentiary hearing has been held, the remand may be to the person(s) who conducted the hearing; or

(iii) Order such other proceedings, including briefs and oral argument, as may be necessary or appropriate.

(2) In the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought. (See [§ 1.102](#).) Following the completion of such further proceedings the Commission may affirm, reverse or modify the order from which review is sought, or it may set aside the order and remand the matter to the designated authority for reconsideration in accordance with its instructions. If an evidentiary hearing has been held, the Commission may remand the matter to the person(s) who conducted the hearing for rehearing on such issues and in accordance with such instructions as may be appropriate.

Note: For purposes of this section, the word “order” refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the “memorandum opinion” or other material which often accompany and explain the order.

(i) An order of the Commission which reverses or modifies the action taken pursuant to delegated authority is subject to the same provisions with respect to reconsideration as an original order of the Commission. In no event, however, shall a ruling which denies an application for review be considered a modification of the

action taken pursuant to delegated authority.

(j) No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section.

(k) The filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority.

§ 54.719 Parties permitted to seek review of Administrator decisions.

(a) Any person aggrieved by an action taken by a division of the Administrator, as defined in [§ 54.701\(g\)](#), may seek review from the appropriate Committee of the Board, as defined in [§ 54.705](#).

(b) Any person aggrieved by an action taken by the Administrator pertaining to a billing, collection or disbursement matter that falls outside the jurisdiction of the Committees of the Board may seek review from the Board of Directors of the Administrator, as defined in [§ 54.703](#).

(c) Any person aggrieved by an action taken by a division of the Administrator, as defined in [§ 54.701\(g\)](#), a Committee of the Board of the Administrator, as defined in [§ 54.705](#), or the Board of Directors of the Administrator, as defined in [§ 54.703](#), may seek review from the Federal Communications Commission, as set forth in [§ 54.722](#).

§ 54.720 Filing deadlines.

(a) An affected party requesting review of an Administrator decision by the Commission pursuant to [§ 54.719\(c\)](#), shall file such a request within sixty (60) days of the issuance of the decision by a division or Committee of the Board of the Administrator.

(b) An affected party requesting review of a division decision by a Committee of the Board pursuant to [§ 54.719\(a\)](#), shall file such request within sixty (60) days of issuance of the decision by the division.

(c) An affected party requesting review by the Board of Directors pursuant to [§ 54.719\(b\)](#) regarding a billing, collection, or disbursement matter that falls outside the jurisdiction of the Committees of the Board shall file such request within sixty (60) days of issuance of the Administrator's decision.

(d) The filing of a request for review with a Committee of the Board under [§ 54.719\(a\)](#) or with the full Board under [§ 54.719\(b\)](#), shall toll the time period for seeking review from the Federal Communications Commission. Where the time for filing an appeal has been tolled, the party that filed the request for review from a Committee of the Board or the full Board shall have sixty (60) days from the date the Committee or the Board issues a decision to file an appeal with the Commission.

(e) In all cases of requests for review filed under [§ 54.719](#), the request for review shall be deemed filed on the postmark date. If the postmark date cannot be determined, the applicant must file a sworn affidavit stating the date that the request for review was mailed.

(f) Parties shall adhere to the time periods for filing oppositions and replies set forth in [47 CFR 1.45](#).

12-1133

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

inContact, Inc., Petitioner,

v.

Federal Communications Commission, Respondent.

CERTIFICATE OF SERVICE

I, Pamela L. Smith, hereby certify that on September 11, 2012, I electronically filed the foregoing Final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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