the schools and libraries support mechanism. We are concerned that the current recovery requirements that are subject to petitions for reconsideration do not place sufficient incentive on beneficiaries to ensure compliance with all relevant statutory requirements and our implementing rules. Indeed, some parties note that under our current recovery procedures beneficiaries often do not directly bear the **[*16]** consequence of any failure to comply with our rules. n33 We conclude that directing recovery actions to beneficiaries in those situations where the beneficiary bears responsibility for the rule or statutory violation will promote greater accountability and care on the part of such beneficiaries.

n33 We note that a number of parties argue that it is often difficult for a service provider to recover funds disbursed in violation of the statute or a rule from a school or library, because such entities may not have monies available in their budgets to make such repayments, and service providers are reluctant to jeopardize their good will with the beneficiary. *See, e.g.,* Cox Comments at 9; Hayes Reply at 3-4.

14. We believe that recovering disbursed funds from the party or parties that violated the statute or rule sufficiently addresses USTA's concern that our prior holding in the *Commitment Adjustment Order* was inequitable. We note, however, that contrary to USTA's claim that we had no rules providing the recovery of funds disbursed in violation of the statute or a rule, our debt collection rules have been in place for some time. n34 And, as explained below, those rules are **[*17]** applicable to the situation presented here. n35

n34 *See* 47 C.F.R. § 1.1901 *et seq.*

n35 In its comments to the Commission, but not its Petition, USTA cites to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), for the proposition that the *Commitment Adjustment Order* is so unfair that it violates the takings and due process clauses of the Fifth Amendment. We note, however, that with this Order, we will no longer seek repayment only from service providers. We believe that *Eastern Enterprises* was never relevant to this decision, but even if it was, our decision today would end its relevance. In *Eastern Enterprises,* the Court found the federal statute to be unconstitutional as applied to a coal company that had ceased mining over 25 years before enactment of the statute and had never signed the agreement that formed the basis of the statutory obligation. Here, the providers have or had a direct relationship to the customer benefiting from the discount paid, and the providers received the discount payment from the fund. They also provided the discounted service in close approximation to the time recovery was sought by the Commission. These factual distinctions also show that there is no constitutional due process violation. **[*18]**

15. We direct USAC to make the determination, in the first instance, to whom recovery should be directed in individual cases. In determining to which party recovery should be directed, USAC shall consider which party was in a better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation. For instance, the school or library is likely to be the entity that commits an act or omission that violates our competitive bidding requirements, our requirement to have necessary resources to make use of the supported services, the obligation to calculate properly the discount rate, and the obligation to pay the appropriate non-discounted share. On the other hand, the service provider is likely to be the entity that fails to deliver supported services within the relevant funding year, fails to properly bill for supported services, or delivers services that were not approved for funding under the governing FCC Form 471. We recognize that in some instances, both the beneficiary and the

service provider may share responsibility for a statutory or rule violation. In such situations, USAC may initiate **[*19]** recovery action against both parties, and shall pursue such claims until the amount is satisfied by one of the parties. Pursuant to section 54.719(c) of the Commission's rules, any person aggrieved by the action taken by a division of the Administrator may seek review from the Commission. n36

n36 47 C.F.R. § 54.719. The standard of review such an appeal is *de novo*. 47 C.F.R. § 54.723.

16. We note that USAC's determination concerning which party should be the recipient of the demand letter does not limit the Enforcement Bureau's ability to take enforcement action for any statutory or rule violation pursuant to section 503 of the Act. n37 Any recipient of the demand letter is obligated to repay the recovery amount by the deadlines described in the *Commitment Adjustment Implementation Order*. Failure to do so may subject such recipients to enforcement action by the Commission in addition to any collection action. n38

n37 47 U.S.C. § 503.

n38 *See* *Commitment Adjustment Implementation Order*, 15 FCC Rcd at 22980-81.

17. We also specifically address the issue of whether a service provider should be subject **[*20]** to a recovery action in situations where it is serving as a Good Samaritan. n39 In light of our decision today, we anticipate that recovery would be directed in most instances to the school or library. We conclude that Good Samaritans should not be subject to recovery actions except in those situations where the Good Samaritan itself has committed the act or omission that violates our rules or the governing statute.

n39 *See, e.g.*, Bellsouth Comments at 5-6; Cox Reply at 10. The Good Samaritan policy is a procedure that USAC has implemented to address specific situations in which a funding commitment has been approved, services have been rendered and paid for by the applicant at the undiscounted rate during a particular funding year, but the Billed Entity Applicant Reimbursement (BEAR) cannot be processed for various reasons, such as the service provider originally selected by the applicant has gone out of business, or filed for bankruptcy protection before receiving BEAR payment(s) for the applicant. Under those circumstances, USAC permits the applicant to obtain BEAR payments through a substitute service provider, known as Good Samaritan. See USAC's website, http://www.sl/univeresalservice.org/reference/goodsam.asp. The role of the Good Samaritan is simply to receive the BEAR payment from USAC and pass the reimbursement through to the applicant. **[*21]**

18. We briefly address petitioners' remaining arguments. First, USTA argues that the authorities on which the Commission relied, chiefly the *OPM* decision and the DCA, are inapplicable to the funds at issue and thus offer no support for our determination to seek repayment of funds disbursed to providers in violation of the Act. n40 We cannot agree. The authority, as well as the responsibility, of the Government to seek repayment of wrongfully distributed funds is well established as a matter of federal law. n41

n40 USTA Petition.

n41 *See* United States v. Wurts, 303 U.S. 414, 415 (1938); *Old Republic Insurance Co. v. Federal Crop Insurance Corp.*, 947 F.2d 269, 275 (7th Cir. 1991); *LTV Education Systems, Inc. v. T.H. Bell* 862 F.2d 1168, 1175 (5th Cir. 1989 ("the government, without the aid of a statute, may recover money it mistakenly, erroneously, or illegally paid from a party that received the funds without right."); *California Dept. of Educ. V. Bennett*, 829 F.2d 795, 798-99 (9th Cir. 1987).

19. Although parties assert that the *OPM* decision is **[*22]** limited in its holding to funds disbursed from the general Treasury, and is therefore not relevant here because universal service funds are taken from a special fund that is not deposited in the Treasury, n42 that is too narrow a reading of the principle found in *OPM*. Rather, the principle to be drawn from *OPM* is that the Commission cannot disburse funds in the absence of statutory authority. It is "'central to the real meaning of the rule of law, [and] not particularly controversial' that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so." n43 Thus, contrary to petitioners' argument, we are bound by statutory restrictions in the disbursement of the universal service fund regardless of whether such funds are drawn from the Treasury.

n42 USTA Petition at 3; Nextel Comments at 4; *Ex Parte Letter* at 6, n.9.

n43 *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992)(citation and internal quotation omitted).

20. Moreover, the Commission's disbursement of funds in violation of the statute or a rule gives rise to a claim for recoupment. As **[*23]** the Commission stated in the *Commitment Adjustment Order*, the DCA imposes a duty on agencies to attempt to collect on such claims. Specifically, the DCA requires that "the head of an executive, judicial, or legislative agency. . . . shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." n44 Here, we find that the disbursement of funds in violation of the statute or a rule gives rise to claims that "arise out of the activities" of the Commission, *i.e.*, the activity of ensuring that schools and libraries received discounts for telecommunications services, voice mail, Internet access, and internal connections pursuant to section 254(h). Therefore, we are obligated by law to seek recoupment of funds that were disbursed in violation of our statutory authority. In addition, parties' assertions that the collection mandate of the DCA is inapplicable to the schools and libraries universal service program because its direct application is limited to claims for money owing to the United States Treasury, is inaccurate. By its terms, the DCA is not limited to funds that are owed to the Treasury. The **[*24]** DCA defines "debt or claim" as funds which are "owed to the United States," not merely those which are "owed to the U.S. Treasury." n45 In fact, the DCA defines a "claim" to include overpayments from an agency-administered program, such as the federal universal service program. n46

n44 31 USC § 3711(a)(1).

n45 31 USC § 3701(b)(1). The Commission's regulations implementing the DCA provide:

The terms "claim" and "debt" are deemed synonymous and interchangeable. They refer to an

amount of money, funds, or property that has been determined by an agency official to be due to the United States from any person, organization, or entity, except another federal agency. For purposes of administrative offset under 31 U.S.C. 3716, the terms "claim" and "debt" include an amount of money, funds, or property owed by a person to a State, the District of Columbia, American Samoa, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Commonwealth of Puerto Rico. "Claim" and "debt" include amounts owed to the United States on account of extension of credit or loans made by, insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, taxes, and forfeitures issued after a notice of apparent liability that have been partially paid or for which a court of competent jurisdiction has order payment and such order is final (except those arising under the Uniform Code of Military Justice), and other similar sources. 47 CFR § 1.1901(e). **[*25]**

n46 31 USC § 3701(b)(1)(C).

21. We therefore reject the Petitioners' argument that the authorities on which we relied in the *Commitment Adjustment Order* are inapplicable. We conclude that under these authorities, the Commission has an obligation to seek recovery of universal service funds disbursed in violation of the statute or a rule.

22. USTA argues that we unlawfully delegated our authority to recoup universal service funds disbursed in violation of the statute or a rule to the Administrator because this duty is not found in sections 54.702 or 54.705 of the Commission's rules. n47 We reject this argument. The Administrator oversees the administration of the schools and libraries support mechanism, including the administration of disbursing schools and libraries funds consistent with, and under the direction of, the Commission's rules and precedent. If the Administrator allows funds to be disbursed in violation of the statute or a rule, it is within the ambit of its administration and disbursement duties to seek recoupment in the first instance. Moreover, we note that the Commission retains its authority to seek final payment of its **[*26]** claim. n48 Thus, we have not unlawfully delegated the Commission's authority to seek recoupment of funds disbursed in violation of the statute or a rule. n49

n47 47 CFR §§ 54.702, 54.705 (rules delineating the Administrator's functions and responsibilities).

n48 *Commitment Adjustment Implementation Order*, 15 FCC Rcd 22975.

n49 To the extent USTA suggests that the Commission adopted new recovery rules without notice and comment in the *Commitment Adjustment Order*, we disagree. The Commission found that certain entities received universal service funds erroneously. The Commission has a duty to seek recoupment under several lines of authority, including the DCA. As such, the Commission simply applied its debt collection rules to an outstanding debt. 47 CFR §§ 1.1901 *et seq.*

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

23. This document does not contain new or modified information collection requirements

subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 **[*27]** employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Certification

24. The Regulatory Flexibility Act of 1980, as amended (RFA), n50 requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." n51 The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." n52 In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. n53 A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). n54

n50 The RFA, *see* 5 U.S.C. § 601 -- 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). **[*28]**

n51 5 U.S.C. § 605(b).

n52 5 U.S.C. § 601(6).

n53 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

n54 15 U.S.C. § 632.

25. An initial regulatory flexibility analysis (IRFA) was incorporated in the *Second Further Notice*. n55 The Commission sought written public comment on the proposals in the *Second Further Notice*, including comment on the IRFA. No comments were received to the *Second Further Notice* or IRFA that specifically raised the issue of the impact of the proposed rules on **[*29]** small entities.

n55 *Second Further Notice*, 18 FCC Rcd at 26963-67.

26. In this order, we now direct that recovery of funds disbursed to schools and libraries in violation of the Communications Act, or of a program rule, be sought from whichever party or parties have committed the violation. This n56 has no effect on any parties who have not violated our rules, except to make more money available for them to obtain through the

schools and libraries support program. It only imposes a minimal burden on small entities that have violated our rules by requiring them to return funds they received in violation of our rules. We believe that the vast majority of entities, small and large, are in compliance with our rules and thus will not be subject to efforts to any recover improperly disbursed funds.

n56 ~~*See supra* paras. 13 & 15.~~

27. Therefore, we certify that the requirements of the order will not have a significant economic impact on a substantial number of small entities.

28. In addition, the order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register. n57

n57 See 5 U.S.C. § 605(b).

[*30] V. ORDERING CLAUSES

29. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4 (j), and 254 of the Communications Act of 1934, as amended that this Order on Reconsideration and Fourth Report and Order in CC Docket No. 02-06 IS ADOPTED.

30. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by MCI WorldCom, Inc., United States Telecom Association, and Sprint on November 8, 1999 are granted to the extent provided herein.

31. IT IS FURTHER ORDERED that the terms of this Order on Reconsideration and Fourth Report and Order are effective thirty (30) days after publication in the federal register.

32. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration and Fourth Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

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