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Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matters of)	
)	
Changes to the Board of)	CC Docket No. 97-21
Directors of the National Exchange)	
Carrier Association, Inc.)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	

**PETITION FOR RECONSIDERATION
OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA) hereby submits this petition for reconsideration of the Commission's *Order* relating to statutory violations released on October 8, 1999 in the above-captioned proceeding,¹ pursuant to Section 1.429 of the Commission's rules.² USTA is the principal trade association of the local exchange carrier (LEC) industry. Its members provide over 95 percent of the exchange carrier provided access lines in the United States. USTA members are service providers in the schools and libraries program and are thus directly affected by the Commission's determinations in the *Order*.

¹ *In the Matters of Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 99-291, released October 8, 1999 (*Order*).

² 47 C.F.R. §1.429.

I. INTRODUCTION

In the *Order*, the Commission addressed Universal Service funding commitments made by the Universal Service Administrative Company (USAC) to schools and libraries that were violative of the Communications Act of 1934, as amended (the Act).³ The specific violations cited by the Commission involved applications seeking discounts for ineligible services and for telecommunications services provided by non-telecommunications carriers. The Commission directed USAC to adjust such commitments through two separate actions. One was to cancel the commitment to fund discounts for ineligible services or for services provided by non-telecommunications carriers. The other was to deny payment of reimbursement requests submitted by service providers that had provided ineligible services.

The Commission also directed USAC to submit an implementation plan for its approval that contained proposals for pursuing collection of reimbursements already sent to service providers. On October 22, 1999, USAC submitted its implementation plan to the Commission based on the Commission's determination in the *Order* that it would seek repayment from service providers because service providers actually receive disbursements of funds from the universal service support mechanism.

USTA seeks reconsideration of the Commission's determination that service providers are responsible for the repayment of funds disbursed in violation of the statute. USTA believes that the authorities the Commission relied upon in the *Order* do not provide a legal basis for seeking the repayment of the funds at issue. Further, the

Commission's rules prohibit delegation of collection authority to USAC. Finally, the Commission's decision to collect overpayments from service providers will not cure the statutory violation it seeks to avoid. For these reasons, as more fully set forth below, USTA petitions the Commission to reverse the *Order*.

II. THE COMMISSION'S LEGAL RATIONALE FOR COLLECTING FUNDS PAID IN ERROR IS FLAWED

The Commission relied on two legal bases for its determination that it must recover funds disbursed in violation of the Act. Both of the precedents cited involve payments from the federal government's general Treasury funds. The first is the Supreme Court's decision in *OPM v. City of Richmond*,⁴ where payments from Treasury funds were the subject of the litigation. The second is the Debt Collection Improvement Act (DCIA),⁵ which concerns debts and claims owed to the United States.

The issue before the Commission in the *Order* does not involve a debt owed to the United States. The Universal Service Fund is not intermingled with general Treasury funds, can be used only for a single purpose, and is, in effect, merely a way-station for funds that are collected from telecommunications providers. In addition, these funds are sent directly to, and are disbursed by, USAC, a private, not-for-profit corporation. Since no Treasury funds are involved, the precedents relied upon by the Commission are not applicable and provide no support for the Commission's decision that it must recover the funds.

³ 47 U.S.C. § 151 *et seq.*

⁴ 496 U.S. 414 (1990).

⁵ 31 U.S.C. §§3701 *et seq.*

III. THE COMMISSION'S DELEGATION TO USAC CONSTITUTES AN UNLAWFUL DELEGATION OF AUTHORITY

The Commission's *Order* results in an unlawful delegation of collection authority to USAC. The DCIA authorizes the head of an executive, judicial or legislative agency to collect a claim of the United States by administrative offset. The FCC has no authority to delegate such administrative offset authority to USAC.⁶

The Commission's own rules on administrative offset are consistent with the DCIA, providing that such an offset will be effectuated by the Commission subject to the procedural requirements set forth in its rules.⁷ Nothing in Sections 54.702 or 54.705 of the rules⁸ authorizes USAC to effectuate an administrative offset, or otherwise pursue collection from a service provider, of a disbursement alleged to violate a federal statute.⁹ Further, as acknowledged in the *Order*, the Commission's rules "do not address directly the obligation and procedures in connection with the commitment or disbursement of funds subsequently found not to comply with applicable law."¹⁰ The Commission cannot now create rules that would apply retroactively to service providers that, in good faith and without timely notice of the government's claim of error or ineligibility, provided discounted services or forwarded presumptively appropriate reimbursements to schools and libraries that had received funding commitments from USAC.

⁶ 31 U.S.C. §3716(a).

⁷ See 47 C.F.R. §§1.1911-1.1912.

⁸ 47 C.F.R. §§54.702, 54.705.

⁹ These rules are also consistent with the Commission's duty under the Act, for Congress charged the Commission, not service providers, with responsibility for the Act's implementation. As such, it is the Commission, not service providers, that must act to correct statutory violations, including the recovery of disbursements that violate Section 254(h)(1)(B). Any attempt by the Commission to force service providers to act as *de facto* enforcement agents would be an unlawful delegation of the Commission's authority.

¹⁰ *Order* at 1.

IV. THE COMMISSION'S ORDER IS INEQUITABLE AND VIOLATES DUE PROCESS

It would be inappropriate, inequitable, arbitrary and a violation of a service providers' due process rights for the Commission or USAC to pursue recovery of alleged unlawful payment to service providers when: 1) the service provider is obligated to participate in the subsidy program; 2) the Commission has established no rules providing for the recovery of alleged unlawful payments; 3) USAC made a determination of eligibility of the subject applicant; 4) the service provider had no notice of any deficiency or ineligibility on the part of the subject applicant; and 5) the true beneficiary of the subsidy payment is the applicant.

V. IF REIMBURSEMENT IS SOUGHT, THE TRUE BENEFICIARY, THE SCHOOL OR LIBRARY, SHOULD BE LIABLE

Citing *OPM v. City of Richmond*, the Commission stated that it "cannot grant a money remedy that Congress has not authorized by permitting the funding of discounts for ineligible services or the provision of telecommunications services by non-telecommunications carriers."¹¹ The "money remedy" Congress authorized in the Act is set forth in Section 254(h)(1)(B), which provides that:

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities.¹²

¹¹ *Order* at 3. The *Order* did not address what the Commission would do if the SLD determined that it had disbursed funds to an ineligible applicant. Like disbursements to ineligible telecommunications providers, disbursements to ineligible applicants would clearly violate the statute.

¹² Section 254(h)(1)(B) of the Act (emphasis added).

Notwithstanding this language, the Commission stated that it “will seek repayment [of funds disbursed in violation of the Act] from service providers rather than schools and libraries because, unlike schools and libraries that receive discounted services, service providers actually receive disbursements of funds from the universal service support mechanism.”¹³

It is important to note that the huge volume of applications and the numerous implementation issues which have confronted the USAC Schools and Libraries Division (SLD) since the start of the program have often combined to prevent it from providing service providers with the data necessary to allow them to provide services to schools and libraries “at rates less than the amounts charged for similar services to other parties.” Thus, many schools and libraries have continued to pay the full price for services and have filed Billed Entity Applicant Reimbursement (“BEAR”) forms with the SLD in order to be reimbursed. Because the Commission has ruled that Section 254(h)(1)(B) bars USAC from disbursing funds directly to applicants, USAC disburses these reimbursements via checks it sends to the service provider. The service provider in turn sends a check to the applicant or places a credit on the applicant’s monthly statement.¹⁴ Thus, the bulk of the “funds from the universal service support mechanism” that service providers have received to date pursuant to Section 254(h)(1)(B) have represented reimbursements USAC owes to applicants, not service providers.

Because they receive services “at rates less than the amounts charged for similar services to other parties” or receive reimbursements via the process described above, schools and libraries are clearly the recipients of the “money remedy” authorized by

¹³ *Order* at 4 (emphasis added).

Section 254(h)(1)(B) of the Act. Similarly, because applicants are the recipients of the remedy, any disbursement of that remedy in excess of that authorized by the Act necessarily benefits them, not service providers.

Regardless of whether the “money remedy” authorized by Section 254(h)(1)(B) of the Act is disbursed to schools and libraries via “rates less than the amounts charged for similar services to other parties” or checks from service providers, disbursements which violate the Act will not be cured until the actual beneficiaries of the remedy are compelled to repay the Universal Service Fund. Ordering the SLD to seek repayment from service providers “because...service providers actually receive disbursements of funds from the universal service support mechanism” is administratively convenient, but does not cure the statutory violation.

If the Commission does seek to collect funds, it should do so from the school or library that actually received the benefit, not the service provider, which neither provides the data contained in a funding application, nor makes any funding decisions based on that data. Further, seeking recovery from applicants rather than service providers would be consistent with Section 254(h)(1)(B) of the Act, which provides that a carrier “shall” receive an offset or reimbursement for discounted services provided to schools and libraries.¹⁵

The Commission should issue an order that finds that applicants are the intended and actual beneficiaries of discounted services provided, or funds disbursed, pursuant to Section 254(h)(1)(B) and that, as such, they are liable for repaying any benefits they receive that violate the Act. Such an order would be lawful and equitable, and would

¹⁴ Consistent with the intent of Section 254(h)(1)(B), service providers may not deposit the checks they receive from USAC until after they have mailed a check to the applicant.

clarify the rights and responsibilities of the parties in a manner wholly consistent with the intent of the E-Rate program.

VI. THE ORDER COULD HAVE ADVERSE PUBLIC POLICY EFFECTS ON THE SCHOOLS AND LIBRARIES PROGRAM

The purpose of the schools and libraries program embodied in Section 254(h)(1)(B) is “to ensure that...elementary and secondary school classrooms, and libraries have affordable access to modern telecommunications services that will enable them to provide...educational services to all parts of the Nation.”¹⁶

It is inequitable to order service providers to bear the burden of funding decisions made on the basis of information supplied by applicants. Further, any such burden will fall most heavily on smaller service providers and may dissuade them from competing to provide applicants with any eligible services other than those which state common carrier statutes compel them to provide.

The continued success of the schools and libraries program requires the cooperation of all participants, including applicants, service providers, USAC, and the Commission. The Commission should not undermine this cooperative effort by inequitably penalizing service providers.

¹⁵ 47 U.S.C. §254(h)(1)(B).

¹⁶ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 132 (1996).

VII. CONCLUSION

USTA urges the Commission to reverse its determination to require service providers to reimburse USAC for the discounts given to ineligible recipients or to eligible recipients for ineligible services. The Commission should issue an order that finds that applicants are the intended and actual beneficiaries of discounted services provided, or funds disbursed, pursuant to Section 254(h)(1)(B), and that, as such, they are liable for repaying any benefits they receive that violate the Act.

USTA is also concerned that the Commission's decision to impose repayment obligations on service providers for funds that were disbursed in violation of the Act will have an adverse precedential effect on the schools and libraries program. Therefore, USTA encourages the Commission to consider the effects of its determinations in the *Order* on the operation of the program in subsequent years.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By _____ /s/

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November 8, 1999

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on November 8, 1999 Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

_____/s/_____

Robyn L.J. Davis