

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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WASHINGTON, D.C. 20554

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| In the Matter of                             | ) |                     |
|  | ) |                     |
| Request for Review of the                    | ) | File SLD-26231      |
| Decision of the                              | ) |                     |
| Universal Service Administrator by           | ) |                     |
|  | ) |                     |
| Copan Public Schools                         | ) |                     |
| Copan, Oklahoma                              | ) |                     |
|  | ) |                     |
| Federal-State Joint Board on                 | ) | CC Docket No. 96-45 |
| Universal Service                            | ) |                     |
|  | ) |                     |
| Changes to the Board of Directors of the     | ) | CC Docket No. 97-21 |
| National Exchange Carrier Association, Inc.) | ) |                     |

**COMMENTS  
OF THE  
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA)<sup>1</sup> hereby submits its comments on the Petition for Clarification and/or Reconsideration (Petition) filed by the Universal Service Administrative Company (USAC) in the above-captioned proceedings. USAC requests clarification or reconsideration of the Commission's decision on the Copan Public School appeal of a USAC decision regarding the Schools and Libraries Universal

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<sup>1</sup> The United States Telecom Association, formerly the United States Telephone Association, is the nation's oldest trade organization for the local exchange carrier industry. USTA represents more than 1200 telecommunications companies worldwide that provide a full array of voice, data and video services over wireline and wireless networks. USTA members support the concept of universal service and are leaders in the deployment of advanced telecommunications capabilities to American and international markets.

Service Support Mechanism (Copan Order).<sup>2</sup> The Common Carrier Bureau seeks comment on the USAC Petition through a Public Notice.<sup>3</sup>

In its Petition, USAC states that the Copan Order changed certain Schools and Libraries Program procedures that extended well beyond the Copan application itself. Specifically, USAC maintains that the Copan Order modified the categories of permissible reasons for changing a service provider during a funding year, known as a Service Provider Identification Number (SPIN) change request. USAC contends that the Commission did so by expanding existing policy to allow a SPIN change whenever an applicant seeking Program support certifies that: (1) the SPIN change is allowed under its state and local procurement rules and pursuant to the terms of the contract between the applicant and its original service provider; and (2) the applicant has notified its original service provider of its intent to change service providers. As a result of these changes in overall policy, USAC raises a number of issues that require clarification or reconsideration.

USTA offers the following overall comments on the situation raised by the USAC petition and the Copan Order, as well as on the specific issues in the USAC petition.

**I. The Need to Seek Public Comment before Adopting Decisions that Change Rules or Policies Having Broad Applicability**

By its own admission, the Commission's Copan Order modified the current categories of permissible SPIN changes set forth in USAC guidelines that have broad

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<sup>2</sup> FCC 00-100, released March 16, 2000.

<sup>3</sup> DA 00-1194, released June 2, 2000.

applicability to all participants in the Schools and Libraries Program.<sup>4</sup> This action was taken in response to a Letter of Appeal from an individual recipient, Copan. There was no opportunity for public comment on the Letter of Appeal and no public notice that the Commission's decision would have any ramifications beyond the subject application. Nevertheless, the Commission took action that changes a significant Schools and Libraries Program policy that has general applicability to all present and future participants in this program. In fact, the Commission seems to have based its broader SPIN-change rule decision on what appears to be in Copan a breach of contract situation. By doing so, the Commission has altered the policy affecting all future unspecified applicant/service provider issues involving SPIN change. The set of facts that occur in a breach of contract situation do not necessarily apply to the myriad of other types of circumstances that might warrant a SPIN change; attempting to apply a ruling reached in the vacuum of an appeal consideration to the broader universe could have significant unintended consequences.

USTA believes that the Commission could have avoided the current situation with USAC's appeal of the Copan Order if it had sought public input initially. In a case such as Copan, where the Commission extends the applicability of its ruling beyond the particular facts of the case, USTA submits that the public interest would be served if the Commission seeks public comment before formulating a ruling. This modified procedure would provide the participants in the Schools and Libraries Program, who have considerable experience with contract and service provisioning issues as well as with the Program rules and procedures, an opportunity to make recommendations. It would assist

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<sup>4</sup> Copan Order at ¶ 6.

the decision-making process and provide the Commission with valuable information and insights that would not otherwise be available to it. Such an expanded process would be consistent with the Commission's general obligations under the Administrative Procedures Act.<sup>5</sup>

Therefore, USTA urges the Commission to adopt a procedure where it addresses only the specifics of individual appeals and limits its decisions to those specifics without public comment. If an appeal raises issues that suggest a need for broader rules or Program changes, then those issues should be put out for public comment before a ruling is issued that applies to all parties. Decisions that result in changes to Commission rules or policy should be made only after full due process. The Commission should amend its procedures so that any appeal that warrants Commission action would also require public comment, if the result of its action on the appeal would be applicable to all parties, not only the appellant.

## **II. Comments on Specific Issues Raised by USAC**

### **A. Requested vs. Committed Funding Level**

USTA agrees with USAC that the Commission should limit funding to that amount committed by USAC in the applicant's Funding Commitment Decision Letter, rather than the amount requested by the applicant on its Form 471, for the reasons set forth in the USAC Petition.

### **B. Contract vs. Tariff and Month-to-Month Services**

If the Commission were to continue to apply the Copan Order broadly, its application should be limited only to situations where the applicant had a written contract

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<sup>5</sup> 5 U.S.C. §§ 551, *et seq.*

initially. SPIN changes for tariff and month-to-month services should remain under the previous SPIN change policies where changes were allowed only for “refusal to participate” or “out of business” reasons.

SPIN assignments for month-to-month tariffed services should be fixed for a given Program year unless the service provider goes out of business or refuses to participate in the Program. It should be noted that under current Program policies, non-contract, month-to-month services must be posted for competitive bid each Program year. This fact affords applicants and service providers opportunities for competitive choice without creating undue administrative burdens on the Program.

**C. Retroactivity**

USTA opposes the concept of applying the Copan Order retroactively. The application of retroactive adjustments raises administrative issues of complexity. It is clear that USAC must notify the applicant and both impacted service providers quickly and simultaneously so those service providers can accurately provide benefits and be reimbursed for benefits. In the case of discounted bills, particularly, a USAC retroactive notification of benefit change/SPIN change could lead to disputes over reimbursement when a service provider has in good faith provided benefits based upon a previously processed Form 486 and Funding Commitment Decision Letter from USAC. In addition, the accuracy of retroactive adjustments will be a likely point of contention between the parties. The only situation where retroactive benefits should be considered is where no service provider has ever provided benefits to the applicant during a given Program year.

Even though USAC says that retroactivity is administratively possible, it would set a dangerous precedent for other changes that could be made to this program. If every modification to this still evolving Program was applied retroactively, the cumulative administrative burden of revising prior funding decisions could be significant.

**D. Competitive Bidding Process**

USTA agrees with USAC that the Copan Order raises questions concerning the integrity of the competitive bid process and urges the Commission to retain its current competitive bidding process. As previously stated herein, SPIN change rules contained in the Copan Order should be applied only to true breach of contract situations.

The Commission recognized the importance of the competitive bid process when it adopted the requirement that schools and libraries award contracts for eligible services pursuant to competitive bidding.<sup>6</sup> USTA is concerned that the Commission is creating situations where a service provider that did not participate in the competitive bidding process could take away an applicant from a service provider who did adhere to the Commission's competitive bid process requirements. For example, the new service provider or the applicant could use the winning bid information from the existing service provider to structure a better deal after all other bidders have met the competitive terms of the Commission's rules and USAC procedures. In addition, it appears that the Copan Order as it currently stands will result in Universal Service benefits being paid in instances where the applicant-service provider relationship does not comply with

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<sup>6</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Errata, FCC 97-157, released June 4, 1997. This fact was cited in *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.*, FCC 00-167, ¶ 1, released May 23, 2000.

Program rules or is not subject to the same scrutiny as the original applicant-service provider relationship.

During the Program Integrity Assurance (PIA) process and in consideration of other appeals before them, USAC and the Commission have been steadfast in their adherence to the competitive bidding and contract signing rules and policies. For example, other appeals have been denied because a contract was signed one day too soon (before the 28 day posting rule). It is inconsistent with such strict enforcement to adopt a policy that would allow applicants and new service providers to evade the full PIA process. Under such a scenario, different standards would apply to the applicant/new service provider than to the applicant/original service provider.

The USAC suggestion to limit a new service provider only to the existing funding year would appear to alleviate but not totally cure this lack of competitive bid problem. Certainly, requiring an applicant to post a new Form 470 and allowing all service providers an opportunity to bid on providing future service would provide some competitive balance.

Applicants should exercise care when they accept service providers under this Program during the competitive bid process, particularly in dealing with non-traditional service providers under this Program. If the Commission unilaterally waives the requirement of all service providers and applicants to comply with competitive bidding and allows unconditioned SPIN changes in mid-program year, service providers will be less likely to participate in the bidding process.

### **E. Change of Service**

USAC requests the Commission to clarify that the Copan Order does not change the Commission's current policies regarding change of service, in that, "if the applicant discovers a provider offering more competitive prices,"<sup>7</sup> it would be for the same service the applicant was purchasing from the original service provider.

USTA believes that existing service providers should have the flexibility to make service changes within the boundaries of the original contract terms and the original funding level. However, the Commission's current application of service change rules prevent existing service providers from substituting new, often higher speed and lower priced, services that applicants desire. Therefore, USTA asks the Commission to either clarify that the Copan Order only applies to the same service or modify its service change rules to allow existing service providers to upgrade offerings during the same funding year or funding years of a multiyear contract.

### **III. Conclusion**

The Commission should reconsider its decision to change the SPIN change Program rules based on the determination it reached in the Copan Order and limit the applicability of the Copan Order solely to Copan. SPIN change procedures are more substantive than administrative in that they have an impact on the competitive bidding rules and compliance behavior associated with those rules. If the Commission's existing

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<sup>7</sup> Copan Order at ¶ 10.

rules in the Copan Order are expanded beyond breach of contract policies, it should institute a public proceeding so all the issues can be aired and considered.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By  \_\_\_\_\_

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June 16, 2000

**CERTIFICATE OF SERVICE**

I, Meena Joshi, do certify that on June 16, 2000 the above comments of the United States Telecom Association was delivered via the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

  
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Meena Joshi