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July 6, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, SW
Room TW-A325
Washington, DC 20554

Re: *Ex Parte* Notice
CC Docket No. 97-21
CC Docket No. 96-45

Dear Ms. Salas:

On July 5, 2000, Jim Lambertson of Verizon Communications, Mary Henze of BellSouth, Karen Johnson of WorldCom, Laura Holloway of NEXTEL, Laura Phillips of Dow, Lohnes & Albertson representing NEXTEL, Norina Moy of Sprint, Ken Cartmell of Quest, and John Hunter of the United States Telecom Association (USTA), met with Rebecca Beynon of Commissioner Furtchgott-Roth's Office.

The purpose of the meeting was to discuss the Commission's October 8, 1999 order relating to statutory violations in the Schools and Libraries program, the petitions for reconsideration filed by WorldCom, Sprint, and USTA of that order, and the USAC Implementation Plan required by that order. The attached items were part of the discussion and were distributed at the meeting.

An original and one copy of this *ex parte* notice are being filed in each of the referenced dockets with the Office of the Secretary. Please include it in the public record of the above-referenced proceedings.

Respectfully submitted,

John W. Hunter
Senior Counsel

Attachments (2)

cc w/o att: Rebecca Beynon

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SCHOOLS AND LIBRARIES PROGRAM OVERCOMMITMENT REPAYMENT OF FUNDS

Participants – Extensive group of service providers, including voluntary participants, in the Schools & Libraries program

Participants are united in opposition to service provider liability for statutory violations of the Schools & Libraries program

- Commission's October 8, 1999 Statutory Violations Order
  - Involved ineligible services ($970,000) and ineligible service providers ($1.7 million) in Year One
  - USAC ordered to submit a plan to identify amounts of funds disbursed in error and to collect such funds from service providers
- Petitions for Reconsideration filed by WorldCom, Sprint, USTA
- Participants urged Common Carrier Bureau to seek public comment on Petitions for Reconsideration and USAC Implementation Plan
- At Deputy Common Carrier Bureau Chief's request, participants submitted a recovery proposal that allocates repayment obligations to the party who receives the benefit conferred by overpayment
- Anticipated order on violation liability for Year One and Out Years

If the Commission's current position prevails, it will have a severe adverse effect on the Schools & Libraries program

- Voluntary service providers may not participate in the program
- Other service providers will have to impose/implement additional procedures to safeguard against future errors
  - Time-consuming
  - Additional costs to be passed through to customers
- Jeopardize the program's integrity, good-will, and self-certification

Equity dictates that service providers not be held liable for overpayments

- Service providers did not make the error. They acted in good faith
- Service providers had no notice of the government's claim of error or ineligibility
- Service providers have no way of knowing that an error may have been committed
- Service providers relied on the Schools & Libraries program agreements and responsibilities among the service providers, USAC and the recipients
- Placing the burden on service providers contradicts USAC/SLD directives

Legal principles are at stake with holding service providers liable

- Commission's Order adopted a substantive rule without public notice or opportunity for public comment
- Commission has no authority to collect funds from service providers
  - Act provides that service providers are entitled to payment for services
  - Service providers are not the beneficiaries of the Schools & Libraries program, but only vendors
- Commission has jurisdiction over recipients
  - Commission has imposed forfeiture penalties on recipients that violate Commission rules
  - Applicants enter into agreements with the Commission by completing and submitting funding requests
- Statutory violations involve only ineligible recipients and ineligible service providers. Ineligible services do not constitute statutory violations

Proposed Solution

- Service providers should not be liable for violations of the Schools & Libraries program
- Alternative recovery program
  - Statutory violations - ineligible service providers
    - Ineligible service provider is only party who knew or should have known whether they were eligible to receive competitive advantage
    - Therefore, ineligible service providers must reimburse the Schools & Libraries fund
  - Statutory violations - ineligible applicants
    - Ineligible applicant is only party who knew or should have known whether they were eligible to receive competitive advantage
    - Therefore, ineligible applicant must reimburse the Schools & Libraries fund
  - Non-statutory violations – violations of Commission or USAC rules
    - Because of varied situations where violations could occur, liability should be assessed based on the particular situation
    - A comprehensive solution should be further explored

EX PARTE

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February 1, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, SW
Room TW-A325
Washington, DC 20554

Re: *Ex Parte* Notice
CC Docket No. 97-21
CC Docket No. 96-45

Dear Ms. Salas:

A group of local exchange carriers, interexchange carriers, wireless carriers, and representative trade associations[1] who directly or through association members provide eligible services to schools and/or libraries submit this *ex parte* presentation regarding the Schools and Libraries Universal Service Support program (hereinafter the "E-rate program").

The participants have a significant interest in the October 8, 1999 Orders of the Commission concluding that Service Providers of the E-rate program are responsible for repayment of E-rate funds that were disbursed to schools and/or libraries in violation of the Communications Act of 1934, as amended ("Act") or E-rate program rules. All of the participants are united in their opposition to the Commission's Orders. As substantiated in Attachment I, the Orders have no basis in law or policy, create significant inequities and will result in schools and libraries having fewer telecommunications services available to them at reasonable prices under the E-rate program.

To ensure that the E-rate program operates effectively, efficiently and in a manner consistent with the intentions of Congress and the Commission, the participants offer a recovery proposal in Attachment II that allocates the repayment obligation to the party who receives the benefit conferred by the overpayment. This proposal is submitted as a result of a January 7, 2000 meeting with Yog Varma, Kathy Dole and Irene Flannery of the Commission's Common Carrier on this subject.

On January 31, 2000, Jim Lambertson of Bell Atlantic, Mary Henze of BellSouth,

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[1]The participants include AT&T Corp., CommNet Cellular, Inc., the Competitive Telecommunications Association, MCI WorldCom, Inc., Nextel Communications, Sprint Corporation, and the United States Telecom Association.

Lori Wright of MCI WorldCom, Norina Moy of Sprint, and John Hunter of the United States Telecom Association, met with Carol Mattey, Kathy Dole, and Irene Flannery of the Common Carrier Bureau to discuss the recovery proposal described in Attachment II. That attachment was part of the discussion and was distributed at the meeting.

The participants strongly urge the Commission to seek public comment on the issues raised in these two attachments in this *ex parte* and the petitions for reconsideration of the October 8, 1999 Orders.

An original and one copy of this *ex parte* notice are being filed in each of the referenced dockets with the Office of the Secretary. Please include it in the public record of the above-referenced proceedings.

Respectfully submitted,

John W. Hunter
Senior Counsel

Attachments (2)

cc: Carol Mattey
Kathy Dole
Irene Flannery

ATTACHMENT I

Legal and Policy Analysis of the Commission's Overcommitment Orders

As proposed by the Commission in its October 8, 1999 Orders[1] and implemented by the Universal Service Administration Company ("USAC"), the repayment obligation ignores the real beneficiary of the disbursed funds (*i.e.*, the school or library that received supported services) and thereby creates significant disincentives that will negatively impact the program. First, some Service Providers, particularly smaller companies operating in highly competitive markets, may conclude that participating in the E-rate program poses an unacceptable risk. If a Service Provider chooses to respond to an Applicant's RFP, relies on the certifications provided by the Applicant and the funding decision made by USAC, and then, months or years after providing service, is held accountable for reimbursing the fund because of errors made by USAC or the Applicant, that Service Provider may decide that it cannot afford to respond to any additional RFPs.

Second, while some Service Providers may simply choose not to participate in the program at all, others are likely to cut back their participation, focusing only on those Applicants eligible for a low level of support, thereby minimizing their financial risk. Additionally, Service Providers may only bid on RFPs from Applicants that they believe

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[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 ("*Statutory Violations Order*"); *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 99-292, released October 8, 1999 ("*Rule Violations Order*").

to understand and follow the E-Rate rules, or those Applicants with whom they have an existing relationship.

Finally, placing the reimbursement obligation on Service Providers as a class will force all participating Service Providers to increase their prices to accommodate the increased risk of never receiving payment for services rendered. As a result, all Applicants, including the neediest Applicants, and even the most careful Applicants, will be forced to pay more for all eligible services than they would otherwise.

Lower participation, limiting the availability of eligible services for Applicants, and higher prices for those services are not in the public interest and do not enhance Congress' or the Commission's goals in the E-Rate program. Thus, when seeking to recover erroneously disbursed benefits, the Commission should look to the party that benefited from that disbursement and seek repayment from that beneficiary.

Background

Commission Orders of October 8, 1999. The origin of the participants' concern is found in the Commission's *Statutory Violations Order* that addressed funding commitments made by USAC to Applicants that the Commission believed violated the Act. 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 containing proposals for pursuing collection of reimbursements already sent to Service Providers for services they have already provided schools and libraries. On October 22. 1999, USAC submitted its implementation plan to the Commission. Therein, USAC proposed to implement the Commission's determination in the *Statutory Violations Order* that it would seek repayment from Service Providers because Service Providers had actually received disbursements of funds from the universal service support mechanism. USAC's plan and the Commission's Order, however, failed to properly address (a) whether each of the violations was, in fact, a violation of the Act; and (b) whether the Commission had legal authority to collect these funds from the Service Providers, which are merely third-party vendors in a program designed to benefit schools and libraries.

On the same day, the Commission adopted a companion order, the *Rule Violations Order*, addressing erroneous payments that violated its E-rate program rules. In that Order, the Commission waived the rule violations, finding that Service Providers are "unlikely" to be informed of an applicant's compliance with E-rate rules, thus justifying waiver of a "rule" violation. Distinguishing rules violations from statutory violations, the Commission concluded that Service Providers have knowledge and control over statutory violations, stating they "know, or should have known, that the services they provided were not eligible for support or, in the case of non-carrier providers, that they were ineligible for support for discounts on telecommunications

services."[2] The Commission's conclusion therein is wrong. First, it fails to examine whether specific violations were, in fact, "statutory" or "rules" violations. For example, there is no support for the Commission's statement that the provision of ineligible services is a statutory violation. Moreover, there is no basis for concluding that carriers have any knowledge or control over whether the Applicant is receiving eligible services or is using those services for eligible educational purposes.

Discussion

Before presenting the participants' recovery plan, it is important to understand the legal and policy implications of the plan proposed by USAC, pursuant to the Commission's Orders. Three of the Service Provider Participants have challenged the Commission's determination that Service Providers are responsible for statutory violations by filing Petitions for Reconsideration of the *Statutory Violations Order*.[3] Because the Commission's Orders and USAC's plan are not supported by legal precedent, the Commission's policies regarding the E-rate program, or Congress' intent for the E-rate program, the participants herein are submitting an alternative plan.

Procedural Flaws in the Commission's Orders. First, the Commission's Orders enacted a new substantive rule regarding disbursements and recovery of E-rate funds without public notice or opportunity for comment. The Administrative Procedures Act limits the Commission's ability to change its rules without following public notice and comment procedures. Section 553(b) of the Administrative Procedures Act requires the Commission to undertake a notice and comment rule making proceeding for agency rules

[2] *Rule Violations Order*, n. 22.

of broad applicability. The limited exception to the notice and comment requirement is for "interpretive rules, general statements of policy, or rule of agency organization, procedure or practice."[4] An interpretive rule is one that "does not contain new substance of its own,"[5] is merely "what the administrative officer thinks the statute or [existing] regulation means,"[6] or does not create "new law, rights or duties. . . "[7] Thus, it is only when a Commission decision merely interprets existing rules and regulations, that publication in the Federal Register and an opportunity for public comment are not required.

Given that the Commission's Orders herein clearly contained new substance not previously included in the Commission's rules and had a substantial impact on the E-Rate program, a notice and comment proceeding was required prior to any decision to impose a repayment obligation on the Service Providers participating in the program. Thus, the participants herein request that the Commission fully consider the proposals outlined in this presentation and put them on public notice so interested parties, including, schools and libraries, and the hundreds of Service Providers providing eligible services under the E-Rate program, have an opportunity to comment on the legal, policy and factual aspects of the proposed recovery plans.

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[3] *See* Petitions for Reconsideration filed by MCI Worldcom, Inc., Sprint Corporation, and the United States Telecom Association on November 15, 1999. The legal and policy arguments advanced in those petitions are included in the discussion of the shortcomings of the Commission's Orders below.

[4] 5 U.S.C. § 553(b)(3)(A).

[5] The National Latino Media Coalition v. FCC, 816 F.2d 785, 788 (D.C.Cir. 1987).

[6] *Id., quoting* Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C.Cir. 1952). *See also* Cabias v. Egger, 690 F.2d 234, 238 (D.C.Cir. 1982).

[7] United Technologies Corp., Pratt & Whitney Group v. U.S. EPA, 821 F.2d 714, 718 (D.C.Cir. 1987). *See also* Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C.Cir. 1979).

Substantive Legal Flaws in the Commission's Orders. The Commission also should consider adopting a new recovery plan, such as the one set forth in Attachment II, because its current plans are not legally supported by the Communications Act of 1934, as amended, (hereinafter "Act")[8], the legislative history of the E-rate program, prior Commission Orders or other legal precedent. First, even assuming the Commission is correct that it is legally obligated to recover funds disbursed in violation of Section 254 of the Act, it has no authority to collect the funds from Service Providers.[9] The Act, the Commission's rules and Commission Orders impose primary program compliance obligations and accountability on Applicants; not Service Providers.[10] The Act only provides that Service Providers, upon providing services to an Applicant, are entitled to payment for those services.[11] The fact that Service Providers rather than Applicants are compelled to seek reimbursement from the fund – a requirement imposed on Service Providers by the Commission "for purposes of administrative ease"[12] – does not make

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[8] 47 U.S.C. §§ 151, *et seq.*

[9] It is not clear that the Commission was correct in concluding that *OPM v. Richmond* and the Debt Collection Improvement Act (DCIA) compel the recovery of overcommitted funds. The holding in *Richmond*, that payments of money from the federal Treasury are limited to those authorized by Congress pursuant to its authority under the appropriations clause of the Constitution, is quite narrow. Similarly, the DCIA only applies to debts and claims owed to the federal Treasury. Neither the discounted services received by Applicants, nor the disbursements from the federal Universal Service Fund paid to Service Providers as reimbursement for those discounted services rendered to program beneficiaries, constitute Congressionally appropriated funds. In fact, Congress has no appropriations authority over the E-Rate program. Further, any erroneously disbursed benefits are owed to the federal Universal Service Fund, not the federal Treasury. Thus, *Richmond* and the DCIA are not applicable to the E-Rate program and do not require the Commission to recover benefits disbursed in violation of the Act from either Service Providers or Applicants.

[10] As beneficiaries of the E-Rate program, Applicants are required to certify to the Commission that they have met the requirements for E-rate eligibility and that the services being supported by the federal Universal Service fund are eligible for such support. *See, e.g.*, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (May 8, 1997) ("*FCC USF Order*"). No such obligations are imposed on Service Providers.

[11] 47 U.S.C. § 254(h)(1)(B).

[12] *FCC USF Order* at ¶ 586.

Service Providers the beneficiaries of the E-Rate program. As the Commission has previously recognized, the 1996 amendments to the Act "include[ ] schools and libraries among the explicit beneficiaries of universal service support."[13]

Moreover, any Commission assertion that it cannot collect from the Applicants because it has no jurisdiction over Applicants is incorrect. In the *FCC USF Order*,[14] the Commission stated that it maintained jurisdiction over the Applicants, pursuant to Sections 502 and 503(b) of the Act, authorizing it to impose a forfeiture penalty on any school administrator who violates the rules and regulations issued by the Commission. Further, Applicants, who complete funding request forms and provide them to the Commission via USAC, have entered into an agreement with the Commission. Even if the Commission lacked specific jurisdictional authority, it would have the authority to enforce the terms of such an agreement with an Applicant.

Unlike Applicants, the actual and intended beneficiaries of the E-Rate program, Service Providers are nothing more than "vendors," as that term is defined by Office of Management and Budget ("OMB") regulations.[15] These OMB regulations are applicable to award programs administered by federal agencies.[16] The OMB regulations do not impose program compliance obligations on vendors. Further, the regulations do not impose any liability on vendors when funds or benefits are found to have been disbursed in violation of a statute or program rules.[17]

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[13] *Id.* at ¶ 424.

[14] *Id.* at ¶ 578.

[15] *See* OMB Circular No. A-133, Audits of States, Local Governments and Non-Profit Organizations, revised June 24, 1997, at Section 105.

[16] *Id.*

[17] *Id.*

Finally, prior to implementing any recovery plan, the Commission must fully explore the nature of each erroneous disbursement of E-rate program benefits. While some may clearly violate the Act, arguably requiring recovery of the funds[18], many others only violate Commission rules and procedures. As the Commission acknowledged in its *Statutory Violations Order*, disbursements of program benefits that do not violate the Act impose no recovery obligation on the Commission, thus providing it greater discretion in applying remedies.

Section 254 of the Act clearly states that only eligible schools and libraries may receive services deemed eligible for universal service discounts. Thus, if an applicant receives funding but does not fulfill the statutory requirements for eligibility, it has committed a statutory violation. Similarly, if telecommunications services are provided by an entity that is not a "telecommunications carrier," as defined by the Act, the service provider involved has provided a statutory violation. In Attachment II, the participants propose specific recovery plans for such statutory violations.

The participants assert that all other erroneous disbursements of program benefits violate Commission rules or procedures. The Act does not define the specific "services" eligible for support from the federal Universal Service Fund. Indeed, Section 254(c)(1) of the Act charges the Commission with responsibility for enumerating specific services, stating that "universal service is an evolving level of telecommunications service that the Commission shall establish periodically...taking into account advances in telecommunications and information technologies and services." In Section 254(c)(3) of the Act, Congress broadened this delegation of authority, expressly giving the

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[18] *See* discussion *supra*

Commission discretion to "designate additional services for such [Federal universal service] support mechanisms for schools [and] libraries. . ." Moreover, in Section 254(c)(2), Congress gave the Joint Board authority to "from time to time, recommend to the Commission modifications in the definition of services" eligible for support. As a result, a "service" that is not eligible for support during the current program year could -- via Commission action alone -- be eligible for support in future years. If a service can be supported in a future program year pursuant to a Commission action such as a rulemaking, unauthorized support, such a service received prior to the Commission's action would only constitute a violation of the Commissions rules, not a violation of the Act. Recognizing that "service" is not defined in the Act, gives the Commission discretion to employ a full range of remedies, will promote a more effective and efficient E-rate program, ensure that a broad range of communications services are available to all interested schools and libraries, and is in the public interest.

ATTACHMENT II

E-Rate Benefit Recovery Plan

This recovery plan represents the views of an industry-wide coalition of Service Providers; it outlines one possible solution to the E-Rate commitment adjustment issue. To ensure that the this issue receives the fullest possible consideration, the coalition urges the Commission to put the previously filed Petitions for Reconsideration, the USAC Implementation Plan, and this document out for public comment.

Section 1: E-RATE BENEFITS

1. An E-Rate benefit is the value of the funds from the federal Universal Service Fund committed to an Applicant by USAC.
2. A benefit is disbursed to an Applicant by one of the following methods:
   a) services provided at a discount by a Service Provider. Receipt of the benefit occurs when the Service Provider invoices the Applicant at a discounted rate.
   b) direct reimbursement provided by USAC and delivered to Applicants by service providers. Receipt of the benefit occurs when USAC issues the Applicant's reimbursement check. [1]
3. A benefit is erroneously disbursed when USAC commits funds to an Applicant in violation of the Act or program rules, and fails to correct its error before the Applicant receives the benefit.
4. An erroneously disbursed benefit constitutes a statutory violation if its disbursement violates the Telecommunications Act of 1996.
5. An erroneously disbursed benefit constitutes a non-statutory violation if its disbursement violates a rule promulgated by the FCC or USAC.
6. As the organization charged by the FCC with administering the Schools and Libraries Universal Service support mechanism, including the commitment of funds, USAC is the party responsible for ensuring that any erroneously disbursed benefits are recovered and/or corrected.

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[1] While the FCC has compelled USAC to mail Reimbursement Checks to Service Providers rather than directly to Applicants, it cannot be said that Service Providers are thereby in possession of the benefit. Program rules provide not only that Service Providers must mail a check to an Applicant within 10 days of receiving a check from USAC, but that Service Providers must mail such checks before cashing the check from USAC. These rules prevent a Service Provider from accruing any benefit at the expense of the Fund or Applicants, notwithstanding the Service Provider's physical possession of a benefit check.

Section 2: STATUTORY VIOLATIONS

A. Assumptions

1. There are two categories of statutory violations.
   a) Applicants who do not meet the statutory definition of entities eligible to receive Universal Service benefits.
   b) Service Providers who provide telecommunications services but do not meet the statutory definition of telecommunications carrier and are therefore ineligible to provide telecommunications services to Applicants.

2. Ineligible Applicants are always responsible for repaying the fund because:
   1. they received benefits to which they were not entitled
   2. they were the only party which knew or should have known whether they were eligible to receive those benefits

3. Service Providers who provide telecommunications services but do not meet the statutory definition of telecommunications carrier are always responsible for reimbursing the fund because:
   a) they received a competitive advantage to which they were not entitled
   b) they were the only party which knew or should have known whether they were eligible to receive that competitive advantage

B. Mechanism for Recovering from an Ineligible Service Provider

1. USAC determines the value of funds it has committed to an Applicant who receives telecommunications service from a Service Provider who provided telecommunications services but does not meet the statutory definition of telecommunications carrier.
2. USAC determines if the Applicant has received the benefit.
3. If the Applicant has not received the benefit, USAC cancels the funding commitment and notifies both parties.
4. If the Applicant has received the benefit in the form of a discounted invoice from the Service Provider, USAC cancels the commitment, notifies both parties, and denies any reimbursement request submitted by the Service Provider.[2]

[2] If USAC has already reimbursed the Ineligible Service Provider, USAC may seek repayment from the Service Provider, or, if the Service Provider is eligible to provide discounted Internal Connections, Internet

5. If the Applicant has received the benefit in the form of a Reimbursement Check from USAC, USAC cancels the funding commitment, notifies both parties, and seeks reimbursement from the Service Provider. [3]
6. Ineligible Service Providers may reimburse the fund by
    a. Making cash payments to USAC
    b. Allowing USAC to deduct what they owe the fund from reimbursements they are due for providing discounted Internal Connections, Internet Access or other services.

C. Mechanism for Recovering from Ineligible Applicant

1. USAC determines the value of funds it has committed to an Applicant who is ineligible to receive any benefits from the Universal Service fund.
2. USAC determines if the Applicant has received the benefit.
3. If the Applicant has not received the benefit, USAC cancels the funding commitment and notifies the Applicant and Service Provider.
4. If the Applicant has received the benefit in the form of a discounted invoice from the Service Provider:
    a) USAC cancels the commitment;
    b) USAC notifies both parties;
    c) USAC honors any reimbursement request submitted by the Service Provider for benefits delivered prior to the cancellation of the commitment; and,
    d) USAC notifies the Applicant that it is obligated to repay the fund by sending a check payable to USAC and the Service Provider to the Service Provider.
5. If the Applicant has received the benefit in the form of a Reimbursement Check from USAC delivered by the Service Provider:
    a) USAC cancels the funding commitment;
    b) USAC notifies both parties; and,
    c) USAC notifies the Applicant that it is obligated to repay the fund by sending a check payable to USAC and the Service Provider.[4]

Access or some other service, may adjust checks it sends the Service Provider as reimbursement for providing those services.

[3] If USAC has already reimbursed the Ineligible Service Provider, USAC may seek repayment from the Service Provider, or, if the Service Provider is eligible to provide discounted Internal Connections, Internet Access or some other service, may adjust checks it sends the Service Provider as reimbursement for providing those services.

Section 3: NON-STATUTORY VIOLATIONS

A. Assumptions

1. There are two categories of non-statutory violations:
   a) Violations of FCC Rules (including but not limited to: eligible services conditioned by rules; competitive bidding requirements, funding priority rules, filing deadlines)
   b) Violations of USAC Rules (including but not limited to: SPIN changes, splitting FRNs, data entry errors)
2. The best means of correcting any violation will turn on at least three factors:
   a) how quickly USAC detects the violation
   b) how quickly USAC notifies the Applicant and Service Provider of the violation
   c) how the Applicant receives the benefit
3. For benefits an Applicant receives via a discounted Service Provider invoice, detection and notice could occur:
   i. before the Applicant has received any discounts on services
   ii. after the Applicant has received discounts less than or equal to the funding commitment to which they are entitled
   iii. after the Applicant has received discounts greater than the funding commitment to which they are entitled.
4. For benefits an Applicant receives via a Reimbursement Check from USAC, detection and notice could occur:
   i. before USAC mails a Reimbursement Check
   ii. after USAC mails a Reimbursement Check

[4] Because Ineligible Applicants are ineligible to receive support from the Universal Service fund for <u>any</u> service. Ineligible Applicants must always repay the fund and may never be given the option of having funding commitments for other services reduced.

B. Mechanism for Recovering Benefits Delivered via Discounted Service Provider Invoice

Hypothetical
-USAC issues FCDL for $500
-FCDL Should Have been $200

1. USAC discovers error before Applicant has received any discounted services.
Remedy: a. USAC issues a revised FCDL to Service Provider and Applicant

2. USAC discovers error after the Applicant has received discounts less than or equal to the funding commitment to which they are entitled.

Remedy: a. USAC reimburses Service Provider
b. USAC issues a Revised FCDL to Service Provider and Applicant

3. USAC discovers error after the Applicant has received discounts greater than the funding commitment to which they are entitled.

Remedy: a. USAC reimburses Service Provider
b. USAC issues a Revised FCDL to Service Provider and Applicant
c. If Applicant has sufficient undelivered benefits on other FRNs with the same Service Provider, USAC asks Applicant whether it would like to reimburse Fund or have other FRNs adjusted[5]
d. Applicant reimburses Fund by mailing check to Service Provider payable to both Service Provider and USAC, Service Provider remits check to USAC, or
e. USAC adjusts Applicant's Other FRNs and issues Revised FCDLs to Applicant and Service Provider
f. If Applicant has insufficient benefits remaining on other FRNs, USAC notifies Applicant that it must reimburse Fund

[5] Applicants could also be offered the option of having the total value of their funding commitments in the next program year reduced by the value of the unauthorized benefit they received.

C. Mechanism for Recovering Benefits Disbursed via USAC Reimbursement Check

Hypothetical
-USAC issues FCDL for $500
-FCDL Should Have been $200
-Service Provider provides $100 in services to Applicant
-Applicant files BEAR for $100

1. USAC Discovers Error Before Mailing Reimbursement Check

Remedy:
a. USAC issues a Revised FCDL to Service Provider and Applicant
b. USAC mails Reimbursement Check to Service Provider for $100
c. Service Provider mails check to Applicant for $100

2. USAC Discovers Error After Mailing Reimbursement Check

Remedy:
a. USAC issues a Revised FCDL to Service Provider and Applicant

Hypothetical
-USAC issues FCDL for $500
-FCDL Should Have been $200
-Service Provider provides $300 in services to Applicant
-Applicant files BEAR for $300

3. USAC Discovers Error Before Mailing Reimbursement Check

Remedy:
a. USAC issues a Revised FCDL to Service Provider and Applicant
b. USAC mails Revised Reimbursement Check to Service Provider
c. Service Provider mails check to Applicant

4. USAC Discovers Error After Mailing Reimbursement Check

Remedy:
a. USAC issues a Revised FCDL to Service Provider and Applicant
b. If Applicant has sufficient undelivered benefits on other FRNs with the same Service Provider, USAC asks Applicant whether it would like to reimburse Fund or have other FRNs adjusted[6]
c. Applicant reimburses Fund by mailing check to Service Provider payable to both Service Provider and USAC, Service Provider remits check to USAC, or
d. USAC adjusts Applicant's Other FRNs and issues Revised FCDLs to Applicant and Service Provider

[6] Applicants could also be offered the option of having the total value of their funding commitments in the next program year reduced by the value of the unauthorized benefit they received.

e. If Applicant has insufficient benefits remaining on other FRNs, USAC notifies Applicant that it must repay Fund

Section 4: OTHER ISSUES TO CONSIDER

1. The remedy for non-statutory violations could vary depending upon the type of violation. Factors to be considered in determining the appropriate remedy may include issues such as:

a. Accuracy of information provided to Applicant by USAC

b. Hardship: If USAC fails to revise a funding commitment in a timely manner, compelling an Applicant to reimburse the fund in full could result in a hardship that is more severe than the violation warrants.

c. Efficiency: In instances in which the cost of seeking full recovery of a small overcommitment are larger than the overcommitment itself, it may be in the public interest to waive enforcement of the violated rule than to pursue enforcement.

2. Remedies other than full recovery:

a. Applicant is barred from participation in program
   - i. for program year
   - ii. for certain number of years
   - iii. forever

b. Limitations on future eligibility
   - i. specific contracts become ineligible

c. Cancel future support but waive past (i.e., do not require reimbursement)
   - i. within program year

d. Correct and allow future support but waive past
   - i. minor corrections (data entry, SPIN)

e. Fines

f. Criminal charges

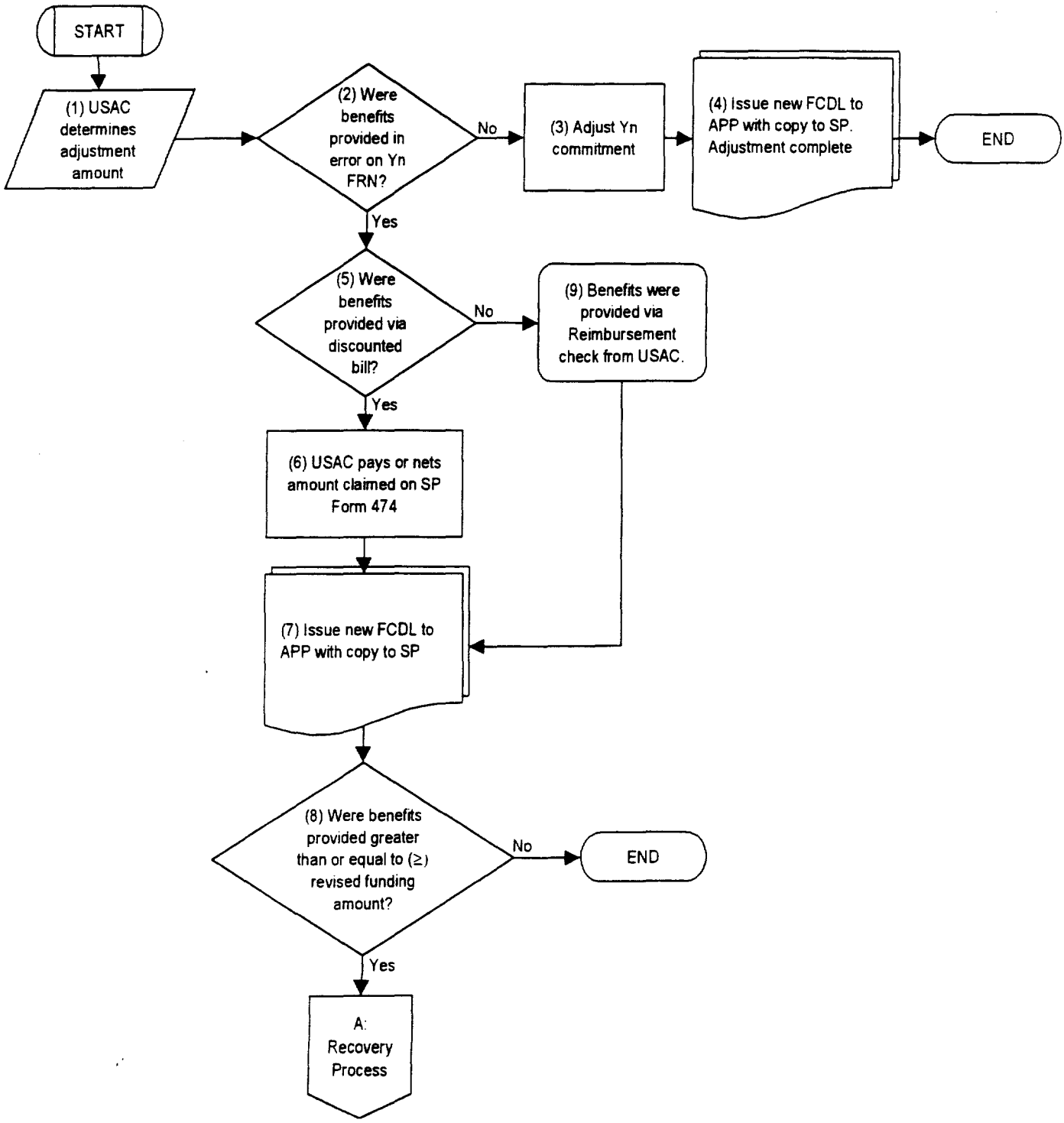
g. Targeted audits

3. Commission could establish defined set of remedies for violations of USAC Rules and delegate enforcement authority for such violations to USAC.

4. In any recovery action, USAC could give the Applicant the option of either 1) immediately reimbursing USAC via their Service Provider, or 2) accepting reduction in funding commitments for the same or subsequent funding years.

Commitment Adjustment Process

January 31, 2000



NOTES:

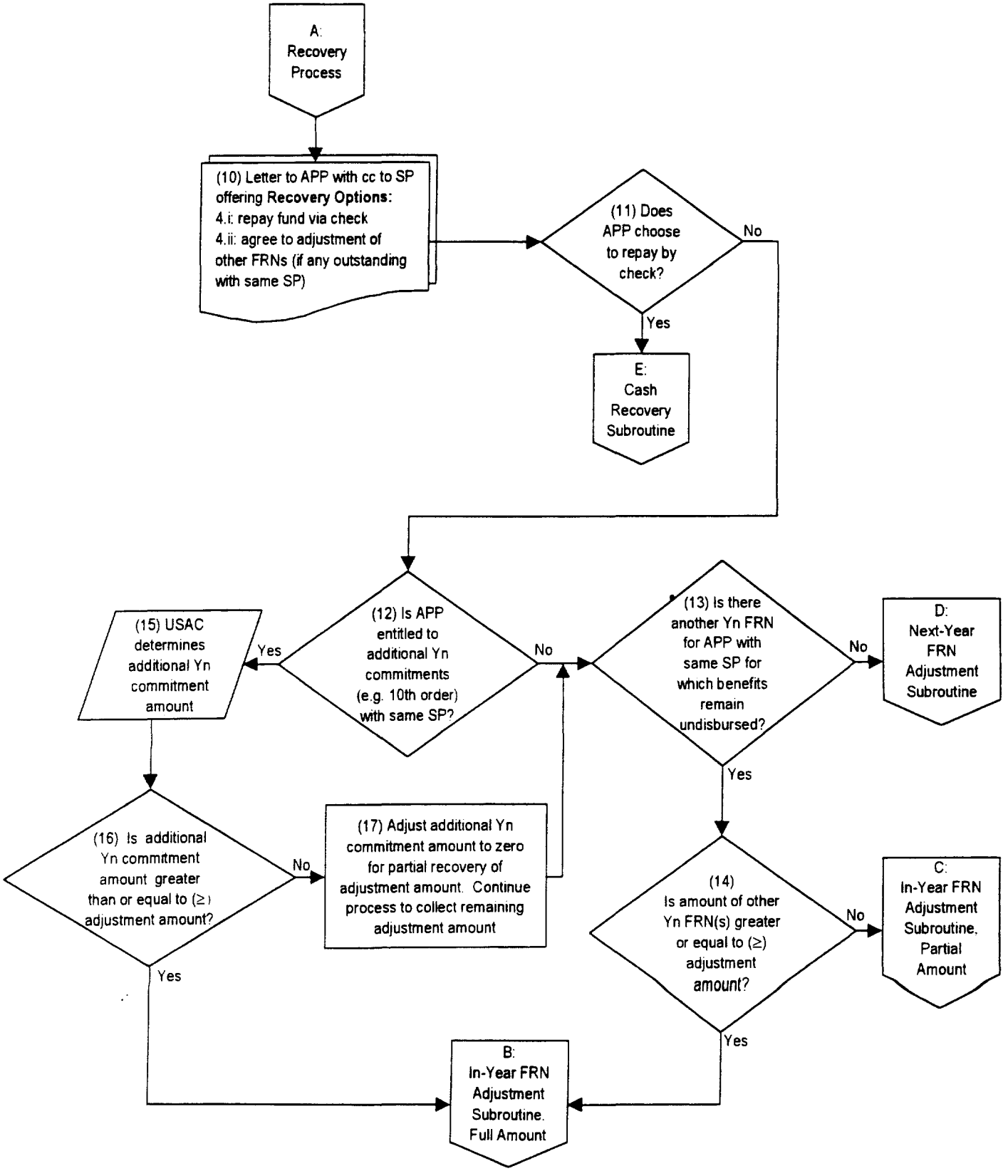
a) Instead of limiting the process flow to year 1 and year 2 per USAC implementation document, proposed process flow is designed for use in multiple program years. Thus, the program year for which an overcommitment is discovered is identified as "Yn", while the following program year is identified as "Yn−1".

b) Abbreviations: SP = Service Provider, APP = Applicant

c) Repayment option to adjust other outstanding FRNs must be limited to FRNs issued for the same Service Provider Identification Number (SPIN).

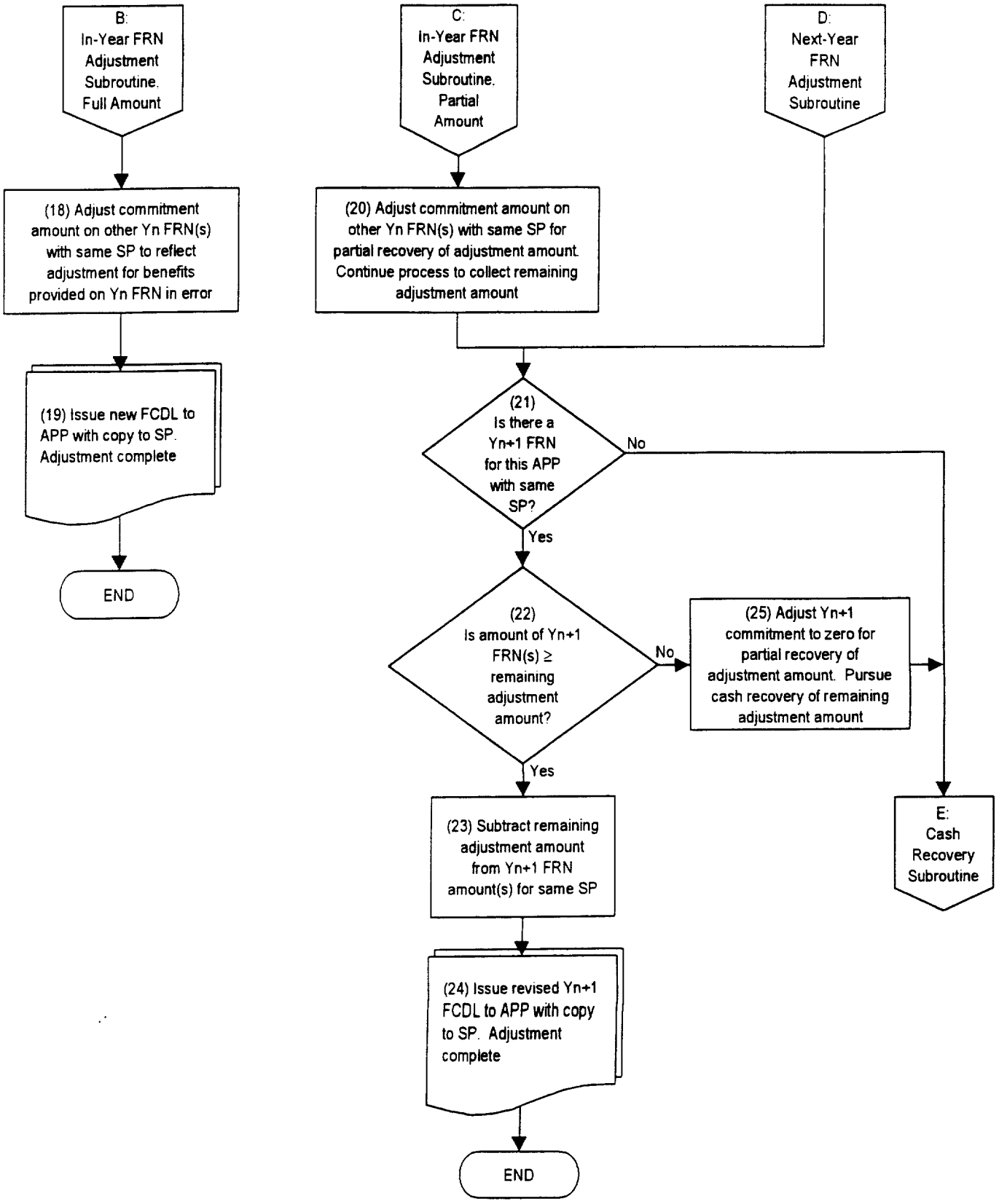
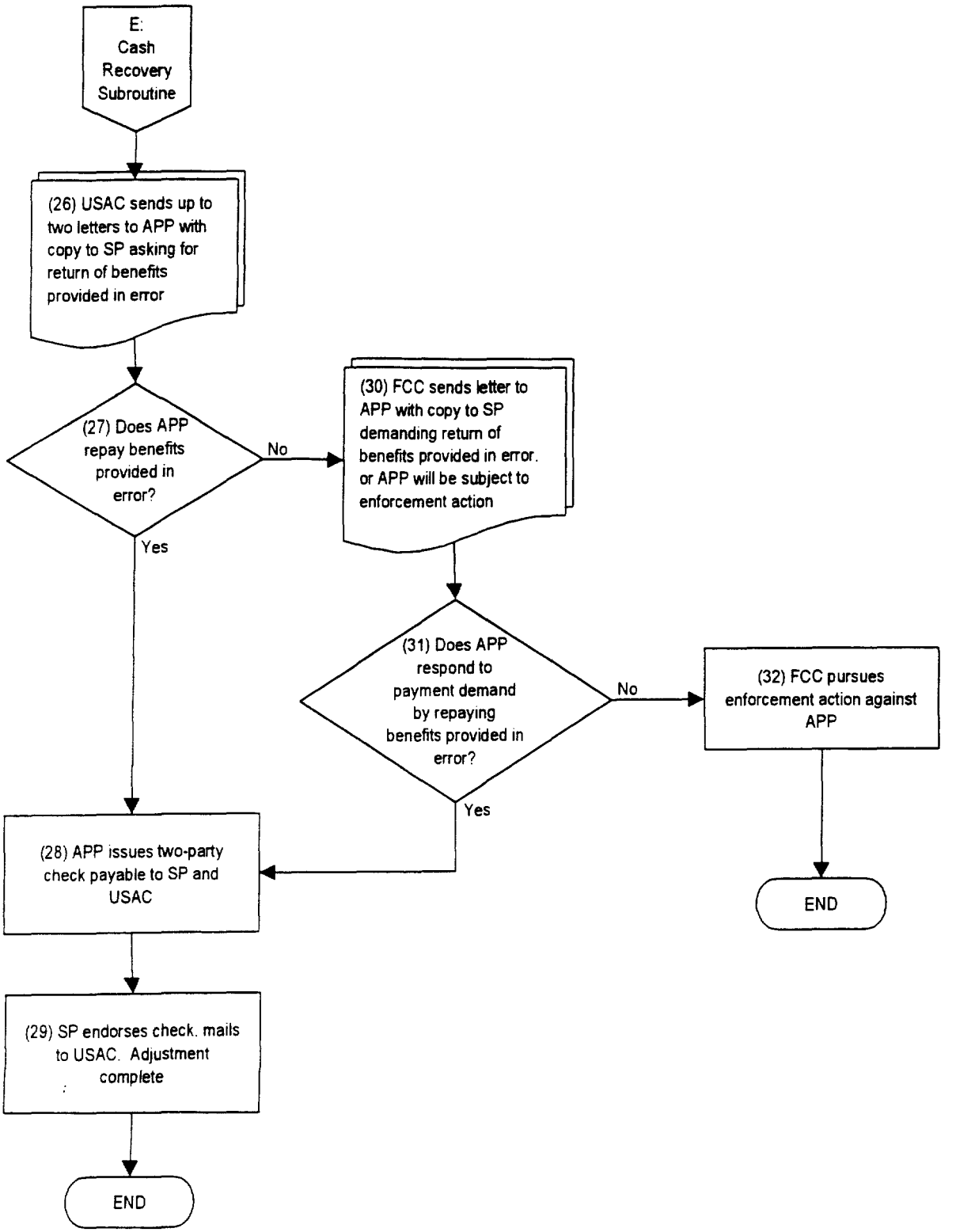
Commitment Adjustment Process

January 31, 2000



Commitment Adjustment Process

January 31, 2000



Commitment Adjustment Process
Cash Recovery
January 31, 2000