payment to the carriers is, as the Commission stated, simply a means of eliminating the schools as middlemen for "administrative ease."[18]

In fact, when the Commission first implemented the program, it specifically rejected commenters' suggestions that it should establish program guidelines identifying eligible services consistent with Section 254's statement that funding should be available to services with "educational purposes." Parties argued that such guidelines would assist all parties in administering the program as well as prevent fraudulent use by schools and libraries of discounted services.[19] The Commission stated at that time that this step was unnecessary because it already had sufficient remedies against offending schools and libraries. For example, the Commission noted that the application certification requirements and the potential civil and criminal liability faced by the person authorized by a school or library to order the services were sufficient to avoid fraud and misuse.[20] Yet, by abruptly shifting all financial

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[18] *USF Order,* 12 FCC Rcd at 9083,¶ 586.

[19] *USF Order,* 12 FCC Rcd at 9079-80, ¶ 578. As a result, carriers, who do not even participate in the discount application process, have no particular guidance as to the services that qualify under the program. The list of "eligible services" established by USAC also is evolving and contains many services that are "conditionally" eligible for discount funding. The Commission is free to designate additional eligible services. In *Texas Office of Public Utility Counsel v. FCC,* the court observed that, by using the word "designate" in section 254(c)(3), Congress could have meant for the FCC to authorize a broad class of services. *Texas PUC v. FCC,* 183 F.3d at 445. This makes it even more difficult for carriers to know which services are eligible under the program and even more necessary for them to be able to rely on USAC's funding commitments. In fact, the Commission recognized in its *Waiver Order* that providers had reasonably relied on the funding commitments applicants had received from USAC. *Waiver Order* at ¶7.

[20] *USF Order,* 12 FCC Rcd at 9079-80, ¶ 578.

responsibility to the carrier, the *Adjustment Order* takes the opposite approach by relieving applicants of all liability for mistakes and, potentially, abuse of the e-rate program.

The Commission also has stated that it maintained jurisdiction over schools and libraries, pursuant to sections 502 and 503(b) of the Act, which authorize it to impose a forfeiture penalty on any school administrator who violates the rules and regulations issued by the Commission. Further, the Commission announced that it would, in consultation with the Department of Education, engage and direct an independent auditor to conduct random audits of schools and libraries to determine whether its support policies require adjustment.[21] These are obvious indications that the *Adjustment Order* represents a complete and unexplained departure from prior stated Commission intentions to hold schools and libraries accountable for their mistakes or potential misuse of services for ineligible, non-educational purposes.

Other statements likewise demonstrate that the Commission was and is well aware that carriers should not be the financially accountable party under the e-rate support program and that the Commission has no authority to pursue enforcement actions against carriers.[22] Even in

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[21] *Id.* at 9081, ¶ 581.

[22] In the *Waiver Order*, for example, the Commission appropriately recognized that service providers were not in a position to monitor the school's compliance with the applicable regulations and could not have known of any potential problem absent notification by USAC. The Commission recently affirmed the responsibility of schools and libraries in submitting accurate information along with their applications. *See, e.g.* In the Matter of Request for Review of the Decision of the Universal Service Administrator by Scranton School District, Scranton, Pennsylvania, Federal-State Joint Board on Universal Service, *Order*, File No. SLD-112318, CC Docket Nos. 96-45 and 97-21, DA 00-20, at ¶ 8 (released January 7, 2000). " We find that it is administratively appropriate to require an applicant to be responsible for correctly calculating and reporting its estimated pre-discount costs in completing its FCC Form 471 upon which its ultimate funding is dependent." *See also* Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy, Brooklyn, New York,

directing USAC to seek recovery of disbursed funds from service providers when the disbursement of these funds was made in violation of the Commission rule-based eligibility requirements, the Commission implicitly recognized that program compliance responsibility rests almost entirely on the schools or libraries.[23]

B. The *Adjustment Order* Misapplies Legal Precedent

The *Adjustment Order* also relies on the inapposite Supreme Court precedent of *OPM v. Richmond*[24] to come to the conclusion that USAC is compelled to recollect funds when the payment is made in violation of a the Communications Act. *OPM v. Richmond's* holding is quite narrow, applying only to payments of money from the federal Treasury that are authorized by statute pursuant to the constitutional appropriation clause. Unlike Richmond's claim in *OPM v. Richmond*, the issue here is not about the payment of benefits from a fund appropriated by Congress. Rather, the issue is about the *reimbursement* of funds erroneously disbursed or the repayment of funds that once were committed from *a non-appropriated, non-Treasury* fund.

At most, *OPM v. Richmond* can be read to suggest a governmental responsibility to recover erroneously-committed funds from program *beneficiaries* that have violated *statutory*

Federal-State Joint Board on Universal Service, File No. SLD-105791, *Order*, CC Docket Nos. 96-45 and 97-21, FCC 00-2 at ¶15 (released January 7, 2000).

[23] In the *Waiver Order*, the Commission observed that the USAC funding commitment letter has been revised to provide notice of the possibility of carrier reimbursement. However, the revised letter also confirms that it is the applicants, *i.e.* the schools and libraries, which receive funding commitments from the USAC, contingent on *their* compliance with all statutory, regulatory and procedural requirements of the program.

eligibility requirements. Nextel has no argument with the government taking appropriate steps to recover erroneously-committed funds from program beneficiaries, but carriers are not the intended program beneficiaries under the e-rate program. Further, most carriers have neither committed any "wrongdoing" for which they should be penalized nor are they in a position to detect or correct other parties' "wrongdoings" or errors.[25]

Accordingly, *OPM v. Richmond* does not provide any legal basis for the Commission to direct USAC to cancel its existing commitments after service providers have already supplied services under the e-rate program, nor does it provide any legal basis for seeking reimbursement from carriers, who are not the intended beneficiaries of the program. Thus, on reconsideration, the Commission must direct USAC to recover funding from the beneficiary entities once it has determined that there was no funding entitlement. Anything less is a half measure that fails to accomplish the reversal of a discount that was incorrectly supplied or fraudulently obtained.

The *Adjustment Order* also failed to address other court precedent that supports carriers' entitlement to payment for services they have rendered under the e-rate program. In *Arizona v. United States*,[26] the State of Arizona was seeking reimbursement of its costs incurred in

[24] Office of Personnel Management v. Richmond, 496 U.S. 414, *reh'g denied*, 497 U.S. 1046 (1990).

[25] In the case the Commission relied upon, Richmond was a beneficiary of disability benefits who was seeking the payment of a disability benefit from the Civil Service Retirement and Disabilities Fund after his own action had caused him to temporarily lose his right to that particular statutorily-based benefit.

[26] *Arizona v. United States*, 494 F.2d 1285 (Ct. Cl. 1974).

connection with the removal and relocation of utility plant conduit to accommodate the construction of a federal highway under a statute that authorizes the use of federal funds to reimburse states for costs of utility relocation due to federal highway construction. The Federal Highway Administration ("FHA") initially approved the state project to relocate its gas conduit, but later reversed itself. The court found that Arizona had complied with all the statutory conditions of the program and held that the federal government had a contractual obligation to pay the state its proportionate share of the relocation costs because of the FHA's prior approval of the project. The federal government argued that reimbursement was not required because the utility's permit allowed the state to terminate the permit at the state's discretion. The court rejected the federal government's argument, finding that it would have improperly imposed a condition for the payment of federal funds beyond the two conditions explicitly imposed by statute.

Carriers providing services in the e-rate program are in a comparable situation to Arizona. Their compensation under the statute is attached solely to their provision of services to the schools and libraries and the submission to the USAC of their invoice for such services, reflecting that they have charged the lowest comparable price charged to other similarly-situated customers. Having met these conditions, carriers are entitled to payment.

III. CARRIERS PARTICIPATE IN THE PROGRAM AS THIRD PARTY VENDORS

Carriers' participation in the program is limited to fulfilling purchase orders from the schools, as the *USF Order* correctly acknowledged.[27] While carriers that serve particular

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[27] *USF Order*, 12 FCC Rcd at 9006, ¶ 431.

geographic areas must respond to a *bona fide* request for provision of eligible services under the program, there is nothing in the statute that compels providers to dedicate specific internal resources to support schools or engage in school-specific marketing to make them aware of services they may find to be particularly useful. On reconsideration, the Commission should analyze the nature of the carrier's participation in the program and confirm they are vendors as that term is used in government-wide guidelines.

The Office of Management and Budget ("OMB") maintains advisory circulars applicable to federal agencies in the context of other federal government award programs that are instructive in this regard. These advisory circulars set forth the uniform standards federal agencies must apply to non-federal entities that receive federal awards.[28] Under section 105 of the Circular No. A-133, a "vendor" is a "dealer, distributor, merchant or other seller providing goods or services that are required for the conduct of a federal program. These services or goods may be ... for the use of beneficiaries of the federal program."[29]

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

[29] *See* Section 105 of Circular No. A-133. *See also,* Section 210(c) of the OMB Circular No. A-133 listing the characteristics of a buyer/vendor relationship. A payment is a payment for goods or services supplied by a vendor "when the organization: (1) Provides the goods and services within normal business operations; (2) Provides similar goods or services to many different purchasers; (3) Operates in a competitive environment; (4) Provides goods or services that are ancillary to the operation of the Federal program; and (5) is not subject to compliance requirements of the Federal program." The Circular specifically states that, when making a determination of whether a person is a vendor or a subrecipient of funds, it is not required that all these characteristics be present and reasonable judgment should be used in making that determination.

In general, the scope of a vendor's program compliance responsibilities are to make their records accessible for audits.[30] Thus, as a general matter, the OMB does not pass program compliance responsibility on to vendors as opposed to program beneficiaries.

E-rate service providers have all the critical characteristics of "vendors" under the terms of the OMB circular: they supply services to schools and libraries that benefit from the program. These services are essential for the educational goals the program promotes. However, their responsibility, as enunciated by the Commission, is limited to ensuring that the prices service providers offer to the schools and libraries match the lowest corresponding rates for similarly-situated customers. Further, as the Commission is aware, carriers have no obligation to provide any data in support of the schools' applications for funding and do not have to apply themselves for eligibility under the program prior to entering into a purchase agreement with the schools.[31] In fact, the Commission recently made plain that over-

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[30] OMB Circular No. A-133, § 210(f). Section 210(f) provides that "[i]n most cases, the auditee's compliance responsibility for vendors is only to ensure that the procurement, receipt, and payment of goods and services comply with the laws, regulations, and the provisions of contracts or grant agreements. Program compliance requirements normally do not pass through to vendors. However, the auditee is responsible for ensuring compliance for vendor transactions which are structured such that the vendor is responsible for program compliance or the vendor's records must be reviewed to determine program compliance. Also, when these vendor transactions relate to a major program, the scope of the audit shall include determining whether these transactions are in compliance with laws, regulations, and the provisions of contracts or grant agreements." Under section 105 of the Circular, the "auditee" is the non-Federal entity that expends Federal awards.

[31] Whether carriers receive payment from a school and USAC rather than just from a school has no impact on the legal relationship of the third-party vendor to the program administrator.

involvement of a service provider-vendor in a school's application process could result in disqualification of the applicant school.[32]

In the context of other government support programs, the government does not bring suit against persons qualifying as "vendors" to obtain the reimbursement of government funds that beneficiaries of the support program used to pay these vendors for services rendered to them. Nextel urges the Commission to exercise this same restraint and not direct USAC to bring action against innocent vendors that merely provide the services that schools and libraries specify.

IV. OTHER FEDERAL SUPPORT PROGRAMS DO NOT HOLD THE SERVICE VENDORS LIABLE FOR BENEFICIARY FRAUD OR MISTAKES

In dealing with the mechanics of reimbursement, the *Adjustment Order* failed to consider the precedent available from other government support programs that service vendors have a reasonable expectation to receive payment for services provided in compliance with their engagements, like any other provider engaged in government support programs has a property interest in the payment of its services. This is true whether the provider is or is not the intended beneficiary of the program.[33]

For example, the U.S. Department of Education (the "Department") administers the federal Pell Grant program, which provides grants directly from the federal government to

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[32] See In the matter of Request For Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service, *Order*, File No. SPIN-1433006149, CC Docket No. 96-45, FCC 00-167 (released May 23, 2000).

[33] *Furlong v. Shalala*, 156 F.3d 384, 393 (2d Cir. 1998) citing *Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir. 1984), *White Plains Nursing Home v. Whalen*, 53 A.D.2d 926 (N.Y. App. Dir. 1976), *aff'd*, 366 N.E.2d 79 (N.Y.1977).

statutorily eligible, financially needy students enrolled in eligible education programs offered at eligible institutions of higher education.[34] The fund disbursement mechanics of the Pell Grant are similar to those of the e-rate program. Universities act as conduits for disbursing grants from the Department to the eligible students.[35] As the first step to receiving a Pell Grant, a student must apply to the Department on an approved application form. The Department provides each institution designated by the student with an "institutional student information record" ("ISIR") which includes the student's personal information and the amount which the student's family may be reasonably expected to contribute towards the student's education. In determining a student's eligibility to receive a Pell Grant, the university is entitled to assume that the ISIR information received from the Department is accurate and complete. The institution calculates and credits each eligible student's account with the Pell Grant it has received from the Department, in accordance with payment schedules published by the Department. Or, under the "reimbursement payment" method, the institution first credits the student account for the amount of the grant and, upon submission of a supporting documentation to the Department, the eligible institution receives from the Department either a reimbursement for the Pell Grant funds awarded and disbursed to eligible students, or an offset against the amount of Pell Grant funds the school, for any reason, owes to the Department.

The Department regulations do not hold educational institutions liable for repayment of any overpayments of federal Pell Grant funds to students unless the institutions themselves have committed some sort of "wrongdoing" by not complying with the Department rules and

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[34] The federal Pell Grant Program regulations are codified in 34 C.F.R. Part 690.

[35] *See Trustees of the California State University v. Riley*, 74 F.3d 960 (1996).

regulations governing the program.[36] The student, not the university, is responsible for returning any overpaid Pell funds to the Department.[37] When a school loses its eligibility in the course of an award year, eligible students attending the institution and who filed a valid application before the institution became ineligible still are paid Pell Grants for payment periods that the students completed before the institution became ineligible and the payment period in which the institution became ineligible. The institution receives payment from the Department for any Pell funds the university has appropriately credited or disbursed to the students for those payment periods.

Applying Pell Grant principles to the e-rate reimbursement mechanics, the Commission could not order reimbursement by the carriers of funds they have received in compensation for the provision of the required services to the schools and libraries. Nor could the Commission order its administrator to cancel its existing commitments, upon which carriers have relied, to provide services to schools and libraries. Errors or fraud for which the schools, rather than the carriers, are responsible would not trigger a carrier reimbursement responsibility. Carriers would be entitled to keep the funds they received in compensation for the services already provided, regardless of the reasons upon which the Commission or its program administrator

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[36] *See* 34 C.F.R. § 690.79.

[37] In at least one case, the Department decided that a school paying Pell Grants to students who were contemporaneously receiving other Pell Grants at other institutions had no way of knowing of these concurrent payments because the students did not inform the school that they were simultaneously enrolled in other schools. The Department decided not to penalize the school for the misconduct of its students of which the school could not have been aware. *See,* In the Matter of Jesode Hatorah, 1996 WL 1056642 (E.D. Ohio March 5, 1996).

would base its request for reimbursement. Further, carriers should be paid for the services rendered and not yet paid.[38]

V. THE COMMISSION HAS A CONTRACT WITH THE BENEFICIARY SCHOOLS AND LIBRARIES WHICH IT IS ENTITLED TO ENFORCE

While it is impossible to discern from the *Adjustment Order* itself, it is possible that the Commission believes it has greater jurisdiction over carriers pursuant to the Communications Act than it does over e-rate program beneficiaries. This cannot be the case. If it were, then none of the Commission's rules directing beneficiary compliance are enforceable. Nextel agrees with the Commission's prior analysis that it maintains full Section 502 and Section 503 jurisdiction over program beneficiaries.

Before receiving any funding commitments, schools and libraries are required to comply with strict self-certification requirements in their applications designed to ensure that only eligible entities receive support.[39] They also must prepare specific plans for using their chosen technology.[40] Services must be obtained through the use of competitive bidding and copies of the school contract with service providers sent to USAC for approval of the school or library purchase order.[41]

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[38] This is not meant to suggest that the Commission should not pursue reimbursement – only that the program beneficiary is the appropriate party from whom to seek reimbursement except in the case of carrier wrongdoing.

[39] *USF Order,* 12 FCC Rcd at 9002, ¶ 425 and 9079, ¶ 577.

[40] *Id.* at 9077, ¶ 573.

[41] *Id.* at 9080, ¶ 580.

These various steps educational institutions go through demonstrate that if schools and libraries receive a funding commitment from USAC, they have a relationship with the Commission and USAC as its administrator comparable to a contractual relationship. The Commission, directly or through its administrator, thus is entitled to take actions against the schools that violate their commitments under the Commission policies, rules and published USAC procedure as well as under general contract law.

VI. CONCLUSION

Nextel supports the e-rate program and the pending petitions for reconsideration of the *Adjustment Order*. The *Adjustment Order* represents an unexplained and unjustified departure from the Commission's prior recognition that program beneficiaries are responsible for their own mistakes or fraud on the program. Similarly, where USAC mistakenly grants an application, the beneficiary of that grant should be responsible for paying back that commitment. Any conscious Commission policy that disregards other federal grant policy precedent and holds the service provider vendor responsible for reimbursing the program will have a serious adverse impact on the well-being of the program. Service providers will be discouraged from participating in the program, and potential applicants will be deprived of access to a wide variety of competing telecommunications services – contrary to Congress' intentions for the e-rate program. Nextel urges the Commission to order USAC to complete the

cycle of recovering money wrongfully paid out of the program, not by stopping at the service vendor which acted as nothing more than a conduit between USAC and the applicant, but by reversing the discount at the level of the program beneficiary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victrena Robinson, a secretary at Dow, Lohnes & Albertson, do hereby certify that on this 3rd day of August, 2000, I served a true copy of the foregoing Comments, via First-Class Mail, Postage Prepaid, on the following:

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