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

DEC 20 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**PETITION FOR IMMEDIATE STAY
OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA)¹ hereby requests that the Commission grant an immediate stay of the Commission's Order in the above-captioned proceeding that adopted a Universal Service Administrative Company (USAC) plan to collect Universal Service Schools and Libraries funds that were found to be erroneously disbursed in violation of applicable statutory provisions.² In that Order, the Commission implemented determinations made in its previous Commitment Adjustment Order in the above-captioned proceeding.³

USTA members are service providers in the Universal Service Schools and Libraries program. USTA and other parties had sought reconsideration of the

¹ 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.

² FCC 00-350, released October 26, 2000 (Order).

³ FCC 99-291, released October 8, 1999.

Commitment Adjustment Order. Those petitions challenge the legal and policy basis for the Commission's determination that service providers are held responsible for USAC funding commitments that were in violation of the applicable provisions of the Communications Act of 1934, as amended (the Act).⁴ Those petitions remain pending. Furthermore, a group of local exchange carriers, interexchange carriers, wireless carriers, and representative trade associations, including USTA, filed an alternative "E-Rate Benefit Recovery Plan" (Alternative Recovery Plan) on February 1, 2000.⁵ That plan was not recognized or considered by the Commission in its Order. Included in that submission was a "Legal and Policy Analysis of the Commission's Overcommitment Orders," Attachment I of the *Ex Parte* Notice (Legal Analysis). On November 27, 2000, USTA filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit seeking judicial review of the Commission's Order. *United States Telecom Association v. Federal Communications Commission and United States of America*, No. 00-1500 (*USTA v. FCC*).

Because the Commission directed USAC to implement its revised recovery plan no later than December 25, 2000, USTA seeks immediate action on this Petition for Stay.

For the reasons set forth herein, in the USTA and other parties' petitions for reconsideration of the Commission's Commitment Adjustment Order, and the Legal Analysis, the Commission should stay the effectiveness of the Order before USAC implements its recovery plan as adjusted by the Commission's Order. The Commission should grant a stay because, in its absence, carriers and their customers will suffer

⁴ 47 U.S.C. §§151 *et seq.*

⁵ Attachment II to February 1, 2000 *Ex Parte* Notice of John W. Hunter, Senior Counsel, USTA, CC Docket Nos. 97-21 and 96-45 (*Ex Parte* Notice).

irreparable harm. Conversely, a stay will not cause any harm to other parties. It will also serve the public interest. Therefore, the Commission should grant USTA's request for a stay immediately.

I. ARGUMENT

The Commission has found it "helpful to rely on the guidelines set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*⁶ to determine whether a stay is warranted,"⁷ in determining whether a stay is appropriate under its rules. Under that standard, the Commission will grant a stay if the petitioner can demonstrate that: (1) it is likely to prevail on the merits; (2) the petitioner would be irreparably harmed in the absence of a stay; (3) the issuance of a stay will not substantially harm other parties; and (4) a stay is in the public interest.⁸

"The test is a flexible one."⁹ Relief should be granted if the moving party demonstrates "either a high likelihood of success and some injury, or vice versa."¹⁰ In addition, although recoverable monetary loss usually does not constitute "irreparable injury" for stay purposes,¹¹ this is so only where "adequate compensatory or other corrective relief" is available "in the ordinary course of litigation."¹² This means that unrecoverable monetary loss does qualify as irreparable harm.

⁶ 259 F.2d 921 (D.C. Cir. 1958).

⁷ Complaint of Dianne Feinstein, *Memorandum Opinion and Order*, 9 FCC Rcd 2698 (1994).

⁸ *Virginia Petroleum Jobbers; Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985).

⁹ *Population Inst. v. McPherson*, 797 F.2d 1062 (D.C. Cir. 1986).

¹⁰ *Id.*

¹¹ See *Wisconsin Gas*, 758 F.2d at 674.

¹² *Id.* quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925.

A. USTA has demonstrated a strong likelihood of success on the merits

As set forth in the USTA Petition for Reconsideration and the Legal Analysis in the *Ex Parte* Notice, USTA and other parties have demonstrated that the Commission's legal basis for imposing liability on service providers is fatally flawed. There is, therefore, a strong basis for the Commission to reverse its determination that service providers are responsible for statutory violations that have occurred in the Schools and Libraries program.

B. Carriers will likely suffer irreparable harm in the absence of a stay

USTA and other parties that have filed petitions for reconsideration of the Commitment Adjustment Order have not been afforded the benefit of the Commission's determination on their legal and policy arguments. This means that these parties are barred from seeking judicial review of the Commission's erroneous determination that service providers are liable for reimbursements made by USAC in violation of the Act.¹³ Yet the Commission is now ordering the implementation of that determination. This places the petitioners in the untenable position of having to be subjected to reimbursement obligations without having the opportunity to seek judicial remedies because of the Commission's inaction on their reconsideration petitions.

In addition, as set forth in the Legal Analysis, implementation of the Commission's Order will create significant disincentives on service providers that will negatively impact the Schools and Libraries program. The result of such disincentives includes determinations by some service providers to not participate in the program or to reduce their level of participation, as well as imposition by service providers on

¹³ 47 U.S.C. §§151 *et seq.*

consumers of increased prices to cover the increased risks in participating in the program. Furthermore, the USAC plan adopted in the Order provides no mechanism for the Commission, USAC, or the affected service providers to recover such erroneous commitments from the schools and libraries that applied for them. Together, these factors constitute irreparable harm.

C. A stay would not harm other parties

By its own admission, the Commission found that the estimated funds “amount to less than one fifth of one percent of the total funding awarded in year one of the program.”¹⁴ Postponement of recovery of such funds would have no discernable effect on the Schools and Libraries program. The only argument that the Commission has advanced for recovery of the erroneously disbursed funds is that the law requires it. This is the crux of the challenges to the Commission’s orders, and it serves to illustrate that no claim of harm to any party has been made by the Commission. Therefore, a stay of the Commission’s directive to USAC would not harm any party.

D. A stay is strongly in the public interest

For the Commission to order implementation of a recovery plan that is not legal would not be in the public interest. Furthermore, the harm to the Schools and Libraries program of such a directive would also not be in the public interest. Conversely, the avoidance of these implications would be in the public interest.

¹⁴ Commitment Adjustment Order at ¶16.

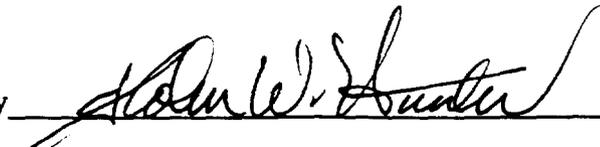
II. Conclusion

For the foregoing reasons, the Commission should grant the USTA request for immediate stay pending review of the requests for reconsideration of these issues.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By



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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on December 20, 2000, Petition for Immediate Stay Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the attached service list.



Meena Joshi