Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6
	)	
	)	
	)	

Comments of Greg Weisiger on the Third Report and Order Notice of Proposed Rule Making

It is again my pleasure to come before the Commission with comments on the Third Report and Order and Notice of Proposed Rule Making in Docket Number 02-6. Although employed by the Virginia Department of Education as statewide E-Rate coordinator, and member of the State E-Rate Coordinators Alliance, these comments are submitted as an individual with individual opinions and recommendations. The commonwealth of Virginia, the Virginia Department of Education, or the State E-Rate Coordinator's Alliance do not endorse and may or may not agree with these comments.

The Commission requests comment on several E-Rate related issues: Adjustment to the Discount Matrix, the Form 470 and its role in enhancing or deterring competitive bidding, the definition of a rural area, wide area network issues, and funding commitment adjustment.

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Comment:

Background

The Telecommunications Act of 1996 is the law of the land. Section 254(h) of the law is straightforward and relatively simple. It states: "All telecommunications carriers shall… 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." This statement is the basic premise for establishment of E-Rate regulations. The law charged the Federal Communication Commission (FCC) with regulation and administration of the law. The FCC ordered that the National Exchange Carrier Association (NECA) should establish a not-for-profit company to administer FCC regulations. NECA charted the Universal Service Administrative Company (USAC). A division of USAC, the Schools and Libraries Division (Administrator) is the administrative body for the E-Rate program.

A Law for All Seasons

The law, it is said, is like a causeway. It keeps those subject to the law on a narrow pathway to or from desired goals. Subjects that stray from the pathway will deal with the consequences of breaking the law, within the bounds of other laws guaranteeing a presumption of innocence and due process.

Regulations and administrative policies in support of the law must be clear enough for subjects to understand so that they may voluntarily stay within legal boundaries. Similarly, administrators of the law must also keep within not only the laws they administer but ALL laws governing their activities. Throughout history, regulators and administrators sometimes depart the narrow causeway and regulate or administer on the basis of convenience or expediency rather than strict adherence to laws. These departures are normally the result of a perception by the regulator or administrator that justice would be better served with circumvention of applicable law - the rights of regulated and administrated subjects notwithstanding.

An administrator, confronted with a subject it speculates has violated established legal regulation or policy, may sometimes knock down legal barriers in order to catch the devil. A regulator, faced with a fiscal dilemma, may conjure justifications to reallocate funds in defiance of established policy. Done once, it becomes easier to knock down another and another until all barriers – erected for our protection, are gone. Then, who is the devil? And when the devil decides to come after us – what do we do then?

An applicable example occurred with the E-Rate Administrator in funding Year Six. The first funding commitment wave of Year Six contained denials for applicants across the country because the Administrator determined that the E-Rate applications contained 30 percent or more of "unsubstantiated" charges. These denials, hundreds to date, began on May 1, 2003 and continue today. Prior to the first denial, applicants were given no notice of this new policy and applicable FCC regulations did not address the issue at all. Appeals were filed with the FCC and remain pending in the lengthy backlog of unresolved appeals at the Commission.

The Administrator, faced with hundreds of millions of dollars annually in committed-but-unspent funds, may have determined implementation of the unsubstantiated policy would reduce unspent funds. Further, the Administrator may have concluded that "unsubstantiated" may be a synonym for "ineligible," which may be included in calculations for evaluation of the 30 percent rule. This policy may or may not have been implemented under the direction or knowledge of the FCC. It was certainly implemented without prior notice to applicants. It is still not at all clear how applicants can "substantiate" charges that are by definition in current instructions "estimates" of future needs.

In other examples, Administrator practices appear to stray further from the letter of the law and deny subjects adequate due process. Denial patterns associated with certain vendors and applicants could be construed to be manufactured when analyzing all funding commitments for those applicants or vendors. Clearly in some cases, particularly some Commitment Adjustment actions, due process rights of applicants have been violated. Unfortunately, the Administrator's review criteria and operations are kept under lock and key – apparently even out of reach of the Freedom of Information Act. To paraphrase the paraphrased title of this chapter – How doth it profit a man to give up his soul for the whole world - But for the SLD?

Strict adherence to legal procedure by the Administrator is vitally important for the integrity of this program. Through funding denial the Administrator has the ability to drive companies out of the E-Rate process and even out of business. The Administrator may deny all funding applications associated with a particular vendor for a variety of reasons. Or, Administrator may simply delay review of applications, using the passage of

time as an effective funding denial. Once denied funding, Applicants may appeal the denial to either the FCC or Administrator. The Administrator will deny the appeal out of hand. The applicant must then appeal to the FCC. Currently, the backlog of appeals at the FCC extends approximately 18 months. A denial by the Administrator for a 90 percent discount applicant who cannot afford the service, is effectively a denial of service for the entire year. If a vendor is targeted for denial in a given year, that vendor's E-Rate business is in jeopardy for years to come, as applicants become aware of particular bad luck with funding for certain vendors.

The law and initial Commission regulation did not contemplate the variety of creative schemes and scams vendors and applicants have devised to dip into this two-and-a-half billion dollar annual program. The press and congressional investigators have brought a number of instances to light and the Administrator has rightfully denied funding to quite a few more. The Commission has strengthened rules governing debarment from the program. Despite the publicity and investigations, the Administrator and Commission should be reticent with further regulation causing unreasonable and undue scrutiny on the thousands of honest applicants trying to navigate the daunting and complex rules and ever-changing policies of this program. A twenty to forty percent denial/rejection rate year after year is simply unacceptable. A better mechanism must be established to ensure fair distribution of funding, prevention of waste, fraud, and abuse, and preservation of the rights and due process of all involved.

Some denials have nothing to do with waste, fraud, or abuse prevention. Rather, the denials or rejections appear to be an attempt by the Administrator to enforce ridiculous policies. For example, applications are rejected because the applications failed

to put zeros on the Form 471, Block 4, Columns 4 and 5 for new construction and administrative buildings. The applicant left the spaces blank, to represent zeros. Normally, a blank space would constitute a "zero" but apparently not in the policy offices of the Administrator.

Clear, understandable, evenly enforced regulations and policies must be maintained for the success of this program.

Questions for NPRM Consideration:

The Commission seeks comment on whether the Discount Matrix should be adjusted, how the reduction should be implemented, and what would the effect be.

The Third Order made significant changes in funding for internal connections by limiting the number of times applicants may receive funding within a five year period. This action was intended to reduce demand for Internal connection funding in future years. Because this aspect of the Order will not be enforced before Funding Year Eight, the impact of funding limitations is not apparent as Year Seven funding requests are being tallied. It would appear Year Seven demand remains well above available capital but below the IBM influenced Year Six demand.

Reducing the number of consecutive years an applicant can receive funding and requiring applicants to retain equipment for at least three years should mute demand for internal connections somewhat in years hence. It is unclear however if these steps will reduce instances of waste, or abuse.

Waste and abuse reduction is one of the key benefits of the proposal to reduce the top two discount categories for internal connections. Numerous audits, investigations,

and application reviews have overwhelmingly involved high discount applicants requesting excessive funding for internal connections. Conversely, requests for telecommunications and Internet services generally do not appear excessive for the same applicants. Analysis of each funding year since Year Two bears out this theory.

Reducing the discount matrix will work hand-in-hand with provisions of the Third Order to help both reduce funding demand and waste and abuse. The combination should allow funding for internal connections to reach applicants at the 20 percent level for the first time in six years.

Lower the Top Discount Rate to 70 Percent

While I concur with the Commission's desire to ensure connectivity in the nation's poorest schools and libraries, I believe a ten percent match does not provide a sufficient incentive for applicants to limit internal connection funding requests. Often such requests include excessive or overly elaborate maintenance agreements or "help desks" which go far beyond basic network maintenance and have the effect of augmenting school employees with service provider employees, paid for with E-Rate funds. Admittedly, such funding requests have been approved in the past, no doubt encouraging similar requests. The Ysleta Decision details the confusion that can ensue when an extravagant or novel service has been funded by the Administrator. Applicants and vendors could rightfully conclude that a practice previously funded by the Administrator would be acceptable for all applicants. However, the Commission notes on numerous denials that previous funding approval does not change compliance with applicable regulation, and the applicant is referred to the Commitment Adjustment

department of the Administrator to investigate the revelations volunteered by the applicant on appeal.

The Ysleta Decision, while giving more guidance on acceptable procurement methods and types of service allowable for internal connection funding, stops short of addressing the totality of waste and abuse associated with high discount internal connection applications. Specifically, Ysleta or the Third Order did not address "economic reasonableness" as criteria for application evaluation. Barring "economic reasonableness" as a quantified and FCC regulated test for application evaluation, the discount matrix must be lowered to address continued wasteful practices.

After considering issues such as abuse of the program for Priority Two at the 90 percent level, I conclude that the discount matrix should be adjusted downward for internal connections. All applicants with 50 percent or more students eligible for the National School Lunch Program should be eligible for a discount of 70 percent for internal connections.

This solution would have several advantages. First, fraud and abuse would be drastically reduced because applicants would be required to pay a higher amount for equipment and may not be inclined to purchase expensive, unnecessary products. Second, with a lower discount, more applicants will be funded, as additional funds previously earmarked for 90 percent applications would be committed to more applicants. Finally, shady vendors that use phony grant schemes or inflated prices and kickbacks to effectively give applicants free equipment would cease when required to match 30

percent of the cost. This suggestion should also satisfy common carriers that have objected to funding of internal connections since the beginning of this program.

Mechanism for Funding Reduced Discount Rates

As noted, discount rates for Priority One services should remain unchanged. The primary charge of the E-Rate program under the Telecommunications Act of 1996 is to provide discounted connectivity for schools and libraries. The 90 percent discount for connectivity, particularly for poor and isolated applicants is necessary and should not be changed. Again, there appears to be relatively little waste or abuse with Priority One applications at all discount rates, as noted in the State E-Rate Coordinator's initial comments on the Second Order NPRM.

In the event that funds remain after funding Priority One requests, the Rules of Priority should remain in place as written. After funding Priority One services, Priority Two services should be funded in accordance with the Rules of Priority described in Section 54.507(g). If insufficient funds are available for all Priority Two requests, remaining funds should be distributed at the appropriate discount, first to recipients of Priority One services at the 90 percent level, then 89 percent, and so on until all funds are exhausted. A minor change in Section 54.507(g)(1)(iii) can facilitate this suggestion.

The Commission seeks comment on how to transition to the new discount matrix.

Because this regulation is proposed to take effect with the 2005 funding year, also known as Year Eight, applicants will not have the opportunity to establish multi-year contracts at high discount rates in anticipation of changes in regulation since the funding

window for Year Seven has closed. Therefore, timing of regulations reducing the discount matrix will limit potential abuse.

Funding requests, including appeals for the life of the appeal, received on or before the close of the Form 471 filing window for Year Seven – February 6, 2004 – should receive the appropriate discount for funded internal connection services for the life of the contract. For administrative ease, the discount rate committed the applicant for Priority One services should be used for continuation of multi-year contracts that secured funding during Year Seven or before. For example, a consortium applicant with a discount rate of 81 percent in Year Seven and a discount rate of 85 percent in Year Eight, should receive a discount of 85 percent for multi-year internal connection contracts signed before February 6, 2004. The same applicant would receive a discount rate of 70 percent for all internal connections contracted after February 6 for which discounts are sought in Year Eight. Other applicants that did not request internal connection funding for multi-year contracts during Year Seven or before may receive discounts according to the new discount matrix.

Competitive Bidding Process

The NPRM asks whether or not the required posting of the Form 470 results in competitive bids and if the 470 serves the needs of the applicant community. It does not on both counts.

The Form 470 Should be Eliminated

The Form 470 should be eliminated. A posted Form 470 per se generally does not lead to competitive bids. Typically, competitive bids result from procurement solicitation

procedures under state, local, or private board regulation or guidelines. Examples of a lack of response from a Form 470 posing include the recent FCC decision in Winston-Salem Forsythe County, and most every rural applicant seeking telephone service. The FCC is also aware of a strategy employed by at least one vendor that engaged the services of a "consultant" who would file Forms 470 on behalf of private schools across the country. After 28 days the vendor would send a contract to the applicants. More often than not the applicant would choose the vendor for E-Rate eligible services. Applicants report absolutely no response from the 470 posting.

The Form 470 has become more a tool for denial than a vehicle for competition. Numerous applications are denied each year for reasons such as "Applicant cited a Form 470 that has not been certified," "Applicant did not list type of service requested on a Form 470," or "Similarities in posted Form 470 indicate competitive bidding violations." Each year more funding requests are denied because certification pages are not received or the infamous Box 14 is checked and services outside of "basic telephone" are requested.

The question of telecommunications competition in rural areas is more basic. The High Cost, Low Income portion of the Universal Service program is a hold-over from the Telecommunications Act of 1934, with the goal of providing affordable telecommunications to all citizens, regardless of location. Historically, the fund has provided subsidies to a single carrier serving a geographic region. Although the Telecommunications Act of 1996 contemplates expanded competition, Commissioner Adelstein, in a January 19 speech, expresses a note of caution: "There is concern that many states and the FCC began using universal service to "create" competition in areas

that could barely support even one provider, let alone multiple." In the current environment, it seems clear competition in rural areas is nonexistent or lacking. Funding denials for Form 470 issues for applicants where virtually no competition exists is particularly devastating to those applicants.

Using the Form 470 to Limit Competition

Applicants can use the Form 470 to actually limit competition. If an applicant selects item 7(a) requesting only tariff service and lists state services covered under tariff, the applicant has absolutely and legally limited the pool of potential vendors to those holding geographic tariffs. In many cases, there would be only a single choice for applicants at a single price. While completely within current program rules, competition is effectively thwarted. Tariff service is typically more expensive than services procured through competitive bid. This method of service procurement should reduce the possibility of funding denial for procurement violation – at least from an SLD perspective.

In another example, funding Year Seven is the first year for voice mail eligibility. It is eligible as a telecommunication service or an Internet access service. To receive E-Rate funding for voice mail, it must be listed on a Form 470 or be included in the RFP for services. If an applicant has an existing multi-year contract that includes voice mail and voice mail was not included on the establishing Form 470 or establishing RFP, the applicant must post a new 470 listing voice mail and "consider" all proposals (if any) for voice mail service – altering the existing contract if necessary if a new vendor offers the service at a lower price.

If the applicant did not post a request for voice mail in the original Form 470 or RFP, a new request must be posted. If the current vendor for voice mail is a telecommunications common carrier and the applicant wishes to enhance the chances that the current vendor is selected to continue the contract, the applicant would not list voice mail as an Internet access service request. Any Internet access voice mail vendor would be eliminated for consideration because the Form 470 did not list that service – even if the Internet access vendor had the lowest price for voice mail service. During Administrator review, could this result in denial because "price was not the primary consideration?" Or, if the Internet vendor voice mail service was selected, would the funding be denied because "the type of service requested not listed on Form 470?" Based on previous experience with the Administrator, both will happen.

Beyond the questions of enhancing or limiting competition through filing of the Form 470 is the question of what should a Form 470 say. Typical advice from state E-Rate coordinators, including myself, prior to December 4, 2002, was that Form 470 postings should be a general as possible, listing all possible services. The logic behind this advice was not to limit the possible types of services or service providers, and a fear that a particular service not listed on a Form 470 would be selected by the applicant and the funding application would be denied by the Administrator because the service was not listed on the Form 470.

On December 4, 2002, the SLD posted on its Website a "warning" to applicants about procurement of services, including language on the Form 470. The FCC decision in Ysleta warned applicants that the Form 470 should be specific to the needs of the applicant and should not be a laundry list of virtually all eligible services. This

ambiguous guidance does not serve program goals and only results in further confusion for not only applicants but also for application reviewers tasked with evaluating applications under such schizophrenic policy.

If no Form 470, What?

Public entity applicants are bound by state and local procurement laws. Private schools are governed by boards or other bodies. There is a wide disparity of procurement laws between states and procurement policies for private schools. It will be an almost impossible, and certainly impractical for the Administrator to become well versed in procurement law of more than 50 state and territory governing bodies. This, in addition to scrutiny for Form 470 violations, will be the evaluation policy of the Administrator this year.

A simpler solution would be to set benchmark recommended prices for various services and products. As discussed above, waste and abuse for Priority One services appears to be minimal. Priority Two however seems ripe for abuse. Funding commitments for internal connections range from several thousand dollars to over a million dollars per school. Experience indicates an adequate local area network, including hardware for a 900 student, 50 classroom, single building school can be done for approximately $300,000. Internal connection requests in excess of this total amount should be scrutinized for potential waste, or abuse, particularly if the same building was funded for internal connections within the past two years. The applicant very well may be installing a local area network one year and a telephone system the next. Provided both funding requests are within cost guidelines, a relatively short and simple review would be necessary.

The Commission has yet to instruct the Administrator to evaluate funding requests for "economic reasonableness" as required by the Act. It is time to include this requirement of the law in Commission regulation and Administrator policy.

COMAD: Be Very, Very Careful Before Taking Money from School Children

In the NPRM the Commission seeks comment on a range of post commitment issues where funds committed and/or disbursed to vendors should be recovered. Comment is requested on recovery of funds for statutory violations as well as violations of waste, fraud, or abuse.

The Commission rightfully authorized the Administrator to recoup funds from applicants/vendors when funding was committed for ineligible services and statutory violations. The NPRM seeks comment on whether and under what conditions the Administrator should engage post-commitment adjustments for wasteful or abusive practices. The Commission should absolutely not expand the post-commitment adjustment powers of the Administrator beyond those enumerated in the Commitment Adjustment Order. Reasons set out in the first section of these comments, A Law for All Seasons, and the experience of Norfolk Public Schools and their COMAD appeal now before the Commission should dissuade Commitment Adjustment expansion. Authorizing the Administrator to conduct post-commitment adjustments for "waste or abuse" requires a great deal of subjectivity of the Administrator. This subjectivity properly belongs in the PRE-commitment stage of the funding process – within the limits of the law, of course. If the Administrator funds applications in error, but outside the scope of the Commitment Adjustment Order, the Administrator or administrator contractors should be held liable for repayment of inappropriate funding. However, if the

inappropriate funding was the result of vendor or applicant willful misconduct, the matter should be addressed by law enforcement entities and dealt with accordingly.

For these comments and a life lesson in post-commitment adjustments gone awry, I offer an excerpt from the Norfolk appeal and later, in almost identical language in Union Parish.

Norfolk Public Schools Appeal:

Occasionally, an applicant is funded for discounts on services that are not eligible for E-Rate funding. With a confusing eligible services list and limited training for the temporary employees charged with reviewing applications, a certain number of ineligible requests will be funded. In addition, the funding of telecommunications services is limited to telecommunications common carriers. Occasionally, telecommunications services will be funded for non-common carriers.

On the other hand, the Administrator will often not discover ineligible funding before the service provider had been paid. With the exception of Year One of the E-Rate program, when improperly funded applicants were granted a waiver by the Commission,[1] the Administrator must request service providers to repay funds that had already been disbursed for services rendered. Post commitment audits have uncovered a number of these situations. Both applicants and service providers are wary of the possibility that E-Rate discounts are never guaranteed years after the work has been completed, sub-contractors paid, taxes paid, and profits reported. Some service providers have refused to participate in the program or have begun demanding clauses in contracts that applicants

[1] FCC 99-292, Released October 8, 1999

will be held liable if E-Rate discounts are retroactively denied. On September 30, 2003 BellSouth petitioned the Commission for assurance that it would not be subject to COMAD should it act as "Good Samaritan" for the state of Tennessee.

The COMAD Waiver Order, FCC 99-292, recognized the fact that this is an exceedingly complex program where funding mistakes will happen; however, the Commission acknowledged that applicants in Year One had not been put on notice that the Administrator would seek to recoup funds improperly dispersed.[2] The waivers in this instance were given to applicants that had violated competitive bidding rules, were funded for ineligible services, or were funded in violation of the Rules of Priority to name but a few. The Commission held that applicants and service providers should have been given notice that funding could be rescinded. Consequently the following language was added in fine print to certification forms in Year Two:

> Applicants' receipt of funding commitments is contingent on their compliance with all statutory, regulatory, and procedural requirements of the universal service mechanisms for schools and libraries. FCC Form 471 Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements. If the SLD subsequently determines that its commitment was erroneously issued either due to action or inaction, including but not limited to that by SLD, the Applicant, or service provider, and that the action or inaction was not in accordance with such requirements, SLD may be required to cancel these funding commitments and seek repayment of any funds disbursed not in accordance with such requirements. The SLD, and other appropriate authorities (including but not limited to USAC and the FCC) may pursue enforcement actions and other means of recourse to collect erroneously disbursed funds.
> The timing of payment of invoices may also be affected by the availability of funds based on the amount of funds collected from contributing telecommunications companies.[3]

[2] FCC 99-292 at 7.
[3] FCC 99-292 footnote 19.

While the new language was relatively broad in scope, it provides specific guidance for post commitment procedures. “Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements.”

Clearly, the intention here is to treat post-commitment reviews differently from pre-commitment reviews. In the post commitment scenario, the Administrator must audit the applicant or initiate some “other review” to determine if funds have been committed in error. In our case, the Administrator relied on its pre-commitment Item 25 review to COMAD our funded applications rather than to audit or initiate “other reviews” of our applications.

The intent of additional COMAD restrictions on the Administrator should be self evident. Applicants, particularly high discount applicants such as ourselves, very often would not begin a project while a discount application was under review, as the applicant may have insufficient funds to complete the project or engage the services without financial assistance through the E-Rate discount mechanism. Once a funding commitment has been issued, services can begin with assurance that the discounted portion will be paid, provided the services were eligible, telecommunications services were provided by a common carrier, or the applicant did not engage in fraudulent or illegal practices to obtain funding. The test for post commitment COMAD should necessarily be very restrictive on the Administrator, lest the applicant community be

subject to COMAD for any number of reasons years after services were rendered and service providers paid.

Seeing the potential for disaster with widespread demands for return of funds, the Commission was very specific and limiting with instructions to the Administrator with its authority to adjust funding commitments. According to the COMAD Order,[4] the Administrator is limited to adjusting funding commitments to: (1) applications seeking discounts for ineligible services;[5] and (2) applications seeking discounts for telecommunications services to be provided by non-telecommunications carriers.[6] It was not necessary for the Commission to include COMAD of commitments obtained through fraud, as those commitments should be revoked as a matter of criminal law.

Funding requests in question under this Request for Review do not meet these limited tests. The services we requested were clearly eligible and telecommunications services were provided by telecommunications common carriers. Our applications were reviewed by the Administrator and properly funded. The Administrator was aware of their existence during its Item 25 review and chose to fund them. The Administrator was not authorized to COMAD these funding requests under the Commission's COMAD Order.

Administrative "review" should not be limited to linking failed Item 25 Review with funded applications. "Review" in such cases could be in the form of a post-commitment audit to discern whether discounted services were actually used effectively.

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[4] FCC COMAD Order, FCC 99-291, Released October 8, 1999.

[5] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9002 (1997), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Erratum, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*Universal Service Order*).

[6] 47 U.S.C. § 254(h)(1)(B).

Conclusion

Norfolk Public Schools reiterates that the E-Rate applications here under appeal were reasonable and for necessary services. Contracts were competitively bid and provided exceptional value for Norfolk schools and the E-Rate program. We had sufficient budget to pay not only our non-discounted share, but the full amount – as we did in the case of the rejected application failing the smear test.

Repayment of over one million dollars in Year Two funding will produce a grave hardship on the service providers Norfolk selected to provide E-Rate discounted services. It will also damage the relationships we have developed with our service providers over the years. Forcing our service providers to repay previously committed funds will also discourage them from further participation in the E-Rate program, without assurance from applicants that they will be made whole should funding be retroactively revoked.

The services were obtained through proper competitive bidding and complied with all regulation and policy in effect at the time. There was no attempt to defraud the program or waste program resources.

End quote

The Commission seeks comment on whether there would be circumstances for recovery of funds directly from the ultimate beneficiary of funding. The question is posed improperly. The question should be whether there should be circumstances for recovery of funds directly from the service provider, as the Commission should grant various petitions filed by Bell South, Verizon and others arguing that Commitment Adjustment funds should be recovered from the beneficiary. The NPRM also notes these petitions will not be a topic for discussion. For my comments however, I must conclude that

petitioners will ultimately prevail either before the Commission or in the courts and the improper mechanism for recovery of funds will be overturned.

Although there are a number of issues involved with the timing of a Commitment Adjustment, generally, the only instance the Commission should attempt to recover funds directly from a vendor is when the vendor willfully violates Commission Universal Service regulation or is convicted of a criminal violation associated with Universal Service funding, procurement, or utilization.

There are two major types of Commitment Adjustments to consider. Commitment Adjustments prior to payment and Commitment Adjustments after all funds have been disbursed. The procedure in the former case is to reduce committed funding by the amount of the adjustment, thus reducing the account balance reserved by the Administrator for a particular funding request number (FRN). Within this category of Commitment Adjustment are adjustments for work performed and adjustments for work not performed by that date. Examples of Commitment Adjustments after work performed but before payment abound as the Administrator has increased scrutiny of invoices received resulting in an increased number of Commitment Adjustments. This type of Commitment Adjustment is particularly disruptive for vendors and applicants. It is disruptive for vendors who provided discounted service and were expecting the discounted share of payment from the Administrator. If the Commitment Adjustment holding vendor payment is for a simple applicant related error, the vendor naturally questions the business decision to participate in the E-Rate program

Commitment Adjustment after work before payment effectively shifts Commitment Adjustment payment from vendors to applicants when the applicant has

paid full price for service and is requesting payment through the Form 472 (BEAR) process. The vendor has received full payment but it is the applicant that ends up holding the bag. If the Commission maintains the stance that vendors must pay Commitment Adjustments, it would logically follow that when a Commitment Adjustment is made on a BEAR form, the Administrator should order the vendor to pay the applicant the discounted portion of the withheld funds.

Commitment Adjustments after fund disbursement, unlike pre-payment adjustments, allow the applicant or vendor the luxury of retaining the funds for work performed while appealing the decision. Applicants subjected to audits years after funding fall into this category. Two Virginia public school divisions audited by the Commission will soon receive commitment adjustments for allegedly receiving discounts for ineligible services. In both cases, the Administrator will attempt to recoup funds from the vendors, even though the audit reported absolutely no improper conduct by the vendors. In fact, the report cited a lack of thorough review by the Administrator for funding the relatively small amounts of ineligible services. Yet, according to current Commitment Adjustment regulations, the vendors must pay for mistakes made by others.

Norfolk is another good example of post commitment, post payment Commitment Adjustment. Because of a number of improbable events and horrendous mistakes by the Administrator, a number of Commitment Adjustment letters were sent to Norfolk informing it that over 1 million dollars in previously committed funding would have to be returned by several vendors. Although Norfolk was not directly responsible for returning the funds, Norfolk's relationship with the vendors could be severely damaged should the

demands for return of funds be upheld. For that reason, Norfolk filed appeals with the Administrator and Commission.

Although the process will be expensive and time consuming, Norfolk and its vendors at least have E-Rate funds in hand while the process moves from Administrator to Commission and possibly on to the courts. Applicants faced with the post-commitment, pre-payment Commitment Adjustment find themselves fighting a long uphill battle to actually receive payment for work performed!

The Commission should not expand use of the Commitment Adjustment process beyond its current state.

The NPRM asks if the Commitment Adjustment process should be expanded to include services for which funding was committed in violation of FCC regulation or Administrator policy. To this I say absolutely NOT! If the Norfolk and Union Parish arguments do not serve as a wake-up call to the Commission, I offer for argument and example, a scenario for consideration. Given the discussion above, Commitment Adjustments fall into three general categories:

Post Commitment, Pre-Payment, Pre-Work
Post Commitment, Pre-Payment, Post-Work (when invoices are scrutinized)
Post Commitment, Post-Payment, Post-Work (generally from audits)

Under current regulation, the Administrator is limited in its power to issue Commitment Adjustments to: (1) applications seeking discounts for ineligible services; and (2) applications seeking discounts for telecommunications services to be provided by non-telecommunications carriers. For argument, let us suppose the Commission adopts rules allowing the Administrator to adjust commitments for violations of any Administrator policy. One such "policy," discussed above, is the 30 percent

unsubstantiated policy for review of applications. Suppose an applicant, after "thorough review" by the Administrator, is issued a commitment for a particular FRN for $100,000. The applicant opts to pay full price and submit BEAR forms to the Administrator. The applicant is required to submit BEAR forms to the Administrator no more than 120 days after the last day to receive services. On day 119, the applicant submits a single BEAR form to the Administrator for $64,245.00. Seeing that the applicant has violated the 30 percent unsubstantiated policy, the Administrator issues a Commitment Adjustment letter rescinding the entire commitment for violation of Administrative policy! This scenario would no-doubt be overturned by the Commission, if the applicant or vendor appeals on time. Meanwhile, while the appeal is sitting at the Commission waiting for a decision (currently a year and a half), the applicant is out-of-pocket $64,245.00 while the appeal meanders through the established process.

Considering some of the incredible denials foisted on applicants by the Administrator during the five complete years of this program, and the clearly improper Commitment Adjustments for Norfolk and possibly Union Parish, the Commission would be ill advised to grant additional Commitment Adjustment powers to the Administrator at this time. Further, the Commission should carefully consider the three Commitment Adjustment scenarios above when considering new regulations. Commitment Adjustments for applicants in the Post-Commitment, Post-Work, Pre-Payment category deserve special consideration by the Commission when considering due-process and applicant rights issues.

The proper place to address waste and abuse issues is in the application review process. If clear regulations and clear, easily understandable policies are put in place,

applicants would know exactly how to structure service requests, contracts, and applications to receive discounts authorized by the Telecommunications Act of 1996. Mentioned above, two audits conducted by the Commission found ineligible services funded for two Virginia applicants – Prince William and Arlington. One audit found improper use of pager service and the other improper use of cellular telephone service. While these findings will be subject to Commitment Adjustment in accordance with the Commitment Adjustment Order, those same services are absolutely eligible in funding Year Seven. But for a single order by the Commission, simple mistakes would have been eligible.

The Commission asks if Commitment Adjustments should be waived for minor violations. As mentioned above, the Commission should not expand provisions of the Commitment Adjustment Order. Commitment Adjustments for instances of fraud are warranted as fraud would constitute a violation of statute. Wasteful commitments on the other hand were improperly granted by the Administrator after reviewing the application. Such applications should not be subject to Commitment Adjustments. The Administrator should be more careful when evaluating funding requests. The Administrator should be incentivized to reduce its errors – positively for reduced mistakes and negatively for increased numbers of mistakes.

Applications where program abuse is suspected should be treated on an individual basis. Let us use the example of the vendor that engaged the services of a consultant to file Form 470s on behalf of applicants, without the applicants' knowledge. If the Administrator has issued commitments for such vendor when the accusations come to light, each application must be carefully reviewed before further action is initiated. The

Administrator must not paint a blanket shadow on the vendor. The Administrator must not assume the actions associated with some funding requests are true for all. In this instance, some contracts could have come about from bona fide responses to properly posted Form 470s. The vendor in this example may have two offices. The Dallas office engages in the questionable practice; however the Atlanta office operates above board. A blanket denial or Commitment Adjustment for all applications associated with the single vendor would unfairly deny funding requests properly negotiated and funded. In this example, the Administrator must determine if ineligible services were funded, if a telecommunications service was provided by a non-common carrier, or if a statute had been violated. If the only reason for potential Commitment Adjustment was alleged Form 470 abuse and the services requested were eligible, the Administrator must prove a willful violation of program rules in each instance before a Commitment Adjustment could not be made. The Commission must also set a benchmark for the level of "willful" violation for Commitment Adjustment purposes.

Additional Suggestions for Reduction of Waste, Fraud, and Abuse.

Before creating new Commitment Adjustment regulations, the Commission should review its relationship with the Administrator for compliance with Commission regulations before granting the Administrator additional powers. For some time I have contended Commission regulations and Administrator policies are confusing and ever changing. Additionally, the Administrator employees have limited training and often issue improper denials. Allowing the Administrator greater latitude with Commitment Adjustments without significant additional oversight of the Administrator would be disastrous. Past Administrator performance has not engendered any level of confidence

with even an elementary ability to enforce or carryout Commission regulation. The Commission should consider terminating its relationship with the Administrator and engage services of a competent authority for administration of this program.

The Administrator was granted its existence through a Commission Order. The Order did not specify that the Administrator should be competent – just that it exist to fulfill Commission directives. The Commission has exactly what it asked for. In the competitive marketplace there are hundreds of private enterprises hungry for an opportunity to administer a program such as this. When those entities see the annual budget of nearly $50 million to administer roughly 100,000 accounts (FRN), they would jump at the chance! The product would be of the highest American private enterprise standards – that is to say best in the world – and at a cost lower than present. Further, the Commission should finally terminate the incestuous relationship between the Administrator and its contractor, the National Exchange Carrier Association which is much too closely tied to the telephone industry.

The Commission should file a Form 470 and issue a Request for Proposal for the Administrative duties associated with the Schools and Libraries Mechanism. The RFP should establish deadlines for reviewing applications and include incentives for meeting the deadlines. The RFP should spell out requirements for evaluation of applications and specific conditions for denial. The RFP should clearly state consequences for improperly funding applications as well as improperly denying applications. After 28 days, the Commission may sign a contract with the new Administrator and begin reviewing applications.

Without question, waste, fraud and abuse can best be detected during application review. Competent reviewers knowledgeable of Commission regulation, appeal case history, Administrator policies, and wasteful or fraudulent practices are best suited to detect questionable activities. Using economic reasonableness or benchmark funding as a test for application review will reduce wasteful practices. Clear regulation and policy explaining exactly what benchmark funding or economically reasonable funding requests are and consequences for straying from benchmarks or submitting economically unreasonable funding requests could result in a new funding commitment: "This funding request is for $1.2 million for a local area network in a 900 student, single building school. An economically reasonable request for such service is $300,000. The applicant has not shown good cause for departure from the average cost. Applicant is awarded the non-discounted portion of $300,000." The applicant is able to salvage some funding, the program does not run out of money, and the vendor keeps a customer.

Respectfully Submitted this eighth day of March, 2004,

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