

**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**

**BELLSOUTH CORPORATION**

Theodore R. Kingsley  
Richard M. Sbaratta

Its Attorneys

Suite 4300  
675 West Peachtree Street, N. E.  
Atlanta, Georgia 30375-0001  
(404) 335-0720

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**COMMENTS**

BellSouth Corporation, on behalf of itself and its wholly-owned subsidiaries (“BellSouth”), submits these comments in response to the *Second Further Notice of Proposed Rulemaking* released by the Commission on December 23, 2003.<sup>1</sup>

**SUMMARY**

The Commission’s overarching goals with the e-rate program should continue to be (1) the simplification of e-rate program administration; (2) ensuring the equitable distribution (and recovery) of program funds; and (3) the prevention of waste, fraud and abuse within the program. Although the Commission has determined not to resolve in this proceeding the pending petitions for reconsideration of the *Commitment Adjustment Order*, the Commission should at least establish interim policies that make clear that when it seeks recovery of disbursed program funds, the Administrator will look primarily to the applicant, and not the service provider, since it is the applicant who has the most knowledge and responsibility for the

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<sup>1</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 03-323 (rel. Dec. 23, 2003) (“*Third Report and Order*” or “*Second FNPRM*”).

application and who actually receives the benefit. In the meantime, the Commission should take immediate action to exempt service providers from fund recovery efforts where (a) the service provider is acting as a Good Samaritan, and (b) in pending COMAD appeals where the applicant, and not the service provider, has erred or violated procedures, policies or rules.

BellSouth believes that lowering the current discount matrix will provide sufficient support for schools and libraries applicants while assuring more accountability and better cost control. BellSouth supports the Commission's proposals with respect to program funding eligibility for network infrastructures. Finally, BellSouth believes that implementing the specific recommendations of the Waste, Fraud and Abuse ("WFA") Task Force is the best way of ensuring that more funding is made available to more applicants under an appropriately streamlined program with adequate protections against waste, fraud and abuse.

**I. THE COMMISSION SHOULD CONTINUE TO IMPROVE E-RATE PROGRAM ADMINISTRATION BY ENSURING EQUITABLE DISTRIBUTION AND RECOVERY OF PROGRAM FUNDS**

BellSouth commends the Commission for the improvements it has made in the administration of the schools and libraries universal service mechanism (the "e-rate program"). The rules adopted in the *Third Report and Order* should limit the ability of schools and libraries to engage in wasteful or fraudulent practices when obtaining internal connections.<sup>2</sup> The Commission's overarching goals with the e-rate program should continue to be (1) the simplification of e-rate program administration; (2) ensuring the equitable distribution (and recovery) of program funds; and (3) the prevention of waste, fraud and abuse within the program.

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<sup>2</sup> *Third Report and Order*, ¶¶ 9-30.

The *Second FNPRM* seeks comment on a number of specific proposals that can further these goals. In weighing the public comments on these proposals, the Commission should keep as its overarching goal the equitable distribution and recovery of program funds. Simplification of program administration is important, but there are circumstances where the Universal Service Administrative Company (“USAC”) Administrator, acting through its Schools & Libraries Division (the “Administrator”) must have the flexibility to consider circumstances on a case-by-case basis. Therefore, a standard rule may not be appropriate in all circumstances, although clear guidelines and expectations from applicants, consultants, vendors and service providers are. Moreover, every rule should be examined in light of the recommendations of the Task Force on the Prevention of Waste, Fraud, and Abuse.<sup>3</sup> Waste, fraud and abuse may be facilitated by rules that are unnecessarily simple or vague, as well as those that are exceedingly complex, and will nearly always negatively impact the equitable distribution (and recovery) of program funds.

**II. THE COMMISSION’S RULES FOR RECOVERING FUNDS DISBURSED IN VIOLATION OF STATUTORY REQUIREMENTS SHOULD BE TAILORED TO FIT THE CIRCUMSTANCES**

The Commission seeks comments on whether it should adopt specific recovery rules for funds that are disbursed in violation of statutory requirements, and on whether it should implement procedures or adopt rules for funds that are disbursed in violation of one or more programmatic rules or procedures under the program or in situations involving waste, fraud or

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<sup>3</sup> See Recommendations of the Task Force on the Prevention of Waste, Fraud and Abuse, Convened by the Schools and Libraries Division, Universal Service Administrative Company (Sept. 22, 2003) (“WFA Recommendations”), and USAC – Schools & Libraries Support Mechanism Interim Response to the Recommendations of the Task Force on the Prevention of Waste, Fraud, and Abuse (Nov. 2003) (“USAC Interim Response”), submitted by Letter from Cheryl L. Parrino, Chief Executive Officer, Universal Service Administrative Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (Nov. 26, 2003).

abuse.<sup>4</sup> BellSouth commends the Commission for seeking comment on the recovery of funds, an area where additional rules and clarity are sorely needed. Although it acknowledges the pending petitions for reconsideration of its *Commitment Adjustment Order*, and specifically the critical point that the Commission should recover erroneously disbursed funds from the party that received the benefit of the disbursement, the Commission states that it seeks to further develop the record in this area rather than resolve those petitions.<sup>5</sup>

BellSouth believes that the Commission should grant the long pending, and prescient, petitions for reconsideration. Especially taking into consideration particular issues that have come to the Commission's attention since those petitions were filed, the Commission should grant those petitions and particularly emphasize the point that equity is just as vital in program administration when funds are being recovered as it is when funds are being disbursed:

If the Commission does seek to collect funds, it should do so from the school or library that actually received the benefit, not the service provider, which neither provides the data contained in a funding application, nor makes any funding decisions based on that data. Further, seeking recovery from applicants rather than service providers would be consistent with Section 254(h)(1)(B) of the Act, which provides that a carrier "shall" receive an offset or reimbursement for discounted services provided to schools and libraries.<sup>6</sup>

The Commission should reverse its fundamental decision to always seek recovery from service providers. In the meantime, the Commission should acknowledge the realities of the program and, in certain circumstances, look primarily to the applicant beneficiary, who has the most knowledge and responsibility for the application.

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<sup>4</sup> *Second FNPRM*, ¶ 81.

<sup>5</sup> *Id.*

<sup>6</sup> Petition for Reconsideration of the United States Telecom Association, CC Docket Nos. 97-21 & 96-45, at 7 (filed Nov. 8, 1999) (citations omitted).

Until such time as it may change its current policy, the Commission should adopt specific recovery rules for funds that are disbursed in violation of various statutory requirements as well as for other types of violations or errors that may occur (such as violations of FCC rules, violations of USAC procedures, or when Good Samaritans are involved, to name a few).<sup>7</sup> While as a general legal principle recovery of funds should be primarily from the applicant, a broader application of this concept would suggest that recovery should come from the party that committed the error or violation. As the Commission has learned from experience, there are clearly facts under which recovery of funds is always more appropriately sought in the first instance from an applicant. By program design, service providers have no control how applications are completed and thus cannot be held responsible for errors or rule violations made by applicants. Service providers should not be made the *de facto*, if not *de jure*, guarantor of schools and libraries funding mechanism applicants. These risks may discourage some service providers from participating in the program, which in turn reduces the competitive pool of service providers.

In particular, service providers acting as Good Samaritans should not be liable to the Administrator for the recovery of program funds. Simply put, the Commission should adopt as a rule the recommendation of the WFA Task Force that a service provider should be exempted from Commitment Adjustment (“COMAD”) responsibility when it acts as a Good Samaritan.<sup>8</sup> As the Task Force states, this rule change will make service providers more willing to step into that role and will reduce the potential for waste when an existing service provider is no longer able to participate in the program. In the last calendar year, BellSouth was requested to, and

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<sup>7</sup> *Second FNPRM*, ¶ 81.

<sup>8</sup> WFA Recommendations at 12.

ultimately did, act as a Good Samaritan in a situation that involved the cooperative efforts of the applicant, state and federal regulatory authorities, and ultimately a public notice and comment proceeding initiated by the Commission.<sup>9</sup> BellSouth's involvement, and indeed, the involvement of any other service provider requested by a state or an applicant to act as a Good Samaritan, would have been facilitated by a rule embodying this specific Task Force Recommendation. Such a rule would clearly be equitable, would be simple to administer, and, by the very source of its recommendation, consistent with the prevention of waste, fraud or abuse.

In general, BellSouth believes that the nature of the e-rate program requires more nuanced rules and procedures for handling funds recovery than exist today. For example, a violation of a USAC procedure warrants a different response than a violation of an FCC rule or a statute, and there are some errors that may not warrant recovery action at all. BellSouth agrees that the FCC should not seek to recover *de minimis* amounts (such as under \$500) and should consider establishing a statute of limitations after which no recovery can be sought (perhaps to match the 5-year record retention requirement). We look forward to working with the Commission and the e-rate community to craft clear and equitable recovery rules even as the Commission works to resolve the long-pending petitions for reconsideration.

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<sup>9</sup> See *Request for Immediate Relief filed by the State of Tennessee; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 & 97-21, *Order*, 18 FCC Rcd 13581 (2003); *BellSouth Corporation Petition for Clarification of Request for Immediate Relief filed by the State of Tennessee; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 & 97-21, *Order*, 18 FCC Rcd 24688 (2003).

### III. LOWERING THE DISCOUNT MATRIX IS CONSISTENT WITH THE COMMISSION'S PROGRAM IMPROVEMENT GOALS

The WFA Task Force has recommended a reconfiguration of the current discount matrix.<sup>10</sup> BellSouth supports adjusting the discount matrix so that the highest discount level is below the current 90% available on all eligible services.<sup>11</sup> A 90% discount provides insufficient incentives for applicants to control project costs and too much incentive for vendor service providers to inflate costs. A lower discount would provide sufficient support for schools and libraries while at the same time restoring a modicum of market discipline, through more accountability and better cost control, which will combat current distortions. BellSouth believes that the highest discount available should be as low as 75%, but acknowledges that there are a number of proposals on the table that would help to address the concerns raised by the 90% discount. For example, the WFA Task Force proposes a top discount of 80% on all services, while SECA suggests reducing only the discounts for Priority 2 services. Either of these proposals would help to change the incentives in the program in a positive way. In addition, lowering the discount percentages will help ensure that the fund will be available for more schools and for more services.<sup>12</sup>

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<sup>10</sup> WFA Recommendations at 3-4.

<sup>11</sup> Statement of Margaret Greene, President, Regulatory & External Affairs, BellSouth Corporation, before the FCC's Forum on the E-rate Program, May 8, 2003, at 10-11, submitted with letter from Mary L. Henze, Assistant Vice President, Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (May 9, 2003) ("Greene Statement").

<sup>12</sup> *Id.*

#### IV. THE COMMISSION'S PROPOSED WAN RULES SHOULD ENSURE MORE EQUITABLE DISTRIBUTION OF FUNDS

BellSouth believes that the Commission should continue to refine its policies in such a way as to discourage the construction of private networks or the use of e-rate funds to subsidize construction of unnecessary new facilities that may be used to serve non-e-rate customers. While increased vigilance in the application review process is critical, BellSouth agrees that a limit on the amount of funding for discounts on service provider upfront capital investments would also be helpful. The Commission has proposed that such a limitation would take effect once those capital investments exceed 25% of the funding request for the service in question. This appears to be a reasonable starting point, which could be adjusted as the Administrator gathers data from future funding requests.

BellSouth supports the Commission's proposed rule that would establish that e-rate discounts for any service provider charges for capital investment of \$500,000 or more must be prorated over a period of at least five years.<sup>13</sup> BellSouth agrees with the Commission that such a rule could serve to spread funding for Priority One services more evenly across funding years.<sup>14</sup> Finally, and similarly, the Commission should not permit e-rate funding for dark fiber under the schools and libraries support mechanism. To the extent that the Commission does permit such funding, limitations should be adopted to preclude discounts on the full cost of dark fiber network build-out when the applicant will not be utilizing the full capacity of that network.<sup>15</sup>

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<sup>13</sup> *Second FNPRM*, ¶ 75.

<sup>14</sup> *Id.*

<sup>15</sup> BellSouth's position on dark fiber is articulated in the *ex parte* filed with the Commission on February 27, 2004; see letter from Mary L. Henze, Assistant Vice President, Federal

**V. THE COMMISSION SHOULD ADOPT THE PROPOSALS OF THE WFA TASK FORCE AND TAKE SPECIFIC ACTIONS TO REDUCE WASTE, FRAUD AND ABUSE**

The WFA Task Force has made a number of critical recommendations, and the Commission has made several proposals, that BellSouth supports in connection with the competitive bidding process in particular and the e-rate program generally. These recommendations include:

- Modification of Form 470 to require the applicant to list all products and services needed, regardless of the existence of a request for proposal (“RFP”).
- Where procurement or contract problems in a Form 470 posting are identifiable with a specific funding request or a specific vendor, the SLD should not automatically deny all unrelated funding requests on that same Form 470 posting.
- Processes should be established that would better align the application process with proposals contained in individual applications, including the establishment of a “simple” Form 470 and 471 for less complex applicant proposals.
- *Recordkeeping Requirements.* The Commission should amend its rules to provide that all records related to the receipt or delivery of discounted services that demonstrate compliance with the FCC's rules be maintained both by applicants and service providers for a period of 5 years. The Commission should clarify, however, that service providers are responsible only for records

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Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (Feb. 27, 2004).

regarding applicants to whom they actually provide service, and not records for applicants on whose contracts they may have bid, but not won.

- *Consultants and Outside Experts.* Consultants and other outside experts offering their services to applicants should be required to register with USAC and to disclose any potential conflicts of interests derived from relationships with service providers. BellSouth supports the recommendations of the WFA Task Force related to the appropriate role of consultants and outside experts, and in particular the recommendation that the SLD assign an entity code to consultants similar to that of applicants and service providers and to follow “IRS tax preparer” signature policies for consultants or other non-applicants who prepare forms for applicants. Applicants should be required to identify any such consultants or outside experts, whether paid or unpaid, that assist in any connection with the applicant’s technology plan or in the applicant’s procurement or application process.
- *Technology Plans.* The Commission should revise its rules regarding technology plans in order to ensure that applicants are ready to fully utilize supported products and services. At the very minimum the Commission’s rules should provide that technology plans be completed and approved before products and services are purchased and installed. BellSouth believes that the Commission’s technology planning requirements should be amended to be made more consistent with the technology planning goals and requirements of

the U.S. Department of Education and the U.S. Institute for Museum and Library Services.<sup>16</sup>

- *Prevention of Unauthorized Applications by Subunits.* BellSouth believes that it is reasonable for the FCC to require that an applicant certify that it has the appropriate authorization from its central authority to file the application. BellSouth also believes that false certification should be a factor to consider when, in an enforcement action, the Commission decides whether to seek recovery of the disbursed funds and from whom. A service provider should be able to rely on such certification and be presumed not to be liable to the SLD for repayment of disbursed funds unless it can be demonstrated that the service provider had knowledge that the certification was false.

All of these recommendations and proposals should be given substantial weight by the Commission, in addition to the comments received in response to the *Second FNPRM*. Implementing the recommendations of the WFA Task Force will go a long way to making an outstanding program even better.

### CONCLUSION

While the Commission considers the pending petitions for reconsideration of the *Commitment Adjustment Order*, the Commission should at least exempt service providers from fund recovery efforts where the service provider is acting as a Good Samaritan or where the applicant, and not the service provider, has erred or violated procedures, policies or rules.

BellSouth believes that a combination of lowering the current discount matrix and implementing

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<sup>16</sup> *Second FNPRM*, ¶ 94.

the recommendations of the WFA Task Force is the best way of ensuring that more funding is made available to more applicants.

Respectfully submitted,

**BELLSOUTH CORPORATION**

By: /s/ Theodore R. Kingsley  
Theodore R. Kingsley  
Richard M. Sbaratta

Its Attorneys

Suite 4300  
675 West Peachtree Street, N. E.  
Atlanta, Georgia 30375-0001  
(404) 335-0720

Date: March 11, 2004

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 11th day of March 2004 served the following parties to this action with a copy of the foregoing **COMMENTS** by electronic filing, addressed to the parties below.

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
The Portals, 445 12<sup>th</sup> Street, S. W.  
Room 5-B540  
Washington, D.C. 20554

Qualex International  
The Portals, 445 12<sup>th</sup> Street, S.W.  
Room CY-B402  
Washington, D.C. 20554

/s/ Juanita H. Lee  
Juanita H. Lee