

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

In the Matter of)	
)	
Schools and Libraries Universal Service)	CC Docket No. 96-45
Support Mechanism)	
)	

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby files reply comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking addressing the administration of the schools and libraries universal service mechanism (“E-rate”).¹ Nextel supports the E-rate program as a service vendor and dedicates significant resources to raising the awareness of schools and libraries about wireless service offerings.

The Commission Cannot Reasonably Seek Recovery from Program Vendors for Errors or Fraud on the Program by Others.

These reply comments are limited to the issue of how E-rate funds should be recovered when such funds are disbursed in violation of statutory requirements, Commission rules or procedures or in situations involving waste, fraud or abuse. The *Second Further Notice* raises this issue as a matter for comment, despite the fact that a previous Commission order addressing

¹ Schools and Libraries Universal Service Support Mechanism, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 26912 (2003) (“Notice”).

fund recovery is the subject of a pending appeal in the D.C. Circuit and several petitions for reconsideration filed in 2000, which are still pending, unresolved, before the Commission.²

The majority of commenters agree that service providers should not be held liable to refund E-rate payments where the error or wrongdoing stems from the actions, representations or malfeasance of a program recipient school or library.³ A policy requiring recovery of E-rate funds from program vendors is not only logistically challenging – it also fails to put the onus of program compliance on the party with the most at stake – the program beneficiary school or library. As many commenters observed, service providers cannot police all of the potential uses or misuses of their products and services. A rule that holds non-beneficiary vendors financially responsible for another party’s misuse of program funds or services discourages vendor participation in the program.

It is not reasonable to expect service providers to be the ultimate guarantors against errors or the fraudulent misuse of their services by third party program participants. Furthermore, exposing non-beneficiary vendors to liability for acts not within their control creates unnecessary risks for vendors which may lead some to opt-out of the program. This only results in fewer

² See *Second Further Notice* at ¶¶ 78-85 citing *Changes to the Board of Directors of the National exchange Carrier Association Inc., Federal State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, FCC 99-291 (rel. October 8, 1999) (“Commitment Adjustment Order”); *petitions for reconsideration pending, petition for review pending sub.nom. USTA v. FCC*, Case Nos. 00-1500, 00-1501 (D.C. Circuit 2000).

³ See, e.g., Comments of Greg Weisiger at 20; Comments of Cox Communications, Inc. at 9; Comments of General Communications, Inc. at 6; Comments of Qwest Communications International, Inc. at 10; Comments of Verizon at 1; Comments of E-Rate Central at 5.

choices for school and libraries and ultimately fewer resources for the intended beneficiaries of the program.

Kellogg and Sovereign Consulting (“Kellogg”) was the only commenter to support seeking E-rate fund recovery from service providers when funds are disbursed in error.⁴ Kellogg argues that service providers benefit the most in such situations and that “service providers try to ‘pull the wool over the eyes’ of applicants.” Tellingly, Kellogg offers no evidence, anecdotal or otherwise, to support this assertion.⁵ As several commenters pointed out, the reality is that the program applicants have both knowledge of and full responsibility over the preparation and contents of their applications for E-rate support.⁶ Service providers play no part in preparing a school or library’s application. Indeed, all of the necessary information, including the technology plan, desired mix of services and locations and other information, resides with the school district or library. E-rate funds are committed to a particular school or library and it is the school or library that is the beneficiary of the E-rate program. Service providers act as mere conduits of the program benefit as program vendors.

Moreover, by the time the error in disbursement is usually discovered, the service provider has already provided service to the school or library. In other words, the benefit has already been conferred to the school or library and the vendor has relied upon the fact that it will be paid for the services it provides as a condition of providing service at all. The Commission

⁴ See Comments of Kellogg & Sovereign Consulting at 11.

⁵ *Id.*

⁶ See, e.g., Comments of BellSouth Corporation at 4; Comments of the National Telecommunications Cooperative Association at 5.

essentially is asking program vendors to assume potentially huge unfunded contingent liabilities in order to participate in the program. The Commission cannot merely assert that the vendor has the ability to sue a school or library after the fact for payment; the better policy is to place the onus for program compliance and refund liability on the party that can, in fact, ensure that its behavior comports with program requirements. Schools and libraries must be held directly accountable for their own errors, mistakes, and fraud.

The Commission Should Act Promptly on the Long-Pending Petitions for Reconsideration of the Commitment Adjustment Order.

While the *Notice* recognizes that the Commission already has approved a proposal by USAC, the E-rate Administrator, to recover erroneously paid E-rate funds from program vendors over four years ago, the *Notice* inexplicably again seeks comment on whether the Commission should seek recovery of funding from program vendors or program beneficiaries. The Commission's Commitment Adjustment Order is the subject of several long-pending petitions for reconsideration and a court appeal initiated by both the United States Telecommunications Association and Nextel. The D.C. Circuit, recognizing the potential financial exposure of program vendors under the terms of the Commitment Adjustment Order, has required that the Commission report every 90 days on its progress to resolve these pending petitions for reconsideration.⁷

⁷ See *Notice* at ¶ 81. *United States Telecom Ass'n v. F.C.C.*, No. 00-1500, at 1 (D.C. Cir. Mar. 13, 2001). The Commission last reported to the Court on March 22, 2004. That report states that “[t]he Commission staff is taking steps to complete its work on the reconsideration petitions pending before the agency.” Status Report of the Federal Communications Commission at 2, *United States Telecom Ass'n v. F.C.C.*, No. 00-1500 (D.C. Cir. Mar. 13, 2001) (filed Mar. 22, 2004). The Commission has submitted status reports using exactly this language approximately every three months since January 23, 2002.

While the *Notice* explains that the Commission is further developing the record on recovery matters, in fact, the Commission has had a complete record on this matter for over four years and has failed to act.⁸ The Commission should act promptly so that parties know where they stand with respect to these matters and so that Nextel, a petitioner before the D.C. Circuit, can move forward on its appeal of the Commission's Commitment Adjustment Order if it is not substantially modified on reconsideration.⁹

⁸ Nextel incorporates by reference its comments in support of the Petitions for Reconsideration filed on this matter. *See* Comments Supporting Petitions for Reconsideration of Nextel Communications, Inc., CC Dockets 97-21, 96-45 (filed Aug. 18, 2000).

⁹ Several commenters urge the Commission to act expeditiously on the pending petitions relating to the Commission's Commitment Adjustment Order. *See* Comments of BellSouth at 4; Comments of the National Telephone Cooperative Association at 5.

Conclusion

For the foregoing reasons, the Commission should adopt a rule that requires reimbursement from the school or library, rather than the service provider, when E-rate funds are disbursed in violation of statutory requirements, Commission rules or procedures or in situations involving waste, fraud or abuse.

Respectfully submitted,

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