

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of

Schools and Libraries Universal Service  
Support Mechanism

CC Docket No. 02-6

**REPLY COMMENTS OF VERIZON ON SECOND FURTHER NOTICE OF  
PROPOSED RULEMAKING**

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**I. Introduction and Summary.**

The commenters overwhelmingly agree that the Commission should reverse its policy of always attempting to recover from service providers any school and library universal service funds that were disbursed in error. Instead, most parties agree that there should be no recovery at all for improperly disbursed funds in the absence of waste, fraud, abuse, or statutory violations, and then USAC should seek repayment only from the entity that is at fault for the improper disbursement – either the applicant or the service provider.

Based on the comments, the Commission should reiterate that dark fiber is not a telecommunications service, and therefore is ineligible for priority one funding; that content should not be added to the definition of Internet access for schools and libraries; and that Centrex should be recognized as a basic telecommunications service that is eligible for priority one funding. Contrary to the claims of one party, the Commission may not and should not permit services funded through the schools and libraries program to be used by the general community for purposes other than those permitted by the Act and the Commission's rules. The Commission also should not adopt proposals for sweeping expansion of the definition of "rural"

services, but should instead refer to the Joint Board the matter of what the definition of “rural” should be, both for schools and libraries and for the rural health care program. Finally, it is premature at best to allow funding for equipment used for voice over Internet protocol services, as one party has suggested.

**II. Most Parties Agree That the Commission Should Limit the Instances in Which Universal Service Administrative Company (“USAC”) Seeks Recovery of Funds that Have Already Been Disbursed.**

Several parties suggested that there should be sweeping revisions to the current process for seeking repayment of funds that have already been disbursed. Specifically, the Commission should revise USAC’s collection process so that:

- Service providers acting as “Good Samaritans” are not asked to repay funds they disbursed in their Good Samaritan role.<sup>1</sup>
- Funds generally are recovered from the party responsible for, or that benefited from, the improper disbursement. This means that service providers should not be held liable for errors by the applicant.<sup>2</sup>
- No funds should be recovered when improperly disbursed due to errors of the Administrator.<sup>3</sup>
- No funds should be recovered where recovery is not cost-effective.<sup>4</sup>
- Recovery should be waived for rule violations that are minor or do not materially undermine the integrity or policies of the program.<sup>5</sup>

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<sup>1</sup> See e.g., Verizon at 5-6; BellSouth at 5-6.

<sup>2</sup> See e.g., Verizon at 3-5; BellSouth at 4-5; Qwest at 10-11; Sprint at 7-8; SBC at 5-6; Cox Communications, Inc. at 9; Pennsylvania Department of Education (“PA DOE”) at 33; General Communication, Inc. at 5; Greg Weisiger at 21; National Telecommunications Cooperative Association at 5.

<sup>3</sup> See e.g., SBC at 6-7; State E-Rate Coordinator’s Alliance, at 9-10 (“SECA”); On-Tech at section F; American Library Association (“ALA”) at 21; PA DOE at 34; Greg Weisiger at 15-16.

<sup>4</sup> See e.g., BellSouth at 6; Qwest at 10; SBC at 7.

<sup>5</sup> See e.g., Verizon at 2, 7; Sprint at 9; SBC at 7-8; SECA at 9-10.

- The Commission should establish time limits, similar to statutes of limitations, beyond which USAC will not seek to recover already disbursed funds.<sup>6</sup>

Revising the rules in this manner eliminates the inequitable situation of USAC seeking recovery, years after the fact, from parties that were not responsible for any errors in disbursement. *See Verizon* at 7-9. In addition, when the rule violations are relatively minor, and only discovered years after the service providers have provided the services (and the applicants have budgeted and paid for them), there is no good policy reason to request repayment. *Id.*, at 9. Moreover, when the amounts at issue are small, it is a waste of resources – of USAC, the applicant, and the service provider – to attempt to recovery of those funds. *SBC* at 7.

Nearly all of the parties that address the issue agree that USAC should not be permitted to seek repayment from service providers of funds that were improperly paid and have been used to provide discounts to schools and libraries unless the improper payment was caused by improper action of the service provider.<sup>7</sup> This is because “[t]he service provider has no way of knowing whether the applicant’s certification is correct or if the applicant and USAC have followed the rules and proper procedures.” *SBC* at 4. The applicant, after selecting the service provider or providers for telecommunications service through competitive bidding, submits an application to USAC. Once it receives the funding commitment from USAC, the applicant informs the service provider, which then begins offering the requested service or services.

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<sup>6</sup> *See e.g., Verizon* at 9-10; *BellSouth* at 6; *Qwest* at 10; *see also SECA* at 10 (“There must be a line in the sand by which applicants can be assured that a funding commitment letter is just that – a commitment. If applicants believe an SLD ‘commitment’ can be revoked at any time, even years later, it does little to invoke confidence in the program”).

<sup>7</sup> *See, e.g., Cox Communications, Inc.* at 9; *PA DOE* at 33; *General Communication, Inc.* at 5; *Greg Weisiger* at 21; *National Telecommunications Cooperative Association* at 5.

The arguments of the few parties who want service providers to always be the one from whom USAC seeks reimbursement cannot withstand analysis. For example, Kellogg and Sovereign Consulting, LLC (“K&S”), claims, without any support, that many service providers engage in statutory violations or fraud. K&S claims that the service providers, after convincing the applicants that their actions are lawful, prepare the application forms, induce the applicants to sign, receive payment, and never provide the services. K&S at 11. Certainly, if some unscrupulous service providers engage in tactics that are illicit or unlawful, K&S should identify them to USAC or the Commission; however, there is no justification for tarring honest service providers with the same brush. Moreover, if the rule was that service providers were forced to repay funds when they were at fault for the wrongful disbursement, such a rule would address the concerns raised by K&S. K&S gives no reason why telecommunications carriers that scrupulously obey the law should be forced to repay funds that were improperly disbursed to the applicant through no fault of theirs.

On-Tech bases its claim that recovery should be sought from service providers on two arguments. First, it points out that most disbursements are made to service providers, so they should repay the funds. While it is true that USAC usually sends the funds to the service provider, not the applicant, that is only for the Administrator’s convenience. In all instances the discounts actually benefit the applicant, either in the form of discounted billing (so the applicant pays a portion of its bill, and USAC pays the other portion) or when the service provider forwards the USAC payment to the applicant. Therefore, the fact that the money is physically delivered in the first instance to the service provider does not justify charging the service

provider for repayment when the service provider is not at fault.<sup>8</sup> Indeed, administratively, it would be far more expedient for USAC to deal directly with the school or library, and many parties have suggested that the Commission move to that process. *See* Reply Comments of Verizon at 5-6 (filed May 6, 2002).

Second, On-Tech claims that the service provider is in the best position to determine if it is eligible to provide telecommunications services under the schools and libraries program and if the services it provides are eligible for reimbursement. However, in most instances, the problem is not that a service provider or service is ineligible. Rather, the far more common scenario is when an eligible service provider provides an eligible service that the applicant uses in a manner that is ineligible under the Act or rules. In that case, there is no justification for seeking recovery from the service provider, which had no knowledge of the ineligible use.

Most parties urge the Commission to find that, in the absence of waste, fraud, abuse, or statutory violations on the part of the applicant or service provider, USAC should be responsible for its own errors and it should not seek reimbursement from either the applicant or service provider for improper disbursements.<sup>9</sup> As SECA points out, “[a] *commitment letter is just that – a commitment*. If applicants believe a SLD ‘commitment’ can be revoked at any time, even years later, it does little to invoke confidence in the program.” SECA at 10 (emphasis in the original). *See also* PA DOE at 34.

Accordingly, as most of the parties urge, unless there is waste, fraud, abuse, or statutory violations, if the Administrator disburses E-rate funds by mistake and the funds have been used

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<sup>8</sup> E-Rate Central (at 6) also claims that recovery should be sought from the entity that receives the payment from USAC. Its argument should likewise be rejected.

<sup>9</sup> *See, e.g.*, On-Tech at section F; ALA at 21; PA DOE at 34; SECA at 10; Greg Weisiger at 15-16.

for authorized services, the Commission should not allow recovery of those funds from either the applicant or the service provider. If there is shown to be waste, fraud, abuse or statutory violation, the party responsible for the impropriety should be required to reimburse the Administrator for the improperly disbursed funds.

### **III. Dark Fiber Is Not a Telecommunications Service and Should Not Be Funded As Such.**

The parties claiming that dark fiber should be funded as a priority one service ignore the fact that dark fiber is, by definition, dark, and therefore provides no telecommunications or Internet access service. It is simply a *facility* installed for possible use in the future which is ineligible for priority one funding. As Qwest points out, the Commission has repeatedly referred to dark fiber as a facility which is incapable, without the installation of electronics at each end, of carrying telecommunications services. *See, e.g.*, 47 C.F.R. § 51.319(e)(3) (referring to dark fiber transport element as “unactivated optical interoffice transmission facilities”). *See also* Qwest at 3-4.<sup>10</sup> The Act defines both a telecommunications service and an information service (which includes Internet access) in terms of information flow. *See* 47 U.S.C. § 153(20), (43), (46). But dark fiber carries no information. Therefore, dark fiber does not meet the definition of either a telecommunications or an Internet access service and is ineligible for priority one funding.<sup>11</sup>

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<sup>10</sup> In addition, as Sprint points out, simply attaching a \$150 copper-to-fiber converter to a strand of dark fiber will not render the fiber usable for telecommunications or Internet access. In order to make it usable, the school must invest in modulating equipment (a switch or router) as well as appropriate monitoring and maintenance services. *See* Sprint at 6.

<sup>11</sup> Qwest points out that Commission decisions defining dark fiber as “wire communication” under the Act are not on point. Unlike the definitions of telecommunications or information services, the Act defines “wire communication” to include “all instrumentalities, facilities, apparatus and services ... incidental to such transmission.” 47 U.S.C. § 153(52). Therefore, it would include the fiber facility. *See* Qwest at 5 and n.14.

Fibertech Networks, LLC (“Fibertech”), a provider of dark fiber facilities but not of the electronics to light it, does not attempt to show how dark fiber meets these definitions. It simply glosses over this threshold issue by saying “it is not necessary to determine the regulatory classification of dark fiber under the E-rate program.” Fibertech at 7. Instead, it quotes the Act as requiring the Commission to adopt rules to facilitate delivery of “advanced services” to schools and libraries. *Id.* at 6, citing section 254(h). That section, however, refers to “advanced *telecommunications and information services*” (emphasis added). As shown above, dark fiber is not a service, and therefore section 254(h) is inapplicable to those facilities. Fibertech asserts that schools *may* use dark fiber (lighting it with their own equipment) for advanced services. While that may be true, they could just as well use it for ineligible purposes for which no funding is permitted, and that argument certainly does not support its claim that dark fiber should be funded. In any event, “lighting” dark fiber facility with a customer’s own equipment does not make the fiber a service – a service can be provided only by an eligible service provider.

#### **IV. Centrex Should Be Funded As a Basic Telephone Service.**

The Commission should grant the request of the American Library Association to declare that Centrex is a basic telephone service that need not be included in a technology plan. ALA at 8. Centrex, a central office-based service that offers the capabilities of premises private branch exchange (“PBX”) and key systems through individual telephone lines, is a direct substitute for the premises-based systems. Those systems are considered to be part of basic telephone service. There is no reason why Centrex should be treated any differently. As the Commission has recognized, treating Centrex as a basic telephone service would streamline the application process, by eliminating the requirement to file a technology plan for Centrex services. *See*

*Application for Review by United Talmudical Academy, Brooklyn, New York*, 18 FCC Rcd 22785, ¶¶ 14-15 (2003).

**V. The Commission Should Not Adopt Avaya's Proposal Regarding Voice Over Internet Protocol Services.**

Avaya, Inc. ("Avaya") asks the Commission to decide that premises-based voice over Internet protocol ("VoIP") capabilities should be funded, presumably as priority one telecommunications services. It also wants the Commission to revamp the method of distributing schools and libraries funds and adopt a "Total Cost of Ownership" analysis. The Commission should reject Avaya's proposals for three reasons.

First, the Commission is currently evaluating the regulatory status of VoIP. *See IP Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004). Until it decides that status, it cannot reasonably evaluate whether VoIP should be eligible for priority one funding. Second, even if it finds that VoIP is eligible for funding, the equipment on the customer's premises that allows voice calls using Internet protocol technology would no more be eligible for funding than would CPE used with traditional circuit-switched telephone service. Even if the specialized premises-based hardware and software that are used with VoIP were eligible, they must be considered internal connections that receive priority two funding, just as is similar equipment (*e.g.*, routers and multiplexing equipment) used in connection with Internet access.

Avaya, however, apparently wants the Commission to scrap the long-standing dichotomy between telecommunications and Internet access service, on the one hand, and internal connections on the other and replace it with a vaguely defined "Total Cost of Service" concept that apparently would include both communications links and premises equipment. This concept requires each applicant to perform a detailed cost analysis of all equipment and services it

proposes to use and compare it with the cost of an alternate VoIP package – a concept far more complex than the Commission’s proposal to include a cost-effective analysis in technology plans that most applicants criticize in their comments. Moreover, as discussed above in connection with dark fiber, there is no statutory basis for Avaya’s proposal. Under section 254(h), the schools and libraries program funds telecommunications and Internet access *services* and internal connections to facilitate use of those services. Avaya’s plan would not only eliminate the statutory distinction between services and internal connections but would also allow funding of premises equipment that goes beyond the current program. There is no statutory or policy basis for adopting such a plan.

**VI. The Commission Should Adopt an Interim Definition of “Rural” Until Either the Joint Board or a Rural Task Force Can Propose A Workable Definition.**

The Commission has inadequate factual information to adopt a new definition of “rural.” The few parties that suggest new definitions advocate proposals that are too granular, not easily verifiable, or do not assess their impact on the schools and libraries program. In the Rural Health Care proceeding, Verizon recommended that the FCC refer the definition of “rural” to the Joint Board on Universal Service or to a Rural Task Force to make a recommendation based on thorough study of the impact of a new definition of “rural” on the rural health care and schools and libraries programs.<sup>12</sup> Verizon has articulated four general principles that should guide the Commission’s selection of a new definition of “rural”: accuracy, ease of administration, transparency, and consistency. *See id.* at 5-6. None of the proposals offered in this docket satisfy these basic requirements, reinforcing the recommendation to further study this issue in-depth.

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<sup>12</sup> See Reply Comments of Verizon, *Rural Health Care Support Mechanism*, WC Docket 02-60 at 3-4 (filed Apr. 7, 2004).

By way of example, two commenters propose the National Center for Education Statistics' Johnson Locale Codes as a new definition of "rural" for the Schools and Libraries Program. American Association of Schools Administrators (AASA) and Association of Educational Service Agencies at 4; Rural School and Community Trust at 2. The Johnson Locale Codes are currently used only for public schools with "coding ... down to the school building level" providing a very granular approach that would be challenging to administer and difficult to expand to all eligible schools and libraries. AASA at 5. However, the operational complexities of applying an education-based definition to health care facilities, or vice versa would be even more daunting. As a result this proposal would be unworkable, and could essentially foreclose the option of maintaining a single definition of "rural" for both the rural health care program and the schools and libraries program. There is no reason to have a different definition of "rural area" for schools and libraries from the one the Commission adopts for rural health care providers in that pending proceeding. It would be extremely difficult for USAC to administer different definitions for the two programs, and there is no special feature of either program that warrants different definitions.

Moreover, the Johnson Locale codes are inaccurate and over-inclusive, including any area with less than 25,000 persons as rural. Rural School and Community Trust at 3 (Locale code 6, small town). For instance, Falls Church, Virginia – inside the Washington, D.C. Beltway – would qualify as rural under this approach. Comments of The Office of Telemedicine of the University of Virginia Medical Center, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, at 15 (dated Feb. 6, 2004).

The Pennsylvania Department of Education also advocates the adoption of an inaccurate definition of "rural" that would maximize the number of schools and libraries qualifying as rural:

the Census Bureau's Non-Urbanized Areas Definition. PA DOE at 22. Specifically, the Department found that 205 out of only 500 school districts in Pennsylvania would qualify as rural under that definition, even though only 140 do so today. *Id.*, at 32. Dr. Patricia Taylor, formerly of the Office of Rural Health Care Policy, explicitly cautioned the Commission to avoid this definition because "many suburbs and other densely populated settlements closely integrated with [Metropolitan Area] central cities would be classified as rural."<sup>13</sup> The Commission cannot sacrifice its mandate to provide discounts to "rural" schools and libraries to the desire to maximize support for schools and libraries.<sup>14</sup>

Moreover, no commenter was able to predict with any certainty the effect that moving to a new definition would have on the number of entities that would be deemed "rural," and thus has not been able to make any meaningful prediction of the effect any of the proposed definitions would have on funding demand. Particularly if the Commission decides to adopt the same definition of "rural" for both this program and the rural health care program, any new test that is overly inclusive would threaten the sustainability of the universal service fund.

The Commission should direct the Joint Board to conduct further study into the proper definition of "rural," including the impact any proposed definitions would have on the fund size. Until the Commission has a chance to rule on the Joint Board's recommendation on this issue,

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<sup>13</sup> Comments of Dr. Patricia Taylor, *Rural Health Care Support Mechanism*, WC Docket 02-60 (filed Feb. 17, 2004).

<sup>14</sup> E-rate Complete suggests a modified version of the definition of "rural" used for USDA's Rural Broadband Program. *E-Rate Complete* at 5. Verizon has previously addressed a similar proposal. See Reply Comments of Verizon, *Rural Health Care Support Mechanism*, WC 02-60 at 6 (filed Apr. 7, 2004). (finding that this recommendation has "failed to quantify the impact of this modification, [failed] to provide evidence that any other federal or state agency incorporates that definition of rural in its programs, [and failed] to demonstrate that such a definition could be easily administered or made transparent to the administrator or health care providers"). The same criticism applies in this instance.

the Commission should work under interim rules, allowing applicants to qualify for rural support if they meet either the old criteria (Goldsmith Modification to 1990 census data), or would be considered “rural” based on the newer 2000 census data (which has no Goldsmith Modification).<sup>15</sup> Such interim rules would minimize the disruption to the fund, because they would preserve the status quo for current applicants’ eligibility, but also allow some updating for current census data.

**VII. The Commission Should Not Expand the Rules to Allow Funds Dedicated for Schools and Libraries to Be Used For Non-Educational Purposes.**

The PA DOE addresses an issue that was raised in an earlier phase of this proceeding, the sharing of discounted services with non-educational community centers. PA DOE at 38-39. Verizon addressed that issue at length in its comments and replies. *See* Comments of Verizon on Proposed Rulemaking and Order at 2-7 (filed Apr. 5, 2002), Reply Comments of Verizon at 1-2 (filed May 6, 2002).

In brief, Verizon showed that allowing such sharing would violate the Act, skew competition in the developing broadband market, and create perverse incentives for providers and applicants to over-request funds from a limited pool. By using services that Congress earmarked solely for educational purposes to subsidize non-educational customers, the proposal would impermissibly expand the reach of the schools and libraries program and unwittingly inhibit the expansion of Internet and other advanced services by undermining competition.

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<sup>15</sup> As under the current rules, both definitions would use the OMB metropolitan service area categorization of census data. *See* 47 C.F.R. 54.5 (defining “rural area” as “a non-metropolitan county or county equivalent, as defined in the Office of Management and Budget’s (OMB) Revised Standards for Defining Metropolitan Areas in the 1990s and identifiable from the most recent Metropolitan Statistical Area (MSA) list released by OMB, or any contiguous non-urban Census Tract or Block Numbered Area within an MSA-listed metropolitan county identified in the most recent Goldsmith Modification published by the Office of Rural Health Policy of the U.S. Department of Health and Human Services”).

Moreover, the Act repeatedly sets limits on how services supported with school and library universal service funds may be used and prohibits using those funds for purposes other than those enumerated.<sup>16</sup>

From a policy perspective, the government should not allow use of universal service dollars to subsidize certain competitors, to the detriment of others, in the highly competitive broadband market. Because most personal Internet usage occurs in the evening hours (after schools and libraries are closed), the Commission would be using these universal service dollars to fund free Internet access during peak times. Therefore, for both legal and policy reasons, the Commission should reject the proposal to allow sharing of bandwidth with ineligible entities.

#### **VIII. Conclusion**

Accordingly, the Commission should adopt an order consistent with these reply comments.

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<sup>16</sup> See, e.g., 47 U.S.C. § 254(e) (A carrier receiving “specific Federal universal service support . . . shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended”) (emphasis added); 47 U.S.C. § 254(h)(1)(B) (additional services provided to schools and libraries shall be provided “to elementary schools, secondary schools, and libraries for educational purposes”) (emphasis added); 47 U.S.C. § 254(h)(3) (“Telecommunications services and network capacity provided to a public institutional telecommunications user under this [schools and libraries] subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value”).