

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

In the Matter of)	
)	
Application for Review of Decision of)	CC Docket No. 02-6
The Schools and Libraries Division)	
Of the Universal Service Administrative)	
Company)	
)	
Appeal of Commitment Adjustment)	
Funding Year: 2000-2001)	
Form 471 Application Number: 190856)	
Applicant: St. Lorenz Lutheran School)	

**REQUEST FOR REVIEW AND/OR WAIVER BY
AMERITECH ADVANCED DATA SERVICES, INC**

Ameritech Advanced Data Services, Inc. (“AADS”) hereby appeals the May 12, 2004, Commitment Adjustment Letter from the Universal Service Administrative Company (“USAC”) to AADS. *See* Letter of USAC to Mary Ann Imurgia, AADS (“Comad Letter”), attached hereto as Exhibit 1. In that letter, USAC states that it is rescinding funding for telecommunications services provided by AADS to St. Lorenz Lutheran School (the “Applicant”) during funding year 2000-2001 on the grounds that an audit found that the applicant did not have an approved technology plan at the time the Form 486 was submitted. Exhibit 1 at 4.

There is no suggestion that AADS is responsible in any way for the Applicant’s failure to comply with the e-rate rules, nor is there any claim that AADS should have, or even could have, been aware of the Applicant’s breach of the rules when AADS obtained reimbursement from USAC for services rendered to the Applicant. Yet, under existing procedures, USAC seeks to recover funds erroneously or improperly disbursed only from service providers, regardless of whether the service provider was responsible for the disbursement or could have done anything to prevent the error. These procedures are inequitable and inefficient, and undermine service

providers' incentives to participate in e-rate projects. For these reasons, AADS has urged the Commission to develop new COMAD procedures that focus on the party or parties that are responsible for, or benefited from, e-rate funds, and thus promote accountability and incentives for all parties to comply with e-rate rules.¹ In the meantime, where, as here, a service provider already has disbursed e-rate funds to the applicant, and is not responsible for the erroneous or improper disbursement of funds, the Commission should, to the extent necessary, waive existing procedures, and instruct USAC to seek reimbursement directly from the applicant.

I. BACKGROUND

On May 12, USAC sent AADS the Commitment Adjustment Letter, notifying AADS that USAC was rescinding in full the e-rate funding committed to the Applicant pursuant to FRN 404628 due to non-compliance with the e-rate rules.² USAC's sole explanation for rescinding funding is:

After a thorough investigation, it was determined that this funding request will be rescinded in full. An audit found that the applicant did not have an approved technology plan at the time the Form 486 was submitted. FCC rules require that entities receiving services other than basic telephone service are covered by an individual and/or higher level technology plan, and that the technology plan is approved prior to the submission of the FCC Form 486. Since the Technology Plan was not approved at the time of submission of the FCC Form 486, the SLD has rescinded the commitment for the service requiring a technology plan. Since this is not a request for Basic Local or Long Distance Service an approved technology plan was required. Accordingly the funding request has been rescinded in full.

Comad Letter at 4. USAC further informed AADS that USAC soon would seek to recover from AADS all of the funds disbursed and distributed to the Applicant (which were \$801.92) for telecommunications services provided by AADS approximately three years ago.³

¹ Comments of SBC Communications Inc., CC Docket No. 02-6 (filed Mar. 11, 2004) (SBC Comments). AADS is a wholly-owned subsidiary of SBC.

² Commitment Adjustment Letter at 4.

³ *Id.* at 1, 4.

II. DISCUSSION

The Commission should require USAC to seek reimbursement of the funds at issue directly from the Applicant and, to the extent necessary, waive any procedures that might provide for recovery of such funds from AADS. In 1999, the Commission first required USAC to adjust commitments for e-rate funding disbursed in violation of the 1996 Act, and directed it to develop a plan for recovering funding improperly or erroneously disbursed.⁴ In a companion order, the Commission waived recovery of funds disbursed or committed in violation of four Commission rules on the ground that affected applicants or service providers may have reasonably relied on the funding commitments by USAC.⁵ The following year, the Commission approved USAC's recovery plan, which generally provided for USAC to recover improperly disbursed e-rate funds from service providers, rather than applicants.⁶ The Commission justified seeking recovery from service providers solely on the ground that "service providers actually receive disbursements of funds from the universal service support mechanism."⁷ But, even then, the Commission acknowledged that these general procedures (*i.e.*, recovering funds from service providers) would not necessarily apply in all cases, "emphasiz[ing]" that these procedures would not apply in cases where the applicant "has engaged in waste, fraud, or abuse."⁸

⁴ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, FCC 99-291 (rel. Oct. 8, 1999) (*Comad Order*).

⁵ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, 15 FCC Rcd 7197, para. 7 (1999) (*Waiver Order*).

⁶ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, 15 FCC Rcd 22975 (2000) (*Comad Implementation Order*).

⁷ *Id.* at para. 8. The Commission stated that, in cases of applicant error, it expected service providers to recover from applicants any funds recovered from the service provider by USAC.

⁸ *Id.* at para. 13.

Application of the general Comad procedures where, as here, the service provider has complied with the e-rate rules exalts form over substance; is inequitable and inefficient; undermines incentives for Applicants to comply with the rules; and would discourage participation in the program. First, the mere fact that service providers, rather than applicants, “actually receive disbursement of funds” is irrelevant. Regardless of whom funds are “actually disbursed” to, it is the applicant, not the service provider, to which e-rate funds are committed and which receives the benefits of such funds. Even if funds are disbursed to the service provider, the service provider cannot retain them, but rather must pass them through to the applicant through reimbursements or discounts. The service provider thus is merely a conduit for the delivery of funds to the applicant. Consequently, it is the applicant, not the service provider, that owes a debt to the United States if funds are erroneously disbursed (except where the service provider itself has failed to comply with the e-rate rules). USAC therefore should seek recovery of such funds (either through demand or referral to the Justice Department) directly from the applicant where such funds were improperly disbursed due to applicant error or malfeasance.

Second, requiring AADS to repay USAC for the disbursed funds in this context would be inefficient and patently inequitable. USAC does not assert, nor could it, that AADS was in any way at fault for the Applicant’s failure to comply with the e-rate rules or that AADS could have done anything to prevent it. In fact, the failure identified is utterly beyond AADS’s control, and AADS had no way to identify (much less correct) this failure when it delivered discounted services three years ago, nor would it have learned of these failures had USAC not sent the Comad Letter. Obtaining approval of a technology plan from an authorized approver is solely the responsibility of the applicant – indeed, AADS and other service providers are prohibited from preparing or approving an applicant’s technology plan under the e-rate rules. Like USAC, AADS was forced to rely entirely on the applicant’s certifications that it had complied with this (and other) e-rate program requirements. As a consequence, there was no way that AADS could have prevented the disbursement of funds to the Applicant or taken steps to remedy the

Applicant's non-compliance with the e-rate rules in this case before providing discounted service three years ago.

Requiring AADS to repay the erroneously disbursed funds to USAC would force AADS either to try to recover the funds from the Applicant (which likely will be costly and time-consuming, and may be impossible), or absorb the loss. Either way, recovery from AADS will increase costs for all concerned, and unfairly punish AADS (which reasonably relied on USAC's funding commitment and the Applicant's certifications of compliance with e-rate requirements) for the mistakes of the Applicant. And, if AADS cannot recover the funds from the Applicant, the Applicant will receive a windfall to which it was not entitled.

Third, seeking reimbursement from AADS also would fail to provide proper incentives for the Applicant, and other applicants, to ensure that they have complied fully with e-rate program requirements. As noted above, requiring AADS to refund e-rate monies improperly disbursed due to applicant error would force AADS to seek recovery from the applicant. But obtaining such recovery likely will be difficult because AADS's only recourse, if the Applicant fails to reimburse AADS for such funds, is to threaten to cut off service, which, of course, is unrealistic in light of the public safety and public interest implications of such action. Only by seeking refunds directly from applicants, and denying future e-rate funding if an applicant fails to repay improperly disbursed funds, will the Commission provide appropriate incentives for all program participants to comply with the rules.

Finally, requiring AADS and other service providers to repay e-rate funds where, as here, the applicant has failed to comply with the e-rate rules will reduce service providers' incentives to bid on e-rate projects, which, in turn, will reduce competition for e-rate contracts. In the end, both consumers and applicants will suffer as e-rate costs increase and e-rate funding (which is capped) fails to be used as productively as it otherwise would.

III. CONCLUSION

For the foregoing reasons, the Commission should direct USAC not to seek reimbursement of funds from AADS in this case. Rather, if the Commission determines that recovery of funds is appropriate here, it should (to the extent necessary) waive existing procedures and instruct USAC to look directly to the Applicant for reimbursement.

Respectfully submitted,

/s/ Christopher M. Heimann

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