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July 14, 2004

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **CC Docket No. 02-6;**
Petition for Review and/or Waiver of Commitment Adjustment [Recovery of Funds]

Dear Ms. Dortch:

On June 18, 2004, Pacific Bell Telephone Co. d/b/a SBC California (SBC) filed a petition for review and/or waiver, appealing the April 30, 2004 Commitment Adjustment Letter from the Universal Service Administrative Company (USAC) to SBC rescinding funding due to actions by the applicant. SBC inadvertently failed to include the exhibit referred to in its petition. SBC resubmits herewith its petition, together with the exhibit. SBC requests that the Bureau substitute the attached documents for the petition filed on June 18.

SBC regrets any confusion the inadvertent failure to attach the exhibit may have caused. Please contact me (202-326-8909) if you have any questions concerning the foregoing.

Sincerely,

/s/ Christopher M. Heimann

Attachment

**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: 179828)	
Applicant: Alum Rock Union Elem. Sch.)	

REQUEST FOR REVIEW AND/OR WAIVER BY PACIFIC BELL

Pacific Bell Telephone Co. d/b/a SBC California (“SBC”) hereby appeals the April 30, 2004, Commitment Adjustment Letter from the Universal Service Administrative Company (USAC) to Pacific Bell. *See* Letter of USAC to Joseph Alex, Pacific Bell (Commitment Adjustment Letter), attached hereto as Exhibit 1. In that letter, USAC states that it is rescinding funding for telecommunications services provided by SBC to Alum Rock Union Elementary School (the “Applicant”) during funding year 2000-2001 on the grounds that: (1) “[i]nformation on the applicants [sic] Form 486 indicated that an authorized technology plan approver had not approved its technology plan;” and (2) USAC’s audit “noted that the applicant was unable to provide evidence of budgeted amounts for the non-discounted portion” of those services. Exhibit 1 at 4.

There is no suggestion that SBC is responsible in any way for the Applicant’s failure to comply with the e-rate rules, nor is there any claim that SBC should have, or even could have, been aware of these breaches of the rules when it 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, SBC 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

In early May, SBC received the Commitment Adjustment Letter, notifying it that USAC was rescinding in full the e-rate funding committed to the Applicant pursuant to FRN 391525 due to non-compliance with the e-rate rules.² USAC's sole explanation for rescinding funding is:

After a thorough investigation, it has been determined that this funding request must be rescinded in full due to non-compliance with the requirements of this Schools and Libraries Support Mechanism. Information on the applicants Form 486 indicated that an authorized technology plan approver had approved its technology plan. An approved technology plan is required for all services other than basic phone services. However, the results of an audit found that the applicant had failed to provide a copy of the technology plan approval letter when requested. In addition, the audit also noted that the applicant was unable to provide evidence of budgeted amounts for the non-discounted portion. As the services requested on this FRN are circuits which is other than basic local and/or long distance phone service, the \$37,538.64 commitment amount for this FRN has been rescinded.

Commitment Adjustment Letter at 4. USAC further informed SBC that USAC soon would seek to recover from SBC all of the funds disbursed and distributed to the Applicant (which, to date,

¹ Comments of SBC Communications Inc., CC Docket No. 02-6 (filed Mar. 11, 2004) (SBC Comments).

² Commitment Adjustment Letter at 4.

are \$19,937.24) for telecommunications services provided by SBC approximately three years ago.³

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 SBC. 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

³ *Id.* at 1, 4.

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.

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

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 SBC to repay USAC for the disbursed funds in this context would be inefficient and patently inequitable. USAC does not assert, nor could it, that SBC was in any way at fault for the Applicant’s failure to comply with the e-rate rules or that SBC could have done anything to prevent it. In fact, the failures identified are utterly beyond SBC’s control, and SBC had no way to identify (much less correct) these failures when it delivered discounted services three years ago, nor would it have learned of these failures had USAC not sent the Commitment Adjustment Letter. Obtaining approval of a technology plan from an authorized approver and retaining proof of such approval are solely the responsibility of the applicant –

⁸ *Id.* at para. 13.

indeed, SBC and other service providers are prohibited from preparing or approving an applicant's technology plan under the e-rate rules. Likewise, only the applicant knows whether it has sufficient committed or available funds to pay for the non-discounted portion of e-rate services at the time it applies for funding, and only it has the evidence necessary to support its certification. (SBC notes, in this regard, that even if the Applicant here could not provide evidence of budgeted amounts for the non-discounted portion, it actually paid that portion when services were delivered three years ago; thus, at this point, the lack of such evidence does not warrant repayment of committed funds.) Like USAC, SBC was forced to rely entirely on the applicant's certifications that it had complied with these (and other) e-rate program requirements. As a consequence, there was no way that SBC 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 SBC to repay the erroneously disbursed funds to USAC would force SBC 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 SBC will increase costs for all concerned, and unfairly punish SBC (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 SBC cannot recover the funds from the Applicant, the Applicant will receive a windfall to which it was not entitled.

Third, seeking reimbursement from SBC 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 SBC to refund e-rate monies improperly disbursed due to applicant error would force SBC to seek recovery from the applicant. But, in SBC's experience, obtaining such recovery often has proven difficult because SBC's only recourse, if an applicant fails to reimburse SBC 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 SBC 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 SBC 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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June 18, 2004



The FCC Acknowledges Receipt of Comments From ...
SBC COMMUNICATIONS
 ...and Thank You for Your Comments

Your Confirmation Number is: **2004618760067**

Date Received:	Jun 18 2004
Docket:	02-6
Number of Files Transmitted:	1

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updated 02/11/02

Exhibit 1



Universal Service Administrative Company
Schools & Libraries Division

COMMITMENT ADJUSTMENT LETTER

April 30, 2004

Joseph Alex
Pacific Bell
370 Third Street, Room 207
San Francisco, CA 94107 2322

Re: COMMITMENT ADJUSTMENT

Funding Year 2000 -2001

Form 471 Application Number: 179828

Applicant Name ALUM ROCK UNION ELEM SCH

Contact Person: Ted Hashiguchi

Contact Phone: 408-928-6911

Dear Service Provider Contact:

Our routine reviews of Schools and Libraries Program funding commitments revealed certain applications where funds were committed in violation of program rules.

In order to be sure that no funds are used in violation of program rules, SLD must now adjust these funding commitments. The purpose of this letter is to inform you of the adjustments to these funding commitments required by program rules.

FUNDING COMMITMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Report for the Form 471 application cited above. The enclosed report includes a list of the FRNs from the application for which adjustments are necessary. The SLD is also sending this information to applicant, so that you may work with them to implement this decision. Immediately preceding the Funding Commitment Report, you will find a guide that defines each line of the Report.

Please note that if the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the funds disbursed. The amount is shown as Funds to be Recovered. We expect to send you a letter describing the process for recovering these funds in the near future, and we will send a copy of the letter to the applicant. If the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount.

Box 125, Correspondence Unit, 80 South Jefferson Road, Whippany, NJ, 07981
Visit us online at: www.sl.universalservice.org

TO APPEAL THIS DECISION:

If you wish to appeal the Funding Commitment Decision indicated in this letter, your appeal must be POSTMARKED within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify which Commitment Adjustment Letter you are appealing. Your letter of appeal must include the Billed Entity Name, the Form 471 Application Number, and the Billed Entity Number from the top of your letter.
3. When explaining your appeal, copy the language or text from the Commitment Adjustment Letter that is at the heart of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Box 125- Correspondence Unit, 80 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We encourage the use of either the e-mail or fax filing options.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket Nos. on the first page of your appeal to the FCC. Your appeal must be POSTMARKED within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site, or by contacting the Client Service Bureau. We strongly recommend that you use either the e-mail or fax filing options.

A GUIDE TO THE FUNDING COMMITMENT REPORT

Attached to this letter will be a report for each funding request from your application for which a commitment adjustment is required. We are providing the following definitions.

- **FUNDING REQUEST NUMBER (FRN):** A Funding Request Number is assigned by the SLD to each request in Block 5 of your Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.
- **SPIN (Service Provider Identification Number):** A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participating in the universal service support programs.
- **SERVICE PROVIDER:** The legal name of the service provider.
- **CONTRACT NUMBER:** The number of the contract between the eligible party and the service provider. This will be present only if a contract number was provided on Form 471.
- **SERVICES ORDERED:** The type of service ordered from the service provider, as shown on Form 471.
- **SITE IDENTIFIER:** The Entity Number listed in Form 471 for "site specific" FRNs.
- **BILLING ACCOUNT NUMBER:** The account number that your service provider has established with you for billing purposes. This will be present only if a Billing Account Number was provided on your Form 471.
- **ADJUSTED FUNDING COMMITMENT:** This represents the adjusted total amount of funding that SLD has committed to this FRN. If this amount exceeds the Funds Disbursed to Date, the SLD will continue to process properly filed invoices up to the new commitment amount.
- **FUNDS DISBURSED TO DATE:** This represents the total funds which have been paid up to now to the identified service provider for this FRN.
- **FUNDS TO BE RECOVERED:** This represents the amount of Funds Disbursed to Date that exceed the Adjusted Funding Commitment amount. These funds will have to be recovered. If the Funds Disbursed to Date do not exceed the Adjusted Funding Commitment amount, this entry will be \$0.
- **FUNDING COMMITMENT ADJUSTMENT EXPLANATION:** This entry provides a description of the reason the adjustment was made.

Funding Commitment Report for Application Number: 179828

Funding Request Number 391525 SPIN: 143002665
Service Provider: Pacific Bell
Contract Number: T
Services Ordered: TELCOMM SERVICES
Site Identifier:
Billing Account Number: PB
Adjusted Funding Commitment: \$0.00
Funds Disbursed to Date: \$19,937.24
Funds to be Recovered: \$19,937.24

Funding Commitment Adjustment Explanation:

After a thorough investigation, it has been determined that this funding request must be rescinded in full due to non-compliance with the requirements of this Schools and Libraries Support Mechanism. Information on the applicants Form 486 indicated that an authorized technology plan approver had approved its technology plan. An approved technology plan is required for all services other than basic phone services. However, the results of an audit found that the applicant had failed to provide a copy of the technology plan approval letter when requested. In addition, the audit also noted that the applicant was unable to provide evidence of budgeted amounts for the non-discounted portion. As the services requested on this FRN are circuits which is other than basic local and/or long distance phone service, the \$37,538.64 commitment amount for this FRN has been rescinded.