

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Schools and Libraries Universal Service ) CC Docket No. 02-6  
Support Mechanism )

**PETITION FOR RECONSIDERATION  
OF  
SPRINT CORP. AND BELL SOUTH CORP.**

Sprint Corporation and BellSouth Corporation (collectively, "Petitioners"), pursuant to Section 1.429 of the Commission's Rules, hereby respectfully submit this petition for reconsideration of the *Fifth Report and Order and Order* released August 13, 2004 (FCC 04-190) in the above-captioned proceeding. Petitioners request reconsideration of two issues: (1) the Commission's conclusion that if an E-rate beneficiary has not paid its non-discounted share of charges for eligible E-rate services within 90 days after delivery of service, that all funds disbursed should be recovered (para. 24); and (2) the inclusion of certain certifications relating to competitive bidding on the Service Provider Annual Certification Form, FCC Form 473 (para. 71).

**I. THE 90-DAY RULE WAS ADOPTED WITHOUT ADEQUATE NOTICE; IS ARBITRARY AND CAPRICIOUS; AND IS UNLIKELY TO PREVENT WASTE, FRAUD AND ABUSE.**

The E-rate program provides funding of between 20-90% of the charges for eligible services provided to eligible schools and libraries; the schools and libraries are required to pay the remaining non-discounted share of the bill. In the *Fifth Report and Order* (para. 24), the Commission has concluded that applicants will be considered to

have failed to pay their non-discounted share if payment is not made within 90 days after delivery of service. Failure to pay will result in recovery of any E-rate funds granted for a project for which the beneficiary failed to pay its non-discounted share.

Petitioners certainly support the notion that applicants should pay their non-discounted share of the bill in a timely fashion. Petitioners also agree that failure to pay (either because the applicant refuses to remit payment, or because the service provider somehow credits the applicant for the non-discounted share) has serious implications for the viability of the E-rate fund and the basic fairness of the competitive bidding process. However, we are concerned that the standard adopted by the Commission to determine whether an applicant is in default of its obligation to pay its non-discounted share of the E-rate bill – failure to pay within 90 days after delivery of service – was adopted without adequate notice; is arbitrary and capricious; fails to reflect common billing practices in the E-rate market, and USAC’s payment track record; and has excessively harsh consequences without necessarily preventing waste, fraud and abuse in the E-rate program.

There is no dispute that Commission policy requires E-rate beneficiaries to pay the non-discounted share of the bill; this policy was adopted in the initial order establishing the E-rate program.<sup>1</sup> However, as the Commission itself acknowledges, its rules “do not set forth a specific timeframe for determining when a beneficiary has failed to pay its non-discounted share” (*Fifth Report and Order*, para. 24). And, insofar as Petitioners are aware, the Commission has never sought comment on whether a specific

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<sup>1</sup> *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9035-9036 (para. 493) (1997).

timeframe should be adopted, or what that timeframe should be. Given the lack of advance notification to the public that the Commission was considering this specific rule change, the Commission's decision here to adopt a 90-day timeframe constitutes a violation of the Administrative Procedure Act (APA), and the rule must accordingly be withdrawn.

In adopting the 90-day period in the *Fifth Report and Order*, the Commission did not cite to any filings in the record below (or indeed, any other information, whether publicly available or not) which would justify this timeframe. Nor could it, given the lack of advance notice that it was even considering such a rule. A review of numerous filings in the *NPRM*<sup>2</sup> and in the *Second Further Notice of Proposed Rulemaking*<sup>3</sup> phases of this docket did not reveal any information on average payment periods (for either E-rate or other commercial customers), the extent to which non-payment is a problem, or any other information which would have indicated parties' awareness that the Commission was considering adoption of a specific timeframe for determining non-payment violations. Nor are Petitioners aware of any comments which specifically endorsed 90 days after delivery of service as a reasonable period for determining whether an applicant had failed to pay its non-discounted share of the bill. Given the lack of record evidence, the Commission's adoption of a 90-day window must be considered arbitrary and capricious.

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<sup>2</sup> *Schools and Libraries Universal Service Support Mechanism*, 17 FCC Rcd 1914 (2002).

<sup>3</sup> *Schools and Libraries Universal Service Support Mechanism*, 18 FCC Rcd 26912 (2003).

It may well be that the Commission was correct in asserting that some companies “refer payment matters to collection agencies if a customer fails to pay after several requests for payment” (*Fifth Report and Order*, para. 24). However, whether correct or not, this statement does not support adoption of the 90-day timeframe adopted here, and in any event, strict comparison of E-rate accounts with either commercial or residential accounts is inapt. First, the Commission’s statement assumes that an E-rate service provider will have made “several requests for payment” in the 90 days following delivery of service. In fact, it is not at all unusual for an E-rate service provider to render the *initial bill* to the applicant up to 90 days after delivery of service because of the complex rules associated with the E-rate program -- complexities which do not arise in the context of other commercial or residential accounts -- and the vagaries of a customer’s billing cycle. For example, on internal connection jobs, a service provider may not bill the customer until the job is completed, it has reviewed the project to ensure that eligible and ineligible items are correctly identified, and (in the case of discounted invoices) reviewed the invoice to ensure that the applicant is billed only for its portion. Back-and-forth discussions with USAC regarding the eligibility of certain items or other invoice questions may consume several weeks;<sup>4</sup> some service providers may choose to defer invoicing their customer for the non-discounted portion of the bill until such discussions with USAC are completed. Even for routine transactions, a customer may be on an end-of-the-month billing cycle under which services delivered on the first of the month are not billed until the end of the following month. Customers are then routinely given 30

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<sup>4</sup> In Petitioners’ experience, lengthy SLD reviews and/or audits are common, so that far more than 90 days may elapse between submission of invoice (to SLD) and receipt of

*Footnote continued on next page*

days from the bill date to remit payment, and government customers typically are given an even longer grace period. And, if there is a billing dispute between the service provider and the customer, full payment often is deferred while the dispute is under investigation. In short, the Commission cannot assume that payments received more than 90 days after delivery of service are actually "late."

Second, "several" [requests for payment] is nowhere defined, and there is no record evidence to suggest that 90 days is the point at which some, many, or most service providers -- of E-rate or any other service -- decide to refer an account to collections. The time that elapses between delivery of service and receipt of payment is only one factor which determines whether an account is sent to a collection agency; for example, a service provider may defer collection activity depending upon the customer's past payment and credit history; whether it has other business dealings with the customer; whether the customer has made partial payment arrangements; whether there is a pending billing dispute which is affecting remittal of payment; etc. Thus, the Commission cannot rely upon its (undocumented) sense of what (unidentified) companies' accounts receivables policies may be, to determine whether a 90-day timeframe is realistic or otherwise reasonable.

Finally, the consequences of failure to remit payment within 90 days after delivery of service -- recovery of all E-rate funds disbursed -- are excessively harsh. As with any customer base, some percentage of E-rate customers will be slow (however defined) payers. However, in Petitioners' experience, very few E-rate customers

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payment.

completely renege on their obligation to pay the non-discounted portion of the bill.<sup>5</sup> To recover previously disbursed E-rate funds from “slow” payers would impose a tremendous financial burden on those schools and libraries that do ultimately pay their share of the bill. More importantly, the penalty is unlikely to prevent waste, fraud and abuse in the E-rate program because in the great majority of cases, the customer does (eventually) remit payment for its portion of the bill – there is no intent to defraud the E-rate program or to compromise the competitive bidding process. Rather than imposing a punitive rule on the overwhelming majority of law-abiding schools and libraries, it may be more effective to address true “deadbeat” customers, or the service providers which are granting illicit rebates/credits, on a case-by-case basis. A well-publicized COMAD involving an applicant that willfully failed to pay its portion of the non-discounted bill could do much to discourage such behavior by other parties.

## **II. THE NEW FORM 473 CERTIFICATION IS INAPPROPRIATE.**

In the *Fifth Report and Order* (para. 71), the Commission adopted three new certification requirements designed to “emphasize to potential service providers that any practices that thwart the competitive bidding process will not be tolerated”:

- that the prices offered by the service provider were arrived at independently;
- that the prices offered by the service provider will not be knowingly disclosed by the service provider to any other offeror or competitor before bid opening or contract award;

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<sup>5</sup> Petitioners are unaware of any comprehensive record evidence of the extent to which schools and libraries have not paid the non-discounted portion of the bill. While audits of specific schools or libraries might have found instances of failure to pay, this information is largely anecdotal, and the failure to pay is usually only one of several violations uncovered.

- that the service provider will make no attempt to induce any other concern to submit or not submit an offer for the purpose of restricting competition.

As an initial matter, Petitioners would emphasize that we heartily endorse efforts to ensure an open and fair competitive bidding process, and that we do not object to the new certifications *per se*. However, these new certifications should not be included in the Form 473 Service Provider Annual Certification Form. The Form 473 was designed to “confirm that the Invoice Forms submitted by each service provider are in compliance with the FCC’s rules governing Universal Service for Schools and Libraries.”<sup>6</sup> The individual who signs the current Form 473 must have knowledge of the E-rate invoices submitted; he or she does not necessarily have knowledge of or input into the preparation or submission of a competitive bid. Indeed, at Sprint, the parties involved with preparing a competitive bid are, by design, separate from the parties who render an invoice, to help ensure that the invoice is not manipulated and that the customer is properly billed for all charges for which it is responsible. Combining both types of certifications on a single document makes it extremely difficult to find a single individual with the knowledge and authority to certify to both areas. A more effective approach might be to create a separate “competitive bidding” certification form.

Petitioners are also very concerned about adoption of new certification requirements such as the ones at issue here from a procedural viewpoint. What may appear to the Commission or USAC to be a relatively minor administrative change can in fact have serious operational implications, especially for large service providers where E-

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<sup>6</sup> See directions accompanying Form 473.

rate responsibilities are distributed among different departments. It is precisely to ensure that affected parties have an adequate opportunity to comment on proposed rule changes that the Administrative Procedure Act (APA) was adopted. Therefore, Petitioners urge the Commission to be explicit about any proposed rule change, in terms of both content and implementation, prior to adoption of such rule. While we acknowledge that the Commission did solicit comment on whether a service provider should certify that the prices in its bid were independently developed,<sup>7</sup> there was no suggestion in the *Second FNPRM* that this certification would be linked to the existing Form 473. In contrast, other proposed changes have been linked to specific FCC forms.<sup>8</sup> To protect against any claim that the APA was violated, the Commission must explicitly describe any proposed rule change in order to ensure that affected parties have adequate notice of and opportunity to comment on such potential changes.

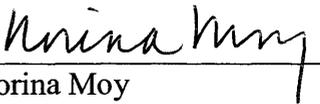
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<sup>7</sup> *Schools and Libraries Universal Service Support Mechanism, Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 26912, 26939 (para. 66) (2003).

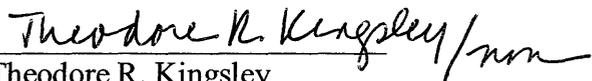
<sup>8</sup> For example, in the *Second FNPRM*, the Commission asked whether the current FCC Form 470 posting process should be modified (*id.*, para. 64.)

Respectfully submitted,

SPRINT CORPORATION

  
Norina Moy  
Richard Juhnke  
401 9<sup>th</sup> St., NW, Suite 400  
Washington, DC 20004  
(202) 585-1915

BELLSOUTH CORPORATION

  
Theodore R. Kingsley  
675 West Peachtree St., Suite 4300  
Atlanta, GA 30375  
(404) 335-0720

October 13, 2004

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **PETITION FOR RECONSIDERATION OF SPRINT CORP. AND BELL SOUTH CORP.** was sent by electronic mail and by e-mail to the below-listed parties on this the 13<sup>th</sup> day of October, 2004

  
Christine Jackson

October 13, 2004

Jeffrey Carlisle, Esq.  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Best Copy and Printing, Inc.  
Room CY-B402  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Narda Jones, Esq.  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554