

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Request for Review of a Decision of the
Universal Service Administrator by
Integrity Communications, Ltd.
Corpus Christi, TX

Petition of the United States Telecom
Association for Clarification or in the
Alternative for Partial Reconsideration

Schools and Libraries Universal Service
Support Mechanism

CC Docket No. 02-6

COMMENTS OF AT&T, INC.

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TABLE OF CONTENTS

I. DISCUSSION.....	6
A. The Problem: Service Providers Do Not Receive Adequate Procedural Protections.....	6
1. Auditees Are Treated Equitably.....	7
2. Service Providers Are Treated Equitably.....	8
a. Notice Is Inadequate.....	8
b. Opportunity Is Inadequate.....	9
B. The Solution: Make the Process Fair(er) for Service Providers.....	10
C. USAC’s Waste, Fraud and Abuse Monitoring Duties Do Not Require Evisceration of Providers’ Due Process Rights.....	11
II. CONCLUSION.....	13

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AT&T Inc. (AT&T) respectfully submits the following comments in support of US Telecom's Petition for Clarification, or in the Alternative, Partial Reconsideration of the Wireline Competition Bureau's (Bureau's) August 28, 2009 *Order*¹ denying Integrity Communications, Ltd.'s (Integrity's) request for review of a decision by the Universal Service Administrative Company (USAC) under the Commission's E-Rate program.²

¹ *Matter of Request for Review of a Decision of the Universal Service Administrator by Integrity Communications, Ltd.*, CC Docket No. 02-6, Order, 24 FCC Rcd 11186 (WCB, Aug. 28, 2009) (*Order*).

² *See Comment Sought on Integrity Communications, Ltd. Petition for Reconsideration and United States Telecom Association Petition for Clarification, or in the Alternative, Partial Reconsideration of the Wireline Competition Bureau's Order Denying Integrity Communications' Request for Review of a Decision of the Universal Service Administrative Company*, CC Docket No. 02-6, Public Notice (rel. Oct. 21, 2009) (*Public Notice* or *Notice*). The *Public Notice*, as its caption indicates, seeks comment on two Petitions relating to the Bureau's *Order*, one by USTelecom and the other by Integrity. Although the two Petitions overlap in some respects, Integrity's petition raises certain fact-specific issues not addressed in

According to the *Order*, a KPMG audit of an E-rate beneficiary revealed two critical facts upon which this matter ultimately turned: (1) an internal connections services contract between Integrity, a service provider, and its customer, as well as the RFP upon which the contract was based, expressly and unambiguously stated that the customer would have no obligation to pay for services rendered until completion of the entire project; and (2) despite this express, unambiguous language, Integrity invoiced the customer on five occasions for “progress” payments (*i.e.*, before completion of the project) and then sought and received payment from USAC for those amounts *via* Form 474 (service provider invoice) submissions containing customer certifications that services were “delivered and installed.”³ Based on these facts, USAC informed the service provider by letter that the audit “revealed” that the service provider prematurely invoiced USAC for equipment and services and, thus, violated program rules and requirements, which then led to the adverse actions of which Integrity now complains.⁴

Like US Telecom, AT&T takes no position with respect to the accuracy of the facts described, or their significance with respect to the issue of liability for non-compliance with the E-Rate rules (by either Integrity or the applicant in question, San Benito). However, on the face of it, USAC’s actions against Integrity appear to have been premised on an unusually straightforward factual record in which the outcome-determinative evidence was essentially the RFP, the contract and the very act of Integrity invoicing USAC in contravention of the express terms of the operative documents. Thus, although AT&T agrees with the principle, advanced by both Integrity and US Telecom, that beneficiary audits are not audits of service providers and,

USTelecom’s petition. *See* USTelecom Petition at 1. These comments solely address the due process-related issues raised in both Petitions and, to that extent, support both Petitions.

³ *See Order* at ¶ 7. These facts, apparently, are uncontroverted. *See id.* at ¶ 13.

⁴ *See id.* at ¶¶ 10-11; Integrity Petition at 3-7.

thus, “findings” in such audits cannot, standing alone,⁵ sustain recovery actions against service providers, USAC’s actions do not substantially erode that principle *on the facts of this case*.

Nevertheless, the *Order* goes a bit too far. Most significantly, the logical extension of the ruling – that USAC can reach non-compliance determinations and then initiate fund recovery actions against service providers as a result of “findings” in beneficiary audits so long as the service provider is given a cosmetic opportunity to “respond” to the alleged facts – is unsustainable in light of the Commission’s *Commitment Adjustment Order* and the debt collections precedents upon which that decision rests.⁶ Service providers’ due process rights should be protected in beneficiary audits, and should not be eroded as an unintended consequence of a ruling that is sustainable if properly moored to the underlying facts. Mindful of the maxim, “bad facts make bad law,”⁷ the Commission should bind the Bureau’s ruling to its facts and, further, ensure adequate procedural protections for providers, as US Telecom seeks.

⁵ Integrity Petition at 5-6; US Telecom Petition at 1-3.

⁶ *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 (1999) (*Commitment Adjustment Order*) on reconsideration *Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 and 02-6, Order on Reconsideration and Fourth Report and Order 19 FCC Rcd 15252 (2004). See 31 U.S.C. § 3711 *et seq.* (Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, together, the “Debt Collection Act”) (establishing, among other things, administrative requirements for the establishment and collection of government claims against private citizens); *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, 15 FCC Rcd 22975 (*Commitment Adjustment Implementation Order*) (2000).

⁷ See *Haig v. Agee*, 453 U.S. 280, 319 (1981).

I. DISCUSSION

A. The Problem: Service Providers Do Not Receive Adequate Procedural Protections.

USAC has conducted, and will conduct in the future, hundreds of beneficiary audits as part of its E-Rate program oversight responsibilities.⁸ The primary objective of these audits (and the purpose for which they are designed) is to determine *whether beneficiaries* – the auditees – have complied with Act and E-Rate program requirements, so as to ensure that program funds are used for their intended purposes.⁹ AT&T is not troubled by USAC reaching compliance determinations about, and seeking recovery from, *auditees* as a direct result of auditors’ beneficiary audit findings, because the process ensures fundamental fairness to beneficiaries. Recovery from beneficiaries in such circumstances, thus, is entirely consistent with the *Commitment Adjustment Order*’s requirement that funds disbursed in violation of program requirements must be recovered from the party found to be culpable, and with the Debt Collection Act’s standards, as effectuated by the *Commitment Adjustment Implementation Order*.¹⁰

US Telecom’s Petition (and, arguably, Integrity’s as well) challenges the appropriateness of USAC making non-compliance determinations *against service providers*, and subsequently

⁸ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 at ¶¶ 7, 9 (2004) (*Fifth Report and Order*). See also *Commitment Adjustment Order* at ¶ 5 (USAC must recover funds committed to schools and libraries in violation of the Act).

⁹ See *Fifth Report and Order* at ¶ 6.

¹⁰ *Commitment Adjustment Order* at ¶¶ 10-15. See also 31 U.S.C. 3716 (a) (setting forth procedural preconditions to establishment of Government’s right to offsets based on claims against private citizens); *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, 15 FCC Rcd 22975 (*Commitment Adjustment Implementation Order*) (2000).

pursuing fund recovery from those providers, based on factual “findings” in beneficiary audits.¹¹ Petitioners’ positions, in this regard, are well taken. Appropriate procedural protections for service providers are notably lacking in the beneficiary audit process. Thus, before recovery against service providers arising out of beneficiary audit findings can be compliant with applicable due process standards (*see* n.6, *supra*); USAC must take steps to ensure that providers are afforded essential due process protections.

1. Auditees are treated equitably.

Auditees enjoy significant procedural safeguards and opportunities – as they should – throughout the audit process in accordance with fundamental due process norms. Auditees are notified of the audits sufficiently in advance to have adequate opportunity to prepare themselves for the audit; auditors visit the auditees’ premises and interact with beneficiaries’ staff directly concerning the facts and issues; auditors elicit and consider proffered explanations from auditees concerning potential issues; and auditors hear the auditees’ “side of the story” on matters of significance. All of these steps and more take place *before* any “findings” against the beneficiaries are ever made and, thus, *before* USAC seeks recovery from applicants. Although the extent to which auditees’ procedural opportunities ultimately benefit them presumably varies from case-to-case, clearly it is equitable for beneficiaries, as potential debtors for governmental claims, to have such protections.

¹¹ See US Telecom Petition at 1-2; Integrity Petition at 5-6.

2. Service providers are treated inequitably.

Service providers, on the other hand, are not afforded remotely comparable protections by USAC (*i.e.*, notice and opportunity to explain why proposed action is not appropriate) before it adopts liability-impacting “findings” and begins the pre-recovery process against them.¹² This represents a material and inequitable disadvantage for service providers in these beneficiary audit matters, in contravention of Debt Collection Act, *Commitment Adjustment Order/Commitment Adjustment Implementation Order* standards, and fundamental due process norms.

a. Notice is inadequate.

There is no requirement that auditors give service providers notice – as there is for applicants – of a beneficiary audit. Thus, unless a provider’s customer tells the provider of a scheduled audit, the service provider receives no advance notice whatsoever. Indeed, if it learns of an audit at all (that is, before it is completed), the provider likely will find out after the audit is well underway -- and perhaps not until it is practically finished -- when customers make requests for assistance (*e.g.*, documents or other information) to respond to auditor queries.

Customers, moreover, typically make these requests under pressurized and often harried conditions not suitable to careful analysis and diligent, effective and complete responses by providers. And customers, often with auditors on-site (or otherwise demanding documents and information in order to meet deadlines established by USAC in their engagement contracts), naturally become flustered when their service providers, unsurprisingly, are unable to provide immediate, effective, on-the-spot assistance. A process that leaves service providers to find out about audits almost after the fact does not give them a reasonable opportunity to marshal their

¹² The hallmarks of procedural due process are adequate notice given to citizens of proposed government action that might result in the deprivation of property, and opportunity afforded to citizens to present grounds why such action should not be taken. *See generally* 2 Richard J. Pierce, Jr., *Administrative Law Treatise* 617-18 § 9.5 (4th ed. 2002).

personnel and other resources in order to effectively assist in the audits, and to ensure that a fair and complete factual record is developed.

b. Opportunity is inadequate.

Presently, service providers typically learn of negative audit “findings” through letters from USAC demanding that service providers “admit or deny” the findings within a specified time period (*e.g.*, 15 days). Most significantly, the audit record is not made available to the providers. Thus, providers are not afforded any effective opportunity to examine the grounds upon which the purported “findings” are allegedly based so as to effectively “admit” or “deny” the findings as demanded in the letters.

If providers admit the findings, or opt not to challenge them (which does not necessarily mean that they admit them), USAC treats the findings as “admitted,” and renders its determinations based on those findings, and then proceeds from there.¹³ Except in rare cases, providers typically will not be in position, at the time the “admit or deny” letter is received, to conduct the kind of review necessary to reach any intelligent conclusion about whether it can “admit or deny” the findings. This is so principally because, regardless of how much time is given (15 days or more, if USAC extends the deadline), service providers simply lack the detail needed to provide an effective review of, and response to, the issues raised. Without the benefit of the audit record, the review that might be necessary to respond to the alleged facts may be next to impossible, or may simply involve substantially more time than the situation reasonably affords. In these situations, service providers may find themselves compelled to make the judgment – especially if relatively small amounts are involved – that their interests, and those of their customers, are better served by foregoing an extensive factual review.

¹³ Indeed, in such situations, providers probably remit payment at the same time as, or even before, responding to the letters.

The realities of the typical situation in which service providers find themselves, thus, present the service provider with the dilemma of either having to construct an unconvincing non-denial denial (*i.e.*, a denial that does not specifically rebut the alleged “facts” or “findings”),¹⁴ or make a calculated (often cost/benefit-based) judgment whether a mad dash to attempt to construct their own quasi-audit to provide a rebuttal is possible given the provider’s non-access to the audit detail.¹⁵ This situation would be alleviated substantially if providers had access to the audit detail and record.¹⁶

B. The Solution: Make the Process Fair(er) for Service Providers.

The inherent unfairness in the situation thus described could be mitigated. At minimum, the present inequitable situation could be made substantially more equitable if USAC simply presented service providers with the factual record – the audit detail -- upon which the preliminary negative findings purport to be based, and then give the service providers adequate time to review the detail, supplement the record, and respond as appropriate. This fundamentally fair step could easily be built into the present beneficiary audit process, either through an appropriate modification to the engagement protocols and procedures between USAC and the

¹⁴ Clearly, Integrity’s challenges to the results of the report were deemed insufficient in the Bureau’s eyes because Integrity failed to rebut the facts established. *See Order* at ¶ 13 (despite Integrity’s “disputes [of] whether its conduct violated the E-rate rules,” the Bureau observed that Integrity did “not claim that any of the factual statements about Integrity in the Audit Report [were] incorrect.”)

¹⁵ The burden of such tasks should not be underestimated. For example, if an auditor wishes to tie the invoices service providers submit to USAC (which beneficiaries will neither have nor even have seen) to customers’ monthly service bills, or attempt to justify retroactive credits appearing on customers’ bills, the auditors may find such tasks thwarted by the fact that service providers’ records are neither made for, nor conducive to, those analyses. The only way an auditor can understand the relationship between billing and invoicing is through extensive interaction with the service provider and in some cases additional manual work on a per FRN, per customer basis.

¹⁶ These and other Hobson’s choices are made even more unpalatable considering the fact that the amounts at issue – whether small or large – involve assets of the organization. Those assets must be disposed of in accordance with laws, organizational policies and fiduciary responsibilities binding upon those organizations and their decision makers. Those standards cannot be met under the present circumstances of these beneficiary audits, a fact that neither the auditors nor USAC appear to appreciate.

auditors it commissions for these projects or, post-audit, by USAC providing the audit detail and making the auditors available for any reasonable follow up questions that might be needed to understand the record.

Such steps make sense: if it is fair, sufficient and consistent with the *Commitment Adjustment Order* to afford the kind of process described to beneficiaries before recovery actions are instituted against them, then it is certainly fair, and indeed compelled by the *Commitment Adjustment Order*, for service providers to receive the kind of minimal safeguards suggested by US Telecom and proposed in these comments. Conversely, if it would be unfair and inequitable for USAC to extract funds from beneficiaries without the protections currently afforded them, as undoubtedly it would be, then it is demonstrably unfair and inequitable to extract funds from service providers without affording them some comparable measure of due process protections.¹⁷

C. USAC’s Waste, Fraud and Abuse Monitoring Duties Do Not Require Evisceration of Providers’ Due Process Rights.

The Bureau, citing USAC’s waste, fraud and abuse monitoring responsibilities, observed that USAC could not “turn a blind eye” to evidence of E-rate violations by service providers uncovered in beneficiary audits.¹⁸ The Bureau concluded that USAC “must address potential rule violations uncovered in an audit regardless of whether the violating entity was the subject of the audit”, and should modify its procedures to “make clear that they apply to any violation

¹⁷ Indeed, the level of protections afforded to beneficiaries in these audits arguably sets the bar, for purposes of the *Commitment Adjustment Order*’s requirements, for what standards should be applied to fixing beneficiaries’ or providers’ liability for non-compliance with program rules and requirements. As the Second Circuit observed: “Due process requires notice and the opportunity to be heard . . . [and] the nature of the property or liberty interest at stake and the legal issues determine the kind” of process that is due. *Interboro Institute v. Foley*, 985 F.2d 90, 92-93 (2nd Cir. 1993) (Second Circuit ruled that state agency properly could adopt state comptroller’s audit findings against junior college for tuition assistance program violations, without further evidentiary hearing, *where auditee had opportunity to submit written response at every level of the audit and the agency’s review, and its submissions were considered and responded to in subsequent reports, and where college could have commenced further proceedings to challenge the findings but elected not to do so*).

¹⁸ See *Order* at ¶¶ 13, 18-19.

found within the course of an audit, even if the violating entity was not the actual subject of the audit.”¹⁹ AT&T agrees with the thrust of the Bureau’s remarks. Indeed, the Commission specifically acknowledged in the *Commitment Adjustment Order* that “recovering disbursed funds *from the party or parties that violated the statute or a Commission rule will further our goals of minimizing waste, fraud and abuse* in the schools and libraries support mechanism.”²⁰ But *whether* USAC should take action when waste, fraud or abuse is uncovered in a beneficiary audit is *not* at issue. Rather, the issue is how to ensure that *findings against service providers* in beneficiary audits are arrived at fairly and equitably.²¹

Thus, whether the facts amount to mere erroneous disbursement of funds, or reveal more serious waste, fraud or abuse, service providers must be afforded due process before adverse findings are made, and recovery actions against them are taken by USAC. USAC’s present practices are insufficient to equitably identify service providers as “violating entities” in any context and, thus, they are not consistent with the *Commitment Adjustment Order*’s directives, whether the issue is waste, fraud and abuse or mere recovery of erroneously disbursed funds.

¹⁹ *Id.* at ¶¶ 18-19.

²⁰ *Commitment Adjustment Order* at ¶ 13 (emphasis added).

²¹ *See* USTelecom Petition at 2-3; Integrity Petition at 5-6.

II. CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission grant US Telecom's Petition and, to the extent its issues overlap with US Telecom's Petition, Integrity's Petition, consistent with the arguments presented in these comments.

Respectfully submitted,

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