

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of
Changes to the Board of
Directors of the National Exchange
Carrier Association, Inc.
Federal-State Joint Board on
Universal Service
CC Docket No. 97-21
CC Docket No. 96-45

ORDER

Adopted: September 21, 2000

Released: October 26, 2000

By the Commission:

I. INTRODUCTION

1. Pursuant to the Commission’s October 8, 1999 Commitment Adjustment Order, on October 22, 1999, the Administrator of the universal service support mechanism for schools and libraries (Universal Service Administrative Company or USAC) submitted to the Commission its plan to collect universal service funds that were erroneously disbursed in year one of the program. By this Order, we adopt, with some minor modifications, USAC’s plan to implement the requirements of the Commitment Adjustment Order described below.

II. BACKGROUND

2. In establishing the universal service support mechanism for schools and libraries, the Communications Act of 1934, as amended (the Act), requires that only those services within the definition of “universal service” be provided at discounted rates, and that the Commission establish rules to enhance school and library access to advanced telecommunications and information services. In its implementation of these statutory provisions, the Commission defined the services within the definition of “universal

1 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 (rel. October 8, 1999) (Commitment Adjustment Order), petitions for reconsideration pending.

2 See Letter from D. Scott Barash, Vice President and General Counsel, USAC, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated October 22, 1999 (Commitment Adjustment Plan).

3 47 U.S.C. § 254(h)(1)(B).

4 47 U.S.C. § 254(h)(2)(A).

service” for schools and libraries as all commercially available telecommunications services,⁵ Internet access, and internal connections.⁶ The Act also requires that telecommunications services provided at discounted rates to schools and libraries shall be provided by telecommunications carriers.⁷

3. USAC, through standard audit and review processes, discovered that, in year one of the universal service support mechanism for schools and libraries,⁸ it had committed funding for discounts for a small number of applicants who failed to satisfy certain requirements of the Act.⁹ Specifically, USAC discovered applications in two general categories where disbursement of funds for these applications would not comply with the Act: (1) applications seeking discounts for ineligible services; and (2) applications seeking discounts for telecommunications services to be provided by non-telecommunications carriers.¹⁰ In the Commission’s October 8, 1999, *Commitment Adjustment Order*, the Commission directed USAC to adjust these commitments and seek repayment of funds because the disbursement of funds associated with these applications would violate the Act.¹¹ The Commission directed USAC to (1) cancel all or any part of a commitment to fund discounts for ineligible services or the provision of telecommunications services by non-telecommunications carriers; and (2) deny payment

⁵ 47 C.F.R. § 54.502.

⁶ 47 C.F.R. § 54.503.

⁷ 47 U.S.C. § 254(h)(1)(B). In the May 8, 1997, *Universal Service Order*, the Commission determined that the term “telecommunications services” encompasses only telecommunications provided on a common carrier basis. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9177-78 (1997), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Erratum, FCC 97-157 (rel. June 4, 1997), *aff’d in part, rev’d in part, remanded in part sub nom Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*Universal Service Order*).

⁸ Year one of the universal service support mechanism for schools and libraries began on January 1, 1998, and ended on June 30, 1999. See *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order, 13 FCC Rcd 14915, 14916, para. 1 (1998).

⁹ *Commitment Adjustment Order*, FCC 99-291, at para. 3. USAC issues Funding Commitment Decision Letters (FCDLs) to applicants informing them of the amount, if any, of discount funding that USAC has committed for them. USAC only disburses actual discount funding to a service provider after the applicant notifies USAC that the service provider has begun delivering the supported services, and the service provider submits an invoice.

¹⁰ As of April 21, 2000, USAC estimated that it had committed approximately \$966,000 in year one discount funding to 33 applicants requesting ineligible services from 12 service providers, and approximately \$796,000 in year one discount funding to 62 applicants requesting telecommunications services from 36 non-telecommunications carriers. Letter from D. Scott Barash, Vice President and General Counsel, USAC, to Magalie Roman Salas, Secretary, FCC, dated June 15, 2000 (USAC Ex Parte Letter) at 1. USAC immediately ceased distribution of discount funding that would violate the Act once it discovered its errors; only a small percentage of discount funding committed in error actually was disbursed. See *infra* note 17.

¹¹ See *Commitment Adjustment Order*, FCC 99-291, at para. 7.

of any requests by providers for compensation for discounts provided on such services.¹² As explained in the *Commitment Adjustment Order*, both the Debt Collection Improvement Act (DCIA) and the Commission's rules require collection of any disbursements it made in violation of the Act.¹³ Accordingly, we directed USAC to submit an implementation plan, for Commission approval, outlining its proposals for pursuing collection of any actual discount funding that was disbursed to service providers in violation of the Act in year one of the program.¹⁴

III. USAC's PROPOSED RECOVERY PLAN

4. Consistent with the Commission's directive, USAC submitted a proposed recovery plan to the Commission.¹⁵ USAC proposes that the first step of its fund recovery be a determination of the "adjustment amount;" that is, the amount of funds that were committed in error to each applicant in receipt of an erroneous funding commitment.¹⁶ Next, USAC proposes to determine whether any portion of the adjustment amount was actually paid to the service provider.¹⁷ If no money was paid in error, we directed USAC in the *Commitment Adjustment Order* to cancel all or any part of a commitment to fund discounts for ineligible services or the provision of telecommunications services by a non-telecommunications carrier.¹⁸ In this regard, USAC issued adjusted FCDLs to both the applicant and the service provider.

5. In instances where funds were disbursed in error,¹⁹ USAC proposes that it determine whether it must seek repayment in cash from the service provider or whether

¹² See *Commitment Adjustment Order*, FCC 99-291, at para. 8.

¹³ See *Commitment Adjustment Order*, FCC 99-291, at para. 10, citing 31 U.S.C. §§ 3701 et seq., 47 C.F.R. §§ 1.1901 et seq. Section 1.911 of the Commission's rules both authorizes and requires the Commission to collect debts owed to the United States for which it is responsible, and section 1.912 authorizes the Commission to offset debts where an offset would be feasible and in accordance with the Commission's rules. 47 C.F.R. §§ 1.911, 1.912.

¹⁴ See *Commitment Adjustment Order*, FCC 99-291, at para. 10.

¹⁵ See *Commitment Adjustment Plan*.

¹⁶ See *Commitment Adjustment Plan* at 3.

¹⁷ See *Commitment Adjustment Plan* at 3. Payment in error is computed first by determining the valid amount (if any) committed to an applicant, which is the total commitment amount less the adjustment amount. If the valid commitment amount is greater than or equal to the entire amount paid out by USAC, then no funds were paid in error. If, however, the valid commitment amount is less than the amount paid by USAC, then the excess of the amount paid over the valid commitment amount is the amount that was paid in error. Funds actually were disbursed in error in only five of USAC's 33 year one commitments for ineligible services and in only 18 of USAC's 62 year one commitments for telecommunications services to be provided by ineligible telecommunications providers. USAC Ex Parte Letter at 1.

¹⁸ See *Commitment Adjustment Order*, FCC 99-291, at para. 8.

¹⁹ USAC has paid approximately \$542,000 for ineligible services to five service providers for year one of the program. USAC has paid approximately \$229,000 to 14 ineligible service providers for year one of the program. USAC Ex Parte Letter at 1.

the service provider will have an "offset" option based on additional year one or year two funding commitments issued by USAC.

6. If there are no additional unpaid funding commitments involving the applicant and service provider in question, then USAC proposes to seek cash repayment of the erroneously committed funds from the service provider.²⁰ In this case, USAC proposes to send a letter to the service provider seeking repayment of such funds.²¹ If the service provider does not remit the funds in response to USAC's initial request, then USAC proposes to make a second request for payment.²² If, after this second request for payment, a service provider does not remit the requested payment, USAC proposes to refer the matter to the Commission.²³

7. If other unpaid commitments were made to the same applicant and service provider as were involved in the original erroneous commitment (in either year one or year two), then USAC proposes to give the service provider two options: to repay in cash the amount paid in error; or to have that amount offset by reductions in amounts owed to the service provider from other valid commitments.²⁴ USAC also proposes to give the service provider the option of choosing a combination of the offset option and the cash repayment option. The sum of offsets and cash repayment must equal the adjustment amount.²⁵

8. If the service provider chooses to offset unpaid amounts from valid year one funding commitment requests against the amount committed in error, then USAC proposes to issue new FCDLs to the service provider and the applicant reflecting the new

²⁰ See *Commitment Adjustment Plan* at 3.

²¹ See *Commitment Adjustment Plan* at 3. USAC proposes to net any funds not repaid by a service provider against any other Universal Service Fund payments that may be due to that service provider. See *Commitment Adjustment Plan* at 3, 4.

²² See *Commitment Adjustment Plan* at 4.

²³ See *Commitment Adjustment Plan* at 4.

²⁴ See *Commitment Adjustment Plan* at 3. To determine whether other valid commitments could offset funds paid in error, USAC first will consider "additional" year one funding commitments, including meritorious appeals and money extended by the Commission's *Tenth Order on Reconsideration*. In the *Tenth Order*, in recognition of the extension of the first funding year from January 1, 1998 – December 31, 1998 to January 1, 1998 – June 30, 1999, the Commission amended its rules to allow school and library applicants with existing contracts that expired prior to December 31, 1998 to extend or renew voluntarily through June 30, 1999 their existing contracts without engaging in the competitive bidding process. These extensions resulted in the commitment of additional discount funding to school and library applicants. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Tenth Order on Reconsideration*, 14 FCC Rcd 5983 (rel. April 2, 1999). If no additional year one funding commitments are available, USAC proposes to consider year two funding commitments.

²⁵ See *Commitment Adjustment Plan* at 4.

amount(s) owed to the service provider.²⁶ Similarly, if the service provider chooses to offset year two funding requests, then USAC proposes to reduce amounts owed to the service provider from year two commitments as necessary, and issue new FCDLs.²⁷

III. DISCUSSION

9. By this Order, the Commission adopts USAC's fund recovery plan described above, with certain modifications explained below. We direct USAC, in its role as Administrator of the universal service support mechanism for schools and libraries, to implement its recovery plan with ongoing Commission oversight. We conclude that USAC's proposed plan, as modified herein, complies fully with the Commission's rules and directions.²⁸

10. As a threshold matter, we conclude that USAC should apply its fund recovery plan to year one and subsequent years of the universal service support mechanism for schools and libraries. We find that continuance of USAC's fund recovery plan beyond year one of the program fully complies with Commission rules, and will ensure the integrity of the support program on a going-forward basis.

11. We agree with USAC's proposal to permit service providers to choose between the offset option and the cash repayment option where the same applicant and service provider are involved.²⁹ With regard to the offset option, we direct USAC to offer service providers two offset methods. First, as proposed by USAC, a service provider may choose to have the erroneous disbursement amount offset by reductions in amounts owed to the service provider from other existing valid commitments involving the same applicant and service provider in the same funding year.³⁰ For example, if \$100 was disbursed in error, and a valid commitment to the service provider in the amount of \$200 remains, the service provider may request that USAC disburse only \$100 to the service provider in the same funding year.

12. Second, in addition to USAC's proposed offset method, if the applicant has a pending request for services to be provided by the same service provider in a subsequent funding year, we direct USAC to permit service providers to offset an error committed in Year X against the amount the service provider may be owed in years after

²⁶ We note that a new FCDL reflecting a new amount owed to the service provider does not change the amount of the original valid commitment.

²⁷ See *Commitment Adjustment Plan* at 4.

²⁸ See 47 C.F.R. §§ 1.1901 et seq.

²⁹ We note that there must be an exact match between the applicant and service provider. That is, if an error was committed with regard to a school district's application, an offset may not be made against a commitment to an individual school in that school district.

³⁰ See *supra* n. 24 regarding the determination of other valid commitments. In addition, we direct USAC to consider any other valid commitments that may be available as offsets.

Year X.³¹ For example, assume that \$150 was disbursed in error to a service provider in Year X, and that the related applicant becomes eligible in Year X+1 for a 20% discount on \$1000 in services (\$200) and that the service provider provides \$1000 worth of services. While the FCDL would indicate that the applicant was awarded \$200 in discounts in Year X+1, the FCDL also would indicate that, as a result of the Year X error, USAC would disburse only \$50 to the service provider, not \$200. Because USAC would be disbursing only \$50 to the service provider, the balance on the amount owed to the service provider would be \$950.³² Under this offset option, an applicant that had received a greater discount than it should have in Year X would effectively have any subsequent disbursement to its service provider reduced in an amount equal to the earlier over-disbursement of universal service funds. If, however, the applicant ultimately does not receive a commitment from USAC in year X+1, the service provider would be required to remit to USAC the amount paid in error in year X.³³

13. With regard to the recovery options, we expect that, as otherwise provided by federal, state, or local law, the service provider may, where appropriate, recover from a school or library payment for the amount of discounted services provided for which USAC will not disburse funds. In addition, we believe that allowing service providers to choose an offset approach will place the correct incentives on applicants because we presume that, in instances of applicant error, the applicant will be responsible for the balance under the contract between the applicant and service provider.³⁴ We also emphasize that the proposed recovery plan is not intended to cover the rare cases in which the Commission has determined that a school or library has engaged in waste, fraud, or abuse. The Commission will address those situations on a case-by-case basis.

14. We modify USAC's proposal by specifying that USAC must submit a draft of its repayment/offset demand letter to the Common Carrier Bureau for prior approval and that, for errors that already have been discovered, USAC shall send the initial letter to the affected service providers no later than 60 days after release of this Order. In future years, we direct USAC to send an initial demand letter within 60 days of written notification of the error to the applicant and service provider. Further, we clarify

³¹ This option shall be limited to requests where: (1) the application has been data entered; (2) the applicant certification has been submitted; and (3) if the request is for internal connections, it is above the minimum funding threshold that has been set, if one has been set.

³² To implement the second offset method, USAC should decline to pay on invoices submitted by the service provider or reimbursement requests submitted by applicants until the full amount disbursed in error has been recovered. To the extent USAC is not invoiced for the full amount committed in error, USAC shall contact the applicant and service provider and if appropriate, give the service provider new offset options.

³³ We would expect USAC to send a letter requesting payment from the service provider within thirty days of USAC having determined that a commitment would not be made to the relevant applicant and service provider.

³⁴ Such recovery by the service provider from the school or library may not be appropriate where the erroneous disbursement was the result of an error by the service provider.

that, consistent with this Order and Commission rules, USAC, in its initial demand letter requesting that the service provider choose among the repayment and offset options, must require a response from the service providers no later than 30 days from issuance of the letter.³⁵ We also clarify that USAC's initial demand letter must expressly request repayment from the service provider in the amount specified in the letter within 30 days if the service provider selects the repayment option or doesn't have an offset option. Accordingly, if a service provider chooses a combination of offset and repayment, it must notify USAC of its intention to partially offset, and must remit the remaining amount to USAC within 30 days.

15. We further modify USAC's proposal by specifying that, in accordance with the Commission's rules, its second demand letter shall be sent to the noncompliant service provider 31 days after issuance of the initial demand letter.³⁶ USAC proposes that, if the service provider does not repay the funds in question after this second demand letter, then USAC will refer the matter to the Commission to take appropriate enforcement action.³⁷ We modify USAC's proposal by clarifying that, in accordance with the Commission rules, if USAC does not receive repayment within 30 days after issuance of the second demand letter, USAC shall refer the matter to the Commission on the 31st day after issuance of the second demand letter.³⁸ We further modify USAC's proposal by requiring USAC to immediately refer to the Commission any service provider that refuses to repay erroneously disbursed funds, even if this refusal occurs prior to 30 days after issuance of the second demand letter. We also modify USAC's proposal by requiring USAC to immediately refer to the Commission any service provider about which USAC has received information indicating that such service provider does not intend to repay erroneously disbursed funds even if USAC receives such information prior to expiration of the 30-day period. Further, we modify USAC's proposal by requiring USAC to immediately refer to the Commission any service provider requests for settlement of their repayment obligation.³⁹

16. We note that, consistent with the Commission's obligations under the DCIA, following USAC referrals to the Commission, the Commission will issue letters demanding repayment from service providers that are obligated to pay erroneously disbursed funds, and informing the service providers of their right to seek review by the

³⁵ See 47 C.F.R. § 1.1911.

³⁶ See 47 C.F.R. § 1.1911.

³⁷ See 47 C.F.R. § 1.1940, et seq. The Commission may impose any sanction permitted by law for any "inexcusable, prolonged, or repeated failure of a debtor" to pay a claim owed to the Commission. 47 C.F.R. § 1.1942.

³⁸ See 47 C.F.R. § 1.1911.

³⁹ In its *Commitment Adjustment Plan*, USAC sought approval to accommodate applicants that filed erroneous year two applications based on inappropriate year one funding commitments. See *Commitment Adjustment Plan* at 4. We decline to grant such approval because USAC appropriately has denied erroneous year two applications as of the date of this Order.

Commission.⁴⁰ If a service provider's repayment obligation is upheld on review, the service provider will have 30 days from the date of issuance of the review decision to repay the erroneously disbursed funds. After 180 days of nonpayment, the Commission will transfer the claim against the service provider to the Secretary of the Treasury for further collection action.⁴¹ Even prior to the expiration of the 180 days, however, if the evidence strongly suggests that collection attempts with respect to a particular service provider would be futile, the Commission may immediately refer such service provider to the Secretary of the Treasury for fund recovery action.⁴²

V. CONCLUSION

17. As discussed above, we conclude that USAC's October 22, 1999 plan, as modified in this Order, is consistent with the Act and our rules. Therefore, we adopt USAC's plan and direct USAC to collect erroneously disbursed universal service funds that were awarded in violation of the Communications Act of 1934.

VI. ORDERING CLAUSES

18. Accordingly, it is ORDERED that, pursuant to the authority contained in sections 1-4, 201, 254 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 254, and 303(r), and 31 U.S.C. §§ 3701 et seq., this Order in CC Docket Nos. 96-45 and 97-21 IS ADOPTED.

19. IT IS FURTHER ORDERED that USAC SHALL IMPLEMENT its October 22, 1999 fund recovery plan, as modified herein, no later than 60 days after release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁴⁰ See 4 C.F.R. § 102.2.

⁴¹ See 31 U.S.C. § 3711(g).

⁴² See 31 C.F.R. § 285.12(h).