



Jason Johnson
EXECUTIVE DIRECTOR

In the Matter of)	
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Schools and Libraries)	WC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Request for Waiver by)	Application No. 171021247
Albuquerque Public Schools)	
of the Commission's Rules)	

**REQUEST FOR WAIVER OF
SERVICE IMPLEMENTATION DEADLINE
FOR FUNDING YEAR 2017**

Pursuant to section 54.719(c) of the Commission's rules, the Albuquerque Public Schools (APS, Albuquerque, or the District) hereby respectfully requests a waiver of section 54.507 of the Commission's rules for the above-referenced application. For the reasons set forth below, we request that the Wireline Competition Bureau (Bureau) grant this waiver request, and any other waivers necessary, to allow Albuquerque an additional six months to complete installation and to receive its committed E-rate funding.

I. BACKGROUND

Albuquerque Public Schools is a school district based in Albuquerque, New Mexico. It serves all of Bernalillo County, which spans 1,167 square miles. It is the largest school district in New Mexico and has approximately 82,000 students and 14,000 employees. There are 143 schools in the district and multiple non-instructional facilities.

On November 21, 2016, APS sought bids for telecommunications access services with the goal of increasing the bandwidth for its schools and reducing its costs. Albuquerque received bids for leased lit and leased dark fiber from six different vendors offering solutions that varied in terms.



The District awarded a contract to Unite Private Networks (UPN or Unite) for leased lit fiber WAN services because it submitted the most cost-effective bid. UPN also offered the least expensive solution. The bid included a special construction charge of \$14.5 million to deploy fiber to the District's schools.

For Funding Year 2017, APS submitted FCC Form 471 #171021247, requesting E-rate funding for WAN services, including special construction charges.¹ USAC issued a funding commitment on November 17, 2017, more than six months after the application was submitted. Given the scope of the project, neither the district nor UPN was willing to begin construction until a positive funding decision was issued.

APS timely submitted an FCC Form 500 #80794 to request an extension of the service implementation deadline and received an extension from USAC until June 30, 2019.² The District and its service provider have worked diligently to complete the connections to the 159 locations by June 30, 2019. Despite these immense efforts, it appears there will be a few sites that will not be lit by June 30, 2019.

As of this writing, 150 of 159 sites have been lit. There are many factors that have led to the fiber project being delayed beyond June 30, 2019. Out of a total of 196.6 miles of fiber, 168.5 miles have been laid thus far. The remaining 28.1 miles of fiber to be constructed are in various stages of completion both aerially and underground. In addition to the timing of the FCDL, the delays have been caused by factors outside of UPN and APS's control:

¹ Exhibit 1, FCC Form 471.

² Exhibit 2, Revised FCDL Extending Service Delivery Deadline



- An 11-month process to receive a franchise agreement from the City of Albuquerque.
- Approvals from the relevant electric utility company—the Public Service Company of New Mexico (PNM)—for pole attachment permits.
- Rights-of-way approvals from the state Department of Transportation (DOT), for which the DOT sought documentation from a facilities' owner that Unite did not have access to.
- Receipt of permission from the U.S. Air Force to access an APS school located on Kirtland Air Force Base.
- The delayed construction of a new District school building.

As an initial matter, UPN had to receive a franchise agreement from the City of Albuquerque before any construction work could begin. It took 11 months for Unite to receive this permission from the City to construct Unite's facilities, in part because the City was modifying its processes for issuing franchise agreements. The City of Albuquerque was unable to move forward with any new agreements until it had completely updated these procedures.³ Obtaining a franchise agreement can typically take three to four months, which is why UPN began working with the City of Albuquerque on July 14, 2017 (four months before the funding commitment was even received). The parties signed the Franchise agreement on June 13, 2018. As a result, UPN only began constructing facilities a year ago.

³ While the majority of schools are located in the City of Albuquerque, some schools in the APS district are located in other towns such as the Village of Los Ranchos de Albuquerque, the Village of Corrales, and the Village of Tijeras. Unite was required to enter into agreements with each separate village where it need to install fiber, which added significant length to the process. For instance, the Village of Los Ranchos de Albuquerque (Village of LR) waited until the City of Albuquerque completed its licensing process before awarding a franchise to UPN. The Franchise agreement with the Village of LR took nearly 15 months to obtain. UPN was also required to enter into Bernalillo County's general franchise agreement, which is the subject of litigation with other telecommunications providers. Bernalillo County initially declined to allow Unite to enter into the agreement because of the pending litigation, but later changed its mind.



Second, an additional challenge was the process by which PNM approved pole attachment requests. PNM is the electric company that owns the poles on which UPN was required to place its aerial fiber. PNM had to approve UPN's requests for pole attachments before UPN could attach to poles. Under PNM's process, however, a vendor can have only 300 pole attachment requests pending at any one time. Once PNM approves those applications, UPN had only ninety (90) days to complete the attachments. If not attached in that timeframe, UPN would have to re-apply for permits.

This project involved more than 2,800 pole attachment requests, so Unite had to wait until PNM had approved a batch of 300 permits before UPN could submit another batch of 300 permits. While this alone was a challenge, the issue was compounded by delays in the approval of permits from PNM. In some cases, permits took as long as approximately seven months to be approved. In an effort to mitigate the delays caused by PNM's unusually slow approval process, UPN converted as many areas as possible to underground installation rather than aerial installation.

Third, in many of these areas, UPN constructed using existing conduit that was owned by a different vendor. Some of the required New Mexico Department of Transportation (DOT) permits were either expired or not in the DOT's records. UPN learned of this issue in February 2019.

Typically, when a situation like this occurs, the state entity, such as the DOT, will grant permits for the new provider and later resolve any recordkeeping issues with the actual owner of the conduit facilities. In this case, however, Unite was forced to act as the intermediary between the DOT and the owner to complete the various steps required to extend the owner's permits and allow Unite access to the conduit. This caused significant delays, which were compounded by the DOT's personnel issues.



The DOT only had one employee, who was already overextended, available to assist with resolving this issue. The DOT permitting issues were finally resolved in June 2019.⁴

Fourth, one school is located on Kirtland Air Force Base. Gaining access to install fiber on Kirtland Air Force Base has been even more challenging than working with the various public municipalities. Gaining the right to lay fiber on a secure Air Force base requires a lengthy approval process and background checks on all contractors performing the work. UPN is well-versed in the approval process from its extensive experience in the last 20 years of implementing WAN solutions for school districts, but these processes take a significant amount of time. UPN has worked closely with the Kirtland Air Force Base to complete the approval process, which is still not finished. Due to UPN's reputation and dealings with the Air Force base, the Base Commander has agreed to allow UPN to access the Right of Way prior to finalizing the overall agreement. UPN and the Air Force base are currently finalizing the plans to lay the fiber on the Base.

Finally, there is one school that the District is rebuilding. There have been delays in the construction of this facility that are outside of the control of Unite and the District. Unite has installed facilities up to the District property, but because the physical building has not been completed, Unite cannot turn up service to this location. The District requests the Commission grant a 12 month extension for the fiber to be lit to this location to allow for the completion of the building construction, which is currently projected to be March or April 2020.

⁴ In addition to the conduit access issue, there were several other areas of the project where significant work with the state DOT was required to receive the appropriate access to state-owned Rights of Way (ROW). For example, the fiber project involves crossing Interstate 40, one of the two major interstates serving the Albuquerque area. Major Interstate crossings require additional engineering work to ensure the crossing is done safely.



The District and the vendor made every effort possible to complete the work, but challenges with PNM, DOT, and the other factors presented above only allowed for 94% of the schools to be lit by June 30, 2019. Because the District's one-year extension expires June 30, 2019, the District is filing this waiver request with the Commission.

II. A WAIVER OF THE COMMISSION'S SERVICE INSTALLATION DEADLINE IS IN THE PUBLIC INTEREST

Albuquerque Public Schools respectfully requests a waiver of the Commission's rules in order to complete its fiber project. First, Albuquerque's project was "unavoidably delayed due to weather or other reasons" outside of its control.⁵ Second, APS satisfies one of the criteria established by the Commission for extensions of the deadline for non-recurring services. Finally, granting this waiver will serve the public interest and will help to achieve the goals of the E-rate program by bringing affordable broadband to students in the Albuquerque area.

Any of the Commission's rules may be waived if good cause is shown.⁶ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁸

In the *2014 Second E-Rate Order*, the Commission expanded the high-speed broadband options available to applicants by equalizing the treatment of leased lit and leased dark fiber networks under the E-Rate program, which included making special construction of leased dark fiber and self-provisioned

⁵ *Modernizing the E-rate Program for Schools and Libraries, Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, ¶ 49 (2014) (*2014 Second E-Rate Order*); see also *Request for Waiver by Utah Education and Telehealth Network, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 18-473 at ¶ 10 (WCB 2018) (*UETN Waiver Order*).

⁶ 47 C.F.R. § 1.3.

⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.



networks eligible for support.⁹ Specifically, applicants may only receive E-Rate discounts for special construction charges related to leased lit or dark fiber if the fiber is lit by the end of the funding year (i.e., June 30).¹⁰ Applicants may obtain a one-year extension of the June 30 deadline to complete special construction and light the fiber, or use a self-provisioned network, if they demonstrate that construction was “unavoidably delayed due to weather or other reasons.”¹¹

When applicants have received that one-year extension from USAC and still need additional time, they have sought a waiver of the rules from the Commission. In addressing requests for waiver of the special construction service delivery deadline, the Bureau reviewed applicants’ special circumstances.¹² In the context of the service implementation deadline applicable to other non-recurring services, the Bureau has issued waivers when (1) the applicant was unable to complete implementation for reasons beyond the service provider’s control, and (2) the petitioner made good faith efforts to comply with Commission rules and procedures.¹³

⁹ *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, 15558, ¶¶ 36, 43. .

¹⁰ *See* 47 CFR § 54.507(d)(1) (stating that a recurring service must be used within the funding year for which discounts are sought to be eligible for support); *see also* *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, 15560, ¶¶ 37, 49.

¹¹ *Id.* at 15555-56, 15560, ¶¶ 38, 49.

¹² *2017 Jemez Waiver Order*, 32 FCC Rcd at 10242-43, ¶ 7 (the Bureau concluded that the criteria for waiving the extension request deadline applicable to other non-recurring services “appropriately describe, at a high-level, the special circumstances that warrant a waiver of the deadline to extend the special construction implementation deadline.”); *Requests for Waiver by Grants/Cibola County School District and Jemez Pueblo Tribal Consortium, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, DA 18-1060 (WCB 2018) (*Grants/Cibola Waiver Order*).

¹³ *Requests for Review/Waiver of the Decision of the Universal Service Administrator by Accelerated Charter*, CC Docket No. 02-6, Order, 29 FCC Rcd 13652, 13652-53, ¶ 2 (WCB 2014) (*Accelerated Charter Order*) (granting a waiver of the service delivery deadline for non-recurring services when petitioners were unable to complete implementation on time for reasons beyond the service providers’ control).



Specifically, the Bureau has granted waivers when the applicants received their funding commitments late or when USAC initially denied the funding requests.¹⁴ The Bureau has also granted extension waivers due to the difficulty of obtaining the necessary permits from various federal, state and local governmental agencies.¹⁵ In Grants/Cibola, the Jemez Pueblo Consortium's service provider had to halt construction due to a state DOT requirement and then reapply for permits—a three-month delay.¹⁶ Finally, the Bureau has also noted the complexity of the builds and the short construction season as reasons to extend the deadline.¹⁷

The District meets these standards. First, the delays were unavoidable and unforeseeable. Neither the District nor Unite took any action that would have contributed to the delays they experienced in obtaining the necessary governmental authorizations to move forward. All of the permits were required for Unite to build and install the facilities.

Second, all of the delays described above were outside of the control of Unite. Unite has done everything within its control to obtain the necessary permits from the City of Albuquerque, the state DOT and the U.S. Air Force, as required by local, state and federal law. The City's decision to review its franchise agreement procedures before resolving Unite's application for authority was outside of Unite's (and the District's) control. The state DOT's determination that it required pre-existing permits from the conduit facilities' owner and that vendor's inability to timely produce those documents was outside of Unite's (and the District's) control. The PNM process for permitting pole attachments and resulting delay was outside of Unite's (and the District's) control. The U.S. Air Force's security protocol for access to its property is outside of Unite's (and the District's) control. Any one of these

¹⁴ *UETN Waiver Order* at ¶ 10.

¹⁵ *Grants/Cibola Waiver Order* at ¶ 5.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 11.



reasons justifies a waiver of the Service Delivery Deadline, however when all of these factors are taken into consideration, it is surprising Unite has completed construction and lit as many of the locations as they have.

Third, the District and Unite not only made good faith efforts to complete the project, but went above and beyond to finish the fiber build. For example, as described above, Unite worked diligently for months with the City of Albuquerque to obtain the franchise agreement. Unite worked with the state DOT to obtain permits that belonged to a different service provider. Unite even changed its fiber facilities, at its own expense, to move some of the build to underground instead of aerial, to mitigate the effect of PNM's pole attachment permitting process. For these reasons, the Commission should grant the waiver and allow the District an extension of time so that Unite can complete the project.

Because some of the Rights of Way and permitting have not yet been granted, the District is requesting an additional six months after the grant of this waiver request to light the remaining locations. The district is hopeful all sites will be lit sooner, as they are currently out of contract with their incumbent provider and paying significantly higher month-to-month rates for WAN service. The District's request for a six-month extension is also consistent with prior Bureau precedent. The Bureau granted UETN two additional years to complete its project, given the unique challenges involved in the construction. Grants/Cibola was given an additional 18 months and the Consortium was given one additional month. The District's request is proportionate to the extensions granted to those projects.

Finally, strict application of the rule in this instance would not be in the public interest. Denial of this waiver would significantly impact the district's ability to provide adequate bandwidth, at a reasonable cost, to its students.



APS believes that denying E-rate funding under these circumstances would be unjust, and that waiving the rule to the extent necessary would be efficient and consistent with the public interest. As such, APS respectfully argues that a waiver of the Commission rules is in the public interest.

III. CONCLUSION

For the foregoing reasons, the Bureau should grant Albuquerque's request for waiver. The Bureau should also grant a waiver of any other rules, such as the invoicing deadline rules, necessary to allow Albuquerque an additional six months to complete the fiber installation and to utilize its funding commitment.

Respectfully submitted,

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