

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

In the Matter of)	
)	
Schools and Libraries)	WC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Request for Waiver by)	Application No. 171048288
ESC Region 11 Consortium)	
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 ESC Region 11 Consortium¹ (the Consortium) 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 the Consortium an additional six months, until December 31, 2019, to complete installation and to receive its committed E-rate funding.

I. BACKGROUND

ESC Region 11 is one of 20 education service centers created by the Texas State Legislature. In order to serve the large number of individual school districts and charter schools in Texas, Texas Education Agency (TEA) is divided into 20 regions, each containing an Educational Service Center, or ESC. The ESCs serve as a liaison between the districts and TEA headquarters, providing support to the districts such as conducting workshops and technical assistance. ESC Region 11 provides professional development, technical support and management of educational

¹ Billed Entity Number 17002993. The FRNs are 1799110232 and 1799110417.

programs. Region 11 serves the counties of Cooke, Denton, Erath, Hood, Johnson, Parker, Palo Pinto, Somervell, Tarrant, and Wise. ESC Region 11 serves 77 school districts, 66 charter school campuses, 70,699 educators, and 578,910 students.

Chapter 8 of the Texas Education Code, enacted by the 75th Texas Legislature in 1997, specified the following purposes of ESCs: Regional Education Service Centers shall:

- Assist school districts in **improving student performance** in each region of the system;
- Enable school districts to **operate more efficiently and economically**; and
- Implement initiatives assigned by the legislature or the commissioner.²

In Funding Year 2017, the Consortium sought bids for wide area network services and Internet access services, with the goal of increasing the bandwidth for its schools and reducing costs for its member districts. After conducting a competitive bidding process consistent with the Commission's rules and soliciting bids for both leased lit and dark fiber, the Consortium awarded a contract to Zayo Group LLC (Zayo) for a dark fiber special construction project, and contracted separately with Netsync Network Solutions (Netsync) to provide the Category 1 equipment necessary to light the fiber installed by Zayo.

The Consortium submitted FCC Form 471 #171048288 for these services, requesting E-rate funding, including special construction charges. USAC issued funding commitments for these FRNs on February 2, 2018, more than eight months after the application was submitted. Given the scope of the project, neither the Consortium nor its service providers were willing to begin construction until a positive funding decision was issued.

The Consortium timely submitted an FCC Form 500 #106308 to request an extension of the service implementation deadline and received an extension from USAC until June 30, 2019. The Consortium and its service providers have worked diligently to complete the work by June 30,

² https://tea.texas.gov/About_TEA/Other_Services/Education_Service_Centers/

2019. Despite these immense efforts, for reasons beyond the control of both the service providers and the Consortium, the project will not be completed by June 30, 2019.³

As of this writing, 90 percent of the FY 2017 phase I project has been completed. The remaining 42 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 various factors outside of the Consortium and its service providers' control, affecting several of the school districts included in this project:

- For the Lake Dallas Independent School District (ISD) installation, the Dallas Area Rapid Transit (DART) has not issued a construction permit to cross DART railroad infrastructure.
- For the Stephenville ISD installation, the Fort Worth Western Railroad has delayed the release of two railroad crossing permits. The estimated receipt of the permits is mid-August. This delay affects completion of the Tolar ISD installation as well.
- For the Paradise ISD installation, the Texas Department of Transportation (DOT) has placed a hold on all utility work along part of the route due to a long-term road construction project.
- For the Sivells Bend ISD installation, the Texas DOT has mandated a fiber route redesign to avoid dam and water supply.
- For the Ponder ISD installation, a local entity has required an all-underground route on a public right-of-way. The route has been reengineered accordingly and the necessary permits requested, but the resulting delay is expected to be about six months.
- For the Aledo ISD installation, the fiber had to be rerouted due to the refusal of a private entity to grant an easement. This caused a four-month delay.
- For the Northwest ISD installation, the service provider is still waiting for a railroad permit.

³ The District was informed recently by the service providers that the work cannot be completed by June 30, 2019. See attached letters from Zayo and Netsync.

The service provider installing the fiber, Zayo, has been working and continues to work diligently with all of these entities to resolve permitting issues and move the construction forward, but collectively, these issues are expected to delay completion of construction by about six months.

The Consortium and its service providers made every effort possible to complete the work, but the challenges described above made it impossible to complete the project by June 30, 2019. Because its one-year extension from USAC expires June 30, 2019, and USAC is not authorized to grant any further extensions, the Consortium is filing this waiver request with the Commission.

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

The Consortium respectfully requests a waiver of the Commission's rules in order to complete its fiber project. First, the Consortium's project was "unavoidably delayed due to weather or other reasons" outside of its control.⁴ Second, the Consortium 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 Texas.

Any of the Commission's rules may be waived if good cause is shown.⁵ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁶ In addition, the Commission may take into account

⁴ *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*).

⁵ 47 C.F.R. § 1.3.

⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁷

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 networks eligible for support.⁸ 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).⁹ 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.”¹⁰

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.¹¹ In the context of the service implementation deadline applicable to other non-recurring services, the Bureau has issued waivers when (1) the applicant

⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁸ *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, 15558, ¶¶ 36, 43.

⁹ 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.

¹⁰ *Id.* at 15555-56, 15560, ¶¶ 38, 49.

¹¹ *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*).

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.¹²

Specifically, the Bureau has granted waivers when the applicants received their funding commitments late or when USAC initially denied the funding requests.¹³ The Bureau has also granted extension waivers due to the difficulty of obtaining the necessary permits from various federal, state and local governmental agencies.¹⁴ 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.¹⁵

The instant waiver request meets these standards. First, the delays were unavoidable and unforeseeable. Neither the Consortium nor its service providers took any action that would have contributed to the delays they experienced in obtaining the necessary authorizations to move forward.¹⁶

Second, all of the delays described above were outside of Zayo's control. First, the FCDL was issued in February 2018, giving Zayo and Region 11 only four months to complete a year-long project within the initial funding year. Second, the permitting process involved multiple local and state governmental entities, and in some cases, private entities, that have no obligation to complete their processes within a certain time frame. Zayo has done everything within its control to obtain the necessary permits from the Texas DOT and the various other public and private entities whose

¹² *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).

¹³ *UETN Waiver Order* at ¶ 10.

¹⁴ *Grants/Cibola Waiver Order* at ¶ 5.

¹⁵ *Id.*

¹⁶ The delays were also outside of the control of Netsync. The fiber must be installed before Netsync can perform its part of the installation.

permissions were required to complete this project. The failure of DART to issue a timely construction permit to cross its railroad infrastructure was beyond Zayo's or the Consortium's control. The Fort Worth Western Railroad's delay in issuing railroad crossing permits was beyond Zayo's or the Consortium's control. The DOT's decision to place a hold on all utility work due to a long-term road construction project was beyond Zayo's or the Consortium's control. The DOT's decision to mandate a fiber route redesign to avoid dam and water supply along the planned route to the Sivells Bend ISD was beyond Zayo's or the Consortium's control. The decision of a local entity to require an all-underground route on a public right-of-way, which required that the planned route be re-engineered and associated permits requested, was beyond Zayo's or the Consortium's control. The refusal of a private entity to grant an easement was beyond Zayo's or the Consortium's control. The delay in receiving a necessary railroad permit for the Northwest ISD installation was beyond Zayo's or the Consortium's control. Any one of these reasons would, on its own, justify a waiver of the service delivery deadline.

Because some of the necessary rights of way and permits have not yet been granted, the Consortium is requesting an additional six months after the grant of this waiver request to light the remaining locations. The Consortium'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. The Consortium'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 Consortium's ability to provide adequate bandwidth, at a reasonable cost, to the students of its member school districts.

The Consortium 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, the Consortium respectfully argues that a waiver of the Commission rules is in the public interest.

III. CONCLUSION

For the foregoing reasons, the Bureau should grant the ESC Region 11 Consortium's request for waiver. The Bureau should also grant a waiver of any other rules, such as the invoicing deadline rules, necessary to allow the Consortium an additional six months—until December 31, 2019—to complete the fiber installation and to utilize its funding commitment.

Respectfully submitted,

/s/ Russell Neal

Russell Neal, CEMP
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Consultant for ESC Region 11

June 30, 2019

CERTIFICATE OF SERVICE

This is to certify that the foregoing Request for Waiver was sent via email to the Schools and Libraries Division, Universal Service Administrative Company at the Appeals@USAC.org address, Zayo Group LLC, and Netsync Network Solutions.

/s/ Russell Neal

Russell Neal, CEMP

June 27, 2019

Rory Peacock
Chief Technology Officer
Education Service Center Region 11
1451 S. Cherry Lane
Fort Worth, TX 76108

Subject: ESC Region 11 Fiber Project – E-Rate Installation Deadline Extension Waiver Request Funding Year 2017

Mr. Peacock,

I am writing this letter to inform you Netsync Network Solutions will be unable to complete the installation of all Category 1 Network Equipment by the June 30, 2019 service completion due date.

The reason for the delay is beyond Netsync Network Solutions control as summarized below:

Zayo Group, LLC has been unable to secure permits from a multitude of permitting entities. The fiber at each project site has not been completed. Therefore, Netsync Network Solutions is unable to complete this installation as requested.

Based upon our recent project status conference calls, we respectfully request until **December 31st, 2019** to complete this project in coordination with the completion of the Fiber build to each project site.

If you have any further questions or concerns regarding this matter, please let me know.

Sincerely,



Deborah Drake
Contracts Manager
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214.601.8955



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June 27th, 2019

Rory Peacock
Chief Technology Officer
Education Service Center Region 11
1451 S. Cherry Lane
Fort Worth, TX 76108

Subject: ESC Region 11 Fiber Project – E-Rate Installation Deadline Extension Waiver for Funding Year 2017

Mr. Peacock,

I am writing this letter to inform you Zayo Group, L.L.C. is unable to complete the Fiber Installation project for Funding Year 2017 by June 30th, 2019. This reason for this delay is beyond Zayo Group, L.L.C.'s control as summarized below:

Stephenville ISD

The Fort Worth Western Railroad has delayed the release of two railroad crossing permits. Latest status from Fort Worth Western Railroad is "Permit is under review". Estimated Receipt of the permits is Mid-August 2019.

Tolar ISD

The Tolar ISD installation is dependent upon the fiber build to Stephenville ISD. The fiber build to Stephenville as previously referenced is being delayed by the issuance of construction permits by Fort Worth Western Railroad.

Sivells Bend ISD

The Texas Department of Transport has mandated a fiber route redesign to avoid Dam and water supply in the Gainesville Area.

Ponder ISD

A local entity has required an all underground route on public right-of-way. Therefore, this route has been reengineered and permits have been requested from all necessary permitting entities. This delay has extended the installation time frame approximately six months.

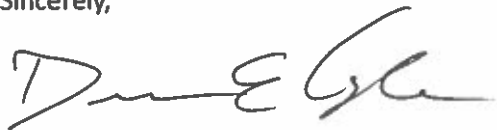
Aledo ISD

This fiber route must be rerouted to avoid a private easement. The private entity would not provide an easement for the original planned route. This change necessitated a four month delay.

Northwest ISD

This fiber route is pending receipt of a Railroad permit. Zayo Group, L.L.C. is working diligently with all of the above entities to resolve the permit issues in order to complete this project in a timely matter, but not later than **December 31, 2019**. We appreciate your patience while we proactively engage the respective permitting entities. If you have any further questions or concerns regarding this matter, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis Kyle". The signature is fluid and cursive, with the first name "Dennis" and last name "Kyle" clearly distinguishable.

Dennis Kyle
Senior Vice President, Zayo Networks, Mountain
Zayo Group, L.L.C.