

November 25, 2019

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VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Notice of Ex Parte Presentation Request for Waiver of Service Implementation Deadline for Funding Year 2018 by Grand Canyon Unified School District, WC Docket No. 02-6.

Dear Ms. Dortch.

On November 21, 2019, the undersigned, counsel for the Grand Canyon Unified School District (GCUSD), held a telephone conversation with Gabriela Gross, deputy division chief of the Wireline Competition Bureau's Telecommunications Access Policy Division regarding the above referenced waiver.¹

During the call, I discussed the standard for providing an extension of the one-year construction deadline for special construction projects and the standard for waiving the one-year rule. Emphasizing the points made in a recent ex parte filing by Commnet, the service provider selected by GCUSD, I explained that neither the standard for granting an extension, nor the standard for waiving the rule, require that the circumstances warranting the extension be unforeseen or unforeseeable.²

The Commission's standard for granting an extension of the one-year deadline is that the implementation "was unavoidably delayed due to weather or other reasons."³ On its face, that standard does not require that circumstances causing the unavoidable delay be unforeseeable.

¹ Request for Waiver by Grand Canyon Unified School District of the Commission's Rules, WC Docket No. 02-06 (filed July 31, 2019) (Waiver).

² Letter from Gina Spade, Counsel for Commnet AZ, LLC (Commnet) to Marlene H. Dortch, Secretary, Federal Communications Commission, Request for Waiver of E-Rate Service Implementation Deadline for Funding Year 2019 by Grand Canyon Unified School District, WC Docket No. 02-6 (filed Nov. 14, 2019).

³ *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, 15553, 15558, ¶¶ 38, 49 (2014) (*Second Modernization Order*).

Nevertheless, USAC has taken the position that only unforeseen circumstances warrant an extension.⁴ In this instance, even applying its own interpretation, USAC rejected a number of unforeseen events identified by GCUSD, concluding that no unforeseen events could justify an extension where it was foreseen that the build would take longer than a year.

Even assuming that USAC's interpretation that the Commission's "unavoidably delayed" standard for granting an extension incorporates a foreseeability element were reasonable, which it is not, the Bureau's criteria for waiving the one-year rule unequivocally contains no such requirement. Of course of the Bureau applies the Commissions' general good cause standard for waiving any Commission rule. Under this standard, waiver is appropriate where the "special circumstances" of the case would make strict compliance with the rule inconsistent with the public interest, "tak[ing] into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis."⁵ The Bureau has concluded that special circumstances warranting waiver in the specific context of special construction arise when "the applicant was unable to complete implementation for reasons beyond the service provider's control," and that "the petitioner made good faith efforts to comply with Commission rules and procedures."⁶ Neither the general good faith standard nor the special circumstances identified by the Bureau require that the reasons identified as being outside the service provider's control be unforeseeable.

The Bureau's *UETN Waiver Order* confirms that circumstances precluding completion of construction within one year need not be unforeseeable. The circumstances justifying the waiver of the one-year construction deadline in the *UETN Waiver Order* were all entirely foreseeable, yet outside the service provider's control. These included the complexity of the build, challenging terrain and short construction seasons.⁷ These entirely foreseeable circumstances justifying waiver are, ironically, the very same type of circumstances that USAC states prevent it from extending the one year deadline.⁸ The *UETN Waiver Order* also found it notable that the provider would not purchase materials or begin construction until funding for the entire duration of the build was approved.⁹ In light of these foreseeable circumstances, the Bureau concluded that "strict adherence

⁴ USAC's position is made clear in its FAQs regarding special construction:

"**Q5:** What if special construction for a fiber run or network cannot be completed in one year because of the terrain, the extensiveness of the build, or other foreseeable factors? Are there any exceptions that will let me seek special construction charges for fiber that is not lit within the same funding year as the funding request?

A5: No. There are no exceptions to the requirement to light the fiber by the end of the funding year (i.e., June 30) when the reasons are foreseeable events. Foreseeable events may include, for example, the size or complexity of the build, the terrain involved, limitations expressed by a service provider or contract terms. Applicants may receive up to a one year extension if they can demonstrate that construction was unavoidably delayed due to weather or other reasons." Available at <https://www.usac.org/e-rate/learn/faqs/eligible-fiber-services/>

⁵ *Request for Waiver by Utah Education and Telehealth Network*, CC Docket No. 02-6, Order, 33 FCC Rcd 4607, 4610, ¶ 8 (WCB 2018) (*UETN Waiver Order*).

⁶ *Request for Waiver by Grants/Cibola County School District, Grants, New Mexico*, CC Docket No. 02-6, Order, 33 FCC Rcd 10048, 10051, ¶ 8 (WCB 2018) (*Grants/Cibola Waiver Order*).

⁷ *UETN Waiver Order*, 33 FCC Rcd at 4611, ¶¶ 9-10.

⁸ See note 4 *supra*, quoting USAC that the foreseeable events precluding extension "may include, for example, the size or complexity of the build, [and] the terrain involved."

⁹ *UETN Waiver Order*, 33 FCC Rcd at 4611, ¶ 10.

to the Commission's rules would leave UETN with inadequate time to complete construction of the planned network."¹⁰

The circumstances of GCUSD's application fall squarely within this precedent. Like *UETN*, GCUSD's build is complex. As set forth in the waiver request, the service provider estimates that construction of the highly remote, 66-mile fiber build will take 11 months, due primarily to make ready work on thousands of utility poles along a railroad right of way. Before construction can begin, Commnet must first obtain permits from numerous public and private entities, including importantly, the National Forest Service and the National Park service, both of which support the project, but cannot initiate the process of issuing permits until funding is fully approved. Commnet estimated that the permitting process would take 9 months, resulting in a total construction period of approximately two years. Both the complexity of the build, for which there are no reasonable alternatives, and the permitting process are beyond Commnet's control. Also, as was the case with *UETN*, there is a limited construction season and Commnet will not begin work until funding for the entire duration of the project is approved.¹¹ Finally, GCUSD fully complied with Commission rules, and there is no fraud, waste or abuse.

It is inconceivable that the public interest would be best served by preventing this desperately needed project from going forward. It is exactly the type of project for which the E-Rate program was established. For the same type of "reasons beyond the service provider's control" that the Bureau has previously granted waivers, strict adherence to the Commission's rules would leave GCUSD "with inadequate time to complete construction of its planned network."

GCUSD respectfully urges the Bureau to expeditiously conclude its review of the waiver request, which has been pending since the end of July, and provide the 18 months requested to complete this much needed and meritorious project.

Please feel free to contact the undersigned if you have any questions.

Sincerely,

/s/ Michael H. Pryor

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¹⁰ *Id.* at 4611, ¶ 11.

¹¹ USAC's initial approval of this project came in early January, providing less than 5 months to complete this project before the June 30th deadline. USAC's late approval, as noted in the waiver request, is a further circumstance beyond the service provider's control that warrants waiver of the rule.