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

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

ORDER

Adopted: October 8, 1999 **Released: October 8, 1999**

By the Commission:

I. INTRODUCTION

1. Pursuant to section 1.3 of the Commission's rules,[1] we find good cause to grant, on our own motion, a one-time, limited waiver of four Commission rules pertaining to the schools and libraries universal service support mechanism in cases where discount funding commitments were made or disbursed in violation of our rules. We also direct the Administrator of the universal service support mechanisms (the Universal Service Administrative Company or USAC) to waive one of its procedural rules that applies to the funding application process. These limited waivers will apply only to the first funding year of the support mechanism and will affect only those commitments identified by USAC that are the subject of this Order.[2] This Order will allow the affected applicants, as determined by USAC, to retain their committed funds during the first funding year.[3]

II. BACKGROUND

2. The Administrator, through standard audit and review processes, recently discovered that it awarded discount funding to a small number of year one applicants in

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[1] 47 C.F.R. § 1.3.

[2] The first funding year of the schools and libraries universal service support mechanism was January 1, 1998, through June 30, 1999.

[3] We note that USAC discovered additional applications where disbursement of funds for these applications would violate certain requirements of the Communications Act of 1934, as amended (the Act). These adjustments are the subject of the Commission's companion order to this Order, *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) (*Statutory Adjustment Order*).

violation of federal statutes, Commission rules pertaining to the schools and libraries discount support mechanism, and a USAC procedural rule that applies to the discount mechanism's application process. USAC identified the affected applications as part of its internal post-commitment management review of applications. In addition, USAC contracted with independent auditors for reviews of its internal controls and, during the course of one of those reviews, USAC further defined and quantified the affected applications.[4]

3. USAC discovered applications in two general categories where commitments or disbursements of funds would violate our rules: (1) applications that did not conform with the Commission's competitive bidding rules;[5] and (2) commitments that, if funded, would violate the Commission's funding priority rules.[6] First, the competitive bidding rules were established generally to promote competition among service providers and ensure that schools and libraries benefited from the competition. The specific competitive bidding rules violated here include the commitment or disbursement of funds for applications that: (i) failed to secure a signed contract prior to filing the FCC Form 471[7] with USAC indicating which services were ordered under the discount mechanism, as required under section 54.504(c) of the Commission's rules;[8] (ii) failed to seek competitive bids and post service requests on the Administrator's website for 28 days prior to entering into a contract or taking services pursuant to a tariff, as required under sections 54.504(a) and 54.504(b)(4) of the Commission's rules;[9] and (iii) failed to calculate properly the service periods for which applicants were eligible for support, as required under sections 54.504(a) and 54.504(c) of the Commission's rules.[10]

4. Second, certain commitments were issued contrary to Commission rules regarding funding priority. The funding priority rules were established to ensure that the neediest schools and libraries received priority for discounts on internal connections. For

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[4] In the first funding year, USAC committed $1.7 billion in funding for the schools and libraries mechanism. Of this amount, approximately $14 million was committed in violation of Commission rules and USAC procedures. Thus, $14 million in commitments that constitute Commission rule and USAC procedural violations divided by a total commitment of $1.7 billion is equal to .0082 or an error rate of .82%.

[5] *See* 47 C.F.R. §§ 54.504(a), 54,504(b)(4), and 54.504(c).

[6] 47 C.F.R. § 54.507(g)(1)(iii).

[7] FCC Form 471, Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806.

[8] As of September 22, 1999, funds were committed to 137 applications in violation of this Commission rule.

[9] As of September 22, 1999, funds were committed to 188 applications in violation of this Commission rule.

[10] As of September 22, 1999, funds were committed to 78 applications in violation of this Commission rule.

the first year of the mechanism, USAC determined, based on the discount funding priority rule found in section 54.507(g)(1)(iii) of the Commission's rules, and an estimate of available funds, that only those schools and libraries eligible for discounts of 70 percent or more would be eligible for discounts on internal connections. USAC discovered that it committed funding to underwrite discounts for internal connections for some institutions with a discount eligibility of less than 70 percent.[11]

5. Finally, in addition to Commission rule violations, USAC discovered that commitments were made with respect to certain applications that did not conform to USAC's procedure, which requires that applicants seeking discounts on pre-existing contracts submit an FCC Form 470[12] at least 28 days prior to filing an FCC Form 471, even though such applicants are exempt from the Commission's competitive bidding rules.[13]

III. DISCUSSION

6. The Commission has general authority to suspend, waive, or amend its rules on its own motion, for good cause.[14] Courts have held that good cause exists to waive a Commission rule if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[15] We find that special circumstances warrant a deviation from the rules identified above of the schools and libraries universal service support mechanism for commitments or disbursements made with respect to year-one applications that failed to comply with the Commission's regulations described above. Precedent makes clear that, "a regulation which is not required by statute may, in appropriate circumstances be waived and must be waived where failure to do so would amount to an abuse of discretion."[16] Congress did not specify the procedures that the Commission must use in implementing the universal service mechanism for schools and libraries, thus the procedures are not "required by statute." We find, as described below, that special circumstances justify a limited waiver of the specific rules described in this Order for affected applications for which commitments or disbursements were made during the first funding year, as identified by

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11 As of September 22, 1999, funds were committed to 160 applicants in violation of this Commission rule.

12 FCC Form 470, Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806.

13 *See* Universal Service Program Description, January 1998. As of September 22, 1999, funds were committed to 134 applications in violation of this USAC procedure.

14 47 C.F.R. § 1.3.

15 *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (noting that the "combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials, administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility").

16 *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (5th Cir. 1995).

USAC. These special circumstances also justify our direction to USAC to waive its procedural rule on a similarly limited basis. We stress that the waivers granted herein are limited in scope, applying only to affected applications for which commitments or disbursements were made during the first funding year, as determined by USAC.

7. Specifically, we are persuaded that, for several reasons, the affected applicants and providers in the first year of the schools and libraries support mechanism may have reasonably relied on the funding commitments applicants received from USAC. First, the commitment letter did not expressly state that USAC or the Commission may seek adjustment of the commitments after an applicant's receipt of the funding commitment. Rather, the discount mechanism application form requires certification and acknowledgement by the applicant of the statement that "you may be audited to ensure that the information you are providing in this form is accurate and that you are abiding by all of the relevant regulations."[17] This statement suggests that compliance with all regulations is a condition for receipt of a discount funding commitment, but may have left some applicants without sufficient notice as to possible adjustment of their funding commitments should program violations be discovered after their receipt of funding commitments or subsequent disbursement.

8. To prevent such ambiguity in the future, USAC has revised its application form certification to reflect the potential for adjustment of commitments after commitment letters have been issued.[18] Further, USAC has revised the language of its funding commitment decision letters to put applicants and service providers on notice of the potential for subsequent adjustment of any commitments or funding issued in error.[19]

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[17] FCC Form 471, Schools and Libraries Universal Service, Services Ordered and Certification, OMB 3060-0806.

[18] Beginning in the third funding year, the revised application form requires certification from the applicant that the applicant has complied with all program rules and acknowledges that "failure to do so may result in denial of discount funding and/or cancellation of funding commitments." *Id.*

[19] USAC funding commitment letters contain the following language:

> Applicants' receipt of funding commitments is contingent on their compliance with all statutory, regulatory, and procedural requirements of the universal service mechanisms for schools and libraries. FCC Form 471 Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements. If the SLD subsequently determines that its commitment was erroneously issued either due to action or inaction, including but not limited to that by SLD, the Applicant, or service provider, and that the action or inaction was not in accordance with such requirements, SLD may be required to cancel these funding commitments and seek repayment of any funds disbursed not in accordance with such requirements. The SLD, and other appropriate authorities (including but not limited to USAC and the FCC) may pursue enforcement actions and other means of recourse to collect erroneously disbursed funds.
> The timing of payment of invoices may also be affected by the availability of funds based on the amount of funds collected from

Thus, each applicant and service provider in funding years subsequent to year one is on notice that funding commitments and disbursements, if in violation of federal statutes, Commission regulations, or USAC procedures, will be subject to adjustment.

9. Second, applicants were required to receive recurring services prior to June 30, 1999, and non-recurring services by September 30, 1999.[20] Accordingly, applicants may have necessarily relied on the commitment of funding to take service and incur costs to complete work within the prescribed regulatory time frame. Providers, too, may have necessarily relied on the commitment of funding to provide service and complete work within the prescribed time frame. Moreover, as mentioned above, applicants and service providers may not have received sufficient notice as to the possible adjustment of the commitments.

10. Third, while the applicants at issue here failed to submit applications fully compliant with our rules, this was the first funding year of USAC's administration of the new schools and libraries support mechanism. Unlike schools and libraries whose applications were rejected outright for failure to meet all applicable rules of this new and sophisticated regulatory initiative, the inexperienced applicants affected here may have reasonably relied on USAC's commitment letter as confirmation that their applications did in fact comply with Commission rules. Under such circumstances, involving the first funding year of the support mechanism, and reasonable applicant reliance on regulatory action, precedent supports a limited regulatory waiver.[21]

11. Finally, we find that waiver of the Commission rules will protect the service providers involved from the obligation to repay the discount funding reimbursements they have received, and/or adjustment of the discount funding reimbursements they are expecting from USAC. It is unlikely that these providers could have informed themselves about the status of an applicant's compliance with applicable

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contributing telecommunications companies.

[20] Section 54.507(d) requires schools and libraries to file applications for discounts each year. 47 C.F.R. § 54.507(d). The schools and libraries mechanism operates on a calendar year cycle (July 1 – June 30) but, for the first year of the mechanism only, the eighteen month period from January 1, 1998 to June 30, 1999, was considered a funding year. 47 C.F.R. § 54.507(b). In the *Tenth Reconsideration Order*, the Commission extended the deadline for the receipt of non-recurring services from June 30, 1999 to September 30, 1999. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Tenth Order on Reconsideration, 14 FCC Rcd 5983, 5991-92 at para. 17 (1999).

[21] *See To the Secretary of Health, Education, and Welfare*, September 15, 1971, 51 Comp. Gen. 162 (1971); *To Mr. Secretary: Apr 19, 1972*, B-164031(1), 1972 WL 6886 (stating that there may be exceptional circumstances under which an agency is not required to seek full recovery where it has erroneously provided grant funds to ineligible recipients that failed to comply with the agency's regulations). Although the universal service support mechanism for schools and libraries is not a grant program, these cases provide an analogy to the circumstances here. *See also* B-176994, *In the Matter of Chicago Association for Retarded Children; Reimbursement Under Special Food Service Program for Children*, Feb. 12, 1976, 1976 WL 8871 (C.G.) (citing occasions where the Comptroller General "agreed to permit a settlement not strictly authorized by . . . program regulations based on an unusual set of circumstances in which the administrative agency itself was partially responsible either for the failure to comply with the regulations or with the fact that expenses were incurred in violation of the regulations").

regulations absent notification by USAC, thus constituting special circumstances, in addition to those discussed above, justifying a waiver of our rules for the first year.[22]

12. We are also persuaded that, in addition to affording relief to applicants that may have reasonably relied on their commitment letters, a limited waiver is not detrimental to the operation of the schools and libraries support mechanism. Specifically, the limited waiver announced in this Order applies only to the specific rules described in this Order for affected applications for which commitments or disbursements were made during the first funding year. In addition, as a result of additional internal controls that USAC has implemented, and the experience gained by applicants in the first funding year, we expect considerably fewer non-conforming applications in the second funding year. Moreover, new language in the commitment letters makes clear to applicants and service providers that funding committed or disbursed that is not compliant with federal law or rules must be withheld or returned. Accordingly, for these reasons, we believe the limited waiver of our rules in the first funding year will not impact the integrity of the funding mechanism for subsequent years.

13. Based on the special circumstances described above, we find it appropriate and in the public interest to grant a one-time, limited waiver of the Commission rules described in this Order, in order to permit commitment and disbursement of funds during the first funding year where such commitment and disbursement would otherwise violate the Commission's rules. Accordingly, for those cases in which USAC's commitment or disbursement of funds during the first funding year would result in a violation of the following rules, we grant a limited waiver of sections 54.504(a), 54.504(b)(4), and 54.504(c), relating to the Commission's competitive bidding rules,[23] and section 54.507(g)(1)(iii), relating to the Commission's funding priority rules.[24] We further direct USAC to grant a one-time, limited waiver of its procedural rule requiring that applicants seeking discounts on pre-existing contracts submit an FCC Form 470 at least 28 days prior to filing an FCC Form 471. The limited waivers described in this Order apply only to the specific Commission rules and USAC procedure described in this Order, for affected applications for which commitments or disbursements were made during the first funding year, as identified by USAC.

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[22] These providers are distinguishable from providers who know, or should have known, that the services they provided were not eligible for support or, in the case of non-carrier providers, that they were ineligible for support for discounts on telecommunications services. In any event, we note that, in the Commission's companion *Statutory Adjustment Order* released today, we conclude that we have no discretion to waive violations of such statutory requirements.

[23] 47 C.F.R. §§ 54.504(a), 54.504(b)(4), and 54.504(c).

[24] 47 C.F.R. § 54.507(g)(1)(iii).

IV. CONCLUSION

14. In sum, for the reasons described above, we conclude that the limited waiver of the Commission's rules described in this Order, as well as USAC's waiver of its procedural requirement, applied only to first-year funding commitments or disbursements described herein, will best serve the public interest.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 254, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 254, and 303(r), and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Order IS ADOPTED. IT IS FURTHER ORDERED that any applicants covered by this Order that did not use their discounts on non-recurring services in full by September 30, 1999, pursuant to section 54.507(b)(2) of the Commission's rules, ARE GRANTED a waiver of that deadline for a period of 180 days from the date of release of this Order.

16. IT IS FURTHER ORDERED that the Universal Service Administrative Company SHALL WAIVE, on a limited basis as set forth in this Order, the procedural requirement described herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary