

NATHANIEL HAWTHORNE
Attorney at Law/Consultant
Admitted in Ohio, Illinois and the District of Columbia

DOCKET FILE COPY ORIGINAL

email: nateh@users.qual.net

February 25, 2000

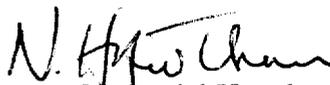
27600 Chagrin Boulevard
Suite 260
Cleveland, OH 44122
(216) 514-3336
fax (216) 514-3337

Federal Communications Commission
Office of the Secretary
445 12 th Street, SW
Room TW-A325
Washington, DC 20554

RECEIVED
FEB 28 2000
FCC MAIL ROOM

Please file the attached Supplement to the Appeal, and return the enclosed copy with a time stamp in the enclosed self addressed stamped envelope.

Sincerely,


Nathaniel Hawthorne

No. of Copies rec'd
List ABCDE

074

Express Mail

**Before
the
Federal Communications Commission**

In the matter of:

**Request for Review by Spring Cove School District
of a Decision by the Universal Service Administrator**

FCC Docket Nos. 97-21 and 96-45

**Motion to Suspend, or waiver of rules for good cause shown.
47 CFR Sec. 1.3**

RECEIVED
FEB 28 2000
FCC MAIL ROOM

Supplement to December 9, 1999 Appeal

Spring Cove filed an Appeal dated December 9, 1999, in the above referenced matter. Since the filing of that Appeal, Counsel has discovered an FCC Memorandum Opinion and Order that directly impacts and supports Spring Cove's Appeal. That Memorandum Opinion and Order, CC Docket No. 96-45, FCC, Release-Number: DA 99-2037, Adopted September 30, 1999 (Mesa Vista Consolidated Schools District (MVCSD)), is attached as Exhibit A.

To recapitulate:

Spring Cove School District is a public school district located in Roaring Spring, Pennsylvania. Spring Cove timely filed the FCC Form 470; FCC Form 471 was filed within the "75 day window" established by the FCC. The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) denied Universal Service Funds (USF) to Spring Cove stating that Spring Cove executed contracts for new service prior to a 28 day waiting period.

Spring Cove:

- (a) appeals the denial of its request for funding by the SLD; and,
- (b) moves to suspend or waive, for good cause shown, the SLD requirement that FCC Form 470 be posted for 28 days before a contract can be executed.

Basically, the SLD denied funding because the contract for new service was signed 1.3 days prior to the end of the required 28-day waiting period computed from the date of the posting of the Form 470 to the SLD Web Site.

The MVCSD Case states coherent rationale as to why rules that relate to USF funding should not be strictly construed in matters like this Appeal. Specifically, the FCC stated that its discretion is warranted “where particular facts make strict compliance inconsistent with the public interest...[t]he Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.” The FCC, in its analysis, went on to state enforcing a deadline is not warranted where “it will mean that...students..will be denied the benefits of the new communications technologies and opportunities that [Spring Cove’s] ...project will make possible.”

Here, and as stated in the MVCSD Case, there is no evidence that there will be an adverse impact on universal service if other schools requested similar relief.

For the foregoing reasons, Spring Cove restates the relief requested:

- A. The FCC should reverse the SLD’s action in refusing to fund the FRN’s appealed.**
- B. The FCC should waive or suspend the SLD rule prohibiting execution of of a contract prior to 28 days after posting of the Form 470.**
- C. The FCC should order funding of each FRN appealed.**

Spring Cove School District



Nathaniel Hawthorne
Attorney
Ohio Bar 0008881

27600 Chagrin Blvd.,
Suite 260
Cleveland, OH 44122

Tel. 216/514/3336
Fax. 216/514/3337
Email: nateh@oh.verio.com

Certificate of Service

A copy of the foregoing Supplement was served on the Universal Service Administrative Company (Administrator) at:

Schools and Libraries Division
Universal Service Administrative Company
Box 125-Correspondence Unit
100 South Jefferson Rd.
Whippany, NJ 07981

pursuant to 47 CFR Sec. 1.47 this 25th day of February, 2000 by Express Mail.



Nathaniel Hawthorne

EXHIBIT A

2ND ITEM of Level 1 printed in FULL format.

In the Matter of Federal-State Joint Board on Universal
Service

CC Docket No. 96-45

FEDERAL COMMUNICATIONS COMMISSION

1999 FCC LEXIS 4760

RELEASE-NUMBER: DA 99-2037

September 30, 1999 Released; Adopted September 30, 1999

ACTION: [*1] MEMORANDUM OPINION AND ORDER

JUDGES:

By the Deputy Chief, Common Carrier Bureau

OPINIONBY: ZAINA

OPINION:

I. INTRODUCTION

1. The Mesa Vista Consolidated Schools District (MVCSD) of El Rito, New Mexico, submitted a petition for waiver of the September 30, 1999, deadline for utilizing universal service discounts for non-recurring services distributed in the first year of the schools and libraries program. n1 The September 30, 1999, deadline was established by the Commission's Tenth Reconsideration Order in this docket, extending the previous deadline of June 30, 1999. n2 In this order, we conclude that MVCSD has demonstrated particular facts and special circumstances sufficient to warrant a departure from the general rule established in the Tenth Reconsideration Order. Accordingly, we grant MVCSD's petition to waive the September 30, 1999, deadline and, as requested by MVCSD, we extend the deadline by 30 days to October 30, 1999.

n1 See Letter from Bruce Peterson, Mesa Vista Consolidated Schools District (MVCSD), to Kathy Dole and Irene M. Flannery, FCC, dated September 15, 1999 (MVCSD Petition).

n2 See *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Tenth Order on Reconsideration, 14 FCC Rcd 5983 (1999)* (Tenth ReconsiderationOrder). [*2]

II. BACKGROUND

2. Section 54.507(d) of the Commission's rules requires schools and libraries "to file new funding requests for each funding year." n3 Section 54.507(e) limits the availability of discounts for a long-term contract covering eligible services to the funding year for which discounts are sought. n4 Moreover, section 54.507(b) states that, for the 1998-1999 funding year, "schools and libraries filing applications within the initial 75-day filing window shall receive funding for requested services through June 30, 1999." n5 These provisions, along with the Commission's orders, require schools and libraries to use services for which discounts have been committed by the Administrator within

the funding year for which the discounts were sought. n6

n3 47 C.F.R. § 54.507(d).

n4 See 47 C.F.R. § 54.507(e).

n5 47 C.F.R. § 54.507(b).

n6 See *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9062, para. 544 (1997)* (Universal Service Order), as corrected by *Federal-State Joint Board on Universal Service, Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997)*, affirmed in part in *Texas Office of Public Utility Counsel v. FCC and USA, No. 97-60421 (5th Cir. July 30, 1999)* (affirming Universal Service Order in part and reversing and remanding on unrelated grounds). See also *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, 14921, para. 9 (1998)* (Fifth Reconsideration Order). [*3]

3. A series of Commission orders have resulted in the current September 30, 1999, deadline for implementation of non-recurring services for Year 1 of the schools and libraries program. The Commission's May 8, 1997, Universal Service Order established a calendar funding year (January 1 -- December 31) for schools and libraries receiving universal service support. n7 On June 22, 1998, however, the Commission issued its Fifth Reconsideration Order, which changed the funding year for schools and libraries support to a fiscal year method (July 1 of a given year -- June 30 of the following year). n8 In order to ease the transition to the new fiscal year method, the Commission extended the first year funding period by six months to the new fiscal year end. As a result, the first year funding period for schools and libraries support ran from January 1, 1998 through June 30, 1999. n9 In order to account for delays in the implementation of the schools and libraries program, the Commission's Tenth Reconsideration Order further extended the implementation period deadline for schools and libraries to use their discounts on non-recurring services from June 30, 1999 (the end of the funding [*4] period) to September 30, 1999, an extension of 92 days. n10 The extended deadline gave schools and libraries with funding commitments more time in which to implement any discounted non-recurring services, such as the installation of internal connections, and thereby make greater use of their universal service discounts. This extension applied only to the 1998-99 funding year.

n7 See *Universal Service Order, 12 FCC Rcd at 9057, para. 535, and 9143, para. 710*.

n8 See *Fifth Reconsideration Order, 13 FCC Rcd at 14916, para. 1, and 14920, para. 8*.

n9 See *id.*

n10 See *Tenth Reconsideration Order, 14 FCC Rcd at 5991-94, para. 17-23*.

III. MESA VISTA CONSOLIDATED SCHOOL DISTRICT'S PETITION

4. The Mesa Vista Consolidated School District (MVCSD) is located in El Rito, New Mexico. According to its petition, MVCSD is a very small and isolated school district located in rural northern New Mexico. The nearest town to MVCSD is 40 miles away. MVCSD maintains that it relies on universal service discount funding to complete its proposed network installation project, without which its students [*5] would be virtually cut off from the rest of the world. n11 Furthermore, MVCSD states that it lacked sufficient funding even to begin its proposed project without first obtaining universal service funding.

n11 See MVCSD Petition at p. 2.

1999 FCC LEXIS 4760, *5

5. MVCSD petitions for waiver and an extension of the deadline for implementing non-recurring services because of project delays resulting from a change in the vendor providing MVCSD with discounted services. The original vendor selected by MVCSD, TAMSCO of New Mexico, ceased doing business in New Mexico subsequent to the Schools and Libraries Division's (SLD) n12 award of a discount to MVCSD. According to MVCSD, upon learning of this situation, SLD advised MVCSD to begin another bidding process which took place in May through June of 1999. Once this second bidding process was completed, MVCSD submitted a request to SLD to change its vendor to Coyote Cabling. SLD then advised MVCSD that SLD and the Commission were still implementing their processes for managing requests to change vendors who had ceased doing business. At the end of July, MVCSD was informed that these processes were in place, and that MVCSD's request was under review at SLD. [*6] In August 1999, however, SLD informed MVCSD that, in order to comply with FCC rules, the Form 470 pertaining to MVCSD's second bidding process would have to be posted on SLD's website for a 28 -- day period, which ended on August 31, 1999. n13 MVCSD was informed on September 6, 1999, that SLD had approved its request to change vendors. n14

n12 The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) was formerly known as the Schools and Libraries Corporation (SLC). SLC merged with USAC, effective January 1, 1999. See Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC 98-306, 13 FCC Rcd 25058 (1998) (Eighth Reconsideration Order).

n13 See 47 C.F.R. § 54.504(b)(4). See also 63 F.R. 70563 (Dec. 21, 1998).

n14 See MVCSD petition at p. 1.

6. According to MVCSD, it lacked sufficient funding to begin its proposed project [*7] without first obtaining a universal service discount. Furthermore, its second vendor was unwilling to proceed with the project until receiving SLD's final approval of the vendor change on September 6, 1999. This left MVCSD with at most 24 days within which to complete its network installation. Because MVCSD maintains that it would be impossible for its network project to be completed in this time, MVCSD requests a waiver of the September 30, 1999, deadline for implementation of non-recurring services, as well as a 30 -- day extension of the deadline to October 30, 1999.

IV. DISCUSSION

7. Generally, the Commission's rules may be waived for good cause shown. n15 As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate." n16 The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. n17 In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. n18 Waiver is, therefore, appropriate [*8] if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. n19 The test for whether MVCSD may be granted a waiver, therefore, is whether it has shown such special circumstances that warrant departure from the rules established in the Fifth Reconsideration Order and the Tenth Reconsideration Order. We conclude that MVCSD has successfully made that

showing.

n15 47 C.F.R. § 1.3.

n16 *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (*WAIT Radio*).

n17 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

n18 *WAIT Radio*, 418 F.2d at 1157.

n19 *Northeast Cellular*, 897 F.2d at 1166.

8. MVCSD's situation raises the kind of particular facts and special circumstances warranting a waiver of the Commission's rules. Unlike most eligible schools and libraries receiving discounts, MVCSD was faced with the uncommon situation [*9] of its vendor ceasing to do business, requiring MVCSD to conduct a second bidding process. Moreover, MVCSD's effort to change vendors was delayed as a result of SLD and the Commission implementing the processes for managing requests to change vendors who had ceased doing business. Despite MVCSD's best efforts, as a result of these unpredictable, unusual, and lengthy delays over which MVCSD had no control, MVCSD was left with a mere 24 days before the September 30, 1999, deadline within which to complete its network installation. MVCSD states that it will be unable to complete its project in that time. Thus, enforcing this deadline will mean that the students in MVCSD's schools will be denied the benefits of the new communications technologies and opportunities that MVCSD's networking project will make possible. Under these facts, we find that enforcement of the Commission's September 30, 1999, implementation deadline would be inconsistent with the public interest.

9. We note that the waiver standard is a difficult one to meet and, in situations such as those presented by MVCSD's petition, where we must maintain universal service support mechanisms that are "specific, predictable, [*10] and sufficient," n20 we must consider carefully the consequences of making exceptions to rules designed to provide predictability. In section 54.507 of its rules, the Commission set forth clear guidelines for the time frame within which schools and libraries must use their discounts. n21 In considering MVCSD's petition for waiver, therefore, we must take into account the impact on universal service if other school districts in the United States requested similar extensions of the deadline for implementation of non-recurring services. Unlike most eligible schools and libraries, MVCSD faced extraordinary delays in implementation of its proposed networking project, despite its best efforts and due to circumstances beyond its control. We conclude that, on these facts, granting MVCSD's petition would not undermine the Commission's method for ensuring that universal service support mechanisms are "specific, predictable and sufficient." n22 MVCSD's petition for waiver of the September 30, 1999, deadline for implementation of non-recurring services is, therefore, granted. Furthermore, MVCSD's petition to extend the deadline for MVCSD by 30 days to October 30, 1999, is also granted.

n20 47 U.S.C. § 254(b)(5). [*11]

n21 See supra at para. 2.

n22 See 47 U.S.C. § 254(b)(5).

V. CONCLUSION

10. It is THEREFORE ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the Mesa Vista

Consolidated School District's petition for waiver IS GRANTED.

Lisa M. Zaina

Deputy Chief, Common Carrier Bureau