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Before the
Federal Communications Commission
Washington, DC 20554

2001 APR 18 A 7:25

In the Matter of	)	
	)	
Request for Review of the Decision of the Universal Service Administrator by	)	
	)	
Massachusetts Department of Education Malden, Massachusetts	)	File No. SLD-149217
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.	)	CC Docket No. 97-21

VED

ORDER

Adopted: April 9, 2001 **Released: April 10, 2001**

By the Common Carrier Bureau:

1. The Common Carrier Bureau (Bureau) has before it a Request for Review filed by the Massachusetts Department of Education (Mass. DOE), Malden, Massachusetts, requesting review of a decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator).[1] Mass. DOE seeks review of SLD's denial of its application for Year 2 funding under the schools and libraries universal service support program.[2] Because Mass. DOE has failed to demonstrate that the schools it represents have the necessary resources to make effective use of the requested funding, we deny the Request for Review and affirm SLD's decision.

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, Internet access, and internal connections.[3] The Commission's rules require that an applicant seeking funds under this program must first submit to the Administrator a completed FCC Form 470, in which the applicant sets forth its

[1] Letter from John Fuller, Massachusetts Department of Education, to Federal Communications Commission, filed October 5, 2000 (Request for Review).

[2] Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

[3] 47 C.F.R. §§ 54.502, 54.503.

technological needs and the services for which it seeks discounts.[4] Once the applicant has entered into an agreement for eligible services, it must file an FCC Form 471 application notifying the Administrator of the services that have been ordered, the carrier with whom the applicant has signed a contract, and an estimate of the funds needed to cover the discounted portion of the price of the eligible services.[5]

3. On the Form 470, applicants must attest that any support they receive is conditional upon their "securing access to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to use the services purchased effectively."[6] Similarly, in Item 22 of the Form 471, an applicant must certify that "[t]he school(s) or librar(ies) I represent have secured access to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to make effective use of the services purchased as well as to pay the discounted charges for eligible services."[7] These certifications are consistent with the requirements set forth in the Commission's May 8, 1997, *Universal Service Order* and the Commission's rules.[8] In the *Universal Service Order*, the Commission stated that applicants for discounts under the schools and libraries universal service support mechanism would be required to certify in their requests for services that "all of the necessary funding in the current funding year has been budgeted and will have been approved to pay for the 'non-discount' portion of requested connections and

[4] 47 C.F.R. §§ 54.504(b)(1), (b)(3). In submitting its FCC Form 470, an applicant is required to provide general information about the services for which it seeks discounts, *e.g.*, number of phones that require service, number of dial-up connections necessary, as well as an assessment of the applicant's existing technology that may be necessary for the effective use of eligible services. *See* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (Form 470).

[5] 47 C.F.R. § 54.504(c); *see also* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (Form 471).

[6] *See* Form 470 at Item 25.

[7] *See* Form 471 at Item 22.

[8] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9079, para. 577 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part in Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999), *motion for stay granted in part* (Sept. 28, 1999), *petitions for rehearing and rehearing en banc denied* (Sept. 28, 1999) (affirming *Universal Service Order* in part and reversing and remanding on unrelated grounds), *cert. denied in Celpage, Inc. v. FCC,* 120 S.Ct. 2212 (May 30, 2000), *cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed, GTE Service Corp. v. FCC,* 121 S. Ct. 423 (November 2, 2000). *See also* 47 C.F.R. § 54.504(b)(1) (requiring applicants to provide information about equipment, services, training and other facilities in place to make use of the services requested) *and* 47 C.F.R. § 54.504(b)(2) (requiring that each applicant's FCC Form 470 certify that "all of the necessary funding in the current funding year has been budgeted and approved to pay for the 'non-discount' portion of requested connections and services as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively . . . "). These requirements are referred to collectively hereinafter as the "necessary resources certifications."

services as well as any necessary hardware, software, and to undertake the necessary staff training required in time to use the services effectively . . . . "[9]

4. On April 6, 1999, Mass. DOE filed a Form 471 application as a consortium leader, seeking Year 2 funding of Internet access on behalf of a large number of Massachusetts public schools.[10] These funding requests were sought as part of Massachusetts' MassEd.net program, which supplies basic internet dial-up capability to public school educators in areas of the state where more advanced Internet connections are prohibitively expensive.[11] On or about August 17, 1999, SLD faxed Mass. DOE a letter requesting information demonstrating that Mass. DOE's members had secured the resources necessary to make effective use of the funds requested.[12] As explained in greater detail below, SLD did not thereafter receive any responsive documentation.[13]

5. On December 15, 1999, SLD issued a Funding Commitment Decision Letter, denying Mass. DOE's application in its entirety.[14] It explained: "This determination . . . is based on our finding that you have not secured access to all of the resources necessary to effectively use the services you are ordering, as well as to pay for the discounted charges for eligible services."[15] On January 19, 2000, Mass. DOE filed an appeal of this decision with SLD, asserting that the educators who received MassEd.net funding had the necessary resources.[16] It also described some of the resources available, and provided documentation of its budgetary allocation for paying its share of the charges.[17]

6. On September 11, 2000, SLD issued a decision denying the appeal.[18] It explained that "[t]he applicant certifies on the FCC Form 471 that the entities it represents have secured access to adequate resources to make effective use of the discounts" and "[i]t is the responsibility

[9] *Universal Service Order*, 12 FCC Rcd at 9079, para. 577.

[10] FCC Form 471, Massachusetts Department of Education, filed April 6, 1999.

[11] Request for Review at 10-11; Affidavit of John Fuller in Support of Request for Review, para. 2 (Fuller Affidavit).

[12] Letter from Schools and Libraries Division, Universal Service Administrative Co., to Thomas K. Iacobucci, Commonwealth of Massachusetts Information Technology – Department of Education, dated September 11, 2000 (Administrator's Decision on Appeal) at 1.

[13] Administrator's Decision on Appeal at 1.

[14] Letter from Schools and Libraries Division, Universal Service Administrative Co., to Thomas K. Iacobucci, Commonwealth of Massachusetts Information Technology – Department of Education, dated December 15, 1999 (Funding Commitment Decision Letter).

[15] Funding Commitment Decision Letter at 1.

[16] Letter from Thomas K. Iacobucci, Commonwealth of Massachusetts Department of Education, to Schools and Libraries Corp., filed January 19, 2000 (Appeal to SLD) at 2.

[17] Appeal to SLD at 1-2.

[18] *See* Administrator's Decision on Appeal.

of the applicant to provide documentation to support that certification if requested."[19] SLD further rejected the new information and documentation proffered by Mass. DOE, finding:

> According to our written procedures, we cannot consider new information, on appeal, unless there is evidence in the file that the applicant was not given the opportunity to provide us with documentation during the review process. Since the applicant was given sufficient time to provide information during the review process, the appeal is denied.[20]

Mass. DOE subsequently appealed this decision to the Commission by filing the pending Request for Review.

7. We initially note that SLD was acting well within its authority in engaging in a careful review of Mass. DOE's Item 22 necessary resources certification. In *United Talmudical Academy*, the Commission upheld SLD's practice of reviewing the accuracy of applicants' certifications regarding necessary resources. It concluded that by doing so, SLD ensures program compliance with statutory requirements, including the directive in section 254(h)(1)(B) of the Communications Act of 1934 which allows funding only for bona fide requests for services to be used for educational purposes.[21] The Commission also found that review of the certifications curbs waste, fraud, and abuse in the schools and libraries universal service program.[22] Thus, there is no doubt that SLD was authorized to obtain estimates and documentation from Mass. DOE in support of its necessary resources certification.

8. We find that Mass. DOE failed to provide any documentation to support its necessary resources certification. SLD originally faxed an Item 22 review documentation request to the applicant contact person, Tom Iacobucci, on August 17, 1999, with instructions to respond within seven days.[23] SLD repeated its request on September 13 and 28, 1999.[24] On September 30, 1999, Tom Iacobucci responded that he believed that the matter had been taken care of, and that he would provide the documentation as soon as possible.[25] No documentation was forthcoming, and SLD repeated its request to Mr. Iacobucci yet again on October 29, 1999.[26]

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[19] *Id.* at 1.

[20] *Id.*

[21] *Request for Review by United Talmudical Academy, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-105791, 15 FCC Rcd 423, paras. 9, 14 (2000) (*United Talmudical Academy*).

[22] *Id.* at para. 14.

[23] Administrator's Decision on Appeal at 1.

[24] Administrator's Decision on Appeal at 1; Fuller Affidavit para. 6; Letter from Schools and Libraries Division, Universal Service Administrative Co., to Massachusetts Department of Education, dated July 10, 1999, at 2 (Item 22 Review Letter) (attached to Request for Review).

[25] Administrator's Decision on Appeal at 1.

[26] Administrator's Decision on Appeal at 1.

On November 3,1999, SLD contacted John Fuller, Director of Operations for the Massachusetts Department of Education Office of Technology, and informed him that it had not received the documentation. SLD set November 4, 1999 as the deadline for the requested information.[27] No documentation was received at any time prior to the issuance of the Funding Commitment Decision Letter on December 15, 1999.[28]

9. Along with its Request for Review, Mass. DOE has supplied an affidavit from Mr. Fuller in which he alleges that, when the first request was received, he instructed Mr. Iacobucci to gather the information and forward it to SLD immediately.[29] Mr. Fuller alleges that when he received the November 1999 call from SLD, informing him that the documentation had not arrived, he spoke again with Mr. Iacobucci who stated that he had sent the information to SLD "several times already."[30] Nevertheless, Mr. Fuller instructed Mr. Iacobucci to resend the information. Mr. Fuller states that a day or two later, Mr. Iacobucci told him that the information had been sent, and Mr. Fuller relied on this assurance.[31]

10. Mr. Fuller concedes, however, that he is unable to locate any documentation or evidence that the Item 22 information was in fact ever sent.[32] This, Mr. Fuller explains, is because Mr. Iacobucci, who was responsible for maintenance of the relevant records, was not retained when his employment term ended on June 30, 2000.[33] Thus, Mr. Fuller cannot say for certain that any documentation was ever sent to SLD. Based on the absence of any contrary evidence in the record, and the inability of Mass. DOE to provide any evidence demonstrating that the documentation was in fact sent, we find that it was reasonable for SLD to conclude that Mass. DOE had failed to document that it had sufficient resources in response to SLD's inquiry.

11. Mass. DOE argues that Mr. Fuller acted in good faith throughout the application process in attempting to see that SLD's requests were complied with and that Mass. DOE should be excused from any inadvertent failure to respond to SLD's demands. However, regardless of the good faith efforts of Mr. Fuller, Mass. DOE is still responsible for its failure, and specifically the failure of Mr. Iacobucci, its chosen contact person, to supply the requested information. Given that Mass. DOE supplied no documentation during the review process in support of its necessary resources certification, we conclude that Mass. DOE failed to demonstrate that its members possessed the necessary resources to make effective use of the services requested, and we hold that SLD properly denied funding on that basis.

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[27] Administrator's Decision on Appeal at 1; Fuller Affidavit para. 7.

[28] Administrator's Decision on Appeal at 1.

[29] Fuller Affidavit paras. 5-6.

[30] Fuller Affidavit para. 7.

[31] *Id.*

[32] Fuller Affidavit para. 9; Request for Review at 7.

[33] Fuller Affidavit para. 9.

12. On appeal, Mass. DOE offers additional documentation supporting its necessary resources certification. In order to ensure that implementation of the schools and libraries program is not unduly delayed, however, we have affirmed SLD's authority to require that requested documentation be supplied by applicants within a reasonable time.[34] Therefore, when SLD requests information to support an Item 22 review, applicants must respond within a reasonable time period or risk the potential of denial based on the failure to support an Item 22 certification.[35] SLD's policy is to require information within seven business days, and we have found that a two-week period is a reasonable period of time.[36] Here, SLD gave the applicant over two months, far more time than it had to, and yet Mass. DOE still did not supply the required information. It is therefore not entitled to supplement the record further.

13. Mass. DOE argues that it should not be denied funding because it was not on notice that the failure to submit "necessary resources" documentation might result in the denial of its application. However, even if Mass. DOE were not given express notice of the consequences of failing to provide requested documentation, it should have known that it could not fail to produce the material indefinitely, and that after SLD had made five separate requests over a period of more than two months without success, SLD might then proceed to a decision based on the existing record.[37] Moreover, the record demonstrates that Mr. Fuller was in fact expressly informed on November 3, 1999 that unless the "necessary resources" information was received by November 4, 1999, "the entire application was at risk of being denied."[38] In addition, as noted above, we had issued Orders prior to November of 1999 making it clear that denial of funding was a possible consequence of the failure to submit requested documentation.[39] Therefore, Mass. DOE's argument that it should be excused because it lacked notice regarding the consequences of failing to comply with SLD's document requests is both contrary to the record and unreasonable on its face.

14. Finally, we note that Mass. DOE was not entitled to relief from SLD for the additional reason that its appeal to SLD was untimely. Under section 54.720 of the Commission's rules, an appeal must be filed with SLD within 30 days of the issuance of the decision as to which review is sought.[40] Documents are considered to be filed with the Commission or SLD only upon receipt.[41] Here, SLD issued its Funding Commitment Decision

[34] *Request for Review by Nefesh Academy, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-27881, CC Dockets No. 96-45 and 97-21, Order, DA 99-2284, para. 4 (Com. Car. Bur. rel. October 22, 1999) (*Nefesh Academy*).

[35] *Id.* at para. 4.

[36] *Id.*

[37] Administrator's Decision on Appeal at 1.

[38] *See* Transcript of Phone Message from Catriona Ayer, Schools and Libraries Division, Universal Service Administrative Co., to Greg Nadeau, Massachusetts Dept. of Education, dated November 3, 1999.

[39] *See Nefesh Academy* at para. 4.

[40] 47 C.F.R. § 54.720.

[41] 47 C.F.R. § 1.7.

Letter on December 15, 1999.[42] Mass. DOE did not file its appeal with SLD until January 19, 2000. Thus, although we have reviewed and affirmed the merits of the Administrator's Decision on Appeal, we also find that, under the Commission's regulations, SLD should have dismissed Mass. DOE's appeal without reaching the merits. We also observe that SLD's decision on the merits of Mass DOE's appeal cannot be construed as a waiver of the 30-day rule, because SLD has no authority to make such a waiver.[43] Since Mass. DOE is not entitled to relief even when the merits are considered, we need not decide whether it would be appropriate to grant a waiver of section 54.720.

15. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed on October 5, 2000 by Massachusetts Department of Education, Malden, Massachusetts, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Mattey

Carol E. Mattey
Deputy Chief, Common Carrier Bureau

[42] Funding Commitment Decision Letter at 1.

[43] *See Request for Review by Springfield Public Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-152238, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd 18893, 18894, n. 4 (Accnt. Pol. Div., Com. Car. Bur. 2000).