

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)
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)
Federal-State Joint Board on)
Universal Service)
)
Changes to the Board of Directors of the)
National Exchange Carrier Association, Inc.)
)
Total Communications, Inc.)
)
Site Link Communications, Inc.)
)
Requests for Review of)
Decisions of the Universal Service)
Administrator)
)

CC Docket No. 96-45 ED

CC Docket No. 97-21

ORDER

Adopted: July 19, 2001

Released: July 20, 2001

By the Common Carrier Bureau:

1. In this Order, we address Requests for Review filed by more than 150 schools and libraries ("Consolidated Applicants") seeking support from the Commission's universal service support mechanism for eligible schools and libraries.¹ The Consolidated Applicants all appeal the denial of their Funding Year 3 applications by the Schools and Libraries Division (SLD) by the Universal Service Administrative Company (USAC or Administrator)². For the reasons discussed herein, we remand all of the Requests for Review of the Consolidated Applicants for individual review by SLD in accordance with the guidance set forth in this Order.

¹ See Appendix A, *infra*, for a list of specific Requests for Review remanded to SLD pursuant to this Order. All of the Consolidated Applicants were joined in a consolidated Request for Review filed on their behalf by Schwaninger & Associates, P.C. See Letter from Benjamin Aron to Office of the Secretary, Federal Communications Commission, filed November 13, 2000 (Consolidated Appeal); see also Letter from Benjamin Aron to Mark Seifert and Andy Firth, Federal Communications Commission, filed March 6, 2001.

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).

I. BACKGROUND

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 eligible schools and libraries to seek competitive bids for all services eligible for discounts.⁴ To comply with the competitive bidding requirement, the Commission's rules first require that an applicant submit to the Administrator a completed FCC Form 470, in which the applicant sets forth its technological needs and lists the services for which it seeks discounts.⁵ The Administrator must post the FCC Form 470 to its web site, where all potential service providers can consider it.⁶ Once the FCC Form 470 has been posted for 28 days and the applicant has signed a contract for eligible services with a service provider, the applicant must then submit a completed FCC Form 471 application to notify the Administrator of the services that have been ordered, the service provider with which 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.⁷ The competitive bidding requirement is important to the integrity of the schools and libraries support mechanism "because it implements the principle of competitive neutrality by allowing all providers access to information about particular schools' and libraries' needs and because it helps to ensure that schools and libraries will receive the lowest possible pre-discount price."⁸

3. All of the Consolidated Applicants applied for universal service funding for funding Year 3 of the universal service program for eligible schools and libraries, which runs from July 1, 2000, to June 30, 2001. All of the Consolidated Applicants apparently entered into business relationships with Total Communications, Inc. (Total Com), wherein Total Com agreed to serve as a "consultant" to the applicant and assist them in obtaining supported services and vendors to provide such services for Year 3 of the schools and libraries universal services support program.⁹ The record shows that all of the Consolidated Applicants eventually selected Site Link Communications, Inc. (Site Link) as their service vendor.¹⁰

³ 47 C.F.R. §§ 54.502, 54.503.

⁴ 47 C.F.R. § 54.504.

⁵ 47 C.F.R. § 54.504(b)(1), (b)(3).

⁶ 47 C.F.R. § 54.504(b)(3).

⁷ 47 C.F.R. § 54.504(c).

⁸ *Federal-State Joint Board on Universal Service*, Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd. 10095, 10098, at para. 9 (1997).

⁹ See letter of SLD to Consolidated Schools ("Further Explanation of Administrator's Funding Decision"), dated October 13, 2000, at 1 (Explanatory Letter).

¹⁰ Explanatory Letter at 1.

4. Each of the Consolidated Schools received identical letters from SLD dated October 13, 2000, denying their requests for universal service funding.¹¹ In this Explanatory Letter, SLD stated its reasons for its denial of funding to all of the Consolidated Applicants. First, SLD stated that all of the affected applicants had entered into agreements with Total Com under which Total Com would locate grants to cover the non-discount portion of funding that the applicant was required to pay, and if Total Com were unable to locate such grants, the applicant would not be responsible for its obligation.¹² Second, SLD stated that the contracts between Site Link and the applicants made Total Com a third-party beneficiary of the contracts, and consequently, when Total Com reviewed the contracts submitted by Site Link, it had a direct financial interest in the contract.¹³ Third, SLD stated that a comparison of competing bids showed that Total Com selected the Site Link proposals even when comparable or updated equipment was offered in the competing bids at roughly half the price of that in the Site Link proposals, and some of these competing bids indicated that Total Com did not provide the detail necessary to enable bidders to formulate adequate bids.¹⁴ Fourth, SLD stated that there was no evidence that Total Com evaluated competing bids.¹⁵ Finally, SLD stated that the “guarantor” arrangement, whereby Total Com assumed responsibility for covering the non-discount portion of an applicant’s costs, “raises a strong inference that the Site Link proposals were inflated to ensure that Site Link would not lose the value of the applicant’s contribution.”¹⁶

5. On appeal, the Consolidated Applicants raise several challenges to SLD’s decision. In general, the Consolidated Applicants argue that SLD has failed to consider each application individually, misstated the facts relating to the individual applications, and failed to apply any standards of law.¹⁷ For example, the Consolidated Applicants point out that 24 of the Consolidated Applicants never entered into a “guarantor” relationship with Total Com because those 24 schools had the resources to cover their non-discount portion of the funding.¹⁸ The Consolidated Applicants also argue that, for the remainder of the applicants, SLD fails to state why as a matter of law this arrangement raises concern.¹⁹

6. The Consolidated Applicants acknowledge that vendors were required to pay Total Com’s “consulting fees” via a third-party interest in their service contracts, amounting to three percent of the contract price, but argue that there is no rule preventing any such arrangement.²⁰

¹¹ Explanatory Letter, *passim*.

¹² Explanatory Letter at 1.

¹³ Explanatory Letter at 1

¹⁴ Explanatory Letter at 2.

¹⁵ Explanatory Letter at 2.

¹⁶ Explanatory Letter at 2.

¹⁷ Consolidated Appeal at 3, 17-21.

¹⁸ Consolidated Appeal at 3.

¹⁹ Consolidated Appeal at 3.

²⁰ Consolidated Appeal at 9.

Furthermore, the Consolidated Applicants argue that such an arrangement does not conflict with the goals of the applicants or the schools and libraries universal service program, and cannot be abused in Total Com's favor.²¹ Finally, the Consolidated Applicants strongly object to SLD's allegation of competitive bidding irregularities, noting that these allegations are unfounded because SLD has provided few factual details or examples to substantiate this allegation.²² The Consolidated Applicants also object to SLD's stated "inference" of improper bidding practices as one basis for its decision to deny funding to the Consolidated Applicants.

II. DISCUSSION

7. As an initial matter, we conclude that the Consolidated Applicants have sufficiently demonstrated that there may be enough factual disparities between each of the applications that justify individualized review. We recognize that there are many similar elements linking each of the applications of the Consolidated Applicants. For example, each and every one of the Consolidated Applicants entered into a "consulting" agreement with Total Com, and eventually selected Site Link as their primary service provider. We also recognize that SLD believed that its decision to dispose of all of the applications of the Consolidated Applicants in a single determination letter was within the scope of its affirmative duty to prevent instances of fraud, waste, and abuse in the universal service support mechanism.

8. On appeal, however, the Consolidated Applicants have demonstrated the need for review on a case-by-case basis. It is unclear from the record to what extent SLD analyzed each of the schools' unique facts and circumstances, prior to rendering its decision. Without reaching conclusions on the merits of each application, therefore, we remand all of the Requests for Review to SLD for individual processing, and direct SLD to review each application and determine whether, based on the individual facts, each application complies with program requirements. In the event that any applications fail to comply with program requirements, SLD shall state the specific factual basis for its determination.

9. In particular, we note that some of the factors outlined by SLD as reasons for its mass denial of the Consolidated Applicants' applications require an examination of each school's individual facts and circumstances. For example, consulting fees in general are not eligible for funding through the universal service support mechanism.²³ SLD, however, customarily applies its "30 percent rule" in determining whether the amount of requested funding for ineligible services amounts to such a degree that denial of the entire funding request is necessary.²⁴ Thus,

²¹ Consolidated Appeal at 9-10.

²² Consolidated Appeal at 10-17.

²³ Universal service support is provided to eligible schools and libraries for telecommunications services, Internet access, and internal connections. *See* 47 C.F.R. § 54.502–505. SLD literature provides notice to applicants that consulting services are not eligible for universal service support. *See* Schools and Libraries Division, Eligible Services List, <http://www.sl.universalservice.org/data/pdf/eligibleserviceslist.pdf> at 37 (January 24, 2001).

²⁴ The "30-percent policy" is not a Commission rule, but rather is an internal SLD benchmark utilized during its application review process, to enable SLD to approve funding requests for eligible services without having to spend an excessive amount of time working with an applicant that for the most part is requesting funding of ineligible

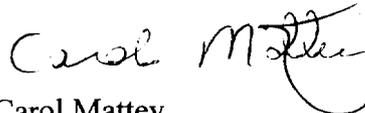
while consulting fees are ineligible for funding, the question of whether such fees in a funding request exceed the 30 percent threshold is a factual question that must be determined for each individual applicant.

10. On remand, therefore, we direct SLD to assess each of the Consolidated Applicants' applications to determine the exact degree to which any ineligible "consulting fees" were present in funding requests. We furthermore direct SLD to specify, in concrete terms, the factual basis for any other finding it makes for each of the Consolidated Applicants. While we believe that SLD has identified potentially serious issues surrounding the applications of the Consolidated Applicants, we believe that each of the Consolidated Applicants is entitled to individualized review. We recognize that SLD, after further review, may still be able to identify applicants whose applications share common material facts and raise identical substantive issues. In the interest of administrative efficiency, SLD shall, within its discretion, be permitted to issue identical determination letters to "groups" of the Consolidated Applicants, provided that the factual and substantive similarities between the applicants in a group are clearly explained.

III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 54.719 and 54.722 of the Commission's rules, 47 C.F.R. §§ 54.719 and 54.722, that the Letters of Appeal filed by the named parties to this Order ARE REMANDED to the Schools and Libraries Division for further consideration as provided herein.

FEDERAL COMMUNICATIONS COMMISSION



Carol Matthey
Deputy Chief, Common Carrier Bureau

services. If 30 percent or less of the request is for funding of ineligible services, SLD normally will approve the portion that is for eligible services. If more than 30 percent of the request is for funding of ineligible services, SLD will deny the application in its entirety. *See, e.g., Request for Review of the Decision of the Universal Service Administrator by New Kensington-Arnold School District New Kensington, Pennsylvania, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Order, File No. SLD-28754, CC Dockets No. 96-45, 97-21, 1999 WL 1216147 (F.C.C., Dec 21, 1999); Request for Review of the Decision of the Universal Service Administrator by Western Heights Public School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Order, File No. SLD-54054, CC Dockets No. 96-45, 97-21, 15 FCC Rcd 8502 (Com. Car. Bur. 1999).*

**APPENDIX A
LIST OF REQUEST FOR REVIEW REMANDED**

<u>Applicant</u>	<u>Application Number</u>
Abiline SDA School	170188
Adelphian Jr. Academy	162828
Advent Home Youth Services	190343
Advent Home Youth Services	181367
All Saints School	161536
Alpine Christian School	190476
Amarillo Junior Academy	171630
Amazing Grace Christian School	187002
Aqsa School	189192
Ariel Dear Academy	159471
Auburn Adventist Academy	160045
Auburn Adventist Academy	171216
Battle Creek Academy	163677
Berea Elem. Junior High School	160744
Berea Elem. Junior High School	162782
Berkshire Hills	160968
Bethany Junior Academy	159652
Bethany Lutheran School	181741
Bethel Junior Academy	159981
Bethel SDA Elem. School	195367
Betty Shabazz International	162294
Betty Shabbazz International	160429
Bishop Adventist School	184915
Brewster Adventist School	167832
Broadview Academy	196271
Bronx-Manhattan SDA School	186498
Brooklyn SDA Elem School	160964
Brooklyn SDA Elem. School	161886
Brooklyn Temple SDA Elem. School	159273
Buena Vista SDA School	159046
Coble Elementary School	167583
Carmel Christian School	172670
Cerebral Palsy Center School	192530
Chicago SDA Academy	159772
Choir Academy of Harlem	160158
Christ The King Catholic School	165807
Christ The King School	15971
Columbia Seventh Day Adventist	162640
Community Catholic School	181453
Community Leadership Academy	195873

Crescent City SDA School	195709
Crestview SDA Elem. School	171569
Dade Marine Institute-South	171381
Daystar Christian Academy	194920
Deamude SDA Elementary School	196444
Dexterville SDA Church Schoo	181294
Dr. Brumfield Johnson Christian Academy	183535
Eagle SDA School	196080
Eastside Multi-Cultural Community	162041
Excelsior Elementary	160159
Faith Family Academy of Oak Cliff	161571
Faith Family Academy of Oak Cliff	158781
Feather River SDA	160083
Flatbush SDA	163396
Forest City SDA	159818
Forest Park Adventist	169581
Fort Smith Christian School	162873
Fresno Adventist Academy	175834
Friends of Avalon Prep School	163059
Frontenac SDA	164074
Georgia Cumberland	185017
Glennville Christian Academy	182588
Greater Grace Christian Academy	196292
Greater Miami Academy	159426
Hanford Christian School	167386
Hartford Area School	163791
Heart of the Earth Center	162303
Hebron SDA School	161527
Hixson SDA School	159271
Holy Cross Catholic Elem School	166765
Holy Rosary Elementary School	165763
Immaculate Conception School	165423
Indianapolis Junior Academy	158880
James Valley Christian School	190409
Jasper Adventist Christian School	160240
Khamit Institute	162584
Kirkland SDA School	188681
Kirkland SDA School	163143
La Vida Mission	190793
Lakeland Adventist Jr. Academy	164011
Laurel Hall	196164
Madison Academy	195424
Maplewood Academy	161365
Maplewood Academy	159950
McMinnville SDA	159821

McMinnville SDA School	191729
Melrose Community School	165093
Midway Christian Academy	163822
Milo Elementary School	194767
Milwaukee SDA	173417
Mitchell Catholic Schools	167434
Mt. Aetna Adventist Elementary	168396
Murphy Adventist School	171635
Nelson Crane Christian School	160193
New Life Christian Academy	160953
New Vistas Christian School	196010
Normative Services Inc.	159047
Northeastern Academy	160161
Oakwood Academy	159345
O'Gorman High School	164999
O'Gorman Junior High School	166063
Optimal Christian Academy	163994
Our Lady of Blessed Sacrament	167265
Our Lady of Lourdes School	163787
Pacific Coast Christian School	185037
Paradise SDA School	194718
Pathfinder Village School	161424
Peninsula Marine Institute	163819
Platte Valley SDA Academy	171247
Reading SDA Junior Academy	163153
Reading SDA Junior Academy	163153
Redding SDA School	189974
Rio Grande Charter School of Excellence	162484
Rocky Knoll Elementary School	182594
Roncalli High School	165059
Sacred Heart School	166720
San Antonio Junior Academy	161324
Sheenway School & Culture Ctr.	161823
Sheenway School & Culture Ctr.	159704
Southwest Christian Academy	196250
SS Cyril Methodius School	172685
St Timothy Episcopal	163366
St. Agnes School	165148
St. Anthony School	166467
St. Dominick's School	194014
St. Joseph Cathedral School	169556
St. Joseph School	165619
St. Joseph's Indian School	166815
St. Lambert School	165127
St. Laurence O'Toole School	160519

St. Lawrence School	166694
St. Malachy Elementary School	159270
St. Martin School	166708
St. Mary's Elementary School	166485
St. Mary's Grade School	165556
St. Mary's High School	165885
St. Mary's School	165146
St. Matthews Lutheran School	184847
St. Michael School	195591
St. Michael School	165169
St. Peter School	166831
St. Thomas School	165170
Standifer Gap School	188035
Tampa Junior Academy	192778
Taylor Christian Academy	162381
Temple of Truth School	159653
The Cathedral School of Brooklyn	171413
The Intervention Group	160121
The Varnett Charter School	159929
Three Angels Academy	195686
Tri City Junior Academy	160088
Trinity Lutheran School	190490
Trinity Lutheran School	209257
Trinity Temple Academy	159774
Triumphant Charter School	171228
Tuolumne	170473
Waxahachie Faith Family Academy	186430
Westchester Area School	185216
Westcoast School	162507
Wisconsin Academy	159576