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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Request for Review by Consorcio de Escuelas y Bibliotecas de Puerto Rico of Decisions of Universal Service Administrator	)	
	)	
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
	)	
Biblioteca Pública Barceloneta	)	Application No. 233178
Biblioteca Pública Adjuntas	)	Application No. 234495
Biblioteca Pública San Lorenzo	)	Application No. 236812
Biblioteca Pública Guayama	)	Application No. 236689
Academia Primaria Adventista	)	Application No. 228886
Biblioteca Pública Camuy	)	Application No. 237339
Biblioteca Pública Caguas, Dr. Pedro Albizu Campos	)	Application No. 236507
Biblioteca Electronica Municipio Autonomo de Carolina	)	Application No. 260589
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Biblioteca Pública Lajas	)	Application No. 237564
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Biblioteca Municipal Las Piedras, Aurea M. Perez	)	Application No. 243153

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Biblioteca Municipal de Quebradillas	)	Application No. 260161
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Saint Patrick's Bilingual School	)	Application No. 232457
Biblioteca Pública Municipal Computarizada de Naranjito	)	Application No. 260232

To: Common Carrier Bureau

REQUEST FOR REVIEW AND WAIVER

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SUMMARY

This Petition seeks review of the SLD's rejection of FCC Form 471 applications filed by 44 schools and public libraries in Puerto Rico solely because the mailing of the Block 6 Certifications and Item 21 attachments were not postmarked before the end of the Year 4 filing window ending January 18, 2001. Following timely electronic filing within the window, this material was promptly mailed to SLD and received no later than Monday, January 22, 2001. These submissions satisfied all requirements for the filing of these documents set forth on FCC Form 471 and the FCC Form 471 Instructions approved by the Office of Management and Budget pursuant to the requirements of the Paperwork Reduction Act.

SLD's new and more stringent filing requirements mandating the mailing and "postmarking" of the paper documents by the close of the filing window is an unlawful modification of these OMB approved requirements because it was never approved by OMB, as required by the Paperwork Reduction Act. Accordingly, pursuant to the express terms of the Paperwork Reduction Act, applicants may not be penalized for failure to adhere to the new requirement and their applications are required to be considered on their merits by SLD. Furthermore, the rejection of the applications violated the Electronic Signatures in Global and National Commerce Act of 2000, requiring that legal effect be given to electronically filed documents notwithstanding the absence of an original paper signature.

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To: Common Carrier Bureau

Request for Review and Waiver

Pursuant to Sections 54.719(c) and 54.721 of the Commission's Rules, 47 C.F.R. §§ 54.719(c), 54.721, the above-referenced applicants ("Applicants") and the Consorcio de Escuelas y Bibliotecas de Puerto Rico ("CEBPR") hereby request review of the attached decisions (Exhibit 1) of the School and Libraries Division ("SLD") of the Universal Service Administrative Company denying appeals to the rejection of the above-referenced applications for Year 4 funding because the mailing of the Block 6 Certifications and Item 21 Attachments were not postmarked before the end of the Year 4 filing window ending January 18, 2001. To the extent necessary, Applicants and CEBPR further request a waiver of Section 54.507(c) of the Commission's Rules, 47 C.F.R. § 54.507(c), and any other FCC rule or SLD policy to permit the consideration of the applications. For the reasons set forth below, the Commission should direct the SLD to accept the applications as having been timely filed during the SLD's filing window for funding Year 4.

I. INTRODUCTION AND STATEMENT OF FACTS.

Applicants are members of CEBPR, a consortium of schools and libraries in Puerto Rico, who filed electronically the above-referenced Form 471 applications with SLD on behalf of the Applicants. As shown on the attached Affidavit of CEBPR's Executive Director, Ms. Ines O'Neill (Exhibit 2), the electronic filing of all applications was properly completed by the close of the Year 4 filing window on January 18, 2001. Based on CEBPR's understanding of the program's procedural requirements, the paper executed Block 6 Certifications and Signature part of the applications and Item 21 Attachments were promptly placed in the United States mail for delivery to SLD on either Friday or Saturday January 19 or 20, 2001. To the best of our knowledge, all mailed papers were received by SLD no later than Monday, January 22, 2001.

Over six months after the submission of the applications, in early July, after the start of the program year and the continuation of existing services by the service provider to many of the Applicants, the above-referenced applications were rejected by SLD solely because the mailing of the Block 6 Certifications and/or Item 21 attachments were postmarked after the 2001-2002 filing window closed on January 18, 2001. CEBPR's initial appeal of the rejections within SLD was denied in the attached notifications (Exhibit 1).[1]

The mailing deadline (by the close of the window) was a new requirement for program Year 4. In prior years, Applicants filing electronically were accorded several days after the close of the filing window in which to submit the required paper documentation. No notice of the new and more stringent filing requirement was given by the FCC or SLD on either the paper or electronic version of the Year 4 Form 471 application form and accompanying FCC Form 471 Instructions. Accordingly, CEBPR was not aware of the changed filing requirement.

[1] In addition, CEBPR's Appeal, filed August 23, 2001, to the rejection of 42 other applications for the same reason is currently pending before the FCC. CEBPR requests the two appeals be considered on a consolidated basis.

As hereinafter shown, SLD's attempt to impose this more burdensome and stringent filing requirement only through informal and unofficial web site publications that were not approved by the Office of Management and Budget ('OMB") violates the Paperwork Reduction Act. As the Form 471 form itself notes, "an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number." See Block 6, Notice to Individuals. The scope of the "currently valid OMB control number" for Form 471 encompasses only the actual form and accompanying FCC Form 471 Instructions which were followed by CEBPR in this case. Absent OMB approval, more burdensome and stringent information filing requirements lawfully cannot be imposed by SLD. Moreover, SLD's rejection of Applications that were properly filed electronically contravened the Electronic Signatures in Global and National Commerce Act and cannot be sustained for this reason.

II. SLD'S ATTEMPT TO IMPOSE A NEW AND MORE STRINGENT FILING REQUIREMENT REGARDING THE SUBMISSION OF PAPER DOCUMENTS WAS NOT ONLY INADEQUATE TO GIVE PROPER NOTICE TO APPLICANTS THAT SLD HAD CHANGED ITS PROCEDURES, BUT IT ALSO VIOLATES THE PAPERWORK REDUCTION ACT.

The requirement that applicants send "postmark" hard copies of the Block 6 Certification and Item 21 attachments by the closing of the filing window is a new requirement for program Year 4. While it was noted by SLD in the context of certain web site documents,[2] the new and more stringent requirements was not set forth on any Form or set of Instructions approved by OMB. Both the paper and electronic versions of FCC Form 471, as well as the FCC Instructions

[2] Form 471 Minimum Processing Standards and Filing Requirements for FY4, Filing Requirements for Forms 471 Filed Manually and Online, Items 1 and 3; Tips For Completing Your Form 471, Tip 2; and Pitfalls to Avoid in Filing Form 471, Items 1 and 3. None of these documents imposing the additional and more restrictive filing requirement was approved by OMB under the Paperwork Reduction Act. Had they been, they would have born the OMB Control Number, as required by 44 U.S.C. § 3507(a)(1)(3).

to Form 471 *at no time* advised applicants of a date or deadline by which the paper documents had to be mailed or filed with the SLD. The OMB approved Instructions for Form 471, a copy of the pertinent parts which is attached (Exhibit 3), only specifies the following requirements:

> You may complete and submit the Form 471 by filing the Form electronically online at the SLD web site, <www.sl.universalservice.org>. If filing your Form 471 electronically, you must also complete and mail to the SLD the following documents in order to successfully complete the submission of your Form 471 application within the application window:
>
> - The Item (21) description(s) of services, and
> - A paper copy of the Block 6 Certification, completed and signed with an original ink signature ...

Similarly, the "Reminders" section on FCC Form 471 Instructions provides that, "If you are filing electronically, you must also complete and sign with an original ink signature a paper copy of your completed Block 6 Certification, your Item (21) Description of Services, and any other attachments in order to successfully complete the submission of your Form 471 within the application window" (Exhibit 4). Thus, while requiring the paper submission of these documents "in order to successfully complete the submission of your Form 471 within the application window," the OMB approved FCC Instructions at no point specified a specific time deadline for the submission of the paper documents.

Furthermore, the instructions for the filing of the paper documents displayed during the electronic filing process at no time advised applicants of a date or deadline by which the paper documents had to be mailed or filed with the SLD (*See* attachment Exhibit 5). This would have been the most obvious place to inform applicants of the time by which the paper documents had to be received by SLD. Instead, the instructions merely provided the address to send the paper documents, specifying no deadline whatsoever. Based on this guidance, it was CEBPR's understanding that the SLD only required that the paper copy of Block 6 and Item 21 be

promptly submitted by mail or other delivery service following electronic filing.

In comparison, SLD's non-OMB approved web site directions imposed a different and more stringent requirement:

> 1. **Application Materials**: All materials associated with Form 471 must be postmarked no later than January 18, 2001 in order for the request to receive consideration as inside the window. This requirement is to help us give applicants earlier funding decisions. These materials are:
>
> - The Form 471 itself (whether electronic or paper)
> - The Block 6 certification of the Form 471 with an original signature by the authorized person
> - Item 21 attachment.[3]

The unapproved requirement is different in two material respects. First, the non-OMB approved directions require that the mailing be completed by the close of the filing window to be considered timely. Second, instead of defining completion as the receipt of the mailed document by SLD, as had been done in previous years,[4] the non-OMB approved directions changed the definition of completion to being placed in the mail and "postmarked" by the close of the window.[5] Thus, an applicant relying only on the OMB approved FCC Form 471 Instructions was not only uninformed of the deadline for the paper documents, but additionally had no basis

[3] SLD Form 471 Minimum Processing Standards and Filing Requirements for FY4, Filing Requirements for Form 471 Filed Manually and Online, # 1.

[4] For Year 3, for example, the deadline for paper documents for electronic filers was January 31, 2000, 12 days after the close of the application filing window. *See Certification Deadline Extended, What's New at SLD web site Section*, January 2000.

[5] Had an applicant read the OMB approved FCC Form Instructions to require the submission of paper documents by the close of the window, this would have led to the illogical conclusion that the paper documents had to be mailed several days before the window deadline to reach the SLD by the deadline. This shows that the Instructions could only be read to impose no express filing deadline for the paper documents.

to ascertain from the FCC Form Instructions that it was a deadline for the "postmarking," rather than the receipt, of the documents.

SLD's attempt to impose and enforce the new and more stringent filing requirement is in clear violation of the Paperwork Reduction Act of 1995 ("PRA").[6] The PRA provides in pertinent part:

> An agency may not make a substantive or material modification to a collection of information after such collection has been approved by the Director [of the Office of Management and Budget], *unless the modification has been submitted to the Director for review and approval* under this subchapter.[7]

The new and more restrictive filing deadline for the paper documents is a substantive and material modification of the OMB approved filing requirements set forth on FCC Form 471 and the accompanying FCC Form 471 Instructions, particularly in this case because it has been the determiner of whether the funding requests will be considered at all by the SLD. In this specific instance, schools and libraries in Puerto Rico are being denied the opportunity to obtain funding for educational purposes solely because of this new and OMB unapproved filing requirement.

Furthermore, the attempted enforcement of the unapproved filing requirement is a violation of the Applicant's basic rights under the statute. Under Section 3512 of the PRA (entitled Public Protection), 44 U.S.C. § 3512, "no person shall be subject to a penalty for failing to comply with a collection of information that . . . does not display a valid control number. . ." The statutory protections of Section 3512 are a "complete defense" and "bar" to the penalty and may be raised at any time.[8] In this case, not only does the new and more stringent SLD

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[6] Pub. L. No. 104-13, 44 U.S.C. § 3501, *et seq.*

[7] 44 U.S.C.A. § 3507(h)(3) (1991 & Supp. 2001) (emphasis added); *United States v. Collins*, 920 F.2d 610, 630 (10th Cir. 1990), *cert. denied*, 500 U.S. 920 (1991).

[8] 44 U.S.C. § 3512(a), (b). The non-OMB approved web site filing deadline was a "collection of information" within the scope of the statute. The statutory definition of "collection of information" encompasses the process by

information collection requirement violate the PRA and fail to display a valid control number, but the electronic version of the Form 471 used by the Applicants also did not display a valid control number. As shown in Exhibit 6, while the OMB control number is on the first page of the paper version of the Form, no OMB control number is displayed on any portion of the electronic version of the form. This is unlike the Commission's electronic application forms that *do* display a valid OMB control number. For example, attached at Exhibit 7 is a Commission Form 601 that displays the requisite OMB control number. The SLD should not, and legally may not be held to a lesser standard than the Commission with respect to the requirement to display a valid OMB control number on any application filing whether electronic or hard copy. Accordingly, no penalty (particularly including the ultimate penalty of an application rejection) may be imposed for failure the follow the new and more stringent filing requirement.

As indicated above, CEBPR was not aware of this additional requirement at the time the applications were filed electronically and regrets its failure to comply with this one requirement. At the same time, however, under the PRA, OMB approved FCC Instructions must take precedence over SLD reference material published on the web site. This is particularly true in this case in order to avoid disadvantaging a substantial number of applicants serving very low income areas who urgently need funding. Moreover, particularly in areas where English is not the primary language and web site access is more limited, applicants should not be compelled to rely upon web site instructions that are different than the FCC's published instructions approved by OMB.

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which the information is collected, as well as the nature of the information. 47 U.S.C. § 3502(3). Furthermore, as agent for the FCC, SLD information collection procedures are subject to PRA. 47 U.S.C. § 3502 (1).

III. UNDER THE E-SIGN ACT, ELECTRONICALLY FILED APPLICATIONS MAY NOT BE REJECTED FOR FAILURE TO FILE PAPER DOCUMENTS WITHIN THE FILING WINDOW.

The Electronic Signatures in Global and National Commerce Act, S. 761 ("E-Sign Act"), signed into law on June 30, 2000, establishes the overall framework governing the use of electronic signatures and records in transactions in or affecting interstate and foreign commerce.[9] In pertinent part, the E-Sign Act provides that:

> Notwithstanding any statute, regulation, or other rule of law . . . with respect to any transaction in or affecting interstate or foreign commerce-
>
> (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
>
> (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.[10]

Under the E-Sign Act, not only is the electronic filing of applications in lieu of paper forms recognized, but the Act specifically requires that, where the electronic process is used, the electronic filing and signature cannot be denied legal effect simply because of the lack of supporting paper documentation and signature. In this instance, SLD specifically requested applicants to complete the "Certification and Signature" block as part of the electronic Form 471 application. CEBPR's Executive Director, as evidenced in the attached Affidavit, did so and filed the electronic application during the filing window. Because these Applications contained the legally binding electronic signatures, the legal effect of the electronic filing cannot be rejected by SLD because of the failure to submit documentation in paper form in the electronic

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[9] *See* Electronic Signatures in Global and National Commerce Act, S. 761, 106th Cong., 2d Sess. (signed into law June 30, 2000).

[10] E-Sign Act at § 101(a).

filing window. Having itself recognized the validity of electronic signatures and filing procedures without the need for the submission of original signatures or documentation,[11] the Commission cannot lawfully apply a different and more stringent requirement to the consideration of the applications processed by SLD.

IV. WAIVER OF SECTION 54.507(C) IS REQUIRED IN THE PUBLIC INTEREST.

Where the particular facts of a case make strict compliance inconsistent with the public interest, the Commission previously has waived electronic window filing requirements to ameliorate the effect of imperfect SLD filing window procedures and prevent hardship to the adversely affected applicants.[12] This case presents exactly this type of situation where such relief is required in the public interest. CEBPR followed all instructions regarding the paper submission of the Block 6 Certification and Item 21 documents set forth in the application form and OMB approved FCC Form 471 Instructions. It was only through web site documents that were not approved by OMB and bore no OMB Control Number that notice of the new and more stringent paper filing requirements could have been obtained. Not only did these non-approved directions efforts fail to give actual notice in this case, but their attempted imposition is unlawful under both the Paperwork Reduction Act and the E-Sign Act.

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[11] *See* Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, FCC 00-255, *Third Report and Order and Second Order on Reconsideration*, 15 FCC Rcd 15996 (2000).

[12] *See* Federal-State Joint Board on Universal Service, Universal Service Support for Eligible Schools and Libraries, Year 3 Filing Window, CC Docket No. 96-45, FCC 00-204, *Order,* 15 FCC Rcd 13932, 13934 ¶ 6 (2000) (*citing WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)). While the Commission has applied the traditional WAIT "hard look" waiver standard in reviewing most SLD determinations to date, it should be noted that CEBPR's instant appeal involves only an SLD application processing guideline that has never been reviewed or adopted by the FCC and accordingly is not a "rule" within the meaning of the Administrative Procedure Act or other statutory requirements. Accordingly, the SLD's guideline is not entitled to any presumption of validity under the standards for administrative consideration of a rule waiver request set forth in WAIT and should be reviewed de novo by the Commission at the time.

The denial of funding consideration for this reason alone is patently unfair to the Applicants and grossly out of proportion to whatever policy reasons might support enforcement of the more stringent and non-approved paper filing requirements. The overwhelming majority of the Applicants are schools and public libraries eligible for a 90% discount. The local communities in Puerto Rico in which these schools and pubic libraries are located simply do not have the resources to fund these services on their own. If the rejections are not corrected, many will lose existing services that have been provided in prior years under the E-Rate program. In addition, as the notices were received after the start of the new program year and existing services have been continued, they could face liability for all service costs. Others new to the program will lose the opportunity to commence services to their students and library users. To penalize Puerto Rico students for the Applicants' failure to follow a *new and unknown* procedural requirement that was not lawfully implemented would result in an extremely arbitrary and harsh outcome, which would in no way further the underlying purpose of the policy in question. In fact, as the paper documents were received within a few days after the close of the filing window, it is difficult to conceive how SLD processing and administrative procedures could have been disadvantaged in any way by the brief delay in receiving the paper documents.

Because of differing economic and cultural conditions, the Commonwealth of Puerto Rico faces a "digital divide" problem far more serious than most continental United States areas. In this case, funding for some of the most disadvantaged and "Information Poor" schools and libraries in Puerto Rico (and in the United States) is being denied because of what in the end must be viewed as no more than an extremely minor and understandable procedural oversight. According to current SLD published data for Year 4, while over $700,000,000 in funding has been approved nationwide to date, only slightly more than $8,000 has been approved for one

eligible institution in Puerto Rico.[13] These serious imbalances alone require the most careful consideration and grant of this appeal. CEBPR, on behalf of the Applicants, respectfully submits that strict compliance with the SLD's procedural requirements is consistent with the public interest, and therefore, warrants a waiver Section 54.507(c) of the Commission's Rules and any other rule or SLD policy necessary to permit consideration of the applications.

V. CONCLUSION.

For the reasons stated above, the SLD's rejection of the above-referenced applications should be reversed and the SLD directed to reinstate the applications for normal consideration as applications filed within the filing window. To the extent necessary, the Commission should waive the requirements of Section 54.507(c) and any other Commission Rule or SLD policy, and direct SLD to deem the above-referenced applications as having been timely filed.

[13] If calculated on a pro-rata population basis, the citizens of Puerto Rico should expect to receive over $9,000,000 of the funding approved by SLD to date. This pro rata estimate itself is low given the substantially higher level of poverty and different economic conditions in Puerto Rico.

Respectfully submitted,

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September 7, 2001