

In this case, the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) took action on Chawanakee’s application on August 6, 2001. The Commission’s rules establish the SLD as the division within USAC that is delegated authority to administer the Schools and Libraries universal service support mechanism. See 47 C.F.R. § 54.701(a), (g). Therefore, for purposes of the Commission’s administrative process, SLD was acting pursuant to delegated authority when it took action on the Chawanakee appeal. Accordingly, pursuant to Section 1.117 of the rules, the Commission had forty days from the date of the SLD’s action (*i.e.*, until September 17, 2001) in which to order the record of the Chawanakee proceeding before it for review. Chawanakee filed its appeal on September 6, 2001. The proceeding therefore continued to be within the “agency administrative process,” within the meaning of the PRA, at the time that Chawanakee filed its PRA appeal, since commission action on the SLD’s determination was not precluded until September 18, 2001. Because the Commission retained jurisdiction over Chawanakee’s application at the time of Chawanakee’s appeal, and had the discretion to review the SLD’s action concerning Chawanakee’s application, Chawanakee’s PRA argument must be deemed to have been made “during the [Commission’s] administrative process.” PRA § 3512(b). Consequently, the Bureau was required to consider the merits of Chawanakee’s PRA argument.

Chawanakee submits that the Bureau misconstrued the applicable procedures and deadlines for appeals based on the PRA. In the *Order*, the Bureau stated that:

the administrative proceeding ceased to be ongoing when the time for appeal of the [SLD] Decision expired without any appeal having been filed. The subsequent filing of an appeal after the matter is closed cannot be considered to constitute part of the ongoing proceeding. If it were, then the requirement that the proceeding be “ongoing” would be meaningless.⁶

⁶ *Order* at 3, para. 5

As an initial matter, the terms “ongoing” and “closed” do not appear in the **PRA**. Rather, the relevant PRA provision states that the PRA argument may be raised at any time “during the agency administrative process.” As discussed above, the agency administrative process timeline in this instance is set forth in Section 1.117 of the Commission’s rules, which was cited in Chawanakee’s appeal⁷ but was not discussed at all in the Bureau’s *Order*.⁸ The Bureau therefore erred by looking to the deadline for filing an appeal rather than by focusing on the appropriate provisions of Section 1.117. In the limited circumstances raised in Chawanakee’s appeal, the thirty day deadline is irrelevant—it is the forty day period set forth in Section 1.117 that determines whether a party has raised a PRA argument “during the administrative process.”

It is important to note that Chawanakee is not arguing that a PRA objection may be raised at any time. The Bureau appears to state that the “ongoing” requirement is necessary so that timelines *are* not rendered meaningless. However, Chawanakee is simply arguing that the Bureau misconstrued the appropriate timeline for raising a PRA argument—Chawanakee is not arguing for an open-ended timeline for raising such an argument. Had Chawanakee filed its appeal on or after September 18, 2001, Chawanakee agrees that, unless the Commission had acted before then on its own motion, the school would have been precluded from raising the PRA argument. But because *the* school raised the PRA argument on September 6, 2001, well before the end of the “agency administrative process” under Section 1.117, the Bureau was required to consider the merits of Chawanakee’s argument.

⁷ Chawanakee Appeal at 4 n.10.

⁸ Because the applicability of Section 1.117 was squarely presented to the Bureau, Chawanakee submits that the Bureau was afforded an opportunity to pass on the *issues* raised in this Application for Review. Accordingly, the requirements of Section 1.115(c) have been satisfied and an Application for Review is the appropriate appeal. However, to the extent that the Commission wishes the Bureau to reconsider its own decision, then Chawanakee respectfully requests that this appeal be treated as a Petition for Reconsideration pursuant to the provisions of Section 1.106 of the Commission’s rules.

Accordingly, for the reasons set forth above and in Chawanakee's Request for Review, as supplemented, the Commission should grant this Application for Review and resolve the issues raised in the Request for Review.

Respectfully submitted,

Chawanakee Joint Elementary School District



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(202) 955-3000

Its Attorneys

Dated: June 20, 2002

CERTIFICATE OF SERVICE

I, Laura Ledet, an employee of Holland & Knight U P , hereby certify that on June 20, 2002, I caused a copy of the foregoing Application for Review to be delivered via first-class mail, postage prepaid to the following:

Universal Service Administrative Company
Schools and Libraries Division
Box 125 – Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981


Laura Ledet

EXHIBIT 4

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September 6, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, DC 20554

Re: Chawanakee Joint Elementary School District
Request for Review
CC Docket Nos. 96-45, 97-21
Billed Entity No. 144045
Form 471 Application No. 229391

Dear Ms. Salas:

Transmitted herewith, on behalf of Chawanakee Joint Elementary School District ("Chawanakee"), are an original and four (4) copies of its Request for Review of the decision of the Schools and Libraries Division ("SLD") in the above-captioned proceeding. For the reasons set forth in the Request for Review, Chawanakee requests that the Commission direct SLD to accept Chawanakee's application as having been filed during the SLD's January 2001 filing window.

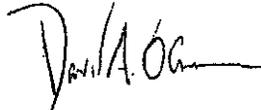
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Magalie Roman Salas, Esq.
September 6, 2001
Page 2

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "David A. O'Connor", with a horizontal line extending to the right.

David A. O'Connor
Counsel for Chawanakee Joint Elementary
School District

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cc: Universal Service Administrative Company
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Whippany, NJ 07981

WAS1 #1011234 v1

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

In the Matter of)	
Request for Review by)	
)	
Chawanakee Joint Elementary)	
School District)	File No. SLD-_____
)	
of Decision of Universal Service)	
Administrator)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

To: Accounting Policy Division, Common Carrier Bureau

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

Request for Review

Chawanakee Joint Elementary School District (“Chawanakee”), by its attorneys and pursuant to Sections 54.719(c) and 54.721 of the Commission’s rules, 47 C.F.R. §§ 54.719(c), 54.721, hereby requests a review of the decision of the Schools and Libraries Division (“SLD”) Administrator of the Universal Service Administrative Company regarding Chawanakee’s Year Four Funding Request (Form 471 Application Number 229391).

Chawanakee electronically filed its FCC Form 471 on January 17, 2001.¹

However, Chawanakee did not mail the original signature page or Item 21

¹ A copy of Chawanakee’s FCC Form 471 is attached hereto as Exhibit 1.

supplemental attachments to SLD until January 19, 2001, one day after the filing window closed.

By a postcard dated July 10, 2001, SLD notified Chawanakee that its application was received after the January 18 window closed.² On July 26, 2001, Chawanakee filed a Letter of Appeal with the SLD.³ The SLD Administrator denied Chawanakee's appeal, indicating that FCC rules did not permit SLD to consider Chawanakee's request.⁴ Chawanakee now submits this appeal of the SLD Administrator's decision to the Commission.⁵

I. In Attempting to Comply with the Paperwork Reduction Act, the Commission Failed to Comply with the Applicable OMB Approval

The SLD improperly rejected Chawanakee's FCC Form 471 application.

While it is not stated, it would appear that Chawanakee's FCC Form 471 was rejected because of the FCC Form 471 instructions that require a paper signature in addition to the electronic signature, and that all attachments must be filed as hard copies within the filing window. These obligations, to the extent that they penalize Chawanakee, are invalid pursuant to the Paperwork Reduction Act ("PRA")

The "public protection" provisions of the PRA are as follows:

² See Exhibit 2.

³ See Exhibit 3.

⁴ See Exhibit 4.

⁵ The SLD Administrator's letter is dated August 6, 2001, which would indicate that the deadline for filing Chawanakee's Request for Review would have been September 5, 2001 if the letter was postmarked the same date as it was dated. See 47 C.F.R. § 54.720(a). However, the Administrator's decision was not received by Chawanakee until August 13, 2001 at the earliest, exactly one week after the date of the letter. See Exhibit 4. Although Chawanakee is unable at this time to locate a copy of the SLD envelope showing a postmark date, it would appear that SLD did not mail the letter until some date after August 6, 2001. In any event, as shown in the text herein, Chawanakee may object to the filing requirements of FCC Form 471 "at any time" during the administrative process, pursuant to Section 3512(b) of the PRA, 44 U.S.C.A. § 3512(b).

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information . . . if—

(1) the collection of information does not display a valid control number assigned by the Director [of the Office of Management and Budget (“OMB”)]. . . or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.⁶

These provisions supersede all other laws. See *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 33 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 813 (1998). In that case, following the enactment in 1995 of the above subsection (b), the Commission was required to entertain, and ultimately grant, a reconsideration request that was filed years late, because the Commission had not complied with the PRA requirements and because Section 3512(b) entitled the petitioner to raise the “protection provided by” subsection (b) “at any time during the agency administrative process” and “[n]otwithstanding any other provision of law.”

There can be no doubt that FCC Form 471 is a “collection of information,” and the Commission did in fact submit it for approval by OMB. On September 1, 2000, OMB conditionally approved an emergency extension of the form,⁷ subject to the following “*Existing Terms of Clearance*”:

On both FCC Form 470 and FCC Form 471, the FCC shall clearly display at the top of the forms the following PRA disclosure statement: ‘An agency may

⁶ 44 U.S.C.A. § 3512.

⁷ See Exhibit 5 hereto, page 1

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. The OMB control number for this information collection is #3060-0806.’⁸

On page 1 of the conditional approval, OMB set forth the following:

“NOTE: The agency is required to display the OMB control number and inform respondents of its legal significance (see 5 CFR 1320.5(b)).”⁹

The Commission did not comply with these “terms of clearance.” Instead, the Commission placed only the following statement at the top of the year 2000 electronic edition of FCC Form 471, which Chawanakee used to make its filing: “Approval by OMB 3060-0806.”

Thus, the FCC Form 471 as used by Chawanakee was not approved by OMB, since it did not display the information notice required pursuant to Section 3512(a)(2) of the PRA, and since it failed to comply with the specific “terms of clearance” outlined by OMB in its approval of Form 471. The consequence of that failure is that Chawanakee should be permitted to supply any missing information at any time that its application is within the administrative process.¹⁰ The OMB regulations implementing the PRA require that where, as here, an agency has imposed a collection of information as a means for proving or satisfying a condition for the receipt of a benefit that is not in compliance with OMB requirements, the agency must

⁸ *Id.* at 2 (emphasis added).

⁹ *Id.* at 1.

¹⁰ To the extent that the Commission determines that **this** Request for Review was not timely filed, Chawanakee submits that in light of Section 5(c)(4) of the Communications Act, **as** amended, **47** U.S.C. § 155(c)(4), and Section 1.117 of the Commission’s rules, **47** C.F.R. § 1.117, the Commission retains jurisdiction over this proceeding and the application therefore remains within the administrative process.

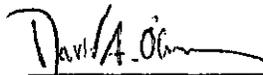
permit a respondent to satisfy the legal conditions in any other reasonable manner." In this instance, Chawanakee submits that the most appropriate remedy would be to direct SLD to accept the materials Chawanakee submitted on January 19, 2001, and process the application.

II. Conclusion.

Because Chawanakee cannot be penalized for having failed to comply with the filing requirements of an FCC form that did not comply with the requirements set forth in the OMB approval, and did not display the information notice required by the PRA, Chawanakee urges the Commission to direct SLD to accept Chawanakee's application as having been timely filed during the Year 4 filing window.

Respectfully submitted,

Chawanakee Joint Elementary School District



Mark J. Palchick
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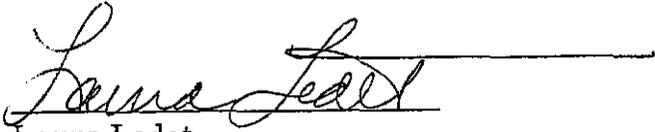
Dated: September 6, 2001

¹¹ 5 C.F.R. § 1320.6(c).

CERTIFICATE OF SERVICE

I, Laura Ledet, an employee of Holland & Knight LLP, hereby certify that on September 6, 2001, I caused a copy of the foregoing Request for Review to be delivered via first-class mail, postage prepaid to the following:

Universal Service Administrative Company
Schools and Libraries Division
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Laura Ledet

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October 23, 2001

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

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VIA HAND DELIVERY

Magalie Roman Salas, Esq.
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445 12th Street, S.W.
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Washington, DC 20554

Re: Chawanakee Joint Elementary School District
Supplement to Request for Review
CC Docket Nos. 96-45, 97-21
Billed Entity No. 144045
Form 471 Application No. 229391

Dear Ms. Salas:

Transmitted herewith, on behalf of Chawanakee Joint Elementary School District ("Chawanakee"), are an original and four (4) copies of its Supplement to Request for Review of the decision of the Schools and Libraries Division ("SLD) Administrator in the above-captioned proceeding. For the reasons set forth in the Request for Review and in the enclosed Supplement, Chawanakee requests that the Commission direct SLD to accept Chawanakee's application as having been filed during the SLD's January 2001 filing window.

An extra copy of this filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

Magalie Roman Salas, Esq.

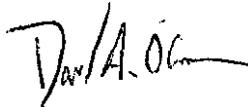
October 23, 2001

Page 2

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "David A. O'Connor". The signature is written in a cursive style with a horizontal line at the end.

David A. O'Connor
Counsel for Chawanakee Joint Elementary
School District

Enclosure

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Schools and Libraries Division
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Whippany, NJ 07981

WAS1 #1024716 v1

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

In the Matter of)
Request for Reviewby)
)
Chawanakee Joint Elementary)
School District) File No. SLD-_____
)
of Decision of Universal Service)
Administrator)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
Changes to the Board of Directors) CC Docket No. 97-21
of the National Exchange Carriers)
Association, Inc.)

To: Accounting Policy Division, Common Carrier Bureau

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

SUPPLEMENT TO REQUEST FOR REVIEW

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District

October 23,2001

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Exhibits

Exhibit 1: Chawanakee Letter of Appeal to SLD Dated July 26, 2001

SUMMARY

Chawanakee Joint Elementary School District (“Chawanakee”) is providing the Commission with supplemental information to its Request for Review filed on September 6, 2001. Supplements to Requests for Review have been accepted by the Commission in the past.

In the Supplement, Chawanakee provides additional arguments that the Schools and Libraries Division (“SLD”) wrongfully determined that Chawanakee’s application was not filed during the *Year Four* filing window. Specifically, Chawanakee argues that, pursuant to the E-Sign Act, the date on which Chawanakee submitted its electronic application and signature is controlling as to the date of submission of its Form 471 application. In addition, the SLD’s duplicative original signature requirement conflicts with the Commission’s statement to the Office of Management and Budget that there would be no duplication of information on FCC Form 471. The SLD’s policies with respect to original signatures should not be more onerous than the agency by whom it was established.

Chawanakee also argues that it has satisfied the statutory requirement for submitting a *bona fide* request for E-rate funding, and that its application should be accepted as having been filed during the filing window. The SLDs arbitrary policy of refusing to accept *bona fide* applications based on the date of the postmark of the application should not be allowed to thwart congressional intent.

Finally, in the alternative to the arguments set forth in the Request for Review and this Supplement, Chawanakee requests a waiver of the Year Four filing window for the reasons set forth in Section IV of the Supplement.

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

In the Matter of)	
Request for Review by)	
)	
Chawanakee Joint Elementary)	
School District)	File No. SLD-_____
)	
of Decision of Universal Service)	
Administrator)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

- To: Accounting Policy Division, Common Carrier Bureau - - - - -

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

Supplement to Request for Review

Chawanakee Joint Elementary School District ("Chawanakee"), by its attorneys, hereby submits this Supplement to its Request for Review filed on September 6, 2001 with respect to its FCC Form 471 Application Number 229391. This Supplement expands upon Chawanakee's arguments in support of its contention that the Schools and Libraries Division ("SLD") erred in denying Chawanakee's Year Four funding request, and, in the alternative, requests a waiver of the Year Four funding denial for the reasons set forth below.

The submission of supplemental information in a Request for Review proceeding is permitted. Supplemental information has been permitted, for example, in *Request for Review by Naperville Community Unit School District 203,*

Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Order, File No. SLD-203343, CC Dockets No. 96-45 and 97-21, FCC 01-73 (rel. Feb. 27, 2001) (“*Naperville*”). In light of the precedent of *Naperville*, and the D.C. Circuit’s directive to the Commission to accord equal treatment to similarly situated parties, *see, e.g., Melody Music Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), Chawanakee requests that the Commission consider the additional arguments set forth in this Supplement.

I. Pursuant to the E-Sign Act, the Date on Which the Paper Signature Was Mailed To SLD Is Not Relevant to Determining if Form 471 Was Received During the Filing Window.

Chawanakee electronically filed its FCC Form 471 on January 17, 2001. For reasons more fully discussed in Section IV of this Supplement, Chawanakee did not mail the original signature page or Item 21 supplemental attachments to SLD until January 19, 2001, one day after the filing window closed.

The SLD improperly determined that Chawanakee failed to file FCC Form 471 within the filing window. Chawanakee’s electronically signed Form 471 was received by the SLD well within the filing window. Pursuant to the Electronic Signatures in Global and National Commerce Act (“E-Sign Act”), the date that the electronically signed application was received is controlling as the date of submission of the application.

The E-Sign Act went into effect on October 1, 2000.¹ The SLD’s Form 471 for Year 4 is dated October 2000 and therefore is subject to the E-Sign Act.

The E-Sign Act states, in pertinent part:

Section 101. General Rule of Validity.

(a) IN GENERAL. - 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.

~~The term “transaction” is defined as “an action or set of actions relating to the~~ conduct of business, consumer, or commercial affairs between two or more persons . . .”² The term “person” includes a government agency such as the FCC,³ meaning that a set of actions relating to the business and commercial affairs between an FCC applicant and the Commission constitutes a “transaction” under the statute, provided that the set of actions affects interstate commerce. Owing to the numerous service providers and schools involved in the E-rate program, Chawanakee submits that the set of actions contemplated by the FCC Form **471** application process “affects” interstate commerce for purposes of the statute. Accordingly, pursuant to the E-Sign Act, FCC E-rate applications may be filed electronically in lieu of being filed in paper form, and electronic signatures

¹ S. 761, 106th Cong. 2d Sess., § 107(a).

² *Id.* § 106(13).

contained in such applications cannot be denied legal effect simply because they were not filed in paper format.

In this instance, SLD specifically requested applicants to complete the “Certification and Signature” block as part of the electronic Form 471 application. Mr. Treber, Chawanakee’s representative, did so and filed the electronic application during the filing window. Because Chawanakee’s electronic Form 471 contained the legally binding electronic signature of Chawanakee’s representative, Mr. Treber, Chawanakee submits that SLD was prohibited under the E-Sign Act from requiring Chawanakee to subsequently submit a signature page ~~in~~ paper form. Accordingly, Chawanakee cannot be punished for failure to comply with an impermissible SLD rule. The Commission should therefore direct SLD to deem Chawanakee’s application as having been timely received during the filing window.⁴

In addition, Section 104(c) of the E-Sign Act prohibits state and federal agencies from imposing or reimposing “any requirement that a record be in a tangible printed or paper form.” The only exception to this rule is if there is a

³ *Id.* § 106(8).

⁴ **This** case should be distinguished from previous Commission decisions that were decided prior to the enactment of the E-Sign Act. See, e.g., *Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and the Application of Bruggemeyer Memorial Library*, DA 99-1529, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13,170(Com. Car. Bur. 1999). In that case, the Commission denied a request for review by an applicant who filed its Form 471 electronically and faxed the signature page to the SLD but did not submit the original signature page to the SLD until **after** the filing window closed. Chawanakee submits that the E-Sign Act invalidates the rationale underpinning the *Bruggemeyer* decision. Similarly, the Commission’s decision in *Winchendon School* can be distinguished from the present case because the Winchendon application was submitted for Funding Year **3**. The application filing window for Funding Year **3** and the relevant FCC forms in use at that time predated the E-Sign Act. See *In re Request for Waiver by The Winchendon School, Winchendon, MA, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-192816, DA 01-2033, Order (Com. Car. Bur. rel. Aug. 28, 2001).

“compelling government interest relating to law enforcement or national security”
and imposing a paper requirement is essential to attaining that interest.⁵

In this situation there is no such compelling government interest relating to law enforcement. First, SLD is not a law enforcement agency and lacks law enforcement powers. Second, and more importantly, the prevention of fraud is not a sufficient justification for requiring original signature pages, because such a justification would undermine the very purpose of the E-Sign Act. The Act is designed to legitimize electronic signatures; if Congress intended the prevention of fraud to be a compelling interest justifying an original signature page, Congress would not have enacted the law in the first place.

Finally, the Commission has recognized that the E-Sign Act supersedes its rules. Pursuant to former Section 64.1160(b) of the FCC's rules, 47 C.F.R. § 64.1160(b), the FCC required long distance carriers to obtain the written signature of new customers. In September 2000, in reaction to the E-Sign Act, the FCC began permitting electronic signatures without the need for the submission of original signatures.⁶ As an agent of the FCC, SLD should not maintain stricter standards than the FCC itself.

⁵ E-Sign Act, § 104(b)(3)(B).

⁶ See 47 C.F.R. § 64.1120(c)(1); see also *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, FCC 00-255 (rel. Aug. 15, 2000) (Letters of Agency may be submitted electronically, without any written original signature requirement). In the decision, the FCC specifically cites as authority the E-Sign Act.

be submitted to the FCC, *not one form* requires the applicant to follow up with a signed original. The SLD should not have a more onerous standard than the agency by whom it was established.

III. Congressional Intent Should Not Be Thwarted by the SLD's Arbitrary Policies.

A. Congress Intended that Bona Fide Requests of All Eligible Schools for Telecommunications Services Should Be Granted.

One of the fundamental goals of the universal service provisions of the Telecommunications Act of 1996 was to ensure the ability of K-12 schools and libraries to obtain access to advanced telecommunications services. *See Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Fifth Order on Reconsideration, 13 FCC Rcd 14,915, 14,919 (1998) (citing Joint Explanatory Statement of the Committee of Conference). Section 254(b)(6) of the Communications Act of 1934, as amended, requires the Commission to “base policies for the preservation and advancement of universal service on the following principles: . . . Elementary and secondary schools and classrooms . . . should have access to advanced telecommunications services as described in subsection (h) [of this section].” 47 U.S.C.A. § 254(b)(6). Subsection (h)(1)(B) provides that

[a]ll telecommunications carriers serving a geographic area *shall, upon a bona fide request* for any of its services that are within the definition of universal service . . . provide such services to elementary schools, secondary schools, and libraries *for educational purposes* at rates less than the amounts charged for similar services to other parties.

Id. § 254(h)(1)(B) (emphasis added).

⁸ See Exhibit 4 attached hereto, Supporting Statement, Item A4

The foregoing makes it clear, and the Commission has recognized, that Congress intended that all eligible schools receive communications service discounts. Indeed, the statute imposes only two requirements on a school desiring discounts. First, the requested services must be for educational purposes. Second, the school must submit a “*bonafide* request.” And the statute commands that when a carrier receives such a request, it “shall” provide service at a discount.

In this case, Chawanakee made a good faith request for telecommunications services to be used for educational purposes. The school’s application is a perfectly good application in all respects. The only reason that SLD denied the application appears to be that, for reasons beyond Chawanakee’s control, the supporting documents to the online application were mailed one day late. However, Chawanakee made a good faith effort to expedite the SLDs receipt of the supporting materials by sending the materials via an overnight carrier.

The overall purpose of the legislation requires SLD and the Commission to overlook minor procedural errors in this instance, in favor of carrying out the Congressional purpose that these telecommunications services be made available to schools and libraries making bona fide requests for such services. Because Chawanakee made a *bonafide* request for telecommunications services, its request should be granted.

B. The SLD's Policy of Determining the Acceptability of Applications Based on the Applications' Postmarked Date is Arbitrary and Capricious.

A reviewing court is required to hold unlawful any agency action determined to be arbitrary or capricious. 5 U.S.C. § 706(2)(A). The SLD has established a cut-off date for accepting mailed applications, based on the postmarked date of the application. Thus, for example, School A could send its application via regular mail on Thursday, January 18 and the application could be received by SLD on Tuesday, January 23. School B's application could be sent via overnight delivery on Friday, January 19 and be received by SLD on Monday, January 22. In this scenario, SLD would accept School A's application and reject School B's application, even though School B's application was received one day earlier than School A's application. The apparent justification for this SLD policy is that it is administratively appropriate to establish a cut-off date in order to expedite the application review process.

The SLD's policy does nothing to forward the purpose of expediting the application review process. Rather, the policy amounts to an arbitrary determination of which applications are acceptable for filing. It is capricious and arbitrary to hold that Chawanakee's application must be denied for having delayed the administrative process when the SLD would accept and process applications that were received after Chawanakee's application was received. Indeed, it is extremely likely that the SLD received Chawanakee's supporting materials well before the SLD received the supporting materials

of schools that chose to send their supporting materials via regular mail on January 18, 2001.

It is important to distinguish the SLDs “postmarked” policy from the Commission’s own policy concerning the filing of appeals in E-rate funding decisions. The Commission requires that E-rate appeals be *filed* within 30 days of a decision by the SLD. This is a clear, consistent policy, because no matter the type of mailing delivery used, the appeal must be *received* by the Commission on a date certain. In contrast, the SLDs arbitrary policy of basing application acceptability on the postmarked date does not withstand scrutiny under Section 706 of the Administrative Procedure Act, because applications received earlier in time are rejected while those received later in time are accepted. To comport with the requirements of Section 706, SLD must revise its policy to establish a *filing date* deadline that does not discriminate on the basis of postal delivery methods employed by applicants. Until the policy is revised, Chawanakee cannot be penalized for having failed to comply with an arbitrary procedure.

IV. A Waiver of the Year 4 Filing Window Is Warranted and Would Serve the Public Interest.

In its Request for Review, Chawanakee argued that the SLD erred in denying the school’s funding request because the Commission derogated from the OMBs specific “Terms of Clearance” instructions set forth in the OMBs approval of FCC Form 471 pursuant to the Paperwork Reduction Act. Because of this derogation, Chawanakee argued that the school could not be penalized for failure to comply with the requirements of FCC Form 471.

Even if the commission determines that neither the E-Sign Act nor the Commission's derogation from the OMB's Terms of Clearance warrant a grant of Chawanakee's Request for Review, the Commission should nonetheless grant a waiver of the filing window deadline⁹ because the delay in submitting the paper signature and supporting materials to SLD was caused by massive, unforeseeable power blackouts in the school's district during the filing window.

The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *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 13,932, 13,934, para. 6 (2000); *Northeast Cellular Telephone Co v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

Chawanakee submits that such a situation is presented here. As set forth in Chawanakee's Letter of Appeal to the SLD, a copy of which is attached hereto as Exhibit 1, Chawanakee timely filed its FCC Form 471 application online on the evening of January 17, 2001, and arranged for a pickup by Federal Express of the paper signature and Item 21 supporting materials for the next day. Throughout the day on January 18, 2001, massive and unforeseeable blackouts affected the entire California Central Valley, including Fresno, where the central Federal Express office is located. As a direct result of the blackouts, Federal Express did not make its scheduled pickup of Chawanakee's package. By the time that Chawanakee was

⁹ See 47 C.F.R. § 54.507(c)

informed that Federal Express was unable to make the scheduled pickup, it was too late to arrange for an alternate mail carrier. Accordingly, Chawanakee's package was unable to be sent to the SLD until one day later, January 19,2001. In any event, as noted above, it is extremely likely that SLD received Chawanakee's package well before SLD received other schools' packages that were sent by regular mail.

Although the Commission has previously held that weather-related delays are not a sufficient justification for a waiver,¹⁰ Chawanakee submits that the facts in this case are distinguishable because the delays at issue here were due to unforeseeable events. The Fresno area was subject to rolling electricity blackouts during the critical final day of the Year 4 filing window. These blackouts caused Severe mail disruptions throughout the day on January 18,2001 and could not have been anticipated by Chawanakee.

Because the delays associated with the blackouts were unforeseeable and beyond the control of Chawanakee, Chawanakee submits that strict application of the filing window deadline would be unwarranted. The public interest would be served by accepting Chawanakee's application as having been timely filed, so that the students of Chawanakee can benefit from the funds that Congress intended should be available to their school.

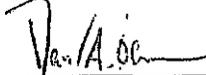
¹⁰ See *In re Request for Waiver by Stephen/Argyle Central School District, Stephen, MN, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange* (continued..)

V. Conclusion.

For the reasons set forth in Chawanakee's Request for Review and in this Supplement, the Commission should direct the SLD to accept Chawanakee's FCC Form 471 application as having been timely filed during the SLD's filing window for Year 4.

Respectfully submitted,

Chawanakee Joint Elementary School District



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Its Attorneys

Dated: October 23, 2001

Carrier Association, Inc., File No. SLD-228975, DA-01-2020, Order (Com. Car. Bur. rel. **Aug. 28, 2001**) (Federal **Express pickup** delays due to blizzard conditions foreseeable).

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.20964

In the Matter of)
Request for Review by)

Chawanakee Joint Elementary)
School District)

File No, SLD-_____

of Decision of Universal Service)
Administrator)

Federal-State Joint Board OR)
Universal Service)

CC Docket No. 96-45

Changes to the Board of Directors)
of the National Exchange Carriers)
Association, Inc.)

CC Docket No, 97-21

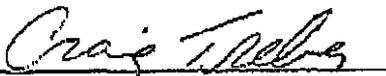
To: Accounting Policy Division, Common Carrier Bureau

Re: Chawanakee Joint Elementary School District, Billed Entity Number 144045
Form 471 Application Number 229391, Funding Year 4, 7/1/2001- 6/30/2002

Supporting Declaration

I, *Craig Treber*, hereby swear under penalty of perjury of the laws of the
~~United States that I have reviewed the foregoing Supplement to Bequest for Review~~ - - - - -
("Supplement"), and that all statements of fact contained within the Supplement,
except those for which official notice may be taken, are true and correct to the best
of my personal knowledge.

Executed this 17 day of October, 2001.

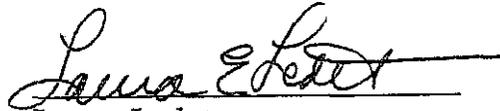


Craig Treber
Technology Director
Chawanakee Joint Elementary school District

CERTIFICATE OF SERVICE

I, Laura Ledet, an employee of Holland & Knight LLP, hereby certify that on October 23, 2001, I caused a copy of the foregoing Supplement to Request for Review to be delivered via first-class mail, postage prepaid to the following:

Universal Service Administrative Company
Schools and Libraries Division
Box 125 - Correspondence Unit
80 South Jefferson Road
Whippany, NJ 07981


Laura Ledet