

Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of Federal-State Joint Board on Universal Service Children's Internet Protection Act CC Docket No 96-45

ORDER

Adopted: July 23, 2003

Released: July 24, 2003

By the Commission:

I. INTRODUCTION

1 In this Order, we adopt measures to ensure that our implementation of the Children's Internet Protection Act (CIPA) complies with the recent decision of the United States Supreme Court...

2. Libraries subject to CIPA's filtering requirements that are not currently in compliance with the CIPA filtering requirements must undertake efforts in Funding Year 2003 to comply by Funding Year 2004 in order to receive e-rate funds.

1 United States v American Library Ass'n, Inc, No 02-361, 2003 WL 21433656 (June 23, 2003)

2 47 U S C § 254(h)(5)(A), (6)(A) See Federal-State Joint Board on Universal Service, Children's Internet Protection Act, CC Docket No 96-45, Report and Order, 16 FCC Rcd 8182, 8195-8197, paras 28-31 (2001) (CIPA Order) Section 254(h)(6)(A)(ii) excludes from the requirements of CIPA libraries receiving only telecommunications services...

3 We find good cause to make the implementation timing modifications without notice and comment rulemaking. The actions we take in this Order are intended to bring implementation of CIPA into compliance with the judgment of the Supreme Court...

CIPA requirements by Funding Year 2004, except to the extent such libraries are eligible for and receive a waiver of the CIPA requirements pursuant to section 254(h)(6)(E)(ii)(III)<sup>4</sup> We direct the Administrator in consultation with the Wireline Competition Bureau (Bureau) to implement the necessary procedural changes, including changes to the current CIPA-related certifications required of applicants We take these steps to respond promptly to the Supreme Court's decision and to ensure that the schools and libraries universal service support mechanism continues to operate in accordance with federal law

## II. BACKGROUND

### A. The Schools and Libraries Universal Service Mechanism

3 Pursuant to section 254 of the Communications Act of 1934, as amended (the Act), the Commission established the schools and libraries universal service support mechanism, known as the e-rate program<sup>5</sup> Under that mechanism, eligible schools and libraries and consortia that include eligible schools and libraries (collectively, recipients) may receive eligible telecommunications services, Internet access, and internal connections at discounted rates.<sup>6</sup> Eligible entities must apply to receive such discounts on an annual basis, with the funding year extending from July 1 to June 30.<sup>7</sup>

4 The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) administers the schools and libraries support mechanism under the direction of the Commission.<sup>8</sup> After an applicant for discounted services under the schools and libraries support mechanism has entered into agreements for eligible services with one or more service providers, it must file with SLD an FCC Form 471 application.<sup>9</sup> The FCC Form 471 notifies SLD of the services that have been ordered and indicates the amount of discounts

<sup>4</sup> See *infra* para 14

<sup>5</sup> 47 U.S.C. §§ 151 *et seq.*, see *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (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*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*affirming Universal Service Order in part and reversing and remanding on unrelated grounds*), *cert. denied*, *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)

<sup>6</sup> 47 C.F.R. §§ 54.502, 54.503

<sup>7</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, 13 FCC Rcd 14915 (1998)

<sup>8</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 (1998)

<sup>9</sup> See *Schools and Libraries Universal Service, Services Ordered and Certification Form*, OMB 3060-0806 (October 2002) (FCC Form 471)

sought<sup>10</sup> SLD then issues a funding commitment decision letter indicating the discounts, if any, to which the applicant is entitled. After the funding year begins and the discounted service commences, the approved recipient of discounted services submits to SLD an FCC Form 486, which indicates that the service has begun and specifies the service start date.<sup>11</sup> After receiving the FCC Form 486, SLD will accept invoices from the service provider and issue disbursements to the provider in cumulative amounts up to the amount of the discount awarded.<sup>12</sup>

## B. CIPA and NCIPA

5 In 2001, Congress established new conditions on the use of computers with Internet access in two separate acts, CIPA, which added sections 254(h)(5) and (h)(6), and the Neighborhood Children's Internet Protection Act (NCIPA), which added section 254(l).<sup>13</sup> Pursuant to section 254(h)(6), which governs libraries, no library may receive universal service discounts unless the authority with responsibility for administration of the library makes certain certifications, and ensures the use of such computers in accordance with the certifications.<sup>14</sup> Specifically, applicants are required to certify that they are enforcing a policy of Internet safety as defined in NCIPA, and that their policy of Internet safety also includes the use of a "technology protection measure," including filtering software, that is in accordance with requirements specified in the CIPA provisions.<sup>15</sup> Under NCIPA, libraries are required to adopt and implement an Internet safety policy that addresses: (1) access by minors to inappropriate material on the Internet, (2) the safety and security of minors when using electronic communications; (3) unauthorized access; (4) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (5) measures designed to restrict minors' access to material harmful to minors.<sup>16</sup>

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<sup>10</sup> 47 C.F.R. § 54.504(c)

<sup>11</sup> Schools and Libraries Universal Service, Receipt of Service Confirmation Form, OMB 3060-0853 (September 2002) (FCC Form 486), Instructions for Completing the Schools and Libraries Universal Service, Receipt of Service Confirmation Form (FCC Form 486), OMB 3060-0853 (September 2002) (Form 486 Instructions). In addition, an early filing option exists for applicants whose services begin on or before July 1 of the funding year. See FCC Form 486.

<sup>12</sup> See FCC Form 486, Form 486 Instructions.

<sup>13</sup> See Neighborhood Children's Internet Protection Act (NCIPA), Pub. L. 106-554 §§ 1731 *et seq.*

<sup>14</sup> Hereinafter we will refer collectively to all of the persons specified in the statute as responsible for making these certifications on behalf of participating libraries as "entities." In the case of a library, certifying entities include a "library, library board, or other authority with responsibility for administration of a library." See, e.g., 47 U.S.C. § 254(h)(6)(A)(i).

<sup>15</sup> 47 U.S.C. §§ 254(h)(5), 254(h)(6). These software filters are designed to block access to Internet sites containing sexually explicit or otherwise objectionable material. See *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 428-430 (E.D. Pa. 2002).

<sup>16</sup> See NCIPA, Pub. L. 106-554 § 1732, codified at 47 U.S.C. § 254(l).

6 To implement these new provisions, the Commission amended its rules in 2001, adding the CIPA and NCIPA requirements as section 54.520.<sup>17</sup> The *CIPA Order* also added new certifications for CIPA and NCIPA to the FCC Form 486 beginning in Funding Year 2001.<sup>18</sup> For those recipients that are in a consortium and are subject to CIPA's requirements, the Commission adopted rules requiring those consortium members to submit certifications on an FCC Form 479 to the consortium leader, referred to as the billed entity, who must retain them. The consortium leader then certifies compliance with CIPA requirements on behalf of its membership on the FCC Form 486.<sup>19</sup>

7 Subsequently, upon a challenge by the American Library Association and others, a three-judge district court held that requiring public libraries to use filtering technology violated the First Amendment of the United States Constitution.<sup>20</sup> It issued an order on May 31, 2002 holding section 254(h)(6) facially unconstitutional and permanently enjoining the Commission from withholding federal funds from any public library for failure to comply with the provision.<sup>21</sup>

8. In compliance with the district court's injunction, the Commission issued an order on June 28, 2002 suspending enforcement of those portions of section 54.520 of its rules implementing section 254(h)(6) as applicable to libraries,<sup>22</sup> pending Supreme Court action.<sup>23</sup> In addition, the Commission directed the Administrator to adopt measures to ensure that Funding Year 2001 library applicants would not be penalized for non-compliance with section 254(h)(6).<sup>24</sup>

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<sup>17</sup> 47 C F R § 54.520

<sup>18</sup> See *CIPA Order*, 47 C F R § 54.520

<sup>19</sup> *CIPA Order*, 16 FCC Rcd at 8194, para. 25

<sup>20</sup> *American Library Association Inc v United States*, 201 F Supp 2d 401 (E D Pa 2002). Section 1741(a) of CIPA, 114 Stat. 2763A-351, provides expedited review for constitutional challenges by a three-judge district court pursuant to 28 U S C § 2284.

<sup>21</sup> *Id.* at 496.

<sup>22</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Rcd 12433 (2002) (specifically suspending enforcement of section 54.520(c)(2)(i) and (iii), (c)(3), (d), and (g)(1) of its rules as applied to libraries, 47 C F R § 54.520(c)(2)(i) and (iii), (c)(3), (d), and (g)(1)) (*CIPA Suspension Order*). Specifically, the Commission suspended enforcement of section 54.520(c)(2)(i) and (iii), 54.520(c)(3) and 54.520(d) to the extent that these provisions require any library to filter or certify to such filtering under 47 U S C § 254(h)(6). The Commission also suspended enforcement of section 54.520(g)(1) as it applies to all libraries. See *id.*

<sup>23</sup> *United States v American Library Ass'n, Inc.*, No. 02-361, 2003 WL 21433656, see *American Library Ass'n, Inc v United States*, 201 F Supp 2d 401, see also 47 U S C § 254(h)(6). Section 1741(b) of CIPA provides for review of a decision finding any provision of CIPA unconstitutional "as a matter of right by direct appeal to the Supreme Court."

<sup>24</sup> See *CIPA Suspension Order*, 17 FCC Rcd at 12447-8, paras. 14-18.

9 On June 23, 2003, the Supreme Court issued its opinion reversing the judgment of the District Court and finding that CIPA, on its face, is constitutional. The Supreme Court found that CIPA does not induce libraries to violate the Constitution because public libraries' Internet filtering software can be disabled at the request of any adult user and, therefore, does not violate their patrons' First Amendment rights.<sup>25</sup> In upholding CIPA, the Supreme Court emphasized "the ease with which patrons may have the filtering software disabled," and that a patron who encounters a blocked site . . . need only ask a librarian to unblock it (or at least in the case of adults) disable the filter."<sup>26</sup> The plurality also highlighted the government's acknowledgment at oral argument that "a patron would not 'have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled.'"<sup>27</sup> Pursuant to Supreme Court rules, the decision in *U S v American Library Association* will become effective no earlier than July 18, 2003.<sup>28</sup>

### III. DISCUSSION

10 Consistent with the Supreme Court decision, as of the effective date of this Order,<sup>29</sup> we lift the suspension of enforcement of those sections of 54.520 of our rules which implemented the section 254(h)(6) requirement that libraries have Internet filtering technology to receive discounts for Internet access and internal connections under e-rate. Specifically, we lift the suspension of enforcement of sections 54.520(c)(2)(i) and (ii), 54.520(c)(3), 54.520(d), and 54.520(g)(1) of our rules as applied to libraries. In addition, we modify section 54.520(f) and (g) to conform with the revised timeline for the implementation of section 254(h)(6) of the Act, as described herein.

11 Consistent with the implementation framework established by Congress, libraries receiving e-rate discounts for Internet access or internal connections shall have one year from July 1, 2003, which is the start of Funding Year 2003, to come into compliance with the filtering requirements of CIPA. When Congress enacted CIPA in 2001, it recognized that it may take

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<sup>25</sup> *United States v American Library Ass'n*, 2003 WL 21433656 at \*8 See also *id* at \*11 (Kennedy, J , concurring), at \*14 (Breyer, J , concurring)

<sup>26</sup> *United States v American Library Ass'n*, 2003 WL 21433656 at \*8 (plurality opinion) See also *id* at \*11 (Kennedy, J , concurring), at \*14 (Breyer, J , concurring) *United States v American Library Ass'n*, 2003 WL 21433656 at \*8 (plurality opinion) See also *id* at \*12 (Breyer, J , concurring) ("As the plurality points out, the Act allows libraries to permit any adult patron access to an 'overblocked' Web site, the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter'"), *id* at \*10 (Kennedy, J , concurring) (underscoring the government's representation that "on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay")

<sup>27</sup> *Id* at \*8 (quoting Tr Of Oral Arg 4)

<sup>28</sup> Under the Supreme Court's rules, its decisions do not become effective until the Court sends a certified copy of the judgment to the lower court The Court does not send the certified copy until at least 25 days after the entry of judgment Sup Ct R 45

<sup>29</sup> This Order and the accompanying rules shall be effective upon the later of publication in the Federal Register, approval of the revised FCC Forms 486 and 479, or the effective date of the Supreme Court decision We direct the Bureau to release a Public Notice announcing the effective date of this Order, when it is known

libraries a significant amount of time to procure and install the Internet filtering technology required to comply with CIPA. Accordingly, CIPA allows libraries either to certify (1) that they are in compliance with CIPA or (2) that they are “undertaking such actions, including any necessary procurement procedures, to put in place” the required policy measures to comply with CIPA for the next funding year.<sup>30</sup> Given that the Supreme Court decision was issued on June 23, 2003 and will be effective no sooner than July 18, 2003, we believe that it is unrealistic to expect all libraries to be in a position to certify compliance with CIPA for Funding Year 2003, which began July 1, 2003.<sup>31</sup> In order to comply with the statute’s Internet filtering requirement, many libraries must prepare a budget for the purchase of software and related costs, design, procure and/or order software appropriate for their systems, install the software and implement a procedure for unblocking the filter upon request by an adult. This process, as Congress recognized, would almost certainly take some time to complete.<sup>32</sup> Therefore, we conclude that allowing libraries this time period to comply with CIPA filtering requirements is consistent with Congress’s intent in enacting CIPA and with the public interest.

12. During Funding Year 2003, all libraries that receive discounts for Internet access or internal connections must certify that they are either compliant with CIPA or undertaking efforts to be in compliance by the time the libraries commence services for Funding Year 2004. Libraries that are not in compliance with CIPA for Funding Year 2003 and will not be undertaking efforts during Funding Year 2003 to comply with CIPA by Funding Year 2004 may not receive e-rate funds for Internet access or internal connections for Funding Year 2003.<sup>33</sup> Such libraries may receive e-rate funds only for telecommunications services.<sup>34</sup> All libraries that have not filed an FCC Form 486 prior to the effective date of this Order<sup>35</sup> must file the revised

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<sup>30</sup> 47 U.S.C. § 254(h)(6)(E)(ii)(II)(aa) CIPA provides that a library that does not have in place the policy of Internet safety and technology protection measures required by section 254(h) and intends to receive support for Internet access and internal connections shall certify “for the first program year after the effective date of this subsection in which it is applying for funds” that it is “undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary” 47 U.S.C. § 254(h)(6)(E)(ii)(II) (“[F]or the second program year after the effective date of this subsection in which it is applying for funds under this subsection, [the entity] shall certify that it is in compliance with [the relevant provisions]”)

<sup>31</sup> Some libraries may have voluntarily installed filtering software consistent with CIPA requirements prior to July 1, 2003. Such libraries would be able to certify that they are in compliance with CIPA for Funding Year 2003.

<sup>32</sup> See 47 U.S.C. § 254(h)(6)(E)(ii)(II).

<sup>33</sup> We do not, however, require such libraries and library consortium members to return e-rate funds received for Internet access or internal connections during the part of Funding Year 2003 prior to the effective date of this Order. Libraries, including library consortium members that are not in compliance with CIPA for Funding Year 2003 and will not be undertaking efforts during Funding Year 2003 to comply with CIPA by Funding Year 2004 may receive e-rate funds for Internet access or internal connections on a pro rata basis for the portion of Funding Year 2003 during which this Order is not effective, *i.e.*, from July 1, 2003 until the effective date of this Order.

<sup>34</sup> 47 U.S.C. § 254(h)(6)(A)(ii). See *CIPA Order*, 16 FCC Rcd at 8195-6, para. 28.

<sup>35</sup> For purposes of this requirement, an FCC Form shall be deemed “filed” as of the postmark date for mailed forms.

FCC Form 486.<sup>36</sup> All libraries that filed the September 2002 version of the FCC Form 486 prior to the effective date of this Order and will receive discounts for Internet access or internal connections for Funding Year 2003 must also refile using the revised FCC Form 486.<sup>37</sup> The deadline for submitting all revised FCC Form 486s remains the same for all libraries – the later of 120 days after the Service Start Date or 120 days after the date of the Funding Commitment Decision Letter.<sup>38</sup> Libraries that filed the September 2002 version of the FCC Form 486 for Funding Year 2003 prior to the effective date of this Order and that receive e-rate funds only for telecommunications services are not required to file a revised FCC Form 486. The filing of a revised FCC Form 486 for such libraries is unnecessary because they do not need to certify compliance with the CIPA filtering requirements.

13. These filing requirements also apply to library consortium leaders.<sup>39</sup> Billed entities that are library consortium leaders should abide by the above instructions for filing the FCC Form 486. Billed entities that previously filed the September 2002 version of FCC Form 486 on behalf of library consortium members must file the revised FCC Form 486, unless all members of the consortium receive e-rate funds only for telecommunications services.<sup>40</sup> In addition, all library consortium members must file with their billed entity, and all billed entities must collect and hold from each consortium member the revised FCC Form 479.<sup>41</sup> All library consortium members that filed an FCC Form 479 prior to the effective date of this Order must file a revised FCC Form 479 with their billed entity within 45 days after the effective date of this Order. In order for such library consortium members to receive e-rate funds for Internet access and internal connections for Funding Year 2003, they must be in compliance with CIPA or undertaking efforts to be in compliance with CIPA at the time the revised FCC Form 479 is filed. Library consortium members that did not file FCC Form 479 prior to the effective date of this Order should work with their billed entity to determine when to submit the revised FCC Form 479.<sup>42</sup> In addition, billed entities whose consortia include both libraries that are in compliance with CIPA for Funding Year 2003 or undertaking efforts to comply for Funding Year 2004 and libraries that

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<sup>36</sup> Appendix A contains a draft version of the proposed revised FCC Form 486, which will be submitted to the Office of Management and Budget (OMB) upon release of this Order. We will be seeking emergency approval of revised FCC Forms 486 and 479 from OMB. See *infra* note 41.

<sup>37</sup> Entities receiving e-rate funds for Internet access may file their FCC Form 486 upon receipt of their Funding Commitment Decision Letter, which may occur prior to the start of the funding year, so some libraries have already filed the FCC Form 486 for Funding Year 2003. See Form 486 Instructions.

<sup>38</sup> See Form 486 Instructions.

<sup>39</sup> Libraries that are members of a library consortium and would not be required to file FCC Form 486 are not required to file the revised FCC Form 486. Such libraries should refer to filing procedures for the revised FCC Form 479.

<sup>40</sup> See *supra* para 12.

<sup>41</sup> Appendix B contains a draft version of the proposed revised FCC Form 479, which will be submitted to the OMB upon release of this Order. See *supra* note 36.

<sup>42</sup> See Form 479 Instructions.

do not intend to comply with CIPA must file FCC Form 500 to adjust their funding commitments as applicable within 30 days after filing the revised FCC Form 486.<sup>43</sup> This FCC Form 500 filing requirement is necessary only for Funding Year 2003 because of the timing of the Supreme Court decision

14. CIPA also provides for a waiver of the certification requirements in the second year after the effective date of CIPA if state or local procurement rules or regulations or competitive bidding requirements prevent compliance.<sup>44</sup> Accordingly, consistent with this provision of CIPA, a library or billed entity that applies for discounts in Funding Year 2003 may submit a waiver request for Funding Year 2004 if state or local procurement rules or regulations or competitive bidding requirements prevent compliance by the start of Funding Year 2004. The revised FCC Forms 486 and 479 attached to this Order have been revised to reflect this option.

#### IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 1-5 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, and 254, and the Children's Internet Protection Act, Pub. L. 106-554 §§ 1701 *et seq* as codified at 47 U.S.C. § 254(h) and (i), this Order is ADOPTED. The modifications to a collection of information contained within this Order are contingent upon approval by the Office of Management and Budget

16. IT IS FURTHER ORDERED that the suspension of enforcement implemented in the *Interim Order* of sections 54.520(c)(2)(i) and (iii), 54.520(c)(3), 54.520(d), and 54.520(g)(1) of the Commission's rules, 47 C.F.R. § 54.520, as they apply to all libraries and to the extent that they require any library to filter or certify to such filtering under 47 U.S.C. § 254(h)(6), is LIFTED as of the effective date of this Order, consistent with the terms of this Order.

17. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 318-220, 254, 303(r), 403, section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and the Children's Internet Protection Act, Pub. L. 106-554 §§ 1701 *et seq* as codified at 47 U.S.C. § 254(h), the amendments to section 54.520 (f) and (g) of the Commission's rules, 47 C.F.R. § 54.520(f) and (g) are ADOPTED, as set forth in Appendix C attached hereto.

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<sup>43</sup> See *Universal Service for Schools and Libraries, Adjustment to Funding Commitment and Modification to Receipt of Service Confirmation Form*, OMB 3060-0853 (April 2000)(FCC Form 500), *Instructions for Completing the Schools and Libraries Universal Service, Adjustment to Funding Commitment and Modification to Receipt of Service Confirmation Form* (FCC Form 500), OMB 3060-0853 (April 2000) (Form 500 Instructions)

<sup>44</sup> 47 U.S.C. § 254(6)(E)(ii)(III)

18. IT IS FURTHER ORDERED that AUTHORITY IS DELEGATED to the CHIEF OF THE WIRELINE COMPETITION BUREAU pursuant to section 5(c) of the Communications Act of 1934, 47 U.S.C. § 155(c), to modify any forms that are necessary to implement the decisions adopted in this Order.

19. IT IS FURTHER ORDERED that THIS ORDER AND THE ACCOMPANYING RULES ARE EFFECTIVE UPON THE LATER OF PUBLICATION IN THE FEDERAL REGISTER, APPROVAL OF THE REVISED FCC FORMS 486 and 479, or THE EFFECTIVE DATE OF THE SUPREME COURT DECISION. Good cause exists to make this effective immediately upon the later of publication in the Federal Register, OMB approval of the revised FCC Forms 486 and 479, or the effective date of the Supreme Court decision. The actions we take in this Order are intended to bring implementation of the CIPA into compliance with the judgment of the Supreme Court, which is best accomplished by requiring the effective date to occur when all of these events have taken place.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary