

**FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

Schools and Libraries Universal Service Mechanism	:	
	:	
	:	CC Docket No. 02-6
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Petition for Waiver and Relief Filed On Behalf of Pennsylvania and South Dakota Applicants	:	
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**JOINT PETITION OF PENNSYLVANIA DEPARTMENT OF EDUCATION AND
SOUTH DAKOTA DEPARTMENT OF EDUCATION
FOR WAIVER AND RELIEF**

I. Introduction

The Pennsylvania Department of Education and South Dakota Department of Education jointly file this Petition for Waiver and Relief to urge the Federal Communications Commission (“FCC” or “Commission”) to waive the deadline applicable to the filing of appeals of adverse actions taken by the Administrator of the Universal Service Support Mechanism for Schools and Libraries (“E-rate”) so that all applicants similarly situated to the Iroquois West School District 10 may receive relief.

Pennsylvania has 1.814 million public school students in 659 school districts, vocational technical schools and charter schools; 327,000 nonpublic private school students in 2650 nonpublic schools; and 613 public libraries. Beginning in 1997, the Pennsylvania Department of Education has devoted a staff member virtually full-time to assist schools and libraries with the complex rules regarding the E-rate program and to serve as a liaison with the federal officials implementing the program.

South Dakota has approximately 122,000 public school students in 171 school districts. In addition, South Dakota has 49 private schools, 21 Native American/BIA schools and 277 libraries. South Dakota has devoted substantial resources to facilitating E-rate participation by schools and libraries, and recently retained a State E-rate consultant to augment those resources.

The state departments of education play a vital role in assisting the Schools and Libraries Division of the Universal Service Administrative Company (“SLD” or “Administrator”) with the training of applicants and dissemination of important program information. Both Pennsylvania and South Dakota are members of the State E-rate Coordinators Alliance (“SECA”), and communicate regularly among themselves and with the SLD and FCC in order to stay abreast of current program developments. In turn, the state E-rate coordinators disseminate this information to the applicants in their respective states in order to encourage applicant comprehension and compliance with E-rate program rules.

For both States, E-rate funding is a vital element in implementing the States’ education technology goals. Pennsylvania has several educational technology programs, including Hands-On Learning and Accountability Block Grants, the latter of which was administered by the Department of Education to provide grants to K-12 schools for improving the technology resources, professional development and technology services available to students. 24 P.S. §15-1501-A.

More recently, the Pennsylvania General Assembly enacted an amendment to the state’s telecommunications law, which establishes an education technology fund to be administered by the Department of Education. The fund will disburse grants to K-12 schools for communications infrastructure, premises equipment, distance learning technology initiatives and technical support

services. Act 183 of 2004 (establishing *inter alia*, the Broadband Outreach and Aggregation Fund), which was signed into law on November 30, 2004.

South Dakota likewise has undertaken numerous initiatives to promote the availability and use of high-speed Internet connections and technology in K-12 classrooms. The Digital Dakota Network (DDN) is a state-supported digital communication system that delivers high-speed data connectivity to all public schools in South Dakota. In addition, the DDN Video delivers high-quality video conferencing capabilities to high/middle school facilities within South Dakota. South Dakota also has an initiative known as "Connecting the Schools," which is a program that will install network electronics and video conferencing tools in the K-12 public school buildings in South Dakota.

Educational technology is a significant priority within the mission of the departments of education in both Pennsylvania and South Dakota. Each department is responsible for implementing K-12 educational technology policies and advocating on behalf of schools regarding the E-rate program. Because of the role played by state departments of education regarding educational technology, the standing of state departments of education to file comments and to participate in FCC proceedings regarding the E-rate program, both on their own behalf and as representatives of their state's schools and libraries, is well recognized and accepted.

II. The Iroquois Decision

In an order released January 11, 2005¹ concerning an appeal of a funding commitment decision letter ("FCDL") filed by Iroquois West School District 10, the FCC invalidated the SLD's manner of applying the 30% unsubstantiated charges rule set forth in 47 C.F.R. §54.504(d). The rule states that, "If 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety." In promulgating this rule, the FCC described it as a codification of the SLD's policy, as follows:

Currently, the Administrator utilizes a 30 percent processing benchmark when reviewing requests that include both eligible and ineligible services. If less than 30 percent of the request seeks discounts for ineligible services, the Administrator normally will consider the request and issue a funding commitment for the eligible services, denying discounts only for the ineligible part. If 30 percent or more of the request seeks discounts for ineligible services, the Administrator will deny the funding request in its entirety.

Schools and Libraries Universal Service Support Mechanism, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 02-6, FCC 03-101 (released April 30, 2003) at ¶38 (footnote omitted). There is absolutely no mention of equating unsubstantiated eligible services as ineligible services.

Nevertheless, beginning with its processing of Form 471 applications for Funding Year 2003, the SLD changed the long-standing "30% ineligible" policy to a policy whereby they denied any request for which 30% or more of a request could not be substantiated. The SLD's apparent reasoning was that if an amount could not be substantiated, that amount was ineligible and thereby subject to the 30% ineligible rule. This errant interpretation was implemented in cases where an applicant's needs had changed since the Form 471 application was submitted, and the applicant desired to reduce the funding request by 30% or more. In these cases, applicants were denied for being honest and forthcoming with PIA reviewers about their actual needs – needs which understandably may and do evolve between the time that service arrangements are made and when the Funding Commitment Decision Letter ("FCDL") may be issued, particularly when the review of a Form 471 application may take months. Unless applicants were willing to be penalized by the SLD's erroneous application of the 30% rule, applicants were left with no choice but to continue with their applications exactly as submitted, even if it meant they had to justify services or

¹ *In re Request for Review of Iroquois West School District 10*, File No. SLD-343292, CC Docket No. 02-6, FCC 03-313 (released January 11, 2005).

equipment that at the time of preparing their applications, they intended to purchase but no longer wanted to procure since their needs had changed in the interim. Then, after the funding commitment decision letter was issued, the applicants safely used a Form 500 to reduce the funding request without the fear of denial. This process, however, meant that in some instances, the amount of the approved Funding Request (“FRN”) was greater than it needed to be; but, this was the only way that applicants could be assured that funding for the FRN would not be jeopardized as a result of the SLD’s application of the 30% policy.

The SLD’s new application of the 30% policy was never publicly announced in any of its guidance published on its web site. For example, in its document explaining the 30% rule, the SLD made no mention that its calculation of the ineligible amount included unsubstantiated amounts. A copy of the SLD’s January 8, 2003 notice is attached as Appendix “A” to this Joint Petition. In addition, there was no mention, either orally or in writing, of this new interpretation of the 30% policy at the annual Train-the-Trainers’ workshop in September 2002, nor was this policy ever communicated to State E-rate coordinators during semi-monthly conference calls.

Only when applicants began receiving FCDLs in FY 2003 did they become aware that the SLD had instituted a change in policy to construe all funding request amounts that are unsubstantiated as automatically ineligible. This information was uncovered only after state E-rate coordinators asked the SLD for an explanation of the manner in which the SLD was applying the 30% rule. No written announcement or advance notification was provided to applicants concerning this change in application of the rule.

In response to the SLD’s policy change, some, but not all, adversely affected applicants filed appeals with the SLD and/or the FCC citing that the SLD applied the 30% rule incorrectly. Indeed, according to the SLD’s own data, for appeals of FY 2003 FCDLs received through August 27, 2004, approximately 15% of those appeals were on the basis of the 30% rule.²

The Iroquois West School District 10 filed its appeal of a FRN denial on the basis of the 30% policy directly with the FCC. In response to this appeal, the FCC overturned and invalidated the SLD’s policy, as follows:

We find that SLD’s actions go beyond the appropriate application of the 30 percent benchmark. We understand SLD’s rationale for applying the 30 percent policy to unsubstantiated amounts for eligible services – to create incentives for applicants to request only those amounts that they can justify as reasonable estimates of the costs of eligible services. The 30 percent policy, however, applies to requests for ineligible services, not for unsubstantiated amounts of eligible services. Such an application goes beyond the scope of the 30 percent policy as drafted. Applicants must be aware, however, that if funding requests are submitted in amounts that go beyond what they can substantiate, their funding requests will be reduced to the amount that is substantiated.

In re Request for Review of Iroquois West School District 10, File No. SLD-343292, CC Docket No. 02-6 at ¶15 (footnote omitted).

The FCC’s Order made clear that the SLD’s policy of including unsubstantiated charges as part of its definition of ineligible amounts for purposes of applying the 30% rule was not correct, and should never have been implemented. Clearly, the SLD’s new 30% unsubstantiated policy and review procedure exceeded the scope of the Administrator’s responsibility to implement and enforce the FCC’s rules. The Joint Petitioners wholly agree with the FCC’s decision and are grateful that the FCC has taken this step to rescind the SLD’s application of the 30% rule.

² SLD “Train The Trainer” Appeals Powerpoint Presentation (September 2004), Slide #16, accessible at <http://www.sl.universalservice.org/data/ppt/2004/13%20appeals.ppt>.

II. The Iroquois Decision Should Be Applied to Adversely Affected Applicants in Pennsylvania and South Dakota, As Well As to All Other Adversely Affected Applicants.

The FCC's decision makes clear that the Iroquois West School District 10 will receive the benefit of the FCC's decision, and so will those applicants that have appeals pending at the SLD and/or FCC on the same basis. But in the absence of the FCC's intervention, all of the other applicants whose funding requests were denied because of the SLD's invalid 30% policy will not receive any relief. This Joint Petition seeks to correct this injustice, and requests the FCC to waive its rule requiring that an appeal be filed within 60 days of the date of the FCDL³ and grant relief to all applicants who were adversely affected by the SLD's invalid application of the 30% rule. Attached as Appendix "B" is a list of the affected Pennsylvania applicants, with the corresponding affected FRNs. This list shows that there are 80 FRNs from 2003 and 24 FRNs from 2004 that were adversely affected.

Attached as Appendix "C" is comparable information for South Dakota applicants that shows there are 14 FRNs of 11 South Dakota applicants that were adversely affected and were denied E-rate discounts incorrectly as a result of the SLD's invalid 30% policy during FY 2003. In FY 2004 to date, there were three FRNs that have been adversely affected.

Joint Petitioners maintain that the SLD's invalid 30% policy constitutes an egregious error in processing applications that the SLD should be required to correct, regardless of whether an appeal was filed by an applicant. The Iroquois decision makes clear that the SLD was wrong to have included unsubstantiated amounts as part of the calculation of the amounts for ineligible services/project subject to the 30% rule. Rather, the SLD should have reduced the FRN by the unsubstantiated amount, and then applied the 30% rule to the amounts of ineligible services. This is a materially different situation from the SLD's commission of a mistake in interpreting a Form 471 application, or a mistake in applying its PIA procedures to a particular Form 471 application. This situation is one where SLD made a policy change without notifying applicants, and it applied an incorrect policy that exceeded the plain meaning of the FCC's rule regarding the review of applications.

Indeed, given the scant information and explanation provided to applicants whose FRNs were denied on the basis of the SLD's invalid 30% policy, many applicants may not have understood or distinguished between a 30% ineligible service denial and a 30% unsubstantiated denial. This is particularly true given that the SLD's web site had not provided any notice to applicants of its policy of equating an unsubstantiated amount to an ineligible service request.

Further, the typical explanation provided to an applicant when an FRN was denied because of the inclusion of 30% or more of unsubstantiated charges stated:

30% or more of this FRN includes a request for unsubstantiated charges which are ineligible ***per program rules***. (emphasis added).

Based on this explanation of the FRN denial, applicants had no way of knowing or even suspecting that this explanation was wholly inaccurate, and that the inclusion of 30% or more of unsubstantiated charges is *not* a violation of E-rate program rules. This language is definitive and clearly could be understood by many applicants as a hopeless case with no chance of winning on appeal.

Further, failure to grant this Petition for Relief may have the untoward consequence of forcing all applicants to appeal every single denial, regardless of whether there is a basis to do so, in order to avoid the possibility of future SLD misinterpretations of an FCC rule. We understand that both the SLD and

³ 47 C.F.R. §54.720(a).

FCC are already backlogged with appeals and that any such increase in appeals will only further hamper an already overburdened appeal-review system.

For these reasons, we respectfully request that the Iroquois Decision be applied to the adversely affected applicants listed in this Petition, as well as all adversely affected applicants in all states and territories, regardless of whether a timely appeal was filed. Only then will the wrongful actions of the Administrator truly be made right.

III. The Public Interest Weighs In Favor of Waiving the Commission's Rule for Filing Appeals.

In order to grant the relief requested by the Joint Petitioners, the Commission must waive its rule governing the time frame applicable to the filing of appeals from a decision of the Universal Service Administrator. The general rule is that an appeal must be filed within 60 days of the date of the Funding Commitment Decisions Letter. 47 C.F.R. §54.720. In the current situation, however, not all of the applicants timely filed an appeal in compliance with Section 54.720. As explained above, by virtue of the descriptive explanation provided by the SLD accompanying the FRN denials, applicants were not aware that the SLD's policy was not consistent with program rules, and therefore, did not know there was a legitimate basis upon which to file an appeal.

In the Ysleta decision, the FCC explained that, in the context of the E-rate program rules, "a rule may be waived where the particular facts make strict compliance inconsistent with the public interest."⁴ In addition, the Commission may take into account considerations of hardship, equity, or effective implementation of overall policy on an individual basis.⁵ The Commission further explained:

In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁶

⁴*Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (DC Cir. 1990).

⁵*WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (DC Cir. 1969).

⁶*Northeast Cellular*, 897 F.2d at 1166.

Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, *et al.*, SLD No. 321479, CC Docket No. 96-45 *et seq.*, Order (released December 8, 2003) at ¶67 (footnotes in original). In that case, the Commission decided to waive its rules to permit applicants to re-bid services in a manner consistent with program rules:

The Commission has previously granted a waiver of its rules where one factor that it took into account was confusion caused by the application of a new rule. We anticipate that we will rarely find good cause to grant a waiver of our rules based on confusion among applicants in applying them. We think that it is appropriate to consider this factor with regard to the instant appeals, however, as they involve the application of our rules to a unique situation, namely the two-step System Integration approach and related practices. The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules. Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants. Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.

Id. at ¶ 73 (footnotes omitted). Like the Ysleta case, the unique situation presented by the Commission's Iroquois decision requires exercise of discretion and waiver of the appeal deadline rule. Only by granting

this waiver will the FCC prevent an undue hardship on the applicants – namely the failure to correct the SLD’s wrong denial of E-rate discounts because of the SLD’s erroneous application of the 30% rule. In the current situation, the applicants who were harmed did nothing wrong yet they were denied discounts. In the Ysleta case, although applicants were found to have violated program rules, they were given the opportunity to resubmit their applications because of the concern that the program rules at issue may not have been sufficiently clarified in advance. Surely if the Commission found extenuating circumstances to be present in the Ysleta case that warranted rule waivers, the Commission will find that the current case also compels that the rules be waived in this case so as to permit the SLD to review these applications and to correct any wrongly issued FRN denials. Moreover, as stated above, the current situation is definitely unique in that it is the first time in which the FCC has found that the SLD did not correctly implement an E-rate program rule. These factors, taken together, weigh in favor of waiving the appeal deadline in order to allow all adversely affected applicants to benefit from the Iroquois decision.

IV. Conclusion

In the view of the foregoing, the South Dakota and Pennsylvania Departments of Education respectfully request the FCC to waive 47 C.F.R. §54.720 and to direct the SLD to review each of the FRNs which were denied on the basis of unsubstantiated charges to determine whether the FRNs should be approved, and to issue revised Funding Commitment Decisions Letters to each affected applicant. Alternatively, the FCC should permit all applicants whose FRNs were denied on the basis of the 30% unsubstantiated policy to submit an appeal within 60 days of the FCC’s Order issued in this proceeding.

Respectfully submitted,

SOUTH DAKOTA DEPARTMENT OF
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