



April 28, 2006

Federal Communications Commission  
Office of the Secretary  
445 - 12th Street, SW  
Washington, DC 20554

Re: Request for Review of Decision of Universal Service Administrator,  
CC Docket No. 02-6  
Applicant Name: North Penn School District  
Billed Entity Number: 126228  
Form 471 Application No.: 468663  
Funding Request Numbers: 1291084, 1306188  
Original FCDL Letter Date: January 10, 2006  
SLD Appeal Decision Date: February 28, 2006

**Request for Review of Decision of Universal Service Administrator and Appeal of  
North Penn School District**

**I. INTRODUCTION**

On January 10, 2006, North Penn School District ("North Penn" or "District") received a funding commitment decisions letter ("FCDL") from the Schools and Libraries Division ("SLD") of Universal Service Administrative Company ("USAC") for Form 471 # 468663 in which two requests for funding, Funding Request Numbers ("FRN") 1291084 and 1306188 were denied in full. The sole explanation for the denial of funding of each FRN was as follows:

This funding request is denied as a result of program rule violations. Applicant was not able to provide required Internet Access Statement. Modified Internet Access statement is unacceptable.<sup>1</sup>

Pursuant to appeal submitted on January 28, 2006 to the SLD, the SLD wrongly denied the District's appeal by letter dated February 28, 2006.<sup>2</sup> **Importantly, however, the SLD completely failed to consider any of the underlying merits of the appeal. Instead, the SLD simply repeated that the FRN denials were appropriate based on the original reason – that the applicant had modified a certification that the applicant had been requested to make during PIA review. As the District's appeal to the SLD stated, however, this reason was NOT a valid basis for denying funding because the Applicant also had provided a cost allocation to deduct any costs associated with remote access to the Internet, and the funding requests should be approved. The SLD has now twice refused to consider the cost allocation performed by the Applicant – during the initial review and during the review of the Applicant's appeal to the SLD.**

## **II. Description of the FRNs at Issue on this Appeal**

Each FRN which was denied by the SLD provides Internet Access Service to North Penn in order to connect each of the District's 18 schools and two non-instructional facility buildings (NIFs) to the Internet. One FRN, 1306188, is for leased fiber transmission service which is offered by a telecommunications carrier, DES Communications. The other FRN, 1291084, is for the connectivity portal to the Internet and World Wide Web, which is provided by Comcast Business Communications. The original annual prediscount cost of the DES Communications FRN is \$241,548.00

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<sup>1</sup> The FCDL is attached as Exhibit A.

<sup>2</sup> The District's appeal submitted to the SLD is attached as Exhibit B. The SLD's appeal decision letter is attached as Exhibit C.

and the amount of E-rate funding requested, applying a 41% discount for shared services, was, \$99,034.58. The original annual prediscount price for the Comcast Business Communications FRN was \$44,400, and the amount of E-rate funding requested, applying a 41% discount for shared services, was \$18,204.00. As will be explained below, these amounts were subsequently reduced during PIA by a modest amount, but the SLD incorrectly refused to consider these reductions and instead prematurely ended its review of the FRNs when SLD erroneously concluded that because the Applicant modified the language of a certification required to be submitted in connection with remote access to the Internet, the FRNs should be rejected.

### **III. USAC Mistakenly Ignored And Should Have Accepted the Applicant's Cost Allocation to Remove Costs Associated with Remote Internet Access from the Funding Requests.**

During the Program Integrity Analysis (PIA) review of these FRNs, the Applicant received the following information request for these two FRNs:

- **For FRN(s) 1291084 and 1306188** for Internet Access services, please provide a statement that the services will only be delivered to eligible users at eligible locations. The rules of this support mechanism do not allow for services or products to be provided to residential homes or other non-school/library facilities (i.e., students and teachers may not dial in from home to access the Internet; there can be no community access, etc). "Remote access" where users from any location use their own Internet account to access school or library information, is eligible for funding. If this funding request for Internet Access is strictly limited to services used only at eligible locations by eligible users, then please confirm in writing the following:

"The Internet Access service for which I seek discounts will be strictly limited to providing services only at eligible locations and used only by eligible users. Access to the Internet will not be provided to homes or other non-school or non-library sites."

(Signed) \_\_\_\_\_  
(Name) \_\_\_\_\_  
(Title) \_\_\_\_\_  
(Date) \_\_\_\_\_

The above statement must be signed and dated. **If you are unable to make such a statement, because the statement is not correct, please indicate such.** (Emphasis added).

In response to this request, the Applicant responded in **two interrelated manners**. First, after fully investigating the network configuration for which E-rate discounts were being requested, the Applicant determined that the network configuration includes District-owned equipment which was paid for 100% by District funds and for which no E-rate funding had ever been requested or received, that enables some users to dial into the District's network and use the District's connection to the Internet. The District determined, therefore, that a cost allocation was required in order to reduce the funding requests by an amount commensurate with the use of the network for remote Internet Access. These cost allocations were implemented as part of the preparation of the District's Item 21 attachments for these two FRNs.

In conjunction with the cost allocation, the District concluded that even with implementing a cost allocation, the precise language of the remote Internet access certification was not accurate. Accordingly, the Applicant modified the language of the Internet Access Certification to include the following highlighted and italicized language – which clearly was inserted in conjunction with the cost allocation to remove Remote Internet Access costs -- in order to be able to truthfully make this Certification, as follows:

The Internet Access service for which I seek discounts *has been cost allocated so that the amounts requested for discounts* will

be strictly limited to providing services only at eligible locations and used only by eligible users. This funding request will not support access to the Internet from homes or other non-school or non-library sites. (Emphasis added).

The District also explained in its October 11, 2005 Response to the PIA questions that:

The District cannot sign the remote access certification as it is worded because the District has a small number of users (approximately 5) who occasionally dial into the District's WAN from remote locations. Therefore, the District has chosen to reduce a small portion of their funding requests for the two FRNs relating to the District's Internet Access (FRNs 1291084 and 1306188), as a cost allocation for this remote access usage. The cost allocation is based on the total number of Internet users in the District (employees and students) versus the number of remote access users. The calculations are as follows based on data reported on the District's NCLB Report Card.

Internet Users:	Employees	2,000
	Students	13,098
	Total Users	15,098
	Remote Internet Users	5
% remote users =	0.00033 (5 /15,098)	

The Item 21 attachments reflect a reduction in funding of:

0.00033 of one of the 17 DES fiber WAN connections that is used to transport the call from the school dialed into to the high school;

0.000333 of the Comcast Internet costs.

The specific calculations are reflected on the Item 21 attachments. In addition, we **revised the certification to reflect the fact that the District has performed a cost allocation**, and the executed certification is being faxed to your attention. <sup>3</sup> (Emphasis added).

PIA did not initiate *any follow up questions* in response to the Applicant's October 11, 2005 information response to the PIA questions. In the explanation of the reasons for denial of the two FRNs that are the subject of this appeal, *no mention was*

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<sup>3</sup> The Item 21 attachments for these two FRNs are attached as Exhibit D. The Response to PIA questions concerning Remote Internet Access are attached as Exhibit E.

*made of the cost allocation performed by the District.* Based on the explanation for the funding denial, and SLD's subsequent letter denying the appeal, it is evident that SLD rejected the funding denials and the appeal based on the modifications to the remote Internet Access Certification and did not even consider the District's cost allocation.

**The SLD erred in evaluating these FRNs because it failed to recognize and accept that a cost allocation to deduct the costs associated with remote Internet Access is a permissible approach for complying with the program requirement that discounts may only be used to provide services to *eligible* locations. The effect of the SLD's denial is to determine, incorrectly, that use of Internet access service from a remote, non-school location taints and invalidates the entire service and funding requests – even though the vast majority of the services (upwards of 99%) are provided to eligible entities and eligible locations. This result is erroneous, and the SLD should have reviewed and accepted the District's cost allocation calculations which reduced the funding requests to remove a proportionate amount of the costs associated with Remote Internet Access and should have rescinded the requirement to sign any form of the Remote Internet Access certification.**

According to the FCC's Third Report and Order in CC Docket No. 02-6, whenever a funding request contains "mixed" eligible and ineligible components, a cost allocation is required in order to enable applicants to obtain E-rate funding for the eligible components of services and products:

Under these rules, if a product or service contains ineligible components, costs should be allocated to the extent that a clear delineation can be made between the eligible and ineligible

components. The clear delineation must have a tangible basis and the price for the eligible portion must be the most cost-effective means of receiving the eligible service.

...

These cost allocation rules address the widespread availability of products and services with mixed eligibility and are fully consistent with the overriding requirement that support be provided for eligible services, while preventing support for ineligible services. By providing service providers and applicants a means of allocating costs between eligible and ineligible components, features or functions of what would otherwise be an eligible service, the cost allocation method increases the variety of service options available to schools and libraries, improving each school or library's ability to purchase the most useful and cost-effective service possible. Without this cost allocation approach, applicants may fail to pursue the purchase of certain advanced telecommunications and information services, contrary to the intent of section 254. Our E-rate rules should not drive the development of communications services and technologies, but rather should permit the marketplace to flourish and innovate in ways that meet consumer needs and facilitate access to these innovations. Schools and libraries should continue to allocate eligible and ineligible costs in their contracts with service providers. In the interests of ensuring that support be provided only for eligible services, the Administrator also should continue to employ the use of the cost allocation method when necessary.<sup>4</sup>

The SLD's web site guidance regarding cost allocations which governed the FY 2005 period, which was the basis for the FCC adoption of the cost allocation rule, explicitly addresses the issue of cost allocations in the context of services or equipment that serves both eligible and ineligible locations:

#### G. Eligible Locations

Q1. If a PBX is to be used for 25 classrooms and 30 extensions, and one extension is used for an ineligible pre-kindergarten classroom rather than K-12, is the entire PBX eligible for discount?

**Products or services provided to both eligible and ineligible locations must be cost-allocated** in the same way that is

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<sup>4</sup> Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, FCC 03-323 (Order Released December 23, 2003) at ¶¶ 37, 38 (footnotes omitted). See also 47 C.F.R. §54.504(g).

described in Cost Allocation Guidelines for Consortia Comprising Eligible and Ineligible Entities posted in the Reference Area of this web site. For the example given, one of the classrooms is not eligible because it is used for prekindergarten rather than K-12. The cost of the PBX must be reduced by 1/30 in order to subtract the ineligible location.<sup>5</sup> (Emphasis added).

The District used a cost allocation methodology to remove the costs associated with Remote Internet Access based on the number of users who use the District's Internet connection from eligible locations and the number of users who use the District's Internet connection from ineligible locations to develop a percentage to attribute to remote Internet access. The explanation of this methodology was clearly articulated, as re-printed above. The methodology resulted in a modest reduction of costs for each FRN, the percentage of which fell well below the 30% ineligibility rule. 47 C.F.R. §54.501(c)(1).<sup>6</sup>

#### **IV. The SLD Does Not Have Authority To Require The Use of A Mandatory "Remote Internet Access Certification" In Light of the FCC's Explicit Rejection Of This Practice and In Light Of The Fact That The Remote Internet Access Certification is a Mandatory Information Collection Which Has Not Been Reviewed or Approved By The Office Of Management And Budget Pursuant To The Paperwork Reduction Act.**

There is no FCC regulation that mandates the collection and completion of the Remote Internet Access certification that the SLD required the Applicant to complete.

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<sup>5</sup> A copy of this advice, published in the form of a Frequently Asked Question, from SLD's web site, is attached as Exhibit F.

<sup>6</sup> The FCC has made clear that in the Third Report and Order that the cost allocation rule shall be viewed in conjunction with the 30% rule. Third Report and Order at ¶138. In point of fact, the amount of Internet access service that the District leased from both vendors on these two FRNs was the same cost, with or without the use of Remote Internet Access. The amount of Remote Internet Access is clearly incidental in light of the number of users that use Remote Internet Access and the vast majority of the users who use the Internet connection when located in the premises of an eligible school building.

The genesis of USAC's requirement of the Remote Internet Access certification arises from one of the certifications that applicants are required to make on FCC Form 471. Specifically, Item 24 a of Block 6 of Form 471 requires each applicant to certify that each of the entities listed on Block 4 of the form 471 meet the statutory definition of school under the No Child Left Behind Act, do not operate a for-profit business and do not have an endowment exceeding \$50 million. In addition, Item 29 requires the applicant that the services will be used for educational purposes. The SLD has taken the position that an eligible entity's connection to the Internet can only be accessed from an eligible school facility. If someone accesses the Internet connection of a District when not on District premises, this "remote access" is prohibited under E-rate rules. See, e.g., SLD's Announcement "New Clarification on Eligibility of Remote Access Routers" published on May 25, 2005 (attached as Exhibit G).

Apparently, the SLD instituted a new requirement with FY 2005 that any applicant applying for any Internet access service must execute a "Remote Internet Access Certification" which is similar to but not identical to the Remote Access Equipment Certification that was required during FY 2005. See Item 21 Attachments for Form 471, Section 3, Certifications and Additional Information to Include in Item 21 Attachments (February 3, 2005)(attached as Exhibit H).<sup>7</sup>

The mandatory Remote Internet Access Certification, however, was not published in a FCC Order or rule, and most certainly were not preceded with any kind of notice and comment period that accompanies FCC rulemaking proceedings as

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<sup>7</sup> In fact, as the SLD's own advice states, with respect to the mandatory Remote Access Equipment Certification, a cost allocation should be performed to when a service or equipment included both eligible and ineligible uses.

required by the Administrative Procedures Act.<sup>8</sup> Nor were these requirements set forth on a form or information collection document which was approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act.<sup>9</sup>

Indeed, the SLD attempted to obtain the FCC's approval to implement the certification requirements as mandatory components of Item 21 attachments in connection with the adoption of the Eligible Services List for FY 2005. The FY 2005 Proposed Eligible Services List that the FCC published on August 25, 2005 and on which comments were solicited, included the following entry:

Some Internal Connections products are eligible or not eligible, depending on how they are used (e.g. file servers, routers, network switches, wireless components, and remote access components). Funding requests for such components in some cases can include statements that ineligible capability will not be used, or can include cost allocation between eligible and ineligible features, or can provide information that allows eligibility to be determined. Further information is provided in the document "Item 21 Attachments for Form 471." See especially the Appendix to that document.

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<sup>8</sup> Legislative rules which are enacted by administrative agencies, such as the letter of agency requirement, must be preceded with the notice and comment period as required by the rulemaking procedures of the Administrative Procedures Act. *See, e.g.,* United States Telecom. Ass'n. v. FCC, In the United States Court of Appeals for the D.C. Circuit, No. 03-1414 (Slip Opinion issued March 11, 2005). Since the letter of agency requirement is not set forth in any FCC regulation, and the requirement applies across the board to all consortium applications for E-rate support, the FCC should have provided notice and opportunity for comment before adopting any formal letter of agency requirements (or allowing USAC to establish any such requirements).

<sup>9</sup>The broad definition of "information" collection under the Paperwork Reduction Act encompasses the letter of agency documentation that USAC requires E-rate consortia applicants to submit. As the Office of Information and Regulatory Affairs of the Office of Management and Budget explains in its "Q&A's" document:

24. What kinds of information does OIRA review under the Paperwork Reduction Act?

Answer: The definition of "information" in the PRA is very broad. Thus, OIRA reviews forms (e.g., the IRS 1040), surveys (e.g., the Census), reporting and recordkeeping requirements (e.g., requirements on business to report workplace safety information to OSHA or air quality monitoring data to EPA) and third party disclosures (e.g., the nutrition labeling requirements of food). *See* [http://www.whitehouse.gov/omb/inforeg/qa\\_062205.pdf](http://www.whitehouse.gov/omb/inforeg/qa_062205.pdf).

In the final Eligible Services List adopted and issued on November 22, 2005, the FCC noted as one of the changes to the final eligible services list:

- We decline to adopt USAC's proposed entry and corresponding modifications asking for additional certifications beyond the certifications already required in Block 6 of Form 471.

FCC Public Notice 05-197, Release of Funding Year 2006 Eligible Services List for Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6 (November 22, 2005) (a copy is attached as Exhibit I).

Remarkably, however, the SLD ignored this FCC directive, and continued to insist on a mandatory certification and the precise language of the Remote Internet Access Certification, even though the certification was not posted on its web site; no prior notice of the mandatory certification was provided to applicants; the SLD completely bypassed and ignored the requirements of the Administrative Procedures Act and the Paperwork Reduction Act in establishing the Remote Access Certification, and ignored the FCC's specific direction to prohibit SLD from "asking for additional certifications beyond the certifications already required in Block 6 of Form 471."

For all of these reasons, the SLD was completely without authority to insist that the Applicant complete the specific Remote Internet Access Certification, and to insist that the Certification contain only the SLD's wording. The SLD should be reversed.

**V. USAC Was Obligated to Communicate Further with the Applicant Regarding the Modified Remote Internet Access Certification and the Cost Allocation Before Making a Decision on The Two FRNs at Issue.**

The SLD's instructions accompanying the Remote Internet Access Certification request were ambiguous and did not unequivocally state that the Applicant *must* sign the Certification *exactly as prescribed* by the SLD. To the contrary, the Applicant did not read any instruction or direction to suggest that modifications to the certification were prohibited and in fact, a plain reading of the SLD's instructions associated with the Certification indicated that Applicant could modify the language of the certification. This impression was based on the language that accompanied the Certification, as follows:

The above statement must be signed and dated. If you are unable to make **such a statement**, because the statement is not correct, please indicate such. (Emphasis added).

The words "such a statement" used in this context definitely leaves open the possibility that the precise language of the Certification was not a prerequisite, but rather, a statement that conveyed the gist of the language of the Certification was acceptable. "Such a statement" is certainly less precise and conveys a different meaning than the phrase, "this specific statement," which apparently is what SLD meant to state. Indeed, the modification that the Applicant made to the Certification was designed to reflect the fact that a cost allocation had been made to deduct the costs associated with Remote Internet Access.

There was no indication either prior or subsequent to the Applicant's submission of the modified certification that a modification to the certification was

impermissible and would constitute grounds for denial of the FRNs. There also was no further communication with the Applicant concerning the cost allocation methodology that the Applicant used to compute the reductions to the FRNs associated with Remote Internet Access. If the cost allocation methodology was not viewed as acceptable, the SLD was obliged to follow up with the Applicant to request further information to insure that the Applicant's calculations met SLD's criteria, so that the SLD could then determine whether the Applicant complied with the 30% ineligibility rule. See, e.g., Fayette County School District Appeal, Request for Review of the Decision of the Universal Service Administrator, File No. SLD-338605, CC Docket No. 02-6, DA 05-2176 (Order Released July 28, 2005). In the Fayette County Appeal Decision, the FCC stated that the SLD is obliged to communicate clearly its information requests to applicants and to follow up with applicants and request further clarification to insure that the SLD has sufficient information in order to evaluate the eligibility of a funding request.

In this case, the SLD's instructions for the Remote Internet Access certification were ambiguous because of the phrase "such a statement" when the SLD apparently intended to say "this specific statement." When the District submitted a modified certification, the SLD should have further communicated to the Applicant that such a certification was unacceptable, and that the Applicant either had to certify to the precise wording of the certification issued by the SLD or provide an explanation why they were unable to sign the SLD version of the certification. Had this communication occurred, the Applicant would have withdrawn the modified Certification and clearly explained that the cost allocation calculation was offered in place of signing the certification. Alternatively, the Applicant would have signed the exactly worded Certification required by SLD and when construed with the cost allocation, the

Certification would have been true since the cost allocation assured that the funding requests did not include any costs associated with Remote Internet Access.

Further, the SLD's mistake was compounded when the administrator refused to review the merits of the Applicant's appeal. It is evident that the SLD refused to even consider the cost allocation methodology that the Applicant used to deduct any costs associated with remote use of the District's Internet connection, given that its basis of deciding the appeal once again focused only on the fact that the Applicant had modified the Remote Internet Access Certification. Had the SLD taken the time to properly review the entire appeal document that the Applicant had submitted, the SLD surely would have seen that the merits of the points that the Applicant has raised regarding the cost allocation that the Applicant performed. As the FCC stated recently in granting an appeal filed by the Pasadena Unified School District:

As an initial matter, we note that reasonable inquiry by USAC and better communication between USAC and the applicant could have resolved the issues that we now face in these Requests for Review. While we have previously noted that the burden of timely and accurately filing rests with the applicant, we are compelled to remind USAC that it retains an obligation to conduct a reasonable inquiry into the filings and materials that USAC itself has in its possession.<sup>10</sup>

The same holds true with respect to the current appeal. Had SLD conducted a reasonable inquiry of the entire file concerning the denial of these two FRNs, the SLD would have discovered that notwithstanding the modified Remote Internet Access Certification, the Applicant submitted a cost allocation to eliminate any costs associated with ineligible uses. Accordingly, the SLD should have ignored the Remote

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<sup>10</sup> Pasadena Unified School District Request for Review of the Decision of the Universal Service Administrator, File No. SLD-399355 et seq., CC Docket No. 02-6 (Order Released February 28, 2006) at ¶19.

Internet Access Certification and focused on the cost allocation performed by Applicant, and if it had questions about the cost allocation methodology, the SLD should have followed up with the Applicant.

**VI. The White Sulphur Springs Appeal Decision Has No Relevance to The Current Appeal Because No E-rate Funding Was Requested or Received to Pay for the Modem Equipment Located on the Applicant's Premises Which is Used To Enable Remote Internet Access.**

The District wants to be absolutely certain that the SLD is aware that E-rate funding has never been requested or received to fund the purchase of the modems that the District has in place which enable remote Internet Access capability. This situation, therefore, is different from and distinguishable from the White Sulphur Springs Appeal decision.<sup>11</sup> In that case, the applicant appealed the denial of internal connections funding for a server which contained remote access capability, after confirming that the applicant had no intention of using such functionality. In response the SLD published web site guidance which eventually was incorporated into the Eligible Services List, which explained that servers with remote access capability were eligible for funding provided that the applicant signed a certification that stated that the applicant would not use the remote access capability of the server.

Since it is possible that the SLD incorrectly assumed that the funding requests contained costs for equipment (such as leased on premises equipment) and/or services for Remote Internet Access, the District wanted to bring these clarifications to the SLD's attention, in order to insure that the accurate facts are clearly set forth to the

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<sup>11</sup> White Sulphur Springs School District Request for Review of the Decision of the Universal Service Administrator, File No. SLD-82064, CC Docket No. 96-45, DA 99-2537 (Order Released November 16, 1999).

SLD. PIA did not request any clarification or pose any information requests to the Applicant during review of these FRNs that touched on this point.

## **VII. Conclusion**

For all of these reasons, the North Penn School District respectfully requests the Federal Communications Commission to reverse the SLD's funding denials for FRNs 1291084 and 1306188, and to approve funding in full for these FRNs consistent with the District's Item 21 attachments.

Respectfully submitted,

/t/ Edward V. Sherretta  
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