

Orangeburg County School District 3
1654 Camden Road
Holly Hill, South Carolina 29059

March 16, 2007

Letter of Appeal
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

CC Docket No 02-6
CC Docket No 96-45

Request for Review of Universal Service Administrative Company (USAC) Administrator's Decision on Appeal letters, dated:

February 27, 2007, re Form 471 Application Numbers 526915, 536972, and 537791
March 1, 2007, re Form 471 Application Numbers 537266, 537336, and 537502
March 13, 2007, re Form 471 Application Number 536569

Authorized person who can best discuss this Appeal with you

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Phone: (888) 249-1661 ext 323
Fax: (866) 534-1584
Email: rlarson@erateconsulting.com
(preferred mode of contact)

Application Information

<u>Entity</u>	Orangeburg County School District 3
<u>Billed Entity Number</u>	127124
<u>Funding Year</u>	FY9 (2006-2007)

<u>Form 471 Application Numbers</u>	<u>Funding Request Numbers</u>	<u>Original Funding Commitment</u>	<u>Form 471 Application Numbers</u>	<u>Funding Request Numbers</u>	<u>Original Funding Commitment</u>
526915	1482143	\$ 50,306.18	537502	1488212	\$434,870.10
	1482259	\$ 14,271.55		1488234	\$544,094.10
				1488261	\$ 25,987.50
536569	1484842	\$ 13,031.50	537791	1488284	\$ 46,519.20
	1485192	\$ 4,091.89		1488302	\$ 20,820.60
536972	1486215	\$ 279,039.60		1488458	\$ 29,278.80
	1486491	\$ 7,751.27		1488483	\$ 7,200.00
537266	1487237	\$ 189,827.15		1488504	\$ 10,800.00
				1489050	\$328,454.30
537336	1487487	\$ 72,100.80			
<u>Total Funding Commitment Request</u>					\$2,083,710.73

Documents To Be Reviewed

Administrator's Decision on Appeal Letters dated:

- February 27, 2007, re Form 471 Application Number 526915, 536972, and 537791¹
- March 1, 2007, re Form 471 Application Numbers 537266, 537336, and 537502²
- March 13, 2007, re Form 471 Application Number 536569³

Decision To Be Reviewed

Denied (for all FRNs listed above)

Request for Review

The Orangeburg (SC) County School District 3 (Orangeburg CSD3) respectfully requests that the FCC accept this letter of appeal and enter an order reversing the decision of the Schools and Libraries Division (SLD) to deny the February 12, 2007 appeal by Orangeburg CSD3 regarding each and all of the 18 FRN's listed above, and to enter an order instructing SLD to approve funding for each and all of these FRNs. In its Administrator's Decision on Appeal Letters (ADLs) of February 27, 2007, March 1, 2007, and March 13, 2007, it is apparent that SLD failed to consider, or improperly evaluated, the arguments and evidence in Orangeburg CSD3's February 12, 2007 appeal.⁴ Alternatively, Orangeburg CSD3 seeks a waiver of certain procedural steps which it believes to be inapplicable to the facts of this matter, but which form the basis of SLD's denial of funding, and to enter the order requested herein.

Summary of Ruling Below

USAC's explanation of its decision, in particular the references in the second bullet (page 2) of its ADL's, considered the duties and responsibilities of the contractor in question, Jeff Linville, and focused on:

1. How Orangeburg CSD3 responded to each of these referenced rules.
2. Whether each of these references, when read by an Orangeburg CSD3 official responsible for the e-rate application process, would lead that individual to conclude that Orangeburg CSD3 should:
 - a. Sign a contract with Mr. Linville, and/or
 - b. Provide a Letter of Agency to Mr. Linville
 in order to comply with the requirements of the e-rate program.

¹ Letters from Universal Service Administrative Company, Schools and Libraries Division, to Richard Larson, eRate Consulting Services LLC, dated February 27, 2007 (Administrator's Decision on Appeal – Funding Year 2006-07).

² Letters from Universal Service Administrative Company, Schools and Libraries Division, to Richard Larson, eRate Consulting Services LLC, dated March 1, 2007 (Administrator's Decision on Appeal – Funding Year 2006-07).

³ Letters from Universal Service Administrative Company, Schools and Libraries Division, to Richard Larson, eRate Consulting Services LLC, dated March 13, 2007 (Administrator's Decision on Appeal – Funding Year 2006-07).

⁴ Letter of Appeal from Orangeburg County School District 3 to Schools and Libraries Division – Correspondence Unit, dated February 12, 2007, re: "Appeal of Funding Commitment Decision Letter Issued on December 12, 2006".

The USAC's references, and Orangeburg CSD3's responses thereto, are as follows:

- *FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications.*⁵ Orangeburg CSD3 Forms 470 and 471 were signed by David Longshore, Jr., Superintendent of Orangeburg CSD3, who meets the requirements of this rule.
- *The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6.*³ David Longshore, Jr., Superintendent of Orangeburg CSD3, certified the Forms 470 and 471 for Orangeburg CSD3 and is authorized to submit and certify to the accuracy of the applications.
- *Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the reference area at our website, www.usac.org/sl.*⁶ This rule compels Orangeburg CSD3 to provide a Letter of Agency (LOA) to anyone who is "authorized to represent" Orangeburg CSD3. Since the contractor in question, Mr. Linville, had no authorization to represent Orangeburg CSD3 in any matter,⁷ Orangeburg CSD3 could not provide him with such an LOA.
- *Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).*⁸ The only mention of consultants and written agreements with E-rate consultants in paragraph 48 of the Fifth Report and Order is in the "Pre-bidding Process" section of the illustrative listing of documents that service providers and program beneficiaries must retain, *i.e.*, in the context of technology plans, as follows:

Pre-bidding Process. Beneficiaries must retain the technology plan and technology plan approval letter. *If consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants.* (Emphasis supplied.)

This provision, however, speaks to technology plans alone. The contractor, Mr. Linville, was not involved in the development of Orangeburg CSD3's technology

⁵ Letters: Administrator's Decision on Appeal, 2/27/2007, 3/01/2007, and 3/13/2007, p. 2 on each letter. *See also* "Instructions for Completing the Schools and Libraries Universal Service 'Description of Services Requested and Certification Form' (FCC Form 470)", p. 18 – Item 24, and "Instructions for Completing the Schools and Libraries Universal Service 'Services Ordered and Certification Form' (FCC Form 470)", p. 33 – Item 33.

⁶ Letters: Administrator's Decision on Appeal, 2/27/2007, 3/01/2007, and 3/13/2007, p. 2 on each letter. *See also* web page from Universal Services Administrative Company, "Letter of Agency." (highlighting added).

⁷ Letter of Appeal from Orangeburg, dated 2/12/2007, p. 2: "The individual in question, Jeff Linville, signed no documents, had no authority, and at no time represented Orangeburg CSD in the e-rate or other processes. His role was to provide assistance on an as-required basis under the supervision of Ms. Walley, and he should not have been categorized as a consultant."

⁸ Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order (rel. Aug. 13, 2004), p. 17-18, para. 48.

plan or submission of the technology plan for approval. Nothing in the Fifth Report and Order indicates that Orangeburg CSDB was required to have or retain a written agreement with him, nor has Orangeburg CSD3 located any other statutory or regulatory provision requiring that it have a written agreement with Mr. Linville.

In summary, the specific references in the second bullet on page 2 of USAC's ADL's do not support or justify its denial of Orangeburg CSD3's funding requests on the procedural basis identified. In addition, we were unable to find any portion of the referenced instructions for the Form 470 and Form 471, the SLD website, or the FCC Fifth Report and Order of August 13, 2004 that required a contract or LOA for a non-employee "consultant" other than the website's instruction to issue an LOA "expressly authorizing the consultant to represent the applicant."⁹ Since Mr. Linville had no such authority, as noted above, Orangeburg CSD3 was not obliged to sign a contract with Mr. Linville and could not issue him an LOA.

Discussion of Applicable Rules and Regulations; Basis for Appeal

USAC bases its initial decision to deny Orangeburg CSD3's e-rate funding requests, and the appeal of USAC's denial, on its position that Orangeburg failed to meet a procedural requirement for submission of a letter of agency or a contract outlining an outside consultant's authority. However, USAC fails to meet its initial burden of showing that the procedural step was even required.

Our February 12, 2007 letter of appeal to USAC detailed Mr. Linville's duties regarding RFP preparation, bid evaluation, and Item 21 checking; none of his activities arise to the level of requiring the procedural steps, not taken by Orangeburg CSD3, upon which USAC bases its denial of the school system's funding request and appeal. Indeed, USAC has provided no reasonable basis for alleging that Mr. Linville had any authority to make decisions, sign documents, or represent Orangeburg CSD3 in any matter. Nonetheless, USAC concluded that Mr. Linville's relationship with Orangeburg CSD3 required a formalized contract.¹⁰

Further, during the Selective Review process, no effort was made by the reviewer to establish if an agency relationship existed between Mr. Linville and Orangeburg CSD3, if either an LOA or contract was required, or why no LOA was issued by Orangeburg CSD3 to Mr. Linville.¹¹ The question-and-answer process used in the Selective Review process was clearly leading, whereby the applicant was led to provide information that could lead to denial without delving into the fundamental issues. In this case, Orangeburg CSD3's respondent, Daphne Walley, was led to state that the school hired a consultant, and to provide superficial descriptions of his duties, without outlining what he was authorized -- and more importantly, not authorized -- to do.

Because of the limited nature of Mr. Linville's duties and responsibilities, there was neither a procedural nor substantive requirement that Orangeburg CSD3 sign a contract with Mr. Linville, and there likewise was no procedural requirement that it provide an LOA for him.

⁹ Web page from Universal Services Administrative Company, "Letter of Agency." (highlighting added).

¹⁰ In contrast, Orangeburg CSD3's appellate letter also identified the Orangeburg CSD3 employee who had the decision-making and/or signing authority in each instance. *See* Letter of Appeal from Orangeburg, dated February 12, 2007, p. 2-3.

¹¹ *Ibid.*: p. 3.

Alternative Request for Waiver

In the alternative, *i.e.*, in the event that the Commission determines that Orangeburg CSD3 was required to have and retain a written agreement or letter of agency with Mr. Linville, Orangeburg CSD3 respectfully requests a waiver of this procedural requirement for each and every FRN submitted.

It is not clear from paragraph 48 of the Fifth Report and Order that a written contract would be required in the case of employment of a technical assistant, such as Mr. Linville. In fact, paragraph 48 strongly indicates that a written agreement would be required only for a consultant employed to prepare a technical plan. At best, this provision is complicated and confusing.¹² Moreover, for Orangeburg CSD3 to be denied funding (*i.e.*, due to an unclear or ambiguous requirement) would subject Orangeburg CSD3 to undue hardship and would thwart the policy goals and the Commission's duties under 47 U.S.C. § 254 to further deploy advanced services to schools.

The Commission may waive any provision of its rules on its own motion and for good cause shown.¹³ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.¹⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁵ 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.¹⁶

The Commission recently addressed a similar issue in the matter, *In re Kan-Ed, Kansas Board of Regents*.¹⁷ In *Kan-Ed*, USAC denied funding requests from a consortium because Letters of Agency were not obtained from some consortia members. The Commission ruled that to deny all funding due to a lack of a written LOA would unfairly penalize the applicant, and thus the Commission overruled USAC and allowed LOA's to be submitted. Like *Kan-Ed*, USAC's denial of funding to Orangeburg CSD3 because a letter of agency was not obtained – assuming such a letter was even required, which as shown above is questionable at best – unfairly penalizes the entire school system.

Finally, but importantly, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core programs requirements by Orangeburg CSD3. If Orangeburg was required to enter into a written contract with Mr. Linville, this was not clear, and rigid compliance with this requirement would not further the purpose of Section 254(h) or serve the public interest.¹⁸ Accordingly, if there was a requirement that Orangeburg CSD3 enter into a written agreement with Mr. Linville, waiver of this requirement in this instance is consistent with, and furthers, the public interest.

¹² “As we recently noted, many E-rate program beneficiaries, particularly small entities, contend that the application process is complicated, resulting in a significant number of applications for E-rate support being denied for ministerial, clerical or procedural errors.” *In re Bishop Perry Middle School*, FCC Opinion, No. SLD-487170 (May 19, 2006)

¹³ 47 C.F.R. § 1.3.

¹⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Circuit 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

¹⁶ *Northeast Cellular*, 897 F.2d at 1166.

¹⁷ *Kan-Ed, Kansas Board of Regents*, File No. SLD-449052 (November 22, 2006)

¹⁸ *See* 47 U.S.C. § 254(h).

Conclusion

In light of the above, we respectfully request that the Commission adopt and incorporate in a final order the arguments and evidence above and in Orangeburg CSD3's February 12, 2007 appeal, or alternatively in its request for waiver, and instruct SLD to approve the requested \$2,083,710.73 funding for the 18 FRNs listed above. Orangeburg CSD3 further requests that the Commission grant to it all other relief to which it deems Orangeburg CSD3 entitled.

Orangeburg CSD3 appreciates the Commission's review and consideration of its appeal. We are available to respond to questions or to provide any further information requested by the Commission.

Authorized signature for this Appeal¹⁹

3/16/2007

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Phone: (888) 249-1661 ext 323
Fax: (866) 534-1584
Email: rlarson@erateconsulting.com

¹⁹ "Letter of Agency for Funding Year 9" from Daphne G. Walley, Technology Coordinator, Orangeburg CSD, authorizing employees of eRate Consulting Services, LLC, to perform e-rate services on behalf of Orangeburg CSD.

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284
536569	1484842 1485192		1488302 1488458 1488483
536972	1486215 1486491		1488504 1489050
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTES 1, 5 & 6 - Orangeburg ADLs 526915 536972
537791



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2006-2007

February 27, 2007

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Re: Applicant Name: ORANGEBURG COUNTY SCH DIST 3
Billed Entity Number: 127124
Form 471 Application Number: 536972
Funding Request Number(s): 1486215, 1486491
Your Correspondence Dated: February 12, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's Funding Year 2006 Funding Commitment Decision Letter for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1486215, 1486491
Decision on Appeal: **Denied**
Explanation:

- After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 15, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. Additional follow up questions were sent on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and verified the

Item 21 documentation. According to documentation submitted to USAC, the private contractor acted as a consultant without signing an agreement with the district. The contractor performed consulting services therefore needed a consulting agreement before performing these services. USAC supports the denial of funding.

- FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Daphne Walley

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Billed Entity Number: 127124
Form 471 Application Number: 536972
Form 486 Application Number:



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2006-2007

February 27, 2007

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Re: Applicant Name: ORANGEBURG COUNTY SCH DIST 3
Billed Entity Number: 127124
Form 471 Application Number: 526915
Funding Request Number(s): 1482143, 1482259
Your Correspondence Dated: February 12, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's Funding Year 2006 Funding Commitment Decision Letter for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1482143, 1482259
Decision on Appeal: **Denied**
Explanation:

- After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 15, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. Additional follow up questions were sent on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and verified the

Item 21 documentation. According to documentation submitted to USAC, the private contractor acted as a consultant without signing an agreement with the district. The contractor performed consulting services therefore needed a consulting agreement before performing these services. USAC supports the denial of funding.

- FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Daphne Walley

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Billed Entity Number: 127124
Form 471 Application Number: 526915
Form 486 Application Number:



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2006-2007

February 27, 2007

Richard Larson
eRate Consulting Services LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Re: Applicant Name: ORANGEBURG COUNTY SCH DIST 3
Billed Entity Number: 127124
Form 471 Application Number: 537791
Funding Request Number(s): 1489233
Your Correspondence Dated: February 12, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's Funding Year 2006 Funding Commitment Decision Letter for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1489233
Decision on Appeal: **Denied**
Explanation:

- After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 15, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. Additional follow up questions were sent on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and verified the

Item 21 documentation. According to documentation submitted to USAC, the private contractor acted as a consultant without signing an agreement with the district. The contractor performed consulting services therefore needed a consulting agreement before performing these services. USAC supports the denial of funding.

- FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Daphne Walley

Richard Larson
eRate Consulting Services LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Billed Entity Number: 127124
Form 471 Application Number: 537791
Form 486 Application Number:

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284
536569	1484842 1485192		1488302 1488458 1488483
536972	1486215 1486491		1488504 1489050
537266	1487237	537791	1489233
537336	1487487		

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTES 2, 5 & 6 - Orangeburg ADLs 537266 537336
537502



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2006-2007

March 01, 2007

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Re: Applicant Name: ORANGEBURG COUNTY SCH DIST 3
Billed Entity Number: 127124
Form 471 Application Number: 537266
Funding Request Number(s): 1487237
Your Correspondence Dated: February 12, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's Funding Year 2006 Funding Commitment Decision Letter for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1487237
Decision on Appeal: **Denied**
Explanation:

- After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 16, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. Additional follow up questions were sent on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and verified the

Item 21 documentation. According to documentation submitted to USAC, the private contractor acted as a consultant without signing an agreement with the district. The contractor performed consulting services therefore needed a consulting agreement before performing these services. USAC supports the denial of funding.

- FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Daphne Walley

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Billed Entity Number: 127124
Form 471 Application Number: 537266
Form 486 Application Number:



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2006-2007

March 01, 2007

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Re: Applicant Name: ORANGEBURG COUNTY SCH DIST 3
Billed Entity Number: 127124
Form 471 Application Number: 537336
Funding Request Number(s): 1487487
Your Correspondence Dated: February 12, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's Funding Year 2006 Funding Commitment Decision Letter for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1487487
Decision on Appeal: **Denied**
Explanation:

- After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 16, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. Additional follow up questions were sent on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and verified the

Item 21 documentation. According to documentation submitted to USAC, the private contractor acted as a consultant without signing an agreement with the district. The contractor performed consulting services therefore needed a consulting agreement before performing these services. USAC supports the denial of funding.

- FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Daphne Walley

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Billed Entity Number: 127124
Form 471 Application Number: 537336
Form 486 Application Number:



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2006-2007

March 01, 2007

Richard Larson
eRate Consulting Services LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Re: Applicant Name: ORANGEBURG COUNTY SCH DIST 3
Billed Entity Number: 127124
Form 471 Application Number: 537502
Funding Request Number(s): 1488212, 1488234, 1488261, 1488284, 1488302,
1488458, 1488483, 1488504, 1489050
Your Correspondence Dated: February 12, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's Funding Year 2006 Funding Commitment Decision Letter for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1488212, 1488234, 1488261, 1488284, 1488302,
1488458, 1488483, 1488504, 1489050

Decision on Appeal: **Denied**

Explanation:

- After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 16, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. Additional follow up questions were sent on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In

response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and verified the Item 21 documentation. According to documentation submitted to USAC, the private contractor acted as a consultant without signing an agreement with the district. The contractor performed consulting services therefore needed a consulting agreement before performing these services. USAC supports the denial of funding.

- FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Red 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Daphne Walley

Richard Larson
eRate Consulting Services LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Billed Entity Number: 127124
Form 471 Application Number: 537502
Form 486 Application Number:

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458 1488483 1488504 1489050
536569	1484842 1485192		
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTES 3, 5 & 6 - Orangeburg ADLs 536569-2 FRNs



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2006-2007

March 13, 2007

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Re: Applicant Name: ORANGEBURG COUNTY SCH DIST 3
Billed Entity Number: 127124
Form 471 Application Number: 536569
Funding Request Number(s): 1484842, 1485192
Your Correspondence Dated: February 12, 2007

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of USAC's Funding Year 2006 Funding Commitment Decision Letter for the Application Number indicated above. This letter explains the basis of USAC's decision. The date of this letter begins the 60 day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1484842
Decision on Appeal: **Denied**
Explanation:

- After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 15, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. The Reviewer sent additional follow up questions on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and

verified the Item 21 documentation. According to documentation submitted to the Selective reviewer, the private contractor acted as a consultant without signing an agreement with the district. Consequently, the FRNs were denied for violation of the competitive bidding requirements. USAC supports the initial Selective decision.

- FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

Funding Request Number(s): 1485192
Decision on Appeal: **Approved, Funding Denied**
Explanation:

- Your appeal has brought forward persuasive information that your appeal should be approved. However, USAC will be unable to provide discounts for your request for the reasons cited below.

After thorough review of the appeal and the relevant facts and documentation, it was determined that a consultant was used for the planning, implementation, and support of your e-rate funding requests, but no consulting agreement or Letter of Agency was provided. In response to the SRIR, Daphne Walley submitted documentation stating a private contractor was used to evaluate bids received in response to the RFP. On November 15, 2006, Ms. Walley submitted documentation stating the district paid the contractor an hourly wage for services rendered and a consultant agreement was not entered with the district. The Reviewer sent additional follow up questions on November 16, 2006 asking Ms. Walley to explain whether the contractor performed services beyond evaluating bids. In response to the request for further clarification, Ms. Walley stated the private contractor assisted with the creation of the RFP, evaluated bids, and verified the Item 21 documentation. According to documentation submitted to the Selective reviewer, the private contractor acted as a consultant without signing an agreement with the district. Consequently, the FRNs were denied for violation of

the competitive bidding requirements. USAC supports the initial Selective decision.

FCC Rules require that FCC Forms 470 and 471 be signed by a person authorized to order telecommunications and other supported services for the eligible entities and certify under oath to all the required certifications. 47 C.F.R. secs. 54.504(b)(2), 54.504(c)(1). The authorized person certifies on the Form 470 and Form 471 that he or she is the person authorized to submit and certify to the accuracy of the applications. See Schools and Libraries Universal Service, Description of Services Requested and Certification Form 470, OMB 3060-0806, Block 5 and Schools and Libraries Universal Service, Services Ordered and Certification Form 471, OMB 3060-0806, Block 6. Consultants or other signers who are not employees of the Billed Entity must have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. See Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 and the Reference Area at our website, www.usac.org/sl. Additionally, the FCC has stated that, if consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824-26, FCC 04-190 para. 48 (rel. Aug. 13, 2004).

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Daphne Walley

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054

Billed Entity Number: 127124
Form 471 Application Number: 536569
Form 486 Application Number:

Orangeburg County School District 3
BEN 127124

<u>Form 471 Application Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Application Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458 1488483 1488504 1489050
536569	1484842 1485192		
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTES 4, 7, 10, 11 - Orangeburg CSD BEN 127124 Appeal
seven 471s

Orangeburg County School District 3
1654 Camden Road
Holly Hill, South Carolina 29059

February 12, 2007

Letter of Appeal

Schools and Libraries Division – Correspondence Unit
P.O. Box 902
100 South Jefferson Road
Whippany, NJ 07981

Re: Appeal of Funding Commitment Decision Letters Issued on December 12, 2006

Authorized person who can best discuss this Appeal with you

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054
Phone: (888) 249-1661 ext 323
Fax: (866) 534-1584
Email: rlarson@erateconsulting.com
(preferred mode of contact)

Steve Tenzer
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054
Phone: (888) 249-1661 ext 322
Fax: (866) 534-1584
Email: stenzer@erateconsulting.com
(preferred mode of contact)

Application Information

Entity

Orangeburg County School District 3

Billed Entity Number

127124

Funding Year

FY9 (2006-2007)

Form 471 Application Number

526915, 536569, 536972, 537266, 537336,
537502, 537791

Funding Request Numbers

1482143, 1482259, 1484842, 1486215,
1486491, 1487237, 1487487, 1488212,
1488234, 1488261, 1488284, 1488302,
1488458, 1488483, 1488504, 1489050, 1489233

Funding Commitment Request

\$2,079,618.84

Document Being Appealed

Funding Commitment Decision Letters (FCDL)
dated December 12, 2006 for 471 # 526915,
536569, 536972, 537266, 537336, 537502 and
471 # 537791

Funding Commitment Decision

\$0.00 – Selective – Insufficient Doc

FCDL Explanation

"A consultant was used for the planning, implementation, and support of your e-rate funding request; however, you did not provide the consulting agreement or a Letter of Agency."

Form 471 Application Number

536569

Funding Request Number

1485192

Funding Commitment Request

\$4,091.89

Document Being Appealed

Funding Commitment Decision Letter (FCDL)
dated December 12, 2006 for 471 # 536569

Funding Commitment Decision

NOT FUNDED

FCDL Explanation

"This FRN is a request for Telecommunications Service from a carrier that does not provide telecommunications on a common carriage basis."

Appeal:

Form 471s 526915, 536569, 536972, 537266, 537336, 537502, 537791; 17 FRNs: We request the Schools and Libraries Division reverse its decisions to deny funding for the seventeen FRNs referenced above, and approve the requested total commitments of \$2,079,618.84 for these FRNs. The decision is in error since the contractor employed by Orangeburg County School District (Orangeburg CSD) served in the limited capacity of a technical assistant to employees of Orangeburg CSD, and at no time represented the district in any capacity. Further, employees of Orangeburg CSD actually prepared and submitted the Form 470, Form 471s, and Item 21 attachments, and responded to PIA and selective review inquiries.

According to the published USAC policy regarding Letters of Agency,

A consultant or anyone signing as the authorized person who is not a school or library employee should also have an LOA from the applicant expressly authorizing the consultant to represent the applicant.¹

The individual in question, Jeff Linville, signed no documents, had no authority, and at no time represented Orangeburg CSD in the e-rate or other processes. His role was to provide assistance on an as-required basis under the supervision of Ms. Walley, and he should not have been categorized as a consultant.

Mr. Linville was compensated on an hourly basis by the Orangeburg CSD to provide the technical assistance that was lacking in the school district. There was no contract between Mr. Linville and the Orangeburg County School District as a result of this financial arrangement. In his limited capacity as a technical assistant, Mr Linville:

... assisted with the creation and design of the RFP. He evaluated the bids received in response to the RFP and he assisted with the verification of the Item 21 documentation for the winning bids.²

RFPs: Responsibility for the content of the RFPs rested solely with the Technology Coordinator of Orangeburg CSD, Daphne G. Walley. Mr. Linville merely assisted with the mechanics of creating the physical documents and ensuring that all necessary components were included. His duties were performed strictly under the supervision of Ms. Walley. Ms. Walley was responsible for the RFPs' final approval, publication, and response to potential bidders; Mr. Linville bore no responsibility for these aspects of the RFP process, and at no time represented Orangeburg CSD.

Bid evaluations: The selection of evaluation categories and weights was made by Ms. Walley. She supervised Mr. Linville's creation of the spreadsheets used to record evaluations, and reviewed all bids and Mr. Linville's recommended scores for each evaluation worksheet. Final review of the score sheets, comparison of scores and selection of the winning bids was performed by Ms. Walley and the Orangeburg CSD Superintendent, Dr. David Longshore; Mr. Linville had no role in these latter activities.

¹ Web page from Universal Services Administrative Company, "Letter of Agency." (highlighting added).

² Email from Daphne Walley, Orangeburg County School District, to Earl Baderschneider, Selective Reviewer, Schools and Libraries Division, dated 11/16/2006 3:04 PM, subject: "RE: Case SR-2006-BEIN 127124" (highlighting added).

Item 21 Attachments: Ms. Walley prepared and submitted all the Item 21 Attachments. To ensure accuracy of technical information on several of these documents after she had prepared them, she instructed Mr. Linville to verify them. Ms. Walley also responded to the PIA and Selective Review inquiries; Mr. Linville had no role in these review processes.

During the FY9 Selective Review Process, information regarding Jeff Linville was provided to the Selective Reviewer by Ms. Walley. In subsequent inquiries from the Selective Reviewer regarding the services provided by Mr. Linville, Ms. Walley listed areas where Mr. Linville lent his technical assistance. There was no further dialog or correspondence on this subject or requests for further explanation. No effort was made by the Selective Reviewer to establish whether or not:

- Mr. Linville's activities constituted, according to USAC policy, an agency relationship with Orangeburg CSD,
- An LOA (or contract) was required,
- Why an LOA was not issued by Orangeburg CSD to Mr. Linville.

This lack of clarifying inquiry by the Selective Reviewer led to the erroneous denial of these FRNs. The information presented above was available for the asking.

In light of the above, we request the Schools and Libraries Division correct the error made in the Selective Review process, reverse its decisions to deny funding for the seventeen FRNs referenced above, and approve the requested total commitments of \$2,079,618.84 for these FRNs.

Form 471 536569, FRN 1485192: We request the Schools and Libraries Division reverse its decision to deny funding for FRN 1485192, and approve the requested total commitment of \$4,091.89 for this FRN. The decision is in error since the service provider for this FRN is a carrier that does provide telecommunications on a common carrier basis per SLD records.

SPIN 143018525 is shown as an Eligible Telecomm Provider³ per the SLD website, and was an Eligible Telecomm Provider in FY7 and FY8. Based upon these facts and assurances from the service provider, Orangeburg CSD filed the FRN for telecomm services.

The service provider has informed us⁴ that on 9/9/2006, they were advised that they were not listed as an Eligible Telecomm Provider. They took immediate steps to correct this deficiency, and as of 9/20/2006, were once again listed as an Eligible Telecomm Provider. This occurred nearly three months before issuance of the FCDL on 12/12/2006, sufficient time to correct the funding commitment decision for this FRN.

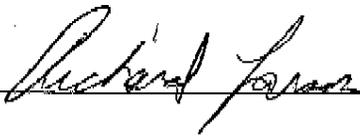
In light of these facts, we request the Schools and Libraries Division reverse its decision to deny funding for FRN 1485192, and approve the requested total commitment of \$4,091.89 for this FRN.

Thank you for your time and consideration in these matters.

³ Web page from USAC, "SPIN and BEAR Contact Search Results" for SPIN 143018525.

⁴ Letter from Joe W. Upton, Billing Manager, Metrocall/Arch Wireless (subsidiaries of USA Mobility) to Whom It May Concer, dated 2/12/2007.

Authorized signature for this Appeal⁵



Date: 2/12/2007

Richard Larson
eRate Consulting Services, LLC
141 New Road, Suite 2I
Parsippany, NJ 07054
Phone: (888) 249-1661 ext 323
Fax: (866) 534-1584
email: rlarson@erateconsulting.com

⁵ "Letter of Agency for Funding Year 9" from Daphne G. Walley, Technology Coordinator, Orangeburg CSD, authorizing employees of eRate Consulting Services, LLC, to perform e-rate services on behalf of Orangeburg CSD.

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261
536569	1484842 1485192		1488284 1488302 1488458
536972	1486215 1486491		1488483 1488504 1489050
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 5 - 470 Item 24 - 471 Item 33

**Schools and Libraries Universal Service
Description of Services Requested and Certification Form**

Estimated Average Burden Hours Per Response: 4 hours

**Instructions for Completing the
Schools and Libraries Universal Service
Description of Services Requested and Certification Form (FCC Form 470)**

CONTENTS

	Notice	page 2
I.	Introduction	page 3
II.	Filing Requirements and General Instructions	page 3
III.	Minimum Processing Standards and Filing Requirement	page 7
IV.	Specific Instructions	page 8
V.	Reminders	page 20

- Although it is not required, we encourage you to file your Form 470 online. This speeds the processing of your form, reduces errors, and avoids rejection due to failure to meet Minimum Processing Standards.
- Do you qualify for E-certification? (See “For Applicants Filing This Form Online” below.) If you do, you may obtain a User ID and a PIN and certify your Form 470 online as well.
- Review the “MINIMUM PROCESSING STANDARDS AND FILING REQUIREMENTS” for Manual Filers, if you are filing on paper.
- The purpose of the FCC Form 470 is to open a competitive bidding process for the services desired.
- An applicant cannot seek discounts for services in a category of service on the Form 471 if those services in those categories were not indicated on a Form 470.
- The Form 470 MUST be completed by the entity that will negotiate with potential service providers.
- The Form 470 cannot be completed by a service provider who will participate in the competitive process as a bidder. If a service provider is involved in preparing the Form 470 and that service provider appears on the associated Form 471, this will taint the competitive process and lead to denial of funding requests that rely on that Form 470.
- The Form 470 applicant is responsible for ensuring an open, fair competitive process and selecting the most cost-effective provider of the desired services, with price as the most heavily weighted factor in the evaluation.
- Required documents MUST be retained for a period of at least five years after the last day of service delivered. You may be audited pursuant to participation in the schools and libraries program.

Item 23 – Check this box to certify that you recognize that any support received under this support mechanism is conditional upon the school(s) and/or library(ies) you represent to securing access, separately or through this program, to all of the resources, including computers, training, software, internal connections, maintenance, and electrical capacity, necessary to use the services purchased under this mechanism effectively. See 47 C.F.R. Sec. 54.504 (c)(1). On FCC Form 471, you will need to certify that you have access to such funding. You recognize that some of the aforementioned resources are not eligible for support.

Item 24 – Check this box to certify that you are the person authorized to order telecommunications and other supported services for the eligible entity(ies). In the cases where an entity is authorized to post a Form 470 and negotiate with service providers on behalf of eligible entities, the term “order” in this certification can be interpreted to mean that the entity signing the Form 470 is authorized to competitively bid and negotiate the terms of a master contract for eligible services for eligible entities. In this situation, the entity filing the Form 470 may make the Item 24 certification. Certify that you are the person authorized to submit and certify to the accuracy of this form. See 47 C.F.R. Sec. 54.504 (b)(2).

Item 25 – Check this box to certify that you have reviewed all applicable FCC, state, and local procurement/competitive bidding requirements, and that you have complied with them. Certify that you acknowledge that persons willfully making false statements on this form can be punished by fine or forfeiture, under the Communications Act, 47 U.S.C. Secs. 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. Sec.1001.

Item 26 – Check this box to certify that you acknowledge that FCC rules provide that persons who have been convicted of criminal violations or held civilly liable for certain acts arising from their participation in the schools and libraries support mechanism are subject to suspension and debarment from the program. See 47 C.F.R. Sec. 54.521.

Item 27 requires the signature of the authorized person.

Item 28 requires that the date of the signature of the Form 470 be provided.

Item 29 – Print the name of the authorized person whose signature is provided in Item 27.

Item 30 – Provide the title or position of the authorized person whose signature is provided in Item 27.

Items 31a-31d – Provide the street address, the telephone number, the fax number and the e-mail address of the authorized person whose signature is provided in Item 27.

Item 31e – Provide the name of the authorized person’s employer. If a consultant is acting as the authorized person, this will be the name of the company that employs the consultant and not the name of the applicant organization.

**Schools and Libraries Universal Service
Services Ordered and Certification Form**

Estimated Average Burden Hours Per Response: 4 hours

**Instructions for Completing the
Schools and Libraries Universal Service
Services Ordered and Certification Form (FCC Form 471)**

CONTENTS

	Key Information	page 1
	Notice	page 2
I.	Introduction	page 3
II.	Filing Requirements and General Instructions	page 3
III.	Minimum Processing Standards and Filing Requirements	page 7
IV.	Specific Instructions	page 10
V.	Reminders	page 36

KEY INFORMATION

- Although it is not required, we encourage you to file your Form 471 online. This speeds the processing of your form, reduces errors, and avoids rejection for failure to meet Minimum Processing Standards.
- See if you qualify for E-certification. (See the **“Special Block 6 Instructions for Applications Filed Online.”**) If you do, obtain a User ID and a PIN and certify your Form 471 online as well.
- File requests for Priority 1 and Priority 2 services on separate Forms 471. (See **“When, Where, and How Many Forms 471 to File.”**)
- If you are filing on paper, review the **“MINIMUM PROCESSING STANDARDS AND FILING REQUIREMENTS.”**
- Note the detailed information provided in the specific instructions for Item 25.
- Remember that the Form 471 application filing window for the funding year closes at 11:59 PM EST on the last day of the filing window. It is your responsibility to check the SLD web site or contact the SLD Client Service Bureau (CSB) to get the announcement of the filing window dates. See the **“Filing Requirements for Forms 471 Submitted Either on Paper or Online.”**

Item 32 - Check this box to certify that you will retain all required documents for a period of at least five years after the last day of service delivered. This includes all documentation showing that you have complied with all statute and Commission rules regarding the application for, receipt of, and delivery of services receiving schools and libraries discounts. See 47 C. F. R. 54 Secs. 504 – 516. Refer to Section II, D of these instructions for examples of the required documentation. You also recognize that you may be audited pursuant to participation in the schools and libraries program at the discretion of the Commission, USAC or another authorized governmental oversight body and that these required documents and records must be available for review. If an applicant is audited, it should be prepared to make the worksheets and other records used to compile these forms available to the auditor and/or the SLD, and it should be able to demonstrate to the auditor and/or the SLD how the entries in its application were provided.

Item 33 – Check this box to certify that you are the person authorized to submit and certify to the accuracy of this form. This person must be authorized to represent any and all of the entities for which discounts are sought in this application. Documentation to confirm this person’s authorization to represent all entities in this application may be sought by the SLD during review of this application. For example, for consortium applications, the consortium lead member must either collect Letters of Agency from each consortium member or be able to provide some other proof that each consortium member knew it was represented on the application. Consortia that have a statutory or regulatory basis and for which participation is mandatory must be able to provide documentation supporting this certification. For consultants or other signers who are not employees of the Billed Entity, those individuals must also have a Letter of Agency from the applicant affirming that they are authorized to represent the applicant. For more information, please refer to “Letters of Agency” on the SLD section of the USAC web site. You also certify that the entities that are receiving discount pursuant to this application have complied with the terms, conditions and purposes of the program, that no kickbacks were paid to anyone and that false statements on this form can be punished by fine or forfeiture under the Communications Act, 47 U.S.C. Secs. 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. Sec. 1001 and civil violations of the False Claims Act.

Item 34 – Check this box to acknowledge that FCC rules provide that persons who have been convicted of criminal violations or held civilly liable for certain acts arising from their participation in the schools and libraries support mechanism are subject to suspension and debarment from the program. 47 C.F.R., Sec. 54.521. You agree to institute reasonable measures to be informed, and will notify USAC should you be informed or become aware that you or any of the entities named on this Form 471, or any person associated in any way with your entity and/or the entities named on this Form 471, is convicted of a criminal violation or held civilly liable for acts arising from their participation in the schools and libraries support mechanism.

Item 35 – Check this box to certify that if any of the Funding Request Numbers on this Form 471 contain requests for discounts for products or services that contain both eligible and ineligible components, that you have allocated the cost of the contract to eligible and ineligible components as required by the Commission's rules at 47 C.F.R. Sec. 54.504(g)(1), (2).

Item 36 – Check this box to certify that this funding request does not constitute a request for internal connections services, except basic maintenance services, in violation of the Commission requirement that eligible entities are not eligible for such support more than twice every five funding years beginning in Funding Year 2005 as required by the Commission's rules at 47 C.F.R. Sec. 54.506(c).

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284
536569	1484842 1485192		1488302 1488458 1488483
536972	1486215 1486491		1488504 1489050
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTES 6 & 9 - USAC - LOA policy



Letter of Agency

The authorized person on the Form 471 - the person whose signature appears in the Form 471 Item 38 - certifies that he or she is the person authorized to submit and certify to the accuracy of the application. This person must be authorized to represent any and all of the entities for which discounts are sought in the funding requests featured on the application. During its review of the Form 471, the SLD may require copies of the documentation that confirms this person's authorization to represent all of the entities featured on the Form 471.

The evidence that establishes this authorization - and therefore, that establishes the relationship between the authorized person and the entities featured on the form - is generally a Letter of Agency (LOA).

Consortium Letter of Agency

A Letter of Agency (LOA) is most commonly signed by consortium members and kept on file by their consortium leader to verify their knowledge of their membership and participation in the consortium. Other vehicles to establish this authorization could be a project agreement, a contract, a letter agreement, or other similar document. The consortium LOA must be signed and dated before the certification postmark date of the Form 471.

Consultant Letter of Agency

A consultant or anyone signing as the authorized person who is not a school or library employee should also have an LOA from the applicant expressly authorizing the consultant to represent the applicant. The consultant LOA must be signed and dated before the first action is taken by that Consultant on your behalf (such as filing the Form 470).

Whatever the form of the document establishing the above authorization, it must contain all of the following:

- The name of the person filing the application (the consortium leader or consultant)
- The name of the person authorizing the filing of the application (the entity who will receive discounted services, such as a consortium member)
- The specific timeframe the LOA or authorizing document covers (for example, the E-rate Funding Year 2003)
- The signature, signature date, and title of an official who is an employee of the entity who is authorizing the filing of the application (the entity who will receive discounted services, such as a consortium member)
- The type of services covered by the LOA or authorizing document. The description of services can be as general as "all E-rate eligible services" or it can be more restrictive (e.g., "basic telephone service only").

NOTE: The timeframes of these authorizations cannot be open-ended, such as "until terminated by either party."

In certain situations, other documentation may be accepted as proof of authorization. For example, for consortium applications, the consortium lead member must either collect Letters of Agency from each consortium member or be able to provide some other proof that each consortium member knew it was represented on the application. Consortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory must be able to provide documentation supporting this certification, including copies of the relevant state statute or regulation.

Note: If the Letter of Agency authorizes a *consortium leader* to apply for discounted services on your behalf, then it must be signed and dated before the certification postmark date of the Form 471. If the Letter of Agency authorizes a *consultant* to act on your behalf, then it must be signed and dated before the first action is taken by that consultant on your behalf (such as filing the Form 470).

Follow this link for a [sample Letter of Agency](#) (PDF, 37 KB) that can be used as a reference guide.

Last modified on 1/30/2007

© 1997-2007, Universal Service Administrative Company, All Rights Reserved.
[Home](#) | [Privacy Policy](#) | [Sitemap](#) | [Website Feedback](#) | [Website Tour](#) | [Contact Us](#)

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261
536569	1484842 1485192		1488284 1488302 1488458
536972	1486215 1486491		1488483 1488504 1489050
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 8 - FCC 5th R&O 8-13-04 para 48

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

In the Matter of)
Schools and Libraries Universal Service)
Support Mechanism) CC Docket No. 02-6

FIFTH REPORT AND ORDER
AND ORDER

Adopted: August 4, 2004

Released: August 13, 2004

By the Commission: Chairman Powell, and Commissioners Abernathy, Copps, and Adelstein issuing
separate statements; Commissioner Martin approving in part, dissenting in part, and issuing a statement.

TABLE OF CONTENTS

Paragraph
I. INTRODUCTION 1
II. BACKGROUND 2
III. FIFTH REPORT AND ORDER..... 13
A. RECOVERY OF FUNDS 15
1. Background 15
2. Discussion 18
a. What to Recover 18
b. When to Recover Funds..... 31
c. How to Recover 37
d. Treatment of Applicants Subject to Recovery Actions 40
B. DOCUMENT RETENTION REQUIREMENTS 45
1. Background 45
2. Discussion 47
C. TECHNOLOGY PLANS 51
1. Background 51
2. Discussion 55
D. CERTIFICATIONS..... 64
1. Background 64
2. Discussion 65
IV. ORDER 72
V. PROCEDURAL MATTERS..... 81
A. PAPERWORK REDUCTION ACT ANALYSIS 81
B. FINAL REGULATORY FLEXIBILITY ANALYSIS..... 83

APPENDIX A – LIST OF COMMENTERS

APPENDIX B – FINAL RULES

providers have complied with program rules.⁸⁹ Further, we believe that specific recordkeeping requirements not only prevent waste, fraud and abuse, but also protect applicants and/or service providers in the event of vendor disputes.

48. Although we agree with commenters that an explicit list of documents that must be retained in the recordkeeping requirement would be most useful for service providers and program beneficiaries,⁹⁰ we do not believe that an exhaustive list of such documents is possible. We base this conclusion on our knowledge that due to the diversity that exists among service providers and program beneficiaries, the descriptive titles or names of relevant documents will vary from entity to entity. To address commenters' concerns, however, we provide for illustrative purposes the following description of documents that service providers and program beneficiaries must retain pursuant to this recordkeeping requirement, as applicable:

- *Pre-bidding Process.* Beneficiaries must retain the technology plan and technology plan approval letter. If consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants.
- *Bidding Process.* All documents used during the competitive bidding process must be retained. Beneficiaries must retain documents such as: Request(s) for Proposal (RFP(s)) including evidence of the publication date; documents describing the bid evaluation criteria and weighting, as well as the bid evaluation worksheets; all written correspondence between the beneficiary and prospective bidders regarding the products and service sought; all bids submitted, winning and losing; and documents related to the selection of service provider(s). Service providers must retain any of the relevant documents described above; in particular, a copy of the winning bid submitted to the applicant and any correspondence with the applicant. Service providers participating in the bidding process that do not win the bid need not retain any documents.
- *Contracts.* Both beneficiaries and service providers must retain executed contracts, signed and dated by both parties. All amendments and addendums to the contracts must be retained, as well as other agreements relating to E-rate between the beneficiary and service provider, such as up-front payment arrangements.
- *Application Process.* The beneficiary must retain all documents relied upon to submit the Form 471, including National School Lunch Program eligibility documentation supporting the discount percentage sought; documents to support the necessary resources certification pursuant to section 54.505 of the Commission's rules, including budgets;⁹¹ and documents used to prepare the Item 21 description of services attachment.
- *Purchase and Delivery of Services.* Beneficiaries and service providers should retain all documents related to the purchase and delivery of E-rate eligible services and equipment. Beneficiaries must retain purchase requisitions, purchase orders, packing slips, delivery and installation records showing where equipment was delivered and installed or where services were provided. Service

⁸⁹ See Council of the Great City Schools Comments at 7.

⁹⁰ See, e.g., Council of the Great City Schools Comments at 7.

⁹¹ See 47 C.F.R. § 54.505.

providers must retain all applicable documents listed above.

- *Invoicing.* Both service providers and beneficiaries must retain all invoices. Beneficiaries must retain records proving payment of the invoice, such as accounts payable records, service provider statement, beneficiary check, bank statement or ACH transaction record. Beneficiaries must also be able to show proof of service provider payment to the beneficiary of the BEAR, if applicable. Service providers must retain similar records showing invoice payment by beneficiary to the service provider, USAC payment to the service provider, payment of the BEAR to the beneficiary, through receipt or deposit records, bank statements, beneficiary check or automated clearing house (ACH) transaction record, as applicable.
- *Inventory.* Beneficiaries must retain asset and inventory records of equipment purchased and components of supported internal connections services sufficient to verify the location of such equipment. Beneficiaries must also retain detailed records documenting any transfer of equipment within three years after purchase and the reasons for such a transfer.
- *Forms and Rule Compliance.* All program forms, attachments and documents submitted to USAC must be retained. Beneficiaries and service providers must retain all official notification letters from USAC, as applicable. Beneficiaries must retain FCC Form 470 certification pages (if not certified electronically), FCC Form 471 and certification pages (if not certified electronically), FCC Form 471 Item 21 attachments, FCC Form 479, FCC Form 486, FCC Form 500, FCC Form 472. Beneficiaries must also retain any documents submitted to USAC during program integrity assurance (PIA) review, Selective Review and Invoicing Review, or for SPIN change or other requests. Service providers must retain FCC Form 473, FCC Form 474 and FCC Form 498, as well as service check documents. In addition, beneficiaries must retain documents to provide compliance with other program rules, such as records relevant to show compliance with CIPA.⁹²

49. We emphasize that the rule we adopt here requires that program participants retain all documents necessary to demonstrate compliance with the statute and Commission rules regarding the application for, receipt, and delivery of services receiving schools and libraries discounts. Thus, the descriptive list above is provided as a guideline but cannot be considered exhaustive. For example, service providers must provide beneficiaries' billing records, if requested, and will be held accountable for properly billing those applicants for discounted services and for complying with other rules specifically applicable to service providers. Service providers are responsible for maintaining records only with respect to the services they actually provide, not records for applicants on whose contracts they may have bid, but not won.⁹³

50. We make additional clarifications to our rules providing for audits of program beneficiaries and service providers participating in the program. In particular, we clarify that schools, libraries, and service providers remain subject to both random audits and to other audits (or investigations) to examine an entity's compliance with the statute and the Commission's rules initiated at the discretion of the Commission, USAC, or another authorized governmental oversight body. We also

⁹² See 47 C.F.R. § 54.520.

⁹³ See BellSouth Comments at 9-10; California Reply Comments at 9.

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261
536569	1484842 1485192		1488284 1488302 1488458
536972	1486215 1486491		1488483 1488504 1489050
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 12 - Bishop_Perry_ex_appendices

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Bishop Perry Middle School)	File Nos. SLD-487170, <i>et al.</i>
New Orleans, LA, <i>et al.</i>)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: May 2, 2006

Released: May 19, 2006

By the Commission: Commissioner Copps issuing a separate statement.

I. INTRODUCTION

1. In this Order, we grant 196 appeals of decisions by the Universal Service Administrative Company (USAC) concerning the schools and libraries universal service support mechanism (also known as the E-rate program) denying funding due to certain clerical or ministerial errors in the application, *i.e.*, a failure to timely file an FCC Form 471, a failure to timely file a certification related to an FCC Form 470, or a failure to comply with minimum processing standards.¹ As explained below, we find that special circumstances exist to justify a waiver of the Commission's rules, and, accordingly, we grant these appeals and remand the underlying applications associated with these appeals to USAC for further action consistent with this Order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in the Appendices, and issue an award or a denial based on a complete review and analysis, no later than 60 days from release of this Order. In addition, we direct USAC to provide all future and pending applicants with a 15-day opportunity to cure any ministerial or clerical errors on their FCC Form 470, FCC Form 471, or associated certifications. We also direct USAC to develop targeted outreach procedures designed to better inform applicants of application procedures.

2. As we recently noted, many E-rate program beneficiaries, particularly small entities, contend that the application process is complicated, resulting in a significant number of applications for E-rate support being denied for ministerial, clerical or procedural errors.² We find that the actions we

¹ In this Order, we use the term "appeals" to generically refer to requests for review of decisions, or waivers related to such decisions, issued by the Commission, the Wireline Competition Bureau, or the Administrator. A list of these pleadings is attached as Appendices A-C. One of the appeals is a petition for reconsideration of a Commission order filed by the Information Technology Department of the State of North Dakota.

² *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Linkup, Changes to the Board of Directors of the National Exchange Carrier*

take here to provide relief from these types of errors in the application process will promote the statutory requirements of section 254(h) of the Communications Act of 1934, as amended (the Act), by helping to ensure that eligible schools and libraries actually obtain access to discounted telecommunications and information services.³ In particular, we believe that by directing USAC to modify certain application processing procedures and granting a limited waiver of our application filing rules, we will provide for a more effective application processing system that will ensure eligible schools and libraries will be able to realize the intended benefits of the E-rate program as we consider additional steps to reform and improve the E-rate program.⁴ Requiring USAC to take these additional steps will not reduce or eliminate any application review procedures or lessen the program requirements that applicants must comply with to receive funding. Indeed, we retain our commitment to detecting and deterring potential instances of waste, fraud, and abuse by ensuring that USAC continues to scrutinize applications and takes steps to educate applicants in a manner that fosters program participation. We also emphasize that our actions taken in this Order should have minimal effect on the overall federal Universal Service Fund (USF or the Fund), because the monies needed to fund these appeals have already been collected and held in reserve.⁵

II. BACKGROUND

3. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections. The E-rate application process generally begins with a technology assessment and a technology plan.⁶ After developing the technology plan, the applicant must file the FCC Form 470 (FCC Form 470) to request discounted services such as tariffed telecommunications services, month-to-month Internet access, cellular services, or paging services, and any services for which the applicant is seeking a new contract.⁷ The FCC Form 470 must be posted on USAC's schools and libraries division website for at least 28 days.⁸ The applicant must then comply with the Commission's competitive

Association, Inc., WC Docket Nos. 05-195, 02-60, 03-109, CC Docket Nos. 96-45, 02-6, 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308 (2005) (*Comprehensive Review NPRM*).

³ 47 U.S.C. § 254(h). The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, amended the Communications Act of 1934.

⁴ *Comprehensive Review NPRM*, 20 FCC Rcd at 11324-25, paras. 37-40 (seeking comment on the application process and competitive bidding requirements for the schools and libraries program).

⁵ We estimate that the appeals granted in this Order involve applications for approximately \$68 million in funding for Funding Years 1999-2005. We note that USAC has already reserved approximately \$585 million to fund outstanding appeals. See, e.g., Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2005, dated August 2, 2005. Thus, we determine that the action we take today should have minimal effect on the USF as a whole.

⁶ 47 U.S.C. § 254(h)(1)(B); 47 C.F.R. § 54.504. Applicants seeking discounts only for telecommunications services do not need to develop a technology plan. See *Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, Order, 16 FCC Rcd 18812, 18816, para. 11 (2001). In August, 2004, the Commission revised its rules concerning technology plans. See *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15826-30, paras. 51-63. See *Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15826-30, paras. 51-63 (2004) (*Schools and Libraries Fifth Report and Order*).

⁷ If the technology plan has not been approved when the applicant files the Form 470, the applicant must certify that it understands that the technology plan must be approved prior to commencement of service. 47 C.F.R. § 54.504(b)(2)(vii).

⁸ 47 C.F.R. § 54.504(b)(4).

bidding requirements set forth in sections 54.504 and 54.511(a) of the Commission's rules.⁹ The applicant then files the FCC Form 471 (FCC Form 471), after entering into agreements for eligible services.¹⁰ Section 54.507 of the Commission's rules states that fund discounts will be available on a first-come-first-served basis.¹¹ Under the Commission's rules, USAC implements an initial filing period, or filing window, for the FCC Form 471 applications that treats all schools and libraries filings within that period as if their applications were simultaneously received.¹²

4. The Commission has vested in USAC the responsibility of administering the application process for the schools and libraries universal service support mechanism.¹³ Pursuant to this authority, USAC has established procedures, including "minimum processing standards," to facilitate its efficient review of the thousands of applications requesting funding that it receives.¹⁴ These minimum processing standards are designed to require an applicant to provide at least the minimum data necessary for USAC to initiate review of the application under statutory requirements and Commission rules. When an applicant submits an FCC Form 470 or FCC Form 471 application that omits information required by the minimum processing standards, USAC automatically returns the application to the applicant without considering it for discounts under the program, without inquiring into the cause of the omission or without providing the applicant with the opportunity to cure the error.¹⁵ For example, if an applicant failed to answer all blocks 1-6 on the FCC Form 471 or failed to submit a properly signed signature certification, the applicant's FCC Form 471 would be rejected and returned to the applicant, without further consideration.¹⁶

5. The Commission has under consideration various appeals filed by parties that have requested funding for discounted services under the schools and libraries universal service support mechanism.¹⁷ The petitioners request review of decisions, or waivers related to such decisions, issued by

⁹ 47 C.F.R. §§ 54.504, 54.511(a).

¹⁰ This form is to request discounts on those services and it contains the discount calculation worksheet and the discount funding request. The FCC Form 471 must be filed each time a school or library orders telecommunications services, Internet access, or internal connections.

¹¹ 47 C.F.R. §§ 54.507(c).

¹² 47 C.F.R. §§ 54.507(c).

¹³ *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).

¹⁴ See, e.g., Instructions for Completing the Universal Service Schools and Libraries Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 (December 2002) (FCC Form 471 Instructions) at 6-9.

¹⁵ See, e.g., USAC website, Form 471 Minimum Processing Standards and Filing Requirements for FY 4, <http://www.sl.universalservice.org/reference/471mps.asp> (Minimum Processing Standards).

¹⁶ *Id.* But note, in the *Naperville Order*, the Commission determined that USAC should not return an application without consideration for having omitted information required by USAC's minimum processing standards where: (1) the request for information is a first-time information requirement on a revised form, thereby possibly leading to confusion on the part of the applicants; (2) the omitted information could be easily discerned by USAC through examination of other information included in the application; and (3) the application is otherwise substantially complete. *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.*, File No. SLD-203343, CC Dockets No. 96-45 and 97-21, Order, 16 FCC Rcd 5032,5037-38, paras. 12-15 (2001) (*Naperville Order*).

¹⁷ See Appendices A-C.

the Commission, the Wireline Competition Bureau, or USAC.¹⁸ The decisions at issue involve the denial of funding based on an applicant's failure to timely file an FCC Form 471, a failure to timely file certifications related to an FCC Form 470, or a failure to comply with minimum processing standards.¹⁹

6. The Commission may waive any provision of its rules on its own motion and for good cause shown.²⁰ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.²¹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²² In sum, 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.²³

III. DISCUSSION

7. In this item, we consider 196 appeals of decisions denying requests for funding from the schools and libraries universal service support mechanism based on an applicant's failure to timely file an FCC Form 471, a failure to timely file the certifications related to an FCC Form 470, or a failure to comply with minimum processing standards. We consider these three groups of applicants separately below.

8. Generally, the petitioners argue that immaterial clerical, ministerial or procedural errors resulted in rejection of their requests. Some also dispute that an error was made at all. For the reasons discussed below, we waive the relevant Commission rules, and grant all pending appeals pertaining to decisions denying funding due to a failure to comply with minimum processing standards, a failure to timely file an FCC Form 471, or a failure to timely file certifications related to an FCC Form 470, and remand the underlying applications associated with these appeals to USAC for further action consistent with this Order. In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the requested services.

9. In many instances here we depart from prior Commission precedent.²⁴ For the reasons described below, however, we find that the departure is warranted and in the public interest. Although we base our decision to grant these requests in part on the fact that many of the rules at issue here are

¹⁸ For purposes of this Order, decisions by both the Schools and Libraries Division and USAC will be collectively referred to as decisions issued by USAC.

¹⁹ See Appendices A-C.

²⁰ 47 C.F.R. §1.3.

²¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

²³ *Northeast Cellular*, 897 F.2d at 1166.

²⁴ See, e.g., *Request for Review by St. John's School, Schools and Libraries Universal Service Support Mechanism, Order*, 20 FCC Rcd 8171 (2005); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the national Exchange Carrier Association, Inc., Bruggemeyer Memorial Library, Order*, 14 FCC Rcd 13170 (1999); see also *Naperville Order*, 16 FCC Rcd at 5036 -5037, para. 11 (Although the Commission granted Naperville's request for review, it affirmed that "consistent with the Commission's rule requiring applicants to submit a 'completed' FCC Form 471, SLD's minimum processing standards provide an efficient means to minimize unnecessary administrative costs by reducing the number of substantially incomplete applications that SLD must review and process," and concluded that "it is appropriate for SLD to require the information requested by Item 22[in Form 471], and for SLD to return applications that fail to provide this information in any form.").

procedural, such a decision is in the context of the purposes of section 254 and cannot be applied generally to other Commission rules that are procedural in nature. Specifically, section 254 directs the Commission to “enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries.”²⁵ Because applicants who are eligible for funding will now receive the opportunity for that funding where previously it was denied for minor errors, we believe granting waivers of these rules in these instances, particularly in light of the limited 15-day correction period we impose, will better ensure that universal service support is distributed first to the applicants who are determined by our rules to be most in need, and thus, further the goals of section 254. We caution, however, that even in the context of the schools and libraries program, the waivers here should not be read to mean that applicants will not be required in the future to comply fully with our procedural rules, which are vital to the efficient operation of the E-rate program. To ensure these issues are resolved expeditiously, we direct USAC to complete its review of the applications listed in the Appendices and issue an award or a denial based on a complete review and analysis no later than 60 days from release of this Order.

10. *Applications Denied for Failing to Meet the Minimum Processing Standards.* Sixty-three applicants were denied funding for failing to meet USAC’s minimum processing standards.²⁶ Some of these appeals involved clerical errors on the part of petitioners who inadvertently left portions of the FCC Form 470 or FCC Form 471 blank or made minor errors while completing the form.²⁷ Some petitioners

²⁵ See 47 U.S.C. § 254(h).

²⁶ See Appendix C. We estimate that these 63 appeals involve applications for approximately \$34 million in funding for Funding Years 1999-2005 and note that these funds have already been collected and held in reserve. Also covered in this Order is one application that does not technically involve a minimum processing error. Alexander City Schools discovered it had incorrectly requested a lesser amount of money than it needed. Even though it promptly notified USAC of its error – within nine days – USAC found that because the correction was made after the close of the filing window, USAC could not correct the amount of funding. See Request for Review by Alexander City Schools.

²⁷ Request for Review by Alexander City Schools; Request for Review by Athens City Schools; Request for Review by Bay St. Louis-Waveland School District; Request for Review of Bucksport School Department; Request for Review of Calumet City School District No. 155; Request for Review of Clovis Unified School District; Request for Review and Waiver of Colegio San Antonio; Request for Review of Colton School District #53; Request for Review of Cooperative Educational Service Agency #12; Request for Review of Creighton School District; Request for Review of Elsa Public Library; Request for Review of Emery Unified School District; Request for Review of Fairfax County Public Schools; Request for Review of Forsyth County Public Library; Request for Review of Franklin Lakes School District; Request for Review of French Camp Academy; Request for Review of Henderson County Public Library; Request for Review of Hood River County School District; Request for Review of Incarnation School; Request for Review of Jackson District Library; Request for Review of Lawrence County School District; Request for Review of Leary Independent School District; Request for Review of Mabton School District 120; Request for Review of Marshfield Public Schools; Request for Review of Maumee City School District; Request for Review of McKittrick School District; Request for Review of Memphis City Schools; Request for Review of Mililani-Mauka Elementary School; Request for Review of Northampton Public Schools; Request for Waiver of Radford City Schools; Request for Review of Rangeley Public Library; Request for Review of Richards Independent Schools; Request for Review of Richford High School; Request for Review of Santa Cruz Catholic School; Request for Review of Sevier County Library; Request for Review of St. Joseph the Carpenter Schools; Request for Review of St. Lawrence Catholic School; Request for Review of St. Mary’s Academy; Request for Review of Suffolk Cooperative Library System; Request for Review of Sweetser; Request for Review of Teton County Library; Request for Review and Waiver of Toledo Academy of Learning; Request for Review of Unger Memorial Library; Request for Review of Upper Adams School District; Request for Review of Vidalia City School District; Request for Review of Volusia County Schools; Request for Review of West Genesee Central School District; Petition for Reconsideration of City of Newport News; Application for Review of Des Moines Public Schools; Petition for Reconsideration of King and Queen County Public Schools.

experienced technical problems, either with their own equipment or while interfacing with USAC's electronic filing mechanism, and failed to properly file electronically.²⁸ Other petitioners used outdated USAC forms.²⁹ Some other petitioners claim that the rules and instructions for filing an FCC Form 470 or FCC Form 471 are vague and unclear and that the resulting misunderstandings led to minor mistakes on their applications.³⁰ Finally, others maintain that they did not violate the minimum processing standards at all.³¹

11. Based on the facts and circumstances of these specific cases, we find that good cause exists to waive the minimum processing standards established by USAC. Minimum processing standards are necessary to ensure the efficient review of the thousands of applications requesting funding that USAC receives. In these circumstances, applicants committed minor errors in filling out their application forms. For example, among other problems, applicants inadvertently forgot to fill in a box, had computer problems, used an outdated form that requests primarily the same information as the current one, or misread the instructions. We do not believe that such minor mistakes warrant the complete rejection of each of these applicants' E-rate applications, especially given the requirements of the program and the thousands of applications filed each year.³² Importantly, applicants' errors could not have resulted in an advantage for them in the processing of their application. That is, the applicants' mistakes, if not caught by USAC, could not have resulted in the applicant receiving more funding than it was entitled to. In addition, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that the denial of funding requests inflicts undue hardship on the applicants. In these cases, we find that the applicants have demonstrated that rigid compliance with the application procedures does not further the purposes of section 254(h) or serve the public interest.³³ We therefore grant these appeals and remand them to USAC for further processing consistent with this Order.

12. *Applications Denied for Filing Outside the FCC Form 471 Filing Window.* We also have before us for consideration 103 appeals of USAC decisions that denied funding for applications that were filed outside of the FCC Form 471 filing window.³⁴ Some petitioners maintain that they submitted the

²⁸ Request for Review of Burnt Hills-Ballston Lake Central School District; Request for Review of West Sioux Community School District.

²⁹ Request for Review by Perrysburg Exempt Village School; Request for Review by Lawrence County School District; Request for Review by Maumee City School District; Request for Review of Maine School Administrative District No. 36; Request for Review of Moencopi Day School.

³⁰ Request for Review of City of Boston; Request for Review of Department of Neighborhood Development; Request for Review of Tennessee School Boards Association; Application for Review of Paramus School District.

³¹ Request for Review of Biblioteca Electronica de Rio Hondo; Request for Review of Sarah A. Reed Children's Center; Request for Review of South Winneshiek Community School District.

³² The initial application is 14 pages long. See USAC website, Schools and Libraries Universal Service

Description of Services Requested and Certification Form 470, available at <http://www.universalservice.org/res/documents/sl/pdf/470.pdf>.

³³ See 47 U.S.C. § 254(h).

³⁴ See Appendix B. We estimate that these 103 appeals involve applications for approximately \$30 million in funding for Funding Years 1999-2005, and note that these funds have already been collected and held in reserve. In the case of Fairfax School District R3, Minnesota Transition School, Minnewaska Area Schools, Our Lady of The Lake School, and St. Francis of Assisi School, the applicants had not yet submitted their completed FCC Forms 471 before filing their requests for review with the Commission but anticipated that their forms would be filed outside the FCC Form 471 filing window. See Request for Review of Fairfax School District R3; Request for Waiver of

relevant information on time.³⁵ Given that it is difficult to determine in these cases whether the error was the fault of the applicant, USAC or a third party, we give the applicants the benefit of the doubt. We find that a slight delay in USAC's receipt of the applications in each of these cases does not warrant the complete rejection of each of these applicants' E-rate applications. Therefore, we find that good cause exists to waive section 54.507 of the rules for these applications.³⁶

13. The rest of the petitioners assert a waiver is appropriate for one of two reasons: either someone on the applicants' staff made a mistake or had a family emergency that prevented them from filing on time or the delay in the filing or receipt of the application was due to circumstances out of the applicants' control. Specifically, in the first group, some of these appeals involve applicants whose staff members inadvertently failed to file the application forms in a timely manner.³⁷ Another group of petitioners state that they were unable to comply with the filing deadline due to staff illness or relatives of staff members who were ill.³⁸ Other petitioners claim that the rules and instructions for filing an FCC

Minnesota Transition School; Request for Waiver of Minnewaska Area Schools; Request for Waiver of Our Lady of The Lake School; Request for Waiver of St. Francis of Assisi School.

³⁵ Request for Review of Centerville School District 60-1; Request for Appeal of Colonial Intermediate Unit 20; Request for Review of Derby Public Schools; Request for Review of Ferndale Area School District; Request for Review of Kent City Schools; Request for Review of Mel Blount Youth Home; Request for Review of North Panola School District; Request for Review of Oglala Lakota Technology Consortium; Request for Review and Waiver of Perrysburg Exempt Village School District.

³⁶ See 47 C.F.R. § 54.507(c).

³⁷ Request for Waiver of Assabet Valley Regional Vocational School District; Request for Review of Barnwell County School District 45; Request for Review of Bath County School District; Request Waiver of Beavertown Community Library; Request for Review of Brown County School Corporation; Request for Review of Caruthers Unified School District; Request for Review of Central Catholic High School; Application for Review of Chawanakee Joint Elementary School District; Request for Review of Clearwater Memorial Library; Request for Waiver of Clinton County Board of Education; Request for Review of Coahoma County Public Schools; Requests for Review of Consorcio de Escuelas y Bibliotecas; Request for Review and Waiver of CPC Behavioral Healthcare; Request for Review of Delta County School District; Request for Review of Fairfax School District R3; Request for Review of Germantown School District; Request for Waiver of Hawaii State Public Library; Petitioner for Reconsideration of High Bridge Board of Education; Request for Waiver of Holmes District School Board; Request for Review of Hubbard Independent School District; Request for Waiver of Indian Oasis Baboquivari District 40; Request for Waiver of Island Trees Public Library; Request for Waiver of Jefferson School District; Request for Review of Los Alamitos Unified School District; Request for Review of Madera Unified School District; Request for Review of Malone Independent School District; Request for Waiver of McClure Community Library; Request for Waiver of Middleburg Community Library; Request for Waiver of Minnesota Transition School; Request for Waiver of Minnewaska Area Schools; Request for Review of Montfort & Allie B. Jones Memorial Library; Request for Waiver of Mount Ayr Community School District; Request for Waiver of Mount Saint John School; Request for Waiver of Mt. Carroll Township Public Library; Request for Review of Our Lady of Refuge; Request for Waiver of Pinon Dormitory; Request for Waiver of Queen of Apostles Catholic School; Request for Waiver of Richmond Public Library; Request for Review of Rylander Memorial School; Request for Waiver of Selinsgrove Community Library; Petitioner for Reconsideration of Siskiyou County Library; Request for Review of Southeast Delco School District; Request for Review of Southeastern Libraries Cooperating; Request for Review of St. Clement's Regional Catholic School; Request for Review of St. Elizabeth Interparochial School; Request for Waiver of St. Francis of Assisi School; Request for Waiver of SuperNet Consortium; Request for Waiver of Tiverton School Department; Request for Waiver Wabash Valley Educational Center; Request for Review of Wallington Public Schools; Request for Waiver of Walnut Community School District; Request for Waiver of Washington Local School District; Request for Waiver of Westside Holistic Family Services; Request for Review of Whitfield County School District; Request for Waiver of Wilkinson County School District; Request for Review of Wilson Memorial Library.

³⁸ Request for Waiver of Augusta County Library; Request for Review of Bonnie Brae Educational Center School; Request for Review of Garvey School District; Request for Waiver of Gaston County School District; Request for

Form 471 are vague and unclear and that the resulting misunderstandings led to forms being filed after the filing window.³⁹

14. Based on the facts and circumstances of these specific cases, we find that good cause exists to waive the deadline for filing the FCC Form 471 found in section 54.507 of the Commission's rules.⁴⁰ Under Bureau precedent deadlines have been strictly enforced for the E-rate program,⁴¹ including those pertaining to the FCC Form 471. We nevertheless find that good cause exists to waive the deadline in these cases. Generally, these applicants claim that staff mistakes or confusion resulted in the late filing of their FCC Form 471s. We note that the primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers, as opposed to positions dedicated to pursuing federal grants, especially in small school districts. Even when a school official has learned how to correctly navigate the application process, unexpected illnesses or other family emergencies can result in the only official who knows the process being unavailable to complete the application on time. Given that the violation at issue is procedural, not substantive, we find that the complete rejection of each of these applications is not warranted. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that denial of funding in these cases would inflict undue hardship on the applicants. In these cases, the applicants have demonstrated that rigid compliance with USAC's application procedures does not further the purposes of section 254(h) or serve the public interest.⁴² We therefore grant these appeals and remand them to USAC for further processing consistent with this Order.

15. The second group of petitioners failed to file an FCC Form 471 in a timely manner due to circumstances beyond their control, such as school reorganizations or inclement weather.⁴³ Some petitioners state that technical problems, either with their own equipment or while interfacing with USAC's electronic filing mechanism, prevented the FCC Form 471s from being timely filed.⁴⁴ Other

Waiver Millennium Community School; Request for Waiver of Northwest Institute for Contemporary Learning, Inc.; Request for Waiver of St. Mary's School; Petition for Reconsideration of Neches Independent School District; Request for Waiver of Unadilla Community School.

³⁹ Request for Waiver of Blackwell Public Schools; Request for Waiver of Brooklyn Jesuit Prep; Request for Review of Cecil County Public Schools; Request for Review of Colleton County School District; Request for Review of Jefferson City School District; Request for Review of Laporte School District 306; Request for Waiver of Nativity Mission School; Request for Review of Pierce City School District R6; Request for Waiver of St. Ignatius Academy.

⁴⁰ See 47 C.F.R. § 54.507(c).

⁴¹ See, e.g., *Request for Review by Information Technology Department State of North Dakota, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-245592, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 7383, 7389, para. 13 (Wireline Comp. Bur. 2002) (*North Dakota Order*); *Request for Review by Wilmington Public Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-254818, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 12069, 12071, paras. 7-8 (Wireline Comp. Bur. 2002) (*Wilmington Public Schools Order*); *Request for Review by South Barber Unified School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-158897, CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Rcd 18435, 18437-38, para. 7 (Com. Car. Bur. 2001) (*South Barber Order*).

⁴² See 47 U.S.C. § 254(h).

⁴³ Request for Waiver of Design and Engineering Services; Request for Waiver of Nelson County Public Schools; Request for Waiver of Our Lady of the Lake School.

⁴⁴ Request for Waiver of A.C.E. Charter High School; Request for Review of American School for the Deaf; Request for Waiver of Associated Marine Institutes, Inc.; Request for Review of Clinton Public Schools; Request

petitioners claim that they attempted to mail their FCC Form 471s on time but that problems with a third-party carrier prevented the application from arriving in a timely manner.⁴⁵

16. Based on the facts and circumstances of these specific cases, we find that good cause exists to waive the deadline for filing the FCC Form 471 found in section 54.507(c) of the Commission's rules.⁴⁶ Under Bureau precedent, deadlines have been strictly enforced for the E-rate program,⁴⁷ including those pertaining to the FCC Form 471. We nevertheless find that good cause exists to waive the deadline in these cases. Generally, these applicants claim that problems with third parties or circumstances outside their control resulted in the late filing of their FCC Form 471s. We find that, given that the violation at issue is procedural, not substantive, a complete rejection of each of these applications is not warranted, especially given that the error in these cases is not the fault of the applicants. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds or a failure to adhere to core program requirements. Furthermore, we find that denial of funding in these cases would inflict undue hardship on the applicants. In these cases, the applicants have demonstrated that rigid compliance with USAC's application procedures does not further the purposes of section 254(h) or serve the public interest.⁴⁸ We therefore grant these appeals and remand them to USAC for further processing consistent with this Order.

17. *Applications Denied for Failing to Certify FCC Form 470.* We also have before us for consideration 29 appeals of USAC decisions that denied funding for applications because their FCC Forms 470 were not certified or not certified before the close of the filing window.⁴⁹ Some of these appeals involve applicants whose staff members inadvertently failed to file the certification before the filing window closed.⁵⁰ Some petitioners state that technical problems, either with their own equipment or while interfacing with USAC's electronic filing mechanism, prevented the FCC Forms 470 from being certified.⁵¹ Other petitioners claim that they attempted to mail their FCC Form 470s certifications but that

for Waiver of Howard County School District; Requests for Waiver of Jemez Mountain School District; Request for Waiver of Leggett Valley Unified School District; Request for Review of Maine School Administrative District #36; Request for Review of Meriwether County School System; Request for Review of North East Independent School District; Request for Review of Saint John Grammar School; Request for Review of Trinity Christian School; Request for Review of Watson School District #56.

⁴⁵ Request for Waiver of Las Vegas City Schools; Request for Review of Loogootee Community School Corporation.

⁴⁶ See 47 C.F.R. § 54.507(c).

⁴⁷ See, e.g., *North Dakota Order*, 17 FCC Rcd at 7389, para. 13; *Wilmington Public Schools Order*, 17 FCC Rcd at 12071, paras. 7-8; *South Barber Order*, 16 FCC Rcd at 18437-38, para. 7.

⁴⁸ See 47 U.S.C. § 254(h).

⁴⁹ We estimate that these 29 appeals involve applications for approximately \$4 million in funding for Funding Years 1999-2005, and note that these funds have already been collected and held in reserve.

⁵⁰ Request for Waiver of Bishop Perry Middle School; Request for Review of Canby School District 891; Request for Review of Candler County Board of Education; Request for Review of Cassopolis Public School; Request for Review of Construction Careers Center; Request for Review of Dunmore School District; Request for Review of Fluvanna County School District; Request for Review of Interstate 35 Community School District; Request for Review of Lydia Bruun Woods Memorial Library; Request for Review of Mabton School District 120; Request for Review of New York State Office of Children & Family Services; Request for Review of Proctor Public Schools; Request for Review of Weld County School District Six.

⁵¹ Request for Review of Fort Atkinson School District; Request for Waiver of Northwestern Local School District; Request for Review of Tewksbury Public Schools; Request for Review of Unified School District 443 Information Technologies Services; Request for Review of Weld County School District Re-3(J).

the FCC Form 470 was either lost by a third-party carrier or USAC.⁵² Still other petitioners maintain that they complied with program rules.⁵³

18. Based on the facts and circumstances of these specific cases, we find that good cause exists to waive the requirement that the certification be filed with FCC Form 470 for these applicants. Our rules require that applicants certify that certain eligibility and program requirements are met.⁵⁴ Specifically, the certifications include attestations that applicants have a current technology plan, if applicable; that they will conduct the competitive bidding process in accordance with Commission rules; that the applicant is an eligible school or library or consortium; that the funding will be used for educational purposes; that the applicant has not received anything of value from the service provider, other than the requested services, in connection with the request for services; that applicants have the necessary resources to use the services purchased effectively; that the signatory has the authority to submit the request on behalf of the applicant; that the applicant has complied with applicable federal, state and local procurement laws and that violations of the rules may result in suspension or debarment from the program.⁵⁵ These certifications on the FCC Form 470 are important to maintain the integrity of the E-rate program and are necessary to ensure that only eligible entities receive support under the program.

19. We find, however, that a missing certification does not constitute a substantive violation, but a procedural one. We emphasize that these applicants still must file the certifications, even though they are late, for their applications to be processed by USAC. The question here is one of timing. USAC denied these applications not because the applicants refused to sign the certification, but because it was not received by USAC by the filing deadline, which meant that the applications were incomplete. Many of the applicants thought they had complied with the requirements, but due to computer error or other third-party errors, the certifications did not reach USAC.

20. While the Bureau has enforced existing filing deadlines for the E-rate program,⁵⁶ we find that good cause exists to waive the procedural deadline in these cases. We find that given that the violation at issue is procedural, not substantive, we find that a complete rejection of each of these applications is not warranted, especially given that the error in these cases is not the fault of the applicants. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds or a failure to adhere to core program requirements revealed by the record in these matters. Furthermore, we find that denial of funding in these cases would inflict undue hardship on the applicants. In these cases, the applicants have demonstrated that rigid compliance with USAC's application procedures does not further the purposes of section 254(h) or serve the public interest.⁵⁷ We therefore grant these appeals and remand them to USAC for further processing consistent with this Order.

⁵² Request for Review of Cook County School District 130; Request for Waiver of Creighton Community Public Schools; Request for Review of Gladwin County Library; Request for Review of Tamaroa Public School District #5; Request for Review of Welch Independent School District 17; Request for Review of Yeshiva Ktana of Passaic.

⁵³ Request for Review of Goose Creek Consolidated Independent School District; Request for Review of Morley-Stanwood Community School District; Request for Review of Sibley East Independent School District #2310; Request for Review of Temple Terrace Public Library.

⁵⁴ 47 C.F.R. § 54.504(b).

⁵⁵ *Id.*

⁵⁶ *See, e.g., North Dakota Order*, 17 FCC Rcd at 7389, para. 13; *Wilmington Public Schools Order*, 17 FCC Rcd at 12071, paras. 7-8; *South Barber Order*, 16 FCC Rcd at 18437-38, para. 7.

⁵⁷ *See* 47 U.S.C. § 254(h).

21. *North Dakota Petition for Reconsideration.* As part of this decision, we also grant a Petition for Reconsideration of an Order filed by the Information Technology Department of the State of North Dakota.⁵⁸ North Dakota mailed its FCC Form 471 certification after the deadline, but asserts that it did not understand when it needed to mail the certification after filing the application electronically.⁵⁹ In *North Dakota*, the Commission rejected North Dakota's arguments that a waiver of its filing requirements was warranted because of, *inter alia*, the complex nature of the application process and the detrimental effect the denial would have on the public schools and libraries in North Dakota.⁶⁰ The Commission stated that "the size and complexity of the application" did not establish good cause to waive the Commission's rules, and reiterated that all applicants are subject to the same filing rules, which are necessary for the program to be administered in an efficient and equitable basis.⁶¹

22. On reconsideration, we find that good cause exists to waive the deadline for filing the FCC Form 471. We now believe that, consistent with our reasoning above, a procedural violation should not have resulted in the rejection in North Dakota's entire application. Contrary to our earlier ruling, we note that our waiver standard allows us to consider hardship when analyzing whether particular facts meet the standard. We find here that denial of funding in this case would inflict undue hardship on the applicant. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds or a failure to adhere to core program requirements. Furthermore, we find that in this case, the applicant has demonstrated that rigid compliance with USAC's application procedures does not further the purposes of section 254(h) or serve the public interest.⁶² For these reasons, we find that a waiver of our filing requirements is warranted, and we grant the Petition for Reconsideration filed by the Information Technology Department of the State of North Dakota.

23. *Additional Processing Directives for USAC.* As of the effective date of this Order, we require USAC to provide all E-rate applicants with an opportunity to cure ministerial and clerical errors on their FCC Form 470 or FCC Form 471, and an additional opportunity to file the required certifications. Specifically, USAC shall inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications, along with a clear and specific explanation of how the applicant can remedy those errors. USAC shall also inform applications promptly in writing of any missing or incomplete certifications. Applicants shall have 15 calendar days from the date of receipt of notice in writing by USAC to amend or refile their FCC Form 470, FCC Form 471 or associated certifications.⁶³ USAC shall apply this directive to all pending applications and appeals even if such applications or appeals are no longer within the filing window. The 15-day period is limited enough to ensure that funding decisions are not unreasonably delayed for E-rate applicants and should be sufficient time to

⁵⁸ *Application for Review of a Decision by the Wireline Competition Bureau, Information Technology Department State of North Dakota, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-245592, CC Dockets No. 96-45 and 97-21, Order, 18 FCC Rcd 21521 (2003).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*, 18 FCC Rcd at 21525-27, paras. 12, 17-18.

⁶² See 47 U.S.C. § 254(h).

⁶³ Applicants will be presumed to have received notice five days after such notice is postmarked by USAC. USAC, however, shall continue to work beyond the 15 days with applicants attempting in good faith to amend their applications. This 15-day opportunity to refile or amend applications exists only where applicants have attempted to file their FCC Form 470 and FCC Form 471 within the filing window. If applicants miss the filing window entirely, they would need to file a request for waiver of the deadline with the Commission.

correct truly unintentional ministerial and clerical errors.⁶⁴ The opportunity for applicants to amend their filings to cure minor errors will also improve the efficiency and effectiveness of the Fund. Because applicants who are eligible for funding will now receive funding where previously it was denied for minor errors, we will ensure that funding is distributed first to the applicants who are determined by our rules to be most in need of funding. As a result, universal service support will be received by schools in which it will have the greatest impact for the most students. Furthermore, the opportunity to amend the application will improve the efficiency of the schools and libraries program. If USAC helps applicants file correct and complete applications initially, USAC should be able to reduce the money it spends on administering the fund because fewer appeals will be filed protesting the denial of funding for these types of issues. Therefore, we believe this additional opportunity to cure inadvertent administrative, ministerial, and clerical errors on applications will improve the administration of fund.

24. To complement this effort, USAC shall also develop a more targeted outreach program and educational efforts to inform and enlighten applicants on the various application requirements, including the application and certification deadlines, in an attempt to reduce these types of errors. We expect that the additional outreach and educational efforts will better assist E-rate applicants in meeting the program's requirements. Similarly, USAC shall develop a targeted outreach program designed to identify schools and libraries that have timely posted an FCC Form 470 on USAC's website but have failed to file the associated FCC Form 470 certification. USAC should also notify applicants that have filed an FCC Form 470, but have failed to file an FCC Form 471 or its certification by the close of the filing window. We believe such an outreach program will increase awareness of the filing rules and procedures and will assist applicants in filing complete and correct application. As we noted above, we believe that these changes will improve the overall efficacy of the program.

25. In addition, we note that, in the *Comprehensive Review NPRM*, we started a proceeding to address the concerns raised herein by, among other things, improving the application and disbursement process for the schools and libraries support mechanism.⁶⁵ Although we expect that the additional direction we have provided in this Order will help ensure that eligible schools and libraries can more effectively navigate the application procedures, this action does not obviate the need to take steps to reform and improve the program based on the record in the *Comprehensive Review* proceeding.

26. We emphasize the limited nature of this decision. As stated above, we recognize that filing deadlines and minimum processing standards are necessary for the efficient administration of the E-rate program. Although we grant the 196 subject appeals before us, our action here does not eliminate the minimum processing standards, or the deadlines for filing the FCC Form 470 and FCC Form 471, or certifications to the FCC Form 470 or 471. We continue to require E-rate applicants to submit complete and accurate information to USAC as part of the application review process. The direction we provide USAC will not lessen or preclude any application review procedures of USAC. All existing E-rate program rules and requirements will continue to apply, including USAC's minimum processing standards, the existing forms and documentation with the associated certifications, USAC's Program Integrity Assurance review procedures, and other processes designed to ensure applicants meet the applicable program requirements.

27. Finally, we are committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant the appeals addressed here, we reserve the right to conduct audits and investigations to determine compliance

⁶⁴ We note that applicants will retain the ability to appeal decisions denying funding requests on the grounds discussed herein.

⁶⁵ *Comprehensive Review NPRM*.

with the E-rate program rules and requirements. Because audits and investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

28. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that the Requests for Review and Requests for Waiver of 47 C.F.R. §§ 54.507(c) and 54.504(b) filed by the petitioners as listed in Appendices A-C ARE GRANTED.

29. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that the Requests for Review and/or Requests for Waiver filed by the petitioners as listed in Appendices A-C ARE REMANDED to USAC for further consideration in accordance with the terms of this Order.

30. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that the Petition for Reconsideration filed by the Information Technology Department of the State of North Dakota IS GRANTED and IS REMANDED to USAC for further consideration in accordance with the terms of this Order.

31. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, USAC SHALL COMPLETE its review of each remanded application listed in the Appendices and issue an award or a denial based on a complete review and analysis no later than 60 days from release of this Order.

32. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458
536569	1484842 1485192		1488483 1488504 1489050
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 13 - 47cfr1.1-3

Federal Communications Commission

§ 1.2

- 1.9047 Special provisions relating to leases of educational broadband service spectrum.
- 1.9048 Special provisions relating to spectrum leasing arrangements involving licensees in the Public Safety Radio Services.
- 1.9050 Who may sign spectrum leasing notifications and applications.
- 1.9055 Assignment of file numbers to spectrum leasing notifications and applications.
- 1.9060 Amendments, waivers, and dismissals affecting spectrum leasing notifications and applications.
- 1.9080 Private commons.

Subpart Y—International Bureau Filing System

- 1.10000 What is the purpose of these rules?
- 1.10001 Definitions.
- 1.10002 What happens if the rules conflict?
- 1.10003 When can I start operating?
- 1.10004 What am I allowed to do if I am approved?
- 1.10005 What is IBFS?
- 1.10006 Is electronic filing mandatory?
- 1.10007 What applications can I file electronically?
- 1.10008 What are IBFS file numbers?
- 1.10009 What are the steps for electronic filing?
- 1.10010 Do I need to send paper copies with my electronic applications?
- 1.10011 Who may sign applications?
- 1.10012 When can I file on IBFS?
- 1.10013 How do I check the status of my application after I file it?
- 1.10014 What happens after officially filing my application?
- 1.10015 Are there exceptions for emergency filings?
- 1.10016 How do I apply for special temporary authority?
- 1.10017 How can I submit additional information?
- 1.10018 May I amend my application?

Subpart Z—Communications Assistance for Law Enforcement Act

- 1.20000 Purpose.
- 1.20001 Scope.
- 1.20002 Definitions.
- 1.20003 Policies and procedures for employee supervision and control.
- 1.20004 Maintaining secure and accurate records.
- 1.20005 Submission of policies and procedures and Commission review.
- 1.20006 Assistance capability requirements.
- 1.20007 Additional assistance capability requirements for wireline, cellular, and PCS telecommunications carriers.
- 1.20008 Penalties.

APPENDIX A TO PART 1—A PLAN OF COOPERATIVE PROCEDURE IN MATTERS AND CASES UNDER THE PROVISIONS OF SECTION 410 OF THE COMMUNICATIONS ACT OF 1934

APPENDIX B TO PART 1—NATIONWIDE PROGRAMMATIC AGREEMENT FOR THE COLLOCATION OF WIRELESS ANTENNAS

APPENDIX C TO PART 1—NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS

AUTHORITY: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

EDITORIAL NOTE: Nomenclature changes to part 1 appear at 63 FR 54077, Oct. 8, 1998.

Subpart A—General Rules of Practice and Procedure

SOURCE: 28 FR 12415, Nov. 22, 1963, unless otherwise noted.

GENERAL

§ 1.1 Proceedings before the Commission.

The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpoena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings.

(Sec. 403, 48 Stat. 1094; 47 U.S.C. 403)

§ 1.2 Declaratory rulings.

The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(5 U.S.C. 554)

§ 1.3

47 CFR Ch. I (10–1–06 Edition)

§ 1.3 Suspension, amendment, or waiver of rules.

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

CROSS REFERENCE: See subpart C of this part for practice and procedure involving rulemaking.

§ 1.4 Computation of time.

(a) *Purpose.* The purpose of this rule section is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission. It also applies to computation of time for seeking both reconsideration and judicial review of Commission decisions.

(b) *General Rule—Computation of Beginning Date When Action is Initiated by Commission or Staff.* Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the *day after the day* on which public notice of that action is given. See § 1.4(b) (1)–(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled “Public Notice” shall be calculated in accordance with this section. See § 1.4(b)(4) of this section for a description of the “Public Notice” document. Unless otherwise provided in § 1.4 (g) and (h) of this section, it is immaterial whether the first day is a “holiday.” For purposes of this section, the term *public notice* means the date of any of the following events: See § 1.4(e)(1) of this section for definition of “holiday.”

(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the

FEDERAL REGISTER, including summaries thereof, the date of publication in the FEDERAL REGISTER.

NOTE TO PARAGRAPH (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2).

Example 1: A document in a Commission rule making proceeding is published in the FEDERAL REGISTER on Wednesday, May 6, 1987. Public notice commences on Wednesday, May 6, 1987. The first day to be counted in computing the beginning date of a period of time for action in response to the document is Thursday, May 7, 1987, the “day after the day” of public notice.

Example 2: Section 1.429(e) provides that when a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the FEDERAL REGISTER. Section 1.429(f) provides that oppositions to a petition for reconsideration shall be filed within 15 days after public notice of the petition’s filing in the FEDERAL REGISTER. Public notice of the filing of a petition for reconsideration is published in the FEDERAL REGISTER on Wednesday, June 10, 1987. For purposes of computing the filing period for an opposition, the first day to be counted is Thursday, June 11, 1987, which is the day after the date of public notice. Therefore, oppositions to the reconsideration petition must be filed by Thursday, June 25, 1987, 15 days later.

(2) For non-rulemaking documents released by the Commission or staff, including the Commission’s section 271 determinations, 47 U.S.C. 271, the release date.

Example 3: The Chief, Mass Media Bureau, adopts an order on Thursday, April 2, 1987. The text of that order is not released to the public until Friday, April 3, 1987. Public notice of this decision is given on Friday, April 3, 1987. Saturday, April 4, 1987, is the first day to be counted in computing filing periods.

(3) For rule makings of particular applicability, if the rule making document is to be published in the FEDERAL REGISTER and the Commission so states in its decision, the date of public notice will commence on the day of the FEDERAL REGISTER publication date. If the decision fails to specify FEDERAL REGISTER publication, the date of public notice will commence on the release date, even if the document is subsequently published in the FEDERAL REGISTER. See *Declaratory Ruling*, 51 FR 23059 (June 25, 1986).

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458 1488483 1488504 1489050
536569	1484842 1485192		
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 14 & 16 - 897 F2d 1164



Northeast Cellular Telephone Co., L.P. v.
F.C.C.C.A.D.C.,1990.

United States Court of Appeals,District of Columbia
Circuit.

NORTHEAST CELLULAR TELEPHONE COM-
PANY, L.P., et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Nos. 89-1206, 89-1214.

Argued Feb. 5, 1990.

Decided March 9, 1990.

Rehearing En Banc Denied May 9, 1990.

The Federal Communications Commission issued order granting license to cellular radio lottery winner. Losers petitioned for review. The Court of Appeals, Mikva, Circuit Judge, held that Commission had improperly waived rule requiring licensee to establish financial qualifications, on grounds that one of the owners of licensee was subsidiary of large telephone company with which Commission had considerable experience.

Commission order vacated and remanded.

West Headnotes

Telecommunications 372  **1038**

[372](#) Telecommunications

[372IV](#) Wireless and Mobile Communications

[372k1036](#) Licenses and Authorizations

[372k1038](#) k. Cellular Telephones. [Most](#)

[Cited Cases](#)

(Formerly 372k461.10)

Federal Communications Commission did not properly exercise discretion to waive rule requiring that lottery winners for cellular radio license meet specified financial qualifications, by relying on the fact that one of the owners of proposed licensee was a subsidiary of a major telephone company with substantial resources with which Commission has prior experience; Commission failed to articulate “appropriate general standard” governing waiver on those grounds.

***1164 **142** Petition for Review of an Order of the Federal Communications Commission.

[Alan Y. Naftalin](#), Washington, D.C., with whom [Robert M. Connolly](#), Louisville, Ky., was on the brief, for petitioner, Northeast Cellular Telephone, L.P., in No. 89-1206. [Harold J. Carroll](#) and Susan D. Baer, Boston, Mass., were on the brief, for petitioner, Saco River Cellular, Inc., in No. 89-1214.

[Roberta L. Cook](#), Atty., F.C.C., Washington, D.C., with whom [Robert L. Pettit](#), Gen. Counsel, and [Daniel M. Armstrong](#), Associate Gen. Counsel, F.C.C., Washington, D.C., were on the brief, for respondent.

[Michael B. Barr](#), [Bruce D. Peterson](#), Washington, D.C., and John S. Parks, were on the brief, for intervenor, Portland Cellular Partnership.

Before MIKVA, [EDWARDS](#) and [SILBERMAN](#),
Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.MIKVA, Circuit Judge:

This case presents a procedural challenge to an FCC order granting a license to a cellular radio lottery winner, Portland Cellular Partnership (“Port Cell”). The losers***1165 **143** in that lottery, Northeast Cellular Telephone Co. (“Northeast”) and Saco River Cellular, Inc. (“Saco River”), claim that the FCC arbitrarily and capriciously waived the requirement that lottery winners establish their financial qualifications within 30 days of having been selected. We hold that the FCC's waiver decision was arbitrary and capricious because it was not based on any rational waiver policy as required by our decision in [WAIT Radio v. FCC](#), 418 F.2d 1153 (D.C.Cir.1969). Indeed, given the record in this case, we cannot imagine any standard that would have justified a waiver of the filing of Port Cell's financial qualifications. Accordingly, we vacate the waiver and remand the case to the agency.

I. Background

In 1986, the FCC held a lottery for a license to operate cellular radio service in Portland, Maine. Five applicants entered the lottery: Northeast, Saco River,

NYNEX Mobile Communications Company (“NYNEX Mobile”), Community Services Telephone Co. (“Community Services”), and Seacoast Cellular, Inc. (“Seacoast”). Seacoast was tentatively selected as the licensee, with Saco River picked as runner-up.

As a result of a settlement agreement, Seacoast substituted for its own application the application of Portland Cellular Partnership (“Port Cell”) which consisted of itself (42% interest), NYNEX Mobile (48% interest) and Community Service (10% interest). Port Cell's ownership has since been divided equally among NYNEX, Seacoast, and Lewiston-Auburn Cellular.

Under FCC rules, Port Cell was required within 30 days of selection to submit evidence of its financial qualifications to operate the system. *Cellular Further Lottery Reconsideration Order*, 59 Pike and Fischer Rad.Reg.2d 407 (1985). Those rules require the lottery winner to present evidence that the lender has (1) committed to provide all necessary financing; (2) identified sufficient unencumbered funds; (3) assessed the applicant's creditworthiness; and (4) dictated the essential terms of the loan. [47 C.F.R. § 22.917\(b\)\(1\)\(i\) \(1986\)](#). If the selected applicant fails to satisfy these requirements, the applicant is disqualified and the second-place applicant is substituted as the tentative lottery selectee. 59 Pike and Fischer Rad.Reg. at 413.

On July 24, Port Cell tendered a letter of credit from NYNEX Credit Company (“NYNEX Credit”) in satisfaction of the financial qualifications requirement and a balance sheet that estimated Port Cell's costs of construction and operation at \$2.8 million. The letter of credit confirmed that NYNEX was “prepared to make available to [Port Cell] a total credit package of \$3 million.” The letter, however, did not include any evidence that NYNEX Credit had assessed Port Cell's creditworthiness or agreed to any terms or conditions of the financing arrangement.

Saco River and Northeast (the only remaining lottery participants) petitioned the Commission to deny Port Cell's application on two grounds. First, they claimed that Port Cell had failed to demonstrate its financial qualifications because the NYNEX letter did not es-

tablish that the credit package was guaranteed, that the essential terms were set, that NYNEX had assessed Port Cell's creditworthiness, or that NYNEX had sufficient capital. Second, they asserted that the FCC had prejudiced their settlement opportunities by permitting two co-owned applicants-Seacoast and Community Service-to remain in the same lottery.

These claims were denied by the Mobile Services Division of the Commission (“MSD”). [Portland Cellular Partnership](#), 2 FCC Rcd 5586 (1987). Saco River and Northeast filed petitions for review with the FCC, which the Commission also denied. [Portland Cellular Partnership](#), 4 FCC Rcd 2050 (1989). The Commission found that even though Port Cell had failed to comply with the FCC rules with respect to financial qualifications, the Commission would waive those qualifications because strict enforcement was not in the public interest. The Commission found that based on its prior dealings with NYNEX Credit, it was confident that NYNEX met all of the necessary qualifications. It determined that strict compliance would not *1166 **144 serve any interest, and would only result in unnecessary delay. The Commission also rejected the cross-ownership claim.

Northeast and Saco River have appealed both the waiver and cross-ownership decisions. Because we find that the case must be remanded on the basis of the waiver decision, we need not reach the cross-ownership issue.

II. Waiver of Financial Qualifications

There is no question here that Port Cell has failed to comply strictly with regulations requiring that it demonstrate its financial qualifications. The FCC concluded that the NYNEX letter was defective under [§ 22.917\(b\)\(1\)\(i\)](#) because it did not contain the terms of the loan or state that NYNEX had assessed the creditworthiness of the loan applicant. [4 FCC Rcd at 2050](#). The Commission nevertheless concluded that there was good cause to waive the specific requirements of the rule because the Commission knew from its “lengthly [sic] experience” with NYNEX Mobile and from “materials on file in other [FCC] proceedings” that Port Cell was financially capable of constructing and operating its proposed cellular sys-

tem. [Id. at 2051](#).

Apparently, the Commission concluded that because of the relationship between NYNEX Credit and NYNEX Mobile, NYNEX Mobile's role as a general partner in Port Cell, and NYNEX Mobile's proven interest in participating in the cellular industry, it was not unreasonable to assume that the funds were available for Port Cell's venture. From this, the Commission would have the court infer that the FCC's familiarity with NYNEX's credit practices was sufficient to demonstrate that NYNEX had assessed the creditworthiness of the loan applicant and that the loan terms would follow a standard pattern.

The FCC has authority to waive its rules if there is "good cause" to do so. [47 C.F.R. § 1.3](#). The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. [WAIT Radio v. FCC, 418 F.2d 1153, 1159 \(D.C.Cir.1969\)](#). However, as we instructed in *WAIT Radio*, those waivers must be founded upon an "appropriate general standard." We held that "sound administrative procedure contemplates waivers ... granted only pursuant to a relevant standard ... [which is] best expressed in a rule that obviates discriminatory approaches." [418 F.2d at 1159](#).

In remanding *WAIT Radio* to the agency to formulate an acceptable waiver policy, we held that a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation. *See also Industrial Broadcasting Co. v. FCC, 437 F.2d 680 (D.C.Cir.1970)* (indicating need for articulation of special circumstances beyond those considered during regular rulemaking).

The FCC purports to have complied with *WAIT Radio* in granting its waiver to Port Cell. Yet, it has not even come close to doing so. The FCC Order concluded that waiver under these circumstances would serve the public interest contemplated by the financial requirements provisions. It reasoned that if there

is "no speculation" as to the financial qualifications of the tentative selectee, strict enforcement will not serve the regulation's purpose of reducing delays in cellular service. [4 FCC Rcd at 2050-51](#).

The FCC's reasoning wholly ignores the second requirement of *WAIT Radio*: It does not articulate any standard by which we can determine the policy underlying its waiver. The FCC's reliance upon a bare conclusion that there is "no speculation" with respect to Port Cell is astounding. The record reveals nothing unique about Port Cell's situation. This is a case where a very experienced applicant that was clearly aware of the rule, submitted two financial showings which patently did not comply with that rule. The only thing unusual about Port Cell is that one of its *1167 **145 partners is universally recognized as fiscally strong and technically qualified. The Commission's recognition of Port Cell's financial qualifications, then, amounts to nothing more than a "we-know-it-when-we-see-it" standard.

In [Airmark Corp. v. FAA, 758 F.2d 685 \(D.C.Cir.1985\)](#), this court vacated several waivers for failure to articulate identifiable standards. The FAA had published rules requiring compliance with five criteria to qualify for an exemption; however, it had granted such exemptions only haphazardly. We ruled that "[e]lementary evenhandedness requires that if all five factors must be met by one petitioner, then all five factors must be met by the next." [Id. at 692](#). The difficulty presented here is even more striking, since the FCC has not simply deviated from exemption standards; it never stated any standards in the first place.

The only factor stated by the FCC that differentiates Port Cell from any other applicant is the FCC's undefined "familiarity" with one of Port Cell's partners and Port Cell's financial backer. Standing alone, this does not even begin to approach a standard for demonstrating that a licensee is "indisputably ... financially qualified" and thus not required to provide a full statement of financial qualifications. Although the FCC purports to have had vast experience with NYNEX in other markets and contexts, the Commission provides no indication of what aspects of that experience are dispositive, or how those aspects re-

late to the financial qualifications of Port Cell. As noted, NYNEX is only a minority partner in Port Cell. Thus, whether NYNEX Mobile or its parent NYNEX have been worthy licensees in other markets would not be sufficient to confirm Port Cell's qualifications. Indeed, taking the Commission at its word, it would seem that any organization most likely could avoid producing financial qualifications by bringing a Bell Operating Company in as a 5% partner.

Under the Commission's blanket statement, future applicants-and this court-have no ability to evaluate the applicability and reasonableness of the Commission's waiver policy. At a minimum, the FCC needed to indicate what information it had about NYNEX Credit's uncommitted assets, NYNEX Credit's practices in evaluating the creditworthiness of loan applicants, the terms it would imply into NYNEX Credit's loan letter based upon its prior experience, and its basis for concluding that NYNEX Credit would commit funds regardless of whether NYNEX Mobile abandoned the partnership. Absent a finding that this information was considered and used in formulating an articulable standard at the time the waiver was granted, the FCC must disqualify Port Cell's application.

Despite the Commission's assurances that there is no speculation involved in its decision to excuse Port Cell from strict compliance, its statement invites nothing but speculation by all other participants in FCC proceedings. Mere conclusory statements as to the unique reputation and experience of Port Cell's lender and minority partner are not sufficient to satisfy the requirements of *WAIT Radio*.

III. Conclusion

We hold that the FCC's decision was arbitrary and capricious because it was not based on any rational waiver policy. The agency failed to state any legitimate basis for granting Port Cell a waiver from the Commission's financial qualifications requirements. Bigness and national reputation are not reasonable standards for a waiver policy, and the Commission indeed eschews such a characterization of its policy. It follows that this waiver reflects an outrageous, unpredictable, and unworkable policy that is susceptible to discriminatory application. Accordingly, the peti-

tion for review is granted, and the Commission's order is vacated and remanded.

So Ordered.

C.A.D.C.,1990.

Northeast Cellular Telephone Co., L.P. v. F.C.C.
897 F.2d 1164, 67 Rad. Reg. 2d (P & F) 761, 283
U.S.App.D.C. 142

END OF DOCUMENT

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458
536569	1484842 1485192		1488483 1488504 1489050
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 15 - 418 F2d 1153



WAIT Radio v. F. C. C., C.A.D.C. 1969.

United States Court of Appeals District of Columbia
Circuit.

WAIT RADIO, a Co-partnership, Appellant,
v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee, Carter Publications, Inc., Clear Channel
Broadcasting Service, A. H. Belo Corporation, Mid-
west Radio-Television, Inc., Intervenors.

No. 21689.

Argued Dec, 13, 1968.

Decided June 24, 1969.

The Federal Communications Commission denied an application for waiver of Commission's clear channel rules and applicant appealed. The Court of Appeals, Leventhal, Circuit Judge, held that Federal Communications Commission must state basis for its denial of waiver of clear channel rules with clarity and failure to do so required remand of radio station's application which contained information showing that such waiver would be consistent with underlying policy of rules.

Remanded.

Danaher, Circuit Judge, dissented.

West Headnotes

[1] Telecommunications 372 **1132**

[372](#) Telecommunications

[372V](#) Television and Radio Broadcasting

[372k1125](#) Administrative Procedure

[372k1132](#) k. Findings and Determination.

[Most Cited Cases](#)

(Formerly 372k416)

Telecommunications 372 **1144**

[372](#) Telecommunications

[372V](#) Television and Radio Broadcasting

[372k1134](#) Judicial Review or Intervention

[372k1144](#) k. Determination and Disposition; Dismissal and Further Review. [Most Cited Cases](#)

(Formerly 372k426, 372k8)

Federal Communications Commission must state basis for its denial of waiver of clear channel rules with clarity and failure to do so required remand of radio station's application which contained information showing that such waiver would be consistent with underlying policy of rules. Communications Act of 1934, § 402, [47 U.S.C.A. § 402](#).

[2] Administrative Law and Procedure 15A **484.1**

[15A](#) Administrative Law and Procedure

[15AIV](#) Powers and Proceedings of Administrative Agencies, Officers and Agents

[15AIV\(D\)](#) Hearings and Adjudications

[15Ak484](#) Findings

[15Ak484.1](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly 15Ak484)

Administrative Law and Procedure 15A **489.1**

[15A](#) Administrative Law and Procedure

[15AIV](#) Powers and Proceedings of Administrative Agencies, Officers and Agents

[15AIV\(D\)](#) Hearings and Adjudications

[15Ak489](#) Decision

[15Ak489.1](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly 15Ak489)

Agency or commission must articulate with clarity and precision its findings and reasons for its decisions.

[3] Administrative Law and Procedure 15A **385.1**

[15A](#) Administrative Law and Procedure

[15AIV](#) Powers and Proceedings of Administrative Agencies, Officers and Agents

[15AIV\(C\)](#) Rules and Regulations

[15Ak385](#) Power to Make

[15Ak385.1](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly 15Ak385)

That agency may discharge its responsibility by promulgating rules of general application which, in overall prospective, establish "public interest" for broad range of situations, does not relieve it of obligation to seek out "public interest" in particular cases.

[4] Administrative Law and Procedure 15A ↪ 390.1

[15A](#) Administrative Law and Procedure

[15AIV](#) Powers and Proceedings of Administrative Agencies, Officers and Agents

[15AIV\(C\)](#) Rules and Regulations

[15Ak390](#) Validity

[15Ak390.1](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly 15Ak390)

General rule, deemed valid because its overall objectives are in public interest, may not be in "public interest" if extended to applicant who opposes new service that will not undermine policy, served by rule, that has been adjudged in public interest.

[5] Telecommunications 372 ↪ 1126

[372](#) Telecommunications

[372V](#) Television and Radio Broadcasting

[372k1125](#) Administrative Procedure

[372k1126](#) k. In General. [Most Cited Cases](#)

(Formerly 372k411.1, 372k411)

Applicants for waiver of clear channel rules need not attack general rule since essence of waiver assumes validity of general rule.

[6] Telecommunications 372 ↪ 1103

[372](#) Telecommunications

[372V](#) Television and Radio Broadcasting

[372k1095](#) Eligibility and Qualifications for License

[372k1103](#) k. Particular Cases and Problems.

[Most Cited Cases](#)

(Formerly 372k416)

It was manifest error for Commission to deny application for waiver of clear channel rules on ground that there would be violation in absence of waiver sought.

[7] Administrative Law and Procedure 15A ↪ 486

[15A](#) Administrative Law and Procedure

[15AIV](#) Powers and Proceedings of Administrative Agencies, Officers and Agents

[15AIV\(D\)](#) Hearings and Adjudications

[15Ak484](#) Findings

[15Ak486](#) k. Sufficiency. [Most Cited](#)

[Cases](#)

Telecommunications 372 ↪ 1132

[372](#) Telecommunications

[372V](#) Television and Radio Broadcasting

[372k1125](#) Administrative Procedure

[372k1132](#) k. Findings and Determination.

[Most Cited Cases](#)

(Formerly 372k416)

Commission's bare statement that application for waiver of clear channel rules did not present sufficient basis for waiver was a conclusion, not a reason.

[8] Telecommunications 372 ↪ 613

[372](#) Telecommunications

[372I](#) In General

[372k612](#) Commissions and Agencies in General

[372k613](#) k. In General. [Most Cited Cases](#)

(Formerly 372k8.1, 372k8)

That Commission's statutory assignment pertains to industry concerned with basic freedoms of expression does not subject it to unmanageable standards, either as to substantive powers or procedures, but manifest importance of subject matter means that Commission is not lightly to be indulged with dispensations from legal requirements.

****318** Mr. Arthur J. Goldberg, Washington, D.C., for appellant. Mr. Robert M. Lichtman, Washington, D.C., also entered an appearance for appellant.

Mr. Stuart F. Feldstein, Counsel, Federal Communications Commission, with whom Messrs. Henry Geller, General Counsel, and John H. Conlin, Associate General Counsel, Federal Communications Commission, were on the brief, for appellee. Mrs. Lenore G. Ehrig and Mr. Joseph A. Marino, Counsel, Federal Communications Commission, also entered appearances for appellee.

Messrs. Theodore Baron and Michael Finkelstein,

Washington, D.C., were on the brief for intervenor, Carter Publications, Inc.

Messrs. Peter Shuebruk, Herbert M. Schulkind and Howard Jay Braun, Washington, D.C., were on the brief for intervenor, Midwest Radio-Television, Inc.

Mr. R. Russell Eagan, Washington, D.C., entered an appearance for intervenor, Clear Channel Broadcasting Service.

Messrs. William J. Dempsey, and William C. Koplovitz, Washington, D.C., entered appearances for intervenor, A. H. Belo Corporation.

Before DANAHER,^{FN1} LEVENTHAL and ROBINSON, Circuit Judges.

^{FN1}. Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

LEVENTHAL, Circuit Judge:

WAIT Radio brings this appeal to protest a decision by the Federal Communications Commission rejecting as unacceptable its application for authority to operate its station on an unlimited time basis.^{FN1} We think the Commission erred by not giving adequate reasons for denying and refusing to hold a hearing on appellant's request for waiver of certain FCC rules and we remand for further consideration.

^{FN1}. WAIT Radio brings this appeal pursuant to [47 U.S.C. § 402 \(1964\)](#).

I

WAIT operates a Chicago AM radio station on a frequency of 820 kHz, one of the so-called clear channels. Under FCC 'clear channel' rules certain AM frequencies are designated as clear channels that can be used at night only by specified stations that broadcast a signal to 'white areas,' sparsely populated regions that have no local radio service.^{FN2} Because of the 'skywave contour' characteristics of nighttime radio signals, other stations broadcasting on a 'clear channel' frequency must close down at night to avoid interference in 'white' area reception with those stations particularly authorized to transmit this special nighttime signal. As a result, WAIT operates on a sunrise to sunset basis.

^{FN2}. The pertinent rules are found in [47](#)

[C.F.R. §§ 73.21, 73.25, 73.182\(a\)\(1\)\(i\), and 73.182\(w\) \(1968\)](#). While § 73.24, [47 C.F.R. § 73.24 \(1968\)](#), is also involved, it would seem that in the context of this application for waiver, it adds nothing, a point to which we will return.

During the nighttime hours the normal radio signal will travel in what the trade calls a 'skywave contour.' The effective broadcast radius of the signal projects into remote regions that cannot pick up the signal during daylight hours. The clear channel policy attempts to capitalize on this engineering phenomenon by utilizing the skywave contour of strategically located stations to service remote and sparsely populated regions of the country, so-called 'white areas,' where no local stations exist to serve the area with the so-called 'primary' radio signal that we are accustomed to tuning in on our receivers. Under Commission rules the clear channel frequencies are to be free from interference of signals from other stations.

WAIT filed an application requesting a waiver of the clear channel rules. Its proposal included plans for constructing a directionalized antenna that would *1155 **319 beam its signal away from 'white' areas that were being served by stations WBAP and WFAA, licensed to operate clear channels kHz out of Fort Worth/Dallas, Texas. WAIT's application asserted that by confining its signal, its skywave beam would not interfere with the serviceable contour of the signal from the Texas stations except in regions that receive primary groundwave service from at least one other station,^{FN3} and its ostensible violation of Commission rules would not conflict with the policy underlying the 'clear channel' rules.

^{FN3}. WAIT appended to its application detailed engineering data and a map explaining and demonstrating the range of its proposed directionalized signal. Compare [Rio Grande Radio Fellowship Inc. v. FCC, 132 U.S.App.D.C. 128, 406 F.2d 664 \(1968\)](#). The application assumed, based on 'engineering convention' that any interference beyond the '0.5 mv/m 50%' intensity of the Texas signal was not contrary to clear channel policy. In brief appellant has ex-

plained the '0.5 mv/m 50%' designation as being the outer serviceable range of a sky-wave broadcast signal. Under normal conditions it seems that beyond that range a listener will miss about 50% Of the broadcast. The Commission's opinion and order does not dispute WAIT's assertion that the '0.5 mv/m 50%' range delineates the serviceable nighttime signal. Should plans to increase the power on these stations go into effect, it does appear, as noted by intervenors, that WAIT's new service might cause interference in some areas within a '0.5 mv/m 50%' contour. The Commission's opinion, however, does not in any way rely on this fact in rejecting WAIT's application, and the application itself, envisioning such a development, seeks the new authorization subject to a change in Commission policy on broadcast power of existing clear channel stations.

A variant contention put forth by the intervening Texas stations was that interference with their signal, even beyond the '0.5 mv/m 50%' contour, runs afoul of the clear channel policy. The Commission did not rule on this contention. In its Petition for Reconsideration WAIT points out that the programming of the Texas stations does not constitute meaningful service to the non-white area market within the '0.5 mv/m 50%' contour of the Texas stations. This, according to WAIT, is also true of areas beyond the protected contour where the primary service is not only superior to the weak and intermittent reception from the Texas station, but also carries programs of greater interest and relevance to the audiences which are quite remote from the Texas area. Detailed lists were attached to the Petition identifying the cities and areas where WAIT's signal might interfere with that of the Texas stations and also identifying the available alternative services.

In support of its waiver request WAIT further alleged that its programming of 'good' music and forum discussions on matters of public interest is a unique AM service in the Chicago area. Appended to the application were supporting data, of surveys, etc., indicating listener preference for such programming. The application further alleged that the present fluctuating

broadcast schedule, dependent on the actual time of sunrise and sunset, and no evening service, is a disadvantage. WAIT makes particular reference to its distinctive adult audience, able during the evening hours to listen to, and understand, serious social, political and educational programs, and it claims that the limitation on its channel is a limitation on communication of ideas.^{FN4}

^{FN4}. The issue may be said to be whether the public interest requires limitation of the freedom of the listening public at home. Compare [Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 \(1969\)](#).

The Commission rejected WAIT's request in an opinion and order of October 25, 1967, and ordered that the application be returned as unacceptable. WAIT appeals from this decision and order and the Commission's subsequent denial of its petition for reconsideration.

II

Able arguments have been presented on both sides. Appellant stresses to us, as it did in memoranda to the Commission, that First Amendment considerations permeate the field of public broadcasting. First Amendment principles, *1156 **320 WAIT says, mean that the Commission's conceded power to license and regulate in the 'public interest' must be exercised with circumspection, that the rules must be drawn as narrowly as possible so as to give the widest possible play to freedom of expression. It is contended that the Commission's failure to waive its clear channel rules, where this underlying policy will not be infringed, is contrary to the First Amendment's policy of freedom of expression.

The Commission in effect replies to the First Amendment issue by invoking [National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 \(1943\)](#), and other decisions affirming the power to regulate the use of broadcast facilities.

[1][2] At this juncture, we do not rule on appellant's contentions, which go to the impact of the First Amendment on the substantive content of broadcast regulations. When an application pleads, and offers

factual material in support of, a non-frivolous First Amendment contention, an agency may not dismiss it with the routine treatment that might suffice in the ordinary case. We hold that the Commission must state its basis for decision with greater care and clarity than was manifested in its disposition of WAIT's claims, and remand for a clearer statement of reasons.

1. Two strands of doctrine apply to the judicial review of administrative determinations. First is the principle that an agency or commission must articulate with clarity and precision its findings and the reasons for its decisions. The importance of this requirement is inherent in the doctrine of judicial review which places only limited discretion in the reviewing court. As Justice Harlan recently said in the [Permian Basin Area Rate Cases](#), 390 U.S. 747, 792, 88 S.Ct. 1344, 1373, 20 L.Ed.2d 312 (1968):

The court's responsibility is not to supplant (a) Commission's balance of * * * competing interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry.^{FN5}

^{FN5}. See also [NLRB v. Metropolitan Life Ins. Co.](#), 380 U.S. 438, 442-443, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965); [Burlington Truck Lines, Inc. v. United States](#), 371 U.S. 156, 167-168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); [SEC v. Chenery Corp.](#), 332 U.S. 194, 67 S.Ct. 1575, 1760, 91 L.Ed. 1995 (1947); [Radio Station KFJH Co. v. FCC](#), 101 U.S.App.D.C. 164, 247 F.2d 570 (1957); [Northeast Airlines, Inc. v. CAB](#), 331 F.2d 579, 586-589 (1st Cir. 1964); Jaffe, *Judicial Control of Administrative Action* (1965).

Of course busy agency staffs are not expected to dot 'i's' and cross 't's.' Our decisions recognize the presumption of regularity.^{FN6} We adhere to 'salutary

principles of judicial restraint.'^{FN7} Courts are indulgent toward administrative action to the extent of affirming an order where the agency's path can be 'discerned' even if the opinion 'leaves much to be desired.'^{FN8}

^{FN6}. See [Braniff Airways, Inc. v. CAB](#), 126 U.S.App.D.C. 399, 406, 379 F.2d 453, 460 (1967), where we said 'A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues.'

^{FN7}. See [id. at 409, 379 F.2d at 463](#), alluding to 'salutary principles of judicial restraint.'

^{FN8}. See [Colorado Interstate Gas Co. v. FPC](#), 324 U.S. 581, 595, 65 S.Ct. 829, 89 L.Ed. 1206 (1945); [Pikes Peak Broadcasting Co. v. FCC](#), D.C.Cir. No. 22023, March 24, 1969, slip op. at 18, where we concluded we were 'satisfied that the Commission gave * * * a hard look.'

*1157 **321 2. The tension between these principles is heightened when a court undertakes to review administrative action on an application for waiver. Presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule. An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.' [Rio Grande Family Radio Fellowship, Inc. v. FCC](#), supra note 3. Yet an application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. [Permian Basin Area Rate Cases](#), supra; [FPC v. Texaco, Inc.](#), 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112 (1964);

[United States v. Storer Broadcasting Co.](#), 351 U.S. 192 at 204-205, 76 S.Ct. 763, 100 L.Ed. 1081 (1956); [National Broadcasting Co. v. United States](#), 319 U.S. 190, 63 S.Ct. 997 (1943); [American Airlines v. CAB](#), 123 U.S.App.D.C. 310, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966); [Pikes Peak Broadcasting v. FCC](#), *supra* note 8; [WBEN, Inc. v. United States](#), 396 F.2d 601, 618 (2d Cir. 1968), cert. denied, 393 U.S. 914, 89 S.Ct. 240, 21 L.Ed.2d 200 (1968).

[3][4] The salutary presumptions do not obviate the need for serious consideration of meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the 'public interest.' That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases. A general rule implies that a commission need not re-study the entire problem de novo and reconsider policy every time it receives an application for waiver of the rule. On the other hand, a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest. An agency need not sift pleadings and documents to identify such applications, but allegations such as those made by petitioners, stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a 'hard look.'

[FN9](#). See [Pikes Peak Broadcasting v. FCC](#), *supra* note 8.

The agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to hollow claims. The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary. Even when an application complies with these rigorous requirements, the agency is not required to author an essay for the dis-

position of each application. It suffices, in the usual case, that we can discern the 'why and wherefore.' See [Rio Grande Radio Family Fellowship, Inc. v. FCC](#), *supra* note 3.

[5] 3. These principles are not easily reduced to a quantifiable formula for deciding when an agency disposing of a waiver application has crossed the line from the tolerably terse to the intolerably mute. There are strong indications that the boundary has been transgressed in the case before us. The Commission's order suggested, and perhaps even required, that WAIT's waiver application may not be entertained because it failed to proceed broadside against the clear channel policy.[FN10](#) The Commission's view that WAIT's request for waiver must fall *1158 **322 in the absence of an attack on the general rule is underscored by its disposition of appellant's petition for reconsideration.[FN11](#) This approach is without merit. The very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted. And as already noted, provision for waiver may have a pivotal importance in sustaining the system of administration by general rule.

[FN10](#). See P6 of the Commission's opinion, set forth at note 12, *infra*.

[FN11](#). The Commission made a point of noting in its denial of reconsideration that 'WAIT had not attacked the Commission's Clear Channel policy or urged revision of these rules. * * *'

[6][7] The somewhat perfunctory treatment in the Commission's opinion is capped by the startling statement in paragraph 6 that the application is subject to dismissal out of hand because it revealed that in the absence of waiver there would be a violation of the Commission's rules.[FN12](#)

[FN12](#). The Commission said (P6):

On the basis of appellant's statement that it does not attack the Clear Channel doctrine or policy of the Commission or urge reconsideration or revision of the Clear Channel rules, it is difficult to perceive a possible legal basis for the requested action in view

of the clear and acknowledged violations of [Sections 73.21, 73.25](#) and [73.182](#) of the Rules, which establish the so-called Clear Channels and the technical specifications for their use.

It is manifest error to deny a waiver on the ground that there would be a violation in the absence of the waiver sought.

The error is not retrieved by P7. Its bare statement that the application does not present a sufficient basis for waiver is a conclusion, not a reason. And paragraph 7 also reflects the view that overbreadth does not provide a possible legal basis for granting a waiver.

Compare [West-Michigan Telecasters, Inc. v. FCC, 130 U.S.App.D.C. 39, 396 F.2d 688 \(1968\)](#).

It may be that points raised on appeal by Commission counsel would support its order if they had been set forth by the agency, but argument by counsel cannot take the place of an agency's statement of reasons or findings. [FN13](#) Those points noted by counsel which do appear in the opinion are set forth merely as contentions of opponents not as reasons of the Commission. [FN14](#) Nor are the difficulties obviated by the opinion denying reconsideration, which purports to be only a restatement of the original opinion. That opinion reiterates that the circumstances showed an operation in violation of rules, a point we take as a tautology inevitable in an application for waiver, but which the Commission mistakenly takes as a reason for denial.

[FN13](#). See *NLRB v. Metropolitan Life Ins. Co.*, supra note 5; *Burlington Truck Lines, Inc. v. United States*, supra note 5; *West-Michigan Telecasters, Inc. v. FCC*, supra note 12; *Braniff Airways, Inc. v. CAB*, supra note 6. Counsel argued that allocation of 820 kHz to WAIT would be an inefficient use of the wave lengths. A directionalized transmitter would fail to serve 30% Of the population and 80% Of the area within WAIT's normally protected contour. Counsel also noted that stations in other areas might provide an additional primary service in a non-white area and also further Clear Channel policies if 820 kHz were in fact to be duplicated. It was further argued that the

secondary service to areas receiving primary service on one or two frequencies is relevant to the decision of whether waiver should be granted.

[FN14](#). The opinion also notes the proposals pending before the Commission to authorize high-power transmitters which would increase the effective radius of the sky-wave signal. Such increase in signal strength would result in interference over 'white' areas by WAIT's signal. The Commission also stated without elaboration the contention by intervenors, and urged by counsel on appeal, that the additional skywave service in areas with limited primary service is relevant to the decision to grant a waiver. See note 3, supra. Compare [Permian Area Basin Rate Cases, supra, 390 U.S. at 804, 88 S.Ct. 1344](#).

We need not here decide whether the FCC could decline WAIT's request on the ground that a temporary waiver would be an unacceptable administrative burden, or would generate a sense of vested interest or related pressures interfering with future flexibility in the administrative process.

***1159 **323** This is not the kind of case in which the court may be asked to 'cut and sew the meager materials at hand into the pattern which we guess the Commission had in mind.' [FN15](#) A willingness to undertake minor alterations on an opinion already made is not an undertaking to custom tailor a new one.

[FN15](#). See the concurring remarks of Mr. Justice Douglas in [ICC v. Columbus & Greenville Ry., 319 U.S. 551, at 559, 63 S.Ct. 1209, at 1213, 87 L.Ed. 1580 \(1943\)](#).

4. The court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers. On the contrary a rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ig-

nore, at least on a continuing basis. The limited safety valve permits a more rigorous adherence to an effective regulation. [FN16](#)

[FN16](#). See Leventhal, Reviewing the Permian Basin Area Gas Price Hearings, Public Utilities Fortnightly (March 12, 1964). Compare [Permian Area Basin Rate Cases](#), *supra*, 390 U.S. at 822, 88 S.Ct. 1344.

Sound administrative procedure contemplates waivers, or exceptions granted only pursuant to a relevant standard- expressed at least in decisions accompanied by published opinions, especially during a period when an approach is in formation, but best expressed in a rule that obviates discriminatory approaches. [FN17](#) The agency may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function. The process viewed as a whole leads to a general rule, and limited waivers or exceptions granted pursuant to an appropriate general standard. This combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility.

[FN17](#). [City of Chicago v. FPC](#), 128 U.S.App.D.C. 107, 385 F.2d 629 (1968); cert. denied, [Public Service Commission of Wisconsin v. F.P.C.](#), 390 U.S. 945, 88 S.Ct. 1028, 19 L.Ed.2d 1133 (1968).

[8] 5. We have identified deficiencies in the FCC's opinion rejecting the application for waiver. We have examined the significance of the waiver procedure and pointed out that it is not necessarily a step-child, but may be an important member of the family of administrative procedures, one that helps the family stay together. These suffice for the case at hand, and we have no occasion to consider to what extent the overbreadth principle of First Amendment cases narrows the range of administrative discretion consistent with the general standard of 'public interest' and places a special burden on the Federal Communications Commission not to maintain its general rules in

an instance or class of instances not strictly furthering the policy of the regulation. [FN18](#) That the Commission's statutory assignment pertains to an industry concerned with basic freedoms of expression does not subject it to unmanageable standards, either as to substantive powers or procedures. But the manifest importance of subject-matter means that the Commission is not lightly to be indulged with dispensations from legal requirements. [FN19](#)

[FN18](#). Compare, e.g., [Brown v. Louisiana](#), 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); [NAACP v. Alabama](#), 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); [Bates v. Little Rock](#), 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960). [Schneider v. State of N.J., Town of Irvington](#), 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[FN19](#). See [Joseph v. FCC](#), 131 U.S.App.D.C. 207, 404 F.2d 207, 212 (1968); compare [Northern Nat. Gas Co. v. FPC](#), 130 U.S.App.D.C. 220, 399 F.2d 953 (1968); see also [Berko v. SEC](#), 297 F.2d 116, 118 (2d Cir. 1961).

***1160 **324** We think the pleading filed by WAIT, supported by data sufficient to overcome the initial hurdle, was entitled to reflective consideration. On balance we conclude the Commission's treatment, with its 'combination of danger signals,' [FN20](#) belies the 'hard look' the application merited. [FN21](#) We do not rule on substantive contentions, but remand for further consideration.

[FN20](#). See [Joseph v. FCC](#), *supra*, 131 U.S.App.D.C. at 212, 404 F.2d at 212.

[FN21](#). Compare [Pike's Peak Broadcasting Co. v. FCC](#), *supra* note 8, where we noted that a commission's order would be sustained where the agency took 'a hard look' at petitioner's contentions even though 'the standard (applied) would perhaps have become sharper had the Commission focused upon clearer rebuttal of petitioner's central allegations.' Slip op. at 17.

The Commission's conclusory reasoning and mechan-

ical reliance upon [National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997 \(1943\)](#), do not resolve appellant's contentions. WAIT, by seeking waiver, challenged neither the Commission's power to regulate, nor the validity of the general application of the clear channel rules. The issue is whether the Commission may curtail access to broadcast facilities by those applicants who, although technically in violation of a Commission rule, will not be undermining the purpose or policy which the rule was designed to further.

So ordered.

DANAHER, Circuit Judge (dissenting):

When reduced to its bare bones, this appeal presents only a claim that these appellants are entitled as a matter of law to an additional primary nighttime radio service to reach some 7 million people in the Chicago area. They even ask this court to direct that their 'application be accepted for filing and that upon acceptance the application be granted.' In those very words, their brief so concludes.

Never mind the Commission's Clear Channel doctrine or its policy; forget that the proposal patently violates the spirit and the letter of the provisions primarily of [section 73.24\(b\)\(3\)](#), and of other Rules in lesser degree; appellants want a larger audience; they wish to provide the Chicago area with a type of programming which they blandly say the listening audience should have. If their application be not granted, First Amendment rights will be flouted, they argue. Such is the posture of the case as submitted to the Commission and now to this court.

My colleagues remand, calling upon the Commission to articulate its reasons for refusing to grant a waiver of its long-standing Rules. It seems to me fundamental that the burden of making an adequate showing as to any such claimed entitlement rested upon the appellants. On the face of their application when read with their engineering exhibit against the Commission's standards, they wholly failed to sustain that burden, and the Commission so perceived.

Their application before the Commission disclosed that they would subject to interference an area of

some 70,700 square miles and a population of some 2,165,502. Mr. Maurice Rosenfield, Managing Partner and Executive Director, represented that the appellants, including their counsel, not only were aware of legislative and administrative action but that through staff conferences and written directions and memoranda, the Station's employees and agents are kept informed of requirements. Thus the partners knew when they acquired the station in 1962 that they were permitted to operate, daytime only, on 820 kc. They were aware, of course, that they were to be 'silenced' at night, although they now complain that they are being 'silenced' by the Commission's action here challenged. They knew all along that the channel was one of the Class I unduplicated clear channels, reserved for the exclusive use of one station during nighttime hours, and entitled to protection from co-channel interference. Even so, in the instant proceeding, the appellants did not attack the clear ***1161**325** channel policy. They did not seek revision of the Commission's Rules. They simply said that despite the Rules, they are entitled to a nighttime audience in the city of Chicago, notwithstanding that their own application showed that the area 'is served by more than twenty-five AM stations and sixteen FM stations.'

Since their application said that they keep abreast of pertinent legislative and administrative actions, the appellants knew that the Commission's 1961 Report and Order in its Docket 6741 provided that 820 kc is one of 12 clear channels, not to be duplicated at night, and already reserved for expansion of 'white area' service. In like manner, the appellants must have been aware of the Commission's 1962 Memorandum and Order which provided that the same clear channel, on 820 kc, was to be retained, subject to exploitation through the possible use of higher power.

Above all- indeed, without more- the application was defective as the appellants conceded, and accordingly the Commission noted, 'that the proposal would cause interference as defined by [section 73.24\(b\)\(3\)](#).' **FN1**

FN1. That section provides in pertinent part that authorization for increase in the facilities of an existing station will be issued only

after a satisfactory showing has been made 'That a proposed new nighttime operation * * * would (i) not cause objectionable interference to any existing station * * * and (ii) provide a first primary AM service to at least 25 per cent of the area within the proposed interference free nighttime service area.' Oddly enough, their opening brief here made no mention whatever of this threshold rule, and in their reply brief they rested solely on their 'constitutional argument.'

Obviously, the Commission could see right on the face of the application with its attached engineering exhibit that WAIT could not meet the established requirements. The Commission itself from its records and from its own engineering certainly knew what the appellants knew. Not only can it be seen from the text of the Commission's original Memorandum Opinion and Order that consideration had been given to the showing submitted by the appellants, but notice was taken of its lack of showing. The appellants' pleadings and exhibits had received a 'hard look,' I suggest. The appellants simply could not comply with the requirements, and the Commission in footnote 1 of its Memorandum Opinion and Order made specific reference to the appellants' engineering exhibit, there pointing out:

The proposal would cause prohibited interference to an area approximately 850 miles long and 150 miles deep at its center, or what the appellant describes as 'a territorial crescent 100% Served via groundwave from local stations.' Also, the proposal would not satisfy the '25% White area' requirements of this section.

So it was that the Commission concluded based upon its knowledge of the problem, its expertise in the field, the pleadings submitted, and as noted in paragraphs 6 and 7 of its Memorandum Opinion and Order, that the appellants had failed to present facts which would justify their request for waiver. So it was that the appellants' application was returned 'as unacceptable for filing.'

The Commission's action finds support in our cases,[FN2](#) and in the rulings [FN3](#) of the Supreme Court.

[FN2. Carter Mountain Transmission Corporation v. FCC, 116 U.S.App.D.C. 93, 98, 321 F.2d 359, 364, cert. denied, 375 U.S. 951, 84 S.Ct. 442, 11 L.Ed.2d 312 \(1963\); Interstate Broadcasting Co. v. FCC, 105 U.S.App.D.C. 224, 228, 231, 265 F.2d 598, 602, 605 \(1959\). Cf. Transcontinent Television Corporation v. FCC, 113 U.S.App.D.C. 384, 389, 308 F.2d 339, 344 \(1962\).](#)

[FN3. Nat. Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 \(1943\).](#)

I would accept the record just as did the Commission and make my assessment particularly in light of the Commission's *1162 **326 expertise,[FN4](#) here called for in singular degree. Finding that the appellants had wholly failed to justify their requested waiver, I would suppose there was no alternative to a return of the application. As for the First Amendment contention, I would certainly agree that the right of free speech does not include the right to use the facilities of radio without a license and, assuredly, unless a construction permit were to be authorized in accordance with Commission rules, there could be no license. I see here no denial of free speech.

[FN4.](#) See cases cited in notes 2 and 3 supra. Especially take note of the Commission's policy and the findings exemplified in the 1961 and 1962 orders relating to the clear channel program, text supra, which would here be reduced to sheer vacuity.

I will let Mr. Justice Frankfurter speak [FN5](#) for me, thus:

[FN5. Nat. Broadcasting Co. v. United States, supra note 3, 319 U.S. at 226, 63 S.Ct. at 1014.](#)

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free

418 F.2d 1153, 16 Rad. Reg. 2d (P & F) 2107, 135 U.S.App.D.C. 317
(Cite as: 418 F.2d 1153)

speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. [FN6](#)

[FN6](#). Cf. [Red Lion Broadcasting Co. v. FCC](#), 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

I oppose the remand. I would affirm the Commission.

C.A.D.C. 1969.

WAIT Radio v. F.C.C.

418 F.2d 1153, 16 Rad. Reg. 2d (P & F) 2107, 135 U.S.App.D.C. 317

END OF DOCUMENT

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458
536569	1484842 1485192		1488483 1488504 1489050
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 17 - Kan-Ed - FCC-06-170A1

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

In the Matter of
Request for Waiver of the Decision of the
Universal Service Administrator by
Kan-ed, Kansas Board of Regents
Topeka, Kansas
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-449052
CC Docket 02-6

ORDER

Adopted: November 21, 2006

Released: November 22, 2006

By the Commission:

I. INTRODUCTION

1. In this Order, we grant partial relief to Kan-ed, Kansas Board of Regents (Kan-ed), which is appealing a decision by the Universal Service Administrative Company (USAC) that denied Kan-ed funding from the schools and libraries universal service support mechanism because USAC determined that Kan-ed failed to provide evidence of authority to represent its consortium members. We remand the underlying application to USAC for action consistent with this Order, and, to ensure that it is resolved expeditiously, we direct USAC to issue an award or a denial based on a complete review and analysis no later than 90 days from release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, also known as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connection services. In accordance with the Commission's rules, an applicant must file with USAC, for posting to USAC's website, an FCC Form 470 requesting discounted services. After an applicant has entered into

1 Letter from Jerry Huff, Director of Business Operations & Planning, Kan-ed, Kansas Board of Regents, Topeka, Kansas, to Federal Communications Commission, Request for Waiver, File No. 449052, CC Docket Nos. 96-45 and 02-6, filed Mar. 23, 2006 (Request for Waiver). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 47 C.F.R. §§ 54.501-54.503.

3 The applicant must wait 28 days before entering into an agreement with a service provider for the requested services. 47 C.F.R. § 54.504(b). See also Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (Funding Years 2000, 2001, 2002 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB

agreements for eligible services with one or more service providers, it must file an FCC Form 471 with USAC.⁴

3. The Commission's rules allow schools and libraries to form consortia for purposes of seeking competitive bids on their service requests.⁵ Because discounts are restricted by statute to "bona fide request[s]" for services, a consortium application may only be submitted on behalf of schools and libraries that have actually authorized the consortium to make the request.⁶ By signing the FCC Form 471, the applicant is certifying that it is authorized to submit and certify to the accuracy of the application on behalf of all consortium members.⁷ USAC must ensure that the consortium members are aware of the application to be filed and how that application obligates the expenditure of financial and professional resources.⁸ Ensuring that a school or library is aware of and approves the application on its behalf also helps to avoid cases of duplicative requests from different applicants applying on behalf of the same school or library.⁹ In *Project Interconnect*, the Wireline Competition Bureau (the Bureau) affirmed USAC's requirement that an applicant applying as a consortium must submit a letter of agency (LOA) from each of its members expressly authorizing the applicant to submit an application on its behalf.¹⁰ Specifically, the Bureau found that this requirement is consistent with USAC's authority to implement administrative procedures that ensure compliance with the Commission's rules and requirements as

(...continued from previous page)

3060-0806 (April 2002) (Funding Year 2003 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (May 2003) (Funding Year 2004 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (Funding Year 2005 FCC Form 470) (collectively, FCC Form 470).

⁴ The FCC Form 471 notifies USAC of the services that have been ordered, the service providers with which the applicant has entered into an agreement, and an estimate of funds needed to cover the discounts to be given for eligible services. 47 C.F.R. § 54.504(c). See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (December 1997) (Funding Year 1999 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (Funding Year 2000 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (Funding Year 2001 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (Funding Year 2002 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2003) (Funding Year 2004 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (Funding Year 2005 FCC Form 471) (collectively, FCC Form 471).

⁵ 47 C.F.R. § 54.501(d)(1).

⁶ 47 U.S.C. § 254(h)(1)(B).

⁷ 47 C.F.R. § 54.501(c)(1). See also USAC Website, Letter of Agency, <http://www.universalservice.org/sl/tools/reference/letters-of-agency.aspx> (retrieved Sept. 7, 2006) (LOA Guidance); FCC Form 471, Item 33, Block 6.

⁸ *Request for Review of the Decision of the Universal Service Administrator by Project Interconnect, Brooklyn Park, Minnesota, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, File Nos. SLD-146858, 146854, CC Docket Nos. 96-45, 97-21, Order, 16 FCC Rcd 13655, 13659, para. 10 (Common Car. Bur. 2001) (*Project Interconnect Order*). The Wireline Competition Bureau was formerly known as the Common Carrier Bureau.

⁹ *Id.*

¹⁰ *Id.* at 13658, para. 8. USAC requires an LOA to contain the following five elements: the name of the person filing the application; the name of the person authorizing the filing of the application; the specific time frame the LOA covers; the signature, date, and title of an official who is an employee of the entity who is authorizing the filing of the application; and the type of services covered by the LOA. See LOA Guidance. In certain situations, other documentation, such as evidence that each consortium member knew it was represented on the application, may be accepted as proof of authorization. *Id.*

established in the Commission's *Eighth Reconsideration Order*.¹¹ In lieu of an LOA, according to USAC's guidelines, "[c]onsortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory" may provide "copies of the relevant state statute or regulation."¹² In Funding Year 2005, USAC began requiring applicants to obtain signed LOAs from each consortium member prior to the certification date of their FCC Form 471.¹³

4. *Kan-ed's Request for Waiver.* The Kansas Legislature, in the Kan-ed Act, empowered the Kansas Board of Regents to create a state-wide network to which all public and regulated private schools and public libraries will eventually be able to connect for broadband Internet and Intranet access for the purpose of distance learning.¹⁴ Section 75-7223(b) of the Kan-ed Act prohibits the network from impairing existing contracts for service between providers and schools or libraries and prohibits state ownership or construction of any new network facilities.¹⁵ Thus, the Kan-ed Act created a public-private partnership whereby all schools and libraries could request membership and apply for assistance to gain connectivity to the Kan-ed network through coordination with their local providers.¹⁶ In order to become a member, a school or library must complete a form to join the network and may renew their membership in subsequent years via an online form.¹⁷

5. Subsequent to the passage of the Kan-ed Act, the Kansas Board of Regents created an entity, Kan-ed, to contract, through competitive bidding, with private telecommunications and cable providers to create, operate and maintain the Kan-ed network.¹⁸ Kan-ed provides only the backbone, and not the individual connections, to each school district, school and library.¹⁹ Thus, Kan-ed states that since it provides only the backbone, its network costs are largely independent of the number of entities served.²⁰

¹¹ See 47 C.F.R. § 54.705(a)(1) (setting forth the functions of the Schools and Libraries Committee) and 47 C.F.R. § 54.701(g)(i) (directing the Administrator to establish the Schools and Libraries Division, and setting forth its functions). See also *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, Third Report and Order 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, 25075-76, paras. 30-31, 34 (1998) (*Eighth Reconsideration Order*) (describing the functions of the Schools and Libraries Committee).

¹² See LOA Guidance.

¹³ See *id.* See also February 2005 Announcements, Sample Letter of Agency (LOA) Available (2/1/05), available at <http://www.universalservice.org/sl/tools/news-archive/2005/022005.asp#020105a> (retrieved Sept. 7, 2006).

¹⁴ Kan. Stat. Ann. § 75-7221, *et seq.* (2001). See also Letter from Hal Gardner, Executive Director, Kan-ed, Kansas Board of Regents, to Schools and Library Division, Universal Service Administrative Company, dated Sept. 4, 2005, at 1 (Gardner Letter) (responding to a Program Integrity Assurance (PIA) request from USAC for additional information concerning Kan-ed's application). The PIA review process examines applicants' FCC Forms 471 and other documentation to ensure that the discounts recipients seek are for eligible services, provided to eligible entities, and for eligible uses. During this process, USAC may ask for additional documentation to support the statements made in the application. See USAC Website, Program Integrity Assurance (PIA), <http://www.sl.universalservice.org/reference/6pia.asp> (retrieved Sept. 8, 2006).

¹⁵ Kan. Stat. Ann. § 75-223(b)(1); Request for Waiver at 2.

¹⁶ *Id.*

¹⁷ E-mail from Don Dietrich, E-rate Consultant to Kan-ed, to Schools and Libraries Division, Universal Service Administrative Company, dated Sept. 16, 2005 (Dietrich E-mail). Kan-ed also states that these renewals are certified annually by an independent agency. *Id.*

¹⁸ Gardner Letter at 1.

¹⁹ Request for Waiver at 2.

²⁰ *Id.*

Kan-ed has applied for E-rate funds since Funding Year 2002 on behalf of its members under the authority of the Kan-ed Act.²¹

6. On January 25, 2006, USAC issued its Funding Commitment Decision Letter to Kan-ed, denying Kan-ed's application in its entirety because a substantial number of the LOAs or other documentation authorizing the filing of Kan-ed's FCC Form 471 were not signed before the FCC Form 471 certification date or were not provided to USAC.²² On March 23, 2006, Kan-ed filed with the Commission a Request for Waiver, appealing USAC's decision.²³ Kan-ed contends that its network is successful in securing Internet and Intranet access in a manner that prevents duplication of requests for support, allows input from and cooperation with the private sector, and provides access to the educational benefits of distance learning.²⁴ In addition, Kan-ed also requests that it be allowed to add members to Block 4 of its FCC Form 471 for Funding Year 2006 to enable any school or library that had not signed an LOA by February 16, 2006, the certification date of its Funding Year 2006 FCC Form 471 to join its consortium during the funding year and receive discounts.²⁵

III. DISCUSSION

7. Based on the record before us, we grant partial relief to Kan-ed, allowing it to file its LOAs for Funding Years 2005 and 2006 after the certification of its FCC Forms 471.²⁶ We deny, however, Kan-ed's request to add members to Block 4 of its Funding Year 2006 FCC Form 471 throughout the funding year.²⁷

8. USAC denied Kan-ed's entire application because more than 30 percent of its LOAs were deemed incomplete.²⁸ Section 54.504(d) of the Commission's rules states that, "[i]f 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."²⁹ Thus, the 30 percent rule ensures that applicants carefully evaluate the eligibility of the services for which they seek discounts. The 30 percent rule, however, does not apply to the submission of completed LOAs. We find that to deny an entire application because 30 percent of a consortium's members either did not submit an LOA or submitted a deficient LOA would unfairly penalize the entire consortium where only a few members of the consortium fail to produce the requested documentation. Further, such a denial may make applicants reluctant to risk applying with a consortium, in contravention of the Commission's stated desire to "encourage schools and libraries to aggregate their

²¹ *Id.*

²² See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Bradley Williams, Kan-ed, dated Jan. 25, 2006 (Funding Commitment Decision Letter).

²³ Request for Waiver at 2.

²⁴ See Gardner Letter at 3.

²⁵ Request for Waiver at 5. Funding Year 2006 began on July 1, 2006 and ends on June 30, 2007.

²⁶ Request for Waiver at 2.

²⁷ *Id.* at 5.

²⁸ See *Id.* at 2. See also Funding Commitment Decision Letter at 5-12 ("Funding was denied because a substantial number of the Letters of Agency or other documentation authorizing the filing of the Form 471 were not signed before the 471 Certification Postmark Date or were not provided.") USAC's policy allows consortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory to provide copies of the relevant state statute or regulation as proof of authority. See LOA Guidance. We note that Kan-ed cannot rely on its statutory authority to supplant the LOA requirement because membership in Kan-ed by schools and libraries is not mandatory. See Gardner Letter at 1.

²⁹ 47 C.F.R. § 54.504(d).

demand with others to create a consortium with sufficient demand to attract competitors and thereby negotiate lower rates.”³⁰

9. Given the confusion surrounding the application of the 30 percent rule to Kan-ed’s LOAs, we now allow Kan-ed to obtain and submit to USAC updated LOAs for the 2005 Funding Year from all of its members within 30 days from the release of this Order to ensure that each school and library listed had actually authorized Kan-ed to apply on its behalf. To the extent that Kan-ed did not have LOAs for the entities listed in Block 4 of its Funding Year 2006 FCC Form 471 prior to its certification date, we also allow Kan-ed 30 days from the date of release of this Order to obtain and submit to USAC all of the LOAs for its Funding Year 2006 application. If Kan-ed is unable to obtain LOAs from every entity listed on Block 4 of its Funding Year FCC Form 471 within 30 days, we direct USAC to remove those entities from the application and adjust Kan-ed’s funding request accordingly, rather than deny the entire application. We find that denying the entire application under these circumstances would unfairly penalize the entire consortium where only a few members of the consortium failed to produce the requested documentation.³¹ We emphasize that we are not relieving Kan-ed of the obligation to obtain LOAs from its members, we are merely granting Kan-ed additional time in which to produce to USAC proof of its authority to apply on behalf of its members.³²

10. We deny, however, Kan-ed’s request to add members to Block 4 of its Funding Year 2006 FCC Form 471 throughout the funding year.³³ Section 54.507(c) requires all applications to be submitted by a date determined by USAC.³⁴ While we understand Kan-ed’s desire to provide service to entities that decide to join its consortium during the funding year, we find that allowing Kan-ed an open-ended application may undermine the integrity of the E-rate application and disbursement process.³⁵ In particular, we are concerned with the administrative burden on USAC of continually having to update and process Kan-ed’s application throughout the funding year. We are also concerned with the ability of USAC to conduct its PIA review over the course of a funding year when the number of members in a consortium’s application is constantly changing. Thus, we decline to allow Kan-ed to allow additional schools and libraries to join its consortium after the submission of its FCC Form 471 for Funding Year 2006.

³⁰ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9027, para. 476 (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 (Nov. 2, 2000).

³¹ See *Project Interconnect Order*, 16 FCC Rcd at 13661, para. 14.

³² We direct USAC to accept Kan-ed’s LOAs, even though they will not have been dated prior to the certification date of Kan-ed’s FCC Form 471.

³³ Request for Waiver at 2. Kan-ed may also amend its FCC Form 471 for clerical or ministerial errors pursuant to the Commission’s *Bishop Perry Order*. See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, et al., CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) (*Bishop Perry Order*).

³⁴ 47 C.F.R. § 54.507(c). For Funding Year 2006, the FCC Form 471 filing window closed on February 16, 2006. In the *Bishop Perry Order*, we allowed applicants to correct ministerial or clerical errors after the close of the FCC Form 471 filing window, but Kan-ed is requesting a waiver to make substantive changes to its application throughout the funding year. See *Bishop Perry Order*, 21 FCC Rcd at 5319, para. 8.

³⁵ 47 U.S.C. § 254. See also *1997 Universal Service Order*, 12 FCC Rcd at 9076-80, paras. 570-80.

11. Accordingly, we remand the underlying application to USAC for further processing consistent with our actions in this Order. To ensure that the application is processed expeditiously, we direct USAC to issue an award or a denial based on a complete review and analysis no later than 90 days from release of this Order. We emphasize the limited nature of this decision. Our action here does not eliminate USAC's current procedure requiring that an applicant applying for funding on behalf of a consortium have signed LOAs in place prior to submitting an FCC Form 471 or demonstrate its authority through alternative means, such as state statute or regulation.³⁶ We continue to require E-rate applicants to submit complete and timely information to USAC as part of the application review process.

12. Finally, we are committed to guarding against waste, fraud, and abuse, and to ensuring that funds disbursed through the E-rate universal service mechanism are used for appropriate purposes.³⁷ Our action here in no way affects the authority of the Commission or USAC to conduct audits or investigations to determine compliance with E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred and whether recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that Kan-ed, Kansas Board of Regents' Request for Waiver IS GRANTED IN PART AND DENIED IN PART, as described herein.

14. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that Kan-ed, Kansas Board of Regents SHALL PROVIDE to USAC evidence of registration of those entities listed in Block 4 of its Funding Year 2005 FCC Form 471 and LOAs for all of its consortium members for its Funding Year 2006 application within 30 days from release of this Order.

15. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that Kan-ed, Kansas Board of Regents' Request for Waiver IS REMANDED to USAC for further consideration in accordance with the terms of this Order.

16. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, USAC SHALL COMPLETE its review of the underlying application of Kan-ed, Kansas Board of Regents and ISSUE an

³⁶ See *supra* para. 3. See also LOA Guidance.

³⁷ See *Bishop Perry Order*, 21 FCC Rcd 5316.

award or a denial based on a complete review and analysis no later than 90 days from release of this Order.

17. IT IS FURTHER ORDERED that this Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Orangeburg County School District 3
BEN 127124

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458
536569	1484842 1485192		1488483 1488504 1489050
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

Letter of Appeal
Federal Communications Commission
March 16, 2007

NOTE 18 - 47 USC 254h

47 U.S.C.A. § 254

**Effective: January 08, 2002**United States Code Annotated [Currentness](#)

Title 47. Telegraphs, Telephones, and Radiotelegraphs

Chapter 5. Wire or Radio Communication ([Refs & Annos](#)) ▣ [Subchapter II](#). Common Carriers ([Refs & Annos](#)) ▣ [Part II](#). Development of Competitive Markets ([Refs & Annos](#))**→ § 254. Universal service****(a) Procedures to review universal service requirements****(1) Federal-State Joint Board on universal service**

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under [section 410\(c\)](#) of this title a proceeding to recommend changes to any of its regulations in order to implement [sections 214\(e\)](#) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under [section 410\(c\)](#) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost

areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission

may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under [section 214\(e\)](#) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to

the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All 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 under subsection (c)(3) of this section, 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. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall--

- (i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or
- (ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules--

- (A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and
- (B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than \$50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [[20 U.S.C.A. § 9121](#) et seq.].

(5) Requirements for certain schools with computers having internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(I) submits to the Commission the certifications described in subparagraphs (B) and (C);

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (l) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary or secondary school as defined in [section 8801 of Title 20](#), the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to

visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without internet safety policy and technology protection measures in place

A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify 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 for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

(III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library--

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (1) of this section; and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene;

(II) child pornography; or

(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library--

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are--

(I) obscene; or

(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation**(i) In general**

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made--

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process**(I) Libraries with Internet safety policy and technology protection measures in place**

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)--

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify 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 for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

(III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in [section 7801 of Title 20](#).

(B) Health care provider

The term "health care provider" means--

- (i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical

schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term "minor" means any individual who has not attained the age of 17 years.

(E) Obscene

The term "obscene" has the meaning given such term in [section 1460 of Title 18](#).

(F) Child pornography

The term "child pornography" has the meaning given such term in [section 2256 of Title 18](#).

(G) Harmful to minors

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that--

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms "sexual act" and "sexual contact" have the meanings given such terms in [section 2246 of Title 18](#).

(I) Technology protection measure

The term "technology protection measure" means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in [section 69.117 of title 47, Code of Federal Regulations](#), and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

(l) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h) of this section, each school or library to which subsection (h) of this section applies shall--

(A) adopt and implement an Internet safety policy that addresses--

- (i) access by minors to inappropriate matter on the Internet and World Wide Web;
- (ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;
- (iii) unauthorized access, including so-called "hacking", and other unlawful activities by minors online;
- (iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and
- (v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may--

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B) of this section.

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 254, as added Feb. 8, 1996, [Pub.L. 104-104, Title I, § 101\(a\)](#), 110 Stat. 71; and amended Sept. 30, 1996, [Pub.L. 104-208](#), Div. A, Title I, § 101(e) [Title VII, § 709(a)(8)], 110 Stat. 3009-313; Dec. 21, 2000, [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, §§ 1721(a) to (f), 1732], 114 Stat. 2763, 2763A-343 to 2763A-350; Jan. 8, 2002, [Pub.L. 107-110, Title X, § 1076](#)(hh), 115 Stat. 2094.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. [House Report No. 104-204](#) and [House Conference Report No. 104-458](#), see 1996 U.S. Code Cong. and Adm. News, p. 10.

2000 Acts. [House Report No. 106-645](#) and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 2459.

2002 Acts. [House Conference Report No. 107-334](#) and Statement by President, see 2001 U.S. Code Cong. and Adm. News, p. 1230.

References in Text

This chapter, referred to in subsec. (b)(7), was in the original "this Act", meaning Act June 19, 1934, c. 652, 48 Stat. 1064, as amended, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

The Library Services and Technology Act, referred to in subsec. (h)(4), is subtitle B of [Pub.L. 94-462](#), Title II, as added by [Pub.L. 104-208](#), Div. A, Title I, § 101(e) [Title VII, § 702], Sept. 30, 1996, 110 Stat. 3009-293, which is classified generally to subchapter II ([section 9121 et seq.](#)) of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 9101 of Title 20 and Tables.

The effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, referred to in subsecs. (h)(5)(E) and (6)(E), means 120 days after Dec. 21, 2000, the effective date provided in section 1721(h) of the Children's Internet Protection Act, [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(h)], Dec. 21, 2000, 114 Stat. 2763, 2763A-350, which is set out as a note in this section.

The effective date of this subsection, referred to in subsec. (h)(5), (6), probably means Feb. 8, 1996, the approval date of [Pub.L. 104-104, Title I, § 101\(a\)](#), 110 Stat. 71, which enacted this section.

Paragraph (25) of section 8801 of Title 20, referred to in subsec. (h)(7)(A), was redesignated par. (26) by [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVI, § 1606(a)(1)], Dec. 21, 2000, 114 Stat. 2763, 2763A-334.

Amendments

2002 Amendments. Subsec. (h)(7)(A). [Pub.L. 107-110, § 1076](#)(hh), struck "paragraphs (14) and (25), respectively, of section 8801 of Title 20" and inserted "section 7801 of Title 20", and made other technical amendments.

2000 Amendments. Subsec. (h)(4). [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(d)], struck out "paragraph (5)(A)" and inserted "paragraph (7)(A)".

Subsec. (h)(5). [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(a)], redesignated former par. (5) as (7) and inserted a new par. (5).

Subsec. (h)(6). [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(b)], inserted par. (6).

Subsec. (h)(7). [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(a)(1), (c)], redesignated former par. (5) as (7), and as so redesignated inserted subpars. (D) to (I).

Subsec. (l). [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1732], added subsec. (l).

1996 Amendments. Subsec. (h)(4). [Pub.L. 104-208, § 101\(e\)](#) [§ 709(a)(8)], directed that no entity listed in this subsec. shall be entitled to preferential rates or treatment, if such entity is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act, rather than if such entity is a library not eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act.

Effective and Applicability Provisions

2002 Acts. Except as otherwise provided, amendments by [Pub.L. 107-110](#) effective Jan. 8, 2002, see [Pub.L. 107-110, § 5](#), set out as a note under [20 U.S.C.A. § 6301](#).

2000 Acts. [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(h)], Dec. 21, 2000, 114 Stat. 2763, 2763A-350, provided that: "The amendments made by this section [amending this section and enacting provisions set out as notes under this section and section 7001 of Title 20] shall take effect 120 days after the date of the enactment of this Act [Dec. 21, 2000]."

Severability of Provisions

[Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(e)], Dec. 21, 2000, 114 Stat. 2763, 2763A-350, provided that: "If any provision of paragraph (5) or (6) of section 254(h) of the Communications Act of 1934 [47 U.S.C.A. § 254(h)(5), (6)], as amended by this section, or the application thereof to any person or circumstance is held invalid, the remainder of such paragraph and the application of such paragraph to other persons or circumstances shall not be affected thereby."

Enactment of Regulations for Administration of Certain Schools and Libraries with Computers Having Internet Access

[Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1721(f)], Dec. 21, 2000, 114 Stat. 2763, 2763A-350, provided that:

"**(1) Requirement.**--The Federal Communications Commission shall prescribe regulations for purposes of administering the provisions of paragraphs (5) and (6) of section 254(h) of the Communications Act of 1934 [47 U.S.C.A. § 254(h)(5), (6)], as amended by this section.

"**(2) Deadline.**--Notwithstanding any other provision of law, the Commission shall prescribe regulations under paragraph (1) so as to ensure that such regulations take effect 120 days after the date of the enactment of this Act [Dec. 21, 2000]."

Enacting of Regulations for Internet Safety Policy Requirement for Schools and Libraries

[Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1733], Dec. 21, 2000, 114 Stat. 2763, 2763A-351, provided that: "Not later than 120 days after the date of enactment of this Act [Dec. 21, 2000], the Federal Communications Commission shall prescribe regulations for purposes of section 254(l) of the Communications Act of 1934 [47 U.S.C.A. § 254(l)], as added by section 1732 of this Act [The Children's Internet Protection Act, [Pub.L. 106-554, § 1\(a\)\(4\)](#) [Div. B, Title XVII, § 1732], Dec. 21, 2000, 114 Stat. 2763, 2763A-350]."

Universal Service Fund Payment Schedule

[Pub.L. 105-33, Title III, § 3006](#), Aug. 5, 1997, 111 Stat. 269, which made appropriations to the universal service fund in fiscal year 2001, to be disbursed on October 1, 2000, to the Administrator of the Federal universal service support programs established pursuant to this section, was repealed by [Pub.L. 105-119, Title VI, § 622](#), Nov. 26, 1997, 111 Stat. 2521.

LAW REVIEW COMMENTARIES

Deregulatory takings, breach of the regulatory contract, and the Telecommunications Act of 1996. William J. Baumol and Thomas W. Merrill, 72 New York U. L.R. 1037 (1997)

[Explaining *United States v. American Library Association*: Strictly speaking, a flawed decision. Note, 57 Baylor L. Rev. 327 \(2005\).](#)

[Filtering out protection: The law, the library, and our legacies. Note, 53 Case W. Res. L. Rev. 767 \(2003\).](#)

[Filtering the First Amendment: The constitutionality of Internet filters in public libraries under the Children's Internet Protection Act. Note, 41 Hous. L. Rev. 1437 \(2004\).](#)

The [Children's Internet Protection Act: A denial of a student's opportunity to learn in a technology-rich environment. Note, 19 Ga.St.U. L.Rev. 789 \(2003\).](#)

United states v American Library Association: Whither First Amendment Doctrine. Lillian R. BeVier, [55 Sup. Ct. Rev. 163 \(2003\).](#)

Universal service, Section 254 of the Telecommunications Act of 1966: A hidden tax? Nichole L. Millard, [50 Federal Communications L.J. 255 \(1997\).](#)

Use "The filter you were born with": The unconstitutionality of mandatory internet filtering for the adult patrons of public libraries. Richard J. Peltz, [77 Wash. L. Rev. 397 \(2002\).](#)

LIBRARY REFERENCES

American Digest System

Telecommunications  267, 307.1, 312, 323, 461.5.

Key Number System Topic No. 372.

Corpus Juris Secundum

[CJS Telecommunications § 53](#), Federal Law; Universal Service.

[CJS Telecommunications § 70](#), Discrimination -- Federal Law.

[CJS Telecommunications § 72](#), Reasonableness -- Federal Law.

[CJS Telecommunications § 77](#), Allocation of Items Among Areas, Types of Business, or Customers.

RESEARCH REFERENCES

ALR Library

[7 ALR, Fed. 2nd Series 1](#), Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet.

[92 ALR, Fed. 631](#), What Constitutes "Initial Transferee" Under [§ 550\(A\) of Bankruptcy Code](#), Which Permits Recovery of Property, or Value Thereof, from Initial Transferee of Property to Extent Transfer is Avoided.

[31 ALR 825](#), Rate of Return to Which Telephone Company is Entitled.

Encyclopedias

[61 Am. Jur. Proof of Facts 3d 51](#), Cyberporn: Transmission of Images by Computer as Obscene, Harmful to Minors or Child Pornography.

[Am. Jur. 2d NTS, Computers and the Internet § 3](#), Internet Use in Libraries; Effect on Funding.

[Am. Jur. 2d NTS, Computers and the Internet § 4](#), Requirements for Certain Schools for Purchase of Computers or With Computers Having Internet Access.

[Am. Jur. 2d Telecommunications § 17](#), Telecommunications Act of 1996--Goal of Universal Service.

Treatises and Practice Aids

[West's Federal Administrative Practice § 3536](#), Common Carrier Regulation -- Telecommunications Act of 1996.

NOTES OF DECISIONS

Explicit subsidies [3](#)

Rates of affiliated carriers [2](#)

Rulemaking [4](#)

Sufficient support [1a](#)

Universal service support [1](#)

[1](#). Universal service support

Increase in the subscriber line charge (SLC) caps for residential and single-line business telephone customers did not violate the affordability principles of the Telecommunications Act of 1996. [Texas Office of Public Utility Counsel v. F.C.C., C.A.5 2001, 265 F.3d 313](#), certiorari denied [122 S.Ct. 1537, 535 U.S. 986, 152 L.Ed.2d 464](#), on remand [2002 WL 1213038](#), on remand [2003 WL 21544089](#).

The decision of the Federal Communications Commission (FCC) to permit incumbent local exchange carriers (ILECs) to continue to recover universal service costs through access charges to interstate carriers violated requirement of the Telecommunications Act of 1996 that universal service support must be explicit, even though the FCC's order did not require ILECs to use that methods to recover costs. [Comsat Corp. v. F.C.C., C.A.5 2001, 250 F.3d 931](#). Telecommunications ↪ 869

Provision in Children's Internet Protection Act (CIPA), allowing public library patrons to request access to erroneously blocked Internet sites, was insufficient to cure statute's otherwise unconstitutional inducement of First Amendment violations; request requirement would deter patrons from accessing speech that was constitutionally protected, yet sensitive in nature. [American Library Ass'n, Inc. v. U.S., E.D.Pa.2002, 201 F.Supp.2d 401](#), probable jurisdiction noted [123 S.Ct. 551, 537 U.S. 1017, 154 L.Ed.2d 424](#), reversed [123 S.Ct. 2297, 539 U.S. 194, 156 L.Ed.2d 221](#).

When state regulations "depend on" the same interstate revenues used by federal universal service fund program, such regulations improperly "rely on" federal universal service support mechanisms in violation of Telecommunications Act. AT [T Communications, Inc. v. Eachus, D.Or.2001, 174 F.Supp.2d 1119](#).

1A. Sufficient support

Federal Communications Commission's (FCC) definition of "sufficient" in subsection of Telecommunications Act providing that federal universal service support should be explicit and sufficient to achieve the purposes of Act ignored the vast majority of Act's principles by focusing solely on the issue of reasonable comparability; FCC did not demonstrate why reasonable comparability conflicted with or outweighed the principle of affordability, or any other principle identified by Congress to guide FCC in drafting policies to preserve and advance universal service. [Qwest Communications Intern., Inc. v. F.C.C., C.A.10 2005, 398 F.3d 1222](#). Telecommunications ↪ 869

2. Rates of affiliated carriers

Federal Communications Commission's (FCC) increase in cap on Subscriber Line Charge (SLC) collected by Local Exchange Carriers (LECs) did not violate Telecommunications Act by charging SLC rates that were not just and reasonable, inasmuch as FCC did nothing to change its method of setting underlying SLC rates. [National Ass'n of State Utility Consumer Advocates v. F.C.C., C.A.D.C.2004, 372 F.3d 454, 362 U.S.App.D.C. 87](#). Telecommunications ↪ 933

The Federal Communications Commission (FCC) reasonably interpreted the Telecommunications Act provision requiring integration of long distance telecommunications rates to and from domestic noncontiguous points, so that they were equivalent to those prevailing for comparable distances in the contiguous 48 states, to apply not only to rates charged by "interstate interexchange telecommunications service providers," but also to the rates charged by their affiliated carriers; despite the absence of the word "affiliates" from the statutory text, the FCC interpreted it to apply to affiliates so that an interexchange carrier could not circumvent rate integration by providing interstate long distance service to each non-contiguous location through a separate subsidiary. [GTE Service Corp. v. F.C.C., C.A.D.C.2000, 224 F.3d 768, 343 U.S.App.D.C. 125](#). Telecommunications ↪ 950

3. Explicit subsidies

47 U.S.C.A. § 254

Federal Communications Commission's (FCC) increase in cap on Subscriber Line Charge (SLC) collected by Local Exchange Carriers (LECs) did not violate Telecommunications Act by failing to give effect to Congress's intent to remove implicit subsidies and to replace them with explicit subsidies, inasmuch as Act provided no time limit for realization of reform, and FCC's method was eminently reasonable. [National Ass'n of State Utility Consumer Advocates v. F.C.C., C.A.D.C.2004, 372 F.3d 454, 362 U.S.App.D.C. 87](#). Telecommunications ↩ 936

4. Rulemaking

Federal Communications Commission's (FCC) increase in cap on Subscriber Line Charge (SLC) collected by Local Exchange Carriers (LECs) was not arbitrary and capricious in violation of Administrative Procedure Act (APA), inasmuch as FCC adequately explained its reason, and FCC's decision, in striking balance between competing congressional directives of reducing implicit subsidies and maintaining universal service, was reasonable and supported by record evidence. [National Ass'n of State Utility Consumer Advocates v. F.C.C., C.A.D.C.2004, 372 F.3d 454, 362 U.S.App.D.C. 87](#). Telecommunications ↩ 869

47 U.S.C.A. § 254, **47 USCA § 254**

Current through P.L. 110-12 approved 03-15-07

Copr. © 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

END OF DOCUMENT

**Orangeburg County School District 3
BEN 127124**

<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>	<u>Form 471 Applicatio n Numbers</u>	<u>Funding Request Numbers</u>
526915	1482143 1482259	537502	1488212 1488234 1488261 1488284 1488302 1488458
536569	1484842 1485192		1488483 1488504 1489050
536972	1486215 1486491		
537266	1487237		
537336	1487487	537791	1489233

**Letter of Appeal
Federal Communications Commission
March 16, 2007**

NOTE 19 - FY9 LOA



Associate Superintendent
GERALD WRIGHT

Assistant Superintendent
BETTY E. GARRISON

Board of Trustees
ROBERT WILLIAMS, Chairman
JAMIE COURTNEY, Vice-Chairman
MARGARET FARMER-BELSER, Secretary
IDA D. DAMON
ALICE M. PICKNEY
BERNARD PREZZY
MINNIE SKINNER
CATHERINE BEHR, Rec. Sec.

Orangeburg County Consolidated School District Three

DAVID LONGSHORE, JR., Superintendent

Letter of Agency for Funding Year: YR9(2006-2007)
Billed Entity Number: 127124

I hereby authorize eRate, Consulting Services, LLC and it's employees; Jonathan M. Slaughter, Steve Tenzer, Carlos Alvarez, Barry Wilson, Rich Larson, Matt Hetman and Toni Ferguson to submit FCC Form 470, FCC Form 471, and other E-rate forms to the Schools and Library Division on behalf of our school district for all eligible services outlined in the most current "Eligible Services List" published by USAC.

I understand that in submitting these forms on our behalf, you are making certifications for our school district. By signing this letter of agency, I make the following certifications:

- (a) I certify that the schools in our district are all schools under the statutory definitions of elementary and secondary schools found in the Elementary and Secondary Education Act of 1965, do not operate as for-profit businesses, and do not have endowments exceeding \$50 million.
- (b) I certify that the schools in our district have secured access to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to make effective use of the services purchased as well as to pay the discounted charges for eligible services.
- (c) I certify that all schools in our district are covered, or will be covered at the time funded services are provided, by E-rate approved technology plans (unless discounts are only being requested for basic local and long distance telephone service).
- (d) I certify that our school district is compliant, or will be compliant at the time funded services are provided, with the Children's Internet Protection Act (unless discounts are only being requested for telecommunications services.)
- (e) I certify that the services that our school district purchases using E-rate discounts (as described in the law 47 U.S.C. Sec. 254) will be used solely for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value.
- (f) I certify that the entities eligible for support that I am representing have complied with all applicable state and local laws regarding procurement of services for which support is being sought.
- (g) I certify that our school district has complied with all E-rate program rules and I acknowledge that failure to do so may result in denial of discount funding and/or cancellation of funding commitments.
- (h) I understand that the discount level used for shared services is conditional, for future years, upon ensuring that the most disadvantaged schools and libraries that are treated as sharing in the service, receive an appropriate share of the benefits from those services.

P.O. BOX 98 • 1654 CAMDEN ROAD • HOLLY HILL, SOUTH CAROLINA 29059
Telephone (803) 496-3288 • Fax (803) 496-5850

(i) I certify that I am authorized to sign this letter of agency and, to the best of my knowledge, information, and belief, all information provided to E-rate Consulting Services, LLC for E-rate submission is true.

(j) I authorize E-rate Consulting Services, LLC to act as our agent in a limited capacity with any service providers to request Customer Service Records. We are NOT granting E-rate Consulting, LLC authority to make any changes on our behalf.

I understand that persons willfully make false statements on E-rate forms or through this letter of agency can be punished by fine or forfeiture under the Communications Act, 47 U.S.C. Secs. 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. Sec. 1001

Signature:

Name:

Title:

Daphne G. Walley
Daphne G. Walley
Technology Coordinator