

November 26, 2007

Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: Comment on Request for Review of a Decision of the Universal  
Service Administrator by Yonkers Public Schools, CC Docket No. 02-6

Billed Entity Name	Yonkers Public Schools	
Billed Entity Number	123703	
Funding Years	<u>2006</u>	<u>2007</u>
471 Application Numbers	534675	573346, 582763, 582934, 583098, 586037, 586093

### Comment

Earlier this month, the FCC received a Request for Review dated November 8<sup>th</sup> filed by Yonkers Public Schools in Yonkers, NY. The request deals with USAC's denial of an appeal concerning seven Yonkers' FY 2006 and FY 2007 applications for which funding had been denied as the result of a Yonkers' Red Light situation. In its Request for Review, Yonkers: (a) recounts the telephone audit issues and confusion that led to the Red Light situation; (b) reviews the procedurally difficult problems encountered by Yonkers in paying off the alleged debt; and (c), asks the FCC to reinstate the denied funding requests now that the Red Light has been lifted.

E-Rate Central, in its role as a State E-Rate Coordinator under contract with the New York State Education Department, submits these comments to:

1. Support Yonkers' request for review and/or waiver of Yonkers' Red Light funding request denials;
2. Encourage the Commission to address the related and long-standing request for waiver submitted by the New York City Department of Education ("NYCDOE") in October 2003 concerning USAC repayments due on contingent telephone auditor fees; and
3. Ask the Commission to consider the new issue raised by the Yonkers appeal concerning interest payments included in telephone audit refunds.

*Red Light Funding Denials:*

The timeline provided in the Yonkers appeal does not provide a complete picture of the timing of the USAC and FCC demand payment letters and the date on which Yonkers was placed on Red Light status. Although we believe there were extenuating circumstances, it does appear that Yonkers failed to appeal the initial demand payment letter(s) and missed the associated payment deadline(s). Not surprisingly, the failure to appeal and/or pay resulted in Yonkers' Red Light condition.

As extenuating circumstances, however, we note the following:

1. The entire demand payment request was triggered, not by an independent USAC determination of Yonkers' E-rate funding, but by Yonkers' own initiation of a telephone audit and its subsequent unilateral payment to USAC of the discounted portion of its telephone refund (net of telephone auditor fees).
2. Yonkers' liability to repay USAC the discounted portion of the gross telephone refund (including telephone auditor fees) was, and still is, subject considerable confusion as a result of the FCC's failure to rule on the NYCDOE waiver petition (see further discussion below). Specifically, the initial repayment based on the net telephone audit refund was apparently supported by SLD guidance provided to Yonkers.
3. Yonkers' initial repayment to USAC was based, not only on the net discounted refund for telephone services not received, but on the net discounted amount of associated interest payments on the earlier erroneous Verizon billings. Under current E-rate rules, there is no clear precedent requiring the repayment of any related common carrier interest payments (see further discussion below). As such, Yonkers' initial repayment may have exceeded the required repayment as calculated on the gross refund of improper telephone charges.
4. Although USAC notified Yonkers on April 17, 2007, that it was going to dismiss the pending applications, we note that all of the disputed denials in Yonkers' case actually occurred either after Yonkers had initiated attempts to repay its "debt" (first to USAC, then again to the FCC) or after the "debt" had been fully repaid. At these points, we argue that Yonkers was not, or should not have been, in a Red Light status. As such, USAC was no longer authorized to deny Yonkers' applications. In particular:

<u>FY</u>	<u>471 #</u>	<u>FCDL Date</u>	<u>Red Light Status</u>
2006	534675	5/8/2007	On, but repayment initiated 4/25/2007
2007	573346	5/23/2007	On, but repayment initiated 4/25/2007
2007	582763	5/23/2007	On, but repayment initiated 4/25/2007
2007	582934	5/23/2007	On, but repayment initiated 4/25/2007
2007	583098	5/23/2007	On, but repayment initiated 4/25/2007
2007	586037	5/23/2007	On, but repayment initiated 4/25/2007
2007	586093	7/3/2007	Off, payment confirmed as of 6/11/2007

Given the confusion surrounding the entire telephone audit refund issues, as well as the good faith exhibited by Yonkers both in initiating the telephone audit repayments to USAC and in

working through the USAC/FCC debt payment process, we ask that the FCC waive its Red Light denial rules in this case and reinstate the applications requested by Yonkers.

*Net vs. Gross Telephone Audit Refund Issue:*

The Yonkers telephone audit and refund situation is directly comparable to that experienced by NYCDOE in 2002 and discussed in a waiver petition filed (with USAC and FCC encouragement) with the Commission in October 2003. In both cases, the school district had: (a) at their own initiative hired independent auditors to review their historical telephone bills; (b) found and recovered significant amounts for incorrectly billed telephone services; (c) paid, as is the industry practice, a contingent percentage fee to the auditors; and (d), voluntarily repaid USAC the discounted portion of the net refund received. Also, in both cases, USAC responded to the voluntary repayment with a request for an additional payment based on the discounted of the gross refund received.

The critical element of the additional repayment requests, in both cases, is that it would have meant that the districts would — and, in Yonkers' case, did — lose money by having undertaken a telephone audit. In other words, the districts' discount rates were such that the discounted portions of the gross refund, plus the contingent payments to the auditors, exceeded the total refund amount. By paying both USAC and the auditors, the districts would have, or did, lose money on the audit — hardly an incentive to undertake such audits in the future.

Recognizing that the disincentive of the current E-rate repayment rules in the New York City case might not be in the public interest, USAC and the FCC agreed not to press for repayment of the discounted portion of the auditor fees pending an FCC ruling on a NYCDOE petition for waiver. This waiver was filed on October 13, 2003, and is still pending. The following paragraph summarizes the basic thrust of the NYCDOE waiver:

More broadly, NYCDOE asks the Commission to find that telephone audits are a valuable and cost-effective tool for controlling school and library telecommunications costs and for assuring Universal Service Fund integrity. The Commission should also find that reasonable fees incurred by applicants are a necessary expense for such audits. As a result, the calculation of funds to be repaid to USAC should be based on the discounted portion of carrier refunds – net of audit fees – actually received by an applicant. Such a procedure would assure that an applicant would not be penalized for voluntarily initiating an audit of its own telecommunications service charges.

Although the FCC can waive the Red Light Rule for Yonkers, and instruct USAC to reinstate Yonkers' denied applications, without addressing the net vs. gross telephone audit refund issue, we would encourage the FCC to do both in parallel. E-Rate Central is aware of other large applicants who have conducted, or are considering conducting, telephone audits. We believe that resolution of this net vs. gross incentive issue is long overdue.

If the FCC agrees that USAC repayments should be based only on the net refunds received by the applicant, we further encourage the FCC to instruct USAC to recalculate Yonkers' repayment amount accordingly, and to refund the difference back to Yonkers.

*Refund Interest Repayment Requirements:*

It is our understanding that a significant portion (approximately 2/3<sup>rd</sup>s) of the gross refunds received by Yonkers were attributed to interest payable on the earlier overcharges, not to the erroneous charges themselves. Our understanding of the E-rate rules are that, had USAC audited the Yonkers telephone bills and found overcharges, repayment would have been demanded — perhaps from the carrier, if deemed at fault — only for the discounted portion of the overcharges themselves, not for any attributable interest charges. Although E-rate rules permit interest charges to be collected on delinquent debts, we know of no provision to adjust Commitment Adjustment amounts to reflect imputed interest from the date of the original disbursement.

While the FCC may wish to consider an interest imputation rule, until such a rule is implemented we see no basis for demanding repayment of a discounted portion of service provider interest. As a result, we ask the FCC to instruct USAC to recalculate Yonkers' repayment amount exclusive of carrier interest, and to refund the difference back to Yonkers.

*Conclusions:*

In support of Yonkers' recent Request for Review, E-Rate Central asks the FCC to:

1. Waive the Red Light Rule with respect the referenced application denials and to instruct USAC to reinstate these applications;
2. Approve the related NYCDOE waiver concerning the repayments requirements due on contingent telephone auditor fees (and recalculate Yonkers' repayment accordingly); and
3. Confirm that service provider-attributable interest payments are not covered by current E-rate rules (and recalculate Yonkers' repayment accordingly).

Sincerely,



Winston E. Himsworth  
In support of Yonkers Public Schools