

March 17, 2009

Request for Review and Waiver –CC Docket No. 02-6
Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Waiver Request for Year 11 Poverty Discount Form 471 601233

Dear Secretary Dortch:

Please let this letter serve as our request to appeal a USAC Administrator’s Decision on Appeal Funding Year 11 2008, dated February 19, 2009.

CC Docket No. 02-6

Billed Entity Number: 16045095
Billed Entity Name: Espiritu Community Development, Corp
4848 South 2nd Street
Phoenix, AZ 85040
Telephone: 602-243-7788, ext. 212
Fax:: 602-243-7799

Contact Person: Julio Zaveleta
E-Mail of Contact: E-mail: julio_zaveleta@espiritu.org
Form 471 Number: 601233
Funding Request Numbers: 1697500, 1697511, 1697402, 1697476, 1697443, 1697451, and 1697418

Reason for Waiver Request:

We do not agree with USAC/SLD’s findings in their appeal denial letter inserted on Page 7 and 8 of this letter.

1. While it was not an error on the part of USAC/SLD or the school at the time of the application or PIA, once discovered, a timely Appeal attempt was made to USAC to correct the discount level but denied by USAC.
2. Further, in the second part of the denial letter, they state that we were requesting additional funding not included in the initial 471. That part is not true. We were requesting that the current poverty data be used; therefore properly increasing the funding discount level for the school district, we made no request for additional funding over and beyond what was initially applied for.

Background:

It is well known that many states do not have real-time data available. Most data available ranges from 6-months to 2 years old. The U. S. Department of Education’s National Center for

Education Statistics, which is a source utilized for E-Rate and Technology Plan Development, lists their source as: “Source: CCD public school district data for the 2006-2007 school year.” When searching data for this school district. (Website: http://nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=2&details=1&DistrictID=0400052&ID2=0400052)

Realizing the need for real-time data, the Arizona Department of Education (ADE) has developed an electronic data reporting system. All public schools in the state are mandated to upload electronic data each month into this system. The data is extrapolated into two reports for the **National School Lunch Program** (NSLP) twice a year – in **October** and **March**. As stated at the ADE website for the NSLP the data is posted within 90 days after the reporting month. (Website: <http://www.ade.az.gov/health-safety/cnp/frpercentages/>)

In our appeal to the USAC/SLD, submitted on February 4, 2009, we requested that USAC/SLD use current year’s poverty data, which was not made publically available until after the 471 had been filed and the PIA review had been completed for Form 471 # 601233. Year 11 is July 1, 2008 to June 30, 2009. The data made available from the Arizona Department of Education made public in mid-January, 2009 reflected that according to the October 2008 National School Lunch Program data, Espiritu Community Development and the schools under this district had a poverty level of 83.10% (SLD Poverty Level will be 90%). At the time we filed the 471 and subsequent PIA, the poverty level for this school district was 76.67% (SLD Poverty Level is 86%).

As a result of the current poverty data available, the school would now meet the funding level that the SLD as funding for internal connections in their Year 11 application for FRNs 1697500 and 1697511. They are funding at 88% and above, denying at 85% and below.

In the ***Bishop Perry Order***, extractions and the highlighted text specifically pertain to our Waiver Request:

“In this order, we grant 13 appeals of decisions by the Universal Service Administrative Company (USAC) denying funding to the petitioners due to certain clerical or ministerial errors in completing their FCC Forms 471 or the associated Item 21 attachments under the schools and libraries universal service support mechanism, also known as the E-rate program.^[1] We find that the issues raised here are similar to those addressed by the Commission in the *Bishop Perry Order*.^[2] We therefore remand the underlying applications to USAC for further action consistent with the *Bishop Perry Order*.^[3]”

4. We have under consideration 13 appeals of decisions by USAC denying funding under the E-rate program due to certain clerical or ministerial errors in completing the FCC Forms 471 or the associated Item 21 attachments (such as entering the wrong dollar amount, term of service, **or discount level**).^[15] In their requests for review, the petitioners generally request that the Commission allow them to modify their FCC Forms 471 or Item 21 attachments to correct their errors.

We grant these 13 appeals because the petitioners have demonstrated that special circumstances justify a waiver of section 54.504(c) of the Commission’s rules to allow them to amend their

original FCC Form 471 applications or the Item 21 attachments submitted to USAC.^[16] USAC denied the petitioners' funding requests due to certain clerical or ministerial errors in completing the FCC Form 471 applications or the associated Item 21 attachments.^[17] In all 13 cases, the petitioners attempted to modify their FCC Form 471 applications or the Item 21 attachments to correct their errors, albeit after the close of the relevant filing window."

While it was not an error on the part of the school at the time of the application or PIA, once discovered an attempt was made to correct the discount level and denied by USAC. Especially since the funding in question is for this current year of July 1, 2008 to June 30, 2009 and the data reflects the student count and poverty of our district for this same period of time it seems a disservice to the school and inner-city community this school district serves.

Waiver Request - We believe that our request should be approved considering it is similar to the following two rulings:

In *DA-08-2381A1 of the Archer Public Library* and CC Docket No 02-6 *Naperville Order*, which are attached, with text that pertains to our Waiver Request are highlighted for quick reference.

Archer Public Library, Archer City, TX, *et al.*)
Adopted: October 30, 2008

File Nos. SLD-140961, *et al.*
Released: October 30, 2008

By the Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

In this order, we grant 13 appeals of decisions by the Universal Service Administrative Company (USAC) denying funding to the petitioners due to certain clerical or ministerial errors in completing their FCC Forms 471 or the associated Item 21 attachments under the schools and libraries universal service support mechanism, also known as the E-rate program.¹ We find that the issues raised here are similar to those addressed by the Commission in the *Bishop Perry Order*.² We therefore remand the underlying applications to USAC for further action consistent with the *Bishop Perry Order*.³

Under the Commission's rules, USAC implements an initial filing period, or filing window, for the FCC Form 471 applications, and USAC treats all schools and libraries applications filed within that period as simultaneously received.⁴ Upon receipt and successful data entry of an FCC Form 471, USAC issues an FCC Form 471 receipt acknowledgement letter (RAL) to both the applicant and the

¹ A list of the appeals is attached as an appendix to this order. In this order, we use the term "appeals" to generally refer to requests for review of decisions by USAC or the Commission. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

² *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA, et al., 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*) (waiving the Commission's rules to allow applicants additional time to file their FCC Forms 471 where applicants committed ministerial or clerical errors).

³ See *Bishop Perry Order*, 21 FCC Rcd 5316.

⁴ 47 C.F.R. §§ 54.507(c).

service provider to confirm receipt of a timely filed FCC Form 471 and certification.⁵ Currently, if data entry or ministerial errors have occurred during the FCC Form 471 application process, applicants may make allowable corrections to their FCC Form 471 within 15 days of the date of the FCC Form 471 RAL without submitting a new FCC Form 471 application.⁶ Absent a ministerial or clerical error on the part of USAC or the applicant, changes that increase the amount of support requested or that add services not initially requested have generally only been allowed if an applicant submits a new FCC Form 471 application prior to the close of the filing window deadline.⁷

We have under consideration 13 appeals of decisions by USAC denying funding under the E-rate program due to certain clerical or ministerial errors in completing the FCC Forms 471 or the associated Item 21 attachments (such as entering the wrong dollar amount, term of service, or discount level).⁸ In their requests for review, the petitioners generally request that the Commission allow them to modify their FCC Forms 471 or Item 21 attachments to correct their errors.

We grant these 13 appeals because the petitioners have demonstrated that special circumstances justify a waiver of section 54.504(c) of the Commission's rules to allow them to amend their original FCC Form 471 applications or the Item 21 attachments submitted to USAC.⁹ USAC denied the petitioners' funding requests due to certain clerical or ministerial errors in completing the FCC Form 471 applications or the associated Item 21 attachments.¹⁰ In all 13 cases, the petitioners attempted to modify their FCC Form 471 applications or the Item 21 attachments to correct their errors, albeit after the close of the relevant filing window.

⁵ See USAC website, Schools and Libraries, Form 471 Receipt Acknowledgement Letter, <http://www.usac.org/sl/applicants/step07/receipt-acknowledgement-letter.aspx> (retrieved Aug. 19, 2008) (FCC Form 471 RAL Procedures).

⁶ See FCC Form 471 RAL Procedures; Form 471 Receipt Acknowledgement Letter, Funding Year 2008: 07/01/2008 – 06/30/2009, http://www.usac.org/_res/documents/sl/pdf/SampleLetters/form-471RAL-applicant.pdf (retrieved Aug. 19, 2008) (Funding Year 2008 RAL); *Bishop Perry Order*, 21 FCC Rcd at 5316-17, para. 2. Previously, USAC provided two weeks to submit certain corrections. See Form 471 Receipt Acknowledgement Letter, Funding Year 2001: 07/01/2001- 06/30/2002 (Funding Year 2001 RAL); *Request for Review of the Decision of the Universal Service Administrative Company by Oklahoma City Public Schools, Oklahoma City, Oklahoma, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-262187, CC Docket Nos. 96-45, 97-21, 17 FCC Rcd 23501, 23502, para. 3 (Wireline Comp. Bur. 2002) (*Oklahoma City Order*). Corrections that were permitted at that time included changing contact information, reducing the amount of funding requested in an application, changing the service provider identification number if the original service provider had merged with or been acquired by the new service provider, and “unbundling” or “splitting” a funding request that incorrectly combined two requests. See Funding Year 4 RAL; *Oklahoma City Order*, 17 FCC Rcd at 23502, para. 3. USAC has expanded the allowable corrections to include, among other changes, change in category of service, contract number, service start date, contract award date. See Funding Year 2008 RAL.

⁷ See generally *Bishop Perry Order*, 21 FCC Rcd 5316; *Request for Review of the Universal Service Administrative Company by Donna Public Library, Donna, Texas, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-289464, 319218, 320003, 324301, 324627, CC Docket No. 02-6, Order, 19 FCC Rcd 6358 (Wireline Comp. Bur. 2004) (*Donna Public Library Order*).

⁸ See Appendix.

⁹ See Appendix; 47 C.F.R. § 54.504(c). The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *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). 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. *Northeast Cellular*, 897 F.2d at 1166.

¹⁰ See, e.g., Letter from USAC, Schools and Libraries Division, to Cheryl Beesinger, Archer Public Library (dated Sept. 9, 2005) (Archer USAC Decision on Appeal); Letter from USAC, Schools and Libraries Division, to Carey Jones, Assumption High School (dated Jan. 15, 2003) (Assumption USAC Decision on Appeal).

Consistent with precedent, and based on the facts and circumstances of these cases, we find that the mistakes at issue here are sufficiently similar to those in the *Bishop Perry Order*, warranting a waiver of section 54.504(c) of the Commission's rules to the extent that the petitioners will need to amend their original FCC Form 471 applications or Item 21 attachments submitted to USAC.¹¹ As in the *Bishop Perry Order*, the facts and circumstances of these specific cases all involve rejection of funding requests due to unintentional administrative or clerical errors, and the records of each petitioner do not reveal more fundamental problems, such as misuse of funds or a failure to adhere to core program requirements.¹² In this instance, we are waiving the deadline for submitting a complete FCC Form 471 application to USAC, not a substantive rule. Further, the applicants' errors could not have resulted in an advantage for them in the processing of their applications. That is, the applicants' mistakes, if not caught by USAC, would not have resulted in the applicants receiving more funding than they were entitled to. As the Commission noted in the *Bishop Perry Order*, 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.¹³ We thus find that the partial denial of the underlying applications is not warranted, given that the violations at issue are procedural, not substantive.¹⁴

Further, like the applicants in the *Bishop Perry Order*, the petitioners have demonstrated that rigid adherence to filing procedures does not further the purposes of section 254(h) of the Communications Act of 1934, as amended (the Act), or serve the public interest.¹⁵ Specifically, section 254 of the Act 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."¹⁶ We believe that granting these appeals, in this instance, furthers the goals of section 254 of the Act because the applicants' funding will not be denied due to minor errors. We thus find that a denial of funding in all instances inflicts undue hardship on the applicants. 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. We therefore grant the appeals listed in the appendix and remand the underlying applications to USAC for further processing consistent with this order.¹⁷

¹¹ See *Bishop Perry Order*, 21 FCC Rcd at 5316, para. 1; 47 C.F.R. § 54.504(c).

¹² See *Bishop Perry Order*, 21 FCC Rcd at 5323, para. 14.

¹³ *Id.* at 5316-17, para. 2.

¹⁴ *Id.* at 5323, para. 14.

¹⁵ See 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.

¹⁶ See 47 U.S.C. § 254(h).

¹⁷ We estimate that the appeals granted in this order involve approximately \$47,072,214 in funding. We note that USAC has already reserved sufficient funds to address the outstanding appeals. Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2008 (Aug. 1, 2008). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

We are including a table of funding requested by our district in the 12-year-history of E-Rate – with our Year 11 application; we are a first-time applicant for telecommunication reimbursement for all our three schools and administrative offices:

E-Rate Organizer Utilization Summary Chart
Applicant: ESPIRITU COMMUNITY DEVELOPMENT CORP
Billed Entity: 16045095

FY	Req. FRNs	Funded FRNs	486 on File	Requested Amount	Committed Priority 1	Committed Priority 2	Total Committed	Total Disbursed	Remaining Balance	Util. %
2009	11	0	0	\$210,530.87	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2008	7	5	0	\$340,915.72	\$92,837.14	\$0.00	\$92,837.14	\$0.00	\$92,837.14	0%
2007	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2006	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2005	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2004	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2003	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2002	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2001	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
2000	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
1999	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%
1998*	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	0%

We are requesting that the FCC waive the denial made by USAC/SLD in denying the use of the current students National Lunch Program Data for Espiritu Community Development, Inc. and their three schools, allowing the use of current year data for current year services.

Thank you for your considerations.

Sincerely,



Julio Zaveleta, on behalf of
 Fernando Ruiz, President
 Espiritu Community Development Corporation
 4848 South 2nd Street Phoenix, AZ 85040
 Telephone: 602-243-7788, ext. 212
 Fax:: 602-243-7799
 E-mail: jzaveleta@espiritu.org

*Please see following attachments –
 Administrators decision on appeal – 2 pages*



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal – Funding Year 2008-2009

February 19, 2009

Julio Zavaleta
Espiritu Community Development, Corp.
4848 South 2nd Street
Phoenix, AZ 85040

Re: Applicant Name: **ESPIRITU COMMUNITY DEVELOPMENT
CORP**
Billed Entity Number: 16045095
Form 471 Application Number: 601233
Funding Request Number(s): 1697402, 1697418, 1697443, 1697451, 1697476,
1697500, 1697511
Your Correspondence Dated: February 04, 2009

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 2008 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): 1697402, 1697418, 1697443, 1697451, 1697476,
1697500, 1697511

Decision on Appeal: **Denied**
Explanation:

- It was determined that USAC had reviewed these funding requests for the shared discount originally requested by the applicant on the Block 4 submission within the Form 471 application. The rules of this support mechanism do not allow for an increase of a funding request and/or discount(s) subsequent to the Form 471 being committed for funding. Applicants can make data entry corrections, including increase in funding and discounts, during the Receipt Acknowledgment Letter (RAL) or PIA process. Corrections can not be made to the Form 471 once an application has been committed unless there was an error on the part of USAC.

On appeal, you have failed to provide any evidence that USAC erred in its initial determination. Consequently, your appeal is denied.

- Your appeal requests additional funds that were not included in the FCC Form 471 that you are appealing. FCC rules require that funding requests must be submitted via an FCC Form 471. *See 47 C.F.R. sec. 54.504(c)*. New funding requests cannot be submitted through the appeals process. Considerations for funding requests depend on the date the FCC Form 471 is received and the amount of funds available if it is received after the close of the filing window. *See 47 C.F.R. sec. 54.507(g)*. Consequently, USAC denies your appeal insofar as it requests funding that was not included in the FCC Form 471.

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