

Nathaniel Hawthorne, Attorney/Consultant, Ltd.
tel: 216.514.4798, fax: 216.514.4865; fax: 216.472.8184; toll free 877.514-4796

FILED/ACCEPTED
SEP 24 2009
Federal Communications Commission
Office of the Secretary

September 9, 2009

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W. Suite TW-A325
Washington, D.C. 20554

CC: 02-6

**RE: Appeal from a decision by the USAC Administrator and "WAIVER—
EXPEDITED ACTION REQUESTED" on behalf of the Halifax County School
District in CC Docket No. CC Docket No.**

02-6

This is an appeal from an adverse decision of the USAC and Request for a Waiver.

Please file in the above captioned Dockets noting that is also **'WAIVER—
EXPEDITED ACTION REQUESTED.'**

Sincerely,



Nathaniel Hawthorne

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

In the Matter of the)
)
Appeal of the Decision of the)
)
Universal Service Administrator by)
Halifax County School District)
and)
"WAIVER- EXPEDITED ACTION REQUESTED")
)
) CC Docket No. 97 - 21
)
)
) CC Docket No. 96 - 45
Federal-State Joint Board on)
Universal Service)
Changes to the Board of Directors of)
The National Exchange Carrier)

**This is an appeal from a decision by the USAC Administrator and
"WAIVER—EXPEDITED ACTION REQUESTED"**

(1) USAC Administrator's Decision

Form 471 Application Numbers:	531965
BEN:	126889
Applicant Form Identifier:	Wiring-WO-NW
Funding Year:	2006
Administrator's Date of Denial:	September 3, 2009
Date of Appeal:	September 4, 2009

(2) Contact Information

Stacy Lee
Halifax County School District
9525 Hwy 301 South/PO Box 468
Halifax North Carolina 27839
Tel. 252-450-0715

Email:leesc@halifax.k12.nc.us

(3) Funding Request Numbers

1469818;1470225

(4) Administrator's Reason for Denial of Implementation Extension Requests

Applicant's Extension "Request received after the FCC deadline for Implementation Deadline Extension requests which was 9/30/2008."

(5) Law and Argument

The Administrator's Decision is unreasonable and unlawful because:

A. An applicant may obtain an extension of the deadline to implement non-recurring services from the Universal Service Administrative Company (USAC) if it satisfies the following criteria set forth in section 54.507(d) of the Commission's rules: the applicant's service provider is unable to complete implementation for reasons beyond the service provider's control. SLD-247568, et al., FCC DA 07-1187, Rel:: March 9, 2007

B. The deadline established for filing Implementation Deadline Extension Request is procedural in nature, and therefore may be waived by the USAC.

C. Supporting affidavit states that the service provider was unable to complete implementation for reasons beyond the service provider's control.

While the USAC has the FCC's approval to engage in this kind of clerical interpretation; that is, the authority to grant Halifax's Implementation Deadline Extension request the USAC unreasonably and unlawfully refused to do so here.

D. In File Nos. SLD-247568, et al., FCC DA 07-1187, Rel: March 9,

2007, it was stated that:

*****we clarify that USAC has authority to determine which situations constitute circumstances beyond the service provider's control** and therefore satisfy criterion three. In the *Non-Recurring Services Order*, the Commission recognized that there may be a wide range of situations under criterion three that constitute circumstances beyond the service provider's control. Because the Commission was unable to "anticipate every type of circumstance," the Commission "direct[ed] [USAC] to address such situations on a case by case basis, consistent with the reasoning set forth in this Order." [emphases added]

That is, the Commission gave USAC discretion to determine which situations constitute circumstances beyond the service provider's control.

Para.8

In the future, we expect USAC to decide which events satisfy criterion three based on the facts presented by the applicants and consistent with the *Non-Recurring Services Order*. In this case, however, remanding the Extension Requests to USAC at this stage would add unnecessary processing time, causing further delays and hardship for Applicants. We therefore conclude, based on the facts presented in these Extension Requests, that budget cuts or fiscal problems at the state level that jeopardize funding for the non-discounted portion of non-recurring services constitute circumstances beyond the service provider's control, and we grant the Extension Requests. Because we grant these Extension Requests after March 1 of this year, Applicants have until September 30, 2008,

to complete installation of the non-recurring services for the funding years at issue in their Extension Requests. *Para 9*[emphases added]

See also, *Aberdeen School District File No. SLD-297249, et al; FCC 07-63*. In Aberdeen the FCC opined that an additional opportunity to cure inadvertent administrative, ministerial, and clerical errors on applications will improve the administration of the fund. "The 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." *Id.*

E. The FCC said in *File Nos. SLD-487170, et al., FCC 06-54*, in relevant part:

For the reasons described below,*** we find that the departure is warranted and in the public interest. ***we base our decision to grant these requests in part on the fact that many of the rules at issue here are 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." 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. *Para 9*

And, in *Para 12*, the FCC stated that:

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.

Further, the FCC said:

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. 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. *Para 13*

CFR 47 § 1.925 Waivers provides, in relevant part, that

(3) The Commission may grant a request for waiver if it is shown that:
(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest;

or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

F. The purpose of Universal Service Funding is succinctly set forth in

Bishop Perry, File Nos. SLD-487170, et al., CC Docket No. 02-6FCC 06-54,

para 9. There it was said that:

[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." 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.

G. Halifax County School District request a waiver¹ of the September 30, 2002, deadline for installation of non-recurring services for Funding Year 2001 of the Halifax County School District

Halifax's waiver request is based on the following grounds:

¹ See 47 C.F.R. § 1.3 (allowing the Commission to waive Commission rules on its own motion); see also 47 C.F.R. § 0.91 (delegating to the Wireline Competition Bureau the functions of the Commission except as reserved to the Commission under 47 C.F.R. § 0.291).

I, Shelia Lowe being first duly sworn, depose and say the following is within my knowledge

1. I am the Technology Facilitator at Halifax County School District;
2. Initially, I was the Director of Technology for 2.5 years
3. During my time at Halifax County Schools we have had 3 Finance Officers over a 3 year time period,
4. Over the same 3 year time period, Halifax had 2 superintendents,
5. During this time period Halifax was addressing student academic difficulties and had budget difficulties based on the constitutional right to a good education,
6. Halifax was required to hire "instructional coaches" that impacted the budget;
7. During this time of unsettled issues, Halifax was aware of e-rate grants but was not in total understanding of the rules and regulations as it relates to requesting extensions on funding.
8. Despite the budget constraints, Halifax hired an e-rate consultant; that consultant was suppose to file in a timely manner a request to extend the delivery and installation deadline for the following FRNs (146981K & 1470225), the consultant failed to file the required documents;

See attached Affidavit

H. This is an Appeal but if appropriate, Halifax County School District is seeking a waiver of 47 C.F.R. § 54.507(d)(3) based on the above facts which are outlined in the attached affidavit.

See, para 3 of SLD-247568, et al., FCC DA 07-1187, Rel: March 9, 2007, which states:

An applicant may obtain an extension of the deadline to implement non-recurring services from the Universal Service

Administrative Company (USAC) if it satisfies one of four criteria set forth in section 54.507(d) of the Commission's rules:

(1)***

(2)***

(3) the applicant's service provider is unable to complete implementation for reasons beyond the service provider's control; or

(4)***

[emphases added]

Here, as stated in the Affidavit, the circumstances were beyond the Service provider's control.

See also, Non-Recurring Services Order, para. 16, and Federal-State Joint Board on Universal Service, Order, CC Docket No. 96-45, DA 001-2444, 15 FCC Rcd. 21,875 (2000), para. 9 ("The applicant must have submitted documentation to USAC . . . requesting relief on the grounds that its service provider was unable to deliver the services due to events beyond the service provider's control, such as labor walk-outs or natural disasters.") Facts supporting the Applicant's request were submitted to the USAC yet Applicant's request was denied.

I. Even if Halifax's circumstances do not fit any of the four criteria specified by the under section 54.507(d) of the Commission's rules, this Commission can still grant Halifax' request for a waiver under 47 C.F.R. § 1.3. As this Commission has previously stated a "[w]aiver 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." See 47 C.F.R. § 1.3; see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIRadio*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972). See also *Buffalo City*, para. 9;

J. Granting Halifax's request to extend the deadline is consistent with the public interest and the intent of section 254 of the Communications Act. An extension will increase the likelihood that Halifax may successfully utilize discounts available from the schools and libraries universal service mechanism. An extension also is consistent with the Commission's finding in its *Non-Recurring Services Order* that external circumstances, such as delayed funding decisions, can create situations where deadlines are both impractical and unreasonable. *Non-Recurring Services Order*, para. 11. See also paras. 3-5 and n. 11, *supra*. See also *Request for Waiver of the September 30, 2000 Deadline for Implementation of Non-Recurring Services by Baldwin County Board of Education*, *Federal-State Joint Board on Universal Service, Order*, CC Docket No. 96-45, DA No. 01-747, 16 FCC Rcd 7053 (Com. Car. Bur. 2001).

Conclusion:

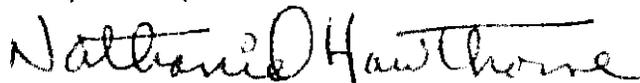
The FCC has always precluded funding that is Waste, Fraud and Abuse. Here, there is no evidence of waste, fraud and abuse. There is only

evidence that the vendor was unable to "complete implementation for reasons beyond the service provider's control."

Halifax County School District is requesting the Following Action by the FCC:

A waiver, and extension of the Delivery and Installation Deadline for the following FRNs 1469818;1470225.

Respectfully submitted,



Nathaniel Hawthorne
District of Columbia Bar No. : 237693
27600 Chagrin Blvd., Ste. 265
Cleveland, OH 44122
tel.: 216/514.4798
e-mail: nhawthorne@telecomlawyer.com
Attorney for Halifax County School District

Cc: Halifax County School District
CNIC

Affidavit

State of North Carolina)	
)	ss.
County of Halifax)	

I, Shelia Lowe being first duly sworn, depose and say the following is within my knowledge:

1. I am the Technology Facilitator at Halifax County School District;
2. Initially, I was the Director of Technology for 2.5 years
3. During my time at Halifax County Schools we have had 3 Finance Officers over a 3 year time period;
4. Over the same 3 year time period, Halifax had 2 superintendents;
5. During this time period Halifax was addressing student academic difficulties and had budget difficulties based on the constitutional right to a good education;
6. Halifax was required to hire "instructional coaches" that impacted the budget;
7. During this time of unsettled issues, Halifax was aware of e-rate grants but was not in total understanding of the rules and regulations as it relates to requesting extensions on funding;
8. Despite the budget constraints, Halifax hired an e-rate consultant; that consultant was suppose to file in a timely manner a request to extend the delivery and installation deadline for the following FRNs (1469818 & 1470225); the consultant failed to file the required documents;

Further affiant sayeth naught.

Shelia Lowe
Shelia Lowe

Sworn to and subscribed before me this 12 day of August 2009.

Alison A Epps

My Commission Expires: September 18 2012

