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Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of	)	
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Requests for Waiver of Sections 54.504(c), 54.504(f), 54.507(c), and 54.507(g) of the Commission's Rules	)	
	)	
State of Louisiana Department of Education Baton Rouge, LA	)	File Nos. SLD-412169, 422313
	)	
Recovery School District New Orleans, LA	)	File Nos. SLD-412169, 422313, 585165, *et al.*
	)	
New Orleans Public Schools New Orleans, LA	)	File Nos. SLD-412169, 422313, 585165, *et al.*
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6

ORDER

Adopted: January 29, 2010 **Released: February 2, 2010**

By the Commission:

I. INTRODUCTION

1. In this order, we address requests for waivers of our rules filed by the State of Louisiana Department of Education (Louisiana DOE), the Recovery School District (RSD), and the New Orleans Public Schools (NOPS) (collectively, petitioners) under the schools and libraries universal service support mechanism, also known as the E-rate program, for funding years 2004, 2007, 2008, and 2009.[1] The petitioners generally seek to make changes to their applications for funding years 2004, 2007, 2008, and

[1] *See* Letter from Dr. Robin Jarvis, Recovery School District, Darryl Kilbert, Orleans Parish Schools, and Cecil J. Picard, State of Louisiana Department of Education, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed June 28, 2006) (June 2006 Request for Waiver); Letter from Rayne Martin, Recovery School District, and Peggy Villars Abadie, New Orleans Public Schools, to Gina Spade, Telecommunications Access Policy Division, Federal Communications Commission, CC Docket No. 02-6 (filed Apr. 20, 2009) (April 2009 Request for Waiver); Letter from Rayne Martin, Recovery School District, and Peggy Villars Abadie, New Orleans Public Schools, to Federal Communications Commission, CC Docket No. 02-6 (filed June 22, 2009) (June 2009 Request for Waiver); Letter from Rayne Martin, Recovery School District, to Federal Communications Commission, CC Docket No. 02-6 (filed July 16, 2009) (July 2009 Request for Waiver); Letter from George McDonald, consultant to Recovery School District, to Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 4, 2009) (August 2009 Supplement) (collectively, Requests for Waivers). Section 54.719(c) of our rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company (USAC) may seek review from the Commission. 47 C.F.R. § 54.719(c).

2009.[2] The requested changes are not ministerial or clerical errors, pursuant to the Commission's *Bishop Perry* Order, and thus require Commission action.[3]

2. As provided below, we grant in part and deny in part the requests for waivers. Although we grant [redacted], NOPS, and RSD certain waivers of our rules, these waivers extend only to the applications and funding request numbers (FRNs) at issue for funding years 2004, 2007, 2008, and 2009. Specifically, we grant the petitioners' request to add schools to their funding year 2004 FCC Form 471 applications and, on our own motion, grant three service substitutions requests pending at USAC. We deny the petitioners' request to allow funding committed in funding year 2004 for switch maintenance to be used to purchase switches. While we deny the petitioners' request that all entities receive funding at the 90 percent discount level for internal connections (priority 2 services) for funding year 2004, we allow the petitioners to use available funding year 2004 funds for all entities at the 88 percent level for priority 2 services. In addition, we grant the petitioners' requests to revise FCC Form 471 applications for funding years 2007 through 2009 to correct the entity names and numbers, and to allow the petitioners to change their application type from "school district" to "consortium" for the relevant funding years. We deny the petitioners' request to use funding committed in funding year 2007 for long distance services to instead pay for dial tone services.

3. To ensure that the petitioners' underlying funding year 2004, 2007, 2008, and 2009 FCC Form 471 applications are resolved expeditiously, we direct USAC to complete its review of each underlying application and issue an award or denial based upon a complete review and analysis no later than 90 calendar days from the release date of this order.[4]

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[2] The petitioners do not seek waivers for funding years 2005 and 2006 since they received funding in those years without the need for a waiver of our rules. In funding year 2005, USAC issued Orleans Parish 10 funding commitment decision letters (FCDLs). *See e.g.*, Letter from USAC, Schools and Libraries, to Kimberly LaGure, Orleans Parish School District (dated June 27, 2005) (regarding FCC Form 471 application number 461702); Letter from USAC, Schools and Libraries, to Kimberly LaGure, Orleans Parish School District (dated Aug. 23, 2006) (regarding FCC Form 471 application number 461700); Letter from USAC, Schools and Libraries, to Kimberly LaGure, Orleans Parish School District (dated Apr. 27, 2006) (regarding FCC Form 471 application number 461697); Letter from USAC, Schools and Libraries, to Kimberly LaGure, Orleans Parish School District (dated May 5, 2006) (regarding FCC Form 471 application number 475787); Letter from USAC, Schools and Libraries, to Kimberly LaGure, Orleans Parish School District (dated Aug. 23, 2006) (regarding FCC Form 471 application number 458435); Letter from USAC, Schools and Libraries, to Kimberly LaGure, Orleans Parish School District (dated June 27, 2005) (regarding FCC Form 471 application number 464879). For funding year 2006, USAC issued Orleans Parish five FCDLs. *See* Letter from USAC, Schools and Libraries, to Peggy Villars Abadie, Orleans Parish School District (dated Dec. 12, 2006) (regarding FCC Form 471 application number 524214); Letter from USAC, Schools and Libraries, to Peggy Villars Abadie, Orleans Parish School District (dated Dec. 12, 2006) (regarding FCC Form 471 application number 517092); Letter from USAC, Schools and Libraries, to Peggy Villars Abadie, Orleans Parish School District (dated Dec. 12, 2006) (regarding FCC Form 471 application number 524197); Letter from USAC, Schools and Libraries, to Peggy Villars Abadie, Orleans Parish School District (dated Dec. 12, 2006) (regarding FCC Form 471 application number 524226); Letter from USAC, Schools and Libraries, to Peggy Villars Abadie, Orleans Parish School District (dated Dec. 12, 2006) (regarding FCC Form 471 application number 524235).

[3] *See* Requests for Waivers; *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*).

[4] *See* Appendix. For the subject funding year 2009 FCC Form 471 applications, USAC shall process those applications consistent with the terms of this order. *See infra* paras. 24-34.

II. BACKGROUND

A. E-rate Program Rules and Requirements

4. 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, basic maintenance and internal connections.[5] The applicant must file an FCC Form 470 to request discounted services.[6] After the FCC Form 470 is posted on USAC's website for all potential competing service providers to review, the applicant must wait at least 28 days before entering an agreement for services.[7] After entering into a contract for eligible services, the applicant must submit a complete FCC Form 471 application to USAC to request discounts on the eligible services to be provided.[8] The FCC Form 471 application must be filed within each funding year's "filing window" because, under our rules, USAC treats all filings made within the filing window as if the applications were simultaneously received.[9]

5. Upon successful receipt of the FCC Form 471 application and certification, USAC issues to both the applicant and the service provider an FCC Form 471 receipt acknowledgement letter (RAL) that contains, among other things, instructions for correcting certain ministerial and clerical errors (such as incorrectly entering the name of a service provider) in the submitted FCC Form 471 application.[10] An applicant may make allowable corrections to its FCC Form 471 application without submitting a new FCC Form 471 application within 20 days of the date of the RAL.[11] If a non-allowable correction on the FCC Form 471 application is identified (such as adding another service to the funding request), the applicant must certify a new FCC Form 471 application within the relevant filing window.[12]

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[5] 47 C.F.R. §§ 54.501-54.503.

[6] 47 C.F.R. § 54.504(b).

[7] 47 C.F.R. § 54.504(b)(4).

[8] 47 C.F.R. § 54.504(c); *see, e.g.*, Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (FCC Form 471).

[9] 47 C.F.R. § 54.507(c).

[10] *See* USAC website, Schools and Libraries Division, Form 471 Receipt Acknowledgement Letter, http://www.usac.org/sl/applicants/step07/receipt-acknowledgement-letter.aspx (last visited Feb. 2, 2010) (RAL Procedures); *see also, e.g.*, USAC website, Schools and Libraries, Form 471 Receipt Acknowledgement Letter (Funding Year 2009: 07/01/2009 – 06/30/2010), http://www.usac.org/_res/documents/sl/pdf/SampleLetters/form-471RAL-applicant.pdf (last visited Feb. 2, 2010). *See generally Bishop Perry Order*, 21 FCC Rcd at 5326–27, paras. 23-24 (2006) (granting waivers to petitioners due to certain clerical or ministerial errors in filing their FCC Forms 470 or FCC Forms 471 and associated certifications). In the *Bishop Perry Order*, the Commission directed USAC to provide applicants with 15 days to make these types of corrections. *Id.* at 5326, para. 23.

[11] *See* RAL Procedures. The 20-day period is based on the 15 days from the date applicants are notified by USAC of mistakes to their FCC Forms 470 and FCC Forms 471 and the presumption that applicants will receive such notice approximately five days after the notice is postmarked by USAC. *See Bishop Perry Order*, 21 FCC Rcd at 5326, para. 23, n.63.

[12] *See* RAL Procedures.

6. Under our rules, eligible schools and libraries may receive discounts ranging from 20 percent to 90 percent of the pre-discount price of eligible services, based on indicators of need.[13] The annual funding cap for the E-rate program is $2.25 billion.[14] E-rate funds are allocated according to rules of priority, with first priority being given to requests for telecommunications services and Internet access (priority 1 services).[15] The remaining available funds are allocated to requests for support for internal connections and basic maintenance of internal connections (priority 2 services).[16] Requests for E-rate funding exceed the established funding cap each year. Thus, requests for priority 2 services may be denied because available funds are exhausted. In fact, since funding year 2000, with one exception, priority 2 funding has been available only at the 80 percent discount level and above.[17]

B. 2005 Hurricane Katrina Order

7. On August 29, 2005, Hurricane Katrina struck the Gulf Coast of the United States, causing significant damage in Alabama, Louisiana, and Mississippi.[18] In response, in October 2005, the Commission released the *Hurricane Katrina Order* in which, among other things, the Commission provided relief under the E-rate program to eligible schools and libraries that were directly or indirectly affected by Hurricane Katrina.[19] Specifically, the Commission provided funding to all schools and libraries directly affected by the hurricane at the highest level of discount for priority 2 services (i.e., 90 percent) for funding years 2005 and 2006.[20] Affected schools and libraries were required to certify that

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[13] *See* 47 C.F.R. § 54.505(b). Schools and libraries in areas with higher percentages of students eligible for free or reduced-price lunch through the National School Lunch Program (or a federally approved alternative mechanism) qualify for higher discounts for eligible services than applicants with low levels of eligibility for such programs. *Id.* Schools and libraries located in rural areas also generally receive greater discounts. *Id.*

[14] 47 C.F.R. § 54.507(a).

[15] 47 C.F.R. § 54.507(g)(1)(i).

[16] 47 C.F.R. § 54.507(g)(1)(ii).

[17] *See, e.g.*, Schools and Libraries News Brief (dated Apr. 11, 2008), available at http://www.usac.org/sl/tools/news-briefs/preview.aspx?id=155 (last visited Feb. 2, 2010) (setting the funding year 2007 denial threshold); Schools and Libraries News Brief (dated July 6, 2007), http://www.usac.org/sl/tools/news-briefs/preview.aspx?id=98 (last visited Feb. 2, 2010) (setting the funding year 2006 priority 2 threshold). In funding year 2003, priority 2 funding was available at the 70 percent discount level due to a $420 million rollover of unused E-rate funds. *See Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26935, para. 57 (2003) (*Third Report and Order*) (carrying forward unused funds that were projected to be unused in the first quarter of 2004 for use during the remainder of funding year 2003, i.e., through June 30, 2004).

[18] President Bush issued Major Disaster Declarations for these three states on that same day. *See* FEMA website, 2005 Federal Disaster Declarations, http://www.fema.gov/news/disasters.fema?year=2005 (last visited Feb. 2, 2010).

[19] *See Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-up*, CC Docket Nos. 96-45 and 02-6 and WC Docket Nos. 02-60 and 03-109, Order, 20 FCC Rcd 16883 (2005) (*Hurricane Katrina Order*).

[20] *See id.* at 16903, para. 38. In the *Hurricane Katrina Order*, the Commission also re-opened the funding year 2005 E-rate filing window for schools, libraries, and consortia of schools and libraries that were directly or indirectly affected by Hurricane Katrina; allowed affected parties to "restart the clock" for the purposes of complying with the "two-in-five" rule (providing that eligible entities are only able to receive support for internal connections in two of every five funding years); allowed affected parties to substitute services or products in one broad category for

(continued....)

the services and products sought in their applications would be solely used to restore the network to the functional equivalent of the pre-Katrina degree of functionality.[21] In doing so, the Commission noted that, in a number of instances, the Commission's rules explicitly provide participants in the E-rate program with specific requirements for requesting extensions of deadlines or waivers of certain Commission rules due to the occurrence of unforeseen events such as Hurricane Katrina.[22] The Commission emphasized that the actions taken in the *Hurricane Katrina Order* did not represent the entirety of the relief that may be available to E-rate program participants in the affected areas.[23]

C. Background on the New Orleans Public Schools and the Recovery School District

8. Until 2003, NOPS was the administrative authority for all public schools in the Orleans Parish School District (Orleans Parish).[24] In 2003, the State of Louisiana determined that a number of NOPS schools were failing and enacted legislation to create the RSD, a special state school district, administered by the Louisiana DOE, to assume administration of those failing schools and turn them into successful schools.[25] RSD began taking control of failing NOPS schools in school year 2006-2007.[26] While the majority of the schools that have been placed in the RSD are in New Orleans, the district also has responsibility for schools elsewhere in the state.[27] As a result of additional state legislation passed in November 2005, 107 low-performing schools in New Orleans were transferred to the RSD.[28] As the city repopulates and recovers from Hurricane Katrina, schools are being repaired, rebuilt and reopened.[29] Currently, 70 RSD schools out of those transferred to the RSD are open in New Orleans, including 33 traditional public schools and 37 public charter schools.[30] As of July 2009, there are 18 schools remaining within the NOPS.[31]

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another; and allowed schools and libraries serving displaced students and citizens to amend their funding year 2005 FCC Form 471 applications to account for the unexpected population increases. *Id.*

[21] *Id.* at 16904, para. 39.

[22] *Id.* For example, eligible services and equipment components of eligible services may be transferred to another eligible school or library in the event that the particular location where the service originally was received is permanently or temporarily closed. 47 C.F.R. § 54.513(c).

[23] *Hurricane Katrina Order*, 20 FCC Rcd at 16904, para. 39.

[24] *See* New Orleans Public Schools: Our History, http://www.nops.k12.la.us/pages/our_history (last visited Feb. 2, 2010) (NOPS History).

[25] *See* Louisiana Recovery School District, Frequently Asked Questions, http://www.rsdla.net/InfoGlance/FAQs.aspx (last visited Feb. 2, 2010) (RSD FAQs); 2003 La. Act 9 (legislation establishing the RSD).

[26] RSD FAQs. Schools that fail to meet state minimum academic standards for at least four consecutive years are eligible for state intervention. *Id.*

[27] *Id.* For example, in February 2008, five schools – four schools in East Baton Rouge Parish and one in Point Coupee Parish – were placed into the RSD. *Id.*

[28] *Id.*; 2005 La. Act 35 (amendment transferring NOPS schools to the RSD).

[29] *Id.*

[30] *Id.*

[31] *See* NOPS History.

III. DISCUSSION

9. In this order, we address the requests for waivers submitted by Louisiana DOE, NOPS, and RSD for funding years 2004, 2007, 2008, and 2009.[32] We expect that the partial relief provided to NOPS and RSD in this order will preserve and advance universal service by allowing schools in the New Orleans metro area, and other schools taken over by the RSD in the state of Louisiana, to provide students with needed telecommunications and information services. While we grant in part the requests for waivers of our rules, we stress the limited nature of this decision. The Commission's filing deadlines and procedural rules are necessary for the efficient administration of the E-rate program. As indicated above, we are granting in part the funding years 2004 and 2007-2009 waiver requests due to the unique nature of the school districts located within the state of Louisiana and the devastation caused by Hurricane Katrina.

10. In granting in part these waiver requests, however, we do not anticipate that RSD and NOPS will request such extensive revisions to their FCC Form 471 applications in later funding years because the issues related to the status of the schools taken over by RSD will have been resolved by this order. We are sympathetic to the challenges faced by the schools in Louisiana following Hurricane Katrina, but we stress that future waivers of a similar nature should not be necessary for these schools. We thus continue to require RSD and NOPS, along with all E-rate applicants, to timely submit complete and accurate information to USAC as part of the application process. This includes providing correct and complete school program names and entity numbers when submitting an FCC Form 471 application. We remind applicants that the failure to provide complete and accurate information to USAC will result in either a delay in funding or the denial of the application. Further, in remanding these underlying applications to USAC, we make no finding as to the ultimate eligibility of the services or the petitioner's applications.[33] We remind USAC of its obligation to independently determine whether the disbursement of universal service funds would be consistent with program requirements, Commission rules and orders, or applicable statutes, and to decline to disburse funds where this standard is not met.

11. Further, we emphasize that 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 in part the requests for waivers addressed here, we reserve the right to conduct audits or investigations to determine compliance with the E-rate program rules or requirements. Because audits and investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or our rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or our rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal process. We also 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 procedures and in cooperation with law enforcement agencies.

12. We address the funding year 2004 and funding years 2007-2009 waiver requests separately below.

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[32] *See* Requests for Waivers.

[33] Additionally, nothing in this order is intended: (1) to authorize or require payment of any claim that previously may have been released by a service provider or applicant, including in a civil settlement or plea agreement with the United States; or (2) to authorize or require payment to any person or entity that has been debarred from participation in the E-rate program.

A. Funding Year 2004 Requests for Waivers

13. We grant in part and deny in part the petitioners' requests for waivers of our rules related to their funding year 2004 FCC Form 471 applications.[34] In funding year 2004, Orleans Parish (also known as NOPS) submitted two FCC Form 471 applications (application numbers 412169 and 422313) for internal connections from IBM[35] and BellSouth Communications Systems, LLC (BellSouth) at an 88 percent shared discount level for 110 schools within its school district.[36] In March 2005, USAC issued Orleans Parish separate funding commitment decision letters (FCDLs) for these two applications partially approving their requests for funding.[37] Because the FCDLs were issued after March 1, 2005, pursuant to USAC's procedures, USAC automatically extended the service delivery deadline for these services until September 30, 2006.[38]

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[34] *See* June 2006 Request for Waiver; April 2009 Request for Waiver.

[35] Systems Engineering and Management Associated (SEMA), Inc. was originally the service provider for FCC Form 471 application number 412169, FRNs 1135675, 1137610, and 1137654. USAC subsequently approved a service provider (SPIN) change to IBM for FRNs 1135675 and 1137610. FRN 1137654 in the post-discount amount of $32,736.00 was cancelled at the request of the applicant. *See* FCC Form 500 Notification Letter from USAC, Schools and Libraries Division, to George McDonald, Orleans Parish School District (regarding FCC Form 471 application number 412169, FRN 1137654).

[36] *See* FCC Form 471, Orleans Parish School District (FCC Form 471 No. 412169) (dated Feb. 2, 2004) (FCC Form 471 No. 412169); FCC Form 471, Orleans Parish School District (Application No. 422313) (dated Feb. 2, 2004) (FCC Form 471 No. 422313).

[37] *See* Letter from USAC, Schools and Libraries Division, to Kimberly LaGure, Orleans Parish School District (dated Mar. 24, 2005) (FCDL No. 412169); Letter from USAC, Schools and Libraries, to Kimberly LaGure, Orleans Parish School District (dated Mar. 24, 2005) (FCDL No. 422313). In the FCDL for FCC Form 471 application number 412169, USAC approved FRNs 1135675, 1137610, and 1137654 in the post-discount amount of approximately $767,453.07 for internal connections from IBM and denied FRN 1137639 in the post-discount amount of $1,068,672 because "30 percent or more of this FRN included a request for redundant software maintenance which is an ineligible service based on program rules." *See* FCDL No. 412169; 47 C.F.R. § 54.504(d). In the FCDL for FCC Form 471 application number 422313, USAC approved all FRNs (FRNs 1168527, 1168546, 1168574, 1168593, 1168608, and 1168619) but with modifications to certain FRNs to remove ineligible products or correct the shared discount. *See* FCDL No. 422313. For example, for FRN 1168574, USAC removed the ineligible visual concert cards, camera, and microphone kit. *Id.*

[38] *See* 47 C.F.R. § 54.507(d); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 13510, 13512, para. 7 (2001) (*Permanent Extension Order*). The Commission's rules give applicants three additional months (until September 30 following the close of the funding year) to install one-time services known as non-recurring services. An applicant may request an extension of this deadline if one of certain criteria is met. The qualifying criteria are: (1) the applicant's FCDL is issued by USAC on or after March 1 of the funding year for which discounts are authorized; (2) the applicant receives a service provider change authorization or service substitution authorization from USAC on or after March 1 of the funding year for which discounts are authorized; (3) the applicant's service provider is unable to complete implementation for reasons beyond the service provider's control; or (4) the applicant's service provider is unwilling to complete installation because funding disbursements are delayed while USAC investigates the application for program compliance. *See* USAC website, Service Delivery Deadlines and Extension Requests, http://www.universalservice.org/sl/applicants/step11/service-deadlines-extension-requests.aspx (last visited Feb. 2, 2010) (Service Delivery Deadline Guidance); 47 C.F.R. § 54.507(d); *Permanent Extension Order,* 16 FCC Rcd at 13513, para. 12. USAC will automatically extend the service delivery deadline in situations where criteria (1) or (2) are met. *See* Service Delivery Deadline Guidance. A request for an extension must be submitted to USAC on or before the September 30 deadline. *See* Service Delivery Deadline Guidance; *see also Permanent Extension Order,* 16 FCC Rcd at 13514, para. 15.

14. On June 28, 2006, and April 20, 2009, the petitioners filed requests for waiver with the Commission generally seeking a waiver of sections 54.504(c) and 54.507(c) of our rules to permit NOPS to include schools that were not originally listed on its funding year 2004 FCC Form 471 applications so that all schools in the New Orleans metropolitan area can receive priority 2 (internal connections) funds that were requested as part of Orleans Parish's funding year 2004 FCC Form 471 applications.[39] The petitioners indicate that, in the aftermath of Hurricane Katrina, some schools have reopened as charter schools with new names; some schools not previously on the funding year 2004 FCC Form 471 applications have reopened or are rescheduled to be reopened; and some schools have reopened under the control of the RSD.[40] The petitioners seek waivers of the Commission's rules so they can use the funding year 2004 priority 2 funds that remain unused for any school formerly part of the NOPS district, whether that school remains part of NOPS, has become a charter school, or has become part of the RSD.[41] NOPS and RSD state that they are not seeking funding in addition to the amounts already committed on Orleans Parish's funding year 2004 FCC Form 471 applications.[42] The petitioners' specific requests regarding their funding year 2004 FCC Form 471 applications are detailed separately below.

15. Entity substitution requests. For FCC Form 471 application number 412169, FRN 1135675, the petitioners seek to revise the application to include 16 schools that were not originally listed on Orleans Parish's FCC Form 471 application for new equipment at the data center for NOPS.[43] The petitioners also seek to revise FRN 1137610 of FCC Form 471 application number 412169 to include 29 schools that were not originally listed on Orleans Parish's FCC Form 471 application to be served by new equipment at the RSD data center.[44] Additionally, for FCC Form 471 application number 422313, NOPS

[39] *See* June 2006 Request for Waiver; April 2009 Request for Waiver; 47 C.F.R. §§ 54.504(c), 54.507(c). RSD and NOPS filed the April 20, 2009 request for waiver to supplement the original request for waiver filed on June 28, 2006, to provide a specific listing of the schools to be added to Orleans Parish's funding year 2004 FCC Form 471 applications and to include FCC Form 471 application number 422313 as part of the waiver request. *See* April 2009 Request for Waiver.

[40] *See* June 2006 Request for Waiver.

[41] *See* June 2006 Request for Waiver; April 2009 Request for Waiver.

[42] April 2009 Request for Waiver at 2.

[43] *See* June 2006 Request for Waiver at 1-2; April 2009 Request for Waiver 2-3; April 2009 Request for Waiver at Attachment 7. The 16 new schools include: Audubon-Carrollton, Audubon Montessori School, Benjamin Franklin Elementary Math and Science, Edna Karr Secondary School, Einstein Charter, Franklin High School, Harte Elementary School, Hynes Garden District, Juvenile Alternative School, Lusher High School, McMain Magnet High School, New Orleans Charter Science and Math High School, New Orleans Center for Health Careers, Orleans Parish School Board District Office, Priestly School, and Robert R. Moton Elementary School. *See* April 2009 Request for Waiver at Attachment 7; FCC Form 471 No. 412169.

[44] *See* June 2006 Request for Waiver at 1-2; April 2009 Request for Waiver 2-3; April 2009 Request for Waiver at Attachment 8. The 29 new schools include: Marion Abramson Elementary School, Algiers Charter Central Office, Arthur Ashe Elementary School, Benjamin Banneker Elementary, G.W. Carver Elementary School, Frederick Douglass High School, Charles R. Drew Elementary School, Fannie C. Williams Elementary, Edgar P. Harney Elementary School, Holy Cross High School, John McDonogh High School, Johnson Elementary School, Lake Area Middle, Live Oak Elementary School, Thurgood Marshall Elementary School, Mary Queen of Vietman, Ronald McNair Elementary School, Martin Luther King, Jr Elementary School, Our Lady of Lourdes High School, O Perry Walker High School, Sarah T. Reed Elementary School, RSD Central Office, Schaumburg Elementary School, Schwarz Alternative High School, Slyvannie F. Williams Elementary School, James. M. Singleton Elementary Charter, St. Julian Elementary, Harriet R. Tubman Elementary School, and Welcome School. *See* April 2009 Request for Waiver at Attachment 8; FCC Form 471 No. 412169.

and RSD seek to add 15 schools that were not originally included on Orleans Parish's funding year 2004 application.[45] The petitioners state that, because USAC issued the funding commitment after March 1 of the funding year and because Orleans Parish subsequently changed its service provider, little work was done under these FRNs prior to Hurricane Katrina striking the New Orleans metropolitan area.[46]

16. We grant the petitioners' request for waiver of section 54.504(c) of our rules to permit NOPS and RSD to include schools not originally included on Orleans Parish's funding year 2004 FCC Form 471 applications.[47] We find that, in this instance, the petitioners have presented special circumstances justifying waivers of our rules. Due to Hurricane Katrina striking the New Orleans metropolitan area in August 2005, and the flooding that followed, more than 120 school buildings in the New Orleans area were damaged, some of them beyond repair.[48] Thus, school program names and school building names changed from those originally included on Orleans Parish's funding year 2004 applications as school buildings were repaired and as new school buildings were built to replace the damaged or destroyed school buildings. Therefore, based on the unique circumstances in this instance, we find that rigid adherence to our rules does not further the purposes of section 254(h) of the Communications Act of 1934, as amended (the Act), or serve the public interest.[49] In addition, NOPS and RSD do not seek any funding in addition to the amounts already committed on Orleans Parish's funding year 2004 FCC Form 471 applications.[50] Moreover, at this time, there is no evidence of waste, fraud, or abuse, misuse of funds, or a failure to adhere to core program requirements. Accordingly, we remand the underlying applications to USAC and direct USAC to allow for the addition of the schools to NOPS's and RSD's funding year 2004 FCC Form 471 application numbers 422313 and 412169 consistent with the terms of this order.[51] In granting the petitioners' request to include additional schools to their funding year 2004 FCC Form 471 applications, RSD and NOPS shall not receive additional funding above the initial amount requested as part of their funding year 2004 FCC Form 471 applications.

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[45] *See* April 2009 Request for Review. These 15 schools include: Singleton, Audubon –Carrollton, Ben Franklin High School, Benjamin Franklin Elementary, Hynes Garden District, Audubon-Broadway, Moton – St. Leo the Great Site, Lusher Elementary, McMain, Reed, Harter, Karr High School, NOPS administrative office, Einstein Charter School, and Harney. *Id.* at Attachment 3.

[46] *See* June 2006 Request for Waiver at 2.

[47] 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. *Accord, NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (stating that in addition to the public interest being well-served, there must also be a sufficiently "unique situation" to grant waiver).

[48] *See* RSD FAQs.

[49] *See* 47 U.S.C. § 254(h).

[50] *See* April 20 Request for Waiver at 2.

[51] We estimate that these waivers involve applications for approximately $3.4 million in funding for 2004. We note that USAC has already reserved sufficient funds to address outstanding appeals. *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2010 (Nov. 2, 2009). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

17. Service substitution request. NOPS and RSD also seek to use funds committed for funding year 2004 for switch maintenance funds under FCC Form 471 application number 422313, FRN 1168546, totaling approximately $963,458, to purchase and install switches at 13 schools.[52] Section 54.504(f) of the Commission's rules allows for the substitution of a service or product for another where: (1) the service or product has the same functionality; (2) the substitution does not violate any contract provisions or state or local procurement laws; (3) the substitution does not result in an increase in the percentage of ineligible services or functions; and, (4) the applicant certifies that the requested change is within the scope of the controlling FCC Form 470.[53] NOPS and RSD argue that no substitution is necessary because switches and switch maintenance are the same service because they were both requested under the internal connections category.[54] Further, NOPS and RSD contend that, even if they are not the same service, the functionality of the two FRNs is the same – data distribution.[55] NOPS and RSD state that, if the Commission determines that a service substitution does not meet the criteria specified in the rules, they seek a waiver of section 54.507(f) to permit a substitution so that the funds committed for switch maintenance can be used instead to pay for switches.[56] NOPS and RSD argue that if such a waiver is not approved, NOPS will have to pay the full cost of the switches at the 13 locations, imposing a serious financial burden on the school district.[57]

18. We deny NOPS's and RSD's request for waiver of section 54.504(f) of our rules.[58] First, we find that the proposed service substitution request does not meet the first prong of the criteria specified in our rules for granting such a request.[59] Although the funding year 2004 Eligible Services List (ESL) did not include a separate category for basic maintenance for internal connections, just because services are listed under the same category in the ESL does not make them the same service.[60] That is, equipment that provides switching functions and the services necessary to maintain the switches provide two separate

[52] June 2006 Request for Waiver at 2 (regarding FCC Form 471 application number 422313, FRN 1168546). The 13 schools include: Dr. Ronald McNair Elementary School, Lake Forest Montessori, Mahalia Jackson School, Singleton, Audubon-Carrollton, Benjamin Franklin High School, Benjamin Franklin Elementary School, Hynes Garden District School, Audubon-Broadway, Moton –St. Leo the Great Site, Lusher Elementary, McMain, Harte, and Karr High School. *Id.*

[53] *Id.*

[54] April 2009 Request for Waiver at 2. In funding year 2004, switches and switch maintenance were both listed as internal connections because the Commission had not yet created a separate category for services provided as basic maintenance for internal connections. *See* USAC website, Schools and Libraries, Eligible Services List, Funding Year 2004 Eligible Services List of the Schools and Libraries Support Mechanism (rel. Oct. 10, 2003), http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_101003.pdf (last visited Feb. 2, 2010) (Funding Year 2004 ESL). Our rules require USAC to submit annually a draft eligible services list (ESL) listing services eligible for support under the E-rate program for the following funding year. *See* 47 C.F.R. § 54.522; *see also Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26929, para. 40 (2003).

[55] April 2009 Request for Waiver at 2.

[56] *Id.*; 47 C.F.R. §54.504(f).

[57] April 2009 Request for Waiver at 2.

[58] 47 C.F.R. § 54.504(f).

[59] *Id.*

[60] *See* FY 2004 ESL. For example, the Internet access category also includes e-mail service, but Internet access and e-mail service are not the same service. *Id.*

functionalities.[61] Therefore, we find that NOPS and RSD do not meet the criteria for a service substitution under our rules.[62]

19. Second, we find that, in this instance, NOPS and RSD have not presented special circumstances justifying a waiver of our rules.[63] While the E-rate rules do not penalize applicants for requesting too much funding for a certain service, it would be unfair to other applicants to allow RSD and NOPS to use funding for services other than those they originally requested because, absent a waiver, those are returned to the USF for use by other eligible entities.[64] In fact, in the *Hurricane Katrina Order*, the Commission, on its own motion, waived the requirement that, for purposes of section 54.504(f), the substituted service or product must have the same functionality as the service it is replacing.[65] In granting a waiver under those limited circumstances, however, the Commission specifically indicated that the service substitutions allowed in that order would be limited to funds received from applications from funding year 2005.[66] Moreover, RSD and NOPS are not harmed by our denial of their waiver request because they could request additional funding for switches and switch maintenance in future funding years.[67] Accordingly, we deny NOPS's and RSD's request for waiver of the Commission's service substitution rules for FCC Form 471 application number 422313, FRN 1168546, for funding year 2004.

20. Additionally, there are three pending service substitution requests from NOPS for internal connections services with USAC for funding year 2004 related to FCC Form 471 application numbers

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[61] *Id.*; *see, e.g.*, *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26921-22, paras. 22-23. Certain basic maintenance costs that are "necessary to the operation of the internal connections network" are eligible for priority 2 support. *See id.* Basic maintenance services are "necessary" if, but for the maintenance at issue, the connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services without E-rate discounts. *Id.* Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information.

[62] 47 C.F.R. § 54.504(f).

[63] *See supra* note 47.

[64] Pursuant to Commission rules, any unused funding reverts back to the universal service fund (USF) to be available for use in subsequent funding years. 47 C.F.R. § 54.507(a)(2). In accordance with this rule, the Commission has carried forward unused E-rate funds for use in funding years 2003, 2004, 2007, 2008, and 2009. *Third Report and Order*, 18 FCC Rcd at 26927, para. 55; *Carryover of Unused Funds for Funding Year 2004*, CC Docket No. 02-6, Public Notice, 19 FCC Rcd 20420 (Wireline Comp. Bur. 2004); *Wireline Competition Bureau Announces Carryover of Unused Funds for Funding Year 2007*, CC Docket No. 02-6, Public Notice, 22 FCC Rcd 10795 (Wireline Comp. Bur. 2007); *Carryover of Unused Federal Universal Service Funds for Funding Year 2008*, CC Docket No. 02-6, Public Notice, 23 FCC Rcd 9960 (Wireline Comp. Bur. 2008); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 09-1734 (rel. July 31, 2009).

[65] *Hurricane Katrina Order*, 20 FCC Rcd at 16908-9, para. 49. The Commission found that, under the circumstances at that time, it was in the public interest to allow the replacement of damaged and destroyed services and equipment for program participants in Alabama, Louisiana DOE, and Mississippi, with funds previously granted for other services and equipment. *Id.*

[66] *Id.*

[67] If RSD and NOPS installed switches prior to September 2006 – the deadline for using funding year 2004 funds – and purchased maintenance for those switches, they only needed to submit an invoice to seek reimbursement for those services.

422313 and 412169, totaling approximately $2.2 million.[68] On our own motion, we grant these requests. Unlike NOPS's and RSD's request above, we find that, for these pending service substitution requests, NOPS meets the criteria for service substitution under our rules.[69] Specifically, all three service substitution requests seek substitution of a service or product with the same functionality.[70] Moreover, under E-rate program procedures, Orleans Parish had until September 30, 2006, to install the requested services but Hurricane Katrina struck in August 2005 before the services could be installed. Therefore, we recognize that technology has evolved since 2004 and NOPS may seek to replace equipment initially requested as part of its funding year 2004 funding requests for internal connections with more cost-effective and efficient equipment that serves the same function. Further, pursuant to our rules, the requested change is within the scope of the original FCC Form 470, and the amount of the funding requests will not increase.[71] Accordingly, we grant these service substitution requests.

21. Request to change priority level. Lastly, for funding year 2004 FCC Form 471 application numbers 422313 and 412169, the petitioners request a waiver of section 54.507(g) of the Commission's rules so that NOPS can use the available funding year 2004 funds at a 90 percent discount rate (the rate for which all NOPS schools and former-NOPS charter schools qualified in funding years 2005 and 2006 based on the *Hurricane Katrina Order*) without regard to the discount rate for which they qualified in funding year 2004.[72] The petitioners argue that the discount rate has little meaning now because of the major exodus of population from New Orleans after the storm and the intra-city relocations that have occurred because of the varying degrees of damage to different neighborhoods.[73] They further contend that the original funding year 2004 FCC Form 471 applications were based on circumstances as they existed at the time of application, prior to Hurricane Katrina.[74] They also argue that most of the schools they seek to add to the funding year 2004 FCC Form 471 applications were not originally included on the applications because the discounts for which they qualified in funding year 2004 would most likely have resulted in the priority 2 funding requests being denied for lack of funding.[75] Thus, the petitioners state

[68] *See* April 2009 Request for Waiver at Attachment 4 (Letter to USAC, Schools and Libraries Division, from Peggy Villars Abadie, New Orleans Public School Board (dated Sept. 21, 2007)) (FCC Form 471 422313 Service Substitution Request) (regarding FRN 116868, seeking the substitution of wireless local area network access points and installation); April 2009 Request for Waiver at Attachments 5 and 6 (FCC Form 471 412169 Service Substitution Requests) (regarding FRNs 1135675 and 1137610, seeking the substitution of various internal connections equipment and services).

[69] *See* 47 C.F.R. § 54.504(f).

[70] *Id.*; *see* FCC Form 471 422313 Service Substitution Request; FCC Form 471 412169 Service Substitution Requests.

[71] *See* 47 C.F.R. § 54.504(f); FCC Form 471 422313 Service Substitution Request; FCC Form 471 412169 Service Substitution Requests.

[72] June 2006 Request for Waiver at 3-4; April 2009 Request for Waiver at 1-2; 47 C.F.R. § 54.507(g); *Hurricane Katrina Order*, 20 FCC Rcd at 16903, para. 38. The petitioners also seek a waiver of section 54.505 of the Commission's rule related to priority of service. *See* June 2006 Request for Waiver at 3-4; April 2009 Request for Waiver at 1-2; 47 C.F.R. § 54.505. Because section 54.507(g) specifically relates to the rules of priority, we only reference section 54.507(g) in this order. *See* 47 C.F.R. § 54.507(g).

[73] June 2006 Request for Waiver at 3.

[74] *Id.*

[75] April 20 Request for Waiver at 1-2. For example, in funding year 2004, Audubon Montessori would have qualified for a 50 percent discount rate compared to 80 percent in funding year 2007. *Id.* at 2.

that the funding year 2004 FCC Form 471 applications only included schools that Orleans Parish believed would need services at that time and did not reflect subsequent events and needs.[76]

22. We deny the petitioners' request for waiver of section 54.507(g) of the Commission's rules to allow NOPS to use the available funding year 2004 funds from FCC Form 471 application numbers 422313 and 412169 at the highest level of priority for priority 2 services (i.e., 90 percent).[77] However, we allow the petitioners to use the available funding year 2004 funds at an 88 percent share discount level, the level at which they qualified at the time of the initial application in funding year 2004.[78] Although the Commission may waive any provision of its rules, we find that, in this instance, the petitioners have not demonstrated special circumstances or particular facts that warrant a waiver of our priority rules to grant them a 90 percent discount for funding year 2004.[79] Orleans Parish's funding year 2004 FCC Form 471 applications were submitted in February 2004, well in advance of the devastation caused by Hurricane Katrina in August 2005.[80] To grant a waiver of our priority rules at the highest level of priority for priority 2 services for funding year 2004 applications submitted prior to Hurricane Katrina would provide NOPS with the opportunity for a greater discount than the discount for which the schools qualified at the time of application in 2004.

23. Moreover, the circumstances described in the *Hurricane Katrina Order* are not present here.[81] In the *Hurricane Katrina Order*, the Commission found good cause to waive section 54.507(g) of its rules to provide for the highest level of priority due to the need for an immediate indication of whether E-rate program participants in the directly affected areas were likely to receive funds for priority 2 services because of the damage caused by Hurricane Katrina to their telecommunications and information systems.[82] The funding level for funding year 2004 was already set and there is no need for such an emergency determination of funding level in this case. However, we will allow NOPS to use the available funding year 2004 funds at an 88 percent discount level – the level at which its schools originally qualified in funding year 2004.[83] Allowing NOPS to use the available funds at an 88 percent discount level will ensure that NOPS receives the available funding year 2004 funding while not giving NOPS an opportunity for a greater discount than the discount for which the schools qualified at the time of application in 2004. Accordingly, we deny the petitioners' request for waiver of section 54.507(g) of our rules to allow NOPS to receive funding committed for its funding year 2004 application numbers 422313 and 412169 at a 90 percent discount level, but allow NOPS to use such funds at an 88 percent discount level.[84]

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[76] *Id.*

[77] *See* June 2006 Request for Waiver at 4; April 2009 Request for Waiver at 1-2; 47 C.F.R. § 54.507(g).

[78] *See supra* para. 13.

[79] *See supra* note 47; 47 C.F.R. § 54.507(g).

[80] *See* FCC Form 471 No. 412169; FCC Form 471 No. 422313.

[81] *See Hurricane Katrina Order*, 20 FCC Rcd 16883.

[82] *See* 47 C.F.R. § 54.507(g); *Hurricane Katrina Order*, 20 FCC Rcd at 16905-7, paras. 43-45.

[83] *See supra* para. 13.

[84] *See* June 2006 Request for Waiver at 4; April 2009 Request for Waiver at 1-2; 47 C.F.R. § 54.507(g).

B. Funding Years 2007, 2008, and 2009 Request for Waivers

24. We grant in part and deny in part the petitioners' requests for waivers of our rules related to their funding years 2007-2009 applications.[85] Their requests for waivers are discussed separately below.

25. Entity substitution requests. In February 2007, RSD and NOPS filed four FCC Form 471 applications for services for public schools in the New Orleans metropolitan area for funding year 2007.[86] In late 2007, RSD sought to revise these applications to include schools that were not initially included on the RSD's and NOPS's funding year 2007 FCC Form 471 applications, but USAC advised RSD that such additions went beyond allowable ministerial and clerical corrections to the FCC Form 471 applications which USAC had the authority to approve.[87] Approximately two years later, on June 22, 2009, RSD and NOPS submitted a request for waiver with the Commission seeking a waiver of section 54.504(c) of its rules to permit them to modify not only their funding year 2007 FCC Form 471 applications, but also their funding year 2008 FCC Form 471 applications[88] and additional funding year 2008 FCC Form 471 applications filed by certain school districts,[89] to include those schools that ultimately received services in funding years 2007 and 2008.[90]

26. Specifically, RSD and NOPS state that, at the time of filing their funding year 2007 FCC Form 471 applications, they did not know which schools were going to be operable or which school programs would be housed in a particular building prior to the start of the funding year in July 2007.[91] Therefore, RSD and NOPS completed their funding years 2007 and 2008 FCC Form 471 applications by listing the names of the buildings where services would be received and not necessarily the name of the school program(s) to be housed in a particular building in the coming funding year.[92] Additionally, RSD

[85] *See* June 2009 Request for Waiver.

[86] *See* FCC Form 471, Recovery School District (dated Feb. 8, 2007) (Application Number 585165); FCC Form 471, Orleans Parish School District (dated Feb. 8, 2007) (Application Number 550299); FCC Form 471, Orleans Parish School District (dated Feb. 8, 2007) (Application Number 586416); FCC Form 471, Orleans Parish School District (dated Feb. 8, 2007) (Application Number 584480). FCC Form 471 application numbers 586416 and 550299 were filed jointly as consortium applications. *See* Application Number 586416; Application Number 550299.

[87] *See supra* para. 5; Letter from USAC, Schools and Libraries Division, to Rayne Martin, Recovery School District and Orleans Parish School District (dated Mar. 31, 2009) (USAC Letter).

[88] 47 C.F.R. § 54.504(c); June 2009 Request for Waiver; *id.* at Attachments 4-5; *see also* Application Number 585165; Application Number 550299; Application Number 586416; Application Number 584480; FCC Form 471, Recovery School District (filed Feb. 7, 2008) (Application Number 616735); FCC Form 471, Recovery School District (filed Feb. 7, 2008) (Application Number 636670) (application numbers 616735 and 636670 are consortium applications). As part of this waiver request, after further consideration of the issues, RSD and NOPS withdrew their previous waiver request filed with the Commission on April 3, 2009, and asked the Commission to treat the June 22, 2009 waiver request as a new request for waiver. *Id.* at 1; *see* Letter from Rayne Martin, Recovery School District, and Peggy Villars Abadie, New Orleans Public Schools, to Gina Spade, Telecommunications Access Policy Division, Federal Communications Commission, CC Docket No. 02-6 (filed Apr. 3, 2009).

[89] *See* FCC Form 471, McDonogh City Park Academy (filed Jan. 28, 2008) (Application Number 613699); FCC Form 471, New Orleans Free School (filed Jan. 28, 2008) (Application Number 613794); FCC Form 471, Algiers Charter Schools Association (filed Feb. 7, 2008) (Application Number 635733); FCC Form 471, Algiers Charter Schools Association (filed Feb. 7, 2008) (Application Number 635961).

[90] *See* June 2009 Request for Waiver.

[91] June 2009 Request for Waiver at 2-5.

[92] *See id.*

and NOPS state that, throughout funding years 2007 and 2008, some school buildings were renovated to accommodate additional school programs and certain schools were reorganized as charter schools, resulting in different schools actually receiving services than those that were originally included on their funding years 2007 and 2008 FCC Form 471 applications.[93] Further, RSD and NOPS note that some schools that were originally included on their initial funding years 2007 and 2008 FCC Form 471 applications did not ultimately receive service in funding years 2007 or 2008.[94] Thus, RSD and NOPS seek a waiver from the Commission to allow USAC to fund those schools that actually received services for funding years 2007 and 2008.[95] RSD and NOPS argue that, without approval of this request, the New Orleans area public schools will be denied E-rate funding for requests made in good faith and based on the current circumstances at the time of their initial applications in 2007 and 2008.[96]

27. Additionally, for funding year 2009, RSD and NOPS ask the Commission to waive its rules to allow RSD to revise, where necessary, its funding year 2009 FCC Form 471 applications to replace school building names with school program names and to update the entity numbers.[97] RSD and NOPS state that these revisions may be necessary as school programs move to new locations due to the construction of new buildings and the completion of renovations to existing buildings.[98] Lastly, RSD and NOPS similarly ask the Commission to waive its rules to allow certain RSD schools that applied for E-rate funding in funding years 2008 or 2009 to update school program names and entity numbers, as appropriate, so that they will be eligible for funding.[99] NOPS and RSD argue that granting these waivers will enable RSD, its schools and its charter operators, to obtain reimbursement for the costs of providing eligible products and services to eligible entities during funding years 2008 and 2009.[100]

28. We grant NOPS's and RSD's request for waiver of section 54.504(c) of our rules to allow USAC to fund those schools that actually received services in funding years 2007 and 2008 but may have not been originally included on RSD's and NOPS's funding years 2007 and 2008 FCC Form 471 applications.[101] For the reasons discussed above, we find that a waiver of our rules is warranted in this

[93] *Id.*; *see, e.g.*, June 2009 Request for Waiver, Attachment 4 (line 16, Green Middle School was subsequently chartered out with the new program name of Samuel J. Green Charter School; line 44, the building name of Reed Senior High School subsequently also housed Craig Elementary).

[94] *See, e.g.*, June 2009 Request for Waiver, Attachment 4 (line 27, L.B. Landry Learning Academy did not receive service in funding year 2007; line 68, Thurgood Marshall was not originally included on the funding year 2007 FCC Form 471 applications but received service in funding year 2007); *id.* at Attachment 5 (line 52, New Orleans Alternative High School did not receive service in funding year 2008; line 72, Laurel Elementary School was not originally included on the funding year 2008 FCC Form 471 applications but received service in funding year 2008).

[95] *See* June 2009 Request for Waiver at 3, 5.

[96] *Id.* at 2-5.

[97] *See* June 2009 Request for Waiver at 5 (regarding FCC Form 471 application numbers 687776 and 674236); 47 C.F.R. § 54.504(c).

[98] *See* June 2009 Request for Waiver at 5.

[99] *Id.* at 5-6.

[100] *Id.* at 7.

[101] 47 C.F.R. § 54.504(c); June 2009 Request for Waiver, Attachment 4 and 5. For funding year 2007, these schools are listed in column J of attachment 4 for RSD's applications, and Sophie B. Wright Charter School at line 25 of attachment 4 for NOPS's applications. June 2009 Request for Waiver at 3-4, Attachment 4. For funding year 2008, these schools are listed on column D of attachment 5 for RSD's applications and the list of schools provided for FRN 1762251 for RSD on the tab titled "Wiring Block 4." *See* June 2009 Request for Waiver at 5, Attachment 5.

instance.[102] We understand that, as New Orleans and the surrounding areas recover from the damage caused by Hurricane Katrina, school program names have changed as school programs move from one building to another or as several school programs occupy the same school building. Therefore, we find that waiver is warranted to allow RSD and NOPS to update their funding years 2007 and 2008 FCC Form 471 applications to include certain schools that were not originally included on their applications, as provided in their waiver request, and to update school program names and entity numbers to reflect the actual entities that received services in funding years 2007 and 2008 or will be receiving services in funding years 2008 and 2009. [103] Additionally, although RSD and NOPS seek to add schools to their funding year 2007 and 2008 FCC Form 471 applications, RSD and NOPS do not seek an increase in funding above the requested amount for any FRNs as part of their funding year 2007 FCC Form 471 applications,[104] and we do not permit any increase in funding above the requested amount for any FRNs as part of RSD's and NOPS's funding years 2008 and 2009 FCC Form 471 applications.[105] Moreover, at this time, there is no evidence of waste, fraud, or abuse, misuse of funds, or a failure to adhere to core program requirements. Accordingly, we remand NOPS's and RSD's underlying funding years 2007, 2008, and 2009 applications to USAC for further action consistent with the terms of this order.[106]

29. In remanding the underlying applications to USAC, we direct USAC to allow RSD and NOPS to substitute school program names for the school building names originally included on their funding years 2007 and 2008 FCC Form 471 applications, in addition to any associated new entity numbers. Consistent with this direction, USAC shall allow RSD and NOPS to make any similar school program name changes and entity number changes to their funding year 2009 FCC Form 471 applications as a result of school relocations, new building construction, or building renovations, to appropriately designate the school program names located within a particular building.[107] As indicated above, we believe that permitting such changes serves the public interest and furthers the purposes of section 254(h) of the Act.[108] USAC shall not permit the addition of a school to their applications that is not included as part of this waiver request. Thus, such changes are limited to updating the information for those schools that were originally included on RSD's and NOPS's funding year 2007, funding year 2008 or funding year 2009 FCC Form 471 applications, or as part of this waiver request. If RSD and NOPS seek to subsequently revise their applications to include additional schools that are not included as part of this waiver request, they must seek a waiver from the Commission. We anticipate that, subsequent to funding year 2009, approximately four years post-Hurricane Katrina, RSD and NOPS will be able to file their FCC Form 471 applications with the correct list of school program names and entity numbers.

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[102] *See supra* para. 16.

[103] See June 2009 Request for Waiver.

[104] *See id*, Attachment 4.

[105] *See id.*

[106] *See* Appendix. We estimate that these waivers involve applications for approximately $52 million in funding for funding years 2007 and 2008. We note that USAC has already reserved sufficient funds to address outstanding appeals. *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2010 (Nov. 2, 2009). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

[107] *See* June 2009 Request for Waiver at 5-6, Attachment 6.

[108] *See supra* para. 16; 47 U.S.C. § 254(h).

30. Change in application type. In February 2008, RSD and NOPS both included Wright Middle School on their funding year 2008 FCC Form 471 applications.[109] RSD subsequently removed Wright Middle School from its funding year 2008 FCC Form 471 application.[110] NOPS, however, sought to change its application type from a school district application to a consortium application so that Wright Middle School – a school under the management of RSD, not NOPS – could benefit from NOPS's network.[111] USAC again advised NOPS that such a change to its application type went beyond an allowable ministerial and clerical correction to its FCC Form 471 application, and, therefore, USAC did not allow NOPS to make this change.[112] Thus, as part of their June 2009 waiver request, RSD and NOPS seek a waiver of section 54.504(c) of the Commission's rules to allow them to change the application type on NOPS's funding year 2007 and funding year 2008 FCC Form 471 applications from "school district" to "consortium" due to the inclusion of Wright Middle School on its applications for both funding years.[113] RSD and NOPS explain that Wright Middle School receives its telecommunications and Internet services via the NOPS network rather than the RSD network.[114] Additionally, all of the services for Wright Middle School were billed to NOPS.[115] Therefore, RSD and NOPS argue that NOPS's funding year 2007 and funding year 2008 FCC Form 471 applications should have been categorized as consortium applications rather than school district applications.[116]

31. We grant RSD's and NOPS's request for waiver of section 54.504(c) of our rules to allow NOPS to change its application type for funding year 2007 and funding year 2008 from "school district" to "consortium."[117] We find that it is in the public interest to waive section 54.504(c) of our rules to allow NOPS to amend its applications type and be reimbursed for payments made to the service provider for Wright Middle School. Accordingly, we remand NOPS's underlying funding year 2007 and funding year 2008 FCC Form 471 applications to USAC to make this change to NOPS's applications.[118]

32. Service substitution request. Lastly, as part of RSD's and NOPS's waiver request for funding year 2007, they seek a waiver of section 54.504(f) of the Commission's rules to permit them to apply funding year 2007 funds designated for long distance service in the amount of $93,589.96 toward

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[109] *See* FCC Form 471, Orleans Parish School District (filed Feb. 7, 2008); (Application Number 606647); FCC Form 471, Orleans Parish School District (filed Feb. 7, 2008) (Application Number 634554); June 2009 Request for Waiver at 7.

[110] *See* June 2009 Request for Waiver at 7.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 7 (regarding funding year 2007 FCC Form 471 application number 584480 and funding year 2008 FCC Form 471 application numbers 606647 and 634554).

[114] *See* June 2009 Request for Waiver at 7.

[115] *Id.*

[116] *Id.*

[117] 47 C.F.R. § 54.504(c); *see* June 2009 Request for Waiver at 7.

[118] *See* Appendix. We estimate that this waiver involves applications for approximately $9.7 million in funding for funding years 2007 and 2008. We note that USAC has already reserved sufficient funds to address outstanding appeals. *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2010 (Nov. 2, 2009). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

their expenses for dial tone services for funding year 2007.[119] RSD and NOPS believe that this requested change is consistent with our rules concerning service substitutions post-commitment.[120] Although USAC has not committed funding to RSD and NOPS for funding year 2007, RSD and NOPS have purchased the services.[121] Therefore, RSD and NOPS seek a waiver of our rules to allow this change to the funding year 2007 FCC Form 471 application number 550299.[122]

33. We deny RSD's and NOPS's request for waiver of section 54.504(f) of the Commission's rules to allow NOPS and RSD to apply the funding year 2007 funds they requested for long distance service toward their expenses for dial tone services.[123] As explained above, section 54.504(f) of the Commission's rules allows USAC to grant a request by an applicant to substitute a service or product for another where: (1) the service or product has the same functionality; (2) the substitution does not violate any contract provisions or state or local procurement laws; and, (3) the substitution does not result in an increase in the percentage of ineligible services or functions; and, (4) the applicant certifies that the requested change is within the scope of the controlling FCC Form 470.[124] First, we find that NOPS and RSD have not satisfied the first prong establishing that long distance and dial tone service have the same functionality.[125] Unlike long distance telephone service, which is provided by interexchange carriers and provides telephone service outside of a local calling area, dial tone service provides only local telephone dial tone service and access to interexchange services.[126]

34. Second, NOPS and RSD have not presented special circumstances justifying a waiver of our rules.[127] NOPS and RSD requested far more funding for long distance than they needed and requested less funding for dial tone service than they actually spent.[128] Applicants are required to bid for services and include an accurate assessment of their needs on their applications. The application process is based on the premise that applicants can support their requests for funding. The waiver request presented by NOPS and RSD would indicate that NOPS's and RSD's estimates were not at all accurate assessments of their need for these services. Although applicants are not penalized for requesting funding they do not ultimately need, they are not allowed to transfer that funding to another service for which they

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[119] *Id.* at 4, Attachment 4 (regarding FCC Form 471 application number 550299, FRNs 1568782 and1568737); 47 C.F.R. § 54.504(f).

[120] June 2009 Request for Waiver at 4.

[121] RSD's and NOPS's FCC Form 471 application number 550299 included FRN 1568737 for dial tone service in the pre-discount amount of $230,151 and FRN 1568782 for long distance in the pre-discount amount of $102,000. *Id.* at Attachment 4; *see* Application Number 550299. RSD and NOPS, however, used $451,736.67 for dial tone service and $8,410.04 for long distance. June 2009 Request for Waiver at 4, Attachment 4.

[122] *Id.*

[123] *See* June 2009 Request for Waiver at 4; 47 C.F.R. § 54.504(f).

[124] 47 C.F.R. § 54.504(f); *supra* para. 17.

[125] *See* 47 C.F.R. § 54.504(f).

[126] *See* USAC website, Schools and Libraries, Eligible Services List, Schools and Libraries Support Mechanism for Funding Year 2007, http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_101906.pdf, at 35, 38 (last visited Feb. 2, 2010).

[127] *See supra* note 47.

[128] *See supra* note 122.

did not request enough funding. Accordingly, we deny NOPS's and RSD's request for waiver of our service substitution rules as it relates to funding year 2007 FCC Form 471 application number 550299.

C. RSD Funding Year 2008 and Funding Year 2009 Request for Waivers for RSD Schools Located Outside the New Orleans Metropolitan Area

35. We grant RSD's requests for waivers of our rules related to certain funding year 2008 and funding year 2009 FCC Form 471 applications for RSD schools located outside the New Orleans metropolitan area. On July 16, 2009, RSD filed a separate request for waiver with the Commission relating to the same issues as addressed above but with respect to 11 Louisiana schools located outside of the New Orleans metropolitan area that were taken over by the RSD subsequent to the filing of its FCC Form 471 applications for funding years 2008 and 2009.[129] RSD thus seeks a waiver of our rules so that it can revise certain funding year 2008 and funding year 2009 FCC Form 471 applications to reflect the actual schools and associated entity numbers to receive service for these funding years.[130]

36. First, RSD states that four schools located within the East Baton Rouge (EBR) school district and two schools located within the Point Coupee Parish School (PCPS) District were officially taken over by the RSD in July 2008, well after the funding year 2008 FCC Form 471 applications were submitted to USAC.[131] RSD therefore asserts that it was unable to include these schools in its funding year 2008 FCC Form 471 applications, and seeks a waiver of our rules so that it can amend the application type for these funding year 2008 FCC Form 471 applications from "school district" to "consortium" due to the subsequent takeover by RSD.[132] Second, RSD asserts that it filed FCC Form 471 applications on behalf of four additional EBR schools and two Caddo Parish schools. Due to the subsequent completion of management and chartering agreements, these schools were converted to RSD charter schools in July 2009.[133] Third, RSD seeks to amend its and Advance Baton Rouge's funding year 2009 FCC Form 471 applications to reflect the correct entity numbers of the schools to receive E-rate funding.[134] Lastly, RSD seeks to amend certain funding year 2009 FCC Form 471 applications for six RSD charter schools to reflect that the schools are operated by organizations other than RSD.[135] RSD

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[129] *See* July 2009 Request for Waiver at 2, Attachment 1. RSD subsequently filed a supplement to its July 2009 filing to correct two errors in Attachment 1. *See* August 2009 Supplement.

[130] *See id*; 47 C.F.R. 54.504(c). The funding year 2008 FCC Form 471 application numbers include: 611187, 611517, 611175, 611791, 611467, and 613865. The funding year 2009 FCC Form 471 application numbers include: 696164, 696034, 696032, 696189, 696133, 696188, 696139, 696141, 696191, 696140, and 696187.

[131] *See* July 2009 Request for Waiver at Attachment 1 (first chart). These schools include: Capitol Pre-College Academy for Boys; Capitol Pre-College Academy for Girls; Glen Oaks Middle School; Prescott Middle School; and Pointe Coupee Central High School. *Id.*

[132] July 2009 Request for Waiver at 2; *see* 47 C.F.R. 54.504(c).

[133] July 2009 Request for Waiver at 2 at Attachment 1 (second chart). These schools include: Linear Middle School, Linwood Middle School, Crestworth Middle School, Dalton Elementary School, Kenilworth Middle School, and Lanier Elementary School. *Id.*

[134] *See* 47 C.F.R. 54.504(c); July 2009 Request for Waiver at 2, Attachment 1 (second chart). These schools include: Glen Oaks Middle School; Prescott Middle School; and Pointe Coupee Central High School. July 2009 Request for Waiver at 2, Attachment 1 (second chart).

[135] *See* July 2009 Request for Waiver at 2; 47 C.F.R. § 54.504(c). The funding year 2009 FCC Form 471 application numbers include: 696164, 696034, 696032, 696189, 696133, 696188, 696139, 696141, 696191, 696140, and 696187.

states that it initially filed FCC Form 471 applications on behalf of these schools because the charter operators were not approved until March 2009, after the funding year 2009 FCC Form 471 application filing deadline.[136] RSD argues that granting the waivers will allow the subject school districts or charter operators to receive reimbursement for services provided to the affected schools for funding years 2008 and 2009 despite either the schools' takeover by RSD pursuant to Louisiana law or its subsequent conversion to an RSD charter school.[137]

37. Consistent with our discussion and analysis above, we grant RSD's requests for waiver for the schools referenced in its waiver request.[138] We find that, in this instance, RSD has presented special circumstances justifying a waiver of our rules.[139] As underperforming schools and school districts are taken over by the RSD pursuant to Louisiana law, RSD will necessarily need to revise its FCC Form 471 applications to reflect the actual schools to receive service, their associated entity numbers and the current charter operator of the school.[140] We direct USAC to allow RSD to make these changes. Additionally, where schools were subsequently taken over by RSD or converted to RSD charter schools after their original school districts' FCC Form 471 applications were submitted to USAC, we allow the applicants to revise the application type from "school" to "consortium" to reflect such change. Also, we direct USAC to allow the relevant schools, subsequently taken over by RSD, to revise their relevant funding years 2008 and 2009 FCC Form 471 applications to reflect the actual schools, the associated entity numbers, and the current charter operator.[141] We limit this waiver only to those specific schools listed as part of the underlying funding years 2008 and 2009 FCC Form 471 applications addressed in this order.[142] Accordingly, we remand the underlying funding year 2008 and 2009 FCC Form 471 applications to USAC for further action consistent with this order.[143]

IV. ORDERING CLAUSES

38. 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 underlying applications associated with the Requests for Waivers filed by the State of Louisiana Department of Education, the Recovery School District, and the New Orleans Public Schools filed on June 28, 2006, April 20, 2009, June 22, 2009, July 16, 2009, and August 4, 2009, respectively, ARE GRANTED IN

[136] July 2009 Request for Waiver at 2. The charter operators for these schools are listed in attachment 1 (second chart). *Id.* at Attachment 1.

[137] *See* July 2009 Request for Waiver at 2.

[138] *See supra* paras. 16, 28; July 2009 Request for Waiver at 2 and Attachment 1.

[139] *See supra* note 47.

[140] *See supra* para. 8.

[141] *See* July 2009 Request for Waiver, Attachment 1.

[142] *Id.*

[143] *See* Appendix. We estimate that these waivers involve applications for approximately $1.5 million in funding for funding years 2008 and 2009. We note that USAC has already reserved sufficient funds to address outstanding appeals. *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2010 (Nov. 2, 2009). We thus determine that the action we take today should have minimal impact on the universal service fund as a whole.

PART and DENIED IN PART to the extent provided herein and REMANDED to USAC for further consideration consistent with this order.

39. 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), sections 54.504(c), 54.504(f), 54.507(c), and 54.507(g) of the Commission's rules, 47 C.F.R. §§ 54.504(c), 54.504(f), 54.507(c), 54.507(g), ARE WAIVED to the extent provided herein.

40. IT IS FURTHER ORDERED, pursuant to authority contained in sections 1-4 and 254 of the Communications Act, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Universal Service Administrative Company SHALL COMPLETE its review of each remanded application referenced in this order and ISSUE an award or a denial based on a complete review and analysis no later than 90 calendar days from the release date of this order.

41. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX

Applications and Funding Request Numbers Granted

Petitioner	Application Numbers	Funding Request Numbers (FRNs)	Funding Year
State of Louisiana Department of Education Baton Rouge, LA	412169	1135675, 1137610	2004
	422313	All FRNs	2004
Recovery School District New Orleans, LA	412169	1135675, 1137610	2004
	422313	All FRNs	2004
	585165, 550299, 584480, 586416	All FRNs	2007
	616735, 636670, 613699, 613794, 635733, 635961, 606647, 634554, 611187, 611517, 611175, 611791, 611467, 613854, 634569, 633768, 631488	All FRNs	2008
	687776, 674236, 696164, 696034, 696032, 696189, 696133, 696188, 696139, 696141, 696191, 696140, 696187, 690806	All FRNs	2009
New Orleans Public Schools New Orleans, LA	412169	1135675, 1137610	2004
	422313	All FRNs	2004
	585165, 550299, 584480, 586416	All FRNs	2007
	616735, 636670, 613699, 613794, 635733, 635961, 606647, 634554	All FRNs	2008
	687776, 674236	All FRNs	2009