Before the
Federal Communications Commission

In the Matter of the	)	File No. SLD -
	)	
Appeal of the Decision of the	)	
	)	
Universal Service Administrator by	)	
	)	
FRANKLIN SCHOOL DISTRICT	)	
		CC Docket No. 02-6

Appeal and Waiver Request
Request for Expedited Relief

May 3, 2011

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, S.W., Washington, D.C. 20554

This is an Appeal and Waiver Request from an adverse decision by the USAC Administrator.

(1) **Funding Commitment Decision on Invoice Extension Deadline**

Form 471 Application Numbers:	583472; 582948; 690166
Funding Year 10:	07/01/2007-06/30/2008
BEN:	120968
Date of Denial Notice:	April 19, 2011
Date of Appeal:	May 3 , 2011

(2) SLD Contact Information

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(3) **Funding Request Numbers Appealed**

FRNS: 1616422; 1617901;1890533

(4) USAC's Reason for Denial of Deadline Extension Request

Invoice Number: N/A Line(s): N/A
Decision on Request: **Denied**

Explanation: Current guidelines and procedures require Invoice Deadline Extension requests to be filed by the end of the relevant invoice receipt period for the service category of the FRN requiring an extension (120 days after the end of the service delivery date). The extension request was not filed in a timely manner, so it is denied.

(5) Issue

Is it unjust, unreasonable and contrary to the Telecommunications Act of 1996 and Congressional Policy for the USAC Administrator to deny a request for extensions where the failure to file BEARS was a ministerial oversight and where those tasked with working on E-rate applications are typically school administrators, technology coordinators, and teachers who may have little or no experience with the invoice requirements for the E-rate program and where this may be particularly true of staff at small school districts?

(6) Facts

Applicant, a small school district with an enrollment of 1400, was in the process of a changing its entire management staff. The superintendent, chief financial officer, and technology director were all terminated at the same time by the Board of Education. When this termination occurred, no one picked up the e-rate responsibilities for Applicant. [1]

[1] *http://www.sl.universalservice.org/FY14Integration/FY3_Form471/FY14-FY8_471Printinfo.asp?_prevPage=http://www.slforms.universalservice.org/F*

There was a complete staff and total turnover. Therefore, Applicant did timely file BEARS.

(7) Law and Argument

This is an Appeal and a Waiver Request.

The most recent Commission Order, *Alton Community Unit School District 11, et al., DA 10-999, Rel: June 2, 2010* is specifically relevant to this appeal and waiver request.

In *Alton*, reciting the facts, this Commission stated,

> USCA denied funding because their invoice forms were late or never received by the USAC***these appeals ***are consistent with the decision in *Canon-McMillan*, that non-payments of these invoices is not warranted, given that the applicants missed a procedural deadline***. Para 1

And, at *paras 4 and 5,* the Commission continued.

> "***since funding year 2003, the relevant forms [472] must be post marked no later than 120 days after the date of the FCC Form 486 notification letter or 120 days after the last day to receive service, whichever is later. An applicant may request an extension of the filing deadline.*** "petitioners present a number of explanations for the timing of their invoice submissions, or lack thereof. Some Petitioners assert that staff turnovers***resulted in a failure to file their invoice forms on time." *Para 5*

Factually, in *Canon-McMillan School District*, *DA 08-2385, Rel: October 30, 2008,*

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orm471Expert/DisplayExt471_Block1.aspx?Block=1&isDisplay=trueFCC Form 471 Application for Franklin

> *[e]*ighteen appeals involve the untimely filing of the FCC Form 472 and two appeals involve the untimely filing of the FCC Form 474. Some petitioners assert that staff changes or inadvertent errors or typographical errors by the applicant's staff resulted in incorrect information being submitted on the FCC Form 472 or failure to file the FCC Form 472 on a timely basis. Several petitioners assert that they were confused about the funding year based on correspondence from USAC, which delayed or prevented the filing of the timely invoice forms. Further, some applicants contend that they relied upon the service provider to add information to the form and submit the completed form to USAC and that the service provider failed to do so*** Based on the facts and circumstances of these specific cases, we find that good cause exists to grant these appeals. Generally, these applicants claim that staff changes or inadvertent errors on the part of their staff resulted in the late filing or failure to file the FCC Form 472 or FCC Form 474. We believe that the petitioners have demonstrated that they made good faith efforts to comply with programmatic rules. We note that those tasked with working on E-rate applications are typically school administrators, technology coordinators, teachers and librarians who may have little experience with invoice requirements *** Moreover, we emphasize that these applicants missed a procedural deadline and did not violate a substantive rule. In the *Bishop Perry Order*, the Commission found that, under certain circumstances, rigid adherence to certain E-rate rules and requirements that are "procedural" in nature does not promote the goals of section 254 of the Act – ensuring access to discounted telecommunications and information services to schools and libraries – and therefore does not serve the public interest. This is especially true in these circumstances, where the applicants are at the end of the process and have already received service and complied with all other E-rate program rules to date. [Emphases added]

In *Bishop Perry Middle School, et al., FCC 06-54, Rel: May 19, 2006,*

*t*he Commission held,

> a departure from required filing deadlines may be warranted upon careful review of the petitioner's case and when doing so will serve the public interest. Generally, these applicants claim that staff changes or inadvertent errors on the part of their staff resulted in the late filing or failure to file the FCC

> Form 472 or FCC Form 474. We believe that the petitioners have demonstrated that they made good faith efforts to comply with programmatic rules. **We note that those tasked with working on E-rate applications are typically school administrators, technology coordinators, teachers, and librarians who may have little experience with the invoice requirements for the E-rate program. This may be particularly true of staff at small school districts or libraries.** [Emphases added]

The holdings in *Bishop Perry, Alton and Canon-McMillan are* consistent with Applicant's request.

Applicant, a small school district with an enrollment of 1400, was in the process of a changing its entire management team. The superintendent, chief financial officer, and technology director were all terminated at the same time by the Board of Education. When this occurred, no one picked up the e-rate responsibilities for Applicant. In *Bishop Perry* the Commission waived Commission's rules for failure to timely file an FCC Form 471, to timely file a certification related to an FCC Form 470, or to comply with minimum processing standards due to certain clerical or ministerial errors. In *Alton and Canon-McMillan* staff changes caused the problem.

In Canon-McMillan this Commission directed the USAC to take specific action to assist Applicants. The Commission specifically said "[f]or those applications where the appropriate form was not submitted to USAC previously, we direct USAC to solicit submission of the invoice form no later than 15 calendar days from the release of this order and to remit

payment associated with the solicited invoice form, if warranted, no later than 90 calendar days from the receipt of the invoice form." *Para 4* Here, apparently the USAC took no such action.

There is additional Commission authority for granting this Appeal and Waiver. See, *Request for Review of the Decision of the Universal Service Requests for Waiver of Decisions of the Universal Service Administrator by Academy for Academic Excellence, et al., CC Docket No. 02-6, Order, 22 FCC Rcd 4747, 4749-50, para. 5 (2007)* (finding that failure to timely file an FCC Form 471 due to a misunderstanding or personal emergency, or delay in filing or receipt by USAC of the FCC Form 471 due to circumstances out of the applicants' control, constitute special circumstances that warranted a waiver of the FCC Form 471 deadline).

In *Alton*, the Commission granted 49 appeals of decisions by USAC denying funding because it found,

> that the invoice forms, either the FCC Form 472 or the FCC Form 474, were late or not received by USAC. Petitioners "present a number of explanations for the timing of their invoice submissions, or the lack thereof. Some petitioners assert that staff turnover or miscommunications between staff as E-rate duties were transitioned to a new employee resulted in a failure by the applicants to file their invoice forms on time. For example, Springer Municipal Schools claimed that its E-rate staff person resigned from her position without completing the invoice forms, and Lexington/Richland School District #5 claimed that it has had repeated staff turnover and ineffective consultants. Several petitioners assert that they were confused about the rules and the invoice process. Four petitioners filed an invoice form but made an error and, by the time the error was discovered, it was too late to file a new invoice. Three

> applicants were late because of errors made by the service provider, and one service provider claims that the applicant failed to schedule its installation on time. *** these applicants claim that staff changes or inadvertent errors on the part of their staff resulted in the late filing or failure to file the FCC Form 472 or FCC Form 474. We believe that the petitioners have demonstrated that they made good faith efforts to comply with programmatic rules. *** working on E-rate applications are typically school administrators, technology coordinators, teachers, and librarians who may have little experience with the invoice requirements for the E-rate program. This may be particularly true of staff at small school districts or libraries. [Emphases added]

In *Glendale Unified School District, DA 06-244, Rel February 1, 2006,* this Commission, citing the relevant facts, stated that,

> Glendale filed its FCC Form 471 for Funding Request Numbers (FRNs) 980062 and 980113 on February 4, 2003, noting that the service start date for the two FRNs was July 1, 2003. Glendale received its Funding Commitment Decision Letter on March 3, 2004 and filed its FCC Form 486 on March 8, 2004.9 On its FCC Form 486, Glendale listed its funding year service start date as March 8, 2004, the date that it submitted the form to USAC, instead of July 1, 2003, the actual service start date. On June 22, 2004, Glendale submitted its FCC Form 472 Billed Entity Applicant Reimbursement Form (BEAR Form), seeking reimbursement for work billed from November 2003 to May 2004 pursuant to FRNs 980062 and 980113.11 On November 19, 2004, USAC sent Glendale notification that it was not reimbursing certain expenses associated with the FRNs 980062 and 980113 because the service start date was before the services received date on the FCC Form 486. On November 4, 2005, Glendale then filed the instant Request for Review and/or Waiver with the Commission.

In *Buffalo City School District, DA 02-1464, File No. SLD-262700, Rel: June 21, 2002* this Commission, citing the applicable facts, stated:

> Buffalo City's request for an extension does not satisfy any of the four criteria for an automatic one-year extension under section 54.507(d)(1) – (4) of the Commission's rules. Buffalo City received its

> FCDL prior to March 1, 2002, and therefore pursuant to the Commission's rules, its vendor must complete installation of the Funding Year 4 non-recurring services prior to September 30, 2002. Buffalo City also does not satisfy the criterion at section 54.507(d)(3) of the Commission's rules, which allows for an automatic extension if the applicant's service provider cannot complete the installation before the scheduled deadline due to circumstances beyond its control. Ronco has stated that it does have the capability to meet the September 30, 2002 deadline, albeit with increased hardship. Because Buffalo City's situation does not fit within any of the four criteria under section 54.507(d) of our rules, we must treat Buffalo City's request as a request for a waiver of section 54.507(d) of our rules. The Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and <u>such deviation would better serve the public interest than strict adherence to the general rule</u>. We conclude that special circumstances exist to justify a waiver of section 54.507(d) of the Commission's rules as requested by Buffalo City. Specifically, we find that the potential hardships that would be incurred by Buffalo City, including financial hardships, if its vendor were forced to compress its 15-month installation schedule into an 8-month schedule justifies a waiver in this instance. <u>In this situation, requiring strict adherence to section 54.507(d) of the Commission's rules would impose an impractical and unreasonable hardship on Buffalo City.</u> [Emphases added]

While *Buffalo* did not satisfy the Commission rules for an extension, <u>a waiver was nevertheless granted.</u>

In Barrow County School District, DA 11-533 Rel: March 22, 2011 the applicants affected by the USAC decisions state that they submitted the incorrect service start date when filing FCC Forms 486. Citing precedent, *Glendale Unified School District,* the Commission said,

> minor mistakes such as this do not warrant the complete rejection of these applications given that the applicants made a procedural error and did not violate a Commission rule. Therefore, we find good cause to grant the appeals and remand the underlying applications to USAC for further action consistent with this order. In addition, we also find good cause to waive section 54.720 of the Commission's rules for Greater Albany and Lincoln County. Although Greater Albany's appeal was filed late, the district filed the appeal as soon they received actual notice of the denial. Lincoln County's appeal was only two days late.

In *Lynwood Unified School District, DA 02-2566, File No. SLD-252297 Rel: October 8, 2002, g*ranting *Lynwood's* request to extend the deadline is consistent with the public interest and the intent of s*ection 254* of the Communications Act. There is was held that,

> [a]n extension will increase the likelihood that *Lynwood* may successfully utilize discounts available from the schools *** universal service mechanism. An extension also is consistent with the Commission's finding in the *Non-Recurring Services Order* that external circumstances, such as delayed funding decisions, can create situations where deadlines are both impractical and unreasonable.

See also Request for Waiver of Section 54.507(d) of the Commission's Rules by Harvest Preparatory School, File No. SLD-486149, CC Docket No. 02-6, Order, 25 FCC Rcd 5501(Wireline Comp. Bur. May 20, 2010) (granting waiver of USAC's procedural deadline for five funding requests left off an applicant's request for an extension of the deadline for non-recurring services). See 47 C.F.R. § 54.507(d) (2009).

DA 10-2215 Argos Public Library, Rel: November 23, 2010,

Waived Form 471 application deadlines for 20 of 52 applicants. Seventeen of the successful applicants had missed the deadline by 14 days or less; two had serious emergencies, but still filed within 30 days; and one had simply failed to submit its certification on time.

DA 10-2216, Associated Marine Institutes, Rel: November 23, 2010 waived the non-recurring service delivery deadlines for 26 applicants whose requests for extensions had been denied by USAC. In all cases, the FCC found that the applicants had endeavored in good faith to meet their original installation deadlines.

DA 10-2217, California State E-Rate Coordinator, Rel: November 23, 2010 Granted a waiver requested by the California Department of Technology Services ("DTS") to validate the extension of a Statewide Master Contract after DTS had mistakenly failed to check the contract extension box on the associated Form 470 (but had noted such extensions in its RFP).

The facts in *DA 08-2371*, *Radford City Schools, Rel: October 30, 2008* are consistent with Applicants request.

> On December 15, 2000, USAC posted Radford's FCC Form 470 to its website for Funding Year 2001. On January 18, 2001, Radford filed its FCC Form 471. On September 28, 2001, Radford received a Funding Commitment Decision Letter denying four of its Priority One funding requests because it did not submit its FCC Form 470 signed certification page prior to January 18, 2001, the filing date of its FCC Form 471. On February 13, 2002, it filed an appeal with the Commission, requesting review of USAC's decision to deny funding for the four Priority One funding requests, noting that it made a technical mistake in not submitting the certification. Radford asserts,

moreover, that its mistake is immaterial because the funding requests that were denied were all part of Virginia statewide master contracts for which the Commonwealth of Virginia filed certified FCC Forms 470, either as part of existing contracts or when issuing requests for proposals for new services. Radford also argues that, in each of the funding requests, Virginia has ensured that Radford complied with the required bidding process for these services. We grant Radford's Request for Review. Consistent with precedent, and based on the facts and circumstances of this case, we waive the requirement that the FCC Form 470 certification be filed with USAC prior to the filing of the FCC Form 471.*** missing certification does not constitute a substantive violation, but a procedural one. Importantly, in this instance, the funding requests that were denied here were all part of existing Virginia statewide master contracts for which Virginia filed certified FCC Forms 470, either as part of existing contracts or when issuing requests for proposals for new services. If the state files an FCC Form 470, then the applicant may cite the state's FCC Form 470 on its FCC Form 471; no separate bidding documents or contracts are required by an applicant that relies on the state's FCC Form 470, other than what is required by the state master contract and state and local procurement laws. Thus, Radford could have cited to Virginia's FCC Forms 470 on its FCC Form 471, rather than posting its own FCC Form 470. Because Radford could have relied on Virginia's FCC Forms 470 without needing a separate certification, we find it appropriate to waive the certification requirement here. Accordingly, given that the violation at issue is procedural, not substantive, we find that a complete rejection of Radford's application is not warranted. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds or a failure to adhere to core program requirements revealed by the record in this matter. Furthermore, we find that denial of funding in this case would inflict undue hardship on Radford. In this case, Radford has demonstrated that rigid compliance with USAC's application procedures does not further the purposes of section 254(h) of the Communications Act of 1934, as amended, or serve the public interest. We therefore grant Radford's appeal and remand the underlying application to USAC for further action consistent with this order. [2]

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[2] *Cf. Amy Biehl Charter High School, DA 09-2242 Released: October 20, 2009.* We find that neither Amy Biehl nor Weld has provided sufficient evidence to warrant waivers of the competitive bidding rules. Neither the school or library took any reasonable steps to attempt to comply with the Commission's competitive bidding rules. In this case, both Amy Biehl and

Applicant submits that the special circumstances here warrant the granting of this appeal and the waiver.

CERTAINLY THERE IS A NEED FOR RULES FOR THE SAKE OF FINALITY! But where the circumstances demonstrate, as here through no error of its own, the Applicant is penalized to the extent of $66,471.68 in relief is warranted.

Conclusion:

(a) Within 90 days <u>or less</u> Order funding for the telecommunications services requested in the 471 Application, specifically FRN: 1655138

(b) Set aside funds to totally fund Applicant's request.

Respectfully submitted,

/S/Nathaniel Hawthorne

Weld failed to file an FCC Form 470. The FCC Form 470 is the document that initiates the competitive bidding process, which is the root of the E-rate support mechanism and is used to ensure that applicants comply with the Commission's competitive bidding rules. In addition, the FCC Form 470 is used to certify, among other things, that the applicant meets the statutory definition and requirements for E-rate eligibility and that the services purchased will be used solely for educational purposes. Accordingly, we decline to waive the rules to allow Amy Biehl to file an FCC Form 471 and receive support without first having filed an FCC Form 470. We also deny Weld's request that we waive all relevant E-rate deadlines so that Weld can apply for support in E-rate funding year 2006. Amy Biehl and Weld remain eligible to apply for support from the schools and libraries mechanism in future funding years.

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