

July 22, 2011

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Further Explanation of Administrator's Funding Decision  
Form 471 Application Number: 536476  
Funding Request Number: 1484785  
Funding Year 2006 (07/01/2006 – 06/30/2007)

**Please be advised that the Commitment Adjustment Letter (CAL) is the official action on this application by the Universal Service Administrative Company (USAC). Please refer to that letter for instructions regarding how to appeal the Administrator's decision, if you wish to do so.** The purpose of this letter is to provide you with additional information concerning the reasons for denial of these funding requests

### **Background**

The Navajo Nation DINE Education Consortium (BEN 233673) has received E-Rate program funding since Funding Year 2003. The Navajo Nation Head Start Consortium (BEN 16028599) received E-Rate program in Funding Year 2005. Since Funding Year 2003, more than \$13.8 million of E-Rate program funds have been provided for telecommunications services, Internet access, basic maintenance of internal connections and internal connections. These entities applied for funding as library consortia and the consortia members are located within the Navajo Nation in the states of Arizona, Utah and New Mexico.

In a letter dated March 28, 2008,<sup>1</sup> the Navajo Nation was informed that USAC was holding invoices from your service provider, OnSat Native American Services (OnSat), pending your responses to USAC's request for information and documentation arising out of the findings reported in the "Special Review of the Navajo Nation Payments to OnSat" (Special Review) conducted by the Navajo Nation Office of the Auditor General.<sup>2</sup> USAC requested information and documentation regarding the findings in the Special Review.

<sup>1</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (March 28, 2008).

<sup>2</sup> Office of the Auditor General, The Navajo Nation, Special Review of the Navajo Nation Payments to OnSat (June 18, 2007) (*Special Review*).

USAC became increasingly concerned about additional potential violations of the Federal Communications Commission (FCC) rules governing the E-Rate program including the eligibility of Chapter Houses to participate in the program after press reports in April 2008 indicated that the Chapter Houses function as local government centers. For example, in a telephone conversation between Mel Blackwell and a representative of the Navajo Nation July 14, Mr. Blackwell was informed that OnSat planned to turn service off at five police stations, among other locations and was asked what USAC could do to avoid that from occurring.

USAC sought additional information regarding the eligibility of the Chapter Houses and other issues including provision of service to ineligible entities in an April 14, 2008 letter.<sup>3</sup> USAC received written responses from the Navajo Nation dated May 12, 2008<sup>4</sup> and July 3, 2008,<sup>5</sup> and met Dr. Joe Shirley, President of the Navajo Nation, on July 2, 2008. USAC informed President Shirley that USAC's questions had not been fully answered in these responses, and that additional information was needed before a decision on the pending invoices could be made. On July 15, 2008, President Shirley informed USAC that "the Navajo Nation has complied completely with all requests for information from USAC. We have no further information to provide."<sup>6</sup>

In July 2008, USAC was contacted by counsel for the Navajo Nation who stated that they had been retained "to review the Nation's participation in the FCC's E-rate program (beginning funding year 2003 until the present), prior internal and external audits conducted relating to those entities, and to provide assistance in complying with FCC regulations related to the E-rate program".<sup>7</sup> In this and subsequent letters, USAC was requested to take no action on the Navajo Nation's pending funding requests to USAC so that the review could be completed. USAC officials met with counsel to the Navajo Nation in September 2008, and on December 8, 2008 provided a detailed letter to USAC regarding the results of their review (Report).<sup>8</sup>

USAC officials conducted a site visit to the Navajo Nation in July 2009, meeting with Navajo Nation officials, their attorneys, and visiting 12 Chapter Houses. In October 2009, Navajo Nation's counsel provided USAC with news articles reporting that President Shirley had been placed on administrative leave, that Ernest Franklin, the Navajo Nation official who had been the E-rate program contact was under investigation, and that the scope of the investigation included the Navajo Nation's contract with OnSat.

<sup>3</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (Apr. 14, 2008).

<sup>4</sup> See Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division (May 12, 2008)(May 12 letter).

<sup>5</sup> Letter from Ernest Franklin, Executive Director, Navajo Nation Telecommunication Regulatory Commission, to Mel Blackwell, Vice President, Schools and Libraries Division (July 3, 2008) (July 3 letter).

<sup>6</sup> Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division, Universal Service Administrative Company (July 15, 2008).

<sup>7</sup> Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to USAC (July 16, 2008).

<sup>8</sup> See Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC (Dec. 8, 2008).

USAC was informed that the Navajo Nation Attorney General's office would be providing a report to USAC within a couple of weeks. In February 2010, USAC was informed that no additional report would be forthcoming, that President Shirley had been reinstated, and that a Special Prosecutor had been named to investigate the allegations.

USAC has reviewed the information and documentation provided by the Navajo Nation, its attorneys as well as information obtained through the site visit and has determined that the funding commitments listed above will be rescinded in full and recovery of all funds disbursed sought from the Navajo Nation and from OnSat.

#### Eligibility of Chapter Houses and Head Start Centers as Libraries

#### FCC Rules

#### Entity Eligibility Requirements

FCC rules authorize USAC to provide funding for eligible services provided to eligible entities.<sup>9</sup> These rules define eligible libraries follows:

(1) Only libraries eligible for assistance from a State library administrative agency under the Library Services and Technology Act (Public Law 104-208) and not excluded under paragraphs (c)(2) or (c)(3) of this section shall be eligible for discounts under this subpart.

(2) A library's eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under this subpart.

(3) Libraries operating as for-profit businesses shall not be eligible for discounts under this subpart.<sup>10</sup>

FCC rules define libraries as follows:

A "library" includes: (1) A public library; (2) A public elementary school or secondary school library; (3) An academic library; (4) A research library, which for the purpose of this section means a library that: (i) Makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and (ii) Is not an integral part of an institution of higher education; and (5) A private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition.

<sup>9</sup> See 47 C.F.R. §§ 54.501, 54.502, 54.503, 54.504, 54.517, 54.518, 54.519, 54.522.

<sup>10</sup> 47 C.F.R. § 54.501(c)

Library consortium. A "library consortium" is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of the resources of schools, public, academic, and special libraries and information centers, for improving services to the clientele of such libraries. For the purposes of these rules, references to library will also refer to library consortium.<sup>11</sup>

#### Educational Purposes Requirement

Applicants seeking Schools and Libraries program funding are required to certify that the schools and libraries to be served are eligible for funding, and that the services will be used "solely for educational purposes."<sup>12</sup> FCC rules define "educational purposes" as follows:

For purposes of this subpart, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate and proximate to the provision of library services to library patrons, qualify as "educational purposes." Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.<sup>13</sup>

Based on the Navajo Nation's certifications and on letters provided by the State of Utah State Library Division, the New Mexico State Library, and the State of Arizona Department of Library, Archives and Public Records, the Navajo Nation Dine Education Consortium was funded as a library consortium with Chapter Houses eligible as libraries, and the Navajo Nation Head Start Consortium as a library consortium with Head Start sites eligible as libraries.

#### State of Arizona Department of Library, Archives and Public Records

The October 21, 2003 letter from the State of Arizona Department of Library, Archives and Public Records states as follows: "Based on the attached documentation the Arizona State Library verified that the Navajo Nation Library at Window Rock is eligible for Library Services and Technology Act, LSTA funding in Arizona."<sup>14</sup> The documentation referred to in this letter is an October 15, 2003 letter from the Navajo Nation's Executive Director of Dine' Education to the Arizona State Library.<sup>15</sup> In this letter, the Navajo Nation requests funding for the Navajo Nation's "Library Consortium" of 110 Chapters

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<sup>11</sup> 47 U.S.C. § 54.500(d), (e).

<sup>12</sup> 47 C.F.R. § 54.504(b)(2)(i), (ii), (v).

<sup>13</sup> 47 C.F.R. § 54.500(b).

<sup>14</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Karen Dixon-Blazer, Executive Director, Dine' Education (Oct. 21, 2008).

<sup>15</sup> See Letter from Karen Dixon-Blazer, Executive Director, Dine' Education, to Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records (Oct 15, 2003).

and the "Central Library" located in Window Rock, Arizona.<sup>16</sup> The letter states as follows in relevant part:

[T]he Navajo Nation believes that the only library that possibly would need to comply with the requirements to be eligible for LSTA would be the Navajo Nation Central Library in Window Rock, Arizona. The Navajo Nation considers all of the other 110 Chapters to be an extension of the Central Library in Window Rock, Arizona.<sup>17</sup>

The letter goes on to explain that the Navajo Nation is divided into "Chapters" throughout the Nation and that "[t]he responsibility for managing the entire Navajo Nation Library System rests with the Central Library in Window Rock, Arizona and is administered by the Executive Branch under the Division of Dine' Education."<sup>18</sup> The letter then states the following:

The responsibility for managing the Chapters of the Navajo Nation also lies within the Executive Branch, but under the Division of Community Development. Therefore the Library system and the 110 Chapters are governmental entities of the sovereign Navajo Nation. All Divisions within the Executive Branch including the Library execute their services through the 110 Chapter Houses to the surrounding communities. Because of this arrangement, the Divisions of Community Development and Dine' Education including the 110 Chapters and Central Library (total 111 sites) formed a Library Consortium to extend and enhance the library services and capabilities to all 110 communities across the Navajo Nation.<sup>19</sup>

The letter explains that the mission of the "Library Consortium" is to use the donations from the Bill and Melinda Gates Foundation's library project "plus the content and resources of the Central Library to connect, educate and inform our people living in the 110 Chapter communities" and to "extend the services of the Navajo Central Library in Window Rock, Arizona plus provide sustainable public Internet access to our people in some of the most remote areas in North America."<sup>20</sup> The letter concludes by reiterating that because the Navajo Nation is a sovereign nation, the only request is for LSTA verification for the Central Library in Window Rock.<sup>21</sup>

The State of Arizona Department of Library, Archives and Public Records provided a subsequent letter dated May 12, 2004 stating that the "Navajo Nation Library at Window Rock and the Arizona Nation Chapters" are eligible for LSTA funding in Arizona.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Ernest Franklin, Navajo Nation Library Consortium, Division of Community Development (May 12, 2004).

### State of Utah State Library Division

The State of Utah State Library Division provided a letter to USAC dated September 3, 2003 stating that "the Red Mesa Chapter of the Navajo Nation is eligible to receive LSTA-funded assistance services including "consulting and general assistance, training and continuing education, and the use of the commercial electronic resources to be found on the public PIONEER website".<sup>23</sup>

### New Mexico State Library

In a letter to USAC dated October 14, 2003, New Mexico's State Librarian stated that he was "very uncomfortable" being asked to become involved in the question of whether the "individual chapters of the Navajo Nation and its library" are eligible for funding.<sup>24</sup> In a subsequent letter dated October 27, 2003, New Mexico's State Librarian stated that the State of New Mexico does not at that time provide a "subgrant" program under LSTA but that if they did at that time, "any "Indian tribe" in the state, as defined in the [LSTA] and that meets the IMLS requirements for receipt of LSTA funds would also be eligible to received LSTA funds under such a subgrant program. This would also hold true for any LSTA subgrant programs we may offer in the future."<sup>25</sup>

### Discussion

USAC understands that the Navajo Nation Library, Entity Number 98862, is the same entity as the "Navajo Nation Central Library," which is administered by the Office of the Navajo Nation Library within the Department of Dine Education, and is located in the Navajo Nation Museum, Library and Visitor's Center in Window Rock, Arizona. The website for the Office of the Navajo Nation Library describes the library's collection and services, which include over 61,000 volumes, a variety of special collections, and computers with Internet access for public use.<sup>26</sup> The Navajo Community Library page indicates that this is a branch library that is currently closed. The Public Library page explains the library procedures, which include the requirement that library membership cards are required for use of the computer and that one hour of Internet access is allowed per person per day.<sup>27</sup> Chapters are mentioned in the Plan of Operation<sup>28</sup> and the Book

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<sup>23</sup> Letter from Jane E. Smith, LSTA Grants Coordinator, Utah State Library Division, to Schools and Libraries Division (Sep. 3, 2003).

<sup>24</sup> Letter from Richard Akeroyd, State Librarian, to George McDonald, Vice President Schools and Libraries Division, Universal Service Administrative Company (Oct. 15, 2003).

<sup>25</sup> Letter from Richard Akeroyd, State Librarian, New Mexico State Library to Dr. Ernest Franklin, Navajo Nation Library Consortium Leader, Division of Community Development (Oct. 27, 2003).

<sup>26</sup> See <<http://www.nnlib.org/>>

<sup>27</sup> See <http://www.nnlib.org/cms/kunde/rts/nnliborg/docs/630803997-04-21-2009-09-21-43.pdf>

<sup>28</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117722&pn=Page&DomName=nnlib.org>

Distribution Services<sup>29</sup> as being the intended recipients of books. USAC has not located any information at this website indicating that the Chapter Houses are “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses.

Navajo Nation Chapter Houses are listed at the Navajo Nation Division of Community Development pages of the Navajo Nation website.<sup>30</sup> USAC has not located any information at these pages describing the Chapter Houses as being “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses

USAC was provided with the following information during a July 21, 2009 meeting with Navajo Nation officials:

- The Chapter Houses function as community centers and are where each Chapter House Council, the governing body for each Chapter, meets.
- The Gates Foundation donated computers to the Navajo Nation for library use and they were located in the Chapter Houses. The first computers were donated in 2000, with a refresh being donated in 2007.
- The Chapter Houses are “extensions” of the main library in Window Rock.

USAC requested documentation supporting the designation of the Chapter Houses by the Navajo Nation as extensions, or branches of the main library as well as documentation regarding the library services provided at the Chapter Houses during the time period when USAC provided funding to the Chapter Houses. USAC has not been provided with such documentation to date, and has not been able to locate any publicly available documentation to support that designation.

In response to USAC’s questions, the Navajo Nation stated, “[f]ollowing a visit to the to several Navajo communities, the Gates foundation agreed to that the sole common public structure, called the community chapter house, was the location to establish the beginnings of a community public library.”<sup>31</sup> In a subsequent letter, the Navajo Nation stated as follows:

On the Navajo Nation a Chapter House is a library. It provides the same types of services that any library would with the understanding that resources are more limited for the Nation than perhaps other comparable U.S. libraries. In fact, the

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<sup>29</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117711&pn=Page&DomName=nnlib.org>

<sup>30</sup> See

<http://www.nndcd.org/content.asp?CustComKey=345720&CategoryKey=463648&pn=AdvancedFreeForm&DomName=nndcd.org>

<sup>31</sup> May 12, 2008 letter.

library patrons, who include all Members of the Navajo community of all ages, rely heavily upon the resources provided in the Chapter Houses, such as internet access, video conferencing, and distance learning as the focal point of distribution of native and world information. Other activities may include community activities relating to health awareness, education, etc.<sup>32</sup>

Between July 22 and 24, 2009, USAC conducted site visits to 12 Chapter Houses throughout the Navajo Nation and noted the following:

- Each Chapter House usually contains a large meeting room which is used for the Chapter House Council meetings. The large room usually contains a podium where members of the council sit during Chapter House meetings.
- Each Chapter House has an Office Coordinator or similar office employee who perform and oversee the administrative functions, including helping community members access Navajo Nation services such as health care services.
- Each Chapter House is self-governing and employees of the Division of Community Development provides technical support for the public access computers.
- No Chapter House employee stated that they provided any type of library services. Rather, with regard to the public access computers, the Chapter House office workers enforce the time limits on access to the computers. At one Chapter House, the office coordinator stated that she instructed computer users that the computers were to be used only for educational purposes.
- At most Chapter Houses, notices on the walls/doors lay out the computer usage "rules" which were generally limited to announcing the time limit for access, time limits on accessing social networking site and prohibiting food and drinks near the computers.
- When asked whether there was a library nearby, Chapter House employees stated there was no library, that the closest library was at the school, or that there was a community library.
- Three of the Chapter Houses contained small book shelves with some paper volumes.
- The Video Conferencing equipment has generally gone unused due to lack of training. The Division of Community Development employees who provide the technical support were not informed that the Video Conferencing equipment was being deployed until one month prior to its delivery.

Documentation describing the public access computers at the Chapter Houses show that in practice the computers were considered public access computers located at community centers rather than public access computers located at libraries for educational purposes. For example, a memo to "All Chapters/Division of Community Development" from the

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<sup>32</sup> July 3, 2008 letter.

Navajo Nation contact with the subject line "Status on the Community Internet Access Funding" states as follows:

As the Navajo Nation Library Consortium Leader and the Navajo Nation President's designated person for e-rate funding for the Navajo Nation, I am informing all the 100 consortium/chapters [sic] members that funding for the community internet access will be paid for from July 1, 2004 through June 30, 2005. . . . Please be aware that these funds are for community use only and any other use, such as administrative, will require additional funds.<sup>33</sup>

Similarly, the undated Navajo Nation Department of Head Start report posted to the FCC's website<sup>34</sup> does not portray the Chapter Houses as libraries, and describes the Chapter House public access computers as follows:

In 1999, the Gates Foundation started the Native American Access to Technology Project (NATP) to meet technology and access to information needs of Native American tribes in the Four Corners area. In partnership with the Navajo Nation and OnSat (a satellite and wireless provider) computers and high speed connectivity was achieved at every Chapter House on the Navajo Nation. From 2 to 15 computers are now connected to broadband Internet and providing free public access at every Chapter on the Navajo Nation.

USAC has determined that the Chapter Houses are not eligible for funding as libraries under FCC rules. The documentation, information obtained through interviews, and the observations made at the site visit indicate that the Chapter Houses are seats of local government and function as community centers. No documentation has been provided demonstrating that the Navajo Nation Central Library considers the Chapter Houses to be extension or branch libraries and describing the library services that are provided at the Chapter Houses. The initial verifications provided by the states suggest that at the time those verifications were provided, there may have been an intent that the computers at Chapter Houses would be used to deliver library services, but no documentation or information has been provided to demonstrate whether such library services were provided for a specified time frame.

#### Navajo Nation Head Start Consortium Eligibility

The Navajo Nation applied for and received funding for the Navajo Nation Head Start Consortium by listing the sites to receive service as the Chapter Houses and stating that they were eligible libraries. The Navajo Nation later explained that the "main reason for

<sup>33</sup> Memorandum from Ernest Franklin, Jr., Planner/Estimator, Design and Engineering Services to All Chapters/Division of Community Development, Aug. 6, 2004.

<sup>34</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

for the creation of the the [Navajo Nation Head Start Consortium] was to address the overcrowding of the libraries/chapters. The head start centers were the closes (sic) buildings to the Libraries/Chapters and thereby were the logical chose (sic) to be considered as library extensions to the existing 111 libraries/chapters.<sup>35</sup>

### FCC Rules

FCC rules regarding the eligibility of schools to receive support provide that:

- (1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. § 7801(18) or "secondary school," as defined in 20 U.S.C. § 7801(38), and not excluded under paragraphs (b)(2) or (b)(3) of this section shall be eligible for discounts on telecommunications and other supported services under this subpart.
- (2) Schools operating as for-profit businesses shall not be eligible for discounts under this subpart.
- (3) Schools with endowments exceeding \$50,000,000 shall not be eligible for discounts under this subpart.<sup>36</sup>

20 U.S.C. § 7801(18) defines an elementary school as follows: "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law."<sup>37</sup>

Head Starts facilities can satisfy the FCC's eligibility requirements when pre-kindergarten education is included in the applicable definitions of elementary school and elementary education and when Head Start facilities are defined as schools under applicable law.

During the site visit described above, separate Head Start facilities were observed at most of the Chapter House compounds. The Head Start facilities are not currently in operation and so it was not possible to interview Head Start employees. The Report describes the in detail educational services provided at the Head Start facilities.<sup>38</sup> Moreover, the Navajo Nation Department of Head Start report posted to the FCC's website indicates that Head Start services rather than library services were provided at the Head Start facilities.<sup>39</sup>

Because the Head Start facilities should have sought funding as schools rather than as libraries, USAC requested a copy of the Navajo Nation laws or regulations that define elementary education to include pre-kindergartdn and/or Head Start Centers specifically.

<sup>35</sup> May 12, 2008 letter.

<sup>36</sup> 47 C.F.R. § 54.501(b).

<sup>37</sup> FCC regulations define "elementary school" as a non-profit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law. 47 C.F.R. § 54.500(j).

<sup>38</sup> See Report at 38-41.

<sup>39</sup> See [http://www.fcc.gov/cgb/rural/presentations/ONSA\\_T2OverviewofNNHeadStartTechnologyPlan.pdf](http://www.fcc.gov/cgb/rural/presentations/ONSA_T2OverviewofNNHeadStartTechnologyPlan.pdf)

In response, the Reivew described the statutes that created the Navajo Nation Head Start program and that require the Head Start program to provide instruction in the Navajo (Dine') language. These statutes do not, however, satisfy the FCC's requirement that the Head Start facilities be defined as schools providing elementary education. Therefore, USAC has determined that the Head Start facilities are not eligible to receive funding.

The Report also states that the Federal Department of Health and Human Services shut down the Head Start classrooms on May 2, 2006.<sup>40</sup> Therefore, USAC should not have been billed by OnSat for services provided from May 2, 2006 through June 30, 2006. USAC's records indicate that OnSat billed and was paid the full amount funded by USAC.

#### Failure to Comply with the FCC's Competitive Bidding Requirements.

##### FCC's Competitive Bidding Requirements

FCC rules require applicants to conduct a fair and open competitive bidding process free from conflicts of interest.<sup>41</sup> FCC rule further require applicants to select the most cost-effective service offering<sup>42</sup> and require applicants to certify that "[a]ll bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals."<sup>43</sup> FCC rules also require the applicant to have entered into a contract or legally binding agreement before submitting their funding requests to USAC.<sup>44</sup>

According to the Report, all of the Navajo Nation's funding requests rely on the 2001 Master Agreement entered into between the Navajo Nation an OnSat.<sup>45</sup> The term of the Master Agreement was 48 months with the term automatically renewing for additional one (1) year terms unless terminated in writing.

<sup>40</sup> See Report at 23.

<sup>41</sup> See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858, ¶ 60 (2003) ("Ysleta Order"); See also *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028-4032-33, ¶ 10 (2000); *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007); *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008)

<sup>42</sup> See 47 C.F.R. § 54.511(a).

<sup>43</sup> See 47 C.F.R. § 54.504(c)(1)(xi).

<sup>44</sup> See 47 C.F.R. § 54.504(c).

<sup>45</sup> See Report at 41.

The Grant Agreement between the Bill and Melinda Gates Foundation (Gates Foundation) and the Navajo Nation, signed by the Gates Foundation on August 31, 2001, and the Navajo Nation on November 30, 2001 specifies that a portion of the grant is "to fund the Navajo Nation's payment obligations to OnSat for the connectivity services to be provided in accordance with the service agreement entered into between the Navajo Nation and OnSat."<sup>46</sup> The term of the Grant Agreement is execution through July 31, 2004.<sup>47</sup>

- The Report states that the 2001 Master Agreement was not competitively bid and not in compliance with FCC rules as follows:<sup>48</sup>
  - "The Master Agreement, that governs the relationship between OnSat and the Nation, was entered into in 2001, two years before the Nation received E-rate funding. It was the result of a "partnership between OnSat and the Bill and Melinda Gates Foundation, that funded the installation of computers and satellite uplink facilities at the Chapter Houses. Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid. This established OnSat as the incumbent carrier for the Nation."<sup>49</sup>
  - In response to USAC's questions regarding the Funding Year 2006 competitive bid process, the Navajo Nation contact informed USAC that Navajo Nation law always requires the following selection criteria: 50% for price, 25% for overall experience in the field, 25% for Navajo preference. The Report states that Navajo Nation procurement laws and regulations do not in fact support this statement.<sup>50</sup>
  - The Report states that "[t]he "scoring grids" used in the 2007-2008 RFP [sic] show that scoring was done in such a way that OnSat was essentially assured a win. . . . In other words, [the competitor] could have offered its services for free, and would not have won."<sup>51</sup>
  - The Report states that documentation indicates a high level Navajo Nation official strongly urged the Navajo Nation e-rate contact to select the incumbent.<sup>52</sup>
  - The Report states that "There were indications in the Special review, and during the interview process for this investigation, that OnSat exercised undo

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<sup>46</sup> Grant Agreement between the Bill and Melinda Gates Foundation and the Navajo Nation, Grant Number NA-99-86515-03-B (2001)

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> Report at 41-42.

<sup>50</sup> *See id.* at 42.

<sup>51</sup> *See id.* at 43.

<sup>52</sup> *See id.*

influence on the planning, implementation and support of the Nation's E-rate participation.<sup>53</sup>

- The Report explains that the FCC Form 471 applications submitted to USAC were not supported by contracts that were executed prior to the submission of the FCC Form 471<sup>54</sup>, that the Navajo Nation did not pay the appropriate non-discount amount,<sup>55</sup> and that the modification to the 2001 Master Agreement supporting the Head Start Consortium funding was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation.<sup>56</sup>

USAC has determined that the Navajo Nation's funding requests listed above are not in compliance with the FCC's competitive bidding requirements. All of the Navajo Nation's funding requests associated with OnSat rely on the 2001 Master Agreement. The competitive bidding process initiated by the Navajo Nation's Funding Year 2003 Form 470 posting was a sham because the terms of the Gates Foundation grant required the services for which funding was requested to be provided by OnSat at least through the end of Funding Year 2003. The Navajo Nation used the same 2001 Master Agreement to seek funding in 2004 and 2005. The 2005 funding requests for the Navajo Nation Head Start Consortium were based on a modification to the 2001 Master Agreement that was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation. Finally, the competitive bid process initiated by the Funding Year 2006 Form 470 posting on which the Funding Year 2006 and 2007 funding requests for OnSat rely was tainted by the conduct described above.

#### Overbilling and OnSat's Failure to Deliver Service

As a result of the issues identified in the Special Review, USAC requested a complete accounting of the dates and time period for any service interruptions relevant to the pending payments at each site, a certification for each Chapter House site stating that it was operational during the time frame that the services were provided and subsequently billed to USAC, and documentation supporting the receipt of services at each site for which funding has been provided for all funding years.

In response to USAC's request for this information, the Report states as follows:

- [T]he use of OnSat's standard Master Agreement with multiple addenda, modifications, and Statements of Work (SOWs) to deliver both E-rate and non-E-rate eligible services, coupled with OnSat's invoicing policies, makes it nearly impossible for the Nation to track payments, servicesm and eligible services.<sup>57</sup>

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<sup>53</sup> See *id.* at 45.

<sup>54</sup> See *id.* at 12.

<sup>55</sup> See *id.* at 12 - 14.

<sup>56</sup> See *id.* at 15 - 17.

<sup>57</sup> *Id.* at 2.

- Based on the facts available, we are unable to determine whether any amounts need to be paid to USAC. As described above, under the terms of the contract with OnSat, the Nation's ability to object to service outages and receive credits was extremely limited. It is OnSat's position that the services were contracted for on a fixed fee basis, regardless of the number of actual sites receiving service or the amount of bandwidth actually used. The Nation also did not and does not have the technical ability to determine whether the bandwidth it was paying for was actually delivered.<sup>58</sup>

Because USAC is rescinding these funding commitments in full and seeking recovery of all amounts disbursed, this issue will not be further analyzed.

Schools and Libraries Division  
USAC

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<sup>58</sup> *Id.* at 30.



Notification of Commitment Adjustment Letter

Funding Year 2006: July 1, 2006 - June 30, 2007

July 22, 2011

Ernest Franklin  
NAVAJO NATION DINE EDUCATION CONSORTIUM  
P.O. BOX 9000  
WINDOW ROCK, AZ 86515

Re: Form 471 Application Number: 536820  
Funding Year: 2006  
Applicant's Form Identifier: nndec\_07d  
Billed Entity Number: 233673  
FCC Registration Number: 0005013263  
SPIN: 143026920  
Service Provider Name: OnSat Native American Services, Inc.  
Service Provider Contact Person: Dar Smith

Our routine review of Schools and Libraries Program (Program) funding commitments has revealed certain applications where funds were committed in violation of Program rules.

In order to be sure that no funds are used in violation of Program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the required adjustments to your funding commitment, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of that letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." The FCC's Red Light Rule requires USAC to dismiss pending FCC Form 471 applications if the entity responsible for paying the outstanding debt has not paid the debt, or otherwise made satisfactory arrangements to pay the debt within 30 days of the notice provided by USAC. For more information on the Red Light Rule, please see "Red Light Frequently Asked Questions (FAQs)" posted on the FCC website at [http://www.fcc.gov/debt\\_collection/faq.html](http://www.fcc.gov/debt_collection/faq.html).

TO APPEAL THIS DECISION:

You have the option of filing an appeal with USAC or directly with the Federal Communications Commission (FCC).

If you wish to appeal the Commitment Adjustment Decision indicated in this letter to USAC your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and email address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Number(s) (FRN) you are appealing. Your letter of appeal must include the
  - Billed Entity Name,
  - Form 471 Application Number,
  - Billed Entity Number, and
  - FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow USAC to more readily understand your appeal and respond appropriately. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep a copy of your entire appeal including any correspondence and documentation.
4. If you are an applicant, please provide a copy of your appeal to the service provider(s) affected by USAC's decision. If you are a service provider, please provide a copy of your appeal to the applicant(s) affected by USAC's decision.
5. Provide an authorized signature on your letter of appeal.

To submit your appeal to us on paper, send your appeal to:

Letter of Appeal  
Schools and Libraries Division - Correspondence Unit  
100 S. Jefferson Rd.  
P. O. Box 902  
Whippany, NJ 07981

For more information on submitting an appeal to USAC, please see the "Appeals Procedure" posted on our website.

If you wish to appeal a decision in this letter to the FCC, you should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received by the FCC or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. We strongly recommend that you use the electronic filing options described in the "Appeals Procedure" posted on our website. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. See the "Guide to USAC Letter Reports" posted at <http://usac.org/sl/tools/reference/guide-usac-letter-reports.aspx> for more information on each of the fields in the Report. USAC is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on the FRN(s), a separate letter will be sent to the service provider detailing the necessary service provider action.

Note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Review the Funding Commitment Adjustment Explanation in the attached Report for an explanation of the reduction to the commitment(s). Please ensure that any invoices that you or your service provider(s) submits to USAC are consistent with Program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division  
Universal Services Administrative Company

cc: Dar Smith  
OnSat Native American Services, Inc.

Funding Commitment Adjustment Report for  
Form 471 Application Number: 536820

Funding Request Number: 1485605  
Services Ordered: INTERNET ACCESS  
SPIN: 143026920  
Service Provider Name: OnSat Native American Services, Inc.  
Contract Number: C22052  
Billing Account Number: 928-871-7475  
Site Identifier: 233673  
Original Funding Commitment: \$94,838.40  
Commitment Adjustment Amount: \$94,838.40  
Adjusted Funding Commitment: \$0.00  
Funds Disbursed to Date \$79,920.00  
Funds to be Recovered from Applicant: \$79,920.00  
Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that this funding request will be rescinded in full and USAC will seek recovery of erroneously disbursed funds from the applicant. Please see the attached Further Explanation Letter for additional information.

July 22, 2011

Pearl Lee  
Navajo Nation Library Consortium  
P. O. Box 2928, Building 2528 Morgan Blvd.  
Window Rock, AZ 86515

Further Explanation of Administrator's Funding Decision  
Form 471 Application Number: 536820  
Funding Request Number: 1485605  
Funding Year 2006 (07/01/2006 – 06/30/2007)

**Please be advised that the Commitment Adjustment Letter (CAL) is the official action on this application by the Universal Service Administrative Company (USAC). Please refer to that letter for instructions regarding how to appeal the Administrator's decision, if you wish to do so.** The purpose of this letter is to provide you with additional information concerning the reasons for denial of these funding requests

### **Background**

The Navajo Nation DINE Education Consortium (BEN 233673) has received E-Rate program funding since Funding Year 2003. The Navajo Nation Head Start Consortium (BEN 16028599) received E-Rate program in Funding Year 2005. Since Funding Year 2003, more than \$13.8 million of E-Rate program funds have been provided for telecommunications services, Internet access, basic maintenance of internal connections and internal connections. These entities applied for funding as library consortia and the consortia members are located within the Navajo Nation in the states of Arizona, Utah and New Mexico.

In a letter dated March 28, 2008,<sup>1</sup> the Navajo Nation was informed that USAC was holding invoices from your service provider, OnSat Native American Services (OnSat), pending your responses to USAC's request for information and documentation arising out of the findings reported in the "Special Review of the Navajo Nation Payments to OnSat" (Special Review) conducted by the Navajo Nation Office of the Auditor General.<sup>2</sup> USAC requested information and documentation regarding the findings in the Special Review.

<sup>1</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (March 28, 2008).

<sup>2</sup> Office of the Auditor General, The Navajo Nation, Special Review of the Navajo Nation Payments to OnSat (June 18, 2007) (*Special Review*).

USAC became increasingly concerned about additional potential violations of the Federal Communications Commission (FCC) rules governing the E-Rate program including the eligibility of Chapter Houses to participate in the program after press reports in April 2008 indicated that the Chapter Houses function as local government centers. For example, in a telephone conversation between Mel Blackwell and a representative of the Navajo Nation July 14, Mr. Blackwell was informed that OnSat planned to turn service off at five police stations, among other locations and was asked what USAC could do to avoid that from occurring.

USAC sought additional information regarding the eligibility of the Chapter Houses and other issues including provision of service to ineligible entities in an April 14, 2008 letter.<sup>3</sup> USAC received written responses from the Navajo Nation dated May 12, 2008<sup>4</sup> and July 3, 2008,<sup>5</sup> and met Dr. Joe Shirley, President of the Navajo Nation, on July 2, 2008. USAC informed President Shirley that USAC's questions had not been fully answered in these responses, and that additional information was needed before a decision on the pending invoices could be made. On July 15, 2008, President Shirley informed USAC that "the Navajo Nation has complied completely with all requests for information from USAC. We have no further information to provide."<sup>6</sup>

In July 2008, USAC was contacted by counsel for the Navajo Nation who stated that they had been retained "to review the Nation's participation in the FCC's E-rate program (beginning funding year 2003 until the present), prior internal and external audits conducted relating to those entities, and to provide assistance in complying with FCC regulations related to the E-rate program".<sup>7</sup> In this and subsequent letters, USAC was requested to take no action on the Navajo Nation's pending funding requests to USAC so that the review could be completed. USAC officials met with counsel to the Navajo Nation in September 2008, and on December 8, 2008 provided a detailed letter to USAC regarding the results of their review (Report).<sup>8</sup>

USAC officials conducted a site visit to the Navajo Nation in July 2009, meeting with Navajo Nation officials, their attorneys, and visiting 12 Chapter Houses. In October 2009, Navajo Nation's counsel provided USAC with news articles reporting that President Shirley had been placed on administrative leave, that Ernest Franklin, the Navajo Nation official who had been the E-rate program contact was under investigation, and that the scope of the investigation included the Navajo Nation's contract with OnSat.

<sup>3</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (Apr. 14, 2008).

<sup>4</sup> See Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division (May 12, 2008)(May 12 letter).

<sup>5</sup> Letter from Ernest Franklin, Executive Director, Navajo Nation Telecommunication Regulatory Commission, to Mel Blackwell, Vice President, Schools and Libraries Division (July 3, 2008) (July 3 letter).

<sup>6</sup> Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division, Universal Service Administrative Company (July 15, 2008).

<sup>7</sup> Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to USAC (July 16, 2008).

<sup>8</sup> See Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC (Dec. 8, 2008):

USAC was informed that the Navajo Nation Attorney General's office would be providing a report to USAC within a couple of weeks. In February 2010, USAC was informed that no additional report would be forthcoming, that President Shirley had been reinstated, and that a Special Prosecutor had been named to investigate the allegations.

USAC has reviewed the information and documentation provided by the Navajo Nation, its attorneys as well as information obtained through the site visit and has determined that the funding commitments listed above will be rescinded in full and recovery of all funds disbursed sought from the Navajo Nation and from OnSat.

### Eligibility of Chapter Houses and Head Start Centers as Libraries

#### FCC Rules

##### Entity Eligibility Requirements

FCC rules authorize USAC to provide funding for eligible services provided to eligible entities.<sup>9</sup> These rules define eligible libraries follows:

- (1) Only libraries eligible for assistance from a State library administrative agency under the Library Services and Technology Act (Public Law 104-208) and not excluded under paragraphs (c)(2) or (c)(3) of this section shall be eligible for discounts under this subpart.
- (2) A library's eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under this subpart.
- (3) Libraries operating as for-profit businesses shall not be eligible for discounts under this subpart.<sup>10</sup>

FCC rules define libraries as follows:

A "library" includes: (1) A public library; (2) A public elementary school or secondary school library; (3) An academic library; (4) A research library, which for the purpose of this section means a library that: (i) Makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and (ii) Is not an integral part of an institution of higher education; and (5) A private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition.

<sup>9</sup> See 47 C.F.R. §§ 54.501, 54.502, 54.503, 54.504, 54.517, 54.518, 54.519, 54.522.

<sup>10</sup> 47 C.F.R. § 54.501(c)

Library consortium. A "library consortium" is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of the resources of schools, public, academic, and special libraries and information centers, for improving services to the clientele of such libraries. For the purposes of these rules, references to library will also refer to library consortium.<sup>11</sup>

#### Educational Purposes Requirement

Applicants seeking Schools and Libraries program funding are required to certify that the schools and libraries to be served are eligible for funding, and that the services will be used "solely for educational purposes."<sup>12</sup> FCC rules define "educational purposes" as follows:

For purposes of this subpart, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate and proximate to the provision of library services to library patrons, qualify as "educational purposes." Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.<sup>13</sup>

Based on the Navajo Nation's certifications and on letters provided by the State of Utah State Library Division, the New Mexico State Library, and the State of Arizona Department of Library, Archives and Public Records, the Navajo Nation Dine Education Consortium was funded as a library consortium with Chapter Houses eligible as libraries, and the Navajo Nation Head Start Consortium as a library consortium with Head Start sites eligible as libraries.

#### State of Arizona Department of Library, Archives and Public Records

The October 21, 2003 letter from the State of Arizona Department of Library, Archives and Public Records states as follows: "Based on the attached documentation the Arizona State Library verified that the Navajo Nation Library at Window Rock is eligible for Library Services and Technology Act, LSTA funding in Arizona."<sup>14</sup> The documentation referred to in this letter is an October 15, 2003 letter from the Navajo Nation's Executive Director of Dine' Education to the Arizona State Library.<sup>15</sup> In this letter, the Navajo Nation requests funding for the Navajo Nation's "Library Consortium" of 110 Chapters

<sup>11</sup> 47 U.S.C. § 54.500(d), (e).

<sup>12</sup> 47 C.F.R. § 54.504(b)(2)(i), (ii), (v).

<sup>13</sup> 47 C.F.R. § 54.500(b).

<sup>14</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Karen Dixon-Blazer, Executive Director, Dine' Education (Oct. 21, 2008).

<sup>15</sup> See Letter from Karen Dixon-Blazer, Executive Director, Dine' Education, to Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records (Oct 15, 2003).

and the "Central Library" located in Window Rock, Arizona.<sup>16</sup> The letter states as follows in relevant part:

[T]he Navajo Nation believes that the only library that possibly would need to comply with the requirements to be eligible for LSTA would be the Navajo Nation Central Library in Window Rock, Arizona. The Navajo Nation considers all of the other 110 Chapters to be an extension of the Central Library in Window Rock, Arizona.<sup>17</sup>

The letter goes on to explain that the Navajo Nation is divided into "Chapters" throughout the Nation and that "[t]he responsibility for managing the entire Navajo Nation Library System rests with the Central Library in Window Rock, Arizona and is administered by the Executive Branch under the Division of Dine' Education."<sup>18</sup> The letter then states the following:

The responsibility for managing the Chapters of the Navajo Nation also lies within the Executive Branch, but under the Division of Community Development. Therefore the Library system and the 110 Chapters are governmental entities of the sovereign Navajo Nation. All Divisions within the Executive Branch including the Library execute their services through the 110 Chapter Houses to the surrounding communities. Because of this arrangement, the Divisions of Community Development and Dine' Education including the 110 Chapters and Central Library (total 111 sites) formed a Library Consortium to extend and enhance the library services and capabilities to all 110 communities across the Navajo Nation.<sup>19</sup>

The letter explains that the mission of the "Library Consortium" is to use the donations from the Bill and Melinda Gates Foundation's library project "plus the content and resources of the Central Library to connect, educate and inform our people living in the 110 Chapter communities" and to "extend the services of the Navajo Central Library in Window Rock, Arizona plus provide sustainable public Internet access to our people in some of the most remote areas in North America."<sup>20</sup> The letter concludes by reiterating that because the Navajo Nation is a sovereign nation, the only request is for LSTA verification for the Central Library in Window Rock.<sup>21</sup>

The State of Arizona Department of Library, Archives and Public Records provided a subsequent letter dated May 12, 2004 stating that the "Navajo Nation Library at Window Rock and the Arizona Nation Chapters" are eligible for LSTA funding in Arizona.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Ernest Franklin, Navajo Nation Library Consortium, Division of Community Development (May 12, 2004).

### State of Utah State Library Division

The State of Utah State Library Division provided a letter to USAC dated September 3, 2003 stating that "the Red Mesa Chapter of the Navajo Nation is eligible to receive LSTA-funded assistance services including "consulting and general assistance, training and continuing education, and the use of the commercial electronic resources to be found on the public PIONEER website".<sup>23</sup>

### New Mexico State Library

In a letter to USAC dated October 14, 2003, New Mexico's State Librarian stated that he was "very uncomfortable" being asked to become involved in the question of whether the "individual chapters of the Navajo Nation and its library" are eligible for funding.<sup>24</sup> In a subsequent letter dated October 27, 2003, New Mexico's State Librarian stated that the State of New Mexico does not at that time provide a "subgrant" program under LSTA but that if they did at that time, "any "Indian tribe" in the state, as defined in the [LSTA] and that meets the IMLS requirements for receipt of LSTA funds would also be eligible to received LSTA funds under such a subgrant program. This would also hold true for any LSTA subgrant programs we may offer in the future."<sup>25</sup>

### Discussion

USAC understands that the Navajo Nation Library, Entity Number 98862, is the same entity as the "Navajo Nation Central Library," which is administered by the Office of the Navajo Nation Library within the Department of Dine Education, and is located in the Navajo Nation Museum, Library and Visitor's Center in Window Rock, Arizona. The website for the Office of the Navajo Nation Library describes the library's collection and services, which include over 61,000 volumes, a variety of special collections, and computers with Internet access for public use.<sup>26</sup> The Navajo Community Library page indicates that this is a branch library that is currently closed. The Public Library page explains the library procedures, which include the requirement that library membership cards are required for use of the computer and that one hour of Internet access is allowed per person per day.<sup>27</sup> Chapters are mentioned in the Plan of Operation<sup>28</sup> and the Book

<sup>23</sup> Letter from Jane E. Smith, LSTA Grants Coordinator, Utah State Library Division, to Schools and Libraries Division (Sep. 3, 2003).

<sup>24</sup> Letter from Richard Akeroyd, State Librarian, to George McDonald, Vice President Schools and Libraries Division, Universal Service Administrative Company (Oct. 15, 2003).

<sup>25</sup> Letter from Richard Akeroyd, State Librarian, New Mexico State Library to Dr. Ernest Franklin, Navajo Nation Library Consortium Leader, Division of Community Development (Oct. 27, 2003).

<sup>26</sup> See <<http://www.nnlib.org/>>

<sup>27</sup> See <http://www.nnlib.org/cms/kunde/rts/nnliborg/docs/630803997-04-21-2009-09-21-43.pdf>

<sup>28</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117722&pn=Page&DomName=nnlib.org>

Distribution Services<sup>29</sup> as being the intended recipients of books. USAC has not located any information at this website indicating that the Chapter Houses are “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses.

Navajo Nation Chapter Houses are listed at the Navajo Nation Division of Community Development pages of the Navajo Nation website.<sup>30</sup> USAC has not located any information at these pages describing the Chapter Houses as being “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses

USAC was provided with the following information during a July 21, 2009 meeting with Navajo Nation officials:

- The Chapter Houses function as community centers and are where each Chapter House Council, the governing body for each Chapter, meets.
- The Gates Foundation donated computers to the Navajo Nation for library use and they were located in the Chapter Houses. The first computers were donated in 2000, with a refresh being donated in 2007.
- The Chapter Houses are “extensions” of the main library in Window Rock.

USAC requested documentation supporting the designation of the Chapter Houses by the Navajo Nation as extensions, or branches of the main library as well as documentation regarding the library services provided at the Chapter Houses during the time period when USAC provided funding to the Chapter Houses. USAC has not been provided with such documentation to date, and has not been able to locate any publicly available documentation to support that designation.

In response to USAC’s questions, the Navajo Nation stated, “[f]ollowing a visit to the to several Navajo communities, the Gates foundation agreed to that the sole common public structure, called the community chapter house, was the location to establish the beginnings of a community public library.”<sup>31</sup> In a subsequent letter, the Navajo Nation stated as follows:

On the Navajo Nation a Chapter House is a library. It provides the same types of services that any library would with the understanding that resources are more limited for the Nation than perhaps other comparable U.S. libraries. In fact, the

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<sup>29</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117711&pn=Page&DomName=nnlib.org>

<sup>30</sup> See

<http://www.nndcd.org/content.asp?CustComKey=345720&CategoryKey=463648&pn=AdvancedFreeForm&DomName=nndcd.org>

<sup>31</sup> May 12, 2008 letter.

library patrons, who include all Members of the Navajo community of all ages, rely heavily upon the resources provided in the Chapter Houses, such as internet access, video conferencing, and distance learning as the focal point of distribution of native and world information. Other activities may include community activities relating to health awareness, education, etc.<sup>32</sup>

Between July 22 and 24, 2009, USAC conducted site visits to 12 Chapter Houses throughout the Navajo Nation and noted the following:

- Each Chapter House usually contains a large meeting room which is used for the Chapter House Council meetings. The large room usually contains a podium where members of the council sit during Chapter House meetings.
- Each Chapter House has an Office Coordinator or similar office employee who perform and oversee the administrative functions, including helping community members access Navajo Nation services such as health care services.
- Each Chapter House is self-governing and employees of the Division of Community Development provides technical support for the public access computers.
- No Chapter House employee stated that they provided any type of library services. Rather, with regard to the public access computers, the Chapter House office workers enforce the time limits on access to the computers. At one Chapter House, the office coordinator stated that she instructed computer users that the computers were to be used only for educational purposes.
- At most Chapter Houses, notices on the walls/doors lay out the computer usage "rules" which were generally limited to announcing the time limit for access, time limits on accessing social networking site and prohibiting food and drinks near the computers.
- When asked whether there was a library nearby, Chapter House employees stated there was no library, that the closest library was at the school, or that there was a community library.
- Three of the Chapter Houses contained small book shelves with some paper volumes.
- The Video Conferencing equipment has generally gone unused due to lack of training. The Division of Community Development employees who provide the technical support were not informed that the Video Conferencing equipment was being deployed until one month prior to its delivery.

Documentation describing the public access computers at the Chapter Houses show that in practice the computers were considered public access computers located at community centers rather than public access computers located at libraries for educational purposes. For example, a memo to "All Chapters/Division of Community Development" from the

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<sup>32</sup> July 3, 2008 letter.

Navajo Nation contact with the subject line "Status on the Community Internet Access Funding" states as follows:

As the Navajo Nation Library Consortium Leader and the Navajo Nation President's designated person for e-rate funding for the Navajo Nation, I am informing all the 100 consortium/chapters [sic] members that funding for the community internet access will be paid for from July 1, 2004 through June 30, 2005. . . . Please be aware that these funds are for community use only and any other use, such as administrative, will require additional funds.<sup>33</sup>

Similarly, the undated Navajo Nation Department of Head Start report posted to the FCC's website<sup>34</sup> does not portray the Chapter Houses as libraries, and describes the Chapter House public access computers as follows:

In 1999, the Gates Foundation started the Native American Access to Technology Project (NATP) to meet technology and access to information needs of Native American tribes in the Four Corners area. In partnership with the Navajo Nation and OnSat (a satellite and wireless provider) computers and high speed connectivity was achieved at every Chapter House on the Navajo Nation. From 2 to 15 computers are now connected to broadband Internet and providing free public access at every Chapter on the Navajo Nation.

USAC has determined that the Chapter Houses are not eligible for funding as libraries under FCC rules. The documentation, information obtained through interviews, and the observations made at the site visit indicate that the Chapter Houses are seats of local government and function as community centers. No documentation has been provided demonstrating that the Navajo Nation Central Library considers the Chapter Houses to be extension or branch libraries and describing the library services that are provided at the Chapter Houses. The initial verifications provided by the states suggest that at the time those verifications were provided, there may have been an intent that the computers at Chapter Houses would be used to deliver library services, but no documentation or information has been provided to demonstrate whether such library services were provided for a specified time frame.

#### Navajo Nation Head Start Consortium Eligibility

The Navajo Nation applied for and received funding for the Navajo Nation Head Start Consortium by listing the sites to receive service as the Chapter Houses and stating that they were eligible libraries. The Navajo Nation later explained that the "main reason for

<sup>33</sup> Memorandum from Ernest Franklin, Jr., Planner/Estimator, Design and Engineering Services to All Chapters/Division of Community Development, Aug. 6, 2004.

<sup>34</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

for the creation of the the [Navajo Nation Head Start Consortium] was to address the overcrowding of the libraries/chapters. The head start centers were the closes (sic) buildings to the Libraries/Chapters and thereby were the logical chose (sic) to be considered as library extensions to the existing 111 libraries/chapters."<sup>35</sup>

### FCC Rules

FCC rules regarding the eligibility of schools to receive support provide that:

- (1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. § 7801(18) or "secondary school," as defined in 20 U.S.C. § 7801(38), and not excluded under paragraphs (b)(2) or (b)(3) of this section shall be eligible for discounts on telecommunications and other supported services under this subpart.
- (2) Schools operating as for-profit businesses shall not be eligible for discounts under this subpart.
- (3) Schools with endowments exceeding \$50,000,000 shall not be eligible for discounts under this subpart.<sup>36</sup>

20 U.S.C. § 7801(18) defines an elementary school as follows: "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law."<sup>37</sup>

Head Starts facilities can satisfy the FCC's eligibility requirements when pre-kindergarten education is included in the applicable definitions of elementary school and elementary education and when Head Start facilities are defined as schools under applicable law.

During the site visit described above, separate Head Start facilities were observed at most of the Chapter House compounds. The Head Start facilities are not currently in operation and so it was not possible to interview Head Start employees. The Report describes the in detail educational services provided at the Head Start facilities.<sup>38</sup> Moreover, the Navajo Nation Department of Head Start report posted to the FCC's website indicates that Head Start services rather than library services were provided at the Head Start facilities.<sup>39</sup>

Because the Head Start facilities should have sought funding as schools rather than as libraries, USAC requested a copy of the Navajo Nation laws or regulations that define elementary education to include pre-kindergartdn and/or Head Start Centers specifically.

<sup>35</sup> May 12, 2008 letter.

<sup>36</sup> 47 C.F.R. § 54.501(b).

<sup>37</sup> FCC regulations define "elementary school" as a non-profit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law. 47 C.F.R. § 54.500(j).

<sup>38</sup> See Report at 38-41.

<sup>39</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

In response, the Reivew described the statutes that created the Navajo Nation Head Start program and that require the Head Start program to provide instruction in the Navajo (Dine') language. These statutes do not, however, satisfy the FCC's requirement that the Head Start facilities be defined as schools providing elementary education. Therefore, USAC has determined that the Head Start facilities are not eligible to receive funding.

The Report also states that the Federal Department of Health and Human Services shut down the Head Start classrooms on May 2, 2006.<sup>40</sup> Therefore, USAC should not have been billed by OnSat for services provided from May 2, 2006 through June 30, 2006. USAC's records indicate that OnSat billed and was paid the full amount funded by USAC.

#### Failure to Comply with the FCC's Competitive Bidding Requirements.

##### FCC's Competitive Bidding Requirements

FCC rules require applicants to conduct a fair and open competitive bidding process free from conflicts of interest.<sup>41</sup> FCC rule further require applicants to select the most cost-effective service offering<sup>42</sup> and require applicants to certify that "[a]ll bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals."<sup>43</sup> FCC rules also require the applicant to have entered into a contract or legally binding agreement before submitting their funding requests to USAC.<sup>44</sup>

According to the Report, all of the Navajo Nation's funding requests rely on the 2001 Master Agreement entered into between the Navajo Nation an OnSat.<sup>45</sup> The term of the Master Agreement was 48 months with the term automatically renewing for additional one (1) year terms unless terminated in writing.

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<sup>40</sup> See Report at 23.

<sup>41</sup> See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858, ¶ 60 (2003) ("Ysleta Order"); See also *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028-4032-33, ¶ 10 (2000); *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007); *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008)

<sup>42</sup> See 47 C.F.R. § 54.511(a).

<sup>43</sup> See 47 C.F.R. § 54.504(c)(1)(xi).

<sup>44</sup> See 47 C.F.R. § 54.504(c).

<sup>45</sup> See Report at 41.

The Grant Agreement between the Bill and Melinda Gates Foundation (Gates Foundation) and the Navajo Nation, signed by the Gates Foundation on August 31, 2001, and the Navajo Nation on November 30, 2001 specifies that a portion of the grant is “to fund the Navajo Nation’s payment obligations to OnSat for the connectivity services to be provided in accordance with the service agreement entered into between the Navajo Nation and OnSat.”<sup>46</sup> The term of the Grant Agreement is execution through July 31, 2004.<sup>47</sup>

- The Report states that the 2001 Master Agreement was not competitively bid and not in compliance with FCC rules as follows:<sup>48</sup>
  - “The Master Agreement , that governs the relationship between OnSat and the Nation, was entered into in 2001, two years before the Nation received E-rate funding. It was the result of a “partnership between OnSat and the Bill and Melinda Gates Foundation, that funded the installation of computers and satellite uplink facilities at the Chapter Houses. Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid. This established OnSat as the incumbent carrier for the Nation.”<sup>49</sup>
  - In response to USAC’s questions regarding the Funding Year 2006 competitive bid process, the Navajo Nation contact informed USAC that Navajo Nation law always requires the following selection criteria: 50% for price, 25% for overall experience in the field, 25% for Navajo preference. The Report states that Navajo Nation procurement laws and regulations do not in fact support this statement.<sup>50</sup>
  - The Report states that “[t]he “scoring grids” used in the 2007-2008 RFP [sic] show that scoring was done in such a way that OnSat was essentially assured a win. . . . In other words, [the competitor] could have offered its services for free, and would not have won.”<sup>51</sup>
  - The Report states that documentation indicates a high level Navajo Nation official strongly urged the Navajo Nation e-rate contact to select the incumbent.<sup>52</sup>
  - The Report states that “There were indications in the Special review, and during the interview process for this investigation, that OnSat exercised undo

<sup>46</sup> Grant Agreement between the Bill and Melinda Gates Foundation and the Navajo Nation, Grant Number NA-99-86515-03-B (2001)

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> Report at 41-42.

<sup>50</sup> See *id.* at 42.

<sup>51</sup> See *id.* at 43.

<sup>52</sup> See *id.*

influence on the planning, implementation and support of the Nation's E-rate participation.<sup>53</sup>

- The Report explains that the FCC Form 471 applications submitted to USAC were not supported by contracts that were executed prior to the submission of the FCC Form 471<sup>54</sup>, that the Navajo Nation did not pay the appropriate non-discount amount,<sup>55</sup> and that the modification to the 2001 Master Agreement supporting the Head Start Consortium funding was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation.<sup>56</sup>

USAC has determined that the Navajo Nation's funding requests listed above are not in compliance with the FCC's competitive bidding requirements. All of the Navajo Nation's funding requests associated with OnSat rely on the 2001 Master Agreement. The competitive bidding process initiated by the Navajo Nation's Funding Year 2003 Form 470 posting was a sham because the terms of the Gates Foundation grant required the services for which funding was requested to be provided by OnSat at least through the end of Funding Year 2003. The Navajo Nation used the same 2001 Master Agreement to seek funding in 2004 and 2005. The 2005 funding requests for the Navajo Nation Head Start Consortium were based on a modification to the 2001 Master Agreement that was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation. Finally, the competitive bid process initiated by the Funding Year 2006 Form 470 posting on which the Funding Year 2006 and 2007 funding requests for OnSat rely was tainted by the conduct described above.

#### Overbilling and OnSat's Failure to Deliver Service

As a result of the issues identified in the Special Review, USAC requested a complete accounting of the dates and time period for any service interruptions relevant to the pending payments at each site, a certification for each Chapter House site stating that it was operational during the time frame that the services were provided and subsequently billed to USAC, and documentation supporting the receipt of services at each site for which funding has been provided for all funding years.

In response to USAC's request for this information, the Report states as follows:

- [T]he use of OnSat's standard Master Agreement with multiple addenda, modifications, and Statements of Work (SOWs) to deliver both E-rate and non-E-rate eligible services, coupled with OnSat's invoicing policies, makes it nearly impossible for the Nation to track payments, services and eligible services.<sup>57</sup>

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<sup>53</sup> See *id.* at 45.

<sup>54</sup> See *id.* at 12.

<sup>55</sup> See *id.* at 12 - 14.

<sup>56</sup> See *id.* at 15 - 17.

<sup>57</sup> *Id.* at 2.

- Based on the facts available, we are unable to determine whether any amounts need to be paid to USAC. As described above, under the terms of the contract with OnSat, the Nation's ability to object to service outages and receive credits was extremely limited. It is OnSat's position that the services were contracted for on a fixed fee basis, regardless of the number of actual sites receiving service or the amount of bandwidth actually used. The Nation also did not and does not have the technical ability to determine whether the bandwidth it was paying for was actually delivered.<sup>58</sup>

Because USAC is rescinding these funding commitments in full and seeking recovery of all amounts disbursed, this issue will not be further analyzed.

Schools and Libraries Division  
USAC

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<sup>58</sup> *Id.* at 30.



Schools and Libraries Division

Notification of Commitment Adjustment Letter

Funding Year 2006: July 1, 2006 - June 30, 2007

July 22, 2011

Ernest Franklin  
NAVAJO NATION DINE EDUCATION CONSORTIUM  
P.O. BOX 9000  
WINDOW ROCK, AZ 86515

Re: Form 471 Application Number: 536993  
Funding Year: 2006  
Applicant's Form Identifier: nndec\_07e  
Billed Entity Number: 233673  
FCC Registration Number: 0005013263  
SPIN: 143026920  
Service Provider Name: OnSat Native American Services, Inc.  
Service Provider Contact Person: Dar Smith

Our routine review of Schools and Libraries Program (Program) funding commitments has revealed certain applications where funds were committed in violation of Program rules.

In order to be sure that no funds are used in violation of Program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the required adjustments to your funding commitment, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of that letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." The FCC's Red Light Rule requires USAC to dismiss pending FCC Form 471 applications if the entity responsible for paying the outstanding debt has not paid the debt, or otherwise made satisfactory arrangements to pay the debt within 30 days of the notice provided by USAC. For more information on the Red Light Rule, please see "Red Light Frequently Asked Questions (FAQs)" posted on the FCC website at [http://www.fcc.gov/debt\\_collection/faq.html](http://www.fcc.gov/debt_collection/faq.html).

Schools and Libraries Division - Correspondence Unit  
100 South Jefferson Road, P.O. Box 902, Whippany, NJ 07981  
Visit us online at: [www.usac.org/sl](http://www.usac.org/sl)

TO APPEAL THIS DECISION:

You have the option of filing an appeal with USAC or directly with the Federal Communications Commission (FCC).

If you wish to appeal the Commitment Adjustment Decision indicated in this letter to USAC your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and email address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Number(s) (FRN) you are appealing. Your letter of appeal must include the
  - Billed Entity Name,
  - Form 471 Application Number,
  - Billed Entity Number, and
  - FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow USAC to more readily understand your appeal and respond appropriately. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep a copy of your entire appeal including any correspondence and documentation.
4. If you are an applicant, please provide a copy of your appeal to the service provider(s) affected by USAC's decision. If you are a service provider, please provide a copy of your appeal to the applicant(s) affected by USAC's decision.
5. Provide an authorized signature on your letter of appeal.

To submit your appeal to us on paper, send your appeal to:

Letter of Appeal  
Schools and Libraries Division - Correspondence Unit  
100 S. Jefferson Rd.  
P. O. Box 902  
Whippany, NJ 07981

For more information on submitting an appeal to USAC, please see the "Appeals Procedure" posted on our website.

If you wish to appeal a decision in this letter to the FCC, you should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received by the FCC or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. We strongly recommend that you use the electronic filing options described in the "Appeals Procedure" posted on our website. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. See the "Guide to USAC Letter Reports" posted at <http://usac.org/sl/tools/reference/guide-usac-letter-reports.aspx> for more information on each of the fields in the Report. USAC is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on the FRN(s), a separate letter will be sent to the service provider detailing the necessary service provider action.

Note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Review the Funding Commitment Adjustment Explanation in the attached Report for an explanation of the reduction to the commitment(s). Please ensure that any invoices that you or your service provider(s) submits to USAC are consistent with Program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division  
Universal Services Administrative Company

cc: Dar Smith  
OnSat Native American Services, Inc.

Funding Commitment Adjustment Report for  
Form 471 Application Number: 536993

Funding Request Number: 1486127  
Services Ordered: INTERNAL CONNECTIONS  
SPIN: 143026920  
Service Provider Name: OnSat Native American Services, Inc.  
Contract Number: C22052  
Billing Account Number: 928-871-7475  
Site Identifier: 233673  
Original Funding Commitment: \$1711,141.59  
Commitment Adjustment Amount: \$1711,141.59  
Adjusted Funding Commitment: \$0.00  
Funds Disbursed to Date \$1711,141.59  
Funds to be Recovered from Applicant: \$1711,141.59  
Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that this funding request will be rescinded in full and USAC will seek recovery of erroneously disbursed funds from the applicant. Please see the attached Further Explanation Letter for additional information.

July 22, 2011

Pearl Lee  
Navajo Nation Library Consortium  
P. O. Box 2928, Building 2528 Morgan Blvd.  
Window Rock, AZ 86515

Further Explanation of Administrator's Funding Decision  
Form 471 Application Number: 536993  
Funding Request Number: 1486127  
Funding Year 2006 (07/01/2006 – 06/30/2007)

**Please be advised that the Commitment Adjustment Letter (CAL) is the official action on this application by the Universal Service Administrative Company (USAC). Please refer to that letter for instructions regarding how to appeal the Administrator's decision, if you wish to do so.** The purpose of this letter is to provide you with additional information concerning the reasons for denial of these funding requests

#### **Background**

The Navajo Nation DINE Education Consortium (BEN 233673) has received E-Rate program funding since Funding Year 2003. The Navajo Nation Head Start Consortium (BEN 16028599) received E-Rate program in Funding Year 2005. Since Funding Year 2003, more than \$13.8 million of E-Rate program funds have been provided for telecommunications services, Internet access, basic maintenance of internal connections and internal connections. These entities applied for funding as library consortia and the consortia members are located within the Navajo Nation in the states of Arizona, Utah and New Mexico.

In a letter dated March 28, 2008,<sup>1</sup> the Navajo Nation was informed that USAC was holding invoices from your service provider, OnSat Native American Services (OnSat), pending your responses to USAC's request for information and documentation arising out of the findings reported in the "Special Review of the Navajo Nation Payments to OnSat" (Special Review) conducted by the Navajo Nation Office of the Auditor General.<sup>2</sup> USAC requested information and documentation regarding the findings in the Special Review.

<sup>1</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (March 28, 2008).

<sup>2</sup> Office of the Auditor General, The Navajo Nation, Special Review of the Navajo Nation Payments to OnSat (June 18, 2007) (*Special Review*).

USAC became increasingly concerned about additional potential violations of the Federal Communications Commission (FCC) rules governing the E-Rate program including the eligibility of Chapter Houses to participate in the program after press reports in April 2008 indicated that the Chapter Houses function as local government centers. For example, in a telephone conversation between Mel Blackwell and a representative of the Navajo Nation July 14, Mr. Blackwell was informed that OnSat planned to turn service off at five police stations, among other locations and was asked what USAC could do to avoid that from occurring.

USAC sought additional information regarding the eligibility of the Chapter Houses and other issues including provision of service to ineligible entities in an April 14, 2008 letter.<sup>3</sup> USAC received written responses from the Navajo Nation dated May 12, 2008<sup>4</sup> and July 3, 2008,<sup>5</sup> and met Dr. Joe Shirley, President of the Navajo Nation, on July 2, 2008. USAC informed President Shirley that USAC's questions had not been fully answered in these responses, and that additional information was needed before a decision on the pending invoices could be made. On July 15, 2008, President Shirley informed USAC that "the Navajo Nation has complied completely with all requests for information from USAC. We have no further information to provide."<sup>6</sup>

In July 2008, USAC was contacted by counsel for the Navajo Nation who stated that they had been retained "to review the Nation's participation in the FCC's E-rate program (beginning funding year 2003 until the present), prior internal and external audits conducted relating to those entities, and to provide assistance in complying with FCC regulations related to the E-rate program".<sup>7</sup> In this and subsequent letters, USAC was requested to take no action on the Navajo Nation's pending funding requests to USAC so that the review could be completed. USAC officials met with counsel to the Navajo Nation in September 2008, and on December 8, 2008 provided a detailed letter to USAC regarding the results of their review (Report).<sup>8</sup>

USAC officials conducted a site visit to the Navajo Nation in July 2009, meeting with Navajo Nation officials, their attorneys, and visiting 12 Chapter Houses. In October 2009, Navajo Nation's counsel provided USAC with news articles reporting that President Shirley had been placed on administrative leave, that Ernest Franklin, the Navajo Nation official who had been the E-rate program contact was under investigation, and that the scope of the investigation included the Navajo Nation's contract with OnSat.

<sup>3</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (Apr. 14, 2008).

<sup>4</sup> See Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division (May 12, 2008)(May 12 letter).

<sup>5</sup> Letter from Ernest Franklin, Executive Director, Navajo Nation Telecommunication Regulatory Commission, to Mel Blackwell, Vice President, Schools and Libraries Division (July 3, 2008) (July 3 letter).

<sup>6</sup> Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division, Universal Service Administrative Company (July 15, 2008).

<sup>7</sup> Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to USAC (July 16, 2008).

<sup>8</sup> See Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC (Dec. 8, 2008).

USAC was informed that the Navajo Nation Attorney General's office would be providing a report to USAC within a couple of weeks. In February 2010, USAC was informed that no additional report would be forthcoming, that President Shirley had been reinstated, and that a Special Prosecutor had been named to investigate the allegations.

USAC has reviewed the information and documentation provided by the Navajo Nation, its attorneys as well as information obtained through the site visit and has determined that the funding commitments listed above will be rescinded in full and recovery of all funds disbursed sought from the Navajo Nation and from OnSat.

#### Eligibility of Chapter Houses and Head Start Centers as Libraries

##### FCC Rules

##### Entity Eligibility Requirements

FCC rules authorize USAC to provide funding for eligible services provided to eligible entities.<sup>9</sup> These rules define eligible libraries follows:

- (1) Only libraries eligible for assistance from a State library administrative agency under the Library Services and Technology Act (Public Law 104-208) and not excluded under paragraphs (c)(2) or (c)(3) of this section shall be eligible for discounts under this subpart.
- (2) A library's eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under this subpart.
- (3) Libraries operating as for-profit businesses shall not be eligible for discounts under this subpart.<sup>10</sup>

FCC rules define libraries as follows:

A "library" includes: (1) A public library; (2) A public elementary school or secondary school library; (3) An academic library; (4) A research library, which for the purpose of this section means a library that: (i) Makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and (ii) Is not an integral part of an institution of higher education; and (5) A private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition.

<sup>9</sup> See 47 C.F.R. §§ 54.501, 54.502, 54.503, 54.504, 54.517, 54.518, 54.519, 54.522.

<sup>10</sup> 47 C.F.R. § 54.501(c)

Library consortium. A "library consortium" is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of the resources of schools, public, academic, and special libraries and information centers, for improving services to the clientele of such libraries. For the purposes of these rules, references to library will also refer to library consortium.<sup>11</sup>

#### Educational Purposes Requirement

Applicants seeking Schools and Libraries program funding are required to certify that the schools and libraries to be served are eligible for funding, and that the services will be used "solely for educational purposes."<sup>12</sup> FCC rules define "educational purposes" as follows:

For purposes of this subpart, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate and proximate to the provision of library services to library patrons, qualify as "educational purposes." Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.<sup>13</sup>

Based on the Navajo Nation's certifications and on letters provided by the State of Utah State Library Division, the New Mexico State Library, and the State of Arizona Department of Library, Archives and Public Records, the Navajo Nation Dine Education Consortium was funded as a library consortium with Chapter Houses eligible as libraries, and the Navajo Nation Head Start Consortium as a library consortium with Head Start sites eligible as libraries.

#### State of Arizona Department of Library, Archives and Public Records

The October 21, 2003 letter from the State of Arizona Department of Library, Archives and Public Records states as follows: "Based on the attached documentation the Arizona State Library verified that the Navajo Nation Library at Window Rock is eligible for Library Services and Technology Act, LSTA funding in Arizona."<sup>14</sup> The documentation referred to in this letter is an October 15, 2003 letter from the Navajo Nation's Executive Director of Dine' Education to the Arizona State Library.<sup>15</sup> In this letter, the Navajo Nation requests funding for the Navajo Nation's "Library Consortium" of 110 Chapters

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<sup>11</sup> 47 U.S.C. § 54.500(d), (e).

<sup>12</sup> 47 C.F.R. § 54.504(b)(2)(i), (ii), (v).

<sup>13</sup> 47 C.F.R. § 54.500(b).

<sup>14</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Karen Dixon-Blazer, Executive Director, Dine' Education (Oct. 21, 2008).

<sup>15</sup> See Letter from Karen Dixon-Blazer, Executive Director, Dine' Education, to Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records (Oct 15, 2003).

and the “Central Library” located in Window Rock, Arizona.<sup>16</sup> The letter states as follows in relevant part:

[T]he Navajo Nation believes that the only library that possibly would need to comply with the requirements to be eligible for LSTA would be the Navajo Nation Central Library in Window Rock, Arizona. The Navajo Nation considers all of the other 110 Chapters to be an extension of the Central Library in Window Rock, Arizona.<sup>17</sup>

The letter goes on to explain that the Navajo Nation is divided into “Chapters” throughout the Nation and that “[t]he responsibility for managing the entire Navajo Nation Library System rests with the Central Library in Window Rock, Arizona and is administered by the Executive Branch under the Division of Dine’ Education.”<sup>18</sup> The letter then states the following:

The responsibility for managing the Chapters of the Navajo Nation also lies within the Executive Branch, but under the Division of Community Development. Therefore the Library system and the 110 Chapters are governmental entities of the sovereign Navajo Nation. All Divisions within the Executive Branch including the Library execute their services through the 110 Chapter Houses to the surrounding communities. Because of this arrangement, the Divisions of Community Development and Dine’ Education including the 110 Chapters and Central Library (total 111 sites) formed a Library Consortium to extend and enhance the library services and capabilities to all 110 communities across the Navajo Nation.<sup>19</sup>

The letter explains that the mission of the “Library Consortium” is to use the donations from the Bill and Melinda Gates Foundation’s library project “plus the content and resources of the Central Library to connect, educate and inform our people living in the 110 Chapter communities” and to “extend the services of the Navajo Central Library in Window Rock, Arizona plus provide sustainable public Internet access to our people in some of the most remote areas in North America.”<sup>20</sup> The letter concludes by reiterating that because the Navajo Nation is a sovereign nation, the only request is for LSTA verification for the Central Library in Window Rock.<sup>21</sup>

The State of Arizona Department of Library, Archives and Public Records provided a subsequent letter dated May 12, 2004 stating that the “Navajo Nation Library at Window Rock and the Arizona Nation Chapters” are eligible for LSTA funding in Arizona.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Ernest Franklin, Navajo Nation Library Consortium, Division of Community Development (May 12, 2004).

### State of Utah State Library Division

The State of Utah State Library Division provided a letter to USAC dated September 3, 2003 stating that "the Red Mesa Chapter of the Navajo Nation is eligible to receive LSTA-funded assistance services including "consulting and general assistance, training and continuing education, and the use of the commercial electronic resources to be found on the public PIONEER website".<sup>23</sup>

### New Mexico State Library

In a letter to USAC dated October 14, 2003, New Mexico's State Librarian stated that he was "very uncomfortable" being asked to become involved in the question of whether the "individual chapters of the Navajo Nation and its library" are eligible for funding.<sup>24</sup> In a subsequent letter dated October 27, 2003, New Mexico's State Librarian stated that the State of New Mexico does not at that time provide a "subgrant" program under LSTA but that if they did at that time, "any "Indian tribe" in the state, as defined in the [LSTA] and that meets the IMLS requirements for receipt of LSTA funds would also be eligible to received LSTA funds under such a subgrant program. This would also hold true for any LSTA subgrant programs we may offer in the future."<sup>25</sup>

### Discussion

USAC understands that the Navajo Nation Library, Entity Number 98862, is the same entity as the "Navajo Nation Central Library," which is administered by the Office of the Navajo Nation Library within the Department of Dine Education, and is located in the Navajo Nation Museum, Library and Visitor's Center in Window Rock, Arizona. The website for the Office of the Navajo Nation Library describes the library's collection and services, which include over 61,000 volumes, a variety of special collections, and computers with Internet access for public use.<sup>26</sup> The Navajo Community Library page indicates that this is a branch library that is currently closed. The Public Library page explains the library procedures, which include the requirement that library membership cards are required for use of the computer and that one hour of Internet access is allowed per person per day.<sup>27</sup> Chapters are mentioned in the Plan of Operation<sup>28</sup> and the Book

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<sup>23</sup> Letter from Jane E. Smith, LSTA Grants Coordinator, Utah State Library Division, to Schools and Libraries Division (Sep. 3, 2003).

<sup>24</sup> Letter from Richard Akeroyd, State Librarian, to George McDonald, Vice President Schools and Libraries Division, Universal Service Administrative Company (Oct. 15, 2003).

<sup>25</sup> Letter from Richard Akeroyd, State Librarian, New Mexico State Library to Dr. Ernest Franklin, Navajo Nation Library Consortium Leader, Division of Community Development (Oct. 27, 2003).

<sup>26</sup> See <<http://www.nnlib.org/>>

<sup>27</sup> See <http://www.nnlib.org/cms/kunde/rtts/nnliborg/docs/630803997-04-21-2009-09-21-43.pdf>

<sup>28</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117722&pn=Page&DomName=nnlib.org>

Distribution Services<sup>29</sup> as being the intended recipients of books. USAC has not located any information at this website indicating that the Chapter Houses are “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses.

Navajo Nation Chapter Houses are listed at the Navajo Nation Division of Community Development pages of the Navajo Nation website.<sup>30</sup> USAC has not located any information at these pages describing the Chapter Houses as being “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses

USAC was provided with the following information during a July 21, 2009 meeting with Navajo Nation officials:

- The Chapter Houses function as community centers and are where each Chapter House Council, the governing body for each Chapter, meets.
- The Gates Foundation donated computers to the Navajo Nation for library use and they were located in the Chapter Houses. The first computers were donated in 2000, with a refresh being donated in 2007.
- The Chapter Houses are “extensions” of the main library in Window Rock.

USAC requested documentation supporting the designation of the Chapter Houses by the Navajo Nation as extensions, or branches of the main library as well as documentation regarding the library services provided at the Chapter Houses during the time period when USAC provided funding to the Chapter Houses. USAC has not been provided with such documentation to date, and has not been able to locate any publicly available documentation to support that designation.

In response to USAC’s questions, the Navajo Nation stated, “[f]ollowing a visit to the to several Navajo communities, the Gates foundation agreed to that the sole common public structure, called the community chapter house, was the location to establish the beginnings of a community public library.”<sup>31</sup> In a subsequent letter, the Navajo Nation stated as follows:

On the Navajo Nation a Chapter House is a library. It provides the same types of services that any library would with the understanding that resources are more limited for the Nation than perhaps other comparable U.S. libraries. In fact, the

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<sup>29</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117711&pn=Page&DomName=nnlib.org>

<sup>30</sup> See

<http://www.nndcd.org/content.asp?CustComKey=345720&CategoryKey=463648&pn=AdvancedFreeForm&DomName=nndcd.org>

<sup>31</sup> May 12, 2008 letter.

library patrons, who include all Members of the Navajo community of all ages, rely heavily upon the resources provided in the Chapter Houses, such as internet access, video conferencing, and distance learning as the focal point of distribution of native and world information. Other activities may include community activities relating to health awareness, education, etc.<sup>32</sup>

Between July 22 and 24, 2009, USAC conducted site visits to 12 Chapter Houses throughout the Navajo Nation and noted the following:

- Each Chapter House usually contains a large meeting room which is used for the Chapter House Council meetings. The large room usually contains a podium where members of the council sit during Chapter House meetings.
- Each Chapter House has an Office Coordinator or similar office employee who perform and oversee the administrative functions, including helping community members access Navajo Nation services such as health care services.
- Each Chapter House is self-governing and employees of the Division of Community Development provides technical support for the public access computers.
- No Chapter House employee stated that they provided any type of library services. Rather, with regard to the public access computers, the Chapter House office workers enforce the time limits on access to the computers. At one Chapter House, the office coordinator stated that she instructed computer users that the computers were to be used only for educational purposes.
- At most Chapter Houses, notices on the walls/doors lay out the computer usage "rules" which were generally limited to announcing the time limit for access, time limits on accessing social networking site and prohibiting food and drinks near the computers.
- When asked whether there was a library nearby, Chapter House employees stated there was no library, that the closest library was at the school, or that there was a community library.
- Three of the Chapter Houses contained small book shelves with some paper volumes.
- The Video Conferencing equipment has generally gone unused due to lack of training. The Division of Community Development employees who provide the technical support were not informed that the Video Conferencing equipment was being deployed until one month prior to its delivery.

Documentation describing the public access computers at the Chapter Houses show that in practice the computers were considered public access computers located at community centers rather than public access computers located at libraries for educational purposes. For example, a memo to "All Chapters/Division of Community Development" from the

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<sup>32</sup> July 3, 2008 letter.

Navajo Nation contact with the subject line "Status on the Community Internet Access Funding" states as follows:

As the Navajo Nation Library Consortium Leader and the Navajo Nation President's designated person for e-rate funding for the Navajo Nation, I am informing all the 100 consortium/chapters [sic] members that funding for the community internet access will be paid for from July 1, 2004 through June 30, 2005. . . . Please be aware that these funds are for community use only and any other use, such as administrative, will require additional funds.<sup>33</sup>

Similarly, the undated Navajo Nation Department of Head Start report posted to the FCC's website<sup>34</sup> does not portray the Chapter Houses as libraries, and describes the Chapter House public access computers as follows:

In 1999, the Gates Foundation started the Native American Access to Technology Project (NATP) to meet technology and access to information needs of Native American tribes in the Four Corners area. In partnership with the Navajo Nation and OnSat (a satellite and wireless provider) computers and high speed connectivity was achieved at every Chapter House on the Navajo Nation. From 2 to 15 computers are now connected to broadband Internet and providing free public access at every Chapter on the Navajo Nation.

USAC has determined that the Chapter Houses are not eligible for funding as libraries under FCC rules. The documentation, information obtained through interviews, and the observations made at the site visit indicate that the Chapter Houses are seats of local government and function as community centers. No documentation has been provided demonstrating that the Navajo Nation Central Library considers the Chapter Houses to be extension or branch libraries and describing the library services that are provided at the Chapter Houses. The initial verifications provided by the states suggest that at the time those verifications were provided, there may have been an intent that the computers at Chapter Houses would be used to deliver library services, but no documentation or information has been provided to demonstrate whether such library services were provided for a specified time frame.

#### Navajo Nation Head Start Consortium Eligibility

The Navajo Nation applied for and received funding for the Navajo Nation Head Start Consortium by listing the sites to receive service as the Chapter Houses and stating that they were eligible libraries. The Navajo Nation later explained that the "main reason for

<sup>33</sup> Memorandum from Ernest Franklin, Jr., Planner/Estimator, Design and Engineering Services to All Chapters/Division of Community Development, Aug. 6, 2004.

<sup>34</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

for the creation of the the [Navajo Nation Head Start Consortium] was to address the overcrowding of the libraries/chapters. The head start centers were the closes (sic) buildings to the Libraries/Chapters and thereby were the logical chose (sic) to be considered as library extensions to the existing 111 libraries/chapters."<sup>35</sup>

### FCC Rules

FCC rules regarding the eligibility of schools to receive support provide that:

- (1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. § 7801(18) or "secondary school," as defined in 20 U.S.C. § 7801(38), and not excluded under paragraphs (b)(2) or (b)(3) of this section shall be eligible for discounts on telecommunications and other supported services under this subpart.
- (2) Schools operating as for-profit businesses shall not be eligible for discounts under this subpart.
- (3) Schools with endowments exceeding \$50,000,000 shall not be eligible for discounts under this subpart.<sup>36</sup>

20 U.S.C. § 7801(18) defines an elementary school as follows: "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law."<sup>37</sup>

Head Starts facilities can satisfy the FCC's eligibility requirements when pre-kindergarten education is included in the applicable definitions of elementary school and elementary education and when Head Start facilities are defined as schools under applicable law.

During the site visit described above, separate Head Start facilities were observed at most of the Chapter House compounds. The Head Start facilities are not currently in operation and so it was not possible to interview Head Start employees. The Report describes the in detail educational services provided at the Head Start facilities.<sup>38</sup> Moreover, the Navajo Nation Department of Head Start report posted to the FCC's website indicates that Head Start services rather than library services were provided at the Head Start facilities.<sup>39</sup>

Because the Head Start facilities should have sought funding as schools rather than as libraries, USAC requested a copy of the Navajo Nation laws or regulations that define elementary education to include pre-kindergartdn and/or Head Start Centers specifically.

<sup>35</sup> May 12, 2008 letter.

<sup>36</sup> 47 C.F.R. § 54.501(b).

<sup>37</sup> FCC regulations define "elementary school" as a non-profit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law. 47 C.F.R. § 54.500(j).

<sup>38</sup> See Report at 38-41.

<sup>39</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

In response, the Reivew described the statutes that created the Navajo Nation Head Start program and that require the Head Start program to provide instruction in the Navajo (Dine') language. These statutes do not, however, satisfy the FCC's requirement that the Head Start facilities be defined as schools providing elementary education. Therefore, USAC has determined that the Head Start facilities are not eligible to receive funding.

The Report also states that the Federal Department of Health and Human Services shut down the Head Start classrooms on May 2, 2006.<sup>40</sup> Therefore, USAC should not have been billed by OnSat for services provided from May 2, 2006 through June 30, 2006. USAC's records indicate that OnSat billed and was paid the full amount funded by USAC.

#### Failure to Comply with the FCC's Competitive Bidding Requirements.

##### FCC's Competitive Bidding Requirements

FCC rules require applicants to conduct a fair and open competitive bidding process free from conflicts of interest.<sup>41</sup> FCC rule further require applicants to select the most cost-effective service offering<sup>42</sup> and require applicants to certify that "[a]ll bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals."<sup>43</sup> FCC rules also require the applicant to have entered into a contract or legally binding agreement before submitting their funding requests to USAC.<sup>44</sup>

According to the Report, all of the Navajo Nation's funding requests rely on the 2001 Master Agreement entered into between the Navajo Nation an OnSat.<sup>45</sup> The term of the Master Agreement was 48 months with the term automatically renewing for additional one (1) year terms unless terminated in writing.

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<sup>40</sup> See Report at 23.

<sup>41</sup> See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858, ¶ 60 (2003). ("Ysleta Order"); See also *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028-4032-33, ¶ 10 (2000); *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007); *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008)

<sup>42</sup> See 47 C.F.R. § 54.511(a).

<sup>43</sup> See 47 C.F.R. § 54.504(c)(1)(xi).

<sup>44</sup> See 47 C.F.R. § 54.504(c).

<sup>45</sup> See Report at 41.

The Grant Agreement between the Bill and Melinda Gates Foundation (Gates Foundation) and the Navajo Nation, signed by the Gates Foundation on August 31, 2001, and the Navajo Nation on November 30, 2001 specifies that a portion of the grant is "to fund the Navajo Nation's payment obligations to OnSat for the connectivity services to be provided in accordance with the service agreement entered into between the Navajo Nation and OnSat."<sup>46</sup> The term of the Grant Agreement is execution through July 31, 2004.<sup>47</sup>

- The Report states that the 2001 Master Agreement was not competitively bid and not in compliance with FCC rules as follows:<sup>48</sup>
  - "The Master Agreement, that governs the relationship between OnSat and the Nation, was entered into in 2001, two years before the Nation received E-rate funding. It was the result of a "partnership between OnSat and the Bill and Melinda Gates Foundation, that funded the installation of computers and satellite uplink facilities at the Chapter Houses. Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid. This established OnSat as the incumbent carrier for the Nation."<sup>49</sup>
  - In response to USAC's questions regarding the Funding Year 2006 competitive bid process, the Navajo Nation contact informed USAC that Navajo Nation law always requires the following selection criteria: 50% for price, 25% for overall experience in the field, 25% for Navajo preference. The Report states that Navajo Nation procurement laws and regulations do not in fact support this statement.<sup>50</sup>
  - The Report states that "[t]he "scoring grids" used in the 2007-2008 RFP [sic] show that scoring was done in such a way that OnSat was essentially assured a win. . . . In other words, [the competitor] could have offered its services for free, and would not have won."<sup>51</sup>
  - The Report states that documentation indicates a high level Navajo Nation official strongly urged the Navajo Nation e-rate contact to select the incumbent.<sup>52</sup>
  - The Report states that "There were indications in the Special review, and during the interview process for this investigation, that OnSat exercised undo

<sup>46</sup> Grant Agreement between the Bill and Melinda Gates Foundation and the Navajo Nation, Grant Number NA-99-86515-03-B (2001)

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> Report at 41-42.

<sup>50</sup> *See id.* at 42.

<sup>51</sup> *See id.* at 43.

<sup>52</sup> *See id.*

influence on the planning, implementation and support of the Nation's E-rate participation.<sup>53</sup>

- The Report explains that the FCC Form 471 applications submitted to USAC were not supported by contracts that were executed prior to the submission of the FCC Form 471<sup>54</sup>, that the Navajo Nation did not pay the appropriate non-discount amount,<sup>55</sup> and that the modification to the 2001 Master Agreement supporting the Head Start Consortium funding was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation.<sup>56</sup>

USAC has determined that the Navajo Nation's funding requests listed above are not in compliance with the FCC's competitive bidding requirements. All of the Navajo Nation's funding requests associated with OnSat rely on the 2001 Master Agreement. The competitive bidding process initiated by the Navajo Nation's Funding Year 2003 Form 470 posting was a sham because the terms of the Gates Foundation grant required the services for which funding was requested to be provided by OnSat at least through the end of Funding Year 2003. The Navajo Nation used the same 2001 Master Agreement to seek funding in 2004 and 2005. The 2005 funding requests for the Navajo Nation Head Start Consortium were based on a modification to the 2001 Master Agreement that was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation. Finally, the competitive bid process initiated by the Funding Year 2006 Form 470 posting on which the Funding Year 2006 and 2007 funding requests for OnSat rely was tainted by the conduct described above.

#### Overbilling and OnSat's Failure to Deliver Service

As a result of the issues identified in the Special Review, USAC requested a complete accounting of the dates and time period for any service interruptions relevant to the pending payments at each site, a certification for each Chapter House site stating that it was operational during the time frame that the services were provided and subsequently billed to USAC, and documentation supporting the receipt of services at each site for which funding has been provided for all funding years.

In response to USAC's request for this information, the Report states as follows:

- [T]he use of OnSat's standard Master Agreement with multiple addenda, modifications, and Statements of Work (SOWs) to deliver both E-rate and non-E-rate eligible services, coupled with OnSat's invoicing policies, makes it nearly impossible for the Nation to track payments, servicesm and eligible services.<sup>57</sup>

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<sup>53</sup> See *id.* at 45.

<sup>54</sup> See *id.* at 12.

<sup>55</sup> See *id.* at 12 - 14.

<sup>56</sup> See *id.* at 15 - 17.

<sup>57</sup> *Id.* at 2.

- Based on the facts available, we are unable to determine whether any amounts need to be paid to USAC. As described above, under the terms of the contract with OnSat, the Nation's ability to object to service outages and receive credits was extremely limited. It is OnSat's position that the services were contracted for on a fixed fee basis, regardless of the number of actual sites receiving service or the amount of bandwidth actually used. The Nation also did not and does not have the technical ability to determine whether the bandwidth it was paying for was actually delivered.<sup>58</sup>

Because USAC is rescinding these funding commitments in full and seeking recovery of all amounts disbursed, this issue will not be further analyzed.

Schools and Libraries Division  
USAC

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<sup>58</sup> *Id.* at 30.



Notification of Commitment Adjustment Letter  
Funding Year 2006: July 1, 2006 - June 30, 2007

July 22, 2011

Ernest Franklin  
NAVAJO NATION DINE EDUCATION CONSORTIUM  
P.O. BOX 9000  
WINDOW ROCK, AZ 86515

Re: Form 471 Application Number: 537091  
Funding Year: 2006  
Applicant's Form Identifier: nndec\_07f  
Billed Entity Number: 233673  
FCC Registration Number: 0005013263  
SPIN: 143026920  
Service Provider Name: OnSat Native American Services, Inc.  
Service Provider Contact Person: Dar Smith

Our routine review of Schools and Libraries Program (Program) funding commitments has revealed certain applications where funds were committed in violation of Program rules.

In order to be sure that no funds are used in violation of Program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the required adjustments to your funding commitment, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of that letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." The FCC's Red Light Rule requires USAC to dismiss pending FCC Form 471 applications if the entity responsible for paying the outstanding debt has not paid the debt, or otherwise made satisfactory arrangements to pay the debt within 30 days of the notice provided by USAC. For more information on the Red Light Rule, please see "Red Light Frequently Asked Questions (FAQs)" posted on the FCC website at [http://www.fcc.gov/debt\\_collection/faq.html](http://www.fcc.gov/debt_collection/faq.html).

TO APPEAL THIS DECISION:

You have the option of filing an appeal with USAC or directly with the Federal Communications Commission (FCC).

If you wish to appeal the Commitment Adjustment Decision indicated in this letter to USAC your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and email address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Number(s) (FRN) you are appealing. Your letter of appeal must include the
  - Billed Entity Name,
  - Form 471 Application Number,
  - Billed Entity Number, and
  - FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow USAC to more readily understand your appeal and respond appropriately. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep a copy of your entire appeal including any correspondence and documentation.
4. If you are an applicant, please provide a copy of your appeal to the service provider(s) affected by USAC's decision. If you are a service provider, please provide a copy of your appeal to the applicant(s) affected by USAC's decision.
5. Provide an authorized signature on your letter of appeal.

To submit your appeal to us on paper, send your appeal to:

Letter of Appeal  
Schools and Libraries Division - Correspondence Unit  
100 S. Jefferson Rd.  
P. O. Box 902  
Whippany, NJ 07981

For more information on submitting an appeal to USAC, please see the "Appeals Procedure" posted on our website.

If you wish to appeal a decision in this letter to the FCC, you should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received by the FCC or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. We strongly recommend that you use the electronic filing options described in the "Appeals Procedure" posted on our website. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. See the "Guide to USAC Letter Reports" posted at <http://usac.org/sl/tools/reference/guide-usac-letter-reports.aspx> for more information on each of the fields in the Report. USAC is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on the FRN(s), a separate letter will be sent to the service provider detailing the necessary service provider action.

Note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Review the Funding Commitment Adjustment Explanation in the attached Report for an explanation of the reduction to the commitment(s). Please ensure that any invoices that you or your service provider(s) submits to USAC are consistent with Program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division  
Universal Services Administrative Company

cc: Dar Smith  
OnSat Native American Services, Inc.

Funding Commitment Adjustment Report for  
Form 471 Application Number: 537091

Funding Request Number:	1486934
Services Ordered:	INTERNAL CONNECTIONS MNT
SPIN:	143026920
Service Provider Name:	OnSat Native American Services, Inc.
Contract Number:	C22052
Billing Account Number:	928-871-7475
Site Identifier:	233673
Original Funding Commitment:	\$260,805.60
Commitment Adjustment Amount:	\$260,805.60
Adjusted Funding Commitment:	\$0.00
Funds Disbursed to Date	\$148,185.00
Funds to be Recovered from Applicant:	\$148,185.00
Funding Commitment Adjustment Explanation:	

After a thorough review, it was determined that this funding request will be rescinded in full and USAC will seek recovery of erroneously disbursed funds from the applicant. Please see the attached Further Explanation Letter for additional information.



July 22, 2011

Pearl Lee  
Navajo Nation Library Consortium  
P. O. Box 2928, Building 2528 Morgan Blvd.  
Window Rock, AZ 86515

Further Explanation of Administrator's Funding Decision  
Form 471 Application Number: 537091  
Funding Request Number: 1486934  
Funding Year 2006 (07/01/2006 – 06/30/2007)

**Please be advised that the Commitment Adjustment Letter (CAL) is the official action on this application by the Universal Service Administrative Company (USAC). Please refer to that letter for instructions regarding how to appeal the Administrator's decision, if you wish to do so.** The purpose of this letter is to provide you with additional information concerning the reasons for denial of these funding requests

### **Background**

The Navajo Nation DINE Education Consortium (BEN 233673) has received E-Rate program funding since Funding Year 2003. The Navajo Nation Head Start Consortium (BEN 16028599) received E-Rate program in Funding Year 2005. Since Funding Year 2003, more than \$13.8 million of E-Rate program funds have been provided for telecommunications services, Internet access, basic maintenance of internal connections and internal connections. These entities applied for funding as library consortia and the consortia members are located within the Navajo-Nation in the states of Arizona, Utah and New Mexico.

In a letter dated March 28, 2008,<sup>1</sup> the Navajo Nation was informed that USAC was holding invoices from your service provider, OnSat Native American Services (OnSat), pending your responses to USAC's request for information and documentation arising out of the findings reported in the "Special Review of the Navajo Nation Payments to OnSat" (Special Review) conducted by the Navajo Nation Office of the Auditor General.<sup>2</sup> USAC requested information and documentation regarding the findings in the Special Review.

<sup>1</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (March 28, 2008).

<sup>2</sup> Office of the Auditor General, The Navajo Nation, Special Review of the Navajo Nation Payments to OnSat (June 18, 2007) (*Special Review*).

USAC became increasingly concerned about additional potential violations of the Federal Communications Commission (FCC) rules governing the E-Rate program including the eligibility of Chapter Houses to participate in the program after press reports in April 2008 indicated that the Chapter Houses function as local government centers. For example, in a telephone conversation between Mel Blackwell and a representative of the Navajo Nation July 14, Mr. Blackwell was informed that OnSat planned to turn service off at five police stations, among other locations and was asked what USAC could do to avoid that from occurring.

USAC sought additional information regarding the eligibility of the Chapter Houses and other issues including provision of service to ineligible entities in an April 14, 2008 letter.<sup>3</sup> USAC received written responses from the Navajo Nation dated May 12, 2008<sup>4</sup> and July 3, 2008,<sup>5</sup> and met Dr. Joe Shirley, President of the Navajo Nation, on July 2, 2008. USAC informed President Shirley that USAC's questions had not been fully answered in these responses, and that additional information was needed before a decision on the pending invoices could be made. On July 15, 2008, President Shirley informed USAC that "the Navajo Nation has complied completely with all requests for information from USAC. We have no further information to provide."<sup>6</sup>

In July 2008, USAC was contacted by counsel for the Navajo Nation who stated that they had been retained "to review the Nation's participation in the FCC's E-rate program (beginning funding year 2003 until the present), prior internal and external audits conducted relating to those entities, and to provide assistance in complying with FCC regulations related to the E-rate program".<sup>7</sup> In this and subsequent letters, USAC was requested to take no action on the Navajo Nation's pending funding requests to USAC so that the review could be completed. USAC officials met with counsel to the Navajo Nation in September 2008, and on December 8, 2008 provided a detailed letter to USAC regarding the results of their review (Report).<sup>8</sup>

USAC officials conducted a site visit to the Navajo Nation in July 2009, meeting with Navajo Nation officials, their attorneys, and visiting 12 Chapter Houses. In October 2009, Navajo Nation's counsel provided USAC with news articles reporting that President Shirley had been placed on administrative leave, that Ernest Franklin, the Navajo Nation official who had been the E-rate program contact was under investigation, and that the scope of the investigation included the Navajo Nation's contract with OnSat.

<sup>3</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (Apr. 14, 2008).

<sup>4</sup> See Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division (May 12, 2008)(May 12 letter).

<sup>5</sup> Letter from Ernest Franklin, Executive Director, Navajo Nation Telecommunication Regulatory Commission, to Mel Blackwell, Vice President, Schools and Libraries Division (July 3, 2008) (July 3 letter).

<sup>6</sup> Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division, Universal Service Administrative Company (July 15, 2008).

<sup>7</sup> Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to USAC (July 16, 2008).

<sup>8</sup> See Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC (Dec. 8, 2008).

USAC was informed that the Navajo Nation Attorney General's office would be providing a report to USAC within a couple of weeks. In February 2010, USAC was informed that no additional report would be forthcoming, that President Shirley had been reinstated, and that a Special Prosecutor had been named to investigate the allegations.

USAC has reviewed the information and documentation provided by the Navajo Nation, its attorneys as well as information obtained through the site visit and has determined that the funding commitments listed above will be rescinded in full and recovery of all funds disbursed sought from the Navajo Nation and from OnSat.

### Eligibility of Chapter Houses and Head Start Centers as Libraries

#### FCC Rules

##### Entity Eligibility Requirements

FCC rules authorize USAC to provide funding for eligible services provided to eligible entities.<sup>9</sup> These rules define eligible libraries follows:

(1) Only libraries eligible for assistance from a State library administrative agency under the Library Services and Technology Act (Public Law 104-208) and not excluded under paragraphs (c)(2) or (c)(3) of this section shall be eligible for discounts under this subpart.

(2) A library's eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under this subpart.

(3) Libraries operating as for-profit businesses shall not be eligible for discounts under this subpart.<sup>10</sup>

FCC rules define libraries as follows:

A "library" includes: (1) A public library; (2) A public elementary school or secondary school library; (3) An academic library; (4) A research library, which for the purpose of this section means a library that: (i) Makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and (ii) Is not an integral part of an institution of higher education; and (5) A private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition.

<sup>9</sup> See 47 C.F.R. §§ 54.501, 54.502, 54.503, 54.504, 54.517, 54.518, 54.519, 54.522.

<sup>10</sup> 47 C.F.R. § 54.501(c)

Library consortium. A "library consortium" is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of the resources of schools, public, academic, and special libraries and information centers, for improving services to the clientele of such libraries. For the purposes of these rules, references to library will also refer to library consortium.<sup>11</sup>

#### Educational Purposes Requirement

Applicants seeking Schools and Libraries program funding are required to certify that the schools and libraries to be served are eligible for funding, and that the services will be used "solely for educational purposes."<sup>12</sup> FCC rules define "educational purposes" as follows:

For purposes of this subpart, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate and proximate to the provision of library services to library patrons, qualify as "educational purposes." Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.<sup>13</sup>

Based on the Navajo Nation's certifications and on letters provided by the State of Utah State Library Division, the New Mexico State Library, and the State of Arizona Department of Library, Archives and Public Records, the Navajo Nation Dine Education Consortium was funded as a library consortium with Chapter Houses eligible as libraries, and the Navajo Nation Head Start Consortium as a library consortium with Head Start sites eligible as libraries.

#### State of Arizona Department of Library, Archives and Public Records

The October 21, 2003 letter from the State of Arizona Department of Library, Archives and Public Records states as follows: "Based on the attached documentation the Arizona State Library verified that the Navajo Nation Library at Window Rock is eligible for Library Services and Technology Act, LSTA funding in Arizona."<sup>14</sup> The documentation referred to in this letter is an October 15, 2003 letter from the Navajo Nation's Executive Director of Dine' Education to the Arizona State Library.<sup>15</sup> In this letter, the Navajo Nation requests funding for the Navajo Nation's "Library Consortium" of 110 Chapters

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<sup>11</sup> 47 U.S.C. § 54.500(d), (e).

<sup>12</sup> 47 C.F.R. § 54.504(b)(2)(i), (ii), (v).

<sup>13</sup> 47 C.F.R. § 54.500(b).

<sup>14</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Karen Dixon-Blazer, Executive Director, Dine' Education (Oct. 21, 2008).

<sup>15</sup> See Letter from Karen Dixon-Blazer, Executive Director, Dine' Education, to Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records (Oct 15, 2003).

and the "Central Library" located in Window Rock, Arizona.<sup>16</sup> The letter states as follows in relevant part:

[T]he Navajo Nation believes that the only library that possibly would need to comply with the requirements to be eligible for LSTA would be the Navajo Nation Central Library in Window Rock, Arizona. The Navajo Nation considers all of the other 110 Chapters to be an extension of the Central Library in Window Rock, Arizona.<sup>17</sup>

The letter goes on to explain that the Navajo Nation is divided into "Chapters" throughout the Nation and that "[t]he responsibility for managing the entire Navajo Nation Library System rests with the Central Library in Window Rock, Arizona and is administered by the Executive Branch under the Division of Dine' Education."<sup>18</sup> The letter then states the following:

The responsibility for managing the Chapters of the Navajo Nation also lies within the Executive Branch, but under the Division of Community Development. Therefore the Library system and the 110 Chapters are governmental entities of the sovereign Navajo Nation. All Divisions within the Executive Branch including the Library execute their services through the 110 Chapter Houses to the surrounding communities. Because of this arrangement, the Divisions of Community Development and Dine' Education including the 110 Chapters and Central Library (total 111 sites) formed a Library Consortium to extend and enhance the library services and capabilities to all 110 communities across the Navajo Nation.<sup>19</sup>

The letter explains that the mission of the "Library Consortium" is to use the donations from the Bill and Melinda Gates Foundation's library project "plus the content and resources of the Central Library to connect, educate and inform our people living in the 110 Chapter communities" and to "extend the services of the Navajo Central Library in Window Rock, Arizona plus provide sustainable public Internet access to our people in some of the most remote areas in North America."<sup>20</sup> The letter concludes by reiterating that because the Navajo Nation is a sovereign nation, the only request is for LSTA verification for the Central Library in Window Rock.<sup>21</sup>

The State of Arizona Department of Library, Archives and Public Records provided a subsequent letter dated May 12, 2004 stating that the "Navajo Nation Library at Window Rock and the Arizona Nation Chapters" are eligible for LSTA funding in Arizona.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Ernest Franklin, Navajo Nation Library Consortium, Division of Community Development (May 12, 2004).

### State of Utah State Library Division

The State of Utah State Library Division provided a letter to USAC dated September 3, 2003 stating that "the Red Mesa Chapter of the Navajo Nation is eligible to receive LSTA-funded assistance services including "consulting and general assistance, training and continuing education, and the use of the commercial electronic resources to be found on the public PIONEER website".<sup>23</sup>

### New Mexico State Library

In a letter to USAC dated October 14, 2003, New Mexico's State Librarian stated that he was "very uncomfortable" being asked to become involved in the question of whether the "individual chapters of the Navajo Nation and its library" are eligible for funding.<sup>24</sup> In a subsequent letter dated October 27, 2003, New Mexico's State Librarian stated that the State of New Mexico does not at that time provide a "subgrant" program under LSTA but that if they did at that time, "any "Indian tribe" in the state, as defined in the [LSTA] and that meets the IMLS requirements for receipt of LSTA funds would also be eligible to received LSTA funds under such a subgrant program. This would also hold true for any LSTA subgrant programs we may offer in the future."<sup>25</sup>

### Discussion

USAC understands that the Navajo Nation Library, Entity Number 98862, is the same entity as the "Navajo Nation Central Library," which is administered by the Office of the Navajo Nation Library within the Department of Dine Education, and is located in the Navajo Nation Museum, Library and Visitor's Center in Window Rock, Arizona. The website for the Office of the Navajo Nation Library describes the library's collection and services, which include over 61,000 volumes, a variety of special collections, and computers with Internet access for public use.<sup>26</sup> The Navajo Community Library page indicates that this is a branch library that is currently closed. The Public Library page explains the library procedures, which include the requirement that library membership cards are required for use of the computer and that one hour of Internet access is allowed per person per day.<sup>27</sup> Chapters are mentioned in the Plan of Operation<sup>28</sup> and the Book

<sup>23</sup> Letter from Jane E. Smith, LSTA Grants Coordinator, Utah State Library Division, to Schools and Libraries Division (Sep. 3, 2003).

<sup>24</sup> Letter from Richard Akeroyd, State Librarian, to George McDonald, Vice President Schools and Libraries Division, Universal Service Administrative Company (Oct. 15, 2003).

<sup>25</sup> Letter from Richard Akeroyd, State Librarian, New Mexico State Library to Dr. Ernest Franklin, Navajo Nation Library Consortium Leader, Division of Community Development (Oct. 27, 2003).

<sup>26</sup> See <<http://www.nnlib.org/>>

<sup>27</sup> See <http://www.nnlib.org/cms/kunde/rtts/nnliborg/docs/630803997-04-21-2009-09-21-43.pdf>

<sup>28</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117722&pn=Page&DomName=nnlib.org>

Distribution Services<sup>29</sup> as being the intended recipients of books. USAC has not located any information at this website indicating that the Chapter Houses are “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses.

Navajo Nation Chapter Houses are listed at the Navajo Nation Division of Community Development pages of the Navajo Nation website.<sup>30</sup> USAC has not located any information at these pages describing the Chapter Houses as being “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses

USAC was provided with the following information during a July 21, 2009 meeting with Navajo Nation officials:

- The Chapter Houses function as community centers and are where each Chapter House Council, the governing body for each Chapter, meets.
- The Gates Foundation donated computers to the Navajo Nation for library use and they were located in the Chapter Houses. The first computers were donated in 2000, with a refresh being donated in 2007.
- The Chapter Houses are “extensions” of the main library in Window Rock.

USAC requested documentation supporting the designation of the Chapter Houses by the Navajo Nation as extensions, or branches of the main library as well as documentation regarding the library services provided at the Chapter Houses during the time period when USAC provided funding to the Chapter Houses. USAC has not been provided with such documentation to date, and has not been able to locate any publicly available documentation to support that designation.

In response to USAC’s questions, the Navajo Nation stated, “[f]ollowing a visit to the to several Navajo communities, the Gates foundation agreed to that the sole common public structure, called the community chapter house, was the location to establish the beginnings of a community public library.”<sup>31</sup> In a subsequent letter, the Navajo Nation stated as follows:

On the Navajo Nation a Chapter House is a library. It provides the same types of services that any library would with the understanding that resources are more limited for the Nation than perhaps other comparable U.S. libraries. In fact, the

<sup>29</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117711&pn=Page&DomName=nnlib.org>

<sup>30</sup> See

<http://www.nndcd.org/content.asp?CustComKey=345720&CategoryKey=463648&pn=AdvancedFreeForm&DomName=nndcd.org>

<sup>31</sup> May 12, 2008 letter.

library patrons, who include all Members of the Navajo community of all ages, rely heavily upon the resources provided in the Chapter Houses, such as internet access, video conferencing, and distance learning as the focal point of distribution of native and world information. Other activities may include community activities relating to health awareness, education, etc.<sup>32</sup>

Between July 22 and 24, 2009, USAC conducted site visits to 12 Chapter Houses throughout the Navajo Nation and noted the following:

- Each Chapter House usually contains a large meeting room which is used for the Chapter House Council meetings. The large room usually contains a podium where members of the council sit during Chapter House meetings.
- Each Chapter House has an Office Coordinator or similar office employee who perform and oversee the administrative functions, including helping community members access Navajo Nation services such as health care services.
- Each Chapter House is self-governing and employees of the Division of Community Development provides technical support for the public access computers.
- No Chapter House employee stated that they provided any type of library services. Rather, with regard to the public access computers, the Chapter House office workers enforce the time limits on access to the computers. At one Chapter House, the office coordinator stated that she instructed computer users that the computers were to be used only for educational purposes.
- At most Chapter Houses, notices on the walls/doors lay out the computer usage "rules" which were generally limited to announcing the time limit for access, time limits on accessing social networking site and prohibiting food and drinks near the computers.
- When asked whether there was a library nearby, Chapter House employees stated there was no library, that the closest library was at the school, or that there was a community library.
- Three of the Chapter Houses contained small book shelves with some paper volumes.
- The Video Conferencing equipment has generally gone unused due to lack of training. The Division of Community Development employees who provide the technical support were not informed that the Video Conferencing equipment was being deployed until one month prior to its delivery.

Documentation describing the public access computers at the Chapter Houses show that in practice the computers were considered public access computers located at community centers rather than public access computers located at libraries for educational purposes. For example, a memo to "All Chapters/Division of Community Development" from the

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<sup>32</sup> July 3, 2008 letter.

Navajo Nation contact with the subject line "Status on the Community Internet Access Funding" states as follows:

As the Navajo Nation Library Consortium Leader and the Navajo Nation President's designated person for e-rate funding for the Navajo Nation, I am informing all the 100 consortium/chapters [sic] members that funding for the community internet access will be paid for from July 1, 2004 through June 30, 2005. . . . Please be aware that these funds are for community use only and any other use, such as administrative, will require additional funds.<sup>33</sup>

Similarly, the undated Navajo Nation Department of Head Start report posted to the FCC's website<sup>34</sup> does not portray the Chapter Houses as libraries, and describes the Chapter House public access computers as follows:

In 1999, the Gates Foundation started the Native American Access to Technology Project (NATP) to meet technology and access to information needs of Native American tribes in the Four Corners area. In partnership with the Navajo Nation and OnSat (a satellite and wireless provider) computers and high speed connectivity was achieved at every Chapter House on the Navajo Nation. From 2 to 15 computers are now connected to broadband Internet and providing free public access at every Chapter on the Navajo Nation.

USAC has determined that the Chapter Houses are not eligible for funding as libraries under FCC rules. The documentation, information obtained through interviews, and the observations made at the site visit indicate that the Chapter Houses are seats of local government and function as community centers. No documentation has been provided demonstrating that the Navajo Nation Central Library considers the Chapter Houses to be extension or branch libraries and describing the library services that are provided at the Chapter Houses. The initial verifications provided by the states suggest that at the time those verifications were provided, there may have been an intent that the computers at Chapter Houses would be used to deliver library services, but no documentation or information has been provided to demonstrate whether such library services were provided for a specified time frame.

#### Navajo Nation Head Start Consortium Eligibility

The Navajo Nation applied for and received funding for the Navajo Nation Head Start Consortium by listing the sites to receive service as the Chapter Houses and stating that they were eligible libraries. The Navajo Nation later explained that the "main reason for

<sup>33</sup> Memorandum from Ernest Franklin, Jr., Planner/Estimator, Design and Engineering Services to All Chapters/Division of Community Development, Aug. 6, 2004.

<sup>34</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

for the creation of the the [Navajo Nation Head Start Consortium] was to address the overcrowding of the libraries/chapters. The head start centers were the closes (sic) buildings to the Libraries/Chapters and thereby were the logical chose (sic) to be considered as library extensions to the existing 111 libraries/chapters."<sup>35</sup>

### FCC Rules

FCC rules regarding the eligibility of schools to receive support provide that:

- (1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. § 7801(18) or "secondary school," as defined in 20 U.S.C. § 7801(38), and not excluded under paragraphs (b)(2) or (b)(3) of this section shall be eligible for discounts on telecommunications and other supported services under this subpart.
- (2) Schools operating as for-profit businesses shall not be eligible for discounts under this subpart.
- (3) Schools with endowments exceeding \$50,000,000 shall not be eligible for discounts under this subpart.<sup>36</sup>

20 U.S.C. § 7801(18) defines an elementary school as follows: "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law."<sup>37</sup>

Head Starts facilities can satisfy the FCC's eligibility requirements when pre-kindergarten education is included in the applicable definitions of elementary school and elementary education and when Head Start facilities are defined as schools under applicable law.

During the site visit described above, separate Head Start facilities were observed at most of the Chapter House compounds. The Head Start facilities are not currently in operation and so it was not possible to interview Head Start employees. The Report describes the in detail educational services provided at the Head Start facilities.<sup>38</sup> Moreover, the Navajo Nation Department of Head Start-report posted to the FCC's website indicates that Head Start services rather than library services were provided at the Head Start facilities.<sup>39</sup>

Because the Head Start facilities should have sought funding as schools rather than as libraries, USAC requested a copy of the Navajo Nation laws or regulations that define elementary education to include pre-kindergardetn and/or Head Start Centers specifically.

<sup>35</sup> May 12, 2008 letter.

<sup>36</sup> 47 C.F.R. § 54.501(b).

<sup>37</sup> FCC regulations define "elementary school" as a non-profit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law. 47 C.F.R. § 54.500(j).

<sup>38</sup> See Report at 38-41.

<sup>39</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofINNHeadStartTechnologyPlan.pdf>

In response, the Reivew described the statutes that created the Navajo Nation Head Start program and that require the Head Start program to provide instruction in the Navajo (Dine') language. These statutes do not, however, satisfy the FCC's requirement that the Head Start facilities be defined as schools providing elementary education. Therefore, USAC has determined that the Head Start facilities are not eligible to receive funding.

The Report also states that the Federal Department of Health and Human Services shut down the Head Start classrooms on May 2, 2006.<sup>40</sup> Therefore, USAC should not have been billed by OnSat for services provided from May 2, 2006 through June 30, 2006. USAC's records indicate that OnSat billed and was paid the full amount funded by USAC.

#### Failure to Comply with the FCC's Competitive Bidding Requirements.

##### FCC's Competitive Bidding Requirements

FCC rules require applicants to conduct a fair and open competitive bidding process free from conflicts of interest.<sup>41</sup> FCC rule further require applicants to select the most cost-effective service offering<sup>42</sup> and require applicants to certify that "[a]ll bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals."<sup>43</sup> FCC rules also require the applicant to have entered into a contract or legally binding agreement before submitting their funding requests to USAC.<sup>44</sup>

According to the Report, all of the Navajo Nation's funding requests rely on the 2001 Master Agreement entered into between the Navajo Nation an OnSat.<sup>45</sup> The term of the Master Agreement was 48 months with the term automatically renewing for additional one (1) year terms unless terminated in writing.

<sup>40</sup> See Report at 23.

<sup>41</sup> See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Red 6858, ¶ 60 (2003) ("Ysleta Order"); See also *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Red 4028-4032-33, ¶ 10 (2000); *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007); *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008)

<sup>42</sup> See 47 C.F.R. § 54.511(a).

<sup>43</sup> See 47 C.F.R. § 54.504(c)(1)(xi).

<sup>44</sup> See 47 C.F.R. § 54.504(c).

<sup>45</sup> See Report at 41.

The Grant Agreement between the Bill and Melinda Gates Foundation (Gates Foundation) and the Navajo Nation, signed by the Gates Foundation on August 31, 2001, and the Navajo Nation on November 30, 2001 specifies that a portion of the grant is “to fund the Navajo Nation’s payment obligations to OnSat for the connectivity services to be provided in accordance with the service agreement entered into between the Navajo Nation and OnSat.”<sup>46</sup> The term of the Grant Agreement is execution through July 31, 2004.<sup>47</sup>

- The Report states that the 2001 Master Agreement was not competitively bid and not in compliance with FCC rules as follows:<sup>48</sup>
  - “The Master Agreement , that governs the relationship between OnSat and the Nation, was entered into in 2001, two years before the Nation received E-rate funding. It was the result of a “partnership between OnSat and the Bill and Melinda Gates Foundation, that funded the installation of computers and satellite uplink facilities at the Chapter Houses. Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid. This established OnSat as the incumbent carrier for the Nation.”<sup>49</sup>
  - In response to USAC’s questions regarding the Funding Year 2006 competitive bid process, the Navajo Nation contact informed USAC that Navajo Nation law always requires the following selection criteria: 50% for price, 25% for overall experience in the field, 25% for Navajo preference. The Report states that Navajo Nation procurement laws and regulations do not in fact support this statement.<sup>50</sup>
  - The Report states that “[t]he “scoring grids” used in the 2007-2008 RFP [sic] show that scoring was done in such a way that OnSat was essentially assured a win. . . . In other words, [the competitor] could have offered its services for free, and would not have won.”<sup>51</sup>
  - The Report states that documentation indicates a high level Navajo Nation official strongly urged the Navajo Nation e-rate contact to select the incumbent.<sup>52</sup>
  - The Report states that “There were indications in the Special review, and during the interview process for this investigation, that OnSat exercised undo

<sup>46</sup> Grant Agreement between the Bill and Melinda Gates Foundation and the Navajo Nation, Grant Number NA-99-86515-03-B (2001)

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> Report at 41-42.

<sup>50</sup> See *id.* at 42.

<sup>51</sup> See *id.* at 43.

<sup>52</sup> See *id.*

influence on the planning, implementation and support of the Nation's E-rate participation.<sup>53</sup>

- The Report explains that the FCC Form 471 applications submitted to USAC were not supported by contracts that were executed prior to the submission of the FCC Form 471<sup>54</sup>, that the Navajo Nation did not pay the appropriate non-discount amount,<sup>55</sup> and that the modification to the 2001 Master Agreement supporting the Head Start Consortium funding was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation.<sup>56</sup>

USAC has determined that the Navajo Nation's funding requests listed above are not in compliance with the FCC's competitive bidding requirements. All of the Navajo Nation's funding requests associated with OnSat rely on the 2001 Master Agreement. The competitive bidding process initiated by the Navajo Nation's Funding Year 2003 Form 470 posting was a sham because the terms of the Gates Foundation grant required the services for which funding was requested to be provided by OnSat at least through the end of Funding Year 2003. The Navajo Nation used the same 2001 Master Agreement to seek funding in 2004 and 2005. The 2005 funding requests for the Navajo Nation Head Start Consortium were based on a modification to the 2001 Master Agreement that was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation. Finally, the competitive bid process initiated by the Funding Year 2006 Form 470 posting on which the Funding Year 2006 and 2007 funding requests for OnSat rely was tainted by the conduct described above.

#### Overbilling and OnSat's Failure to Deliver Service

As a result of the issues identified in the Special Review, USAC requested a complete accounting of the dates and time period for any service interruptions relevant to the pending payments at each site, a certification for each Chapter House site stating that it was operational during the time frame that the services were provided and subsequently billed to USAC, and documentation supporting the receipt of services at each site for which funding has been provided for all funding years.

In response to USAC's request for this information, the Report states as follows:

- [T]he use of OnSat's standard Master Agreement with multiple addenda, modifications, and Statements of Work (SOWs) to deliver both E-rate and non-E-rate eligible services, coupled with OnSat's invoicing policies, makes it nearly impossible for the Nation to track payments, servicesm and eligible services.<sup>57</sup>

<sup>53</sup> See *id.* at 45.

<sup>54</sup> See *id.* at 12.

<sup>55</sup> See *id.* at 12 - 14.

<sup>56</sup> See *id.* at 15 - 17.

<sup>57</sup> *Id.* at 2.

- Based on the facts available, we are unable to determine whether any amounts need to be paid to USAC. As described above, under the terms of the contract with OnSat, the Nation's ability to object to service outages and receive credits was extremely limited. It is OnSat's position that the services were contracted for on a fixed fee basis, regardless of the number of actual sites receiving service or the amount of bandwidth actually used. The Nation also did not and does not have the technical ability to determine whether the bandwidth it was paying for was actually delivered.<sup>58</sup>

Because USAC is rescinding these funding commitments in full and seeking recovery of all amounts disbursed, this issue will not be further analyzed.

Schools and Libraries Division  
USAC

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<sup>58</sup> *Id.* at 30.



Notification of Commitment Adjustment Letter

Funding Year 2006: July 1, 2006 - June 30, 2007

July 22, 2011

Ernest Franklin  
NAVAJO NATION DINE EDUCATION CONSORTIUM  
P.O. BOX 9000  
WINDOW ROCK, AZ 86515

Re: Form 471 Application Number: 537378  
Funding Year: 2006  
Applicant's Form Identifier: nndec\_07h  
Billed Entity Number: 233673  
FCC Registration Number: 0005013263  
SPIN: 143002562  
Service Provider Name: Navajo Comm Co Inc  
Service Provider Contact Person: Jessica Matushek

Our routine review of Schools and Libraries Program (Program) funding commitments has revealed certain applications where funds were committed in violation of Program rules.

In order to be sure that no funds are used in violation of Program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the required adjustments to your funding commitment, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of that letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." The FCC's Red Light Rule requires USAC to dismiss pending FCC Form 471 applications if the entity responsible for paying the outstanding debt has not paid the debt, or otherwise made satisfactory arrangements to pay the debt within 30 days of the notice provided by USAC. For more information on the Red Light Rule, please see "Red Light Frequently Asked Questions (FAQs)" posted on the FCC website at [http://www.fcc.gov/debt\\_collection/faq.html](http://www.fcc.gov/debt_collection/faq.html).

TO APPEAL THIS DECISION:

You have the option of filing an appeal with USAC or directly with the Federal Communications Commission (FCC).

If you wish to appeal the Commitment Adjustment Decision indicated in this letter to USAC your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and email address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Number(s) (FRN) you are appealing. Your letter of appeal must include the
  - Billed Entity Name,
  - Form 471 Application Number,
  - Billed Entity Number, and
  - FCC Registration Number (FCC RN) from the top of your letter.
3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow USAC to more readily understand your appeal and respond appropriately. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep a copy of your entire appeal including any correspondence and documentation.
4. If you are an applicant, please provide a copy of your appeal to the service provider(s) affected by USAC's decision. If you are a service provider, please provide a copy of your appeal to the applicant(s) affected by USAC's decision.
5. Provide an authorized signature on your letter of appeal.

To submit your appeal to us on paper, send your appeal to:

Letter of Appeal  
Schools and Libraries Division - Correspondence Unit  
100 S. Jefferson Rd.  
P. O. Box 902  
Whippany, NJ 07981

For more information on submitting an appeal to USAC, please see the "Appeals Procedure" posted on our website.

If you wish to appeal a decision in this letter to the FCC, you should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received by the FCC or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. We strongly recommend that you use the electronic filing options described in the "Appeals Procedure" posted on our website. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. See the "Guide to USAC Letter Reports" posted at <http://usac.org/sl/tools/reference/guide-usac-letter-reports.aspx> for more information on each of the fields in the Report. USAC is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on the FRN(s), a separate letter will be sent to the service provider detailing the necessary service provider action.

Note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment amount. Review the Funding Commitment Adjustment Explanation in the attached Report for an explanation of the reduction to the commitment(s). Please ensure that any invoices that you or your service provider(s) submits to USAC are consistent with Program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division  
Universal Services Administrative Company

cc: Jessica Matushek  
Navajo Comm Co Inc

Funding Commitment Adjustment Report for  
Form 471 Application Number: 537378

Funding Request Number: 1487823  
Services Ordered: TELCOMM SERVICES  
SPIN: 143002562  
Service Provider Name: Navajo Comm Co Inc  
Contract Number: MTM  
Billing Account Number: 928-871-7475  
Site Identifier: 233673  
Original Funding Commitment: \$239,391.45  
Commitment Adjustment Amount: \$239,391.45  
Adjusted Funding Commitment: \$0.00  
Funds Disbursed to Date \$0.00  
Funds to be Recovered from Applicant: \$0.00  
Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that this funding request will be rescinded in full and USAC will seek recovery of erroneously disbursed funds from the applicant. Please see the attached Further Explanation Letter for additional information.



July 22, 2011

Pearl Lee  
Navajo Nation Library Consortium  
P. O. Box 2928, Building 2528 Morgan Blvd.  
Window Rock, AZ 86515

Further Explanation of Administrator's Funding Decision  
Form 471 Application Number: 537378  
Funding Request Number: 1487823  
Funding Year 2006 (07/01/2006 – 06/30/2007)

**Please be advised that the Commitment Adjustment Letter (CAL) is the official action on this application by the Universal Service Administrative Company (USAC). Please refer to that letter for instructions regarding how to appeal the Administrator's decision, if you wish to do so.** The purpose of this letter is to provide you with additional information concerning the reasons for denial of these funding requests

#### **Background**

The Navajo Nation DINE Education Consortium (BEN 233673) has received E-Rate program funding since Funding Year 2003. The Navajo Nation Head Start Consortium (BEN 16028599) received E-Rate program in Funding Year 2005. Since Funding Year 2003, more than \$13.8 million of E-Rate program funds have been provided for telecommunications services, Internet access, basic maintenance of internal connections and internal connections. These entities applied for funding as library consortia and the consortia members are located within the Navajo Nation in the states of Arizona, Utah and New Mexico.

In a letter dated March 28, 2008,<sup>1</sup> the Navajo Nation was informed that USAC was holding invoices from your service provider, OnSat Native American Services (OnSat), pending your responses to USAC's request for information and documentation arising out of the findings reported in the "Special Review of the Navajo Nation Payments to OnSat" (Special Review) conducted by the Navajo Nation Office of the Auditor General.<sup>2</sup> USAC requested information and documentation regarding the findings in the Special Review.

<sup>1</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (March 28, 2008).

<sup>2</sup> Office of the Auditor General, The Navajo Nation, Special Review of the Navajo Nation Payments to OnSat (June 18, 2007) (*Special Review*).

USAC became increasingly concerned about additional potential violations of the Federal Communications Commission (FCC) rules governing the E-Rate program including the eligibility of Chapter Houses to participate in the program after press reports in April 2008 indicated that the Chapter Houses function as local government centers. For example, in a telephone conversation between Mel Blackwell and a representative of the Navajo Nation July 14, Mr. Blackwell was informed that OnSat planned to turn service off at five police stations, among other locations and was asked what USAC could do to avoid that from occurring.

USAC sought additional information regarding the eligibility of the Chapter Houses and other issues including provision of service to ineligible entities in an April 14, 2008 letter.<sup>3</sup> USAC received written responses from the Navajo Nation dated May 12, 2008<sup>4</sup> and July 3, 2008,<sup>5</sup> and met Dr. Joe Shirley, President of the Navajo Nation, on July 2, 2008. USAC informed President Shirley that USAC's questions had not been fully answered in these responses, and that additional information was needed before a decision on the pending invoices could be made. On July 15, 2008, President Shirley informed USAC that "the Navajo Nation has complied completely with all requests for information from USAC. We have no further information to provide."<sup>6</sup>

In July 2008, USAC was contacted by counsel for the Navajo Nation who stated that they had been retained "to review the Nation's participation in the FCC's E-rate program (beginning funding year 2003 until the present), prior internal and external audits conducted relating to those entities, and to provide assistance in complying with FCC regulations related to the E-rate program".<sup>7</sup> In this and subsequent letters, USAC was requested to take no action on the Navajo Nation's pending funding requests to USAC so that the review could be completed. USAC officials met with counsel to the Navajo Nation in September 2008, and on December 8, 2008 provided a detailed letter to USAC regarding the results of their review (Report).<sup>8</sup>

USAC officials conducted a site visit to the Navajo Nation in July 2009, meeting with Navajo Nation officials, their attorneys, and visiting 12 Chapter Houses. In October 2009, Navajo Nation's counsel provided USAC with news articles reporting that President Shirley had been placed on administrative leave, that Ernest Franklin, the Navajo Nation official who had been the E-rate program contact was under investigation, and that the scope of the investigation included the Navajo Nation's contract with OnSat.

<sup>3</sup> See Letter from Mel Blackwell, Vice President, Schools and Libraries Division, to Dr. Joe Shirley, Jr., President, Navajo Nation (Apr. 14, 2008).

<sup>4</sup> See Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division (May 12, 2008)(May 12 letter).

<sup>5</sup> Letter from Ernest Franklin, Executive Director, Navajo Nation Telecommunication Regulatory Commission, to Mel Blackwell, Vice President, Schools and Libraries Division (July 3, 2008) (July 3 letter).

<sup>6</sup> Letter from Dr. Joe Shirley, Jr., President, Navajo Nation, to Mel Blackwell, Vice President, Schools and Libraries Division, Universal Service Administrative Company (July 15, 2008).

<sup>7</sup> Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to USAC (July 16, 2008).

<sup>8</sup> See Letter from James E. Dunstan, Daniel J. Marglos, Garvery Schubert Barer, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC (Dec. 8, 2008).

USAC was informed that the Navajo Nation Attorney General's office would be providing a report to USAC within a couple of weeks. In February 2010, USAC was informed that no additional report would be forthcoming, that President Shirley had been reinstated, and that a Special Prosecutor had been named to investigate the allegations.

USAC has reviewed the information and documentation provided by the Navajo Nation, its attorneys as well as information obtained through the site visit and has determined that the funding commitments listed above will be rescinded in full and recovery of all funds disbursed sought from the Navajo Nation and from OnSat.

#### Eligibility of Chapter Houses and Head Start Centers as Libraries

#### FCC Rules

#### Entity Eligibility Requirements

FCC rules authorize USAC to provide funding for eligible services provided to eligible entities.<sup>9</sup> These rules define eligible libraries follows:

- (1) Only libraries eligible for assistance from a State library administrative agency under the Library Services and Technology Act (Public Law 104-208) and not excluded under paragraphs (c)(2) or (c)(3) of this section shall be eligible for discounts under this subpart.
- (2) A library's eligibility for universal service funding shall depend on its funding as an independent entity. Only libraries whose budgets are completely separate from any schools (including, but not limited to, elementary and secondary schools, colleges, and universities) shall be eligible for discounts as libraries under this subpart.
- (3) Libraries operating as for-profit businesses shall not be eligible for discounts under this subpart.<sup>10</sup>

FCC rules define libraries as follows:

A "library" includes: (1) A public library; (2) A public elementary school or secondary school library; (3) An academic library; (4) A research library, which for the purpose of this section means a library that: (i) Makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public; and (ii) Is not an integral part of an institution of higher education; and (5) A private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition.

<sup>9</sup> See 47 C.F.R. §§ 54.501, 54.502, 54.503, 54.504, 54.517, 54.518, 54.519, 54.522.

<sup>10</sup> 47 C.F.R. § 54.501(c)

Library consortium. A "library consortium" is any local, statewide, regional, or interstate cooperative association of libraries that provides for the systematic and effective coordination of the resources of schools, public, academic, and special libraries and information centers, for improving services to the clientele of such libraries. For the purposes of these rules, references to library will also refer to library consortium.<sup>11</sup>

#### Educational Purposes Requirement

Applicants seeking Schools and Libraries program funding are required to certify that the schools and libraries to be served are eligible for funding, and that the services will be used "solely for educational purposes."<sup>12</sup> FCC rules define "educational purposes" as follows:

For purposes of this subpart, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate and proximate to the provision of library services to library patrons, qualify as "educational purposes." Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.<sup>13</sup>

Based on the Navajo Nation's certifications and on letters provided by the State of Utah State Library Division, the New Mexico State Library, and the State of Arizona Department of Library, Archives and Public Records, the Navajo Nation Dine Education Consortium was funded as a library consortium with Chapter Houses eligible as libraries, and the Navajo Nation Head Start Consortium as a library consortium with Head Start sites eligible as libraries.

#### State of Arizona Department of Library, Archives and Public Records

The October 21, 2003 letter from the State of Arizona Department of Library, Archives and Public Records states as follows: "Based on the attached documentation the Arizona State Library verified that the Navajo Nation Library at Window Rock is eligible for Library Services and Technology Act, LSTA funding in Arizona."<sup>14</sup> The documentation referred to in this letter is an October 15, 2003 letter from the Navajo Nation's Executive Director of Dine' Education to the Arizona State Library.<sup>15</sup> In this letter, the Navajo Nation requests funding for the Navajo Nation's "Library Consortium" of 110 Chapters

<sup>11</sup> 47 U.S.C. § 54.500(d), (e).

<sup>12</sup> 47 C.F.R. § 54.504(b)(2)(i), (ii), (v).

<sup>13</sup> 47 C.F.R. § 54.500(b).

<sup>14</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Karen Dixon-Blazer, Executive Director, Dine' Education (Oct. 21, 2008).

<sup>15</sup> See Letter from Karen Dixon-Blazer, Executive Director, Dine' Education, to Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records (Oct 15, 2003).

and the "Central Library" located in Window Rock, Arizona.<sup>16</sup> The letter states as follows in relevant part:

[T]he Navajo Nation believes that the only library that possibly would need to comply with the requirements to be eligible for LSTA would be the Navajo Nation Central Library in Window Rock, Arizona. The Navajo Nation considers all of the other 110 Chapters to be an extension of the Central Library in Window Rock, Arizona.<sup>17</sup>

The letter goes on to explain that the Navajo Nation is divided into "Chapters" throughout the Nation and that "[t]he responsibility for managing the entire Navajo Nation Library System rests with the Central Library in Window Rock, Arizona and is administered by the Executive Branch under the Division of Dine' Education."<sup>18</sup> The letter then states the following:

The responsibility for managing the Chapters of the Navajo Nation also lies within the Executive Branch, but under the Division of Community Development. Therefore the Library system and the 110 Chapters are governmental entities of the sovereign Navajo Nation. All Divisions within the Executive Branch including the Library execute their services through the 110 Chapter Houses to the surrounding communities. Because of this arrangement, the Divisions of Community Development and Dine' Education including the 110 Chapters and Central Library (total 111 sites) formed a Library Consortium to extend and enhance the library services and capabilities to all 110 communities across the Navajo Nation.<sup>19</sup>

The letter explains that the mission of the "Library Consortium" is to use the donations from the Bill and Melinda Gates Foundation's library project "plus the content and resources of the Central Library to connect, educate and inform our people living in the 110 Chapter communities" and to "extend the services of the Navajo Central Library in Window Rock, Arizona plus provide sustainable public Internet access to our people in some of the most remote areas in North America."<sup>20</sup> The letter concludes by reiterating that because the Navajo Nation is a sovereign nation, the only request is for LSTA verification for the Central Library in Window Rock.<sup>21</sup>

The State of Arizona Department of Library, Archives and Public Records provided a subsequent letter dated May 12, 2004 stating that the "Navajo Nation Library at Window Rock and the Arizona Nation Chapters" are eligible for LSTA funding in Arizona.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Letter from Jane Kolbe, Library Development Division, State of Arizona Department of Library, Archives and Public Records, to Ernest Franklin, Navajo Nation Library Consortium, Division of Community Development (May 12, 2004).

### State of Utah State Library Division

The State of Utah State Library Division provided a letter to USAC dated September 3, 2003 stating that "the Red Mesa Chapter of the Navajo Nation is eligible to receive LSTA-funded assistance services including "consulting and general assistance, training and continuing education, and the use of the commercial electronic resources to be found on the public PIONEER website".<sup>23</sup>

### New Mexico State Library

In a letter to USAC dated October 14, 2003, New Mexico's State Librarian stated that he was "very uncomfortable" being asked to become involved in the question of whether the "individual chapters of the Navajo Nation and its library" are eligible for funding.<sup>24</sup> In a subsequent letter dated October 27, 2003, New Mexico's State Librarian stated that the State of New Mexico does not at that time provide a "subgrant" program under LSTA but that if they did at that time, "any "Indian tribe" in the state, as defined in the [LSTA] and that meets the IMLS requirements for receipt of LSTA funds would also be eligible to received LSTA funds under such a subgrant program. This would also hold true for any LSTA subgrant programs we may offer in the future."<sup>25</sup>

### Discussion

USAC understands that the Navajo Nation Library, Entity Number 98862, is the same entity as the "Navajo Nation Central Library," which is administered by the Office of the Navajo Nation Library within the Department of Dine Education, and is located in the Navajo Nation Museum, Library and Visitor's Center in Window Rock, Arizona. The website for the Office of the Navajo Nation Library describes the library's collection and services, which include over 61,000 volumes, a variety of special collections, and computers with Internet access for public use.<sup>26</sup> The Navajo Community Library page indicates that this is a branch library that is currently closed. The Public Library page explains the library procedures, which include the requirement that library membership cards are required for use of the computer and that one hour of Internet access is allowed per person per day.<sup>27</sup> Chapters are mentioned in the Plan of Operation<sup>28</sup> and the Book

<sup>23</sup> Letter from Jane E. Smith, LSTA Grants Coordinator, Utah State Library Division, to Schools and Libraries Division (Sep. 3, 2003).

<sup>24</sup> Letter from Richard Akeroyd, State Librarian, to George McDonald, Vice President Schools and Libraries Division, Universal Service Administrative Company (Oct. 15, 2003).

<sup>25</sup> Letter from Richard Akeroyd, State Librarian, New Mexico State Library to Dr. Ernest Franklin, Navajo Nation Library Consortium Leader, Division of Community Development (Oct. 27, 2003).

<sup>26</sup> See <<http://www.nnlib.org/>>

<sup>27</sup> See <http://www.nnlib.org/cms/kunde/rtts/nnliborg/docs/630803997-04-21-2009-09-21-43.pdf>

<sup>28</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117722&pn=Page&DomName=nnlib.org>

Distribution Services<sup>29</sup> as being the intended recipients of books. USAC has not located any information at this website indicating that the Chapter Houses are “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses.

Navajo Nation Chapter Houses are listed at the Navajo Nation Division of Community Development pages of the Navajo Nation website.<sup>30</sup> USAC has not located any information at these pages describing the Chapter Houses as being “extensions” or branches of the Navajo Nation Central Library. USAC has not located any information at these pages describing any library services that are being provided at the Chapter Houses

USAC was provided with the following information during a July 21, 2009 meeting with Navajo Nation officials:

- The Chapter Houses function as community centers and are where each Chapter House Council, the governing body for each Chapter, meets.
- The Gates Foundation donated computers to the Navajo Nation for library use and they were located in the Chapter Houses. The first computers were donated in 2000, with a refresh being donated in 2007.
- The Chapter Houses are “extensions” of the main library in Window Rock.

USAC requested documentation supporting the designation of the Chapter Houses by the Navajo Nation as extensions, or branches of the main library as well as documentation regarding the library services provided at the Chapter Houses during the time period when USAC provided funding to the Chapter Houses. USAC has not been provided with such documentation to date, and has not been able to locate any publicly available documentation to support that designation.

In response to USAC’s questions, the Navajo Nation stated, “[f]ollowing a visit to the to several Navajo communities, the Gates foundation agreed to that the sole common public structure, called the community chapter house, was the location to establish the beginnings of a community public library.”<sup>31</sup> In a subsequent letter, the Navajo Nation stated as follows:

On the Navajo Nation a Chapter House is a library. It provides the same types of services that any library would with the understanding that resources are more limited for the Nation than perhaps other comparable U.S. libraries. In fact, the

<sup>29</sup> See

<http://www.nnlib.org/content.asp?CustComKey=117342&CategoryKey=117711&pn=Page&DomName=nnlib.org>

<sup>30</sup> See

<http://www.nndcd.org/content.asp?CustComKey=345720&CategoryKey=463648&pn=AdvancedFreeForm&DomName=nndcd.org>

<sup>31</sup> May 12, 2008 letter.

library patrons, who include all Members of the Navajo community of all ages, rely heavily upon the resources provided in the Chapter Houses, such as internet access, video conferencing, and distance learning as the focal point of distribution of native and world information. Other activities may include community activities relating to health awareness, education, etc.<sup>32</sup>

Between July 22 and 24, 2009, USAC conducted site visits to 12 Chapter Houses throughout the Navajo Nation and noted the following:

- Each Chapter House usually contains a large meeting room which is used for the Chapter House Council meetings. The large room usually contains a podium where members of the council sit during Chapter House meetings.
- Each Chapter House has an Office Coordinator or similar office employee who perform and oversee the administrative functions, including helping community members access Navajo Nation services such as health care services.
- Each Chapter House is self-governing and employees of the Division of Community Development provides technical support for the public access computers.
- No Chapter House employee stated that they provided any type of library services. Rather, with regard to the public access computers, the Chapter House office workers enforce the time limits on access to the computers. At one Chapter House, the office coordinator stated that she instructed computer users that the computers were to be used only for educational purposes.
- At most Chapter Houses, notices on the walls/doors lay out the computer usage "rules" which were generally limited to announcing the time limit for access, time limits on accessing social networking site and prohibiting food and drinks near the computers.
- When asked whether there was a library nearby, Chapter House employees stated there was no library, that the closest library was at the school, or that there was a community library.
- Three of the Chapter Houses contained small book shelves with some paper volumes.
- The Video Conferencing equipment has generally gone unused due to lack of training. The Division of Community Development employees who provide the technical support were not informed that the Video Conferencing equipment was being deployed until one month prior to its delivery.

Documentation describing the public access computers at the Chapter Houses show that in practice the computers were considered public access computers located at community centers rather than public access computers located at libraries for educational purposes. For example, a memo to "All Chapters/Division of Community Development" from the

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<sup>32</sup> July 3, 2008 letter.

Navajo Nation contact with the subject line "Status on the Community Internet Access Funding" states as follows:

As the Navajo Nation Library Consortium Leader and the Navajo Nation President's designated person for e-rate funding for the Navajo Nation, I am informing all the 100 consortium/chapters [sic] members that funding for the community internet access will be paid for from July 1, 2004 through June 30, 2005. . . . Please be aware that these funds are for community use only and any other use, such as administrative, will require additional funds.<sup>33</sup>

Similarly, the undated Navajo Nation Department of Head Start report posted to the FCC's website<sup>34</sup> does not portray the Chapter Houses as libraries, and describes the Chapter House public access computers as follows:

In 1999, the Gates Foundation started the Native American Access to Technology Project (NATP) to meet technology and access to information needs of Native American tribes in the Four Corners area. In partnership with the Navajo Nation and OnSat (a satellite and wireless provider) computers and high speed connectivity was achieved at every Chapter House on the Navajo Nation. From 2 to 15 computers are now connected to broadband Internet and providing free public access at every Chapter on the Navajo Nation.

USAC has determined that the Chapter Houses are not eligible for funding as libraries under FCC rules. The documentation, information obtained through interviews, and the observations made at the site visit indicate that the Chapter Houses are seats of local government and function as community centers. No documentation has been provided demonstrating that the Navajo Nation Central Library considers the Chapter Houses to be extension or branch libraries and describing the library services that are provided at the Chapter Houses. The initial verifications provided by the states suggest that at the time those verifications were provided, there may have been an intent that the computers at Chapter Houses would be used to deliver library services, but no documentation or information has been provided to demonstrate whether such library services were provided for a specified time frame.

#### Navajo Nation Head Start Consortium Eligibility

The Navajo Nation applied for and received funding for the Navajo Nation Head Start Consortium by listing the sites to receive service as the Chapter Houses and stating that they were eligible libraries. The Navajo Nation later explained that the "main reason for

<sup>33</sup> Memorandum from Ernest Franklin, Jr., Planner/Estimator, Design and Engineering Services to All Chapters/Division of Community Development, Aug. 6, 2004.

<sup>34</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

for the creation of the the [Navajo Nation Head Start Consortium] was to address the overcrowding of the libraries/chapters. The head start centers were the closes (sic) buildings to the Libraries/Chapters and thereby were the logical chose (sic) to be considered as library extensions to the existing 111 libraries/chapters."<sup>35</sup>

### FCC Rules

FCC rules regarding the eligibility of schools to receive support provide that:

- (1) Only schools meeting the statutory definitions of "elementary school," as defined in 20 U.S.C. § 7801(18) or "secondary school," as defined in 20 U.S.C. § 7801(38), and not excluded under paragraphs (b)(2) or (b)(3) of this section shall be eligible for discounts on telecommunications and other supported services under this subpart.
- (2) Schools operating as for-profit businesses shall not be eligible for discounts under this subpart.
- (3) Schools with endowments exceeding \$50,000,000 shall not be eligible for discounts under this subpart.<sup>36</sup>

20 U.S.C. § 7801(18) defines an elementary school as follows: "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law."<sup>37</sup>

Head Starts facilities can satisfy the FCC's eligibility requirements when pre-kindergarten education is included in the applicable definitions of elementary school and elementary education and when Head Start facilities are defined as schools under applicable law.

During the site visit described above, separate Head Start facilities were observed at most of the Chapter House compounds. The Head Start facilities are not currently in operation and so it was not possible to interview Head Start employees. The Report describes the in detail educational services provided at the Head Start facilities.<sup>38</sup> Moreover, the Navajo Nation Department of Head Start report posted to the FCC's website indicates that Head Start services rather than library services were provided at the Head Start facilities.<sup>39</sup>

Because the Head Start facilities should have sought funding as schools rather than as libraries, USAC requested a copy of the Navajo Nation laws or regulations that define elementary education to include pre-kindergartdn and/or Head Start Centers specifically.

<sup>35</sup> May 12, 2008 letter.

<sup>36</sup> 47 C.F.R. § 54.501(b).

<sup>37</sup> FCC regulations define "elementary school" as a non-profit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law. 47 C.F.R. § 54.500(j).

<sup>38</sup> See Report at 38-41.

<sup>39</sup> See <http://www.fcc.gov/cgb/rural/presentations/ONSAT2OverviewofNNHeadStartTechnologyPlan.pdf>

In response, the Reivew described the statutes that created the Navajo Nation Head Start program and that require the Head Start program to provide instruction in the Navajo (Dine') language. These statutes do not, however, satisfy the FCC's requirement that the Head Start facilities be defined as schools providing elementary education. Therefore, USAC has determined that the Head Start facilities are not eligible to receive funding.

The Report also states that the Federal Department of Health and Human Services shut down the Head Start classrooms on May 2, 2006.<sup>40</sup> Therefore, USAC should not have been billed by OnSat for services provided from May 2, 2006 through June 30, 2006. USAC's records indicate that OnSat billed and was paid the full amount funded by USAC.

#### Failure to Comply with the FCC's Competitive Bidding Requirements.

##### FCC's Competitive Bidding Requirements

FCC rules require applicants to conduct a fair and open competitive bidding process free from conflicts of interest.<sup>41</sup> FCC rule further require applicants to select the most cost-effective service offering<sup>42</sup> and require applicants to certify that "[a]ll bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals."<sup>43</sup> FCC rules also require the applicant to have entered into a contract or legally binding agreement before submitting their funding requests to USAC.<sup>44</sup>

According to the Report, all of the Navajo Nation's funding requests rely on the 2001 Master Agreement entered into between the Navajo Nation an OnSat.<sup>45</sup> The term of the Master Agreement was 48 months with the term automatically renewing for additional one (1) year terms unless terminated in writing.

<sup>40</sup> See Report at 23.

<sup>41</sup> See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, Order, 19 FCC Rcd 6858, ¶ 60 (2003) ("*Ysleta Order*"); See also *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028-4032-33, ¶ 10 (2000); *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007); *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008)

<sup>42</sup> See 47 C.F.R. § 54.511(a).

<sup>43</sup> See 47 C.F.R. § 54.504(c)(1)(xi).

<sup>44</sup> See 47 C.F.R. § 54.504(c).

<sup>45</sup> See Report at 41.

The Grant Agreement between the Bill and Melinda Gates Foundation (Gates Foundation) and the Navajo Nation, signed by the Gates Foundation on August 31, 2001, and the Navajo Nation on November 30, 2001 specifies that a portion of the grant is "to fund the Navajo Nation's payment obligations to OnSat for the connectivity services to be provided in accordance with the service agreement entered into between the Navajo Nation and OnSat."<sup>46</sup> The term of the Grant Agreement is execution through July 31, 2004.<sup>47</sup>

- The Report states that the 2001 Master Agreement was not competitively bid and not in compliance with FCC rules as follows:<sup>48</sup>
  - "The Master Agreement, that governs the relationship between OnSat and the Nation, was entered into in 2001, two years before the Nation received E-rate funding. It was the result of a "partnership between OnSat and the Bill and Melinda Gates Foundation, that funded the installation of computers and satellite uplink facilities at the Chapter Houses. Because of the unique nature of the arrangement, in which the Gates Foundation funded the entire Master Agreement, the 2001 Master Agreement was not competitively bid. This established OnSat as the incumbent carrier for the Nation."<sup>49</sup>
  - In response to USAC's questions regarding the Funding Year 2006 competitive bid process, the Navajo Nation contact informed USAC that Navajo Nation law always requires the following selection criteria: 50% for price, 25% for overall experience in the field, 25% for Navajo preference. The Report states that Navajo Nation procurement laws and regulations do not in fact support this statement.<sup>50</sup>
  - The Report states that "[t]he "scoring grids" used in the 2007-2008 RFP [sic] show that scoring was done in such a way that OnSat was essentially assured a win. . . . In other words, [the competitor] could have offered its services for free, and would not have won."<sup>51</sup>
  - The Report states that documentation indicates a high level Navajo Nation official strongly urged the Navajo Nation e-rate contact to select the incumbent.<sup>52</sup>
  - The Report states that "There were indications in the Special review, and during the interview process for this investigation, that OnSat exercised undo

<sup>46</sup> Grant Agreement between the Bill and Melinda Gates Foundation and the Navajo Nation, Grant Number NA-99-86515-03-B (2001)

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> Report at 41-42.

<sup>50</sup> *See id.* at 42.

<sup>51</sup> *See id.* at 43.

<sup>52</sup> *See id.*

influence on the planning, implementation and support of the Nation's E-rate participation.<sup>53</sup>

- The Report explains that the FCC Form 471 applications submitted to USAC were not supported by contracts that were executed prior to the submission of the FCC Form 471<sup>54</sup>, that the Navajo Nation did not pay the appropriate non-discount amount,<sup>55</sup> and that the modification to the 2001 Master Agreement supporting the Head Start Consortium funding was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation.<sup>56</sup>

USAC has determined that the Navajo Nation's funding requests listed above are not in compliance with the FCC's competitive bidding requirements. All of the Navajo Nation's funding requests associated with OnSat rely on the 2001 Master Agreement. The competitive bidding process initiated by the Navajo Nation's Funding Year 2003 Form 470 posting was a sham because the terms of the Gates Foundation grant required the services for which funding was requested to be provided by OnSat at least through the end of Funding Year 2003. The Navajo Nation used the same 2001 Master Agreement to seek funding in 2004 and 2005. The 2005 funding requests for the Navajo Nation Head Start Consortium were based on a modification to the 2001 Master Agreement that was not approved through the appropriate process nor signed by a qualified representative of the Navajo Nation. Finally, the competitive bid process initiated by the Funding Year 2006 Form 470 posting on which the Funding Year 2006 and 2007 funding requests for OnSat rely was tainted by the conduct described above.

#### Overbilling and OnSat's Failure to Deliver Service

As a result of the issues identified in the Special Review, USAC requested a complete accounting of the dates and time period for any service interruptions relevant to the pending payments at each site, a certification for each Chapter House site stating that it was operational during the time frame that the services were provided and subsequently billed to USAC, and documentation supporting the receipt of services at each site for which funding has been provided for all funding years.

In response to USAC's request for this information, the Report states as follows:

- [T]he use of OnSat's standard Master Agreement with multiple addenda, modifications, and Statements of Work (SOWs) to deliver both E-rate and non-E-rate eligible services, coupled with OnSat's invoicing policies, makes it nearly impossible for the Nation to track payments, servicesm and eligible services.<sup>57</sup>

<sup>53</sup> See *id.* at 45.

<sup>54</sup> See *id.* at 12.

<sup>55</sup> See *id.* at 12 - 14.

<sup>56</sup> See *id.* at 15 - 17.

<sup>57</sup> *Id.* at 2.

- Based on the facts available, we are unable to determine whether any amounts need to be paid to USAC. As described above, under the terms of the contract with OnSat, the Nation's ability to object to service outages and receive credits was extremely limited. It is OnSat's position that the services were contracted for on a fixed fee basis, regardless of the number of actual sites receiving service or the amount of bandwidth actually used. The Nation also did not and does not have the technical ability to determine whether the bandwidth it was paying for was actually delivered.<sup>58</sup>

Because USAC is rescinding these funding commitments in full and seeking recovery of all amounts disbursed, this issue will not be further analyzed.

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<sup>58</sup> *Id.* at 30.