

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of the
Decision of the
Universal Service Administrator by
Houston Independent School District
Houston, Texas
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-398831
CC Docket No. 02-6

ORDER

Adopted: October 27, 2005 Released: October 27, 2005

By the Telecommunications Access Policy Division, Wireline Competition Bureau:

1. In this Order, the Telecommunications Access Policy Division grants a Request for Review filed by Houston Independent School District (Houston) seeking review of a decision by the Schools and Libraries Division of the Universal Service Administrative Company (USAC). As explained below, we find that USAC erred in denying Houston's Funding Year 2004 application for discounted services under the schools and libraries universal service support mechanism on the ground that Houston's funding request was for services ineligible for discounts under program rules. Based upon our review of the record, we find that Houston's funding request was for services eligible for support under the schools and libraries universal service support mechanism. Accordingly, for the reasons set forth below, we grant the Request for Review and remand Houston's application to USAC for further consideration consistent with this Order.

2. Under the schools and libraries universal service support mechanism, commonly referred to as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections. The Commission vested in USAC the responsibility for administering the application process for the universal service support mechanism. Accordingly, USAC reviews the applications for discounts

1Letter from Schools and Libraries Division, Universal Service Administrative Company, to William Edwards, Houston Independent School District, dated January 18, 2005 (Administrator's Decision on Appeal); Letter from William Edwards, Houston Independent School District, to Federal Communications Commission, filed March 18, 2005 (Request for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company may seek review from the Commission. 47 C.F.R. § 54.719(c).

247 C.F.R. §§ 54.502, 54.503.

347 C.F.R. § 54.705(a)(1). The Schools and Libraries Committee oversees the administration of the schools and libraries support mechanism. Id. See also Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal State Joint Board on Universal Service, Third Report and Order and Fourth Order on

that it receives, and issues funding commitments in accordance with the Commission's rules. Under the schools and libraries universal service support mechanism, applicants may only seek support for eligible services.⁴ Pursuant to the Administrator's operating procedures, USAC performs a Program Integrity Assurance (PIA) review to verify that the discounts recipients seek are for eligible services, provided to eligible entities, and for eligible uses.⁵

3. In its Funding Year 2004 application, Houston sought discounts for the provision of Internet access over a fiber optic wide area network (WAN) operated and managed by Phonoscope, LTD (Phonoscope).⁶ Houston's Funding Year 2004 application, filed on February 3, 2004, was an extension of applications USAC had previously approved for Funding Years 2002 and 2003.⁷ The record shows that the fiber optic WAN is part of Phonoscope's integrated, facilities-based Metropolitan Area Network spanning five counties in the Houston area.⁸ The amount of funding requested in Houston's application was \$4,422,810.08.⁹ On June 30, 2004, USAC denied funding for the entire application on the basis that thirty percent or more of the funding request was for dark fiber and a private network, which are ineligible under program rules.¹⁰ On July 22, 2004, Houston filed an appeal with USAC, asserting that USAC misconstrued its funding request and that, in actuality, the funds were requested for a managed "lit" fiber connection serving Houston area schools.¹¹ Houston further explained that Phonoscope has

Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058, 25075-76, paras. 30-31 and 34 (1998) (*Eighth Reconsideration Order*) (describing the functions of the Schools and Libraries Committee). Under the rules adopted in the Commission's Eighth Reconsideration Order, the Schools and Libraries Committee's functions include, but are not limited to, "development of applications and associated instructions," and "administration of the application process, including activities to ensure compliance with Federal Communications Commission rules and regulations."

⁴See 47 C.F.R. § 54.504; Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806, at 20 (October 2003) (FCC Form 471 Instructions) (stating that applicants may not seek support for ineligible services, entities and uses). See also USAC website, <<http://www.sl.universalservice.org/data/pdf/i471y7.pdf>>.

⁵See USAC website, PIA, <<http://www.sl.universalservice.org/reference/6pia.asp>>.

⁶See FCC Form 471, Houston Independent School District, filed February 3, 2004 (Houston FCC Form 471). The Funding Request Numbers (FRNs) at issue in this case are: 1135973, 1136206, 1136285, 1136449, 1136548, and 1136899.

⁷See Request for Review at 2.

⁸See Letter from Rhonda Druke, Phonoscope, LTD, to Schools and Libraries Division, Universal Service Administrative Company, dated July 8, 2004.

⁹*Id.*

¹⁰Letter from Schools and Libraries Division, Universal Service Administrative Company, to William Edwards, Houston Independent School District, dated June 30, 2004, at 5-6 (Funding Commitment Decision Letter). Dark fiber refers to fiber optic cable for which the service provider has not provided modulating equipment, *i.e.*, the fiber is "unlit." See 2003 Eligible Services List, <<http://www.sl.universalservice.org/data/pdf/EligibleServicesList> (dated October 10, 2003) (2003 Eligible Services List).

¹¹Letter from William Edwards, Houston Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated July 22, 2004. On August 6, 2004, Houston amended its appeal by correcting the referenced Funding Applications Number. Letter from Jacqueline Martin, Houston Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated August 6, 2004. It appears from the record that USAC considered the appeal filed on August 6. See Administrator's Decision on Appeal.

managed the inner workings of the WAN using its own fiber, switches, and modulating equipment since Funding Year 2001.¹² On January 18, 2005, USAC denied the appeal, reiterating its earlier finding that Houston's application requested support for the installation and management of dark fiber and a private network, which are ineligible for discounts.¹³ On March 18, 2005, Houston filed the instant Request for Review.¹⁴

4. In its Request for Review, Houston argues that USAC inaccurately described its Funding Year 2004 application as a request for support for dark fiber and a private network.¹⁵ Houston asserts that its funding request is related to the provision of telecommunications, or more specifically, Internet access over "lit" fiber and is not part of a private network.¹⁶ As evidence of these assertions, Houston provides vendor quotes (from Phonoscope) for each FRN illustrating that Phonoscope is providing one "Gig Managed Ethernet Circuit" to each of Houston's sites over a Phonoscope-owned fiber optic network infrastructure.¹⁷ Houston argues that use of the terms "Gig Managed Ethernet Circuit" and "provisioned" in the vendor quotes relate to active, not dark, fiber.¹⁸

5. Houston also argues that attaching Phonoscope equipment necessary to transmit signals over the fiber facility demonstrates that its funding request is for "lit" fiber instead of unsupported dark fiber. Houston explains that Phonoscope uses Gigabit Interface Connectors (GBICs), which are essential modulating devices for Gigabit Ethernet systems, to manage its fiber network and deliver signals for Houston area schools.¹⁹ The GBICs are maintained at each Houston site as an uplink to the Phonoscope network.²⁰ The Phonoscope uplink GBIC at each site is the first inline piece of equipment for the final hand-off link between the provider and Houston.²¹ According to Houston, the fiber providing Internet connectivity to each site is useless without the Phonoscope GBICs; Houston may not obtain telecommunications services if it attempts to bypass the provider's GBICs and connect its local area network equipment directly to the uplink fiber.²² Houston states that the GBICs in Houston's local

¹²*Id.*

¹³Administrator's Decision on Appeal at 1.

¹⁴*See* Request for Review at 4.

¹⁵*Id.* at 2.

¹⁶*Id.*

¹⁷*See Id.* at 4, Attachment 3. Houston provided these vendor quotes in response to a PIA request for additional information. *See* Letter from Schools and Libraries Division, Universal Service Administrative Company, to Jacqueline Martin, Houston Independent School District, dated May 19, 2004. A quote for FRN 1135973, for example, states that "Phonoscope is pleased to provide you with this clarification quote for the annual management of a three Gig Managed Ethernet Circuit to each of the 11 HISD [Houston] hub sites listed below provisioned over a Phonoscope owned fiber optic network infrastructure." *See* Letter from David Caddle, Phonoscope, LTD to Jim Leichty, Houston Independent School District, dated January 16, 2004.

¹⁸*See id.*

¹⁹In its Request for Review, Houston states that it is unclear whether USAC is basing its determination on Phonoscope's use of Gigabit Interface Connectors, which are also used by lessors of dark fiber. *See* Request for Review at 5-6.

²⁰*See* Request for Review at 6.

²¹*Id.*

²²*Id.*

switches exist solely to accept the “lit” fiber hand-off from Phonoscope.²³ Thus, Houston argues that the managed fiber network provided by Phonoscope is not dark fiber.²⁴

6. We have reviewed the underlying record and conclude that USAC erred in denying Houston’s request for support. As discussed above, USAC determined that Houston’s funding request was for dark fiber and a private network, both of which are ineligible under program rules. It appears that USAC’s determination was based on language contained in the Houston-Phonoscope service agreement.²⁵ Our review of the entire Phonoscope Agreement, related addendums and other supporting documentation indicates that the Internet fiber optic WAN at issue is indeed “lit” and is not a private network. The record demonstrates that the Internet fiber optic network at issue is not a private network because it is provided over a common carrier Metropolitan backbone.²⁶ In fact, Houston’s WAN is provided, in part, utilizing Phonoscope fiber routes that service other customers.²⁷

7. Program rules permit schools and libraries to receive support to obtain telecommunications services and Internet access using lit fiber.²⁸ To receive support for services using lit fiber as a Priority One service, the school or library must purchase a functioning service from either a telecommunications service provider or Internet access provider, which in turn is responsible for ensuring that both the fiber and the equipment to light the fiber are provided.²⁹ The record in the instant case indicates that Houston is buying a service that includes Phonoscope equipment necessary to transmit signals over fiber facilities instead of using its own equipment to effectively “light” the fiber. In fact, since Funding Year 2001, Phonoscope has provided, operated, and managed Gigabit Ethernet Circuits for each of Houston’s sites over a Phonoscope-owned fiber optic network infrastructure. Telecommunications services, as well as Internet connectivity, would not be possible for the Houston area schools at issue without the Phonoscope modulating equipment.³⁰ Thus, we find that the fiber optic WAN

²³*Id.*

²⁴*Id.*

²⁵See Fiber Optic Network Lease Agreement of District Wide Area Fiber Optic Network for Houston Independent School District, RFP # 00-11-6 (2000) (Phonoscope Agreement). Section VI of the Phonoscope Agreement provides, in pertinent part:

Use: The [Houston Independent School] District agrees that only District’s own signals will be carried over the Dark Fiber specified in this Agreement, and specifically agrees not to resell the use of the Dark Fiber for the purposes of transmitting a third Party’s signal. The District shall not extend the Applicable Fiber in any manner nor shall the District access or allow any third party to access, any of Phonoscope’s splice points.

Id. at 9.

²⁶See Letter from Rhonda Druke, Phonoscope, LTD, to Schools and Libraries Division, Universal Service Administrative Company, dated July 8, 2004.

²⁷*Id.*

²⁸See 2003 Eligible Services List. See also *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26934, para. 76 (2003) (*Third Report and Order*).

²⁹See *Third Report and Order*, 18 FCC Rcd at 26934, para. 76.

³⁰See Request for Review at 6.

provided by Phonoscope is “lit” and is therefore eligible for E-rate support. As a result, we grant Houston’s Request for Review.

8. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291 and 54.722(a) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291 and 54.722(a), that the Request for Review filed by Houston Independent School District, Houston, Texas, on March 18, 2005, IS GRANTED and REMANDED to USAC for further action consistent with this decision.

FEDERAL COMMUNICATIONS COMMISSION

Narda M. Jones
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