

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

In the Matter of
Request for Review of the Decision of the
Universal Service Administrator by
Benavides Independent School District,
Benavides, Texas
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-348268
CC Docket No. 02-6

ORDER

Adopted: October 30, 2006

Released: October 30, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant the appeal of Benavides Independent School District (Benavides) of a decision by the Universal Service Administrative Company (USAC) that denied funding under the schools and libraries universal service mechanism because Benavides submitted invoices with billing dates after the close of Funding Year 2003 (July 1, 2003 to June 30, 2004). As explained below, we find that special circumstances exist to grant this appeal and remand the application to USAC for further action consistent with this Order. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the invoices, and disburse funding based on a complete review and analysis no later than 60 days from release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism (also known 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 connection services. The Commission has vested in USAC the responsibility of administering the application process for the schools and libraries universal service support mechanism. Section 54.507(d) of the Commission's rules requires schools, libraries and eligible consortia to use recurring services for which

1 Benavides Independent School District, Benavides, Texas, Request for Review, CC Docket No. 02-6, filed Apr. 5, 2006 (Benavides 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 USAC may seek review from the Commission. 47 C.F.R. § 54.719(c). In this Order, we use the term "appeals" to refer generically to the request for review of the decision issued by USAC.

2 Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 (1998).

discounts have been committed by USAC within the funding year for which the discounts were sought.³ Non-recurring services have an implementation deadline of September 30 following the close of the applicable funding year,⁴ although that deadline may be extended if the applicant satisfies one of four criteria.⁵

3. Section 54.719 of the Commission's rules provides that any person aggrieved by a decision of any division of USAC may file an appeal with the relevant committee governing the division or directly with the Commission.⁶ Section 54.720 of the Commission's rules establishes deadlines for affected parties to seek review by the Commission of funding decisions issued by USAC.⁷ For those requests seeking review of decisions issued on or after August 13, 2001, the appeal must be filed with the Commission or USAC within 60 days of the issuance of the decision that the party seeks to have reviewed.⁸ The time limit for filing an appeal commences on the issuance date of the decision and runs until the filing of an appeal.⁹ The Commission's rules treat appeals filed with the USAC or with the Commission as having been filed on the date the appeal is postmarked.¹⁰

4. The Commission has under consideration an appeal filed by Benavides requesting review of a decision issued by USAC.¹¹ The decision at issue involves payment for work performed outside of the funding year.¹² On January 8, 2003, Benavides timely submitted its Funding Year 2003 FCC Form 471, which included funding requests for internal connections, a recurring service.¹³ Computer Technical Services was listed as the service provider.¹⁴ On November 18, 2003, USAC issued a Funding Commitment Decision Letter, approving the two internal connections funding requests, among other funding requests contained in the same application.¹⁵

³ 47 C.F.R. § 54.507(d).

⁴ *Id.*

⁵ 47 C.F.R. § 54.507(d)(1)-(4). See also <http://www.universalservice.org/sl/applicants/step11/service-deadlines-extension-requests.aspx>.

⁶ 47 C.F.R. § 54.719.

⁷ 47 C.F.R. § 54.720.

⁸ 47 C.F.R. § 54.720(b). See *Implementation of Interim Filing Procedures for Filings of Requests for Review*, CC Docket No. 96-45, Order, 17 FCC Rcd 339, 340, para. 3 (Com. Car. Bur. 2001), as corrected by *Implementation of Interim Filing Procedures for Filings of Requests for Review*, CC Docket No. 96-45, Errata (Com. Car. Bur. rel. Dec. 28, 2001 and Jan. 4, 2002) (modifying the 30-day rule and stating that the new 60-day rule would apply to all such pleadings that were required to be filed on or after Sept. 12, 2001 and were received by the Commission on or after Sept. 12, 2001). The rule change excluded petitions for reconsideration, which must, by statute, be filed within 30 days. See 47 U.S.C. § 405(a).

⁹ 47 C.F.R. § 54.720(b) (appeals must be filed within 60 days of the issuance of the decision being appealed).

¹⁰ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, paras. 52, 57 (2003) (*Second Report and Order*). Prior to the *Second Report and Order*, appeals filed with USAC or the Commission were treated as having been filed on the date actually received. *Id.*

¹¹ See Benavides Request for Review at 1. For purposes of this Order, decisions by both the Schools and Libraries Division and USAC will be collectively referred to as decisions issued by USAC.

¹² See Benavides Request for Review at 1.

¹³ FCC Form 471, Benavides Independent School District, filed Jan. 8, 2003.

¹⁴ *Id.*

¹⁵ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Benavides Independent School District, dated Nov. 18, 2003 (Funding Commitment Decision Letter).

5. After the funding requests were approved, on January 12, 2004, Benavides filed a Service Provider Identification Number (SPIN) change request to change its service provider to Avnet.¹⁶ Benavides' requested SPIN change required further review by USAC, which caused several delays to the start date of Avnet providing service to Benavides. On March 11, 2004, Benavides filed a revised SPIN change request, per USAC's direction.¹⁷ USAC approved the change on March 24, 2004.¹⁸ On May 28, 2004, Benavides filed an FCC Form 500 in order to reduce the funding request due to a product substitution and to change the expiration date for its contract with Avnet from June 30, 2004 to September 30, 2004.¹⁹ Benavides was then informed that USAC misplaced this form and was instructed by USAC to refile it.²⁰ Benavides resubmitted the FCC Form 500 on December 9, 2004,²¹ and USAC approved it on February 7, 2005.²²

6. On August 12, 2004, Benavides also filed an FCC Form 486 in order to inform USAC that Avnet had begun providing service on July 1, 2004.²³ On September 22, 2004, USAC sent a Form 486 Notification Letter to Benavides and one to Avnet, which listed the service start date as July 1, 2004.²⁴ On June 19, 2005, Benavides filed another FCC Form 500,²⁵ extending service to September 30,

¹⁶ Letter from Ernest Singleton, Benavides Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated Jan. 12, 2004 (SPIN Change Request).

¹⁷ Letter from Ernest Singleton, Benavides Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated Mar. 11, 2004 (Revised SPIN Change Request) (Benavides filed a second SPIN change request in order to provide USAC with all the required information).

¹⁸ See E-mail from Schools and Libraries Division, Universal Service Administrative Company, to Ernest Singleton, Benavides Independent School District, dated Mar. 24, 2004 (confirming SPIN change from Computer Technical Services to Avnet, Inc.).

¹⁹ FCC Form 500, Benavides Independent School District, filed May 28, 2004. An FCC Form 500 is used to inform USAC that the applicant wishes to reduce its funding commitment, or about a modification in the beginning or ending date for the services received. See Instructions for Completing the Universal Service for Schools and Libraries Adjustment of Funding Commitment and Modification to Receipt of Service Confirmation Form (FCC Form 500), OMD 3060-0853 (April 2000).

²⁰ See Letter from Ernest Singleton, Benavides Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated Dec. 9, 2004.

²¹ Fax from Ernest Singleton, Benavides Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated Dec. 9, 2004 (enclosing May 2004 product substitution request, modified FCC Form 471, certified mail receipt, and copy of return receipt).

²² See Benavides Dec. 9, 2004 Letter; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Ernest Singleton, Benavides Independent School District, dated Feb. 7, 2005 (Supplemental Form 471 Application Approval Letter).

²³ FCC Form 486, Benavides Independent School District, filed Aug. 12, 2004. Benavides signed the certification on August 23 and mailed the certification to USAC on August 25. An FCC Form 486 is used to inform USAC when the applicant is receiving, is scheduled to receive, or has received service in the relevant funding year from its service providers. Receipt by USAC triggers the process for USAC to receive invoices. See Instructions for Completing the Schools and Libraries Universal Service Receipt of Service Confirmation Form (FCC Form 486), OMD 3060-0832 (August 2003).

²⁴ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Ernest Singleton, Benavides Independent School District, dated Sept. 22, 2004 (Form 486 Notification Letter); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Michael Beeman, Avnet, Inc., dated Sept. 22, 2004 (Form 486 Notification Letter).

²⁵ FCC Form 500, Benavides Independent School District, dated June 19, 2005.

2005, which USAC accepted, sending a Form 500 Notification Letter Funding Commitment Synopsis on July 4, 2005.²⁶

7. Avnet began submitting invoices to USAC seeking payment on April 5, 2005.²⁷ Ultimately, USAC denied payment for 11 invoices for the two funding requests at issue.²⁸ These denials were sent directly to the service provider and, based on character limitations in the emails sent by USAC, included only minimal information.²⁹ In particular, these e-mails did not include any information outlining the right of the service provider or the school or library to appeal USAC's decision.³⁰ In addition, Benavides was not directly notified by USAC. Subsequently, Benavides appealed the denials in November 2005.³¹ USAC then denied Benavides' appeal with respect to the invoices that were rejected more than 60 days prior to Benavides' appeal because the appeal was untimely filed.³² For the remaining invoices, USAC denied the appeal because the billing date was outside of the funding year.³³ In its appeal to the Commission, Benavides argues that USAC approved all of its requests for extensions and Benavides now owes its service provider \$180,000 as a result of USAC's denial.³⁴ Further, Benavides states its funding request does not involve waste, fraud, or abuse.³⁵

III. DISCUSSION

8. We grant the appeal filed by Benavides. Based on the facts and circumstances of this specific case, we find that special circumstances warrant a waiver of both the deadline for filing an appeal of USAC's decision and the requirement that program funds be expended within the funding year for recurring services.³⁶

²⁶ See Form 500 Notification Letter Funding Commitment Synopsis (Funding Year 2003), at 4, dated July 4, 2005.

²⁷ See USAC Record, Invoice Review Screens (Apr. 7, 2005 – Sept. 26, 2005) (USAC Invoice Review) (rejecting invoices submitted by Avnet). On August 12, 2004, Benavides submitted its FCC Form 486 to notify USAC that Avnet had begun providing service. See FCC Form 486, Benavides Independent School District, filed Aug. 12, 2004.

²⁸ Benavides Request for Review at 2. See also USAC Invoice Review.

²⁹ See Benavides Request for Review, Exhibits 20a-20c.

³⁰ *Id.*

³¹ Letter from Ernest Singleton, Benavides Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated Nov. 1, 2005 (Letter of Appeal).

³² Nine of the twelve invoice appeals were dismissed for violating the 60-day rule. See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Ernest Singleton, Benavides Independent School District, dated May 9, 2006 (Administrator's Decision on Invoice Appeal) (May 2006 Decision on Two Appeals) (denying appeal of two invoices for violating the 60-day rule); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Ernest Singleton, Benavides Independent School District, dated May 9, 2006 (Administrator's Decision on Invoice Appeal) (May 2006 Decision on Eight Appeals) (denying appeal of eight invoices for violating the 60-day rule). See also 47 C.F.R. § 54.720(b) (appeals must be filed within 60 days of the issuance of the decision being appealed).

³³ See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Ernest Singleton, Benavides Independent School District, dated Feb. 16, 2006 (Administrator's Decision on Invoice Appeal) (Feb. 2006 Decision on Two Appeals) (denying two invoices for billing dates outside of the funding year); May 2006 Decision on Two Appeals.

³⁴ Benavides Request for Review at 2.

³⁵ *Id.*

³⁶ The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.

(continued....)

9. First, we waive section 54.507(d) of the Commission's rules because in this case, we find that the applicant made a good faith effort to comply with program rules and special circumstances justify a departure from this rule.³⁷ Although Benavides sought to extend support for the recurring services provided by Avnet outside of the funding year, USAC approved those changes. Specifically, USAC approved Benavides's extension of Funding Year 2003 funding from June 30, 2003 to September 30, 2005, sent confirmation documentation to Benavides and posted the information on its website, but then denied payment when Benavides adhered to that timeline.³⁸ While it appears that USAC mistakenly granted the extensions, it was not until after the end of Funding Year 2003, after it had rejected Avnet's invoices, that USAC notified Benavides that program funds could not be expended outside the funding year. Until that time, Benavides had proceeded in reliance on USAC's approvals of its changes. According to Benavides, at no time did USAC inform Benavides that it was operating outside the funding year in violation of program rules.³⁹ If USAC had done so, instead of approving Benavides' changes, Benavides could have applied for funding for the services in Funding Years 2004 or 2005. Therefore, we find that good cause exists here to waive the requirement that program funds be expended within the funding year.

10. We note that Benavides appears to have complied with all other program rules and to have worked with USAC in good faith to make changes to its funding requests for Funding Year 2003. Notably, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that denial of funding in this case would inflict undue hardship on the applicant. In this case, the applicant has demonstrated that rigid compliance with the Commission's implementation deadline does not further the purposes of section 254(h) or serve the public interest.⁴⁰ We therefore grant this appeal and remand it to USAC for further processing consistent with this Order.

11. We also waive the Commission's rule requiring appeals from a USAC decision to be filed with USAC within 60 days.⁴¹ In general, the Commission has strictly enforced its appeal filing deadlines.⁴² Unlike other deadlines, filing deadlines for appeals, in particular, are needed to provide

(...continued from previous page)

Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166.

³⁷ See 47 U.S.C. § 54.507(d) (requiring that recurring services be used within the funding year for which discounts were sought). In the past, we have granted requests for an extension of the service delivery deadline in order to alleviate potential hardships that would be incurred by schools without an extension. See *In the Matter of Chicago Public Schools, Chicago, Illinois*, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 17086, 17090, paras. 10-11 (Wireline Comp. Bur. 2002); *In the Matter of Buffalo City School District, West Seneca, New York*, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 11881, 11885, paras. 10-11 (Wireline Comp. Bur. 2002).

³⁸ Benavides Request for Review at 1.

³⁹ *Id.* at 2-3.

⁴⁰ See 47 U.S.C. § 254(h).

⁴¹ 47 C.F.R. § 54.720. Benavides filed its appeal with the Commission on April 5, 2006, which timely appealed the February 16, 2006 Administrator's Decision on Appeal. See Benavides Request for Review at 1; Feb. 2006 Decision on Two Appeals at 1. It did not, therefore, violate section 54.720(a) of the Commission's rules.

⁴² See *Application for Review by Mescalero Apache School*, CC Docket No. 02-6, Order, 20 FCC Rcd 5848, 5848-49, para. 2 (2005) (*Mescalero Order*) (upholding a decision by the Wireline Competition Bureau (Bureau) to deny a request for review of a USAC decision denying the school's untimely appeal). See, e.g., *Request for Review of the*

(continued....)

finality in the decision-making process.⁴³ Notwithstanding our prior decisions, we find special circumstances warrant a deviation from the general rule with respect to Benavides' appeal. Benavides' service provider received an invoice remittance statement that did not give Benavides or its service provider notice of the 60-day deadline for filing an appeal.⁴⁴ Upon learning of the denials, Benavides appealed the invoice rejections with USAC.⁴⁵ In fact, Benavides appealed two of its invoices in a timely fashion.⁴⁶ We therefore find that Benavides' appeal should be considered on the merits in spite of the procedural violation because Benavides not did receive notice of the requirements for filing an appeal in accordance with Commission rules. We thus waive the 60-day filing requirement in section 54.720(b) of the Commission's rules under these circumstances.⁴⁷

12. We emphasize the limited nature of this decision. We recognize that limiting the expenditure of program funds to the funding year for which they were sought is necessary for the efficient administration of the schools and libraries E-rate program. Although we grant the subject appeal before us, our action here does not eliminate the requirement to expend program funds for recurring services only within the funding year. We continue to require E-rate applicants to comply with all Commission and program rules.

13. Finally, we are committed to guarding against waste, fraud, and abuse, and to ensuring that funds disbursed through the E-rate universal service mechanism are used for appropriate purposes.⁴⁸ Although we grant the Request for Review addressed here, this action in no way affects the authority of the Commission or USAC to conduct audits or investigations to determine compliance with E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred and whether

(...continued from previous page)

Decision of the Universal Service Administrator by Baldwin Park Unified School District, Baldwin Park, California, CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 15888, para. 1 (Telecom. Access Policy Div. 2003) (*Baldwin Park Order*) (affirming USAC decision to deny untimely appeal); *Request for Review of the Decision of the Universal Service Administrator by Stafford Municipal School District, Stafford, Texas*, CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 1795, 1796, para. 3 (Telecom. Access Policy Div. 2003) (*Stafford Order*) (affirming USAC decision to deny untimely appeal).

⁴³ We have strictly enforced the appeals deadlines established for the schools and libraries universal service support mechanism, allowing waivers of deadlines only in limited, compelling situations. See *Mescalero Order*, 20 FCC Rcd at 5848-49; *Baldwin Park Order*, 18 FCC Rcd at 15888; *Stafford Order*, 18 FCC Rcd at 1796. But see *Request for Waiver filed by Greenfield Public School District, Shutesbury, Massachusetts*, CC Docket No. 02-6, Order, DA 06-487 (Wireline Comp. Bur. rel. Feb. 28, 2006) (the Bureau granted a waiver request where the district's technology coordinator was unexpectedly called to active military duty in a time of war).

⁴⁴ See USAC Invoice Review.

⁴⁵ See Benavides Request for Review.

⁴⁶ See Feb. 2006 Decision on Two Appeals

⁴⁷ See *Request for Review by Calhoun School, New York, New York*, CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 356, 358, para. 8 (Wireline Comp. Bur. 2003) (the appeal period runs from the issuance of the document giving notice of SLD's decision).

⁴⁸ See *Request for Review of the Decision by the Universal Service Administrator by Bishop Perry Middle School, New Orleans, Louisiana, et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006).

recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

III. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and the authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), that the Request for Review filed by Benavides Independent School District, Benavides, Texas IS GRANTED.

15. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and the authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), that sections 54.720 and 54.507(d) of the Commission's rules, 47 C.F.R. §§ 54.720 and 54.507(d), ARE WAIVED to the extent provided herein.

16. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and the authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), USAC SHALL COMPLETE its review of the remanded application and ISSUE an award or a denial based on a complete review and analysis no later than 60 days from release of this Order.

17. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau