

Before the  
Federal Communications Commission  
Washington, DC 20554

|   |   |                                      |
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| In the Matter of                        | ) |                                      |
|   | ) |                                      |
| Request for Review of Decisions of the  | ) |                                      |
| Universal Service Administrator by      | ) |                                      |
|   | ) |                                      |
| Savannah R-III School District          | ) |                                      |
| Savannah, Missouri                      | ) | File Nos. SLD-365980, 415489, 471867 |
|   | ) |                                      |
| Schools and Libraries Universal Service | ) | CC Docket No. 02-6                   |
| Support Mechanism                       | ) |                                      |

**ORDER**

**Adopted: August 12, 2008**

**Released: August 12, 2008**

By the Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this order, we grant the request by Savannah R-III School District (Savannah) for review of decisions by the Universal Service Administrative Company (USAC) that denied or rescinded funding under the schools and libraries universal service support mechanism, also known as the E-rate program, for Funding Years (FYs) 2003, 2004 and 2005.<sup>1</sup> For the reasons set forth below, we grant Savannah’s appeal and remand its application to USAC for action consistent with this order. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the application and issue a decision based on a complete review and analysis no later than 60 calendar days from release of this order.<sup>2</sup>

**II. BACKGROUND**

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.<sup>3</sup> The applicant must file an FCC Form 470 to request discounted services and specify whether the service is telecommunications, Internet access, internal connections, or basic

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<sup>1</sup> Letter from Don Lawrence, Superintendent, Savannah R-III School District, to Federal Communications Commission, CC Docket No. 02-6 (Dec. 13, 2006) (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). Funding Years begin July 1 and run through June 30 of the following year.

<sup>2</sup> In performing a complete review and analysis of the underlying applications, USAC shall either grant the application, or, if denying the application, provide the applicant with any and all grounds for denial.

<sup>3</sup> 47 C.F.R. §§ 54.501-54.503.

maintenance of internal connections and provide a description of the services being sought.<sup>4</sup> The FCC Form 470 must be posted on USAC's Schools and Libraries Division website for at least 28 days before the applicant can file its FCC Form 471.<sup>5</sup>

3. In the *Tennessee Order*, the Commission stated that a service is considered a component of internal connections if it is necessary to "transport information within one or more instructional buildings of a single school campus."<sup>6</sup> The *Tennessee Order* also stated that it was reasonable to presume that, if facilities are located on an applicant's premises, then such facilities are necessary to transport information within one or more buildings of the school campus, and are not part of an end-to-end Internet access service.<sup>7</sup> This presumption can be rebutted with evidence that the applicant does not own or have exclusive use of the facilities and thus is truly buying an end-to-end telecommunications or Internet access service rather than seeking reimbursement for an internal connection.<sup>8</sup> The Commission stated that some factors to consider when distinguishing between a service and an internal connection include "ownership of the facility used to provide the service, any lease-purchase arrangements regarding such facility, exclusivity arrangements regarding such facility, maintenance agreements regarding such facility and upfront capital costs."<sup>9</sup>

4. On May 17, 2005, during USAC's Program Integrity Assurance (PIA) review process, USAC requested additional information from Savannah regarding the on-premise satellite equipment that Savannah used for Internet connectivity.<sup>10</sup> USAC asked a series of questions about the antenna and satellite router, including whether the ownership of the equipment transferred to the school in the future and if the lease included an option for the applicant to purchase the equipment.<sup>11</sup> Savannah answered "Yes" to both questions, indicating a lease-purchase arrangement and a transfer of the satellite equipment ownership to Savannah.<sup>12</sup> As a result, USAC reclassified Savannah's services from Internet access to internal connections and denied its funding on the basis that it had not sought bids for internal

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<sup>4</sup> 47 C.F.R. § 54.504(b).

<sup>5</sup> 47 C.F.R. § 54.504(b)(4). The FCC Form 471 is the Services Ordered and Certification Form.

<sup>6</sup> *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc. of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13754, para. 37 (1999) (*Tennessee Order*).

<sup>7</sup> *Id.* at 13754, para. 37.

<sup>8</sup> *Id.* at 13754, para. 39.

<sup>9</sup> *Id.*

<sup>10</sup> Letter from Universal Service Administrative Company, Schools and Libraries Division, to Tom Lewis, Director of Technology, Amazonia Elementary School (May 17, 2005) (PIA Review Letter). Amazonia Elementary School is a school in the Savannah R-III School District. During PIA review, each application is reviewed to ensure that program support is committed only for eligible products and services as well as eligible uses by eligible entities. See <http://www.universalservice.org/sl/applicants/step08/default.aspx>.

<sup>11</sup> PIA Review Letter at 1.

<sup>12</sup> Letter from Tom Lewis, Director of Technology, Amazonia Elementary School, to Universal Service Administrative Company, Schools and Libraries Division (May 23, 2005) (PIA Review Response).

connections on its FCC Form 470 and, therefore, did not post for these services on USAC's Schools and Libraries Division website for at least 28 days before filing its FCC Form 471.<sup>13</sup> On July 7, 2005, Savannah appealed USAC's decision, arguing that the satellite equipment does not belong to the school district and payments to the service provider are only for the Internet access it provides.<sup>14</sup> On October 28, 2005, USAC denied Savannah's appeal, noting that the school district did not demonstrate that the information provided during PIA review was incorrect.<sup>15</sup> In January and March of 2006, USAC sought recovery of funds disbursed in previous years in connection with the same satellite service.<sup>16</sup> On March 8, 2006, Savannah submitted two more appeals in response to the notification of commitment adjustment letters.<sup>17</sup> Savannah noted that the satellite dish, satellite modem and cables were owned by the service provider and would be removed at the end of the three-year agreement.<sup>18</sup> Savannah said that the school district owns the router, which was purchased with school district funds.<sup>19</sup> USAC denied the appeals on March 15, 2006.<sup>20</sup> Savannah subsequently filed an appeal with the Commission for all three funding years.<sup>21</sup>

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<sup>13</sup> Letter from Universal Service Administrative Company, Schools and Libraries Division, to Tom Lewis, Director of Technology, Amazonia Elementary School (June 27, 2005) (Funding Commitment Decision Letter).

<sup>14</sup> Letter from Tom Lewis, Director of Technology, Amazonia Elementary School, to Universal Service Administrative Company, Schools and Libraries Division (July 7, 2005) (Appeal to USAC).

<sup>15</sup> Letter from Universal Service Administrative Company, Schools and Libraries Division, to Tom Lewis, Director of Technology, Amazonia Elementary School (Oct. 28, 2005) (FY 2005 Administrator's Decision on Appeal).

<sup>16</sup> Letter from Universal Service Administrative Company, Schools and Libraries Division, to Tom Lewis, Director of Technology, Amazonia Elementary School (Jan. 11, 2006) (FY 2003 Notification of Commitment Adjustment Letter); Letter from Universal Service Administrative Company, Schools and Libraries Division, to Tom Lewis, Amazonia Elementary School (March 13, 2006) (FY 2004 Notification of Commitment Adjustment Letter) (collectively, Notification of Commitment Adjustment Letters).

<sup>17</sup> Letters from Tom Lewis, Director of Technology, Amazonia Elementary School, to Universal Service Administrative Company, Schools and Libraries Division (March 8, 2006) (Notification of Commitment Adjustment Letters Appeals)

<sup>18</sup> *Id.* at 1.

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

<sup>20</sup> Letters from Universal Service Administrative Company, Schools and Libraries Division, to Tom Lewis, Director of Technology, Savannah R-III School District (May 15, 2006) (FY 2003 and FY 2004 Administrator's Decisions on Appeal).

<sup>21</sup> Request for Review.

### III. DISCUSSION

5. Consistent with precedent, we grant Savannah's request for review.<sup>22</sup> We find that, consistent with the *Tennessee Order*, Savannah has rebutted a finding that led USAC to conclude that the requested services were internal connections.<sup>23</sup> One of the central inquiries from the *Tennessee Order* for purposes of distinguishing between internal connections and other services is whether the applicant owns the facilities used to provide the service or has any lease-purchase agreements with the service provider.<sup>24</sup> Savannah admits that it incorrectly answered "Yes" to two questions during PIA review in reference to transfer of ownership and a purchase option on the equipment.<sup>25</sup> Savannah's admission that it made the mistakes is supported by the service agreement between Savannah and its service provider, which states that the satellite equipment was merely to be used to obtain Internet access.<sup>26</sup> Nothing in the service agreement mentions a transfer of ownership to Savannah or an option to purchase.<sup>27</sup>

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<sup>22</sup> *Request for Review by the Minnesota River Valley Education District, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, File No. SLD-347185, Order, 21 FCC Rcd 12917 (Wireline Comp. Bur. 2006) (granting an appeal when the applicant mistakenly gave an incorrect response to a PIA question during a *Tennessee Order* inquiry and the evidence on appeal rebutted USAC's findings); *Quinter Public Schools Unified School District No. 293, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, File No. SLD-421315, Order, 21 FCC Rcd 14122 (Wireline Comp. Bur 2006) (*Quinter Public Schools Order*) (noting that, when there is an apparent inconsistency, USAC must make contact with the applicant to determine with certainty whether facilities located on an applicant's premises should be presumed to be internal connections). We estimate that the appeal granted in this order involves \$10,080 in funding. We note that USAC has already reserved sufficient funds to address this outstanding appeal. Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2008 (May 2, 2008). Thus, we determine that the action we take today should have minimal impact on the universal service fund as a whole.

<sup>23</sup> *Tennessee Order*, 14 FCC Rcd at 13753-54, para. 38.

<sup>24</sup> *Id.* at 13754, para. 39.

<sup>25</sup> Request for Review at 1. Specifically, USAC asked the following questions: 1) Is the leased on-premise equipment an integral component of a Telecommunications or Internet access service (Savannah responded: "Yes"); 2) Will the leased on-premise equipment be provided by the same service provider that provides the associated Telecommunications Service or Internet access service? (Savannah responded: "Yes"); 3) Does the responsibility for maintaining the equipment rest with the service provider? (Savannah responded "Yes"); 4) Will ownership of the equipment transfer to the school or library in the future? (Savannah responded "Yes"); 5) Does the relevant contract or lease include an option for the applicant to purchase the equipment? (Savannah responded "Yes"); 6) Will the leased equipment be used at the applicant site for any purpose other than receipt of the eligible Telecommunications Services or Internet access of which it is a part? (Savannah responded "No"); 7) Will the school's or library's internal data communications network function without dependence on the equipment? (Savannah responded "No"); 8) Are there any contractual, technical, or other limitations that would prevent the service provider from using the equipment that would normally be shared on other similar arrangements with other customers? (Savannah responded "Yes"). PIA Review Response at 1.

<sup>26</sup> Orbital Data Net, Inc. Service Agreement for Education Customers (dated June 27, 2003) (Savannah Service Agreement).

<sup>27</sup> The service agreement states that "[t]his monthly fee includes use of Orbital Data Net VSAT equipment for term of agreement, standard installation, depot warranty maintenance and business hour help desk support." Savannah Service Agreement at 1.

6. Savannah's mistake in answering the PIA questions incorrectly should not result in the denial of funding under these circumstances.<sup>28</sup> Savannah's three-year service agreement indicates that the monthly fee was for the use of the satellite equipment and does not contain any terms indicating that the property would be transferred to the school district when the agreement ended. The service agreement terms are consistent with the *Tennessee Order*'s conclusion that equipment should not be categorized as internal connections when there is no evidence that the applicant owns or will own the equipment and there is no evidence of a lease-purchase agreement.<sup>29</sup> We find that Savannah has provided the necessary evidence to show that the applicant does not own or have exclusive use of the facilities and thus is truly buying an end-to-end service rather than seeking reimbursement for an internal connection.<sup>30</sup> We therefore grant Savannah's appeal and remand its application to USAC for further action consistent with

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<sup>28</sup> As noted above, Savannah answered "No" to the question of whether the school's internal data communications network would function without dependence on the equipment. *Supra* n.25. The *Tennessee Order* specifically notes that a school's internal networks should function without the connection to the Internet hub site, indicating that the hub sites are not necessary to transport information within the school and are, thus, not internal connections. *Tennessee Order*, 14 FCC Rcd at 13753-54, para. 38. It appears from the record that Savannah mistakenly answered this question in the negative since there is nothing in the service agreement or other documents that show that the school's internal networks could not function independently of the satellite hookup. However, we remand this issue to USAC to make a complete analysis and determination based on the Commission's conclusions in the *Tennessee Order*. Savannah also answered "Yes" to the question of whether there are any contractual, technical, or other limitations that would prevent the service provider from using the communications equipment with other customers. Again, it appears from the record that Savannah mistakenly answered this question in the positive since there is nothing in the service agreement or other documents that show barriers preventing the service provider from providing service from the equipment site. We also remand this issue to USAC to make a complete analysis and determination based on the Commission's conclusions in the *Tennessee Order*.

<sup>29</sup> *Tennessee Order*, 14 FCC Rcd at 13754, para. 40.

<sup>30</sup> In addition to granting Savannah's request for review on the merits, we also find good cause to waive section 54.720 of the Commission's rules that establishes deadlines for affected parties to seek review of decisions issued by USAC. 47 C.F.R. § 54.720. The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166. We find that, even though Savannah's appeal was filed more than 60 days after it received the Notification of Commitment Adjustment Letters and FY 2005 Administrator's Decision on Appeal, there is good cause to waive section 54.720 of the Commission's rules. We find that the issue before the Commission should have been resolved with USAC before Savannah resorted to filing another appeal. As the Wireline Competition Bureau found in the *Quinter Public Schools Order*, USAC has an obligation to contact applicants to determine with certainty whether facilities located on an applicant's premises should be presumed to be internal connections when there is an apparent inconsistency. *Quinter Public Schools Order*, 21 FCC Rcd at 14126, para. 6. If this additional review had been performed, USAC would have likely found that Savannah's arrangement with its service provider was Internet access and further appeals would have been unnecessary. We therefore find good cause to waive the filing deadline in section 54.720 of the Commission's rules in this instance.

this order.<sup>31</sup> In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the requested services.<sup>32</sup>

7. Finally, we emphasize that the Commission is committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant the appeals addressed here, the Commission reserves the right to conduct audits and investigations to determine compliance with the E-rate program rules and requirements. Because audits and 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 disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. The Commission remains committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

#### IV. ORDERING CLAUSES

8. 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 pursuant to 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), the Savannah request for review IS GRANTED and the underlying application IS REMANDED to USAC for further processing consistent with this order.

9. 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 pursuant to 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), section 47. C.F.R. § 54.720 IS WAIVED.

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<sup>31</sup> In performing a complete review and analysis of the underlying applications, USAC shall either grant the application, or, if denying the application, provide the applicant with any and all grounds for denial.

<sup>32</sup> Additionally, nothing in this order is intended to authorize or require payment of any claim that previously may have been released by a service provider or applicant, including in a civil settlement or plea agreement with the United States.

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

FEDERAL COMMUNICATIONS COMMISSION

Jennifer K. McKee  
Acting Chief  
Telecommunications Access Policy Division  
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