

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Waiver of a Decision of the
Universal Service Administrator by
Harvey Public Library District
Harvey, Illinois
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-307716
CC Docket No. 02-6

ORDER

Adopted: October 30, 2008

Released: October 30, 2008

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

I. INTRODUCTION

1. In this Order, we grant the request by Harvey Public Library District (Harvey) appealing a decision by the Universal Service Administrative Company (USAC) that denied funding under the schools and libraries universal service support mechanism (also known as the E-rate program) for Funding Year (FY) 2002. As explained below, we find that special circumstances exist to justify a waiver of USAC's procedures and remand the appeal to USAC for action consistent with this Order. To ensure that the underlying matter is resolved expeditiously, we direct USAC to reinstate the funding commitment no later than 60 days from release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections. Once the school or library has complied with the Commission's competitive bidding requirements and entered into agreements for eligible services, it must file an FCC Form 471 application to notify USAC of the services that have been ordered, the service providers with whom the applicant has entered into an agreement, and an estimate of

1 Letter from Jay Kalman, Harvey Public Library District, to Federal Communications Commission, dated Jan. 19, 2006 (Request for Waiver). 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). Funding Year 2005 started on July 1, 2002 and ended on June 30, 2003.

2 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.

3 47 C.F.R. §§ 54.501-54.503.

funds needed to cover the discounts to be given for eligible services.<sup>4</sup> Also on the FCC Form 471, applicants must list the “service start date,” the date on which services will start in the funding year for which applicants are applying.<sup>5</sup> USAC then issues a Funding Commitment Decision Letter (FCDL) indicating the discounts, if any, to which the applicant is entitled. After the Funding Year begins and the discounted services begin to be provided, the school or library submits to USAC an FCC Form 486, which indicates that the service has begun and demonstrates approval of the technology plan.<sup>6</sup> Applicants must list the actual service start date on the FCC Form 486.<sup>7</sup> USAC will only accept invoices from the service provider and issue disbursements for discounts on eligible services after receipt of the FCC Form 486.<sup>8</sup>

3. *Harvey Request for Review.* Harvey filed its FCC Form 471 for Funding Request Numbers (FRNs) 810261 and 810395 on January 14, 2002, noting that the service start date for the two FRNs was July 1, 2002.<sup>9</sup> Harvey received its FCDL on December 30, 2002 and filed its FCC Form 486 on February 22, 2003.<sup>10</sup> On its FCC Form 486, Harvey listed its Funding Year service start date as February 7, 2003, the date that the service provider finished its work, instead of the actual service start date of January 25, 2003.<sup>11</sup> On September 2, 2003, USAC sent Harvey’s service provider, Logical Network Services (Logical), notification that it was not reimbursing FRNs 980062 and 980113 because the service start date was before the services received date on the FCC Form 486.<sup>12</sup> In an e-mail dated September 17, 2003, Logical filed an appeal with USAC.<sup>13</sup> On March 26, 2004, USAC issued an Administrator’s Decision on Invoice Appeal denying the appeal because the information submitted indicated that the services were delivered outside the dates for which the discounts applied.<sup>14</sup> The next day, on March 27, 2004, Harvey filed an invoice deadline extension with USAC to allow its services to be

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<sup>4</sup> 47 C.F.R. § 54.504(c); Instructions for Completing the Universal Service Schools and Libraries Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806 (December 2002) (FCC Form 471 Instructions).

<sup>5</sup> FCC Form 471 Instructions at 25.

<sup>6</sup> Instructions for Completing the Schools and Libraries Universal Service, Receipt of Service Confirmation Form (FCC Form 486), OMB 3060-0853 (August 2003) at 2 (FCC Form 486 Instructions).

<sup>7</sup> FCC Form 486 Instructions at 12-13.

<sup>8</sup> FCC Form 486 Instructions at 2. *See also Federal-State Joint Board on Universal Service, Children’s Internet Protection Act*, CC Docket No. 96-45, Order, 17 FCC Rcd 12443, 12444, para. 4 (2002) (CIPA II Order); 47 C.F.R. § 54.520.

<sup>9</sup> FCC Form 471, Harvey Public Library District, certified Jan. 14, 2002 (Harvey FCC Form 471).

<sup>10</sup> Letter from Schools and Libraries Division, Universal Service Administrative Company, to Jay Kalman, Harvey Public Library District, dated Dec. 30, 2002 (Funding Commitment Decision Letter); FCC Form 486, Harvey Public Library District, dated Feb. 22, 2003 (Harvey FCC Form 486).

<sup>11</sup> Request for Waiver at 1-2; *see also* Harvey FCC Form 486.

<sup>12</sup> E-mail from Schools and Libraries Division, Universal Service Administrative Company, to Sheila Brady, Logical Network Services, dated Sept. 2, 2003.

<sup>13</sup> E-mail from Sheila Brady, Logical Network Services, to Schools and Libraries Division, Universal Service Administrative Company, dated Sept. 17, 2003 (Logical Request for Appeal).

<sup>14</sup> Letter from Schools and Libraries Division, Universal Service Administrative Company, to Sheila Brady, Logical Network Services, dated March 26, 2004 (Administrator’s Decision on Invoice Appeal).

funded.<sup>15</sup> USAC denied the extension on procedural grounds because the deadline extension was postmarked more than 60 days after the date of the FCC Form 486 Notification Letter.<sup>16</sup>

4. On January 19, 2006, Harvey filed the instant Request for Waiver with the Commission.<sup>17</sup> In its Request for Waiver, Harvey admits that the e-rate coordinator inadvertently put down the wrong service delivery date.<sup>18</sup> At the time, the office containing the E-rate documentation was flooded and much of the paperwork was damaged.<sup>19</sup> In the confusion, the wrong date was entered on the library district's FCC Form 486.<sup>20</sup>

### III. DISCUSSION

5. Consistent with precedent,<sup>21</sup> we waive USAC's procedures in this instance and grant Harvey's Request for Waiver.<sup>22</sup> If Harvey had posted the correct service start date (January 25, 2003), Harvey would have been in compliance with program rules. We find that, although Harvey committed an unintentional, clerical error when it listed the incorrect service start date on its FCC Form 486, it adhered to the other core program requirements. As the Commission has stated, some applicants have contended that the E-rate program can be complicated, resulting in a significant number of applications for E-rate support being denied for ministerial or clerical errors.<sup>23</sup> We find that the action we take here promotes the statutory requirements of section 254(h) of the Communications Act of 1934, as amended (the "Act"), by helping to ensure that Harvey obtains access to discounted telecommunications and information

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<sup>15</sup> E-mail from Jay Kalman, Harvey Public Library District, to Schools and Libraries Division, Universal Service Administrative Company, dated March 27, 2004 (Harvey Request for Appeal).

<sup>16</sup> See *infra* n.25.; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Jay Kalman, Harvey Public Library District, dated Nov. 28, 2005 (Administrator's Decision on Appeal).

<sup>17</sup> Request for Waiver.

<sup>18</sup> Request for Waiver at 1.

<sup>19</sup> *Id.* at 1-2.

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

<sup>21</sup> *Request for Review and/or Waiver by Glendale Unified School District, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-143548, CC Docket No. 02-6, Order, 21 FCC Rcd 1040 (Wireline Comp. Bur. 2006) (granting a waiver request when the school district inadvertently listed as its service start date the date that it submitted the FCC Form 486 to USAC, instead of the actual service start date).

<sup>22</sup> 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. *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.

<sup>23</sup> *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, et al., CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5316, para. 2 (2006).

services.<sup>24</sup> Finally, we note that granting this appeal should have a minimal effect on the Universal Service Fund (USF or the Fund).<sup>25</sup> We therefore grant a waiver of USAC's procedures to Harvey and remand its application to USAC for further action consistent with this order.<sup>26</sup> In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services or the petitioner's application.<sup>27</sup> We remind USAC of its obligation to independently determine whether the disbursement of universal service funds would be consistent with program requirements, Commission rules and orders, or applicable statutes and to decline to disburse funds where this standard is not met.

6. 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 appeal 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.

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<sup>24</sup> 47 U.S.C. § 254(h). The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, amended the Communications Act of 1934. Nothing in this order is intended to authorize or require payment of any claim that has previously been released by a service provider or applicant, including in a civil settlement or criminal plea agreement with the United States.

<sup>25</sup> The appeal granted in this Order involves an application for \$167,760 in funding. We note that USAC has already reserved sufficient funds to address outstanding appeals. *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2008 (Aug. 1, 2008). Thus, we determine that the action we take today should have minimal impact on the Universal Service Fund as a whole.

<sup>26</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. In addition to waiving the relevant rules and procedures that relate to Harvey's listing the wrong service start date, we note that Harvey was not in violation of 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. USAC noted that Harvey's invoice deadline extension request was postmarked more than 60 days after the date of the Form 486 Notification Letter. *See Administrator's Decision on Appeal*. While this is true, the event that Harvey was seeking to appeal was the notification that its invoices were denied, which was sent to Logical on September 2, 2003. Logical had already filed a timely appeal concerning this invoice denial on September 17, 2003. Harvey's subsequent invoice deadline extension request was merely following up on this USAC decision as a prelude to filing an FCC Form 500 in an attempt to change the service start date on its FCC Form 486. We therefore find that Harvey was not in violation of section 54.720 of the Commission's rules for submitting its extension request more than 60 days from the date of the Form 486 Notification Letter and determine Harvey's claims on the merits.

<sup>27</sup> Additionally, nothing in this order is intended: (1) 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; or (2) to authorize or require payment to any person or entity that has been debarred from participation in the E-rate program.

**IV. ORDERING CLAUSES**

7. 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), that the Request for Waiver filed by Harvey Public Library District IS GRANTED.

8. 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, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), USAC SHALL COMPLETE its review of the remanded application and ISSUE an award or denial based on a complete review and analysis the funding commitment no later than 60 calendar days from release of this Order.

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

FEDERAL COMMUNICATIONS COMMISSION

Jennifer K. McKee  
Acting Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau