

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Requests for Review of)	
Decisions of the)	
Universal Service Administrator by)	
)	
Clark County School District)	File Nos. SLD-423200, 480320
Las Vegas, Nevada)	519392, 550660, 599625,
)	681097
)	
Letcher County School District)	File No. SLD-455771
Whitesburg, Kentucky)	
)	
Tahoma School District No. 409)	File No. SLD-395833
Kent, Washington)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: October 20, 2009

Released: October 20, 2009

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

I. INTRODUCTION

1. In this order, we address three appeals of decisions by the Universal Service Administrative Company (USAC) denying funding from the schools and libraries universal service support mechanism, also known as the E-rate program, for funding years 2004-2009 on the grounds that the applicants requested ineligible services.¹ Specifically, the applicants sought funding for dark fiber, which is not an eligible service.² For reasons explained below, we deny these appeals.

¹ In this order, we use the term “appeals” generally to refer to requests for review of decisions issued by USAC. Section 54.719(c) of our 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). *See* Letter from Walt Rulffes, Clark County School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Sept. 15, 2004); Letter from Bill Sampson, Clark County School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 5, 2008); Letter from Bill Sampson, Clark County School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Sept. 19, 2008); Letter from Bill Sampson, Clark County School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Oct. 13, 2008) (regarding USAC’s request to recover disbursed funding for application number 480320 in funding year 2005); Letter from Bill Sampson, Clark County School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Oct. 13, 2008) (regarding USAC’s request to recover disbursed funding for application number 519392 in funding year 2006); and Letter from Bill Sampson, Clark County School District, to Office of the Secretary, Federal Communications Commission, CC

(continued....)

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.³ The Commission vested in USAC the responsibility for administering the application process for the universal service support mechanism.⁴ Accordingly, USAC reviews E-rate applications and issues funding commitments in accordance with the Commission's rules. Under the E-rate program, applicants may only seek support for eligible services.⁵ Pursuant to its 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.⁶

3. *Support for Lit Fiber.* Beginning with E-rate funding year 2004, schools and libraries have been permitted to receive support to obtain telecommunications services and Internet access using lit fiber only. Dark fiber had been eligible for E-rate discounts prior to funding year 2004. The Eligible Services List (ESL) for funding year 2003 stated that “[s]ervice providers can lease fiber capacity that does not include modulating electronics to schools and libraries, if the applicant provides the electronics to modulate the fiber.”⁷ The ESL for funding year 2004, however, stated that “[t]he FCC has not resolved whether unlit dark fiber is a telecommunications service. Pending resolution of this issue, it is not eligible for funding.”⁸

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Docket No. 02-6 (filed Jun. 11, 2009) (Clark County Requests for Review); Letter from Darrell Hall, on behalf of Letcher County School District, to the Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Jan. 12, 2006) (Letcher County Request for Review); Letter from Doug Eash, Tahoma School District No. 409, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Feb. 18, 2005) (Tahoma Request for Review).

² “Dark fiber” refers to optical fiber that has no electronics installed and is therefore not capable of transmitting information. Dark fiber is designated for future use or backup purposes. Fiber that has electronics installed and is capable of transmitting information is referred to as “lit fiber.”

³ 47 C.F.R. §§ 54.501-54.503.

⁴ 47 C.F.R. § 54.705(a)(1).

⁵ See 47 C.F.R. §§ 54.502-54.503; USAC website, Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471) http://www.usac.org/res/documents/sl/pdf/471i_fy05.pdf, OMB 3060-0806, at 23 (November 2004) (last visited Oct. 20, 2009) (stating that applicants may not seek support for ineligible services, entities and uses).

⁶ See USAC website, PIA, <http://www.sl.universalservice.org/reference/6pia.asp> (last visited Oct. 20, 2009).

⁷ See 2003 ESL at 33 (issued Oct. 18, 2002); USAC website, Schools and Libraries, Eligible Services List – Archived Versions, http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_101701.pdf (last visited Oct. 20, 2009).

⁸ See 2004 ESL at 30 (issued Oct. 10, 2003); USAC website, Schools and Libraries, Eligible Services List – Archived Versions http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_101802.pdf (last visited Oct. 20, 2009); see also *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, paras. 76-77 (2003) (*Schools and Libraries Third Report and Order*) (seeking comment on whether dark fiber should be eligible for E-rate discounts). On July 31, 2008, the Commission released a notice of proposed rulemaking that, among other things, asked for commenters to refresh the record on whether dark fiber should be an eligible service. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking, 23 FCC Rcd 11703, 11710-11, para. 17 (2008).

4. To receive support for services using lit fiber, a 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.⁹ The *Third Report and Order* provided that in cases in which a school or library had previously purchased equipment to light fiber, the school or library was permitted to trade in such equipment to the service provider and lease it back.¹⁰ To the extent that a contract modification was necessary to achieve this transaction, such a contract modification would be deemed a minor contract modification under section 54.500(g) of the Commission's rules if it was within the scope of the original contract and the change had no effect or had a negligible effect on price, quantity, quality, or delivery under the original contract.¹¹

5. USAC denied the petitioners' E-rate funding requests for funding years 2004-2009, because it found that the petitioners had requested funding for dark fiber, which was not an eligible service in those funding years. The petitioners subsequently filed their appeals with the Commission.¹²

III. DISCUSSION

6. We deny the appeals filed by Clark County School District (Clark County), Letcher County School District (Letcher County) and Tahoma School District No. 49 (Tahoma) because we find that these applicants sought funding for dark fiber service after funding year 2003, when dark fiber was no longer eligible for E-rate support. Clark County claims that its request should be funded because USAC had approved such funding in previous years and, in reliance on such approvals, Clark County continued to expand its network.¹³ Clark County also asserts that its funding request was for fiber optic cable for a wide area network, which is an eligible telecommunications service.¹⁴ The record also demonstrates, however, that the fiber will be lit by Clark County using modulating equipment that is owned by Clark County.¹⁵ Both Clark County and Tahoma claim that their requests for dark fiber should be funded because the policy regarding the eligibility of dark fiber was changed after they had signed multi-year contracts.¹⁶ Finally, Letcher County claims that its request for dark fiber should be funded because it was the most cost-effective option available.¹⁷

7. We deny the appeals because, as discussed above, dark fiber was no longer eligible for E-rate support after funding year 2003. Clark County, Letcher County and Tahoma do not dispute that they requested dark fiber. To receive E-rate support, an applicant must purchase lit fiber from either a

⁹ See *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26934, para. 76.

¹⁰ See *id.* at 26934, para. 76, n.155.

¹¹ For instance, such a change could fit within the minor contract modification rule if the original contract was for the provision of high bandwidth transmission capability. *Id.*

¹² See Clark County Requests for Review; Letcher County Request for Review; Tahoma Request for Review.

¹³ See Clark County Requests for Review at 1-2.

¹⁴ *Id.*

¹⁵ See FCC Form 471, Item 21 Attachment, Clark County School District (filed Feb. 4, 2004); Letter from Philip J. Brody, Ph.D., Clark County School District, to Robert Herring, Schools and Libraries Division, Universal Service Administrative Company (dated July 13, 2004); Clark County Requests for Review.

¹⁶ Clark County Requests for Review; Tahoma Request for Review.

¹⁷ See Letter from Darrell Hall, on behalf of Letcher County School District, to Schools and Libraries Division, Universal Service Administrative Company (filed Oct. 25, 2005).

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.¹⁸ Regarding the Tahoma and Clark County appeals, although the Commission permits the use of multi-year contracts,¹⁹ the Commission has never adopted a rule insulating applicants and service providers from changes in program rules simply because a multi-year contract was utilized.²⁰ Indeed, the E-rate program is funded on a year-to-year basis and, thus, an applicant has no guarantee that a multi-year contract will continue to be funded for the duration of the contract.²¹ To receive E-rate funding after funding year 2003, the petitioners were required to follow the specified procedures to convert their dark fiber to lit fiber services.²² Therefore, we deny these appeals.

IV. ORDERING CLAUSES

8. ACCORDINGLY, IT IS 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 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 requests for review filed by Clark County School District, Letcher County School District and Tahoma School District No. 409 ARE DENIED.

9. 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
Wireline Competition Bureau

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

¹⁹ See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9062, para. 544 (1997) (subsequent history omitted).

²⁰ See *Petition for Waiver by Sprint Corporation*, CC Docket No. 02-6, Report and Order, 22 FCC Rcd 5353 (Wireline. Comp. Bur. 2007).

²¹ *Id.*

²² See *supra* para. 4.