

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Waiver or Review of a
Decision of the
Universal Service Administrator by
Exigent Technologies
Parsippany, New Jersey
Schools and Libraries Universal Service
Support Mechanism
File Nos. SLD-239449, et al.
CC Docket No. 02-6

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 deny a request for waiver or review of a decision by the Universal Service Administrative Company (USAC) ordering recovery of funds from Exigent Technologies, Inc. (Exigent). Exigent provided services to five schools at discounts under the schools and libraries universal service support mechanism, also known as the E-rate program. For the reasons discussed below, we affirm USAC's action to recover the funds disbursed to Exigent for E-rate funding year 2001 due to Exigent's multiple admitted violations of the Commission's E-rate program rules.

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. The Commission's rules provide, however, that participating schools and libraries must prepare a technology plan and the plan must be approved. Also, applicants may only seek

1 Letter from Michael Baldassare, on behalf of Exigent Technologies, Inc., to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 31, 2004) (Request for Waiver or 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).

2 E-rate funding years start July 1 and run through June 30 of the following year. See 47 C.F.R. § 54.507(b).

3 47 C.F.R. §§ 54.501-503.

4 47 C.F.R. §§ 54.504(b)(2)(iii), 54.504(c)(1)(iv), 54.508.

support for services eligible for support.⁵ Commission rules also require applicants to pay the full non-discounted portion of the price of eligible services.⁶

3. Exigent reports that it installs, supports, and maintains computer networks and that it posted sales of between \$250,000 and \$1.1 million per year, exclusive of the one year in which it participated in the E-rate program.⁷ It states that in late 2000, it was approached by Robert Ferrano, who represented himself as a former USAC employee and said that he could help Exigent increase sales by participating in the E-rate program.⁸ Exigent eventually agreed to employ Mr. Ferrano as an independent contractor, with his compensation based solely on commissions from sales of E-rate services.⁹ Exigent reports that at the sales presentations and elsewhere, Mr. Ferrano made statements about the E-rate program rules that Exigent now recognizes to be inaccurate. For example, according to Exigent, Mr. Ferrano informed schools and Exigent's owners "that Exigent could 'donate' the school's portion of Exigent's bills," and that the schools would not have to pay the non-discounted portion of Exigent's bills.¹⁰ As a result of Mr. Ferrano's presentations, Exigent reports that five schools – Chad School, Chad Science Academy, The Children's Academy, New Vision's Academy, and Full Gospel Christian Academy – applied to the E-rate program.¹¹ Exigent states that Mr. Ferrano then guided both the schools and Exigent through the process, violating multiple rules along the way.¹² Exigent states that not only did Mr. Ferrano inaccurately indicate that no technology plans were required, but he helped the schools complete their FCC Forms 470, and appears to have advised them to select equipment that the schools did not need, simply to increase his commission.¹³ In addition, Exigent claims that Mr. Ferrano convinced the schools to order and seek E-rate discounts on eligible equipment, but then directed Exigent to install equipment that was not eligible for E-rate discounts.¹⁴ Exigent also did not require the schools to pay the non-discounted

⁵ See 47 C.F.R. § 54.504; Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) at 17 (FCC Form 471 Instructions) (stating that applicants may not seek support for ineligible services, entities and uses). See also *Request for Review by Chelmsford Public Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-121771, CC Dockets No. 96-45 and 97-21, Order, 17 FCC Red 761, 762, para. 3 (Com. Car. Bur. 2002).

⁶ See 47 C.F.R. § 54.523.

⁷ Request for Waiver or Review at 2-3.

⁸ *Id.* at 4. In fact, Mr. Ferrano was never an employee of USAC. Rather, he was a temporary employee of NECA – USAC's contractor at the time – between January 1999 and March 2001.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 4-5. The relevant FCC Form 471 applications are Chad School File No. SLD-247033, Chad Science Academy File No. SLD-247454, The Children's Academy File No. SLD-239449, New Visions Academy File No. SLD-253179, and Full Gospel Christian Academy File No. SLD-253436.

¹² Request for Waiver or Review at 5.

¹³ *Id.*

¹⁴ *Id.*

portion of their bills, as required by program rules.¹⁵ Ultimately, Exigent received \$1,120,172.43 in E-rate funds for funding year 2001, the only year in which it participated in the E-rate program.¹⁶

4. Exigent reports that on December 19, 2002, one of its co-owners, Dan Haurey, became aware of a newspaper story regarding E-rate fraud and was concerned enough about Exigent's possible improper behavior to hire a law firm to investigate the situation.¹⁷ When the law firm discovered the illegal actions of Mr. Ferrano, as described above, Exigent directed the law firm to report its findings to USAC as well as to alert USAC of an additional approximately \$5 million in pending requests from other service providers that were involved with Mr. Ferrano.¹⁸ Exigent also reports that, despite Mr. Ferrano's actions, all five schools involved received a fully operational computer network and that all were pleased with Exigent's service.¹⁹ Once informed of the rule violations, USAC sent Exigent commitment adjustment (COMAD) letters.²⁰ Exigent appealed those letters and USAC denied Exigent's appeals.²¹

5. Exigent contends that a waiver is warranted because it "has been proactive and forthright in reporting and attempting to correct the fraud perpetuated on it, the schools, and USAC," and that "[b]y providing timely and specific information, Exigent has assisted USAC by investigating, and hopefully preventing, additional fraud by Mr. Ferrano and possibly helped root out his 'inside' contacts at USAC."²² Exigent asserts that its review of previous USAC and Commission opinions and orders indicates that its own actions in this regard are extraordinary and represent the special circumstances that would justify a

¹⁵ 47 C.F.R. § 54.523.

¹⁶ Request for Waiver or Review at 6.

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ *Id.* at 5-6.

²⁰ See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Daniel Haurey, Exigent (dated Feb. 18, 2004) (COMAD Letter for File No. SLD-247033); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Daniel Haurey, Exigent (dated Feb. 18, 2004) (COMAD Letter for File No. SLD-247454); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Daniel Haurey, Exigent (dated Feb. 18, 2004) (COMAD Letter for File No. SLD-239449); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Daniel Haurey, Exigent (dated Feb. 18, 2004) (COMAD Letter for File No. SLD-253179); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Daniel Haurey, Exigent (dated Feb. 18, 2004) (COMAD Letter for File No. SLD-253436).

²¹ See Letter from Michael Baldassare, on behalf of Exigent, to Schools and Libraries Division, Universal Service Administrative Company (dated Apr. 15, 2004); see also Letter from Schools and Libraries Division, Universal Service Administrative Company, to Michael Baldassare, Exigent (dated July 1, 2004) (Administrator's Decision on Appeal for File No. SLD-247033); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Michael Baldassare, Exigent (dated July 1, 2004) (Administrator's Decision on Appeal for File No. SLD-247454); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Michael Baldassare, Exigent (dated July 1, 2004) (Administrator's Decision on Appeal for File No. SLD-239449); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Michael Baldassare, Exigent (dated July 1, 2004) (Administrator's Decision on Appeal for File No. SLD-253179); Letter from Schools and Libraries Division, Universal Service Administrative Company, to Michael Baldassare, Exigent (dated July 1, 2004) (Administrator's Decision on Appeal for File No. SLD-253436).

²² Request for Waiver or Review at 7.

waiver of the E-rate program rules that it violated, absolving Exigent of the need to refund any E-rate support for the bona fide services and equipment that it provided to the schools.²³

III. DISCUSSION

6. Based on the record, we deny Exigent's Request for Waiver or Review.²⁴ We do not find that special circumstances exist to justify a waiver here. Exigent violated multiple, fundamental Commission E-rate program rules. Through Mr. Ferrano, Exigent informed applicants that they did not need to prepare technology plans nor pay a portion of the price of E-rate services, despite rules expressly requiring them to do both.²⁵ Through its agent, Exigent encouraged applicants to purchase offerings that they did not need.²⁶ Exigent convinced the applicants to permit it to complete the schools' FCC Form 470 applications, and selected itself as the service provider, clearly violating the Commission's E-rate competitive bidding rules.²⁷ Exigent caused E-rate applicants to pay inflated prices for services and billed USAC for eligible services in cases where ineligible services were delivered.²⁸ Exigent also did not require applicants to pay the non-discounted portion of the price of services and equipment.

7. As the Commission ruled in its *Schools and Libraries Fifth Report and Order*, "funds disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered."²⁹ In particular, it concluded that "all funds disbursed should be recovered for any funding requests in which the beneficiary failed to pay its non-discounted share."³⁰ Furthermore, in terms of who to recover from, the Commission has stated that "recovery actions should be directed to the party

²³ *Id.*

²⁴ 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. *Accord, NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008)(stating that in addition to the public interest being well-served, there must also be a sufficiently "unique situation" to grant waiver).

²⁵ 47 C.F.R. §§ 54.504(b)(2)(iv), 54.504(c)(1)(iv), 54.523.

²⁶ Exigent admits that "in order to increase his commissions, Mr. Ferrano may have used his 'experience' at USAC to sell the Schools more equipment than they needed . . ." *Id.* at 5.

²⁷ See 47 C.F.R. §§ 54.504 (a)-(b), 54.511; *Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033 (2000) (*Mastermind Order*).

²⁸ Exigent also admits that "Ferraro may have used his 'experience' at USAC . . . to charge more than he should have . . ." *Id.* The rules limit support to eligible services. 47 C.F.R. §§ 54.501-503.

²⁹ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15814, para. 18 (2004) (*Schools and Libraries Fifth Report and Order*).

³⁰ *Id.* at 15816, para. 24.

or parties that committed the rule or statutory violation in question.”³¹ Therefore, we find that USAC should pursue recovery of these funds from Exigent.

8. We appreciate the efforts that Exigent has made to investigate and report the program violations due to the actions of Mr. Ferrano. We see no reason, however, to excuse Exigent’s ignorance about the basic rules of the E-rate program. Exigent was required to monitor and direct Mr. Ferrano’s actions while he was representing the company. To find otherwise here would allow companies to neglect to supervise their employees and then deny responsibility for their actions. Accordingly, we deny the Request for Waiver or Review and we uphold USAC’s decision to recover all funds disbursed to Exigent in E-rate funding year 2001.

IV. ORDERING CLAUSES

9. 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, 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 or review filed by Exigent Technologies on August 31, 2004, is DENIED.

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
Wireline Competition Bureau

³¹ *Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15255, para. 10 (2004).