

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

In the Matter of	)	
	)	
Requests for Review of	)	
Decisions of the	)	
Universal Service Administrator by	)	
	)	
Lower Merion School District	)	File No. SLD-421438
Ardmore, Pennsylvania	)	
	)	
Bethel School District	)	File No. SLD-459587
Spanaway, Washington	)	
	)	
Tuslaw Local School District	)	File No. SLD-399944
Massillon, Ohio	)	
	)	
Independent School District of Boise City	)	File No. SLD-410686
Boise, Idaho	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	

**ORDER**

**Adopted: November 1, 2011**

**Released: November 1, 2011**

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

1. We grant the appeals filed by Lower Merion School District (Lower Merion), the Bethel School District (Bethel), and Tuslaw School District (Tuslaw) of decisions of the Universal Service Administrative Company (USAC) for funding years 2004 and 2005, denying funding under the E-rate program (more formally known as the schools and libraries universal service program).<sup>1</sup> These applicants were denied funding because USAC determined that they sought E-rate funding for dark fiber when dark fiber was not an eligible service. Consistent with the Commission's *Third Report and Order*, and based on our review of the records for these appeals, we find that these petitioners have demonstrated that they

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<sup>1</sup> Letter from Christopher Stoffere, Lower Merion School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Nov. 14, 2005) (Lower Merion Request for Review); Letter from J.B. Fitzpatrick, Bethel School District, to Federal Communications Commission, CC Docket No. 02-6 (filed Sept. 7, 2006) (Bethel Request for Review); Letter from Linda Schreckinger Sadler, on behalf of Tuslaw Local School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Apr. 22, 2005) (Tuslaw Request for Review). 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).

may have sought funding for lit fiber.<sup>2</sup> We grant these appeals and remand the underlying applications to USAC for further action consistent with this order. We also deny the appeal filed by the Independent School District of Boise City (Boise ISD).<sup>3</sup>

2. Dark fiber was eligible for E-rate funding prior to 2004.<sup>4</sup> Recently, the *Sixth Report and Order* reinstated dark fiber as a service eligible for E-rate support.<sup>5</sup> For the period between funding year 2004 through funding year 2011, however, schools and libraries were permitted to receive support for services using fiber but only if the fiber was lit. Schools and libraries were required to purchase a functioning service from either a telecommunications service provider or Internet access provider, which in turn was responsible for providing both the fiber and the equipment to light the fiber.<sup>6</sup> The *Third Report and Order* clarified 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.<sup>7</sup>

3. We determine that good cause exists to grant and remand these appeals. First, we find that Lower Merion properly converted its agreement for dark fiber with its service provider to an agreement for lit fiber through a minor contract modification and transfer of equipment, consistent with

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<sup>2</sup> See, e.g., *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) (*Third Report and Order*).

<sup>3</sup> Letter from Jim Marconi, The Independent School District of Boise City, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Sept. 7, 2005) (Boise ISD Request for Review).

<sup>4</sup> 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.” See Eligible Services List of the Schools and Libraries Support Mechanism (dated Oct. 18, 2002) at 33, [http://www.usac.org/res/documents/sl/pdf/ESL\\_archive/EligibleServicesList\\_101802.pdf](http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_101802.pdf) (last visited Oct. 20, 2011). The ESL for funding year 2004 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.” See Eligible Services List of the Schools and Libraries Support Mechanism (dated Oct. 10, 2003) at 30, [http://www.usac.org/res/documents/sl/pdf/ESL\\_archive/EligibleServicesList\\_101003.pdf](http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_101003.pdf) (last visited Oct. 20, 2011). See also *Third Report and Order*, 18 FCC Rcd at 26934, paras. 76-77.

<sup>5</sup> See *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18766-18773, paras. 9-19 (2010) (*Sixth Report and Order*).

<sup>6</sup> See *Third Report and Order*, 18 FCC Rcd at 26934, para. 76.

<sup>7</sup> See *Third Report and Order*, 18 FCC Rcd at 26934, para. 76, n.155. To the extent that a contract modification was necessary to achieve this transaction, such a contract modification was deemed a minor contract modification under section 54.500(g) of the Commission's rules if this 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. *Id.* For example, 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.*

the requirements of the *Third Report and Order*.<sup>8</sup> We direct USAC to accept Lower Merion's contract modification and reconsider Lower Merion's application for funding.<sup>9</sup>

4. Second, we find that Bethel and Tuslaw sought funding for lit fiber, not dark fiber, from their service providers.<sup>10</sup> In Bethel's appeal, it claims that it was not requesting dark fiber in its FCC Form 471, but was requesting a leased wide area network (WAN). Bethel supports this claim with documents demonstrating that its service provider in 2005 provided an internet connection to transport voice and data services using fiber. Bethel also attaches its service provider's invoice from October 2005, which describes the provided service as "WAN Transport – Monthly Lease."<sup>11</sup> USAC denied funding because Bethel mistakenly included outdated invoices for dark fiber in its application for funding year 2005, when its other documentation for funding year 2005 supports Bethel's claim that it sought funding for a leased WAN. We grant Bethel's appeal because the record reflects that Bethel inadvertently attached to its funding year 2005 E-rate application outdated invoices reflecting dark fiber services from 2004, which led to the funding denials for funding year 2005.<sup>12</sup> We also grant Tuslaw's appeal. Tuslaw claims that the use of the term "dark fiber" in its E-rate application was in error and that it received a lit fiber service for Internet access during the time period in question.<sup>13</sup> In support of this claim, it has submitted a copy of its contract with its service provider which states that Tuslaw's service provider is activating fiber at four of the Tuslaw School District school buildings.<sup>14</sup> Therefore, we remand the

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<sup>8</sup> *Id.* On appeal to USAC and the Commission, Lower Merion submitted documentation to show that it had converted its agreement with Sunesys prior to funding year 2004. Lower Merion Request for Review at 4; *see also* Letter from Christopher Stoffere, Lower Merion School District, to Schools and Libraries Division, Universal Service Administrative Company (filed June 15, 2005).

<sup>9</sup> We also grant a waiver to Lower Merion because it missed the deadline for filing its appeal with the Commission by three days. Section 54.720 of the Commission's rules provides parties with 60 days to appeal a decision by USAC to either USAC or the Commission. 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), *aff'd*, 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; *Network IP v. FCC*, 548 F.3d 116, 127-28 (D.C. Cir. 2008). *Accord*, *Network IP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008). We find that good cause exists to justify a waiver of the filing deadline in section 54.720 of the Commission's rules. 47 C.F.R. § 54.720.

<sup>10</sup> Although USAC denied Bethel's appeal for missing the deadline for appeals, Bethel claims in its appeal to the Commission, that despite multiple efforts, it did not obtain a copy of the Funding Commitment Decision Letter denying its request for funding until 4 months after it had been issued. Bethel Request for Review at 1. Therefore, as with Lower Merion, we find good cause to grant Bethel a waiver of the filing deadline in section 54.720 of the Commission's rules. *See supra* note 9.

<sup>11</sup> *See* Web Appeal from J.B. Fitzpatrick, Bethel School District, to Schools and Libraries Division, Universal Service Administrative Company (dated June 15, 2006) (Bethel SLD Appeal); *see also* Bethel Request for Review, Attachment.

<sup>12</sup> *See, e.g.*, Bethel School District Funding Year 2005, FCC Form 471, Attachment: YR8-B2.16a, FRN 1278066, Bethel School District Invoice Oct. 5, 2004 – Oct. 20, 2004.

<sup>13</sup> *See* Tuslaw Request for Review at 3-4.

<sup>14</sup> *See* Letter from Linda Schreckinger Sadler, Counsel for Tuslaw School District, to Cara Voth, Attorney Advisor, Federal Communications Commission, dated July 16, 2008.

underlying applications for these appeals to USAC to conduct additional review or process the applications in accordance with our findings within 90 calendar days from the release of this order.<sup>15</sup>

5. We deny Boise ISD's appeal because it does not dispute that it received dark fiber from its service provider for funding year 2004 when dark fiber was not an eligible service. Boise ISD states that it chose dark fiber because it was the most cost-effective solution offered by its service provider.<sup>16</sup> While this may have been the most cost-effective solution for Boise ISD, we are unable to grant this appeal to provide funding for an ineligible service just because it is cost-effective. Although we encourage applicants in the E-rate program to choose services and products that are cost-effective,<sup>17</sup> the service or product must be an eligible service or product in order to qualify for funding and in funding year 2004, dark fiber was not eligible for E-rate support.

6. 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, 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 Lower Merion School District, Bethel School District, and Tuslaw School District ARE GRANTED and their applications ARE REMANDED to USAC for further action consistent with this order no later than 90 calendar days from the release date of this order.

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, 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 the Independent School District of Boise City IS DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

Gina Spade  
Deputy Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau

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<sup>15</sup> To the extent these applicants' inclusion of dark fiber in their applications was an administrative error, we direct USAC to allow the school district to correct this error, consistent with the Commission's *Bishop Perry Order*. *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, *et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5319, paras. 8-9 (2006) (*Bishop Perry Order*).

<sup>16</sup> Boise ISD Request for Review at 2.

<sup>17</sup> Cost-effectiveness is built into the program rules concerning competitive bidding. When selecting a provider for services, schools and libraries are required to fully consider all bids submitted and must select the most *cost-effective* service offering. 47 C.F.R § 54.511(a). In this process, schools and libraries may consider relevant factors other than the pre-discount prices submitted by providers, but price "should be the primary factor considered." *Id.*