

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Petition for Waiver by
South Bay Union School District
Schools and Libraries Universal Service
Support Mechanism
CC Docket No. 02-6

ORDER

Adopted: April 27, 2012

Released: April 27, 2012

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

1. Consistent with precedent, we deny the petition for waiver filed by South Bay Union School District (South Bay). South Bay seeks a waiver of section 54.502 of the Commission's rules, to the extent the rule treats equipment for private branch exchanges (PBX) as "Priority Two" services under the schools and libraries universal service support mechanism (also known as the E-rate program). South Bay asks that the Commission treat such services as "Priority One" services for the remaining years of a multi-year service contract it had with its service provider. We deny South Bay's request for a waiver because South Bay failed to demonstrate the existence of special circumstances necessary to justify such a waiver.

2. Until 2003, USAC treated PBXs leases as part of end-to-end Internet service arrangements, and therefore as Priority One services. On December 1, 2003, USAC posted a correction

1 See Petition for Waiver by Sprint Corporation, CC Docket No. 02-6, Report and Order, 22 FCC Rcd 5353, 5355, para. 5 (Wireline Comp. Bur. 2007) (Sprint Waiver Order). See also Clark County School District, et al., Order, 24 FCC Rcd 12710, 12713 (Wireline Comp. Bur. 2009).

2 See South Bay Union School District Petition for Waiver, CC Docket No. 02-6 (filed Mar. 30, 2004) (Petition).

3 A PBX is a telephone switching system located at a business or organization's site. The PBX provides internal station-to-station dialing and access to the public switched network. See USAC Schools and Libraries Website, Eligible Services List of the Schools and Libraries Support Mechanism for funding Year 2005, http://www.universalservice.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx (last visited April 19, 2012).

4 Under the Commission's rules, first priority for E-rate funding is given to requests for telecommunications services and Internet access (Priority One services) before available remaining funds are allocated to requests for support for internal connections and basic maintenance of internal connections (Priority Two services). See 47 C.F.R. § 54.507(g).

5 Petition at 1. Section 54.502 of the Commission's rules states that supported telecommunications services provided by telecommunications carriers include all commercially available telecommunications services, in addition to all reasonably related charges, except charges for termination liability, penalty surcharges, and other charges not included in the cost of taking such services. 47 C.F.R. § 54.502.

6 Petition at 1.

on its website, stating that Priority One funding would not be available for use of PBXs “because they are utilized to route calls within the premises of a school or library.”⁷ In the *Schools and Libraries Third Report and Order*, the Commission affirmed USAC’s position.⁸ The Commission explained that “a PBX, like most on-premises equipment, is presumed to be Priority Two internal connections.”⁹ The Commission further opined that “it is unlikely that an applicant would be able to establish a rebuttal to the presumption [that the PBX should be treated as part of internal connections], because the PBX functions to transmit information from and between multiple locations within a local network. . . . [T]he PBX is necessary to maintain the internal communications network, but not its end-to-end access to telecommunications services.”¹⁰

3. In its petition, South Bay explains that in 2001 it entered into a seven year contract for end-to-end telecommunications service, including a PBX lease, with the expectation that PBX equipment would be eligible for funding.¹¹ South Bay asserts that the Commission’s decision to change the treatment of PBX leases has caused it considerable financial strain, that it is faced with the financial challenges of significant budget cuts and that, if it is forced to incur the full cost of its service contract, critical instructional needs will suffer reductions.¹²

4. We deny South Bay’s request for a waiver because South Bay failed to demonstrate the existence of special circumstances necessary to justify such a waiver.¹³ While applicants and service providers may enter into multi-year contracts,¹⁴ the E-rate program is funded on a year-to-year basis.¹⁵ A multi-year contract does not insulate applicants and service providers from changes in program rules, or, as in the specific case here, from changes in the eligibility category for certain services, and an applicant has no guarantee that a multi-year contract will continue to be funded for the duration of the contract.¹⁶

⁷ See SLD Website, December 2003 Announcements, <http://www.sl.universalservice.org/whatsnew/2003/122003.asp#120103a> (last visited April 24, 2012).

⁸ *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, 26931, para. 47 (2003) (*Schools and Libraries Third Report and Order*).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Petition at 1.

¹² *Id.*

¹³ The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3 (2011). The Commission may exercise its discretion to waive a rule 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, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

¹⁴ 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*).

¹⁵ See *Sprint Waiver Order*, 22 FCC Rcd 5353, 5355, para. 5.

¹⁶ *Id.*

Therefore, we find that PBX equipment obtained by South Bay should not be treated as Priority One services for the remainder of its contract term. We acknowledge that South Bay will be ineligible for funding of the equipment as Priority Two services for those funding years when South Bay's discount was lower than the threshold for funding Priority Two requests.¹⁷

5. 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 Petition for Waiver filed by South Bay Union School District on March 30, 2004 IS DENIED.

6. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 1.102 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Trent Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

¹⁷ In funding year 2006, for example, South Bay was eligible to receive a discount of 79 percent. However, in that funding year, only applicants eligible for higher discounts for Priority Two received funding due to the cap on E-rate commitments. See Schools and Libraries News brief (Jan. 19, 2007) <http://www.universalservice.org/sl/tools/news-briefs/preview.aspx?id=73> (last visited April 19, 2012 (announcing that there were insufficient funds for funding year 2005 to fund priority 2 services for applicants eligible for 80 percent or lower discounts)).