

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of a Decision of the
Universal Service Administrator by
Mercury Communications, Inc.
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-201728
CC Docket No. 02-6

ORDER

Adopted: June 21, 2013

Released: June 21, 2013

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

1. Consistent with precedent, we grant a request for review filed by Mercury Communications, Inc. (Mercury) of a decision issued by the Universal Service Administrative Company (USAC) seeking to recover funds disbursed to Bassick High School (Bassick) for services provided by Mercury under the E-rate program (more formally known as the schools and libraries universal service support program).

2. In funding year 2000, USAC issued a funding commitment decision letter (FCDL) to Bassick committing \$249,706.80 in E-rate support for internal connections equipment and services. Mercury subsequently invoiced USAC for the full committed amount for internal connections equipment and services it provided to Bassick pursuant to the FCDL. In December 2003, USAC conducted an audit of Bassick and determined that Mercury improperly invoiced USAC for certain internal connections equipment that was not installed, operational, or in use by Bassick. Specifically, USAC's audit report made three findings: (1) three 2-Port Fiber Uplink Modules were not installed or operational, but had been invoiced and were available for inspection; (2) two 12-Port 100 BaseFXs were not installed or

1 See Request for Review of a Decision of the Universal Service Administrator by Fort Worth Independent School District; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 27 FCC Rcd 14995, 14996-97, para. 4 (Wireline Comp. Bur. 2012).

2 See Request for Review filed by Mercury Communications, Inc. of a Decision of the Universal Service Administrator (filed Feb. 18, 2005) (regarding FCC Form 471 application number 201728) (Request for 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).

3 See Letter from USAC, Schools and Libraries Division, to Lou Engeldrum, Bassick High School (dated Apr. 21, 2000).

4 See FCC Form 474, Service Provider Invoice Form, OMB 3060-0806, Mercury Communications, Inc. (dated Dec. 1, 2000).

5 See Schools and Libraries Beneficiary Audit Report – Bassick High School, Audit No. SL2003BE107, Executive Summary (dated Dec. 10, 2003) (USAC Beneficiary Audit Report).

operational, but had been purchased and were available for inspection; and (3) 82 video cable drops were not operational.⁶ In light of these findings, USAC issued a commitment adjustment decision (COMAD) letter to Mercury seeking recovery in the amount of \$111,801.69, the discounted cost of the equipment that was not installed, operational, or in use.⁷

3. In September 2004, Mercury submitted an appeal to USAC of the COMAD letter, disputing the auditor's findings and arguing that Mercury was not informed of the audit or provided an opportunity to submit any documentation to refute the audit findings.⁸ As part of its appeal, Mercury also submitted information provided by Bassick showing that the equipment at issue was installed and was used by Bassick for approximately two years.⁹ Mercury also argued that pursuant to the *Schools and Libraries Fourth Report and Order*, which directed USAC to issue COMADs to the entity at fault for E-rate rule violations, USAC should have issued a revised decision holding Bassick, not Mercury, liable for the alleged violations.¹⁰ USAC denied Mercury's appeal, stating that it was unable to review, on appeal, any additional information provided by Mercury to refute USAC's audit findings.¹¹ USAC did not respond to Mercury's argument that Bassick, rather than Mercury, should have received the COMAD.¹² Mercury then filed the instant request for review with the Commission.¹³

4. Based upon our review of the record, we grant Mercury's request for review.¹⁴ In funding year 2000, the Commission's rules allowed E-rate applicants to upgrade their equipment on a

⁶ *Id.*

⁷ See Letter from USAC, Schools and Libraries Division, to Wayne Browning, Mercury Communications, Inc. (dated June 3, 2004). In 2001, in the *Commitment Adjustment Implementation Order*, the Commission established procedures to recover funds disbursed to parties that obtained the funds in violation of the Commission's E-rate program rules. See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, 15 FCC Rcd 22975, 22979, para. 11 (2001) (*Commitment Adjustment Implementation Order*). At that time, the Commission only authorized USAC to commence commitment adjustment recovery actions against the service provider. *Id.* Subsequently, in July 2004, the Commission issued the *Schools and Libraries Fourth Report and Order* that modified the rules governing COMAD recovery actions, to allow USAC to pursue recovery actions against the party responsible for the violation, such as the school, library, or service provider. See *Federal-State Joint Board on Universal Service; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.; Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 and 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15255-57, paras. 10-15 (2004) (*Schools and Libraries Fourth Report and Order*). The Commission stated that the modified rules should apply to COMAD recovery actions that were under appeal to USAC or the Commission. See *id.* at 15255, para. 10.

⁸ Letter from Paul Sobel, on behalf of Mercury Communications, Inc., to USAC, Schools and Libraries Division, at 2 (dated Sept. 2, 2004) (Appeal to USAC).

⁹ See *id.*; Request for Review at 3 n.8. During the audit, the equipment at issue was onsite and available for inspection. Request for Review at 3 n.8.

¹⁰ See Appeal to USAC at 1; *supra* n.7.

¹¹ See Letter from USAC, Schools and Libraries Division, to Lou Engeldrum, Bassick High School (dated Dec. 15, 2004).

¹² *Id.*

¹³ See Request for Review.

¹⁴ The Bureau must conduct a *de novo* review of requests for review of decisions issued by USAC. 47 C.F.R. § 54.723.

yearly basis.¹⁵ In this instance, with respect to the 2-Port Fiber Uplink Modules and the 12-Port 100 BaseFXs, the record shows that Mercury installed this equipment and Bassick used the internal connections equipment for educational purposes for approximately two years.¹⁶ However, prior to USAC's December 2003 audit, Bassick replaced these ports with upgraded equipment.¹⁷ With respect to the 82 video cable drops, Mercury provided an attestation from the principal stating that Bassick used television monitors on wheeled stands that it connected to the video cabling as needed, but were not connected to the video cabling at the time of USAC's audit.¹⁸ We thus find that the absence of television monitors connected to the video cabling during the auditor's visit is an insufficient basis for finding the video cable drops were not used for educational purposes for a reasonable period of time.¹⁹ We therefore find that Bassick's decision to upgrade the internal connections equipment was permissible under the Commission rules in effect at the time.²⁰ We further find that neither Mercury nor Bassick violated the existing E-rate program rules, and thus direct USAC to discontinue the recovery action against Mercury.²¹

5. 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

¹⁵ See *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, 26919, para. 17 (2003) (*Schools and Libraries Third Report and Order*) (stating that the rules, at that time, permitted applicants to upgrade their equipment on a yearly basis, even when existing equipment continued to have a useful life). Subsequently, in 2003, the Commission adopted rules to limit the ability of schools and libraries to engage in wasteful or fraudulent practices when obtaining internal connections. See *id.* (determining that recipients of support are expected to use all equipment purchased with universal service discounts at the particular location, for the specified purpose, for a reasonable period of time). Thus, in this instance, we apply the rules in effect prior to the *Schools and Libraries Third Report and Order*, because Bassick submitted its application to USAC prior to 2003.

¹⁶ See Request for Review at 2-3.

¹⁷ *Id.*; USAC Beneficiary Audit Report at 5.

¹⁸ Request for Review at 2. See Letter from Ronald Remy, Principal, Bassick High School (dated Sept. 9, 2004) (explaining the customary use of the video drops with mobile video monitors).

¹⁹ See *supra* n.14.

²⁰ See *supra* n.1.

²¹ Additionally, notwithstanding our decision above, we find that USAC should have complied with the Commission's direction in the *Schools and Libraries Fourth Report and Order* and issued a revised COMAD letter to Bassick, the party responsible for the alleged E-rate program violations detailed in USAC's audit report. See *supra* n.7

request for review filed by Mercury Communications, Inc., IS GRANTED to the extent indicated herein and REMANDED to USAC for further action consistent with the terms of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kimberly A. Scardino
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau