

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Request for Waiver by) File No. SLD- 181034007
Grand Canyon Unified School District) CC Docket No. 02-6
Schools and Libraries Universal Service Support)
Mechanism)

ORDER

Adopted: February 20, 2020

Released: February 20, 2020

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

I. INTRODUCTION

1. Grand Canyon Unified School District (Grand Canyon USD), located near the southern rim of the Grand Canyon in Arizona, consists of two schools that serve approximately 300 students. This remote location has made it difficult for the school district to receive adequate Internet connectivity in the past. In 2018, the Universal Service Administrative Company (USAC) approved Grand Canyon USD’s funding year 2018 funding request for special construction of a leased lit fiber network under the E-Rate program.1 Due to the unique topography of the build route and permitting obstacles associated with building through a National Park and National Forest, Grand Canyon USD and its service provider anticipated from the outset of the project that it would take no less than 24 months to complete construction and light the associated fiber. Because this was not an “unavoidable” delay as required under the Commission’s rules, USAC denied Grand Canyon USD’s request for a one-year extension of the funding year 2018 service implementation deadline of June 30, 2019.

2. In this Order, we grant a Request for Waiver filed by Grand Canyon USD seeking a waiver of the Commission’s rules governing the special construction service implementation deadline applicable to its funding year 2018 E-Rate funding request.2 We find that the unique circumstances in this matter warrant a waiver of the special construction service implementation deadline, and we remand Grand Canyon USD’s funding request to USAC with instructions to extend the deadline by which Grand

1 The E-Rate program is formally known as the Schools and Libraries universal service support mechanism.

2 See Request for Waiver by Grand Canyon Unified School District, CC Docket No. 02-6 (filed July 30, 2019) (Grand Canyon USD Request for Waiver). The Commission may waive any provision of its rules on its own motion and for good cause shown. See 47 CFR § 1.3. In general, the Commission may grant a waiver if: (1) special circumstances warrant a deviation from the general rule; and (2) such deviation would better serve the public interest than strict adherence to the general rule. See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular). In addition, when determining whether to grant a waiver, the Commission may take into consideration questions 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), aff’d, 459 F.2d 1203 (D.C. Cir. 1972) (WAIT Radio). The burden of proving that a waiver is appropriate in a particular case rests with the petitioner. See Tucson Radio Inc. v. FCC, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

Canyon USD must complete special construction and begin use of the leased lit fiber service to September 1, 2021.

II. BACKGROUND

3. Under the E-Rate program, eligible schools, libraries, and consortia (comprised of eligible schools and libraries) may request universal service discounts for eligible services, including connections necessary to support broadband connectivity to eligible schools and libraries.³ In 2010, the Commission expanded the broadband options available under the E-Rate program by allowing eligible schools and libraries to receive E-Rate support for leased dark fiber.⁴ In the *2014 Second E-Rate Order*, the Commission further expanded the high-speed broadband options available to applicants by equalizing the treatment of leased lit fiber and leased dark fiber, which included making special construction of leased dark fiber and self-provisioned networks eligible for support.⁵ The Commission also adopted several safeguards, including service implementation deadlines, to ensure that E-Rate support is not used to purchase unnecessary services.⁶ Specifically, applicants may only receive E-Rate discounts for special construction charges related to leased lit or dark fiber if the fiber is lit by the end of the funding year⁷ (i.e., June 30),⁸ and special construction charges related to a self-provisioned network are only eligible for E-Rate support if the facilities are constructed and used by the end of the funding year.⁹

4. Applicants may obtain a one-year extension of the June 30 deadline to complete special construction and light the fiber, or use a self-provisioned network, if they demonstrate that construction was “unavoidably delayed due to weather or other reasons.”¹⁰ An applicant seeking an extension on this basis must submit a request for an extension to USAC by the June 30 deadline.¹¹ If USAC concludes that a timely request for extension demonstrates that construction for the applicant’s special construction project was unavoidably delayed due to weather or other reasons, USAC will grant the request and extend the applicant’s deadline to complete special construction and light the fiber to June 30 of the following

³ See 47 CFR §§ 54.501-02.

⁴ 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, 18766-67, para. 9 (2010) (*Schools and Libraries Sixth Report and Order*).

⁵ See *Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15555, 15558, paras. 36, 43 (2014) (*2014 Second E-Rate Order*).

⁶ *Id.*

⁷ See 47 CFR § 54.507(b), (d)(1) (stating that a recurring service must be used within the funding year for which discounts are sought to be eligible for support); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16738, para. 129 (2012) (“In the E-Rate program, fiber must be lit within the funding year for non-recurring charges to be eligible.”); see also *2014 Second E-Rate Order*, 29 FCC Rcd at 15552, 15558, paras. 37, 49.

⁸ 47 CFR § 54.507(b) (establishing July 1 through June 30 as the funding year for the E-Rate program).

⁹ See *2014 Second E-Rate Order*, 29 FCC Rcd at 15558, para. 49.

¹⁰ See *id.* at 15555-56, 15560, paras. 38, 49.

¹¹ See USAC, Schools and Libraries News Brief, June 30 Deadline to Complete FY2018 Special Construction Required to Light or Use the Fiber (dated May 17, 2019), https://www.usac.org/wp-content/uploads/e-rate/documents/SL_News_Brief/5_17_2019-News-Brief-Schools-Libraries-USAC.pdf (*SLD May 2019 News Brief*) (“Applicants seeking support for special construction related to leased dark fiber and self-provisioned networks may request a one-year extension of the June 30 deadline by demonstrating that construction was unavoidably delayed

funding year.¹² The Wireline Competition Bureau (Bureau) has stated that applicants who know in advance that a special construction project will take longer than one funding year to complete should consider breaking the project down into stages, and seek funding for each stage in separate funding years.¹³

5. On March 22, 2018, Grand Canyon USD filed a funding year 2018 FCC Form 471 requesting E-Rate discounts for, among other services, special construction of a leased lit fiber network.¹⁴ The special construction service implementation deadline for funding year 2018 applications was June 30, 2019.¹⁵ Grand Canyon USD's selected service provider, Commnet AZ, LLC (Commnet), however, proposed a projected two-year timeline to complete the 67-mile-long fiber route connecting the school district's demarcation point with existing fiber in Williams, Arizona.¹⁶ This timeline included an estimated nine months to complete necessary permitting with multiple federal agencies and entities, including Grand Canyon National Park and Kaibab National Forest, and eleven months for make-ready construction. USAC issued Grand Canyon USD's funding commitment on January 3, 2019, fully funding its funding request.¹⁷

6. On February 19, 2019, Grand Canyon USD timely filed a request for a one-year extension of the June 30, 2019 special construction service implementation deadline for funding year 2018, until June 30, 2020.¹⁸ Grand Canyon USD explained that the service provider was unable to complete delivery and installation for reasons beyond its control, including, receiving its funding commitment much later than expected and the federal government shutdown from December 2018 to January 2019, which prevented the service provider from getting the necessary permits in order to begin construction.¹⁹ In response to questions from USAC, Grand Canyon USD stated that the 24-month projected timeline was necessitated by the length of the build, the remoteness of the area, and the multiple entities required to grant permits.²⁰ Grand Canyon USD also provided documentation showing that the planned build was so long and complex that, even without delays, it could not be completed by the June 30, 2019 special construction service implementation deadline.²¹

7. On March 20, 2019, USAC denied Grand Canyon USD's request for an extension of the special construction service implementation deadline.²² USAC found that although applicants can receive a one-year extension to complete special construction for unavoidable delays, Grand Canyon USD

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due to weather or other reasons or the late issuance of [a funding commitment] (or nonissuance of [a funding commitment]).”).

¹² *Id.*; see also *2014 Second E-Rate Order*, 29 FCC Rcd at 15553, 15558, paras. 38, 49.

¹³ See *Request for Waiver by Utah Education and Telehealth Network*, CC Docket No. 02-6, Order, 33 FCC Rcd 4607, 4612, para. 13 n.46 (WCB 2018) (*UETN Order*).

¹⁴ FCC Form 471 Application No. 181034007.

¹⁵ See 47 CFR § 54.507(b); *SLD May 2019 News Brief* (“To be eligible for E-rate program discounts for special construction charges . . . special construction must be completed in time for the fiber to be lit . . . by the end of the relevant funding year (i.e., June 30, 2019 for FY2018”).

¹⁶ *Grand Canyon USD Request for Waiver* at Exhibit 6; FCC Form 471 Application No. 181034007, Exhibit 6.

¹⁷ Letter from USAC, Schools and Libraries Division, to Stephanie Nicely, E-Rate Coordinator, Grand Canyon Unified School District (dated Jan. 3, 2019) (Grand Canyon USD Funding Commitment Decision Letter).

¹⁸ *Grand Canyon USD Request for Waiver* at 4.

¹⁹ *Id.* at Exhibit 8.

²⁰ *Id.* at Exhibit 9.

²¹ See *id.* at Exhibit 8.

²² See *id.* at Exhibit 10.

expected a build rate of 24 months when it started the project, and therefore the delay did not warrant an extension of the special construction service implementation deadline under the Commission's rules.²³ On appeal to USAC, Grand Canyon USD reiterated that the project satisfied the standard for an extension of the special construction service implementation deadline because the project was unavoidably delayed by the federal government shutdown, extreme weather conditions, and the issuance of a late funding commitment from USAC.²⁴ USAC issued a revised funding commitment decision letter denying Grand Canyon's appeal on July 24, 2019 based on similar grounds.²⁵

8. On July 30, 2019, Grand Canyon USD filed the instant Request for Waiver with the Commission.²⁶ In its request, Grand Canyon USD seeks an extension of the deadline to complete special construction and light the associated fiber.²⁷ Grand Canyon USD argues that USAC incorrectly interpreted the standard for granting a one-year extension of the special construction service implementation deadline.²⁸

9. Alternatively, Grand Canyon USD asserts that a waiver of the special construction service implementation deadline is necessary because the project could not have been completed in one year due to its length and complexity.²⁹ According to Grand Canyon USD, it would have taken at least nine months to obtain permits and right-of-way access from no less than eight entities (including CenturyLink; the City of Williams, Arizona; the Town of Tusayan, Arizona; the Grand Canyon Railway; the National Forest Service; the National Park Service and Grand Canyon National Park; and the Arizona Public Service) before construction could begin.³⁰ Moreover, the National Park Service and the National Forest Service both stipulated that negotiations to obtain the permits necessary to start construction could not begin until funding was approved.³¹ Beyond permitting, Commnet projected eleven months for actual construction of the nearly 67-mile fiber route from the school district's demarcation point to Williams, Arizona, which was likely to be affected by the unique location of the build and limited construction season.³² Grand Canyon USD notes that there was no option to complete the build in stages over multiple funding years because it consists of a single location, and the entire 67-mile long fiber route must be constructed before the school district is able to receive services.³³ In addition, Grand Canyon USD states that deploying fiber is the only way for the school district to receive high speed broadband given that the

²³ *See id.*

²⁴ *See id.* at Exhibits 11-12.

²⁵ *See id.* at Exhibit 13.

²⁶ *See id.* at 1.

²⁷ *See id.*

²⁸ *See id.* at 10; Letter from Michael H. Pryor, Counsel for Grand Canyon USD, Brownstein, Hyatt, Farber, Schreck, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-6, at 1-2 (filed Nov. 25, 2019) (Grand Canyon USD *Ex Parte*). Grand Canyon USD argues that USAC improperly interpreted the "unavoidably delayed" standard to mean that the delay was unforeseeable. *Id.* It asserts that although the delays in the project were foreseeable and incorporated in the construction timeline by the service provider, they were not unavoidable, and therefore USAC should have granted the one-year extension. *Id.*

²⁹ *See Grand Canyon USD Request for Waiver* at 6-7.

³⁰ *See id.* at 7.

³¹ *See id.*

³² *See id.* at 7-8.

³³ *See id.* at 11.

“National Park Service has prohibited the construction of any structures to support microwave broadband service.”³⁴

III. DISCUSSION

10. Based on our review of the facts and circumstances of this request, we find good cause to justify a waiver of the deadline to complete special construction, and any USAC procedural deadlines, such as the invoicing deadline, that might be necessary to effectuate our ruling.³⁵ The Commission may waive any provision of its rules on its own motion and for good cause shown.³⁶ A rule may be waived where particular facts make strict compliance inconsistent with the public interest.³⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³⁸ In sum, a 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.³⁹

11. A waiver of the service implementation deadline for other non-recurring services is appropriate when (1) the applicant was unable to complete implementation for reasons beyond the service provider’s control, and (2) the petitioner made good faith efforts to comply with Commission rules and procedures.⁴⁰ In considering requests for waiver of the special construction service implementation deadline, the Bureau has applied this same criteria to determine whether there are special circumstances that warrant a waiver of the deadline.⁴¹

12. We find good cause to waive the special construction service implementation deadline and give a further extension of time under the circumstances presented. The record shows that missing the deadline was beyond the service provider’s control because the permitting required to build through a National Forest and National Park, combined with the remote location of the nearly 67-mile build and inability to segment the build made it impossible for the project to be completed within a single funding year. Further, the record shows that the petitioner made a good faith effort to comply with program rules by requesting an extension of the service implementation deadline from USAC.

13. Against this backdrop, we conclude that special circumstances justify a waiver of the

³⁴ See *id.* at 10 n.28.

³⁵ 47 CFR § 54.507(d)(1) (requiring schools, libraries, and consortia to use recurring services within the funding year for which E-Rate funds were sought); see also *Request for Waiver by Jemez Pueblo Tribal Consortium; Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 32 FCC Rcd 10238, 10238-39, para. 2, n.11 (WCB 2017) (*Jemez Pueblo Order*) (applicants must complete special construction in time to commence a leased fiber service by June 30 of the applicable funding year, or the charges will be ineligible for E-Rate support).

³⁶ 47 CFR § 1.3.

³⁷ See *Northeast Cellular*, 879 F.2d at 1166.

³⁸ *WAIT Radio*, 418 F.2d at 1159.

³⁹ *Northeast Cellular*, 879 F.2d at 1166.

⁴⁰ See *Requests for Review/Waiver of the Decision of the Universal Service Administrator by Accelerated Charter*, CC Docket No. 02-6, Order, 29 FCC Rcd 13652, 13652-53, para. 2 (WCB 2014) (granting a waiver of the service delivery deadline for non-recurring services when petitioners were unable to complete implementation on time for reasons beyond the service providers’ control).

⁴¹ See, e.g., *Requests for Waiver by Grants/Cibola County School District and Jemez Pueblo Tribal Consortium*, CC Docket No. 02-6, Order, 33 FCC Rcd 10048, 10051, para. 8 (WCB 2018) (granting waivers of the special construction implementation deadline where construction was halted by the state’s transportation office in order to conduct an unforeseen archeological survey and where the service provider was unwilling to continue work on the project given the uncertainty around the project’s funding while USAC completed program compliance review).

special construction service implementation deadline. Strict adherence to the Commission's rules would leave Grand Canyon USD with inadequate time to complete construction of its planned network and would not be in the public interest because it would leave the school district, which is in an extremely remote location, unable to use E-Rate funding to upgrade their broadband infrastructure. We, therefore, direct USAC to set a new deadline of September 1, 2021,⁴² by which time Grand Canyon USD is required to complete special construction and begin using the leased lit fiber service associated with its funding year 2018 funding request.

14. We emphasize the limited nature of this decision. We grant this waiver because the applicant and service provider have furnished compelling evidence of the complexity of the build, unforgiving topography of the build route, and difficult permitting issues. We also emphasize that this Order does not alter the obligation of participants in the E-Rate program to comply with the Commission's rules.⁴³ Applicants continue to be responsible for preemptively planning special construction projects so that they can be completed by June 30 of the relevant funding year.⁴⁴ In most cases, applicants who know in advance that a special construction project will take longer than one funding year to complete can break the project down into stages, and seek funding for each stage in separate funding years so that they can meet the service implementation deadline for each stage. In this case, it was impossible for Grand Canyon USD to break the build into stages because the build was to only one location.

15. Finally, we find no evidence of waste, fraud, or abuse presented by Grand Canyon USD's request for waiver of the June 30, 2019 special construction service implementation deadline. We emphasize that the Commission is committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-Rate program are used for appropriate purposes. Although we grant this Request for Waiver, this action does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with E-Rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or the Commission's rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent that the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. The Commission retains the discretion to evaluate the use of monies disbursed through the E-Rate program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred or recovery is warranted. The Commission will continue to aggressively pursue instances of waste, fraud, or abuse

⁴² Grand Canyon USD requested an 18-month extension to complete the build.

⁴³ 47 CFR §§ 54.501-503.

⁴⁴ We remind applicants of the options available to them to ensure that they complete their special construction projects within the service implementation deadline. If applicants believe that the scope of the project might prevent them from completing construction and lighting the fiber by June 30, they should call USAC's Client Service Bureau to review their special construction plan. USAC, FAQs, Eligible Fiber Services, Question 6 (last visited Feb. 20, 2020), <https://www.usac.org/e-rate/learn/faqs/eligible-fiber-services/> ("Applicants can call the Client Service Bureau at (888) 203-8100 to review their special construction plan. It may be possible to break up the special construction project into stages that will allow applicants to complete special construction and light the fiber for some of their eligible school and/or library locations in one year, and complete additional connections to other eligible school and/or library locations in a subsequent funding year."). Additionally, to provide sufficient time to complete builds, the Commission permits applicants to begin construction of category one non-recurring services up to six months before the July 1 start of the funding year. 47 CFR § 54.507(d); *see also 2014 Second E-Rate Order*, 29 FCC Rcd at 15552-53, 15558, paras. 38, 49 ("[W]e allow category one infrastructure costs incurred six months prior to that funding year, provided the following conditions are met: (1) the construction takes place only after selection of the service provider pursuant to a posted FCC Form 470 (or any successor form); (2) a category one recurring service must depend on the installation of the infrastructure; and (3) the actual service start date of that recurring service is on or after the start of the funding year (July 1) . . .").

under the Commission's procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, the requirement to use a recurring service within the applicable funding year, as set forth in section 54.507(d)(1) of the Commission's rules, 47 CFR § 54.507(d)(1), IS WAIVED to the extent described above and Grand Canyon Unified School District's new deadline to complete special construction and begin using a leased lit fiber service is September 1, 2021.

17. IT IS FURTHER ORDERED that, pursuant to Section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau