

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

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

**ORDER**

**Adopted:** March 23, 2000

**Released:** March 27, 2000

By the Commission:

**I. INTRODUCTION**

1. The Commission has under consideration a petition for reconsideration filed by the State of Washington Department of Information Services (Washington DIS), seeking to amend certain rules adopted by the Commission in the *Universal Service Order*.<sup>1</sup> Specifically, Washington DIS seeks to amend the Commission's consortia rules which provide that, to the extent consortia that apply for support under the schools and libraries universal service support mechanism include private sector entities, such consortia may not receive interstate services provided by incumbent local exchange carriers (ILECs) at below tariffed rates.<sup>2</sup> Washington DIS's proposed amendment of these rules would allow private colleges and universities to join consortia receiving other than tariffed rates.<sup>3</sup> In the alternative, Washington DIS seeks a waiver of the Commission's rules to allow 15 private, non-profit baccalaureate institutions to join its state educational network consortium.<sup>4</sup> Based on the record before us, we deny Washington DIS's petition for reconsideration. We find, however, that Washington DIS has demonstrated good cause to waive the Commission's consortia rules in this limited circumstance.

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<sup>1</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029-9031, paras. 475-483 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part and remanded in part, Texas Office of Public Utility Council v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999) (*affirming Universal Service Order in part and reversing and remanding on unrelated grounds*), petitions for cert. pending.

<sup>2</sup> See Letter and Petition for Reconsideration from David W. Danner, State of Washington Department of Information Services, to Secretary, FCC (filed July 16, 1997) (DIS Petition) at 1. See also 47 C.F.R §54.501(d).

<sup>3</sup> See Letter and Request for Waiver from James P. Schultz, Counsel for State of Washington Department of Information Services, to Irene Flannery and Praveen Goyal, FCC (filed December 13, 1999) (DIS Waiver) at Exhibit A.

<sup>4</sup> See DIS Waiver at 16.

## II. BACKGROUND

2. Section 54.501(d) of the Commission's rules provides that schools and libraries applying for support under the schools and libraries universal service support mechanism may form consortia, such as the one at issue here, for the purpose of soliciting competitive bids for telecommunications and other services.<sup>5</sup> Such consortia may include eligible schools and libraries and other public sector entities.<sup>6</sup> A consortium also may include private sector entities, but only if the prices that the consortium receives for interstate services provided by an ILEC are at generally tariffed rates.<sup>7</sup> If a consortium receiving below tariffed rates permits a private sector entity to join, the school and library members of the consortium will be rendered ineligible for discounts on any interstate services provided by ILECs under the schools and libraries support mechanism.<sup>8</sup>

3. In adopting the consortia rules, the Commission recognized that, by aggregating their demand, schools and libraries participating in consortia arrangements would be better able to attract competitive bids and thereby negotiate lower rates.<sup>9</sup> To further enhance the competitive bidding process, the Commission found that, notwithstanding the non-discriminatory pricing provisions in section 202(a) of the Act, ILECs could offer interstate services at below tariffed rates to consortia that include eligible schools and libraries.<sup>10</sup> The Commission reasoned that, in enacting section 254, which established the schools and libraries program, Congress expressed its intention that schools and libraries receive preferential rates, and that Congress had "expressly granted [these entities] an exemption to section 202(a)'s prohibition against discrimination."<sup>11</sup> Pursuant to its authority under section 201(b), therefore, the Commission designated schools and libraries as a class eligible for different rates, thereby permitting them to receive below tariffed

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<sup>5</sup> 47 C.F.R. §54.501(d).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *Universal Service Order*, 12 FCC Rcd at 9027-28, paras. 476-479.

<sup>10</sup> See also *Universal Service Order*, 12 FCC Rcd at 9031, para. 483. Section 202(a) of the Communications Act, as amended, prohibits common carriers from "unjust or unreasonable discrimination" in providing communications service and "undue or unreasonable preference or advantage" to particular classes of people. 47 U.S.C. § 202(a).

<sup>11</sup> See *Universal Service Order*, 12 FCC Rcd at 9031, para. 483.

services.<sup>12</sup> The Commission, however, found no basis for extending the section 202(b) exception to enable private sector entities to secure below tariffed rates, and declined to do so.<sup>13</sup>

### III. WASHINGTON DIS PETITION FOR RECONSIDERATION AND REQUEST FOR WAIVER

4. On July 16, 1997, Washington DIS filed a petition seeking reconsideration of the Commission's rules under the schools and libraries universal service support mechanism that bar the participation of private sector entities in consortia receiving interstate services provided by ILECs at below tariffed rates.<sup>14</sup> Specifically, Washington DIS requests that the Commission clarify that schools and libraries may participate in a consortium that includes private, non-profit baccalaureate institutions without the consortium losing its eligibility for discounts under the schools and libraries support mechanism for interstate services provided by an ILEC, when the consortium is taking such services at rates other than generally tariffed rates.<sup>15</sup> In the alternative, Washington DIS seeks a limited waiver of the Commission's rules based on the unique circumstances presented by its statewide educational network consortium.<sup>16</sup>

5. The Washington DIS statewide educational network, known as the "K-20 Network," was established by the Washington State legislature in 1996.<sup>17</sup> It was planned as a statewide, high-bandwidth, backbone network that would provide telecommunications services to each of the state's 298 public K-12 school districts, 127 public higher education institutions, and 15 private non-profit baccalaureate institutions.<sup>18</sup> The network is intended to provide the state's schools and libraries with distance learning opportunities, administration, and resource sharing through data transport, Internet, and intranet services, videoconferencing, and satellite-delivered full-motion video.<sup>19</sup> Washington DIS states that it formed a consortium believing that aggregation would increase purchasing power.<sup>20</sup> Washington DIS states that, prior to the

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<sup>12</sup> See also *Universal Service Order*, 12 FCC Rcd at 9031, para. 483. Section 201(b) permits the Commission to classify particular types of communications as eligible for preferential rates notwithstanding section 202(a)'s non-discrimination prohibitions. 47 U.S.C. § 201(b). Government entities, including state higher education institutions, are a class eligible for preferential rates under Section 201(b).

<sup>13</sup> *Id.* at 9028, para. 477.

<sup>14</sup> See DIS Petition at 1.

<sup>15</sup> See *id.*

<sup>16</sup> See DIS Waiver at 16-17.

<sup>17</sup> See Letter from James P. Schultz, Counsel for State of Washington Department of Information Services, to Praveen Goyal, FCC (filed February 17, 2000) (February Letter) at 2-3.

<sup>18</sup> See Letter from James P. Schultz, Counsel for State of Washington Department of Information Services, to Praveen Goyal, FCC (filed January 27, 2000) (January Letter) at 7.

<sup>19</sup> See DIS Waiver at 11-12.

<sup>20</sup> See January Letter at 6.

Commission's adoption of the *Universal Service Order* on May 8, 1997, Washington DIS conducted a competitive bidding process for services to the network and, between December 1996 and February 1997, entered into numerous contracts, including a contract with an ILEC for the provision of interstate telecommunications services at below tariffed rates.<sup>21</sup> Washington DIS completed construction on portions of the network prior to May 7, 1997.<sup>22</sup>

6. Washington DIS seeks to add 15 private, non-profit colleges and universities to the K-20 Network, but recognizes that inclusion of such entities would render the consortium's school and library members ineligible for discounts on interstate services provided by an ILEC at below tariffed rates.<sup>23</sup> Washington DIS wishes to allow the 15 private institutions to join the K-20 Network consortium because they can supply the network with unique on-line content, and they produce approximately 25 percent of the state's public K-12 teachers.<sup>24</sup> Washington DIS also notes that, absent the 15 private institutions' participation in the K-20 Network consortium, the private institutions would face significant financial difficulties in securing access to their own on-line resources.<sup>25</sup> Washington DIS, however, does not want to render school and library network participants ineligible for discounts on interstate services provided by an ILEC by allowing these 15 private institutions to join the consortium.<sup>26</sup> Washington DIS contends that the Commission's rules require it to make a difficult "Hobson's choice:" include the 15 private institutions and lose discounts for its K-12 members on the interstate services provided by an ILEC, or exclude the 15 private institutions, which would diminish the overall educational value of the network and would force the 15 private institutions to obtain their own on-line access at considerable expense.

7. According to Washington DIS, no reasonable technological solution exists whereby the 15 private institutions could join the network and receive tariffed services while the other network participants receive below tariffed services.<sup>27</sup> Washington DIS represents that its network was designed to provide services to members of the consortium over a single backbone. Washington DIS claims that to integrate the 15 private schools into the network while somehow separating the services they receive from the bulk purchases of services available to all other network participants could only be achieved by establishing a separate parallel network backbone

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<sup>21</sup> See February Letter at 2.

<sup>22</sup> See *id.* at 2-3.

<sup>23</sup> See DIS Waiver. These schools are: Antioch University, Bastyr College, City University, Cornish College of the Arts, Gonzaga University, Heritage College, Northwest College, Pacific Lutheran University, St. Martin's College, Seattle University, Seattle Pacific University, University of Puget Sound, Walla Walla College, Whitman College, and Whitworth College.

<sup>24</sup> See January Letter at 9.

<sup>25</sup> See *id.* at 7.

<sup>26</sup> See *id.*

<sup>27</sup> See February Letter at 1-2.

for the 15 private schools.<sup>28</sup> The 15 private institutions could utilize the secondary backbone and receive services at generally tariffed rates.<sup>29</sup> Washington DIS states that such a solution, however, would result in increased costs to the network, increased technological and operational complexity, and unnecessary network redundancies.<sup>30</sup>

#### IV. DISCUSSION

8. The Commission's rules may be waived for good cause shown.<sup>31</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."<sup>32</sup> A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.<sup>33</sup> In addition, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>34</sup> Waiver is, therefore, 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.<sup>35</sup> For the reasons set forth below, we find that the circumstances before us meet this waiver standard.

9. First, we concur with Washington DIS that a waiver of section 54.501(d) of the Commission's rules is warranted in this instance because strict application of the Commission's rules does not serve the public interest under these specific circumstances. We note as an initial matter that a substantial portion of the network had been designed, commissioned, and begun by the time the Commission released its May 8, 1997 First Report and Order.<sup>36</sup> In creating the K-20

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<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> 47 C.F.R. §1.3

<sup>32</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

<sup>33</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*)

<sup>34</sup> *WAIT Radio*, 897 F.2d at 1157.

<sup>35</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>36</sup> According to Washington DIS, "The network design for Phase I was approved on May 29, 1996. At the same time, the board approved the project's technical goals, objectives, standards and services, as well as the Phase I timeline. Procurement was conducted during the fall of 1996; resulting contracts were signed between December 1996 and February 1997. Phase I included the higher education institutions and the Educational Service Districts (School Districts), which are part of the K-12 sector. Therefore, a substantial portion of the project's first phase had been completed by the time the Commission released its May 8, 1997 First Report and Order. To date, Phases I and II have been completed with the exception of the connection to the network of the 15 private colleges in question. Phase III will connect public libraries." See February Letter at 2-3.

Network, Washington State's legislature aimed to link together all state education and library facilities for the benefit of parents, students, educators, librarians, and library patrons. Such a goal is consistent with the Congressional purpose for including schools and libraries among the explicit beneficiaries of universal service support: to ensure that schools and libraries have affordable access to modern telecommunications and information services that will enable them to provide educational services to all parts of the nation.<sup>37</sup> Indeed, Washington DIS has demonstrated that the state's educational goals are ill-served if these 15 private institutions are left off the network, and neither they nor the network members gain access to each others' content.<sup>38</sup> In light of the educational value that these 15 private institutions can bring to the K-20 Network, we believe that it is in the public interest to permit these schools to join the K-20 Network. To require DIS to forego receipt of interstate services from an ILEC at below tariffed rates, so that the consortium can include the 15 private institutions, who bring such a benefit to the network, would be inconsistent with the goal of ensuring that schools and libraries are able to secure the lowest possible pre-discount prices for eligible services.<sup>39</sup> Moreover, we find it significant that these private institutions are non-profit, which lessens our concern about allowing them to derive the benefits of below tariffed rates by participation in this consortium. We conclude, therefore, that a waiver of the Commission's rules here will further Washington DIS's goals for its statewide educational network and the Commission's goal to facilitate the ability of schools and libraries to negotiate lower rates, thereby benefiting the public.<sup>40</sup>

10. Second, Washington DIS would suffer extreme hardship if it had to integrate the 15 private institutions into the K-20 Network through a second backbone network. We are convinced by Washington DIS that establishing a second backbone network just for these 15 institutions, and then connecting it to the K-20 Network, would be prohibitively expensive and an inefficient way to assure that the 15 private institutions do not receive interstate services from an ILEC at below tariffed rates. We conclude that waiving the Commission's rules in this limited circumstance to allow the 15 private institutions direct access to the K-20 Network and permitting them to receive below tariffed rates would alleviate the financial and technological hardships that would be engendered by strict application of section 54.501(d) of the Commission's rules.

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<sup>37</sup> See *Universal Service Order*, 12 FCC Rcd at 9002, para. 424.

<sup>38</sup> We note that 25% of the state's future public teaching workforce attend these 15 institutions. Absent a waiver of this rule, these future public educators will lose the unique benefit from these institutions' participation in the K-20 Network.

<sup>39</sup> See *Universal Service Order*, 12 FCC Rcd at 9028, paras. 475-477.

<sup>40</sup> We note that Washington DIS states that it planned to include the 15 private, non-profit institutions in its consortium and had completed a portion of the K-20 network well before the *Universal Service Order* imposed conditions on consortia membership. In this regard, Washington DIS claims that prohibiting these 15 private institutions from joining the consortium would seem unfair not only to those institutions, who had expected to receive on-line services through participation in the consortia, but also to the network's members, who expected to obtain content available only from these 15 private institutions.

11. In sum, we are persuaded by Washington DIS that a waiver of section 54.501(d) of the Commission's rules is warranted on grounds of hardship, public policy and equity. Based on the unique circumstances presented, we believe that a limited waiver of the Commission's rules here will further Congress's goal to provide preferential rates to eligible schools and libraries.

12. Based on the record before us, however, we decline to modify the Commission's consortia rules as Washington DIS requests in its petition for reconsideration. In crafting its consortia rules, the Commission struck a balance between not compromising non-discriminatory pricing policies and allowing schools and libraries the freedom to aggregate with private sector entities to secure competitive service rates.<sup>41</sup> Through these consortia rules, the Commission sought to avoid situations where private sector entities – especially large private sector firms – joined consortia for the sole reason of receiving below tariffed rates.<sup>42</sup> Washington DIS's petition involves only 15 private institutions and does not implicate the private sector entities with which the Commission was most concerned in establishing its consortia rules. There is no evidence in this case that the 15 private institutions, all of whom will contribute and receive content from the network, will join Washington DIS's consortium merely to receive below tariffed rates. Thus, if we were to grant a rule change here, we would do so without fully evaluating its effects on the very private sector entities with which we were concerned, as evidenced by our rules. Accordingly, we conclude that based on the record before us, a modification of our rules is not warranted here and we deny Washington DIS's petition for reconsideration.

## V. ORDERING CLAUSES

13. It is THEREFORE ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the State of Washington Department of Information Services request for waiver IS GRANTED and the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>41</sup> See *Universal Service Order*, 12 FCC Rcd at 9027-9028, paras.477-478.

<sup>42</sup> See *id.*