

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

In the Matter of
Federal-State Joint Board on
Universal Service
Petition of the State of Alaska for Waiver for
the Utilization of Schools and Libraries
Internet Point-of-Presence in Rural Remote
Alaska Villages Where No Local Access
Exists and Request for Declaratory Ruling
CC Docket No. 96-45

ORDER

Adopted: November 29, 2001

Released: December 3, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we grant the State of Alaska (Alaska) a limited waiver of section 54.504(b)(2)(ii) of the Commission's rules, which requires applicants to certify that the services requested will be used solely for educational purposes, subject to the conditions discussed below. We find that good cause exists to allow members of rural remote communities in Alaska, where there is no local or toll-free dial-up Internet access, to use excess service obtained through the universal service mechanism for schools and libraries when not in use by the schools and libraries for educational purposes.

II. BACKGROUND

2. In section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act), Congress instructed the Commission to establish a universal service support mechanism for eligible schools and libraries. The Act provided that

1 Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling, CC Docket No. 96-45, Request for Waiver and Declaratory Ruling, filed January 29, 2001 (Alaska Petition). See also State of Alaska Seeks a Declaratory Ruling and Waiver of Section 54.504(b)(2)(ii) of the Commission's Rules Pleading Cycle Established, CC Docket No. 96-45, Public Notice, DA 01-584 (rel. Mar. 7, 2001) (Alaska Public Notice).

2 47 U.S.C. § 254. See also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

discounts should be given to eligible schools and libraries for educational purposes.³ In the *Universal Service Order*, the Commission implemented this provision by requiring schools and libraries to certify that the services obtained through discounts from the schools and libraries mechanism would be used solely for educational purposes.⁴ This requirement was codified in section 54.504(b)(2)(ii) of the Commission's rules.⁵

3. The educational purposes certification rule is one of several certifications that schools and libraries are required to make under oath, in order to be eligible for discounts pursuant to the schools and libraries universal service mechanism.⁶ In the *Universal Service Order*, the Commission noted that all of the certification requirements were intended to encourage accountability on the part of schools and libraries.⁷ By adopting the certification requirements, the Commission aimed to reduce the likelihood of fraud, waste, and abuse, while correspondingly ensuring that schools and libraries complied with the parameters of the Act. The Commission also concluded in the *Universal Service Order* that the certification requirements were reasonable and not unnecessarily burdensome.⁸

4. On January 29, 2001, Alaska filed a petition with the Commission seeking a waiver of section 54.504(b)(2)(ii) of the Commission's rules.⁹ Alaska states that in remote communities

³ 47 U.S.C. § 254 (h)(1)(B).

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9079, para. 577 (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*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service Order* in part and reversing and remanding on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S.Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S.Ct. 2237 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S.Ct. 423 (November 2, 2000); See also 47 C.F.R. § 54.504 (b)(2)(ii).

⁵ See 47 C.F.R. § 54.504(b)(2)(ii).

⁶ See 47 C.F.R. § 54.504(b)(2). In conjunction with filing a FCC Form 470, a person authorized to order telecommunications and other supported services must certify under oath that: "(i) The school or library is an eligible entity under §§ 254(h)(4) and 254(h)(5) of the Act and the rules adopted under this subpart; (ii) the services requested will be used solely for educational purposes; (iii) The service will not be sold, resold, or transferred in consideration for money or any other thing of value; (iv) If the services are being purchased as part of an aggregated purchase with other entities, the request identifies all co-purchasers and the services or portion of the services being purchased by the school or library; (v) All of the necessary funding in the current funding year has been budgeted...; (vi) The school, library, or consortium including those entities has complied with all applicable state and local procurement processes; and (vii) The school, library, or consortium including those entities has a technology plan that has been certified..." See also *Schools and Libraries Universal Service, Description of Services Requested and Certification Form*, OMB 3060-0806 (September 1999) (FCC Form 470). The FCC Form 470 outlines the applicant's requested services in order to solicit competitive bids.

⁷ *Universal Service Order*, 12 FCC Rcd at 9076, para. 570.

⁸ *Universal Service Order*, 12 FCC Rcd at 9079-9080, para. 578.

⁹ See Alaska Petition; Alaska Public Notice.

in rural Alaska, numerous schools and libraries have obtained dedicated Internet access through discounts from the schools and libraries universal service mechanism.¹⁰ Many of these schools and libraries rely on satellite telecommunications services for their Internet connections, and the satellite services are most often provided on a non-usage sensitive basis. Due to the remote nature of schools and libraries in Alaska, there is usually only one provider of this satellite down link service, and that provider typically only provides this service on a 24 hour, 7 days a week basis.¹¹

Schools and libraries occupy the satellite connections for educational purposes when they are open, but during times when the schools and libraries are closed, the available connections remain unused.¹² As a result, due to the non-usage sensitive nature of the services, services that could be used after the operating hours of schools and libraries presently go unused.

5. Our current rules prohibit such unused services from being used for anything but educational purposes.¹³ Alaska has requested that the Commission waive the requirement that schools and libraries must certify that services would be used for solely educational purposes.¹⁴ Specifically, Alaska requested the Commission to waive section 54.504(b)(2)(ii) to permit the use of excess telecommunications services received by rural remote schools and libraries in Alaska if: 1) the services are sold by the service provider on the basis of a price that is not usage sensitive; 2) the use by others in those communities is limited to hours in which the school or library through which the Internet would be accessed is closed; and 3) no toll-free or local dial-up Internet access is otherwise available in the community.¹⁵ If granted a waiver of the Commission's rules, Alaska wishes to use the telecommunications and Internet access services as an Internet "point of presence" in rural remote communities.¹⁶ Alaska further explains its proposal in an *ex parte* filed with the Commission on October 9, 2001.¹⁷

III. DISCUSSION

6. For the reasons discussed below, we grant Alaska a limited waiver of section

¹⁰ See Alaska Petition at 11.

¹¹ See State of Alaska Reply Comments at note 42.

¹² See Alaska Petition at 14.

¹³ See 47 C.F.R. § 54.504(b)(2)(ii).

¹⁴ See Alaska Petition.

¹⁵ See Alaska Petition at 2-3.

¹⁶ See Alaska Petition at 2. A "point of presence" is generally considered to be the point of interconnection between an interexchange carrier's network and a local exchange carrier's network. See 47 C.F.R. § 69.703(c).

¹⁷ In a letter to the Commission, Alaska describes safeguards that it will use to ensure that any use of excess services will comply with the Commission's rules and will reduce the likelihood of fraud, waste, and abuse. See Letter from Robert Halperin, State of Alaska, to Ellen Blackler, Mark Seifert, and Katherine Tofigh, Common Carrier Bureau, Federal Communications Commission, dated October 9, 2001 (Alaska *ex parte*).

54.504(b)(2)(ii), to permit members of rural remote communities in Alaska, where there is no local or toll-free dial-up Internet access, to use excess service obtained through the universal service mechanism for schools and libraries when the services are not in use by the schools and libraries for educational purposes.¹⁸ We grant this waiver subject to the following conditions: (1) there is no local or toll-free Internet access available in the community;¹⁹ (2) the school or library has not requested more services than are necessary for educational purposes; (3) no additional costs will be incurred, i.e., services subject to a waiver must be purchased on a non-usage sensitive basis; (4) any use for noneducational purposes will be limited to hours in which the school or library is not open; (5) and the excess services are made available to all capable service providers in a neutral manner that does not require or take into account any commitments or promises from the service providers.

7. This waiver is dependent on Alaska's implementation of these conditions. We believe that these conditions are appropriately tailored to narrow the scope of waiver to ensure the integrity of the schools and libraries mechanism, yet broad enough to provide relief to rural remote communities in Alaska that are encountering economic and distance-related challenges to receiving telecommunications and advanced services. Maximizing the use of services obtained from the schools and libraries program by permitting such rural remote communities to use the excess service that is available as a result of the non-usage sensitive basis of the service and the limited hours that the service is used for educational purposes will further the goals of universal service, consistent with the Act.²⁰ If these conditions are satisfied, then we will find that special circumstances have been met and that a waiver is in the public interest.

8. As an initial matter, we conclude that there is no statutory prohibition against our waiving section 54.504(b)(2)(ii) of the Commission's rules.²¹ Section 254(h)(1)(B) provides that

¹⁸ See 47 C.F.R. § 54.504(b)(2)(ii). In its Petition, Alaska also requests a declaratory ruling from the Commission declaring that no other regulation and no statutory provision prevents the ability of rural remote communities that lack access to either local or toll-free dial-up Internet connections. See Alaska Petition at 23. We decline to address these issues at this time.

¹⁹ For the purposes of this waiver, "communities" will consist of Census Designated Places, a closely settled unincorporated population center of at least 25 persons, or Alaska Native Village Statistical Areas (ANVSA). ANVSAs are designated boundaries that encompass the settled area associated with each Alaska Native Village. See State of Alaska Department of Labor and Workforce Development web site, *Alaska Population Overview: 1999 Estimates* (visited October 22, 2001), <http://www.labor.state.ak.us/research/pop/popover.htm>.

²⁰ See 47 U.S.C. § 254. See also Section 706 of the Act, reproduced in the notes under 47 U.S.C. § 157. Section 706 directs the Commission and the states to utilize various regulatory methods to "encourage deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans[.]"

²¹ See 47 U.S.C. § 254 (h)(1)(B); 47 C.F.R. § 54.504(b)(2)(ii). See also *Schools and Libraries Notice and Order*. Commenters have expressed concern that a waiver of section 54.504(b)(2)(ii) of the Commission's rules would violate section 254(h)(1)(B) of the Act. See, e.g., United States Telecom Association (USTA) Comments at 2-4; Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) Reply Comments at 2-3.

eligible schools and libraries shall receive discounts on certain services for educational purposes.²²

Pursuant to the Commission's discretion to implement the statute, the Commission narrowly constructed its rule to require schools and libraries to certify that they use such discounted services solely for educational purposes.²³ This rule supports the Commission's efforts to guard against fraud, waste, and abuse.²⁴ Nothing in section 254(h)(1)(B) prohibits the Commission from granting a waiver of section 54.504(b)(2)(ii) of its rules to expand the use of such services, so long as in the first instance they are used for educational purposes.²⁵

9. The Commission's rules, however, may only be waived for good cause shown.²⁶ As noted by the Court of Appeals for the D.C. Circuit, agency rules are presumed valid.²⁷ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁸ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁹ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.³⁰

10. We find that Alaska's waiver request satisfies the above-stated conditions. First, Alaska has adequately demonstrated special circumstances. Alaska states that there are approximately 240 communities in the state that lack local or toll-free dial-up access to the Internet. These communities are located in remote areas of the state that are isolated by severe terrain and a harsh climate. Most of these communities are sparsely populated (population under 250), and are reachable only by air or water. As a result, access to information services is minimal and generally cost-prohibitive. In fact, Alaska asserts that start-up costs for an Internet service

²² See 47 U.S.C. § 254 (h)(1)(B).

²³ See 47 C.F.R. § 54.504(b)(2)(ii).

²⁴ *Universal Service Order*, 12 FCC Rcd at 9076, para. 570 ("We concur with the Joint Board's finding that Congress intended to require accountability on the part of schools and libraries and, therefore, we concur with the Joint Board's recommendation and the position of most commenters that eligible schools and libraries be required to: (1) conduct internal assessments of the components necessary to use effectively the discounted services they order; (2) submit a complete description of services they seek so that it may be posted for competing providers to evaluate; and (3) certify to certain criteria under penalty of perjury."). By taking steps to require accountability from applicants, the Commission was reducing the likelihood of fraud, waste, and abuse.

²⁵ See *supra* para. 4.

²⁶ 47 C.F.R. § 1.3.

²⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

²⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

³⁰ *WAIT Radio*, 418 F.2d at 1159.

provider in a village is often more than \$20,000, in addition to the monthly cost for a satellite link.³¹ Of the communities without local or toll-free dial-up access to the Internet, 135 have available, non-usage sensitive Internet access at local schools or libraries.³² Given their extreme isolation and the lack of access to affordable Internet services, we believe it is appropriate to allow rural remote areas in Alaska that lack local or toll-free dial up access to the Internet to utilize excess service obtained through the universal service mechanism under the limited circumstances described above.

11. We also conclude that granting Alaska's waiver will serve the public interest. We believe that it is in the public interest to take steps to utilize the excess services obtained through the schools and libraries mechanism. Alaska explains that nearly 75 percent of rural Alaskan communities do not have Internet access via a local dial-up or toll-free connection.³³ In many of these communities, however, schools and libraries have access to information services because of assistance from the schools and libraries mechanism.³⁴ This waiver will serve the public interest by promoting access to available resources and allowing communities to make use of the excess service. We find that the waiver is also in the public interest because it is consistent with the Commission's efforts to encourage access to advanced telecommunications and information services.³⁵

12. In addition, we believe that each of the conditions imposed with this waiver promotes the public interest by reducing the likelihood of waste, fraud, and abuse, and guarding against additional costs from being imposed on the schools and libraries mechanism.³⁶ These conditions are discussed separately below.

13. The first condition limits application of the waiver to communities in Alaska where there is no local or toll-free dial-up Internet access.³⁷ As noted above, many of these communities lack affordable access to the Internet due to their remote nature but also have available, non-

³¹ See Alaska Petition at 12.

³² Alaska *ex parte* at 2.

³³ See Alaska Petition at 4.

³⁴ See Alaska Petition at 11; Alaska *ex parte* at 2.

³⁵ See 47 U.S.C. § 254(b).

³⁶ Commenters have raised particular concerns that this waiver may impose costs, incidental or otherwise, on the schools and libraries universal service mechanism. See, e.g., Independent Telephone & Telecommunications Alliance (ITTA) Comments at 4-5; USTA Comments at 7-8. In its letter filed with the Commission, Alaska discusses the possibility that the increased usage of the satellite resources may lead satellite service providers to raise its rates in the future. We believe that it is unnecessary to take specific steps to address this issue at this time. Should the Commission become concerned about rising costs of services, however, it may be appropriate to reassess this matter.

³⁷ See *supra* para. 10.

usage sensitive connections to the Internet in their schools and libraries. We believe that allowing these communities to access services obtained from the schools and libraries universal service mechanism will serve the public interest by reducing waste and making more efficient use of available resources.

14. Under the second condition, eligible schools and libraries in Alaska are not permitted to request more services than are necessary for educational purposes.³⁸ Alaska will protect against that possibility by instructing schools and libraries to maintain information documenting the necessity for additional services.³⁹ This will reduce the likelihood of fraud and abuse by enabling the Schools and Libraries Division of the Universal Service Administrative Company to efficiently assess whether additional requests are associated with educational purposes. As noted above, this waiver only allows for the use of excess service that is incidental to services provided for educational purposes. If there are increases in requests not warranted by educational purposes, we believe that it will be appropriate to reassess the propriety of this waiver.

15. The third condition limits the waiver to communities where the services used by the school are purchased on a non-usage sensitive basis.⁴⁰ By limiting implementation of this waiver to communities that pay a flat, non-traffic sensitive rate for services, it reduces wasted resources and it protects against abuse by ensuring that the schools and libraries program does not incur additional costs based on the increased utilization. In addition, we note that any additional equipment related to the provision of Internet service to the community will not be eligible for support.⁴¹

16. The fourth condition limits local community usage to hours in which the school or library is not open.⁴² By limiting use for non-educational purposes to non-operating hours for the schools and libraries, we guard against abuse by eliminating the possibility that community usage may interfere with usage of services for educational purposes in schools and libraries. In accord with this condition, Alaska will include terms in agreements with ISPs restricting community usage to non-operating hours.⁴³ Specifically, agreements will include an explicit statement that service is restricted to non-operating hours of the school or library and will designate normal operating hours, along with the anticipated school year calendar.⁴⁴ The local Internet service

³⁸ See Alaska *ex parte*.

³⁹ See *ex parte* at 5.

⁴⁰ See *ex parte* at 4.

⁴¹ See Alaska Petition at 14.

⁴² See *ex parte* at 5-6.

⁴³ *Id.*

⁴⁴ *Id.*

provider will also be required to demonstrate the effectiveness of how it will restrict service to the designated hours.⁴⁵

17. Pursuant to the fifth condition, excess services must be made available to all capable service providers in a neutral manner that does not require or take into account any commitments or promises from the service providers.⁴⁶ This condition is consistent with the Act, which prohibits any discounted services or network capacity from "being sold, resold, or transferred by such user in consideration for money or any other thing of value."⁴⁷ We believe that this condition will ensure that excess services are not transferred in exchange for any benefit to the school, library, or surrounding community, whether the benefit is a promise of particular services, prices, or other thing of value. This condition will also protect against fraud, waste, and abuse by providing that all public, tribal, non-profit, and commercial entities will be treated equally. We note that there may be circumstances in which demand for the excess services by service providers is greater than the available excess services. In such instances, the school or library may determine priority based on a set of neutral criteria that is consistent with this condition, such as random selection, first-come-first-served, or any other methodology that does not prioritize based on expectations of particular benefits to the institution or surrounding community. We also note that this condition in no way prohibits schools and libraries from establishing minimal technical requirements to protect the integrity of the institution's network, to ensure that selected providers are actually capable of providing service, or to ensure that selected providers are prepared to offer service.

18. Therefore, because we find that this waiver is in the public interest and that Alaska has demonstrated special circumstances, we find good cause to grant Alaska's waiver request subject to the provided conditions. We are confident that this waiver will ensure that appropriate steps will be made to ensure the integrity of the schools and libraries universal service mechanism.

19. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 254 and sections 1.3, 1.925 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, the waiver request filed by the State of Alaska on January 29, 2001, is GRANTED, subject to the conditions indicated herein.

20. IT IS FURTHER ORDERED that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

⁴⁵ *Id.*

⁴⁶ Nook Net Comments at 1 (asking how the local service provider will be selected); ITTA Comments at 6 (asserting that the waiver may violate the principle of competitive neutrality).

⁴⁷ 47 U.S.C. § 254 (h)(3).

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Secretary