

Before the
 Federal Communications Commission
 Washington, DC 20554

In the Matter of)	
)	
Application for Review of a)	
Decision of the)	
Wireline Competition Bureau by)	
)	
Mescalero Apache School)	File No. SLD-317139
Mescalero, New Mexico)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: March 10, 2005

Released: March 14, 2005

By the Commission:

1. Before the Commission is an Application for Review filed by Mescalero Apache School Mescalero, New Mexico, of a decision issued by the Telecommunications Access Policy Division of the Wireline Competition Bureau (Bureau) on delegated authority.¹ Mescalero seeks review of the Bureau’s decision denying Mescalero’s request for review of a decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator).² For the reasons set forth below, we deny the Application for Review.

2. On July 1, 2002, SLD issued a Funding Commitment Decision Letter denying a funding request by Mescalero.³ On September 10, 2002, Mescalero filed an appeal with SLD.⁴ In an Administrator’s Decision on Appeal, SLD indicated that it would not consider Mescalero’s appeal

¹ Letter from Richard S. Meyers, Counsel for Mescalero Apache School, to the Federal Communications Commission, filed January 22, 2003 (Application for Review).

² *Id.*; *Request for Review by Mescalero Apache School, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-317139, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 26094 (Wireline Com. Bur. 2002) (*Bureau Order*).

³ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Gino Wilcox, Mescalero Apache School, dated July 1, 2002 (Funding Commitment Decision Letter). Mescalero’s funding request in Funding Request Number 838498 was for Priority 2 internal connections. Although SLD denied Mescalero’s request for funding for this service in Funding Year 2002, Mescalero did receive a commitment for funding for a similar request in Funding Year 2003.

⁴ Letter from Ray Swinney, Mescalero Apache School, to Schools and Libraries Division, Universal Service Administrative Company, filed September 10, 2002 (Request for Administrator Review).

because the appeal was not filed within 60 days of the July 1, 2002, Funding Commitment Decision Letter.⁵ Mescalero then filed a Request for Review with the Commission.⁶

3. Mescalero acknowledged in its Request for Review that its appeal to SLD was filed outside of the 60-day filing deadline, but argued that the extenuating circumstances it described warranted review of SLD's decision.⁷ Specifically, Mescalero stated that the school was in a "transition period from late June through August" during which the school district had moved to a new facility.⁸ Mescalero further stated that during this period mail was not delivered correctly, the school year was underway, the number of students increased by more than 200, and staff members were working long hours.⁹ As a result, Mescalero stated, the Funding Commitment Decision Letter was not read until August 13, 2002.¹⁰ Mescalero also indicated that upon reviewing the Funding Commitment Decision Letter, it contacted its service provider for information and the service provider was not responsive.¹¹

4. Under delegated authority from the Commission, the Bureau reviewed the appeal.¹² In the *Bureau Order*, the Bureau affirmed SLD's decision, finding that Mescalero's appeal to SLD was not filed within the requisite 60-day time limit in which to file an appeal under section 54.720(b) of the Commission's rules.¹³ The Bureau also denied Mescalero's request for waiver of the Commission's rules, concluding that Mescalero had not demonstrated special circumstances necessary to warrant a deviation from the general rule.¹⁴ Having concluded that the initial appeal was untimely, the *Bureau Order* did not address the merits of SLD's underlying decision in the Funding Commitment Decision Letter.¹⁵

⁵ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Ray Swinney, Mescalero Apache School, dated September 11, 2002 (Administrator's Decision on Appeal). Commission rules previously required that appeals must be filed with the Commission or SLD within 30 days of the issuance of the decision that the party seeks to have reviewed. This deadline was modified in 2001 by an interim order, extending the deadline to 60 days. *See Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Rcd 339 (Com. Car. Bur. 2001), as corrected by *Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata (Com. Car. Bur. rel. Dec. 28, 2001 and Jan. 4, 2002). In 2003, the Commission permanently extended the time limit for filing an initial appeal with SLD and the Commission to 60 days. *See Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, 9221, paras. 55-56 (2003). 47 C.F.R. § 54.720(b).

⁶ Letter from Ray Swinney, Superintendent, Mescalero Apache School District, to the Federal Communications Commission, filed October 30, 2002 (Request for Review); *Bureau Order*, 17 FCC Rcd at 26095, para. 2.

⁷ Request for Review.

⁸ *Id.* at 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 47 C.F.R. §54.722(a).

¹³ *Bureau Order*, 17 FCC Rcd at 26095, para. 3.

¹⁴ *Id.* at 26095-96, paras. 4-7.

¹⁵ *Id.* at 26095, para. 3.

5. We find that Mescalero has not presented a persuasive argument to demonstrate that the *Bureau Order* was in error. Mescalero asserts in its Application for Review, as it did in its Request for Review, that the disruption caused by the transfer of the school district to a new location and a non-responsive vendor, as well as the hardship that its students will experience due to lack of funds, constitute special circumstances that warrant a waiver of the 60-day SLD appeal deadline.¹⁶ In cases of missed deadlines, however, the Bureau rarely grants waivers for untimely filing of appeals to SLD.¹⁷ The Bureau has consistently held that applicants are responsible for submitting their appeals in a timely manner and complying with program rules and procedures.¹⁸ It similarly has held that financial need does not meet the requirement of special circumstances that warrant a waiver of the Commission's rules.¹⁹

6. We also reject Mescalero's argument that the *Bureau Order* conflicts with the Bureau's decisions in the *Buffalo City*, *Chicago Public Schools* and *Mesa Vista Orders*.²⁰ In these orders, the Bureau granted deadline waivers only for the delivery of particular services and under particular circumstances. These orders, moreover, dealt with service installation deadlines, not with appeal filing

¹⁶ Application for Review at 5-6.

¹⁷ The Bureau has granted few Requests for Review for missing a SLD appeal deadline. In the cases that have been granted, the Bureau generally found evidence of mistake on the part of SLD or some other agency, or found that the appeal was actually filed in a timely manner. See, e.g., *Request for Review by B.F. Jones Memorial Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 25387 (Com. Car. Bur. 2000) (appeal filed in a timely manner). See also *Request for Review by Council Bluffs Community Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 18836 (Com. Car. Bur. 2000) (SLD failed to post applicant's FCC Form 470 in a timely manner).

¹⁸ See, e.g., *Request for Review by Albuquerque Public Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File Nos. SLD-242088, 244611, CC Docket No. 02-6, Order, 19 FCC Rcd 3985 (Wireline Comp. Bur. 2004) (where the applicant missed an appeal deadline because the school was closed for business during the Christmas holidays). See also *Request for Review by Baldwin Park Unified School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-316487, CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 15888 (Wireline Comp. Bur. 2003) ("Baldwin Park states that its appeal was untimely as a result of delays in its investigation with Kinko's Copier and Fed Ex."); and *Requests for Waiver by Nederland Independent School District, et al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-274014, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 19544, 19545 (Wireline Comp. Bur. 2002) ("[W]e have consistently held that personnel disruptions, employee medical conditions or employee confusion or misunderstanding about SLD rules and deadlines do not rise to the level of special circumstances required for a waiver.").

¹⁹ *Request for Review by Lansingburgh Central School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-109845, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 6999 (Com. Car. Bur. 1999) ("To simply advert . . . to its limited resources and the needs of its students, does not distinguish its situation from other applications the SLD must process each funding year in accordance with its filing deadlines.").

²⁰ *Id.* at 6. *Buffalo City School District, Federal-State Joint Board on Universal-Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-262700, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 11881 (Wireline Comp. Bur. 2002) (*Buffalo Order*); *Chicago Public Schools, Federal-State Joint Board on Universal Services, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-263338, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 17086 (Wireline Comp. Bur. 2002) (*Chicago Order*); *Federal-State Joint Board on Universal-Service*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 99-2037 (Com. Car. Bur. rel. Sept. 30, 1999) (*Mesa Vista Order*).

deadlines. Normally, supported services must be delivered within the funding year for which services are sought. The services involved in these orders were non-recurring services, and the Bureau accorded the deadline for delivery of services special treatment because there are only limited times of the year when these services can be installed, generally during the summer months when classes are not in session.²¹ The *Buffalo Order* pointedly refers to “the Commission’s and the Bureau’s long-standing policy of ensuring that applicants for non-recurring services are not penalized for delays that are not within their control.”²²

7. The particular circumstances that persuaded the Bureau in the *Buffalo, Chicago and Mesa Vista Orders* were that the installations were delayed at least in part because of actions by SLD. In the *Buffalo and Chicago Orders*, the service provider was unable to begin installation until the schools had received a funding commitment decision letter from SLD, and by that date there was insufficient time for the service provider to complete the service installation.²³ In the *Mesa Vista Order*, the initial service provider went out of business, requiring the applicant to re-start the bidding process to select a second vendor. That selection, however, was delayed because SLD and the Commission were in the process of adopting procedures for situations in which a vendor goes out of business.²⁴ Moreover, as the Commission stated in the *Non-Recurring Services Order*, non-recurring services are accorded special treatment because “external circumstances, like delayed funding decisions or manufacturing problems, can create situations where deadlines are both unpractical and unreasonable.”²⁵ Mescalero’s situation, however, involved neither non-recurring services nor these special circumstances. In Mescalero’s case, its tardiness stemmed from a move to a new location, rather than from delays caused by SLD or a service provider. Therefore, the *Bureau Order* does not conflict with the decisions cited by Mescalero.

8. Finally, Mescalero’s Application for Review raises, as a new argument, the assertion that the Commission has practiced a policy of promoting Native Americans’ access to telecommunications services, and that this policy should be taken into consideration in deciding Mescalero’s case.²⁶ Mescalero, however, failed to present this argument in its Request for Review to the Commission.²⁷ The Commission’s rules state that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”²⁸ We conclude that, because Mescalero did not raise this issue in its Request for Review, Mescalero cannot now raise the issue at this stage of the process.²⁹

²¹ *Buffalo Order* at 11882, para. 5; *Chicago Order* at 17088, para. 5; *Mesa Vista Order* at para. 3; see also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 13510, 13512 (2001) (*Non-Recurring Services Order*).

²² *Buffalo Order* at 11885, para. 11.

²³ *Buffalo Order* at 11883-11885, paras. 7 and 10; *Chicago Order* at 17088-17090, paras. 7 and 10.

²⁴ *Mesa Vista Order* at para. 8.

²⁵ *Non-Recurring Services Order* at 13513, para. 11.

²⁶ Application for Review at 6.

²⁷ Request for Review. Mescalero also did not raise the argument in its appeal to SLD. See Request for Administrator Review.

²⁸ 47 C.F.R. § 1.115(c). The note to section 1.115(c) states that “new questions of fact or law may be presented to the designated authority in a petition for reconsideration.” 47 C.F.R. § 1.115(c).

²⁹ *Id.*

9. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed by Mescalero Apache School, Mescalero, New Mexico, on January 22, 2003, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary