

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

In the Matter of
Request for Waiver of the Decision of the
Universal Service Administrator by
Kan-ed, Kansas Board of Regents
Topeka, Kansas
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-449052
CC Docket 02-6

ORDER

Adopted: November 21, 2006

Released: November 22, 2006

By the Commission:

I. INTRODUCTION

1. In this Order, we grant partial relief to Kan-ed, Kansas Board of Regents (Kan-ed), which is appealing a decision by the Universal Service Administrative Company (USAC) that denied Kan-ed funding from the schools and libraries universal service support mechanism because USAC determined that Kan-ed failed to provide evidence of authority to represent its consortium members. We remand the underlying application to USAC for action consistent with this Order, and, to ensure that it is resolved expeditiously, we direct USAC to issue an award or a denial based on a complete review and analysis no later than 90 days from release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, also known as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connection services. In accordance with the Commission's rules, an applicant must file with USAC, for posting to USAC's website, an FCC Form 470 requesting discounted services. After an applicant has entered into

1 Letter from Jerry Huff, Director of Business Operations & Planning, Kan-ed, Kansas Board of Regents, Topeka, Kansas, to Federal Communications Commission, Request for Waiver, File No. 449052, CC Docket Nos. 96-45 and 02-6, filed Mar. 23, 2006 (Request for Waiver). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 47 C.F.R. §§ 54.501-54.503.

3 The applicant must wait 28 days before entering into an agreement with a service provider for the requested services. 47 C.F.R. § 54.504(b). See also Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (Funding Years 2000, 2001, 2002 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB

agreements for eligible services with one or more service providers, it must file an FCC Form 471 with USAC.<sup>4</sup>

3. The Commission's rules allow schools and libraries to form consortia for purposes of seeking competitive bids on their service requests.<sup>5</sup> Because discounts are restricted by statute to "bona fide request[s]" for services, a consortium application may only be submitted on behalf of schools and libraries that have actually authorized the consortium to make the request.<sup>6</sup> By signing the FCC Form 471, the applicant is certifying that it is authorized to submit and certify to the accuracy of the application on behalf of all consortium members.<sup>7</sup> USAC must ensure that the consortium members are aware of the application to be filed and how that application obligates the expenditure of financial and professional resources.<sup>8</sup> Ensuring that a school or library is aware of and approves the application on its behalf also helps to avoid cases of duplicative requests from different applicants applying on behalf of the same school or library.<sup>9</sup> In *Project Interconnect*, the Wireline Competition Bureau (the Bureau) affirmed USAC's requirement that an applicant applying as a consortium must submit a letter of agency (LOA) from each of its members expressly authorizing the applicant to submit an application on its behalf.<sup>10</sup> Specifically, the Bureau found that this requirement is consistent with USAC's authority to implement administrative procedures that ensure compliance with the Commission's rules and requirements as

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3060-0806 (April 2002) (Funding Year 2003 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (May 2003) (Funding Year 2004 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (Funding Year 2005 FCC Form 470) (collectively, FCC Form 470).

<sup>4</sup> The FCC Form 471 notifies USAC of the services that have been ordered, the service providers with which the applicant has entered into an agreement, and an estimate of funds needed to cover the discounts to be given for eligible services. 47 C.F.R. § 54.504(c). See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (December 1997) (Funding Year 1999 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (Funding Year 2000 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (Funding Year 2001 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (Funding Year 2002 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2003) (Funding Year 2004 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (Funding Year 2005 FCC Form 471) (collectively, FCC Form 471).

<sup>5</sup> 47 C.F.R. § 54.501(d)(1).

<sup>6</sup> 47 U.S.C. § 254(h)(1)(B).

<sup>7</sup> 47 C.F.R. § 54.501(c)(1). See also USAC Website, Letter of Agency, <http://www.universalservice.org/sl/tools/reference/letters-of-agency.aspx> (retrieved Sept. 7, 2006) (LOA Guidance); FCC Form 471, Item 33, Block 6.

<sup>8</sup> *Request for Review of the Decision of the Universal Service Administrator by Project Interconnect, Brooklyn Park, Minnesota, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, File Nos. SLD-146858, 146854, CC Docket Nos. 96-45, 97-21, Order, 16 FCC Rcd 13655, 13659, para. 10 (Common Car. Bur. 2001) (*Project Interconnect Order*). The Wireline Competition Bureau was formerly known as the Common Carrier Bureau.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 13658, para. 8. USAC requires an LOA to contain the following five elements: the name of the person filing the application; the name of the person authorizing the filing of the application; the specific time frame the LOA covers; the signature, date, and title of an official who is an employee of the entity who is authorizing the filing of the application; and the type of services covered by the LOA. See LOA Guidance. In certain situations, other documentation, such as evidence that each consortium member knew it was represented on the application, may be accepted as proof of authorization. *Id.*

established in the Commission's *Eighth Reconsideration Order*.<sup>11</sup> In lieu of an LOA, according to USAC's guidelines, "[c]onsortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory" may provide "copies of the relevant state statute or regulation."<sup>12</sup> In Funding Year 2005, USAC began requiring applicants to obtain signed LOAs from each consortium member prior to the certification date of their FCC Form 471.<sup>13</sup>

4. *Kan-ed's Request for Waiver.* The Kansas Legislature, in the Kan-ed Act, empowered the Kansas Board of Regents to create a state-wide network to which all public and regulated private schools and public libraries will eventually be able to connect for broadband Internet and Intranet access for the purpose of distance learning.<sup>14</sup> Section 75-7223(b) of the Kan-ed Act prohibits the network from impairing existing contracts for service between providers and schools or libraries and prohibits state ownership or construction of any new network facilities.<sup>15</sup> Thus, the Kan-ed Act created a public-private partnership whereby all schools and libraries could request membership and apply for assistance to gain connectivity to the Kan-ed network through coordination with their local providers.<sup>16</sup> In order to become a member, a school or library must complete a form to join the network and may renew their membership in subsequent years via an online form.<sup>17</sup>

5. Subsequent to the passage of the Kan-ed Act, the Kansas Board of Regents created an entity, Kan-ed, to contract, through competitive bidding, with private telecommunications and cable providers to create, operate and maintain the Kan-ed network.<sup>18</sup> Kan-ed provides only the backbone, and not the individual connections, to each school district, school and library.<sup>19</sup> Thus, Kan-ed states that since it provides only the backbone, its network costs are largely independent of the number of entities served.<sup>20</sup>

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<sup>11</sup> See 47 C.F.R. § 54.705(a)(1) (setting forth the functions of the Schools and Libraries Committee) and 47 C.F.R. § 54.701(g)(i) (directing the Administrator to establish the Schools and Libraries Division, and setting forth its functions). See also *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, Third Report and Order and Fourth Order on Reconsideration* in CC Docket No. 97-21 and *Eighth Order on Reconsideration* in CC Docket No. 96-45, 13 FCC Rcd 25058, 25075-76, paras. 30-31, 34 (1998) (*Eighth Reconsideration Order*) (describing the functions of the Schools and Libraries Committee).

<sup>12</sup> See LOA Guidance.

<sup>13</sup> See *id.* See also February 2005 Announcements, Sample Letter of Agency (LOA) Available (2/1/05), available at <http://www.universalservice.org/sl/tools/news-archive/2005/022005.asp#020105a> (retrieved Sept. 7, 2006).

<sup>14</sup> Kan. Stat. Ann. § 75-7221, *et seq.* (2001). See also Letter from Hal Gardner, Executive Director, Kan-ed, Kansas Board of Regents, to Schools and Library Division, Universal Service Administrative Company, dated Sept. 4, 2005, at 1 (Gardner Letter) (responding to a Program Integrity Assurance (PIA) request from USAC for additional information concerning Kan-ed's application). The PIA review process examines applicants' FCC Forms 471 and other documentation to ensure that the discounts recipients seek are for eligible services, provided to eligible entities, and for eligible uses. During this process, USAC may ask for additional documentation to support the statements made in the application. See USAC Website, Program Integrity Assurance (PIA), <http://www.sl.universalservice.org/reference/6pia.asp> (retrieved Sept. 8, 2006).

<sup>15</sup> Kan. Stat. Ann. § 75-223(b)(1); Request for Waiver at 2.

<sup>16</sup> *Id.*

<sup>17</sup> E-mail from Don Dietrich, E-rate Consultant to Kan-ed, to Schools and Libraries Division, Universal Service Administrative Company, dated Sept. 16, 2005 (Dietrich E-mail). Kan-ed also states that these renewals are certified annually by an independent agency. *Id.*

<sup>18</sup> Gardner Letter at 1.

<sup>19</sup> Request for Waiver at 2.

<sup>20</sup> *Id.*

Kan-ed has applied for E-rate funds since Funding Year 2002 on behalf of its members under the authority of the Kan-ed Act.<sup>21</sup>

6. On January 25, 2006, USAC issued its Funding Commitment Decision Letter to Kan-ed, denying Kan-ed's application in its entirety because a substantial number of the LOAs or other documentation authorizing the filing of Kan-ed's FCC Form 471 were not signed before the FCC Form 471 certification date or were not provided to USAC.<sup>22</sup> On March 23, 2006, Kan-ed filed with the Commission a Request for Waiver, appealing USAC's decision.<sup>23</sup> Kan-ed contends that its network is successful in securing Internet and Intranet access in a manner that prevents duplication of requests for support, allows input from and cooperation with the private sector, and provides access to the educational benefits of distance learning.<sup>24</sup> In addition, Kan-ed also requests that it be allowed to add members to Block 4 of its FCC Form 471 for Funding Year 2006 to enable any school or library that had not signed an LOA by February 16, 2006, the certification date of its Funding Year 2006 FCC Form 471 to join its consortium during the funding year and receive discounts.<sup>25</sup>

### III. DISCUSSION

7. Based on the record before us, we grant partial relief to Kan-ed, allowing it to file its LOAs for Funding Years 2005 and 2006 after the certification of its FCC Forms 471.<sup>26</sup> We deny, however, Kan-ed's request to add members to Block 4 of its Funding Year 2006 FCC Form 471 throughout the funding year.<sup>27</sup>

8. USAC denied Kan-ed's entire application because more than 30 percent of its LOAs were deemed incomplete.<sup>28</sup> Section 54.504(d) of the Commission's rules states that, "[i]f 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety."<sup>29</sup> Thus, the 30 percent rule ensures that applicants carefully evaluate the eligibility of the services for which they seek discounts. The 30 percent rule, however, does not apply to the submission of completed LOAs. We find that to deny an entire application because 30 percent of a consortium's members either did not submit an LOA or submitted a deficient LOA would unfairly penalize the entire consortium where only a few members of the consortium fail to produce the requested documentation. Further, such a denial may make applicants reluctant to risk applying with a consortium, in contravention of the Commission's stated desire to "encourage schools and libraries to aggregate their

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<sup>21</sup> *Id.*

<sup>22</sup> See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Bradley Williams, Kan-ed, dated Jan. 25, 2006 (Funding Commitment Decision Letter).

<sup>23</sup> Request for Waiver at 2.

<sup>24</sup> See Gardner Letter at 3.

<sup>25</sup> Request for Waiver at 5. Funding Year 2006 began on July 1, 2006 and ends on June 30, 2007.

<sup>26</sup> Request for Waiver at 2.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> See *Id.* at 2. See also Funding Commitment Decision Letter at 5-12 ("Funding was denied because a substantial number of the Letters of Agency or other documentation authorizing the filing of the Form 471 were not signed before the 471 Certification Postmark Date or were not provided.") USAC's policy allows consortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory to provide copies of the relevant state statute or regulation as proof of authority. See LOA Guidance. We note that Kan-ed cannot rely on its statutory authority to supplant the LOA requirement because membership in Kan-ed by schools and libraries is not mandatory. See Gardner Letter at 1.

<sup>29</sup> 47 C.F.R. § 54.504(d).

demand with others to create a consortium with sufficient demand to attract competitors and thereby negotiate lower rates.”<sup>30</sup>

9. Given the confusion surrounding the application of the 30 percent rule to Kan-ed’s LOAs, we now allow Kan-ed to obtain and submit to USAC updated LOAs for the 2005 Funding Year from all of its members within 30 days from the release of this Order to ensure that each school and library listed had actually authorized Kan-ed to apply on its behalf. To the extent that Kan-ed did not have LOAs for the entities listed in Block 4 of its Funding Year 2006 FCC Form 471 prior to its certification date, we also allow Kan-ed 30 days from the date of release of this Order to obtain and submit to USAC all of the LOAs for its Funding Year 2006 application. If Kan-ed is unable to obtain LOAs from every entity listed on Block 4 of its Funding Year FCC Form 471 within 30 days, we direct USAC to remove those entities from the application and adjust Kan-ed’s funding request accordingly, rather than deny the entire application. We find that denying the entire application under these circumstances would unfairly penalize the entire consortium where only a few members of the consortium failed to produce the requested documentation.<sup>31</sup> We emphasize that we are not relieving Kan-ed of the obligation to obtain LOAs from its members, we are merely granting Kan-ed additional time in which to produce to USAC proof of its authority to apply on behalf of its members.<sup>32</sup>

10. We deny, however, Kan-ed’s request to add members to Block 4 of its Funding Year 2006 FCC Form 471 throughout the funding year.<sup>33</sup> Section 54.507(c) requires all applications to be submitted by a date determined by USAC.<sup>34</sup> While we understand Kan-ed’s desire to provide service to entities that decide to join its consortium during the funding year, we find that allowing Kan-ed an open-ended application may undermine the integrity of the E-rate application and disbursement process.<sup>35</sup> In particular, we are concerned with the administrative burden on USAC of continually having to update and process Kan-ed’s application throughout the funding year. We are also concerned with the ability of USAC to conduct its PIA review over the course of a funding year when the number of members in a consortium’s application is constantly changing. Thus, we decline to allow Kan-ed to allow additional schools and libraries to join its consortium after the submission of its FCC Form 471 for Funding Year 2006.

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<sup>30</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9027, para. 476 (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 (Nov. 2, 2000).

<sup>31</sup> See *Project Interconnect Order*, 16 FCC Rcd at 13661, para. 14.

<sup>32</sup> We direct USAC to accept Kan-ed’s LOAs, even though they will not have been dated prior to the certification date of Kan-ed’s FCC Form 471.

<sup>33</sup> Request for Waiver at 2. Kan-ed may also amend its FCC Form 471 for clerical or ministerial errors pursuant to the Commission’s *Bishop Perry Order*. See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, et al., CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) (*Bishop Perry Order*).

<sup>34</sup> 47 C.F.R. § 54.507(c). For Funding Year 2006, the FCC Form 471 filing window closed on February 16, 2006. In the *Bishop Perry Order*, we allowed applicants to correct ministerial or clerical errors after the close of the FCC Form 471 filing window, but Kan-ed is requesting a waiver to make substantive changes to its application throughout the funding year. See *Bishop Perry Order*, 21 FCC Rcd at 5319, para. 8.

<sup>35</sup> 47 U.S.C. § 254. See also *1997 Universal Service Order*, 12 FCC Rcd at 9076-80, paras. 570-80.

11. Accordingly, we remand the underlying application to USAC for further processing consistent with our actions in this Order. To ensure that the application is processed expeditiously, we direct USAC to issue an award or a denial based on a complete review and analysis no later than 90 days from release of this Order. We emphasize the limited nature of this decision. Our action here does not eliminate USAC's current procedure requiring that an applicant applying for funding on behalf of a consortium have signed LOAs in place prior to submitting an FCC Form 471 or demonstrate its authority through alternative means, such as state statute or regulation.<sup>36</sup> We continue to require E-rate applicants to submit complete and timely information to USAC as part of the application review process.

12. Finally, we are committed to guarding against waste, fraud, and abuse, and to ensuring that funds disbursed through the E-rate universal service mechanism are used for appropriate purposes.<sup>37</sup> Our action here in no way affects 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 Commission rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses 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 and whether recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

#### IV. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that, 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 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that Kan-ed, Kansas Board of Regents' Request for Waiver IS GRANTED IN PART AND DENIED IN PART, as described herein.

14. IT IS FURTHER ORDERED that, 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 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that Kan-ed, Kansas Board of Regents SHALL PROVIDE to USAC evidence of registration of those entities listed in Block 4 of its Funding Year 2005 FCC Form 471 and LOAs for all of its consortium members for its Funding Year 2006 application within 30 days from release of this Order.

15. IT IS FURTHER ORDERED that, 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 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3 and 54.722(a), that Kan-ed, Kansas Board of Regents' Request for Waiver IS REMANDED to USAC for further consideration in accordance with the terms of this Order.

16. IT IS FURTHER ORDERED that, 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, USAC SHALL COMPLETE its review of the underlying application of Kan-ed, Kansas Board of Regents and ISSUE an

<sup>36</sup> See *supra* para. 3. See also LOA Guidance.

<sup>37</sup> See *Bishop Perry Order*, 21 FCC Rcd 5316.

award or a denial based on a complete review and analysis no later than 90 days from release of this Order.

17. IT IS FURTHER ORDERED that this Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary