

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

In the Matter of
)
)
) File No. EB-03-IH-0738
)
)
)
)
)

NOTICE OF DEBARMENT
AND ORDER DENYING WAIVER PETITION

Adopted: June 21, 2006

Released: June 30, 2006

By the Commission: Commissioners Capps and Adelstein concurring and issuing separate statements.

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION..... 1
II. BACKGROUND..... 4
A. NEC’s Criminal Conviction..... 10
B. Procedural History ..... 14
III. DISCUSSION ..... 18
A. Debarment Decision..... 20
B. Additional Precautionary Measures ..... 28
C. Other Issues..... 29
IV. CONCLUSION ..... 34
V. ORDERING CLAUSES..... 35

I. INTRODUCTION

1. This item debars NEC-Business Network Solutions, Inc. (“NEC”) from all activities associated with the schools and libraries universal service support mechanism, also known as the E-Rate program.<sup>1</sup> NEC pled guilty to and was convicted of serious fraud-related felonies against the E-Rate program. We find NEC’s conduct merits a debarment of at least three years, as contemplated by our debarment rule, but in light of several important factors, we will impose a debarment period of six months from the effective date of this Order. These factors include the Department of Justice’s (“DOJ”) strong

<sup>1</sup> This case arises out of the same underlying federal criminal investigation as another case involving Inter-Tel Technologies, Inc. (“Inter-Tel”). Inter-Tel Technologies, Inc., Notice of Debarment, FCC 06-92 (the “Inter-Tel Debarment Order”).

support of NEC as the first company to come forward and cooperate with DOJ's investigation, which DOJ states advanced its law enforcement capabilities with respect to E-Rate fraud; the mitigating steps NEC has taken to remedy its past conduct and prevent additional wrongdoing in its future participation in the E-Rate program; and the fact that NEC states that it has not participated in the E-Rate program in the last few years.

2. In addition, as another precaution to protect the integrity of the E-Rate program, this item imposes certain other measures to monitor NEC's compliance with our rules during its first two funding years of re-entry into the E-Rate program. We order the Universal Service Administrative Company ("USAC" or the "Administrator") to review NEC's applications submitted during those two funding years with heightened scrutiny. We further direct the Administrator to conduct automatic annual audits to ensure, during those funding years, that NEC complies with our rules, and that E-Rate funds are disbursed for their intended purpose.

3. We take these actions as part of our on-going commitment to protect the public interest and integrity of the E-Rate program in particular. We will continue to take appropriate enforcement actions against bad actors in the E-Rate program in future cases as warranted by the particular circumstances.

## II. BACKGROUND

4. In section 254 of the Act, Congress entrusted the Commission with promoting universal service to all Americans.<sup>2</sup> A critical goal of universal service is to ensure that affordable telecommunications services are available and accessible to underserved categories in our society, including specifically eligible schools and libraries, low-income consumers, rural health care providers, and consumers living in high-cost areas.<sup>3</sup> Congress sought to ensure that quality services are available at affordable rates throughout the country.

5. To promote the goal of serving schools, Congress directed the Commission to establish the E-Rate program.<sup>4</sup> As implemented by the Commission, the E-Rate program provides discounts to schools and libraries for certain services, including local and long distance telephone service, Internet access, and internal connections.<sup>5</sup> Through this resource, millions of schoolchildren and library patrons now have access to telecom services and the Internet in their classrooms and libraries. An average of almost 90,000 schools and libraries each year, including many in the nation's poorest and most isolated communities, obtain benefits through the E-Rate program. When the program began in 1998, only 51 percent of public school classrooms were linked to the Internet. By 2002, that figure increased to 92 percent. The most recent data from the National Center for Education Statistics show that 95 percent of schools had broadband connections.<sup>6</sup>

6. The Commission appointed USAC, a private, not-for-profit corporation, to serve as the federal universal service fund ("USF") administrator.<sup>7</sup> By Commission order, USAC administers the USF

---

<sup>2</sup> See 47 U.S.C. § 254.

<sup>3</sup> See 47 U.S.C. § 254(b).

<sup>4</sup> 47 U.S.C. § 254(b).

<sup>5</sup> 47 C.F.R. §§ 54.502-03.

<sup>6</sup> Basmat Parsad and Jennifer Jones, *Internet Access in U.S. Public Schools and Classrooms: 1994-2003* (NCES 2005-015), U.S. Department of Education, Washington DC: National Center for Education Statistics (February 2005), available at <http://nces.ed.gov/pubs2005/2005015.pdf>.

<sup>7</sup> See *Changes to the Board of Directors of the National Exchange Carrier Association*, Third Report and Order in CC Docket No. 97-21, 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, 25063-66, ¶¶ 10-14 (1998) ("USAC Appointment Order"); 47 C.F.R. § 54.701(a).

and its beneficiary programs, including the E-Rate program. Since 1997, the Administrator has disbursed approximately \$30.3 billion<sup>8</sup> to the various universal service programs, including nearly \$15 billion in commitments since 1998 to support the schools and libraries mechanism.<sup>9</sup> The E-Rate program operates under a funding cap of \$2.25 billion in each funding year.<sup>10</sup> In most funding years since its inception, schools and libraries seek support in excess of available funds, forcing the Administrator to deny potentially eligible requests for E-Rate funds.

7. Because the program is ultimately funded in large part by American consumers,<sup>11</sup> and because E-Rate fraud deprives schoolchildren and public libraries of valuable support, the public has a significant interest in protecting the integrity of E-Rate program funds, and the Commission's rules are intended to ensure that all E-Rate funds are used for their intended purpose. For example, Commission rules require competitive bidding by service providers, certifications from authorized officers within the schools and libraries about the eligibility of the telecommunications services purchased and provided by vendors, and truthful and accurate billing for services by vendors. As the program's steward, the Commission has a critical responsibility to deter misconduct and protect the USF. As part of that effort the Commission scrutinizes the program to identify and eliminate any potential for misconduct. We regularly review and update our rules as necessary to impose additional safeguards where we see the potential for mischief.<sup>12</sup> For instance, the Commission has adopted rules to authorize the Administrator to conduct audits of USF beneficiaries and contributors.<sup>13</sup> In addition, the Commission's rules provide for an annual independent audit of the Administrator to determine "whether the Administrator is properly administering the universal service support mechanisms to prevent fraud, waste, and abuse."<sup>14</sup> The Commission has also established procedures for recovering USF monies disbursed to program

---

<sup>8</sup> This amount was disbursed as of April 30, 2005.

<sup>9</sup> See Universal Service - Schools and Libraries Support Mechanism Commitment Status Weekly Report, dated April 29, 2005.

<sup>10</sup> See 47 C.F.R. § 54.507.

<sup>11</sup> The E-Rate and other universal service programs are funded by mandatory contributions to the USF by all telecommunications carriers providing interstate and international services. 47 U.S.C. § 254. Under section 254(d), the Commission can exempt carriers from universal service contribution requirements if the contributions would be *de minimis*. 47 U.S.C. § 254(d). The *de minimis* threshold is currently \$10,000. See *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5482, ¶ 297 (1997) ("*Fourth Reconsideration Order*"); 47 C.F.R. § 54.708. Telecommunications carriers may pass the costs of these contributions along to consumers including through line-item fees on the consumers' monthly telephone bills. See 47 C.F.R. § 54.712.

<sup>12</sup> *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, *Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308 (2005) ("*Universal Service Fund Oversight NPRM*"); *Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order, 19 FCC Rcd 15808 (2004) ("*Fifth Report and Order*"); *Federal-State Joint Board on Universal Service; Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Schools and Libraries Universal Service Support Mechanism*, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) ("*Fourth Report and Order*"); *Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912 (2003) ("*Third Report and Order*"); *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order, 18 FCC Rcd 9202 (2003) ("*Second Report and Order*").

<sup>13</sup> 47 C.F.R. § 54.707.

<sup>14</sup> 47 C.F.R. § 54.717.

beneficiaries that fail to comply with our rules.<sup>15</sup> Further, the Commission has required schools, libraries, and service providers to maintain documents necessary to demonstrate their compliance with program requirements and has strengthened the requirement that E-Rate applicants and service providers certify the accuracy of information they submit to the Administrator.<sup>16</sup> Finally, on June 14, 2005, the Commission released a notice of proposed rulemaking to explore additional ways to improve the management and oversight of the USF, including strengthening our debarment procedures.<sup>17</sup>

8. As part of its efforts to safeguard the E-Rate program, the Commission adopted in 2003 a rule that provides for automatic suspension and initiation of debarment proceedings against persons convicted of, or held civilly liable for, the commission or attempted commission of fraud and other similar offenses “arising out of activities associated with or related to the schools and libraries support mechanism.”<sup>18</sup> Suspension and debarment prevent the subject from participating in the E-Rate program and thereby protect the fund from persons adjudicated by courts of competent jurisdiction to have committed fraud against the program. The Commission implemented the debarment rule to better protect the integrity of the program.<sup>19</sup> Moreover, the Commission explicitly rejected a government-wide standard providing that an entity “may” be debarred based on a conviction or civil judgment. Instead, the Commission adopted an *automatic* suspension and debarment process, concluding that such a rule is necessary to accomplish the goal of eliminating waste, fraud, and abuse.<sup>20</sup>

9. The Commission’s debarment rule is aimed at protecting the program from fraud, waste, and abuse such as that described above. Pursuant to that rule, the trigger for a Commission debarment proceeding is a civil judgment or criminal conviction in a court of competent jurisdiction “for attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense arising out of activities associated with or related to the schools and libraries support mechanism.”<sup>21</sup> We issue a notice of suspension and initiate debarment proceedings to ensure that the convicted person cannot continue to benefit from the program pending resolution of the debarment process.<sup>22</sup> The suspended person or any interested party has 30 days to contest the suspension or proposed debarment, or seek to limit its scope.<sup>23</sup> After receipt of such a request, the Commission must provide the petitioner notice of the decision to debar,<sup>24</sup> prohibiting its participation in the E-Rate program, absent extraordinary circumstances.<sup>25</sup> Since the debarment rule became effective, there have been eight convictions of individuals and four corporations related to their participation in the E-Rate program.

---

<sup>15</sup> See *Third Report and Order*, 18 FCC Rcd at 26944-52, ¶¶ 78-85; *Fourth Report and Order*, 19 FCC Rcd at 15255-59, ¶¶ 10-22.

<sup>16</sup> See *Fifth Report and Order*, 19 FCC Rcd at 15830-32, ¶¶ 64-71. In appropriate cases, we may also initiate forfeiture proceedings against those responsible for misconduct pursuant to section 503(b) of the Act.

<sup>17</sup> *Universal Service Fund Oversight NPRM*.

<sup>18</sup> See 47 C.F.R. § 54.521; *Second Report and Order*, 18 FCC Rcd at 9227, ¶ 74. The rule defines a “person” as any individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however organized. 47 C.F.R. 54.521(a)(6).

<sup>19</sup> *Second Report and Order*, 18 FCC Rcd 9225, ¶ 66.

<sup>20</sup> *Second Report and Order*, 18 FCC Rcd 9227, ¶ 74.

<sup>21</sup> 47 C.F.R. § 54.521(c).

<sup>22</sup> 47 C.F.R. § 54.521(e)(1); *Second Report and Order*, 18 FCC Rcd 9226, ¶ 69.

<sup>23</sup> 47 C.F.R. §§ 54.521(e)(3), 54.521(e)(4).

<sup>24</sup> 47 C.F.R. § 54.521(e)(5).

<sup>25</sup> 47 C.F.R. § 54.521(g).

After each conviction following enactment of the rule, the Commission initiated debarment proceedings against the perpetrators. The Commission has debarred the eight individuals,<sup>26</sup> and the Commission today resolves the proceedings involving two of the four corporations.<sup>27</sup> The proceedings involving the other two corporations remain pending.<sup>28</sup>

#### A. NEC's Criminal Conviction

10. NEC is an equipment and internal connections provider that is a subsidiary of NEC Corp., a multi-billion dollar computer manufacturer. The NEC case arises out of a DOJ civil and criminal investigation into, among other things, the conduct of NEC in the E-Rate program from 1999 to 2001.<sup>29</sup> On May 27, 2004, NEC pled guilty to two crimes, an antitrust violation, involving bid rigging in the competitive process to win E-Rate contracts, and wire fraud, involving the submission of inflated invoices to the Administrator.<sup>30</sup> NEC was the first corporation convicted of crimes related to the E-Rate program since the enactment of the Commission's debarment rule.

11. The scheme originated in 1999 when NEC agreed to pay a co-conspirator a fee for all E-Rate business opportunities the company brought to NEC, and NEC agreed to use some of co-conspirator's equipment in its E-Rate proposals.<sup>31</sup> In early 2000, NEC submitted a bid to the San Francisco Unified School District. A co-conspirator ran the bidding and ensured that the contract for data

---

<sup>26</sup> Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to Oscar Alvarez, Connect2 Internet Network, Inc., DA 03-2706, Notice of Debarment, December 23, 2003 ("*Alvarez Debarment*"); Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to John Angelides, Connect2 Internet Network, Inc., DA 03-4088, Notice of Debarment, December 23, 2003 ("*Angelides Debarment*"); Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to Duane Maynard, Howe Electric, Inc., DA 03-4089, Notice of Debarment, December 23, 2003 ("*Maynard Debarment*"); Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to John Dotson, DA 04-3828, Notice of Debarment, December 6, 2004 ("*Dotson Debarment*"); Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to John Henry Weaver, DA 05-1727, Notice of Debarment, June 23, 2005 ("*Weaver Debarment*"); Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Haider Bokhari, DA 05-1730, Notice Debarment, June 23, 2005 ("*H. Bokhari Debarment*"); Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Qasim Bokhari, DA 05-1728, Notice of Debarment, June 23, 2005 ("*Q. Bokhari Debarment*"); Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Ronald R. Morrett, DA 05-2349, Notice of Debarment, August 30, 2005 ("*Morrett Debarment*").

<sup>27</sup> One of the debarment proceedings involves NEC, and the other involves Inter-Tel. See *supra* note 1.

<sup>28</sup> Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Tom Tsao, Vice President, Premio Inc., DA 06-489, Notice of Suspension and Initiation of Debarment Proceedings, February 28, 2006 ("*Premio Suspension Notice*"); Letter from Kris A Monteith, Chief, Enforcement Bureau, to Robert J. Buhay, Chief Financial Officer, NextiraOne, LLC, DA 06-951, Notice of Suspension and Initiation of Debarment Proceedings, April 28, 2006 ("*NextiraOne Suspension Notice*").

<sup>29</sup> *U.S. v. NEC-Business Network Solutions, Inc.*, Docket No. 3:04cr00184CRB, Plea Agreement (N.D. Cal. filed May 27, 2004 and entered Jun. 3, 2004) ("*NEC Plea Agreement*"); See *United States v. NEC-Business Network Solutions, Inc.*, No. CR 04-0184, Information (N.D. Cal. filed May 24, 2004); *U.S. ex rel. San Francisco Unified School District v. Nippon Electric Co. Business Network Solutions, et. al.*, Docket No. C 02-2398CRB, Civil Settlement Agreement, 1 (dated May 27, 2004) ("*NEC Civil Settlement Agreement*"); *NEC Plea Agreement* at 3.

<sup>30</sup> *NEC Plea Agreement* at 4-7, 18 U.S.C. § 1343, 15 U.S.C. § 1. See also *U.S. v. NEC-Business Network Solutions, Inc.*, Docket No. 3:04cr00184CRB, Judgment (N.D. Cal. filed Jun. 1, 2004 and entered Jun. 3, 2004) ("*NEC Judgment*").

<sup>31</sup> *NEC Plea Agreement* at 4.

equipment was awarded to NEC, and made NEC the prime contractor.<sup>32</sup> Thereafter, a co-conspirator submitted inflated invoices to the Administrator, which NEC learned about but took no steps to correct. Overall, the prices submitted for the San Francisco Unified Public School District were approximately \$26 million greater than the amounts that the vendors bid, and falsely described some of the equipment to conceal that it was not E-Rate eligible.

12. Later in 2000, NEC also advised the San Francisco Unified School District that it would “donate” to the school district computer workstations valued at about \$7.4 million and later \$10.3 million. NEC in fact planned to use E-Rate funds to offset the expense of the donation.<sup>33</sup> During about the same period, NEC also participated in a similar criminal conspiracy to frustrate the competitive bidding process required by E-Rate program rules in five other school districts in four states.<sup>34</sup>

13. These criminal schemes resulted in the Administrator paying E-Rate funds to service providers that were not selected through the competitive bidding process, for equipment that was not eligible for E-Rate funding, and at prices that exceeded the original bid amounts of the services and equipment.<sup>35</sup> After an investigation, DOJ entered into a civil settlement with NEC on May 27, 2004, and NEC pled guilty to two felony offenses,<sup>36</sup> one involving conspiracy to suppress and eliminate competition in violation of the Sherman Antitrust Act and the other involving wire fraud.<sup>37</sup> For its conduct, NEC agreed to pay \$4.7 million in criminal fines and to provide nearly \$16 million in restitution and damages, including \$10.3 million in cash and nearly \$5.7 million in in-kind products and services.<sup>38</sup> As restitution, the Commission and the USF received approximately \$2 million in cash and USF beneficiaries received all the in-kind products and services to which they were entitled. NEC also agreed to implement a compliance plan and remedial measures, and to cooperate with DOJ.<sup>39</sup>

## **B. Procedural History**

14. On the same day it pled guilty, NEC filed a petition for waiver of section 54.521 of the Commission’s rules, governing debarment proceedings.<sup>40</sup> In addition, NEC requested that the Commission toll the suspension of NEC while its petition was pending.<sup>41</sup> NEC submitted a supplemental filing on June 30, 2004, to provide additional information and argument for its waiver petition.<sup>42</sup> Among

---

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *NEC Plea Agreement* at 6.

<sup>34</sup> *NEC Plea Agreement* at 7, Exhibit C.

<sup>35</sup> *NEC Plea Agreement* at 4-7.

<sup>36</sup> On May 27, 2004, the Court approved the plea agreement and imposed sentence on NEC, which was entered on June 3, 2004. See *U.S. v. NEC-Business Network Solutions, Inc.*, Docket No. 3:04cr00184CRB, Criminal Docket (N.D.Cal. 2004); *NEC Plea Agreement* at 2; *NEC Judgment* at 1.

<sup>37</sup> 15 U.S.C. § 1, 18 U.S.C. § 1343.

<sup>38</sup> *NEC Plea Agreement* at 11.

<sup>39</sup> See *NEC Plea Agreement* at 11-13 and Exhibit A, Special Conditions of Probation; *NEC Civil Settlement Agreement*.

<sup>40</sup> See *NEC-Business Network Solutions, Inc.*, Petition for Waiver of Section 54.521 of the Commission’s Rules, EB File No. 03-IH-0738 (filed May 27, 2004) (“*NEC Waiver Petition*”).

<sup>41</sup> See *NEC Waiver Petition* at 1.

<sup>42</sup> *NEC-Business Network Solutions, Inc. Petition for Waiver of Section 54.521 of the Commission’s Rules*, Supplement to Petition for Waiver, filed June 30, 2004 (“*NEC June 30<sup>th</sup> Supplemental Filing*”).

other things, NEC argues that it has not participated in the E-Rate program since at least November 2002.<sup>43</sup> The Commission's Enforcement Bureau sought comment on the NEC waiver request.<sup>44</sup>

15. SECA and the Chairman and Ranking Member of the United States House of Representatives Committee on Energy and Commerce ("House Commerce Committee Leadership") each filed comments opposing the petition and supporting debarment.<sup>45</sup> SECA states that the "practices that lead to the initial Grand Jury investigation involved millions of dollars and were not limited by geographic location or single funding year."<sup>46</sup> As a result, SECA argues that NEC should be debarred in accordance with the debarment rule to send a clear message to those who do not adhere to the rules of this program.<sup>47</sup> SECA notes that NEC's "claim that some 'very bad judgment calls' were made by a 'few of its employees' is misleading. The practices that led to the initial Grand Jury investigation involved millions of dollars and were not limited by geographic location and they were not limited to a single funding year." Further, SECA takes issue with NEC's claim that the activities centered around a small number of employees and did not impact the majority of the staff or its primary business. SECA points out that "the checks written by school districts and by USAC in response to [NEC] invoices were all made out to [NEC], the corporation. The [NEC] corporation profited by the actions of those few employees."<sup>48</sup>

16. The House Commerce Committee Leadership similarly emphasizes that NEC's conduct was "egregious," and expresses concern that high-ranking NEC employees declined an initial request to provide testimony during Congressional oversight hearings.<sup>49</sup> The House Commerce Committee Leadership also indicates that it has found no evidence that any NEC officials attempted to expose the company's criminal conduct before law enforcement began its investigation and that debarment would not harm the beneficiaries of E-Rate program, it would only harm NEC.<sup>50</sup>

17. DOJ also commented on NEC's petition.<sup>51</sup> While DOJ states that it "does not make specific recommendations against debarment," it strongly emphasizes that NEC cooperated throughout its

---

<sup>43</sup> *NEC Waiver Petition* at 3, 5, 16-17; *NEC June 30<sup>th</sup> Supplemental Filing* at 3.

<sup>44</sup> Public Notice, "Enforcement Bureau, Investigations and Hearings Division, Seeks Comment on NEC Petition for Waiver of Section 54.521 of the Commission's Rules," DA 04-2034 (Enf. Bur., rel. July 7, 2004) ("*July 7<sup>th</sup> Public Notice*").

<sup>45</sup> See SECA Comments to *NEC-Business Network Solutions, Inc. Petition for Waiver of Section 54.521 of the Commission's Rules*, filed July 19, 2004 ("SECA Comments"); Letter from Hon. Joe Barton, Chairman, and Hon. John D. Dingell, Ranking Member, Committee on Energy and Commerce, U.S. House of Representatives, to Hon. Michael K. Powell, Chairman, Federal Communications Commission, filed July 29, 2004 ("House Commerce Committee Leadership Comments"). NEC filed responses. See Reply Comments of NEC, filed on July 29, 2004 ("*NEC Reply Comments*"); Letter from James A. Stenger, Thelen Reid & Priest LLP, Counsel for NEC, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 5, 2004) ("*NEC August 5<sup>th</sup> Letter*").

<sup>46</sup> SECA Comments at 2.

<sup>47</sup> SECA Comments at 1, 2.

<sup>48</sup> SECA Comments at 2.

<sup>49</sup> House Commerce Committee Leadership Comments at 3. The hearing was held on July 22, 2004. See <http://energycommerce.house.gov/108/Hearings/07222004hearing1343/hearing.htm#Related>. Congress held other hearings on E-Rate matters as well. See <http://energycommerce.house.gov/108/Hearings/06172004hearing1291/hearing.htm> ("June 17, 2004 E-Rate Hearing"); <http://energycommerce.house.gov/108/Hearings/09222004hearing1358/hearing.htm> ("September 22, 2004 E-Rate Hearing").

<sup>50</sup> House Commerce Committee Leadership Comments at 3.

<sup>51</sup> See Letter from Scott M. Watson, Chief, Antitrust Division, U.S. Department of Justice, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 22, 2004) ("*DOJ June 22<sup>nd</sup> Letter*"); Letter from James M.

investigation, permitting detection of other conspirators. DOJ also notes that NEC was the “first company to come forward and cooperate in a conspiracy investigation” involving the E-Rate program and that, as such, debarment of NEC could negatively impact the investigations of other conspiracies affecting the E-Rate program.<sup>52</sup> DOJ’s comments in support of NEC are extensive and merit substantial consideration, given DOJ’s role in investigating and prosecuting corporate conspiracies and fraud. These comments are discussed in detail below.

### III. DISCUSSION

18. In general, the Commission’s debarment rule states that upon criminal conviction of certain offenses arising out of activities associated with or related to the E-Rate program, the Commission shall suspend and debar the convicted person from the E-Rate program absent extraordinary circumstances.<sup>53</sup> The rules state that the time period for debarment is three years, although the rules contemplate that the Commission might modify the period in particular circumstances; the Commission might lengthen the period if necessary to protect the public interest,<sup>54</sup> and it might reverse or limit the scope or period of debarment “upon a finding of extraordinary circumstances.”<sup>55</sup> In implementing the debarment rule, the Commission stated that, in light of the statutory obligation to preserve and advance universal service, the Commission would set a very high threshold for parties claiming that their debarment was not warranted in circumstances in which a court of competent jurisdiction has concluded that the person has committed some form of fraud related to the E-Rate program.<sup>56</sup> The *Second Report and Order* offers only one example of such “extraordinary circumstances” -- reversal of the conviction or judgment upon which the debarment was based.<sup>57</sup>

19. Those who seek to avoid debarment by requesting waiver of the rule must meet a similarly high burden. Section 1.3 of the Commission’s rules governs petitions for waiver generally, and provides that a waiver may be granted upon “good cause shown.”<sup>58</sup> Because Commission rules are presumed valid, the petitioner bears a heavy burden.<sup>59</sup> The Commission may exercise its discretion to waive a rule “only if special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest.”<sup>60</sup> We find that the requisite special circumstances are not present here. For the reasons explained below, however, we limit NEC’s debarment period to six months. We find, based on the unique circumstances of this case, imposing a six-month debarment period, with additional precautionary measures, is in the public interest.

#### A. Debarment Decision

20. We debar NEC because it has been convicted of fraud-related offenses involving its participation in the E-Rate program, and there are no extraordinary circumstances sufficient to justify

---

Griffin, Deputy Assistant Attorney General, to Marlene H. Dortch, Secretary, Federal Communications Commission (August 5, 2004) (“*DOJ August 5<sup>th</sup> Letter*”).

<sup>52</sup> *DOJ August 5<sup>th</sup> Letter* at 2.

<sup>53</sup> 47 C.F.R. § 54.521(b). See *Infra*, ¶ 32 for discussion on NEC’s request to toll the suspension procedures.

<sup>54</sup> 47 C.F.R. 54.521(g).

<sup>55</sup> 47 C.F.R. § 54.521(f).

<sup>56</sup> *Second Report and Order*, 18 FCC Rcd at 9225, ¶ 64.

<sup>57</sup> 47 C.F.R. § 54.521(f).

<sup>58</sup> 47 C.F.R. § 1.3.

<sup>59</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (“*WAIT Radio*”). See also *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 669 (D.C. Cir. 1987).

<sup>60</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).



avoidance or waiver of debarment. NEC pled guilty to and was convicted of two counts of criminal misconduct arising out of its conduct in the E-Rate program from 1999 to 2001. Specifically, NEC was convicted of an antitrust violation, involving bid rigging in the competitive process to win E-Rate contracts, and wire fraud, involving the submission of inflated invoices to the Administrator.<sup>61</sup> These offenses are clearly listed as “causes for suspension and debarment” in section 54.521(c) of our rules.<sup>62</sup> Pursuant to section 54.521(b) of our rules, the Commission “shall . . . debar” a company convicted of a crime involving fraud in the E-Rate program, absent extraordinary circumstances.<sup>63</sup> Thus we debar NEC.

21. In support of its waiver request, NEC asks the Commission to consider certain “mitigating factors.” Specifically, NEC states that upon learning in the fall of 2002 of the grand jury investigation into its illegal conduct, the company froze all its E-Rate activities, including activities not implicated by the DOJ investigation, effectively debarring itself from the E-Rate program.<sup>64</sup> NEC also argues that it fully cooperated with DOJ, severed its relationship with a co-conspirator, made full restitution, is committed to a compliance program via its plea agreement going-forward, and that the conduct at issue involved only a small number of employees who have left the company or been reassigned.<sup>65</sup> Finally, NEC argues that waiving the debarment rule would serve the public interest by maximizing the number of vendors participating in the program.<sup>66</sup>

22. We find that NEC has not satisfied the high standards set by our rules regarding avoidance of debarment and waiver. We reject the petitioner’s arguments that the steps NEC took once it was in the investigative spotlight are sufficient to warrant complete avoidance of debarment or cause us to waive our rule. As noted above, an example of extraordinary circumstances is reversal of conviction,<sup>67</sup> not remedial measures or cooperating with law enforcement after a grand jury has been convened. As SECA properly stated, “the fact remains that [NEC] pled guilty to fraud and antitrust violations.”<sup>68</sup> Strict application of the debarment rule to remove bad actors from the program for a period of time is necessary to protect the integrity of the E-Rate program.<sup>69</sup> Accordingly, we conclude that NEC must be debarred to protect the integrity of the E-Rate program against the possibility of additional waste, fraud, and abuse.

23. We recognize, however, the existence of several important countervailing considerations that warrant a reduction in the standard debarment period. First, DOJ submitted not one but two letters documenting the NEC’s cooperation in the advancing DOJ’s law enforcement efforts.

24. DOJ provided the first letter to satisfy its obligation in its plea agreement with NEC to make administrative agencies considering action against NEC, such as the Commission, aware of the company’s cooperation.<sup>70</sup> This letter states that NEC has “provided full and complete cooperation with our investigation” for over two years by “the supply of information and documents, the encouragement of current or former employees to cooperate, and assistance in making interviews productive and

---

<sup>61</sup> *NEC Plea Agreement*.

<sup>62</sup> 47 C.F.R. § 54.521(c).

<sup>63</sup> 47 C.F.R. § 54.521(b).

<sup>64</sup> *NEC Waiver Petition* at 3, 5, 16-17; *NEC June 30<sup>th</sup> Supplemental Filing* at 3.

<sup>65</sup> *See NEC Waiver Petition*.

<sup>66</sup> *See NEC Waiver Petition* at 18; *NEC June 30<sup>th</sup> Supplemental Filing* at 6.

<sup>67</sup> 47 C.F.R. 54.521(f).

<sup>68</sup> SECA Comments at 2.

<sup>69</sup> *See Second Report and Order*, 18 FCC Rcd at 9225, ¶ 66.

<sup>70</sup> *DOJ June 22<sup>nd</sup> Letter* at 1; *NEC Plea Agreement* at 14, ¶ 19.

accurate.”<sup>71</sup> Based on this cooperation, DOJ states that it has been able “to identify and focus our investigative efforts on other culpable corporations and individuals,” and that it has been “successful in pursuing leads across the country, including in school districts we only learned about because of [NEC’s] cooperation.”<sup>72</sup> As a result, DOJ considers “the nature, speed, and extent of [NEC’s] cooperation to have been very helpful in developing our investigation to date.”<sup>73</sup>

25. DOJ’s second letter was provided not as part of its obligation under the plea agreement, but instead “responds to the FCC’s invitation for comment on NEC’s petition,”<sup>74</sup> and went beyond merely reciting aspects of NEC’s cooperation. This letter explains the importance of NEC’s cooperation as the *first* company to break ranks within its conspiracy. DOJ states that antitrust crimes are “always conspiratorial” and “inherently difficult to prove” absent the cooperation of one or more of the conspirators, and an “early cooperator” in particular often provides evidence that allows DOJ “to pursue cases against numerous corporations and individuals who otherwise may have escaped detection and prosecution.”<sup>75</sup> As a result, “the [Antitrust] Division’s enforcement program provides great incentives to induce companies to be the first to turn on their co-conspirators and cooperate with investigations.”<sup>76</sup> With respect to investigations involving the E-Rate program in particular, DOJ states that “a decision to debar the first company to come forward and cooperate in a conspiracy investigation could very well harm the investigation of other conspiracies affecting the E-Rate program that are being conducted around the country. . . .”<sup>77</sup> Regarding NEC specifically, DOJ states that “NEC management greatly assisted investigators in uncovering conspiratorial misconduct that might never have been successfully detected and prosecuted absent NEC’s cooperation,” and “[i]t is precisely this type of timely, proactive, and valuable cooperation by a company that we believe the Commission should weigh heavily” in its debarment decision.<sup>78</sup>

26. In addition to DOJ’s strong support for NEC, there are other considerations justifying a reduction in the standard debarment period. NEC has taken substantial steps to compensate the victims of its crimes, and to prevent similar foul play in the future. NEC has also accepted responsibility for its past wrongdoing through payment of over \$20 million in fines, restitution, and damages. Further, NEC has implemented a comprehensive compliance program that involves high-level management monitoring, employee training, and auditing of government procurement contracts.<sup>79</sup> Finally, we also recognize that NEC has not participated in the E-Rate program for approximately three years already.

27. Under these circumstances, where DOJ has raised significant concerns about the impact of debarment on on-going criminal investigations, where the company has fully remedied its wrongdoing and made programmatic changes to prevent future misconduct with respect to the E-Rate program, and where the company has not participated in the E-Rate program for a substantial period of time, we limit

---

<sup>71</sup> DOJ June 22<sup>nd</sup> Letter at 1.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> DOJ August 5<sup>th</sup> Letter at 1.

<sup>75</sup> DOJ August 5<sup>th</sup> Letter at 2.

<sup>76</sup> DOJ August 5<sup>th</sup> Letter at 2.

<sup>77</sup> DOJ August 5<sup>th</sup> Letter at 2.

<sup>78</sup> DOJ August 5<sup>th</sup> Letter at 1-2.

<sup>79</sup> NEC Unified Solutions, Inc. Compliance Report to the FCC Enforcement Bureau and FCC Office of the Inspector General, dated April 29, 2005; NEC Unified Solutions, Inc. Compliance Report to the FCC Enforcement Bureau and Office of the Inspector General, dated July 27, 2004; *NEC Reply Comments* at 3; *NEC Waiver Petition* at 13-16. DOJ June 22<sup>nd</sup> Letter at 2.

NEC's debarment period to a period of six months. We find that the six-month debarment period, based on the unique facts and circumstances in this case, is in the public interest.

### **B. Additional Precautionary Measures**

28. As an additional precaution to protect the E-Rate program, we put in place two monitoring measures to ensure NEC's compliance upon its re-entry into the E-Rate program. First, we order USAC to review with heightened scrutiny NEC's applications submitted during the first two funding years after re-entry.<sup>80</sup> Second, we order the Administrator to conduct automatic annual audits regarding NEC's compliance with the Act and the Commission's rules governing the E-Rate program, for each of the first two funding periods upon NEC's re-entry. We find these additional precautionary measures are necessary to ensure that E-Rate funds are used only for their intended purpose and that the program is not subject to additional waste, fraud, or abuse.

### **C. Other Issues**

29. We reject NEC's argument that no debarment should be imposed because it would render meaningless certain compliance program provisions of its settlement with DOJ. NEC expressly acknowledged in its settlement with DOJ that the Special Conditions of Probation did not preclude the Commission from exercising its debarment authority.<sup>81</sup> Further, the Special Conditions of Probation apply even beyond the E-Rate program. Thus, we conclude that debarment will not interfere with the purpose and intent of the Special Conditions of Probation.<sup>82</sup>

30. NEC also argues that the "civil component of the \$20.6 million reimbursement agreed to by [NEC], which amounts to goods and services in the E-Rate program valued at \$5.6 million, would be mooted by debarring [NEC] from future participation in the E-Rate program."<sup>83</sup> We disagree. NEC's provision of such goods and services does not involve, directly or indirectly, receiving funds from, or interactions with, the E-Rate program, and is required as restitution under the plea agreement. Therefore, we conclude that debarment has no effect on NEC's provision of such goods and services, and we expect NEC to continue to provide these goods and services during the compliance period required under the Special Conditions of Probation.<sup>84</sup>

31. We also reject NEC's argument that any debarment here would constitute retroactive application of a penalty for conduct that preceded the adoption of the rule, noting that the debarment rule became effective in 2003, while NEC was convicted for its conduct during the period 1999 through 2001.<sup>85</sup> Section 54.521 clearly states that the triggering events for suspension and debarment are a

---

<sup>80</sup> See *Fifth Report and Order*, 19 FCC Rcd at 15822-23, ¶ 44. We note that the Commission currently is considering what particular requirements, if any, that it should apply in conducting heightened review of E-Rate program participants. See *Universal Service Fund Oversight NPRM*, 20 FCC Rcd at 11345, ¶ 91.

<sup>81</sup> *NEC Civil Settlement Agreement* at 8.

<sup>82</sup> We also reject NEC's contention that the Compliance Program it agreed to as part of the Special Conditions of Probation is sufficient to protect the program against additional waste, fraud and abuse. As noted above, debarment is the only way to ensure the absence of additional waste, fraud and abuse.

<sup>83</sup> See *NEC Reply Comments* at 3, n.11.

<sup>84</sup> We similarly reject NEC's argument that debarment is inequitable because its Settlement Agreement was "entered into by the United States of America, acting through the United States Department of Justice and on behalf of the Federal Communications Commission (FCC), including its agent the Universal Service Administrative Company (USAC) (collectively, the United States)." *NEC Civil Settlement Agreement* at 1. As noted above, Paragraph 6 of the Settlement Agreement specifically states that debarment actions are not precluded by the terms of the Settlement Agreement. *Id.* at 6, 8.

<sup>85</sup> See *NEC June 30<sup>th</sup> Supplemental Filing* at 9-11, citing *Bowen v. Georgetown University Hospital*, 109 S.Ct. 468 (1988).

conviction or civil judgment and knowledge by the Commission. Commission of the wrongful acts underlying a criminal conviction or civil judgment is not the trigger for debarment.<sup>86</sup> Therefore, as applied to NEC, its May 27, 2004 conviction (which took place after the effective date of the rules) is the relevant cause for its debarment rather than the conduct underlying that conviction.

32. NEC requests that the Commission toll the suspension procedures contained in section 54.421(e)(1)-(e)(4) of our rules pending resolution of its waiver petition.<sup>87</sup> The purpose of those procedures is to protect the integrity of the E-Rate program by excluding bad actors from participation during the time required for the Commission to provide such entities with notice of the reasons for debarment and an opportunity for them, and any party contracting with them, to contest the debarment or the scope of debarment.<sup>88</sup> We find that these proceedings regarding NEC's petition for waiver have achieved those purposes and satisfied the suspension procedure requirements. NEC and any party contracting with NEC received notice and opportunity to contest any potential debarment, or the scope thereof, when the waiver petition was released for public comment on July 7, 2004.<sup>89</sup> NEC has availed itself of that opportunity, filing four substantive pleadings on the issue, all of which are considered herein. Because NEC requested a stay of the suspension in order that it be heard and because NEC and other interested parties have in fact received notice and have been heard, we find that the suspension procedures have been satisfied and we reject NEC's request that those procedures be tolled, to the extent that such request is not moot, by adoption of this decision.

33. We find that this debarment action is effective as to NEC-Business Network Solutions, Inc., including any and all of its successors and assigns.<sup>90</sup> NEC suggests debarment should be limited to NEC-Business Network Solutions, Inc., and not its successors and assigns.<sup>91</sup> We conclude, however, that the debarment must apply to the company's successors and assigns to protect the integrity of the E-Rate program and to ensure that debarment has its intended effect.

#### IV. CONCLUSION

34. Based on the foregoing and to protect the public interest, including the investments made by American consumers to benefit this nation's deserving school children, NEC-Business Network Solutions, Inc., including its successors and assigns, is hereby debarred from the E-Rate program for six months, effective upon the earlier of receipt of this Notice or its publication in the Federal Register.<sup>92</sup> During the period in which NEC will serve its debarment, NEC, including its successors and assigns, is prohibited from all activities "associated with or related to the schools and libraries support mechanism," including "the receipt of funds or discounted services through the schools and libraries support mechanism, or consulting with, assisting, or advising applicants or service providers regarding the schools and libraries support mechanism."<sup>93</sup> We will continue to take appropriate actions in future cases as warranted by the particular circumstances to protect the integrity of the program.

---

<sup>86</sup> See 47 C.F.R. § 54.521(c), (e).

<sup>87</sup> 47 C.F.R. § 54.521(e)(1) – (e)(4).

<sup>88</sup> 47 C.F.R. § 54.521(e).

<sup>89</sup> See 47 C.F.R. § 54.521(e)(4); *July 7<sup>th</sup> Public Notice*.

<sup>90</sup> We note, and NEC acknowledges in its pleadings, that the terms of its plea agreement with DOJ subject any NEC successor organization to the Special Conditions of Probation. See *NEC Waiver Petition* at 8; *NEC Plea Agreement*, Exhibit A, Special Conditions of Probation, ¶ 19.

<sup>91</sup> *NEC June 30<sup>th</sup> Supplemental Filing* at 7-9.

<sup>92</sup> See 47 C.F.R. § 54.521(e)(5).

<sup>93</sup> See 47 C.F.R. §§ 54.521(a)(1), 54.521(a)(5), 54.521(d).

**V. ORDERING CLAUSES**

35. Accordingly, IT IS ORDERED, pursuant to section 54.521 of the Commission's rules, 47 C.F.R. § 54.521, that NEC-Business Network Solutions, Inc., including its successors and assigns, IS DEBARRED from the schools and libraries universal service support mechanism for six months, effective upon the earlier of receipt of this Notice of Debarment or publication in the Federal Register.

36. IT IS FURTHER ORDERED that the Universal Service Administrative Company shall review with heightened scrutiny NEC's applications submitted during the first two funding years upon its re-entry into the E-Rate program.

37. IT IS FURTHER ORDERED that the Universal Service Administrative Company shall conduct automatic annual audits on NEC's E-Rate activities during the first two funding years upon its re-entry into the E-Rate program.

38. IT IS FURTHER ORDERED, pursuant to sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 and 154(i), and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the *Petition for Waiver of Section 54.521 of the Commission's Rules*, filed by NEC-Business Network Solutions, Inc., on May 27, 2004, IS DENIED, as described herein.

39. IT IS FURTHER ORDERED that the Enforcement Bureau staff shall send, by certified mail/return receipt requested, a copy of this Notice of Debarment and Order Denying Waiver Petition on the release date to Richard Rubin, Thelen Reid & Priest LLP, Counsel to NEC-Business Network Solutions, Inc., 701 Pennsylvania Avenue, N.W., Suite 800, Washington, DC 23004-2608.

40. IT IS FURTHER ORDERED that the Enforcement Bureau staff shall send, via email, a copy of this Notice on the release date to Richard Rubin, [rrubin@thelenreid.com](mailto:rrubin@thelenreid.com), and James A. Stenger, [jstenger@thelenreid.com](mailto:jstenger@thelenreid.com), Counsel to NEC-Business Network Solutions, Inc.

41. IT IS FURTHER ORDERED, pursuant to section 54.521 of the Commission's rules, 47 C.F.R. § 54.521, that this Notice SHALL BE PUBLISHED in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *In the Matter of NEC-Business Network Solutions, Inc.*, File No. EB-03-IH-0738

No program may be doing more to close the digital divide for rural Americans and the economically disadvantaged than the E-Rate program. Indeed, there are many hard-working people in the Schools and Libraries Division, at the FCC and Justice Department, and elsewhere, who are to be commended for successfully bringing the Internet to our schools and libraries and for ensuring that waste, fraud and abuse are ferreted out. NEC-Business Network Solutions, Inc.'s (NEC) convictions and its six month debarment from the program is evidence of the joint effort underway to eliminate any wrongdoing from the E-Rate program. I therefore concur in today's Order.

However, as a general matter, I believe that a six month debarment period is often times little more than a slap on the wrist for companies engaged in efforts to defraud the E-Rate program of millions of dollars and, in the end, our children of the tools they need in the Digital Age. There were mitigating circumstances in this case, and the companion case of Inter-Tel Technologies, Inc., that support a shorter debarment period. However, a stronger penalty may have been warranted given the importance of the E-Rate program and the severity of NEC's actions.

**SEPARATE STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN  
CONCURRING**

*Re: NEC-Business Network Solutions, Inc., Notice of Debarment and Order Denying Waiver Petition, File No. EB-03-IH-0738, FCC 06-91 (June 21, 2006).*

Since its inception, the universal service support mechanism for schools and libraries (commonly referred to as the E-rate program) has opened up a new world of learning and opportunity for millions of school children and library patrons. To ensure the continued success of the E-Rate program, we must remain committed to monitoring, auditing, reviewing and reinforcing the program. A critical part of our Commission oversight is the use of debarment, which prohibits bad actors from participating in the program. Accordingly, I support our decision in this Order to debar NEC from all involvement in the E-Rate program, our first such action against a corporate defendant.

I concur in, rather than approve, this Order because I would have supported a longer debarment period. The Commission's rules provide for a debarment period of three years, which may be extended to protect the public interest or reduced upon a finding of extraordinary circumstances. I note that the Department of Justice has encouraged the Commission to exercise our debarment policy in a way that encourages early and complete cooperation from defendants, and I recognize that the Commission may take into account payment of fines and restitution, the length of time that a provider has not participated, and most importantly a high degree of cooperation with law enforcement. Even weighing these factors, the six-month debarment period adopted in this Order falls short, given the scope and seriousness of the fraud-related activities in this case. Strong enforcement encourages compliance, and penalties should be substantial enough to constitute more than just a cost of doing business. In this case, a longer debarment period would have sent a stronger and clearer message that fraud will not be tolerated.