

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

In the Matter of)	
)	
Request for Review of the Decision of the)	
Universal Service Administrative Company)	
by)	
)	
Nassau County Board of)	File No. SLD-139083
Cooperative Educational Services)	
Westbury, New York)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

ORDER

Adopted: December 5, 2002

Released: December 6, 2002

By the Wireline Competition Bureau:

1. The Wireline Competition Bureau (Bureau) has under consideration a Request for Review filed by the Nassau County Board of Cooperative Educational Services (Nassau County), Westbury, New York, on April 3, 2000, seeking review of a funding decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company.¹ Specifically, SLD denied funding for the one-time capital costs of a telecommunications service where those costs were incurred prior to the start of the funding year because it concluded that such costs should be deemed to be delivered in the year in which they actually occur. We find that, in limited situations, the infrastructure costs incurred by a telecommunications provider in preparation for the commencement of telecommunications service should be deemed to be recoverable beginning in the year in which the telecommunications service commences. We therefore reverse the decision of SLD, and remand this application for further review.

I. BACKGROUND

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for

¹ Request for Review from Winston E. Himsworth, Nassau County BOCES, to Federal Communications Commission, filed April 3, 2000 (Request for Review).

discounts for eligible telecommunications services, Internet access, and internal connections.² Applicants request support for eligible services by submitting to SLD an FCC Form 471.³ SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules. The schools and libraries universal service mechanism provides support to applicants only for eligible services that are received during the applicable funding year.⁴

3. Nassau County filed an application for discounted telecommunications services for Funding Year 1999,⁵ which ran from July 1, 1999, to June 30, 2000.⁶ The services requested carried a monthly prediscount cost of \$7,243.75, as well as a one-time prediscount cost of \$159,626.⁷ Nassau County's application included a March 31, 1999 letter from its service provider indicating that, with respect to the contract for services for which Nassau County requested support, the one-time "initiation fee" would be payable after "the completion of construction on or about July 1, 1999."⁸ The letter referred to the construction of facilities by the service provider to create an entry point for providing the recurring services to the school.⁹ The letter also explained that the recurring monthly charge would commence after July 1, 1999.¹⁰

² 47 C.F.R. §§ 54.502, 54.503.

³ 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1998) (FCC Form 471).

⁴ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9062, para. 544 (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); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, 13 FCC Rcd 14915, 14921, para. 9 (1998); 47 C.F.R. § 54.507(d), (e).

⁵ In prior years, this funding period was referred to as Funding Year 2. Funding periods are now described by the year in which the funding period starts. Thus the funding period that began on July 1, 1999 and ended on June 30, 2000, previously known as Funding Year 2, is now called Funding Year 1999. The funding period which began on July 1, 2000 and ends on June 30, 2001 is now known as Funding Year 2000, and so on.

⁶ FCC Form 471 from Nassau County Board of Cooperative Educational Services to Schools and Libraries Division, Universal Service Administrative Company, filed April 2, 1999 (Nassau County Form 471).

⁷ Nassau County Form 471.

⁸ Letter from Phil DeCabia, Lightpath, to Board of Cooperative Educational Service of Nassau County, dated March 31, 1999 (Lightpath Letter).

⁹ Lightpath Letter.

¹⁰ Lightpath letter.

4. By letter dated November 2, 1999, SLD granted support to Nassau County with respect only to the recurring monthly costs included in Nassau County's request for discounted telecommunications services, while denying support for one-time costs associated with the installation of provider-owned equipment.¹¹ The SLD's Funding Commitment Decision Letter stated that "[t]he estimated one time and/or monthly charge was changed to reflect the documentation provided by [Nassau County]."¹² On November 23, 1999, Nassau County filed a Letter of Appeal with SLD, requesting review of its funding decision, attaching a copy of an invoice from its service provider showing a July 1, 1999, installation date for the services requested.¹³ SLD issued an Administrator's Decision on Appeal on March 28, 2000, denying Nassau County's appeal, stating that the documentation provided by Nassau County indicated that the installation associated with the one-time charge was to be completed "on or about July 1, 1999."¹⁴ SLD concluded that "[s]ince the funding year does not begin until July 1, 1999, the services requested are being delivered outside the current funding year" and, therefore, could not be supported under program rules.¹⁵

5. Nassau County filed the instant Request for Review on April 3, 2000.¹⁶ Nassau County urges the Commission to determine that it received the supported service at the time that construction of the facilities was completed. Nassau County contends that the construction of the facilities by its service provider resulted in the provision of a service to the school only upon establishment of a connection between the schools and the service provider.¹⁷ Nassau County argues that because, unlike internal connections, telecommunications installations are owned by the service provider, the consumer receives no benefit until the facilities are completed, creating a connection for the provision of telecommunications services.¹⁸

II. DISCUSSION

6. In the *Tennessee Order*, the Commission established that a provider of Internet

¹¹ Funding Commitment Decision Letter from Schools and Libraries Division, Universal Service Administrative Company, to Bretton L. Himsworth, Nassau County BOCES, issued November 2, 1999 (Funding Commitment Decision Letter).

¹² Funding Commitment Decision Letter.

¹³ Letter from Winston E. Himsworth, Nassau County BOCES, to Schools and Libraries Division, Universal Service Administrative Company, filed November 23, 1999.

¹⁴ Administrator's Decision on Appeal from Schools and Libraries Division, Universal Service Administrative Company, to Bretton L. Himsworth, Nassau County BOCES, issued March 28, 2000 (Administrator's Decision on Appeal).

¹⁵ Administrator's Decision on Appeal.

¹⁶ Request for Review.

¹⁷ Request for Review at 2-3.

¹⁸ Request for Review at 2-3

access could recover the costs of equipment and infrastructure build-out associated with the delivery of the Internet access service.¹⁹ The Commission noted that, in the ordinary course of business, companies may recover some portion of their infrastructure costs by building such costs into the recurring charges for service provided over that infrastructure.²⁰ In the *Brooklyn Public Library Order*, the Commission affirmed that such new infrastructure costs were also recoverable by providers of telecommunications service.²¹ Specifically, the Commission found:

our rules and Commission precedent do not bar eligible schools and libraries from seeking universal service funding for costs for infrastructure investment associated with the provision of telecommunications services, provided that: (1) the specific services and uses of those services are eligible for universal service funding; and (2) the costs for service to be provided over shared-use infrastructure are properly allocated so that the fund only pays for the costs associated with providing services to the eligible schools or libraries.²²

However, the Commission also found that, when a telecommunications carrier sought to recover such capital installation costs of a “significant” amount, such as where the one-time charge vastly exceeded the monthly recurring charge, the carrier would be required to prorate the costs of new infrastructure over a service term of at least three years instead of seeking immediate recovery of the entire amount.²³

7. The issue presented here is whether installation costs may be recovered in the funding year that the telecommunications service commences even where the installation of service provider-owned equipment has actually occurred in the previous year. In resolving this issue, we must determine when infrastructure should be deemed “delivered” for funding year purposes. We conclude that SLD should have considered the commencement date of Nassau County’s telecommunications services as the relevant delivery date in determining whether the costs of the facilities at issue were recoverable in Funding Year 1999.

¹⁹ See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc. of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, Order, Application No. 18132, CC Docket Nos. 96-45, 97-21, 14 FCC Rcd 13734 (1999) (*Tennessee Order*) (citing 47 C.F.R. Parts 32, 36, 65, 69; also citing Charles F. Phillips Jr., *The Regulation of Public Utilities*).

²⁰ *Tennessee Order*, 14 FCC Rcd at 13749, para. 29.

²¹ *Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-149423, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd 18598 (2000) (*Brooklyn Public Library Order*).

²² *Id.*, 15 FCC Rcd at 18604, para. 12.

²³ *Id.*, 15 FCC Rcd at 18606-07, para. 20.

8. Under its previous decisions to allow recovery of a provider's equipment installation costs, the Commission did not treat equipment installations as a service separate from the ultimate telecommunications service to be provided over that equipment. Specifically, the *Brooklyn Public Library Order* affirmed that telecommunications installations are not independently eligible for support, but are dependent on the eligibility of the services that the installations make possible.²⁴ As that is the case, it is appropriate for SLD to look primarily to the recurring telecommunications services in determining when the costs of that service—including the costs of supporting equipment installation—are incurred by an applicant. Moreover, the mandate in the *Brooklyn Public Library Order* that, in some cases, installation costs must be prorated over at least three years, necessarily results in the attribution of the costs of infrastructure installation to funding years other than the year in which the infrastructure was actually installed. Thus, under this reasoning, for purposes of determining the delivery date of infrastructure, SLD should consider the infrastructure as part of the recurring telecommunications service for delivery purposes rather than the actual delivery date of the equipment.

9. Further, because the timing of a telecommunications facility's construction may not normally be within an applicant's sphere of control, it is not prudent to require that an applicant insist upon additional contractual terms granting it control over timing solely to ensure that its discounts under the universal service mechanism will not be jeopardized. A service provider may consider many factors in scheduling the construction of facilities, including the availability of resources such as equipment and personnel that may not be freely available at any time. Although an applicant may be able to exercise control over the timing of installation of facilities on its own property, it will not normally be in such a position with respect to telecommunications facilities, which may be partly or entirely installed elsewhere. Accordingly, an applicant trying to negotiate contractual terms controlling the timing of installation would do so at a relative disadvantage. As a result, an applicant might be forced to make other sacrifices, including higher negotiated prices or otherwise unfavorable conditions. Given that the construction of the facilities itself may not otherwise be a particular concern of the applicant, it is unreasonable to force the applicant to negotiate those terms into its contracts.

10. In addition to these contract-related problems, if applicants were always required to seek discounts on installation costs in the year of installation, it might make it impossible for them to obtain a full year of discounts on their recurring service in the year in which that service commences. To obtain discounts on installation, applicants would have to delay such installation until the beginning of the funding year, which would delay the actual commencement of service for the time required to complete installation. Applicants would thus lose the opportunity to obtain discounted recurring service for that part of the funding year necessary to complete installation. Allowing installation to be deemed delivered when the service commences, even where it actually occurs just prior to the start of the funding year resolves this difficulty. In keeping with the Commission's decisions, and for the foregoing reasons, we conclude that the infrastructure costs incurred by a telecommunications provider in preparation

²⁴ See *Brooklyn Public Library Order*, 15 FCC Rcd at 18604-05, paras. 12-16.

for the commencement of telecommunications service should be deemed to be delivered and recoverable beginning at the same time that the associated telecommunications service commences.²⁵ We emphasize that the infrastructure must have been installed in order to provide for the delivery of the telecommunications service in question. In this regard, it would be reasonable for SLD to determine whether the installation of equipment to provide telecommunications service was proximate in time (i.e. within several months) of the initiation of service.

11. This Order does not alter or amend the Commission's rules governing eligibility. Thus, an applicant may receive discounted services only for eligible services and only to the extent that those services are consumed by an eligible entity. An applicant may not receive discounts for the construction of telecommunications facilities that will be used to provide ineligible services. An applicant must also segregate out the costs associated with the provision of services to ineligible entities. If the new facilities will serve other customers in addition to the eligible entity named on the Form 471, the applicant cannot request a discount of the entire cost of constructing the facilities. Also, the competitive bidding rules remain applicable to both the recurring services and any facilities constructed to provide those services. Thus, a competitive bidding process cannot be used to support the recovery of equipment contracted for or installed prior to end of the bidding process.²⁶ No discount will be approved for contracts and installations made prior to the close of the 28-day waiting period. Applicants and providers that agree to installation of equipment prior to the issuance of a funding decision, assume the risk that SLD may deny the funding request for that installation for reasons unrelated to timing, e.g., if the equipment is found to be an ineligible service.

12. We therefore reverse SLD's decision and remand for further review of the funding request consistent with this decision. In so doing, we do not intimate that Nassau County will receive the funding it has requested.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 54.719 and 54.722 of the Commission's rules, 47 C.F.R. §§ 54.719 and 54.722, that the request for

²⁵ Under similar reasoning, infrastructure costs incurred by a provider of a new Internet access service in preparation for the commencement of that service would be deemed delivered and recoverable beginning at the same time that the Internet service commences. In contrast, the cost of infrastructure that is properly classified as costs for internal connections or an ineligible wide-area-network under the *Tennessee Order* cannot be recovered as part of the cost of telecommunications or Internet access service. See *Tennessee Order*, 14 FCC Rcd at 13747, 13750, 13753-54, paras. 25, 30-31, 37-39. Internal connections and wide-area network components involve the infrastructure of a school or library, not that of a telecommunications or Internet access service provider. *Id.* Therefore, the costs for such infrastructure cannot be recovered as part of a telecommunications or Internet access service.

²⁶ We also distinguish instances in which both the installation and the commencement of service have occurred in a previous year. In such cases, we would not permit a one-time charge for the installation of non-recurring services in a previous year.

review filed on April 3, 2000, by the Nassau County Board of Cooperative Educational Services, Westbury, New York, IS GRANTED.

14. IT IS FURTHER ORDERED that the application for discounts filed by the Nassau County Board of Cooperative Educational Services, Westbury, New York, is REMANDED to the Schools and Libraries Division of the Universal Service Administrative Company for further review consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
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