

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of the
Decision of the
Universal Service Administrator by
Henkels & McCoy, Inc.
Little Rock School District
Little Rock, Arkansas
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-341105
CC Docket No. 02-6

ORDER

Adopted: July 19, 2006 Released: July 19, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (WCB) grants a Request for Review filed by the service provider Henkels & McCoy, Inc. (Henkels) seeking review of a decision by the Schools and Libraries Division of the Universal Service Administrative Company (USAC).1 Henkels, a service provider selected by the Little Rock School District, Little Rock, Arkansas (Little Rock), seeks review of USAC's decision to reduce certain payments expected by Henkels for discounted services it provided to Little Rock in Funding Year 2003 under the schools and libraries universal service mechanism. As explained below, we find that special circumstances exist to justify remanding several issues raised in the Request for Review to USAC for further action consistent with this Order. To ensure that Henkels' underlying application is processed expeditiously, we direct USAC to initiate contact with Henkels as outlined in this order within 14 days from the release of this Order and to issue a decision based on a complete review and analysis no later than 90 days from the release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, commonly referred to 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 connections.2 The Commission vested in USAC the responsibility for administering the application process

1 Letter from Armin G. Seifart, Henkels & McCoy, Inc., to Federal Communications Commission, filed Nov. 29, 2005 (Request for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company may seek review from the Commission. 47 C.F.R. § 54.719(c). Henkels is the service provider providing products and services to the Little Rock School District, Little Rock, Arkansas (Little Rock) under the E-rate program.

2 47 C.F.R. §§ 54.502, 54.503.

for the universal service support mechanism.³ Accordingly, USAC reviews the applications for discounts that it receives, and issues funding commitments in accordance with the Commission's rules. Under the schools and libraries universal service support mechanism, applicants may only seek support for eligible services.⁴ Once USAC makes a decision to commit funds to a school or library, the service provider must follow several procedures, including, but not limited to, filing a Service Provider Invoice (FCC Form 474) with USAC.⁵

3. On May 18, 2004, Little Rock received a USAC funding commitment for six funding requests for internal connections.⁶ On May 20, 2005, Henkels, the service provider that had been selected by Little Rock, filed an appeal with USAC claiming that the payments Henkels received from USAC for the six funding commitments to Little Rock were reduced by a total of \$178,362.20.⁷ Henkels claimed that USAC provided no reason for this large reduction in USAC's funding commitment.⁸ Henkels also claimed that it had relied on the funding commitments made in the May 18 Funding Commitment Decision Letter and in good faith performed the work under its contract with Little Rock.⁹ Thus, Henkels requested an opportunity to review the reasons for the deductions and to resubmit the invoices with legitimate corrections as allowed.¹⁰ USAC denied Henkels' appeal on September 30, 2005, finding that Henkels' FCC Form 474 included costs for the following ineligible products and services: Emerson CATV tuner, installation of File Commander and Remote Desktop software, power strips, Little Rock Tax, and training that is not directly related to the installation of eligible products.¹¹ The Administrator's Decision on Invoice Appeal asserted that the reductions in the funding requests were for ineligible items.¹² On November 29, 2005, Henkels filed the instant Request for Review.¹³

³ 47 C.F.R. § 54.705(a)(1). The Schools and Libraries Committee oversees the administration of the schools and libraries support mechanism. *Id.* 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 and 34 (1998).

⁴ See 47 C.F.R. § 54.504; Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060- 0806, at 20 (October 2003) (FCC Form 471 Instructions) (stating that applicants may not seek support for ineligible services, entities and uses). See also USAC website, <<http://www.sl.universalservice.org/data/pdf/i471y7.pdf>>.

⁵ See, e.g., Letter from Schools and Libraries Division, Universal Service Administrative Company, to Henkels & McCoy, Inc, dated May 18, 2004, at 1 (May 18 Funding Commitment Decision Letter).

⁶ *Id.*

⁷ See Letter from Armin G. Seifart, Henkels & McCoy, Inc. to Schools and Libraries Division, Universal Service Administrative Company, dated May 20, 2005 (May 20 USAC Appeal).

⁸ *Id.*

⁹ *Id.*

¹⁰ Henkels asserts that it will substantiate such corrections by additional documentation, language corrections or inspections if necessary. *Id.*

¹¹ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Armin G. Seifart, Henkels & McCoy, Inc., dated Sept. 30, 2005 (Administrator's Decision on Invoice Appeal).

¹² *Id.*

¹³ See Request for Review.

4. In its Request for Review, Henkels argues that it reviewed the denial explanation provided by USAC in the Administrator's Decision on Invoice Appeal and the basis of USAC's denial is unclear.¹⁴ Henkels further asserts that the calculation of the reduced payment amounts do not coincide with the line items that are deemed ineligible and therefore, it seeks a further explanation and accounting of the method used for determining the reductions in Henkels' invoices.¹⁵ Henkels requests an opportunity to review the reasons for the deductions and an opportunity to resubmit its invoices with legitimate corrections that are substantiated by additional documentation, language corrections or inspections if necessary.¹⁶ In addition, Henkels seeks full payment for all eligible items as expected and permitted under the Funding Commitment Decision Letters it received from USAC.¹⁷ Although Henkels believes that all of the products provided by Henkels to Little Rock were eligible, it claims that the following specific products or services listed by USAC as ineligible were eligible products under USAC's program rules: De-Modulator-CATV Tuners; install Classroom Software and Configure; and Head-End Training.¹⁸

5. On November 17, 2005, Little Rock filed a letter in support of Henkels' Request for Review with the intent of showing the "negative impact to [Little Rock] students as a result of the decision not to honor the Funding Commitment Decision Letter."¹⁹ Little Rock claims that the products and services identified for denial are all eligible products and services for Funding Year 2003-2004 and that it viewed the receipt of the Funding Commitment Decision Letter as a clear signal to begin the project.²⁰ Little Rock further asserts that if USAC's decision is not reversed, Little Rock will have to make payments to Henkels from funds intended for other scheduled technology projects and upgrades and this will directly affect Little Rock students.²¹

6. Little Rock's application for discounts was also the subject of a Notification of Commitment Adjustment Letter (COMAD) sent to Henkels on October 25, 2005.²² Henkels appealed the COMAD claiming that the commitment adjustment of approximately \$66,300 is unreasonable and not

¹⁴ Request for Review at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 2-3.

¹⁷ See Funding Commitment Decision Letter; see also Letter from Schools and Libraries Division, Universal Service Administrative Company, to Henkels & McCoy, Inc., dated Nov. 8, 2004.

¹⁸ *Id.* at 2-4.

¹⁹ See Letter from Mark D. Milhollen, Chief Financial Officer, Little Rock School District, to Schools and Libraries Division, Universal Service Administrative Company, dated Nov. 17, 2005, at 2 (Little Rock Letter).

²⁰ Little Rock mentions that it answered several questions regarding this application during Program Integrity Assurance review process and also participated in a Selective Review and an audit. Little Rock Letter at 2. It claims that USAC had not mentioned problems with the application during any of these review periods and therefore, Little Rock had no reason to think that it would be responsible for any other funds other than what was not covered by the discount percentage rate as indicated in the Funding Commitment Decision Letters. *Id.*

²¹ *Id.*

²² See Notification of Commitment Adjustment Letter from Schools and Libraries Division, Universal Service Administrative Company, to Henkels & McCoy, Inc., dated Oct. 25, 2005 (COMAD). The COMAD indicates that \$66,306.78 in already-disbursed funds are to be recovered from Henkels if it is determined that the recovery of such funds is required. *Id.*

supported by facts.²³ USAC denied the appeal on April 6, 2006,²⁴ and Henkels appealed USAC's denial of Henkels' COMAD appeal to the Commission on May 31, 2006.²⁵ In its appeal, Henkels requests that the Commission reverse USAC's April 6, 2006, decision and indicates that if the FCC does not reverse this decision, Henkels will pursue legal action against Little Rock to recover the unpaid commitments.²⁶

III. DISCUSSION

7. We have reviewed the underlying record and we grant Henkels' request that it be provided an opportunity to review the reasons for the deductions to its invoices and remand this application to USAC.²⁷ We also grant Henkels' request to resubmit its invoices with legitimate corrections substantiated by any additional documentation or review that USAC deems necessary to determine the eligibility of the products and services requested. In remanding this matter to USAC, we make no findings as to the ultimate eligibility of the requested products and or services.²⁸ As described below, we question some of USAC's findings regarding Henkels' descriptions of the products and services it invoiced and find that USAC could have conducted a more detailed inquiry to determine whether the products or services were eligible. As part of this inquiry, USAC shall contact Henkels and/or Little Rock with any questions it has about the products and services in question to ensure that USAC has a full understanding of the funding requests. In order to properly conduct this inquiry, USAC should provide specific explanations and examples to help Henkels and Little Rock fully understand what information is being requested. To ensure that Henkels' underlying application is processed timely, we require USAC to initiate contact with Henkels within 14 days from the release of this Order and to issue a decision based on a complete review and analysis no later than 90 days from the release of this Order.

8. Although we remand this application generally as described in the paragraph above, we provide specific instructions with respect to three of the following services or products USAC deemed ineligible: Emerson CATV Tuner, Installation of Classroom File Commander and Remote Desktop Software, and End-user training on Head End. Henkels claims that all three are eligible items for which it

²³ See Letter from Armin G. Seifart, Henkels & McCoy, Inc., to Schools and Libraries Division, Universal Service Administrative Company, dated Dec. 22, 2005. Henkels repeated and incorporated by reference the arguments it made in its May 20 USAC Appeal and Request for Review.

²⁴ See Letter from Schools and Libraries Division, Universal Service Administrative Company to Armin G. Seifart, Henkels & McCoy, Inc., dated Apr. 6, 2006.

²⁵ See Letter from Armin G. Seifart, Henkels & McCoy, Inc., to Schools and Libraries Division, Universal Service Administrative Company, dated Dec. 22, 2005.

²⁶ See Letter from Christine A. Crawford, Henkels & McCoy, Inc. to Federal Communications Commission, dated May 31, 2006.

²⁷ We defer our decision on Henkels COMAD appeal until USAC releases a final decision on remand.

²⁸ Although we find that USAC does not yet have enough information to make a determination of ineligibility, we caution Henkels and Little Rock that USAC may ultimately find that the invoiced products and services are not eligible despite the fact that a Funding Commitment Decision Letter has already been issued. USAC has been directed to (1) cancel all or any part of a commitment to fund discounts for ineligible services or the provision of telecommunications services by non-telecommunications carriers; and (2) deny payment of any requests by providers for compensation for discounts provided on such services. See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.* CC Docket Nos. 97-21 and 96-45, Order, FCC 99-291, para. 8 (rel. Oct. 8, 1999).

should be compensated.²⁹ Henkels asserts that it believes that its invoices may have been reduced because of the words it used to describe these items.³⁰ As such, we address these three products or services and provide specific instruction for each.

9. The Emerson CATV Tuner is described as a “De-Modulator” in Little Rock’s invoice from Henkels which was submitted as part of its Item 21 Attachment to its Form 471.³¹ The Eligible Services List (ESL) for Funding Year 2003 states that a “Video Channel Modulator” is eligible for discounts under Internal Connections.³² A Video Channel Modulator is described in the ESL as a video distribution box that takes standard video and audio input from video cameras, recorders, security systems, satellite receivers, disk players, and video games and distributes the signals to the end user.³³ Based on the record, it appears that USAC determined that the Emerson CATV Tuner listed on the Henkel’s quote was a traditional tuner capable of receiving various frequencies or stations on a television, radio or CATV controller and therefore was ineligible for discounts. In the Request for Review, Henkels states that the De-Modulator-CATV Tuner listed on its quote is a product that is used to distribute one signal to the classroom for educational purposes and that displays one preset educational channel to multiple classrooms. Because Henkels’ description of the Emerson CATV Tuner is inconsistent with USAC’s findings, and we found no information in the record explaining why USAC made its determination on the Emerson CATV Tuner,³⁴ we remand Little Rock’s application with respect to USAC’s decision to remove funding for the Emerson CATV Tuner.³⁵ In reviewing this portion of the application, USAC should secure all documentation necessary to determine eligibility, including any specifications Henkels has on the Emerson CATV Tuner and this product’s specific applications in the Little Rock School District.

10. The Installation of Classroom File Commander and Remote Desktop Software is described in the record by Henkels as the installation of two software programs, File Commander and Remote Desktop, that must be installed on all teacher work stations to access and control the Safari multimedia retrieval system.³⁶ Henkels states that File Commander is used to import and upload teacher

²⁹ Request for Review at 2. We address these items specifically as they were the only items for which Henkels provides an explanation of eligibility in its Request for Review.

³⁰ *Id.* Henkels claims that if it had been given an opportunity to identify the specific products or line items that have been deemed ineligible, it would have been able to provide valid eligible product descriptive names that are consistent with FCC rules and the Eligible Services List. *Id.* It says that it attempted to contact USAC for detailed explanations but received no response. *Id.*

³¹ FCC Form 471, Little Rock School District, Item 21 Attach.

³² Eligible Services List of the Schools and Libraries Support Mechanism, at 30 (Oct. 18, 2002) (2003 ESL).

³³ *Id.*

³⁴ Although the equipment is noted as “De Modulators/CATV Tuner” on Little Rock’s Item 21 Attachment, this alone is insufficient as a basis to determine eligibility.

³⁵ In other instances where USAC has failed to provide an explanation for its determination of ineligibility, the WCB has remanded applications to USAC for further consideration. See, e.g., *Request for Review by Terral School District 3, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-118223, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Red 17969 (Com. Car. Bur. 2000).

³⁶ See E-mail from Al Hussey, Henkels & McCoy, Inc., to Monica Lee, Universal Service Administrative Company, dated Feb. 2, 2005 (Henkels Feb. 2 Email).

documents, pictures, and power point presentations to the file server that delivers the prepared instructional material to the local television.³⁷ Henkels states that Remote Desktop is used to project the teacher work station computer screen up to the television via an Internet protocol network or vice-versa.³⁸ The record demonstrates that USAC deemed the installation of File Commander and Remote Desktop ineligible because the software was installed on teacher workstations for the purpose of content management. In its Request for Review, Henkels claims that the software at issue is operational software.³⁹ In Funding Year 2003, software required to obtain operation of eligible equipment was eligible if it was required as a core component of an eligible internal connection.⁴⁰ Software available separately that provides optional operational features was not eligible for discounts, including products that provide network administration and network management.⁴¹ Thus, while some operational software is eligible for discounts, we question whether Henkels has shown that the software at issue -- which, as described by Henkels, is used to import and upload teacher materials to the file server and project the teacher work station computer screen up to the local television or vice versa -- is required as a core component of an eligible internal connection. Accordingly, we remand the Request for Review and direct USAC to obtain further information from Henkels in order to determine the eligibility of the software.

11. On Little Rock's Item 21 attachment, "Training 2 trips 8 days" is listed.⁴² Although Henkels' claims in its Request for Review that such training is the basic technical training provided to Media Specialists, the IT Director and other Network Personnel who will maintain the system, operations procedures and upkeep, Henkels had described the same training earlier in the record as training for the librarian and teachers that have a need to understand the operation of the system.⁴³ The record also shows that Henkels claimed that in order to gain full understanding, the users of the system are given a four-day basic training period, are then permitted to use the system, and then are trained in another more advanced four-day session.⁴⁴ The record demonstrates that USAC deemed such training ineligible because training for end users is not eligible for discounts.⁴⁵

12. The ESL for Funding Year 2003 stated that training was eligible only if it is basic instruction on the use of eligible equipment, coincident with and directly associated with the installation

³⁷ *Id.*

³⁸ *Id.*

³⁹ Request for Review at 2. Henkels claims that the software is a "core component of the Safari System which allows system control" and that "only e-ratable items are installed, such as the Safari DMC, which is a media converter." *Id.*

⁴⁰ 2003 ESL, at 26-27.

⁴¹ 2003 ESL, at 26-27. *See also* Eligible Services List of the Schools and Libraries Support Mechanism, at 68-69 (Nov. 18, 2005)(stating that operating system software for end user computers is ineligible).

⁴² *See* FCC Form 471, Little Rock School District, Item 21 Attachment.

⁴³ Henkels Feb. 2 Email.

⁴⁴ *Id.*

⁴⁵ Discounts for teacher training have not yet been made available through the schools and libraries support mechanism. *See Common Carrier Bureau Reiterates Services Eligible for Discounts for Schools and Libraries*, CC Docket No. 96-45, Public Notice, 13 FCC Rcd 16570 (Com. Car. Bur. 1998); *Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579*, Report to Congress, 13 FCC Rcd 11810 at 11824, n. 64 (1998).

of such equipment.⁴⁶ It also stated that training of teachers and staff in the use of covered services in their programs of instruction or for professional development is not eligible for discount.⁴⁷ Because Henkels deemed this training as training for school personnel who must know the operation of the system and what it is capable of doing, we find that SLD partly erred in its conclusion that this training was ineligible. If the training at issue was indeed for “basic instruction on the use of eligible equipment,” it was eligible for discounts if it was coincident with and directly associated with the installation of the equipment. As noted above, training for school personnel is appropriate as long as such personnel will be the personnel responsible for using of the equipment and the training is not geared towards the use of the services in teachers’ programs of instruction or for professional development. Further, we do not believe “coincident with” means that trainings must take place on the same day as the installation. In fact, as long as the training occurs within a reasonable time after installation, we find that this would satisfy the “coincident” requirement of the ESL. We also find that instruction to personnel that will be responsible for knowing how the equipment works is instruction that is “directly associated with the installation” of the equipment. Providing appropriate training to specified personnel on the use of such equipment helps to ensure that E-rate funds will not be wasted because the supported services will be cared for and used appropriately. Thus, we remand this issue to USAC for further consideration in accordance with our guidance and instructions.

13. Finally, we are committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we partially grant the appeal addressed here, this action does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with the 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 that waste, fraud, or abuse of program funds occurred and that 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.⁴⁸

IV. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291 and 54.722(a) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291 and 54.722(a), that the Request for Review filed by Henkels & McCoy, Inc., on October 3, 2005, IS GRANTED AND REMANDED to USAC.

⁴⁶ 2003 ESL, at 34.

⁴⁷ *Id.*

⁴⁸ We also emphasize that our actions taken in this Order should have minimal effect on the overall federal Universal Service Fund, because the monies needed to fund this appeal have already been collected and held in reserve. We note that USAC has already reserved approximately \$1.26 billion to fund outstanding appeals. *See, e.g.,* Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2006, dated May 2, 2006. Thus, we determine that the action we take today should have minimal impact on the Universal Service Fund as a whole.

15. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 54.722(a), and 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 INITIATE contact with Henkels & McCoy, Inc. within 14 days from the release of this Order and SHALL ISSUE a decision based on a complete review and analysis no later than 90 calendar days from the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau