

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Requests for Review of Decisions of the Universal Service Administrator by Adams County Public Library West Union, Ohio Albemarle County Public Schools Charlottesville, Virginia Austin School District 492 Austin, Minnesota Onondaga-Cortland-Madison Board of Cooperative Educational Services Syracuse, New York Roddenberry Memorial Library Cairo, Georgia Stokes County School District Danbury, North Carolina The School Board of Broward County Sunrise, Florida Schools and Libraries Universal Service Support Mechanism

ORDER

Adopted: October 30, 2008

Released: October 30, 2008

By the Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant the Requests for Review filed by seven petitioners seeking review of decisions by the Universal Service Administrative Company (USAC) reclassifying their services from Priority One services (telecommunications services or Internet access) to Priority Two services (internal connections and basic maintenance of internal connections) for Funding Years 2000-2005 under the schools and libraries universal service support mechanism (also known as the E-rate program). For the reasons discussed below, we find that the petitioners correctly classified their requested services as

1 A list of the petitioners is attached as an Appendix to this order. In this order, we use the term "appeals" to generally refer to requests for review of decisions by USAC. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c). Funding Years start July 1st and run through June 30th of the following year.

Priority One services. We therefore remand the underlying applications to USAC for further action consistent with this order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in the Appendix and issue an award or denial based on a complete review and analysis no later than 90 calendar days from the release date of this order.

II. BACKGROUND

2. Under 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 E-rate funds are allocated according to rules of priority.³ Under the Commission's rules, first priority for E-rate funding is given to requests for telecommunications services and Internet access (Priority One services).⁴ The remaining available funds are allocated to requests for support for internal connections and basic maintenance of internal connections (Priority Two services).⁵ Thus, requests for Priority Two services may be denied because available funds are exhausted.

3. In the *Tennessee Order*, the Commission considered whether facilities located on the applicant's premises should be recognized as part of an end-to-end Internet access service (Priority One service) or part of internal connections (Priority Two service).⁶ The Commission concluded that such on-premises equipment should be presumed to be internal connections, but that an applicant can rebut this presumption and receive Priority One funding if relevant indicia support the conclusion that the facilities are part of an end-to-end service.⁷ Such indicia include, but are not limited to, ownership of the facility used to provide the service, any lease-purchase arrangements regarding such facility, exclusivity arrangements regarding such facility, maintenance agreements regarding such facility, and upfront capital costs.⁸

4. In this instance, USAC performed routine Program Integrity Assurance (PIA) reviews of the petitioners' Priority One funding requests.⁹ Based on the petitioners' responses to USAC's inquiries during the PIA reviews, USAC reclassified the petitioners' services from Priority One to Priority Two services.¹⁰ Specifically, in the cases of Albemarle County Public Schools (Albemarle), Onondaga-

² 47 C.F.R. §§ 54.501-54.503.

³ See 47 C.F.R. § 54.507(g).

⁴ 47 C.F.R. § 54.507(g)(1)(i).

⁵ 47 C.F.R. § 54.507(g)(1)(ii).

⁶ See *Request for Review by the Department of Education of the State of Tennessee, Integrated Systems and Internet Solutions, Inc., and Education Networks of America*, CC Docket Nos. 96-45, 97-21, Order, 14 FCC Rcd 13734, 13747-55, paras. 26-42 (1999) (*Tennessee Order*).

⁷ *Id.* at 13753-54, paras. 37-38.

⁸ *Id.* at 13754, para. 39.

⁹ USAC performs PIA reviews to verify that the discounts recipients seek are for eligible services, provided to eligible entities, and for eligible uses. See USAC website, Schools and Libraries, Program Integrity Assurance, <http://www.sl.universalservice.org/reference/6pia.asp> (retrieved Aug. 11, 2008).

¹⁰ See Letter from USAC, Schools and Libraries Division, to F. Jay Barkey, Adams County Public Library (dated Sept. 28, 2001); Letter from USAC, Schools and Libraries Division, to Bruce Benson, Albemarle County Public Schools (dated Mar. 16, 2004); Letter from USAC, Schools and Libraries Division, to Sandra Livingston, Austin School District 492 (dated May 7, 2002); Letter from USAC, Schools and Libraries Division, to Michelle Gresham, The School Board of Broward County (dated May 10, 2006); Letter from USAC, Schools and Libraries Division, to Kathleen A. Smith, Onondaga-Cortland-Madison BOCES (dated Jun. 23, 2002); Letter from USAC, Schools and

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Cortland-Madison Board of Cooperative Educational Services (Onondaga-Cortland-Madison BOCES), and Stokes County School District (Stokes), USAC reclassified their services to Priority Two internal connections because they all had contracts containing lease-purchase options.¹¹ In the cases of Adams County Public Library (Adams), Austin School District 492 (Austin), and Roddenberry Memorial Library (Roddenberry), and The School Board of Broward County (Broward) USAC reclassified their requests for service to Priority Two internal connections based on the petitioners' responses to USAC's PIA questions.¹² USAC stated that the petitioners' answers indicated that they had exclusive use of the equipment at issue, the equipment functioned as a stand-alone network, or the equipment was not part of an end-to-end service.¹³ Because funds were unavailable during the relevant funding years for Priority Two services, USAC's actions effectively denied the applicants their funding requests.¹⁴ The petitioners filed appeals with USAC,¹⁵ which were denied, and then filed the instant Requests for Review seeking designation of the equipment under review as Priority One services for the relevant funding years.

III. DISCUSSION

5. We grant the petitioners' Requests for Review. Consistent with the Commission's determination in the *Tennessee Order*, and based on the record before us, we conclude that the petitioners have rebutted the presumption that the requested services were for internal connections. Therefore, we find that the petitioners correctly classified their requests for services as Priority One telecommunications services or Internet access.

6. With respect to the funding requests submitted by Albemarle, Onondaga-Cortland-Madison BOCES, and Stokes, based on the record before us, we conclude that the mere presence of a purchase option does not indicate that an applicant has failed the standards set forth in the *Tennessee Order*.¹⁶ In the *Tennessee Order*, the Commission did not state that the presence of a lease-purchase

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Libraries Division, to Alan Kaye and Barbara Causey, Roddenberry Memorial Library (dated Jul. 1, 2002); Letter from USAC, Schools and Libraries Division, to Arden Browder, Stokes County School District (dated Jun. 3, 2002).

¹¹ See Letter from USAC, Schools and Libraries Division, to Debby Stowell, Albemarle County Public Schools (dated Jun. 18, 2004) (Albemarle Administrator's Decision on Appeal); Letter from USAC, Schools and Libraries Division, to Michael Fay, Onondaga-Cortland-Madison BOCES (dated Mar. 8, 2004); Letter from USAC, Schools and Libraries Division, to Frederick G. Johnson, Stokes County School District (dated Jan. 16, 2003).

¹² See Letter from USAC, Schools and Libraries Division, to F. Jay Barkey, Adams County Public Library (dated Nov. 6, 2002) (USAC Adams November 6 Letter); Letter from USAC, Schools and Libraries Division, to Sandra Livingston, Austin School District Number 492 (dated Dec. 20, 2002) (USAC Austin December 20 Letter); Letter from USAC, Schools and Libraries Division, to Barbara Causey, Roddenberry Memorial Library (dated Jan. 15, 2003) (USAC Roddenberry January 15 Letter); Letter from USAC, Schools and Libraries Division, to Vijay Sonty, The School Board of Broward County at 1-2 (dated Sept. 6, 2006) (Broward Administrator's Decision on Appeal).

¹³ See USAC Adams November 6 Letter; USAC Austin December 20 Letter; USAC Roddenberry January 15 Letter; Broward Administrator's Decision on Appeal at 1-2.

¹⁴ See *supra* para. 2.

¹⁵ See Letter from F. Jay Barkey, Adams County Public Library, to USAC, Schools and Libraries Division (dated Oct. 7, 2001); Letter from Albemarle County Public Schools to USAC, Schools and Libraries Division (dated Apr. 22, 2004); Letter from Sandra Livingston, Austin School District, to USAC, Schools and Libraries Division (dated Aug. 21, 2003); Letter from Michael J. Fay, Onondaga-Cortland-Madison BOCES, to USAC, Schools and Libraries Division (dated Aug. 21, 2003); Letter from Barbara Causey, Roddenberry Library, to USAC, Schools and Libraries Division (dated July 10, 2002); Letter from Frederick G. Johnson, counsel to Stokes County School District, to USAC, Schools and Libraries Division (dated July 30, 2002); Letter from Vijay Sonty, The School Board of Broward County, to USAC, Schools and Libraries Division (dated May 30, 2006).

¹⁶ See *supra* para. 3.

provision, alone, determines whether on-premises equipment is Priority One or Priority Two services, but only that such a provision is among the “indicia” the Commission will look at to determine whether such equipment is Priority Two internal connections or basic maintenance of internal connections.¹⁷ In their Requests for Review, the petitioners state either that they did not intend to exercise the lease-purchase provision, or that the provision was nullified by other provisions in their contract with the service provider.¹⁸ Therefore, we find that the petitioners have rebutted USAC’s finding that their services, based on this alone, should have been reclassified from Priority One to Priority Two services.

7. With respect to the funding requests submitted by Adams, Austin, Roddenberry, and Broward, USAC reclassified their requests from Priority One telecommunications service and/or Internet access to Priority Two internal connections because of the petitioners’ answers to questions posed by USAC during the PIA reviews.¹⁹ USAC concluded that the petitioners had exclusive use of the equipment at issue, the equipment functioned as a stand-alone network, or the equipment was not part of an end-to-end service.²⁰ In their Requests for Review, however, the petitioners assert that they either made a mistake in answering the questions or that USAC misunderstood the type of services requested.²¹ These petitioners therefore request that they should be given the chance to resubmit the correct answers or

¹⁷ See *Tennessee Order*, 14 FCC Rcd at 13754, para. 39; see also *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26930-31, para. 46 (2003) (noting that the Commission, in the *Tennessee Order*, did not establish a *per se* requirement that an applicant must meet all factors, but rather should look at the facts presented in a case to determine whether the equipment is part of an end-to-end service).

¹⁸ See Letter from Debby Stowell, Albemarle County Public Schools, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6, at 2 (filed Aug. 18, 2004) (“ACPS did not purchase any ancillary equipment from Sprint-Centel of Virginia nor do we intend to exercise this option in the future.”); see also Facsimile from Bruce Bension, Albemarle County Public Schools, to USAC, Schools and Libraries Division at 2 (dated Oct. 7, 2003) (Albemarle indicates that the ownership of the equipment will not transfer to the school or library and the lease does not include an option for the applicant to purchase the equipment). See Letter from Michael J. Fay, Onondaga-Cortland-Madison Board of Cooperative Educational Services, to Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 02-6, at 3-4, 6 (filed May 5, 2004) (“Verizon’s Schedule A-3 is a legally binding document designed to address the specific needs of government customers, like OCM BOCES, that require a ‘true lease’ rather than a ‘lease-purchase agreement’ of ‘installation sale contract.’”); see also Onondaga-Cortland-Madison BOCES Funding Year 2003 FCC Form 471, Item 21, Attachment A5 at 7 (the contract between the applicant and the service provider states, “Lessee shall have the option to purchase all of the Equipment subject to this Schedule at its location AS IS on the date on which the last Rental Payment is scheduled to be paid. . .”). See Letter from Frederick G. Johnson, counsel to Stokes County School District, to Federal Communications Commission at 1-2 (filed Mar. 17, 2003) (“The contract specifically provides on page 5 in the section entitled Equipment Ownership that Network Dynamics, Inc. [the service provider] is the owner of the property both during and after the term of the contact.” (emphasis in original)).

¹⁹ See USAC Adams November 6 Letter; USAC Austin December 20 Letter; USAC Roddenberry January 15 Letter; Broward Administrator’s Decision on Appeal at 1-2.

²⁰ USAC Adams November 6 Letter; USAC Austin December 20 Letter; USAC Roddenberry January 15 Letter; Broward Administrator’s Decision on Appeal at 1-2.

²¹ See Letter from F. Jay Barkey and Harold Showalter, Adams County Public Library, to Federal Communications Commission (filed Nov. 19, 2002) (Adams Request for Review); Letter from Jacob Mangelson, Austin Independent School District No. 492, to Office of the Secretary, Federal Communications Commission, CC Docket Nos. 95-45 and 97-21 (filed Feb. 17, 2003) (Austin Request for Review); Letter from Barbara Causey, Roddenberry Memorial Library, to Office of the Secretary, Federal Communications Commission, CC Docket Nos. 96-45 and 97-21 (filed Mar. 14, 2003) (Roddenberry Request for Review); Letter from Vijay Sonty, The School Board of Broward County, to the Office of the Secretary, Federal Communications Commission, CC Docket Nos. 02-6 and 96-45 (filed Oct. 20, 2006) (Broward Request for Review).

clarify USAC's misunderstanding.²² Moreover, the petitioners provide evidence that their requests were correctly classified as Priority One telecommunications service and/or Internet access. First, Adams states that its funding request was only for maintenance of equipment that belongs to the Internet access provider, which is necessary for Adams to be able to access its T1 line for Internet service.²³ Neither Adams' master contract nor the service description in Adams' FCC Form 471 application mentions exclusive access to the equipment or an independent, stand-alone internal network.²⁴ Second, Austin, in response to a PIA questionnaire, stated that the provider of the on-premises equipment was a different provider than its service provider, an answer that could indicate that the requested equipment was for internal connections.²⁵ In its Request for Review, however, Austin explains that it "incorrectly completed the questionnaire" and that the same provider provided the on-premises equipment and the Internet service.²⁶ Additionally, Austin's service provider states that it has provided Internet access to Austin for several years and the service to the school "has not changed and does not include internal connections."²⁷ Third, Roddenberry stated in its initial answers to USAC's PIA questionnaire that there was a purchase-option clause, and that Roddenberry had exclusive contractual rights to the equipment.²⁸ In its Request for Review, however, Roddenberry explains that its earlier response was in error and that the contract with its service provider does not contain a purchase option.²⁹ Furthermore, Roddenberry's Funding Year 2002 FCC Form 471 lists the funding request in issue, Funding Request Number 809358, as Telecommunications Services.³⁰ Fourth, Broward states that all equipment used to deliver services to each site was part of the lease-managed service and was not owned, operationally governed, or restricted by the school district.³¹ Specifically, Broward indicates that the contract with its service provider was for the delivery of telecommunications services, not for the procurement of any equipment or a private wide area network.³²

²² See Adams Request for Review; Austin Request for Review; Roddenberry Request for Review; Broward Request for Review.

²³ Adams Request for Review at 1.

²⁴ See Adams County Public Library Funding Year 2001 FCC Form 471, SLD 234818, Item 21, Attachment 471-2001-4.

²⁵ Austin Request for Review at 5.

²⁶ *Id.*

²⁷ Letter to USAC, Schools and Libraries Division, from Kerry J. Kestner, Southern Minnesota Internet Group (dated May 29, 2002).

²⁸ Roddenberry Request for Review at 1-2.

²⁹ *Id.*

³⁰ Roddenberry Library Funding Year 2002 FCC Form 471, SLD 310909, Block 5. Additionally, Roddenberry's contract with its service provider lists only routine telecommunications services. See Roddenberry Library Funding Year 2002 FCC Form 471, SLD 310909, Item 21, Attachments 1B-6B.

³¹ Broward Request for Review at 2.

³² *Id.* Broward also notes that, in Funding Year 2004, USAC approved its request for telecommunications services in the amount of \$1,935,149.76. In Funding Year 2005, the funding year in question, Broward's request for telecommunications services was denied, although it cited to the same multi-year contract and FCC Form 470 it used in Funding Year 2004. Subsequently, in Funding Year 2006, Broward indicates that USAC again approved its request for telecommunications services in the amount of \$2,542,694.23 when it cited to the same contract and FCC Form 470 it used in Funding Years 2004 and 2005. *Id.* Broward thus believes that its denial for FY 2005 was based on a misunderstanding by USAC that Broward had ownership or management control of the network service or equipment in question. *Id.*

8. Accordingly, we conclude that all seven petitioners have rebutted the presumption that the equipment at issue is internal connections and correctly categorized their requests as Priority One services. Moreover, there is no evidence here of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Thus, denial of funding in these cases, without providing the applicants an opportunity to correct their mistakes, would inflict undue hardship on the applicants, and would not further the purposes of section 254(h) or serve the public interest.³³ We therefore grant these appeals and remand them to USAC for further processing consistent with this order.³⁴ In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services or the petitioners' applications.³⁵ We remind USAC of its obligation to independently determine whether the disbursement of universal service funds would be consistent with program requirements, Commission rules and orders, or applicable statutes and to decline to disburse funds where this standard is not met. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in the Appendix and issue an award or denial based on a complete review and analysis no later than 90 calendar days from the release date of this order.³⁶

9. Finally, we emphasize that the Commission is 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 grant the requests for review 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 the Commission's rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains 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. The Commission remains committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

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³³ See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism, et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5321, para. 11 (2006).

³⁴ We estimate that the appeals granted in this order involve application for approximately \$2,872,930.47 in funding. We note that USAC has already reserved sufficient funds to address outstanding appeals. See, e.g., Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2008 (Aug. 1, 2008). Thus, we determine that the action we take today should have a minimal effect on the universal service fund as a whole.

³⁵ Additionally, nothing in this order is intended: (1) to authorize or require payment of any claim that previously may have been released by a service provider or applicant, including in a civil settlement or plea agreement with the United States; or (2) to authorize or require payment to any person or entity that has been debarred from participation in the E-rate program.

³⁶ In performing a complete review and analysis of each underlying application, USAC shall either grant the underlying application before it, or, if denying the application, provide the applicant with any and all grounds for denial.

IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and the 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 Requests for Review filed by Adams County Public Library, West Union, Ohio; Albemarle County Public Schools, Charlottesville, Virginia; Austin School District 492, Austin, Minnesota; Onondaga-Cortland-Madison Board of Cooperative Educational Services, Syracuse, New York; Roddenberry Memorial Library, Cairo, Georgia; Stokes County School District, Danbury, North Carolina; and The School Board of Broward County, Sunrise, Florida, ARE GRANTED and the underlying applications are REMANDED to USAC for further action consistent with this order.

11. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and the 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 USAC SHALL COMPLETE its review of each remanded application and ISSUE an award or a denial based on a complete review and analysis no later than 90 calendar days from the release date of this order.

12. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Jennifer K. McKee
Acting Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

APPENDIX

Requests for Review

Applicant Name	Application Number	Funding Year	Date Request for Review Filed
Adams County Public Library West Union, Ohio	234818	2001	Nov. 19, 2002
Albemarle County Public Schools, Charlottesville, Virginia	376254	2003	Aug. 18, 2004
Austin School District 492 Austin, Minnesota	285292	2002	Feb. 17, 2003
Onondaga-Cortland-Madison Board of Cooperative Educational Services, Syracuse, New York	345905	2003	May 5, 2004
Roddenberry Memorial Library Cairo, Georgia	310909	2002	Mar. 14, 2003
Stokes County School District Danbury, North Carolina	314532	2002	Mar. 17, 2003
The School Board of Broward County Sunrise, Florida	463080	2005	Oct. 20, 2006