

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of
Decisions of the
Universal Service Administrator by
Bootheel Consortium
Silver City, NM et al.
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-309634, et al.
CC Docket No. 02-6

ORDER

Adopted: April 18, 2007

Released: May 8, 2007

By the Commission:

I. INTRODUCTION

1. In this Order, we grant 17 Requests for Review of decisions by the Universal Service Administrative Company (USAC) denying petitioners' requests for funding under the schools and libraries universal service support mechanism (also known as the E-rate program). USAC denied the requests because it found that the applicants were either ineligible for support under the E-rate program or because more than 30 percent of the funding requests were for entities ineligible for support. Specifically, we find that 11 petitioners (Group A Petitioners) have provided sufficient evidence that the entities for which they sought discounted services were eligible for support. We find that four petitioners (Group B Petitioners) have provided sufficient evidence justifying further review by USAC to determine the eligibility of the relevant entities. For the remaining two petitioners (Group C Petitioners), we hold that the Commission's 30 percent rule, which requires USAC to deny an entire funding request if 30 percent or more of the request is for ineligible services, is not applicable to the petitioners' applications. Accordingly, we grant all 17 appeals and remand the underlying applications associated with these appeals to USAC for further action consistent with this Order.

2. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in the Appendices and issue an award or denial based on a

1 In this Order, we use the term "appeals" to generically refer to requests for review of USAC decisions or waivers related to such decisions. A list of these appeals is provided in Appendices A, B, and C. 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).

2 See Appendix A.

3 See Appendix B.

4 See Appendix C; 47 C.F.R. § 54.504(d).

complete review and analysis no later than 90 days from the release of this Order. In addition, we direct USAC to provide all pending and future applicants with a 15-day opportunity to amend their applications to remove ineligible entities or provide additional documentation to USAC demonstrating that all entities for which services are requested are eligible for support.⁵

II. BACKGROUND

3. 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.⁶ Only eligible applicants may seek support for eligible services.⁷ Congress defined the scope of entities eligible for support as elementary and secondary schools, as defined by the Elementary and Secondary Education Act of 1965,⁸ and as libraries eligible for assistance from a state library administrative agency under the Library Services and Technology Act (LSTA).⁹ Both definitions rely on the standards set by each individual state. When USAC reviews an application and identifies an ineligible entity seeking support, it will deny funding for the requested service. In addition, if the total requested for ineligible services exceeds 30 percent of the total for any individual funding request, the Commission's "30 percent rule" requires USAC to deny the entire funding request.¹⁰

⁵ USAC should also apply this direction to applicants with appeals pending before USAC as of the effective date of this Order. *See generally Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, *et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5319-20, 5326-27, paras. 9, 23 (2006) (*Bishop Perry Order*).

⁶ 47 C.F.R. §§ 54.501-503.

⁷ *See* 47 C.F.R. § 54.501 (b)-(d); USAC website, Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) at 3-4 (FCC Form 471 Instructions) (explaining that only schools and libraries meeting statutory eligibility standards may apply for support for eligible services) http://www.universalservice.org/res/documents/sl/pdf/471i_fy05.pdf (retrieved Mar. 7, 2007).

⁸ *See* 47 U.S.C. § 254 (h)(7)(A). The definitions of elementary and secondary schools at 20 U.S.C. § 7801 (18), (38) defer to the definitions of those terms by each individual state. Specifically, the term "elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school that provides elementary education, as determined under state law. The term "secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under state law, except that the term does not include any education beyond grade 12. 20 U.S.C. § 7801(20), (38). In addition, the statute excludes schools that have endowments of more than \$50 million or operate for profit. *See* 47 U.S.C. § 254 (h)(4).

⁹ *See* 47 U.S.C. § 254 (h)(4); Public Law 104-208. In addition, the library must have funding independent from any school, and may not operate as a for-profit business. 47 C.F.R. § 54.501(c). The LSTA states that "library" may include a "private library or other special library, but only if the State ... determines that the library should be considered a library for the purposes" of the LSTA. 20 U.S.C. § 9122(1)(E).

¹⁰ *See* 47 C.F.R. § 54.504(d) ("If 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety."). *See also Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, 9215-9216, paras. 40-41 (2003) (*Schools Second Report and Order*). *See also 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 Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 18598, 18602, n.23, 18607, n.46 (2000).

III. DISCUSSION

4. In this item, we grant petitioners' Requests for Review and remand the underlying applications to USAC for further consideration 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 Appendices and issue an award or denial based on a complete review and analysis no later than 90 days from the release of this Order. We make no finding as to any other aspects of the funding requests at this time.¹¹

5. Group A Petitioners. Group A Petitioners' requests for E-rate discounts were denied because USAC determined that the services requested were for ineligible entities, thus making the services ineligible for support. We find that the Group A Petitioners have provided sufficient evidence that the entities at issue were all eligible for support.¹² In seven cases we reach this conclusion based on our interpretation of the relevant state law.¹³ Specifically, we find that the laws of Texas grant eligibility to two juvenile justice facilities in its state: Hidalgo County Learning Center and Travis County Learning Center.¹⁴ We find that the Kennedy Institute is eligible based on the District of Columbia Education Agency's interpretation of D.C. law.¹⁵ We also interpret Arizona law to grant eligibility to Casa Arizona and Casa Phoenix, schools managed by the U.S. Department of Health & Human Services Office of Refugee Resettlement for refugee minors.¹⁶ Additionally, two New York agencies have corrected prior communications with USAC that indicated that Yeshiva Beth Jacob of Flatbush Queens and Mechon L'Hoyroa were ineligible for funding under the E-rate program.¹⁷

¹¹ Nothing in this order is intended to authorize or require payment of any claim that has previously been released by a service provider or applicant, including in a civil settlement or criminal plea agreement with the United States.

¹² See Appendix A.

¹³ See Request for Review of Casa Arizona; Request for Review of Casa Phoenix; Request for Review of Hidalgo County Learning Center; Request for Review of Lt. Joseph P. Kennedy, Jr., Institute; Request for Review of Mechon L'Hoyroa; Request for Review of Travis County Learning Center; Request for Review of Yeshiva Beth Jacob of Flatbush Queens.

¹⁴ See Texas Education Code Ann. § 37.011; Letter from Linda Brooke, Director of Education, Texas Juvenile Probation Commission, to Kent Weisner, SW Key, Inc., dated Feb. 6, 2006; Letter from Linda Brooke, Director of Education, Texas Juvenile Probation Commission, to Whom it May Concern, dated Feb. 17, 2006; Request for Review of Hidalgo County Learning Center; Request for Review of Travis County Learning Center.

¹⁵ Nevertheless, because the Kennedy Institute facilities may provide classes that are outside the scope of the primary and secondary school programs that the E-rate program covers, we expect that only a portion of the services that the Kennedy Institute is purchasing for its facilities would be eligible for E-rate discounts. We expect the Kennedy Institute to use an auditable monitoring system that carefully follows the Commission rules for allocating costs between eligible and ineligible expenses. See 47 C.F.R. § 54.504(g); Cost Allocation Guidelines for Products and Services, <http://www.universalservice.org/sl/applicants/step06/cost-allocation-guidelines-products-services.aspx> (retrieved Mar. 7, 2007).

¹⁶ See Arizona Rev. Stats. § 15-101 (19); Request for Review of Casa Arizona, at 1; Request for Review of Casa Phoenix, at 1; U.S. Dept. of Health & Human Services, Administration for Children & Families, Office of Refugee Resettlement, The Unaccompanied Refugee Minors Program, www.acf.dhhs.gov/programs/orr/programs/urm.htm (retrieved Mar. 7, 2007).

¹⁷ In both cases, USAC's finding that Petitioners were ineligible was based on inaccurate information provided by the New York State Education Department (NYSED), which NYSED subsequently corrected. See Request for Review of Yeshiva Beth Jacob of Flatbush Queens, at tab 1 (Letter from Peter Caruso, New York State Education

(continued...)

6. We also reverse USAC's decisions for the remaining four Group A Petitioners. Two cases involve letters of agency. We find that, contrary to USAC's determination, Bootheel Consortium was authorized to act on behalf of all its members.¹⁸ Although an employee of Deming High School misinformed USAC that Bootheel Consortium was not authorized to act on Deming's behalf, we find that Deming's superintendent had properly authorized Bootheel's action in a letter of agency.¹⁹ Further, we agree with the Virginia Department of Education that it had statutory authorization to transmit educational programming by satellite to schools participating in the state's distance learning program and that it did not require additional Letters of Agency.²⁰ In another instance, we observe that although the transmission route used by Utah Education Network to serve an eligible entity passed over an ineligible entity's property, the service was eligible because the ineligible entity did not use any of the discounted services.²¹ Finally, we find that New Education for Communities, Inc., given its lack of a permanent location, should not be denied funding for a second new building solely because it failed to include the address of that second building.²²

7. Group B Petitioners. We find that Group B Petitioners have provided sufficient evidence to conclude that the relevant entities in their funding requests may well be eligible for support, justifying further review by USAC to reach a definitive determination.²³ Therefore, we direct USAC to work closely with PEP Connections Preparatory School and the relevant Michigan governmental agencies as well as Yeshiva Bnos Ahavas Israel and the relevant New York State bodies to determine whether the petitioners meet state standards for E-rate eligibility.²⁴ We also find that School Administrative Unit #64 should not be denied funding due solely to an employee's misinterpretation of a question from USAC about whether a building was part of the network whose primary function was the delivery of educational services.²⁵ Rather, we direct USAC to review the funding request again and determine whether or not the building is eligible for E-rate funding. We also direct USAC to give Pinellas County Schools an

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Department, to Judy Klein, Yeshiva Beth Jacob of Flatbush Queens, dated April 30, 2003) (stating that Beth Jacob is "an approved, nonpublic, not-for-profit school in the eyes of the New York State Education Department."); Request for Review of Mechon L'Hoyroa, at 16 (Letter from Sara McCain, LSTA Coordinator, NYSED, to Berel Karniol, Mechaon L'Hoyroa Community Library, dated May 1, 2003) (stating that because Mechon L'Hoyroa was a member of the Southeastern Library Resources Council it was eligible for LSTA funding in New York and thus the E-rate program).

¹⁸ See Request for Review of Bootheel Consortium at 5, Attachment B at 4; Schools and Libraries Division, Universal Service Administrative Company, Bootheel Consortium file, Program Integrity Assurance Review, Log of Contacts, May 14, 2002, (describing phone call from employee of Deming High School to USAC).

¹⁹ See Request for Review of Bootheel Consortium at 5, Attachment B at 4.

²⁰ See Request for Review of Virginia Department of Education, at 2-3.

²¹ See Request for Review of Utah Education Network at 1-2.

²² See Request for Review of New Education for Communities, Inc.

²³ See Appendix B; Request for Review of PEP Connections Preparatory School; Request for Review of Pinellas County Schools; Request for Review of School Administrative Unit #64; Request for Review of Yeshiva Bnos Ahavas Israel.

²⁴ See para. 3; Request for Review of PEP Connections Preparatory School; Request for Review of Yeshiva Bnos Ahavas Israel.

²⁵ See Request for Review of SAU #64, at 1-2.

additional opportunity, i.e., 15 more days, to show that the services it sought based on documentation for services to ineligible schools, would actually, in fact, be used by eligible schools.²⁶

8. We note that those tasked with working on E-rate applications are school administrators, technology coordinators, teachers and librarians who may have little experience with distinguishing between eligible and ineligible entities for the E-rate program. This may be particularly true of staff at small school districts or libraries.²⁷ As a result, applications for E-rate support may have been denied unnecessarily. Moreover, we find that denying the petitioners' requests would create undue hardship and prevent otherwise eligible schools and libraries from receiving funding that they need to bring advanced telecommunications and information services to their students and patrons. In particular, we believe that by directing USAC to provide applicants with an opportunity to demonstrate that entities are eligible or remove services sought for ineligible entities from their funding requests, we will provide for a more effective application processing system and ensure that eligible schools and libraries are able to realize the intended benefits of the E-rate program as the Commission considers additional steps to reform and improve the E-rate program.²⁸ Requiring USAC to take these additional steps will not reduce or eliminate any application review procedures or lessen the program requirements that applicants must comply with to receive funding. We further note that granting these appeals should have minimal effect on the Fund as a whole.²⁹ Therefore, we remand the appeals to USAC for further consideration consistent with this Order.

9. Group C Petitioners. We agree with USAC that the services sought by both Group C Petitioners³⁰ were for ineligible entities and thus are ineligible for E-rate support. We clarify, however, that the 30 percent rule in section 54.504(d) is not applicable to requests by ineligible entities.³¹ The rule states that, "[i]f 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety."³² The 30 percent rule does not extend to ineligible entities, and USAC should not apply it that way. Accordingly, for the two Group C Petitioners, we direct

²⁶ See Request for Review of Pinellas County Schools.

²⁷ See *Bishop Perry Order*, 21 FCC Rcd at 5323, para. 14.

²⁸ See *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 Linkup, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, WC Docket Nos. 05-195, 02-60, 03-109, CC Docket Nos. 96-45, 02-6, 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308, 11324-25, paras. 37-39 (2005) (*Comprehensive Review NPRM*) (seeking comment on the application process for the E-rate program).

²⁹ We estimate that the appeals granted in this Order involve applications for approximately \$28 million in funding for Funding Years 2001-2006. 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 Second Quarter 2007, Jan. 31, 2007. Thus, we determine that the action we take today should have minimal impact on the USF as a whole.

³⁰ See Appendix C.

³¹ See 47 C.F.R. § 54.504(d).

³² *Id.*

USAC to deny funding for the services requested by entities ineligible for E-rate support, and grant funding for the portions of the funding requests that are consistent with Commission rules.³³

10. *Additional Processing Directives for USAC.* As of the effective date of this Order, when USAC has reason to believe that an applicant's funding request includes services for ineligible entities, USAC shall: (1) inform the applicant promptly in writing of any apparently ineligible entities; (2) offer to work with the applicant and the relevant state agency to resolve the eligibility status of the entity; and (3) permit the applicant to revise its funding request to remove the services for ineligible entities or allow the applicant to provide additional documentation to show why the relevant entity is eligible within 15 calendar days from the date of receipt of notice in writing by USAC.³⁴ USAC shall advise an applicant, where there is a disagreement about an entity's eligibility under the E-rate program, to resubmit the request for services for the entity at issue in a separate funding request.³⁵ USAC shall apply this directive to all applications beginning in Funding Year 2007 and to all pending appeals. The 15-day period is limited enough to ensure that funding decisions are not unreasonably delayed for E-rate applicants and should provide sufficient time for applicants to modify their funding requests to remove ineligible entities.³⁶ Further, if USAC assists applicants in removing ineligible entities from funding requests prior to making its funding commitment decisions, USAC should be able to reduce administrative costs that it would otherwise spend on appeals of denied funding requests. Therefore, we believe providing applicants with an additional opportunity to remove ineligible entities from their funding requests will improve the administration of the Fund and the efficiency of the E-rate program.

11. We emphasize the limited nature of this decision. Although we grant the requests for review addressed here, this Order does not alter the obligation of participants in the E-rate program to comply with the Commission's rules by requesting only eligible services.³⁷ We continue to require E-rate applicants to submit complete and accurate information to USAC as part of the application review process. The direction we provide USAC will not lessen or preclude any application review procedures of USAC. Indeed, we retain our commitment to detecting and deterring potential instances of waste, fraud, and abuse by ensuring that USAC continues to scrutinize applications and takes steps to educate applicants in a manner that fosters program participation. All existing E-rate program rules and requirements will continue to apply, including the existing forms and documentation, USAC's Program Integrity Assurance review procedures, and other processes designed to ensure applicants meet the applicable program requirements. In addition, we note that, in the *Comprehensive Review NPRM*, the Commission initiated a proceeding to address the concerns raised herein by, among other things, improving the application and disbursement process for the E-rate program.³⁸

12. 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 appeals addressed here, the Commission reserves the right to conduct

³³ See Request for Review of Latch School Inc. (noting that the only entity in dispute was a pre-kindergarten campus); Request for Review of Capital Region BOCES, at 1-2 (noting that its only error was to fail to secure a single letter of agency from one member of its consortium).

³⁴ See generally *Bishop Perry Order*, 21 FCC Rcd at 5326-27, para. 23.

³⁵ USAC shall accept this additional, separate funding request as if it were filed during the filing window as long as the original funding request was received during the filing window.

³⁶ We note that applicants will retain the ability to appeal decisions denying funding requests on other grounds.

³⁷ 47 C.F.R. §§ 54.501-503.

³⁸ *Comprehensive Review NPRM*, 20 FCC Rcd at 11324-25, paras. 37-40.

audits and investigations to determine compliance with the E-rate program rules and requirements. Because audits and 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 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.

IV. ORDERING CLAUSES

13. 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 section 54.722(a) of the Commission's rules, 47 C.F.R. § 54.722(a), that the Requests for Review filed by the petitioners as listed in Appendices A, B and C ARE GRANTED and REMANDED to the extent provided herein.

14. 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, that USAC SHALL COMPLETE its review of each remanded application listed in Appendices A, B and C and ISSUE an award or a denial based on a complete review and analysis no later than 90 calendar days from release of this Order.

15. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release, in accordance with section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Requests for Review Granted

Applicant	Application Number	Funding Year
Bootheel Consortium Silver City, NM	309634	2002
Casa Arizona Phoenix, AZ	497394, 497397	2006
Casa Phoenix Phoenix, AZ	398970, 400697, 400713	2004
Hidalgo County Learning Center McAllen, TX	401084, 401199, 441366, 455375	2004
Lt. Joseph P. Kennedy, Jr. Institute Washington, DC	192091, 245988, 327671	2000, 2001, 2002
Mechon L'Hoyroa Monsey, NY	293334, 293350	2002
New Education for Communities Oceanside, CA	372555	2003
Travis County Learning Center Austin, TX	441369	2005
Utah Education Network Salt Lake City, UT	375794	2003
Virginia Department of Education Richmond, VA	226937	2001
Yeshiva Beth Jacob of Flatbush Queens Flushing, NY	315131	2002

APPENDIX B

Requests for Review Granted for Further Review

Applicant	Application Number	Funding Year
PEP Connections Preparatory School Starkville, MI	427759	2004
Pinellas County Schools Largo, FL	369756	2003
School Administrative Unit #64 Union, NH	379113	2003
Yeshiva Bnos Ahavas Israel Brooklyn, NY	226981	2001

APPENDIX C

Request for Review Granted

Applicant	Application Number	Funding Year
Capital Region BOCES Albany, NY	159445	2000
Latch School Incorporated Phoenix, AZ	328123	2002