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June 12, 2000

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JUN 12 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals, TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: **Request for Review By the State of Washington Department of Information Services Of A Decision Of The Universal Service Administrator; FCC Docket Nos. 97-21 and 96-45**

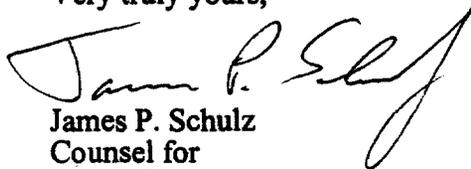
Dear Ms. Salas:

On behalf of the State of Washington Department of Information Services (DIS), transmitted herewith are an original and four (4) copies of a Request for Review of a Decision of the Universal Service Administrator, which is filed pursuant to Section 54.719(c) of the Commission's rules, 47 U.S.C. § 54.719(c).

The Decision of the Universal Service Administrator is dated May 12, 2000. Therefore, this Request for Review is timely filed pursuant to Sections 54.720(d) and 1.4 of the Commission's Rules, 47 CFR § 54.720(d) and § 1.4.

Should additional information be necessary in connection with this matter, please do not hesitate to contact the undersigned.

Very truly yours,



James P. Schulz
Counsel for
State of Washington
Department of Information Services

cc: Irene Flanney
Sharon Webber
Linda Chang
Dorothy Attwood
Kyle Dixon
Jordan Goldstein
Rebecca Beynon
Sara Whitesell

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

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In the Matter of)	
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Request for Review By the)	
State of Washington Department of)	
Information Services Of A Decision)	
Of The Universal Service Administrator)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors)	CC Docket No. 97-21
Of the National Exchange Carrier)	
Association, Inc.)	

**REQUEST FOR REVIEW BY THE STATE OF WASHINGTON DEPARTMENT OF
INFORMATION SERVICES OF A DECISION OF THE UNIVERSAL SERVICE
ADMINISTRATOR**

Filed By:

The Washington State Department of
Information Services

REED SMITH SHAW & McCLAY, L.L.P
1301 K Street, NW
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Washington, DC 20005

Its Attorneys

June 12, 2000

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**Before the
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Washington, D.C. 20554**

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**REQUEST FOR REVIEW BY THE STATE OF WASHINGTON DEPARTMENT OF
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ADMINISTRATOR**

INTRODUCTION

Pursuant to Section 54.719(c) of the Commission's Rules, 47 CFR §54.719(c), the State of Washington Department of Information Services (DIS) requests review, and seeks reversal, of a decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC or Administrator) to deny e-rate funding to virtually every eligible public school in the State of Washington for program year two.

SUMMARY

DIS administers the State of Washington's K-20 Network, a state of the art telecommunications facility serving virtually all of the state's educational institutions, including the state's e-rate-eligible public K-12 schools. In its role as the K-20 Network's administrator, DIS files a single FCC Form 471 annually on behalf of all of the participating eligible public schools and school districts in the State.

SLD denied DIS application for Program Year 2 (PY2) funding on the grounds that more than 30% of the entities for which DIS sought funding were "ineligible entities." In fact, none of the entities for which DIS sought funding were ineligible.

Before denial of its application, DIS discovered that on two occasions data entry errors had been made. The first discovery occurred in June, 1999. In July, 1999, the SLD permitted DIS to submit an amendment to its Form 471 correcting the first error. The second error was discovered shortly after DIS received its Receipt Acknowledgement Letter (RAL) in August, 1999. DIS sought, obtained and followed the guidance of the SLD in correcting the second error and submitted its corrections within the two-week period for correcting data entry errors specified in the RAL and on the SLD's web site.

On October 26, 1999, the SLD denied DIS's application in full, claiming that a significant portion of DIS's funding request was for ineligible entities.

DIS appealed to the Administrator on November 23, 1999, and the Administrator denied the appeal on May 12, 2000, on the ground that "more than 30% of Ineligible Entities [are] Receiving Services," and explaining that DIS's second correction could not be made because "the April 6, 1999 deadline for amendments" for PY2 had passed -- even though: 1) the

SLD's processes allow for corrections after receipt of the RAL; 2) DIS had timely provided its corrections; and 3) the SLD had made several amendments to DIS's PY2 Form 471 in July, 1999.

In the instant appeal, DIS challenges the arbitrary and capricious nature of the SLD's actions in refusing to acknowledge DIS's data entry correction. DIS also questions the promulgation and use, by the Program Administrator, of a 30% rule." DIS asserts that the promulgation and use of this rule in a decisional context exceeding the Administrator's authority and violates Section 54.702(c) of the Commission's rules 47 CFR § 54.702 ©, which prohibit the Administrator from making policy, interpreting Commission rules, or interpreting the intent of Congress.

DIS believes that this case presents novel questions of fact, law and policy. The facts in this case involve a very large number of affected persons -- nearly one million school children in the State of Washington. The questions of law involve the limits of the Administrator's legal authority to promulgate or rely on rules that are not applied in a purely administrative manner, but are used in a decisional context. The policy issues raised involve the question whether Congress intended that the children in one of the several states should be denied funding for an entire program year on the basis of a data-entry error.

I. DIS's Interest In The Matter Presented For Review

DIS administers the State of Washington's K-20 Educational Network, a state-of-the-art, high speed videoconferencing and data network dedicated to meeting the 21st-Century telecommunications needs of the State's educational institutions. Virtually all of the State's

public K-12 schools, colleges and universities participate in the network, which serves as a consortium within the meaning of Section 54.501(d) of the Commission's rules, 47 CFR §54.501(d), aggregating the purchasing power of the State's educational institutions in order to secure the lowest possible prices for services, including the lowest possible pre-discount prices for the State's eligible e-rate entities.

In its capacity as the K-20 Network Administrator, DIS files a single Form 471 Application for universal service funding on behalf of approximately 300 school districts representing some 1800 e-rate eligible public schools -- virtually all of the eligible schools in the State. The SLD denied in full DIS's application for Year 2 funding. DIS appealed to the SLD on November 23, 1999.¹ The SLD upheld its prior decision,² and DIS now appeals to the Commission.

II. Statement of Facts

On April 5, 1999, DIS submitted to the SLD its completed Form 471 for Program Year Two (PY2) funding.³ The DIS Form 471 contains forty one pages of supporting detail, which embody nearly 2000 lines of data. Thirty nine pages contain information in support of

¹ Letter dated Nov. 23, 1999 from Steve Kolodney, Director, State of Washington Department of Information Services, to Mr. David Gorbunoff, Manager, Year 2 Appeals Unit, Schools and Libraries Division (hereinafter *Letter of Appeal*), attached hereto as Exhibit 1.

² Letter dated May 12, 2000 from Schools and Libraries Division, Universal Service Administrative Company to Ms. Erika Lim, Senior Policy Advisor, Washington State Department of Information Services, attached hereto as Exhibit 2. (hereinafter *Decision on Appeal*).

³ Exhibit 2.

DIS's requests for funding for more than 1800 eligible public K-12 schools. The remaining two pages show details for seventy eligible libraries that were anticipated to have been connected to the network during PY2. No grade 13 through 20 entities appear in DIS's Form 471, nor in any of DIS's supporting detail.⁴

DIS's Form 471 application makes four funding requests: one request is for services provided to the network by Sprint Communications Company (Sprint); one is for services provided by AT&T Corporation (AT&T), and two requests are for services provided by USWest.⁵

In late June, 1999, DIS discovered that two numbers in Block 5 of its Form 471 application, estimating the annual pre-discount costs for services provided by AT&T and Sprint, respectively, had been transposed.⁶ While the transposition error did not change the total estimated pre-discount costs for the entire application, it did represent a \$1.77 million error for each of the affected requests, *i.e.*, one request would have been for \$1.77 million more than the correct amount, and one request would have been for \$1.77 million less than the correct amount.

DIS brought the error to the SLD's attention immediately. On or about June 25, 1999, an SLD representative instructed DIS to wait for a funding commitment letter and then to file an appeal to correct the data entry error.⁷

⁴ *Id.*

⁵ *Id.*

⁶ *Appeal Letter to SLD at 1, and see Affidavit of Erika Lim, attached hereto as Exhibit 3 (hereinafter Lim Affidavit).*

⁷ *Id.* This advice was contrary to SLD's published procedures for correcting data entry errors. See discussion beginning at text ____, *infra*.

In late July, 1999, DIS received a phone call from another SLD representative, who requested additional information required to complete Block 17 of the PY2 Form 471.⁸ DIS requested permission to correct the transposition error at the same time as it submitted the requested information, rather than wait for rejection and appeal, as earlier advised. In response, the SLD representative instructed DIS to go ahead and prepare an amended Block 5 in order to correct the transposition error and to submit the corrected Block 5 along with the information required to complete item 17.⁹ DIS submitted the information, as instructed, on July 27, 1999.¹⁰ The SLD subsequently asked DIS to provide additional information regarding 59 of the schools and libraries listed on its Form 471.¹¹

Shortly thereafter, DIS received its Receipt Acknowledgement Letter (RAL) dated August 11, 1999.¹² RALs are issued by the SLD in order to inform applicants that their applications have been received and that the information shown on the RAL has been entered

⁸ Chronology of Events, originally attached to the *Letter of Appeal* as Attachment E, attached hereto as Exhibit 1-E. Item 17 requires confirmation that a list of services provided by each service provider has been appended to the Form 471. *Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471)*, Item 17, at 21 (Dec. 1998) (hereinafter *Form 471 Instructions*). This list was not provided with DIS's original Form 471.

⁹ Exhibit 1-E, *and see* Letter dated July 27, 1999, from Erika Lim to Ms. Jon Cruver, Schools and Libraries Division (via fax), originally attached to the *Letter of Appeal* as Attachment A, attached hereto as Exhibit 1-A (hereinafter *July 27 Letter*).

¹⁰ *Id.*

¹¹ Exhibit 1-E.

¹² FCC Form 471 RECEIPT ACKNOWLEDGEMENT LETTER TO APPLICANT, Re: Form 471 Application Number 147099, dated August 11, 1999, appended to the *Letter of Appeal* as Attachment B and attached hereto as Exhibit 1-B (hereinafter RAL).

into the SLD's database.¹³ The RAL provides on its face for a two-week period following receipt of the RAL for corrections to the data entered on the RAL.¹⁴

The pre-discount cost figures shown on the RAL reflected the amended Block 5 information (correcting the transposition error) that DIS had submitted on July 27.¹⁵ On August 13, 1999, a third SLD representative telephoned DIS to request further information about the K-20 Network's construction and composition.¹⁶ While gathering responsive information, DIS noticed that the estimated pre-discount cost figures as reported in Block 5 of DIS's Form 471, and as reflected in each of the Funding Request Numbers (FRNs) in DIS's RAL, seemed grossly overstated, and DIS began to investigate.

In order to calculate its pre-discount cost estimates, DIS adheres to the affidavit requirements of the Form 471 instructions applicable to consortia containing both eligible and ineligible entities, *i.e.*, DIS first estimates its system-wide costs and then applies an adjustment ratio to account for the presence in the network of ineligible entities (colleges and universities) that the K-20 Network also serves.¹⁷ Upon examination it became apparent that while DIS personnel had accurately processed the information gathered from the roughly 1800 eligible schools that were listed on DIS's Form 471 in order to arrive at well-supported system-wide estimates, they had then inadvertently failed to apply the adjustment ratio (.527) in the final

¹³ *Id.* at 1.

¹⁴ RAL at 2-3. *See also* the SLD's instructions for correcting information at <http://www.sl.universalservice.org/apply/5ral.asp>.

¹⁵ *Letter of Appeal* at 1. *Compare* the amended Block 5 information attached to the *July 27 Letter with RAL* at 2.

¹⁶ Exhibit 1-E

¹⁷ *See Form 471 Instructions*, at 16 ("Services shared by eligible and ineligible entities"), Dec. 1998.

calculations, with the result that the figures submitted in DIS's Form 471 and shown on DIS's RAL reflected an overstatement of approximately \$4.5 million in estimated pre-discount costs.

Immediately upon making this discovery, DIS notified the SLD Program Integrity Assurance (PIA) team member with whom DIS had been working in order to solicit SLD's guidance on how best to correct its error. As was the case with the earlier Block 5 transposition error, DIS was instructed to provide the corrected figures to the SLD.¹⁸ DIS promptly submitted the corrected figures on August 18, 1999, one week after receiving its RAL.¹⁹

DIS had no further contact with the SLD²⁰ until DIS received its Funding Commitment Report dated October 26, 1999, which denied in full DIS's application.²¹ The pre-discount cost figures included in the *Funding Commitment Report* reflected the uncorrected numbers originally filed by DIS rather than the corrected numbers that DIS submitted on August 18, 1999,²² and the "*Funding Commitment Decision*" lines for each of the four FRNs stated, "\$0.00 - Inel. entity receiving service."²³ The "*Funding Commitment Decision Explanation*" lines for each FRN stated, "A significant portion of this FRN is a request for ineligible entities

¹⁸ *Letter of Appeal* at 1, and see Exhibit 1-E.

¹⁹ *Id.*, and see Letter dated August 18, 1999 from Erika Lim to Mr. Romney Biddulph, attached to the *Letter of Appeal* as Attachment C and attached hereto as Exhibit 1-C (hereinafter *August 18 Letter*).

²⁰ The SLD web site advises in boldfaced type that the SLD will not notify applicants of the receipt of their changes. <http://www.sl.universalservice.org/apply/5ral.asp#rald>.

²¹ Letter dated October 26, 1999, from Kate L. Moore, President, Schools and Libraries Division, USAC, to Erika Lim, originally attached to the *Letter of Appeal* as Attachment D and attached hereto as Exhibit 1-D, at 5 (hereinafter *Funding Commitment Report* or FCR).

²² *Letter of Appeal* at 1-2, and compare *August 18 Letter* with FCR at 5.

²³ FCR at 5.

(grades 13 to 20), which are not eligible to receive funding based on the program rules for eligible entities."²⁴

On November 23, 1999, DIS appealed to the SLD's Year 2 Appeals Unit, asserting that the SLD had based its funding decision on incorrect information despite the fact that the correct information was available to the SLD.²⁵ DIS also asserted that FCC program rules would permit SLD to "determine that adjustments to the application [were] appropriate and fund the application accordingly."²⁶ DIS reminded the SLD that DIS applies for e-rate funding on behalf of all of Washington State's eligible K-12 schools, that the K-20 Network advances Congress's goals in establishing the e-rate program, serving the educational needs of nearly one million school children, and noted that "[i]t is inconceivable that Congress intended that children of Washington State be punished because of a clerical error."²⁷

²⁴ *Id.*

²⁵ *Letter of Appeal* at 1-2.

²⁶ *Id.* at 2. See e.g., FCR at 3 (stating that "[a]n FRN that is "Funded" will be approved *at the level that SLD determined is appropriate for that item.* That will *generally* be the level requested by you *unless the SLD determines during the application review process that some adjustment is appropriate . . .*" *Emphasis added.*). See also RAL at 3 (noting that "SLD will accept your corrections but not changes to your actual application *unless the effect is to reduce the size of your request for funding* not needed due to Year One commitment[]." *Emphasis added.*) In connection with this exception due to overcommitments in Year One, the SLD web site elaborates: "If you have requested Year 2 funds for any projects that you now know you will be able to complete using Year 1 commitments—or if there are any other reductions you would like to make in your Year 2 requests—we urge you to delete or reduce the relevant requests accordingly. (You cannot, however, use this process to request any INCREASES in funding.)]" <http://www.sl.universalservice.org/apply/5ral.asp#ralc> (*italics added, capital letters in original*).

²⁷ *Letter of Appeal* at 2.

On May 12, 2000, the SLD issued its *Decision on Appeal*, again denying in full DIS's application. The denial stated:

Denial Reason(s):

- More than 30% of Ineligible Entities Receiving Service - Documentation you provided in support of your Form 471 application shows that 47.3% of the above FRNs are requests for Grade [sic] 13 to 20, which are ineligible to receive funding based on the program rules for eligible entities. We are unable to remove the ineligible entities portion from the funding requests since the April 6, 1999 deadline for amendments to the funding year two Form 471 has passed.²⁸

III. Questions Presented

1. Did the Administrator act in an arbitrary and capricious manner or abuse its discretion by choosing to incorporate amendments to DIS's Form 471 application that were prepared and delivered in late July while refusing to consider data entry corrections that were submitted within two weeks of DIS's receipt of its RAL in August on grounds that the April 6, 1999 deadline for amendments had passed?

2. Did the Administrator exceed its authority in promulgating and applying a decisional rule that results in the summary rejection of any request for funding 30% or more of the funding sought is for ineligible entities or services, regardless of the circumstances under which the request was made, in violation of Section 54.702(c) of the Commission's rules, 47 CFR §54.702(c), which prohibits the SLD from making policy or interpreting the intent of Congress?

²⁸ *Decision on Appeal* at 1.

DIS respectfully asks the Commission to overturn the Administrator's May 12, 2000, decision and to direct the SLD to process DIS's application using the corrected information that DIS provided to the SLD on August 18, 1999, for the reasons discussed below:

1. The Administrator's refusal to consider DIS's August correction of its funding request information on grounds that "the April 6, 1999 deadline for amendments" had passed, especially after having earlier incorporated amendments that were prepared and delivered in late July, was arbitrary and capricious, an abuse of discretion and violative of the statutory requirement in 47 USC §254(b)(5) that the universal service mechanisms must be "predictable."

SLD procedures allow for corrections of data entry errors made by either the SLD or the applicant within two weeks of receipt of an RAL.²⁹ The web site explains:

5. When to Request Corrections Using the Form 471 RAL

To properly process your application, we'll need to received [sic] your allowable correction requests as soon as possible. We encourage you to follow the steps above WITHIN TWO WEEKS of the arrival of your Form 471 Receipt Acknowledgement Letter.³⁰

The "steps" referred to on the web site are six in number and include: 1) photocopying the RAL; 2) drawing lines through the incorrect information and marking the correct information on the RAL; 3) photocopying the marked version for the applicant's records; and 4) sending the marked version to the SLD Correspondence Unit at its address at 100 South Jefferson Road, Whippany, NJ. within two weeks of receipt of the RAL.³¹

²⁹ <http://www.sl.universalservice.org/apply/5ral.asp>. The term "data entry" is nowhere defined in the Commission's rules. DIS defines "data entry errors" as including the entry of incorrect data.

³⁰ *Id.* (Emphasis in original.) See also RAL at 2-3.

³¹ <http://www.sl.universalservice.org/apply/5ral.asp#rald>.

Step 4 includes in parentheses: "(Please, no fax or e-mail.)".³²

The admonition to send the corrections within two weeks of receipt of the RAL is repeated in the language quoted above and in bold type.³³ Step 5 contains promise that "[a]llowable corrections received in a timely fashion will be reflected in your Funding Commitment Decisions Letter," followed by a warning that only allowable corrections will be made which, in turn, is followed by a notice in bold type that the SLD will not notify applicants of the receipt of their changes.³⁴ The sixth and final step advises applicants to notify their service providers of any changes made in order to "help your service provider keep your records updated."³⁵

DIS did not follow each of the steps listed on the web site because instead, DIS solicited, received and complied with explicit instructions from the SLD's representative regarding the steps it should take to correct its FRNs. Specifically, DIS marked a copy of its original Block 5 instead of marking a copy of its RAL, and, as instructed by the PIA team member with whom it had been working closely, DIS faxed the copy, along with its letter of explanation, directly to the team member with whom PIA team member at its address at 100 South Jefferson Road, Whippany, NJ. In short, DIS's deviation from the prescribed method for making corrections to information contained in a RAL were minor and were undertaken in

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

consultation with the SLD?³⁶ Therefore, in all material respects and for all practical purposes, DIS complied with the SLD's requirements for submitting timely corrections to DIS's RAL.

The SLD web site further explains: (1) the stage in the SLD's process at which the RAL is sent to the applicant and (2) the role that the RAL plays in that process:

Your Receipt Acknowledgement Letter is sent out after data entry is complete on your application but before we have begun *any* program integrity review (which may involve phone and fax communication between you and our staff). Thus, the Receipt Acknowledgement Letter does NOT reflect *any* decisions on your funding requests, and is NOT a commitment of funding. Instead, it simply shows you the information we have in our data system based on your application.³⁷

The DIS's RAL was dated August 11, 1999, and the SLD's representative contacted DIS seeking further information regarding the K-20 Network on August 13, 1999. DIS's corrections were sent on August 18, 1999 -- one week from the date of the RAL.

Since no funding decisions had been made by August 11, and the phone and fax communication between DIS and SLD staff were completed within one week of DIS's receipt of its RAL (well within the time provided for making corrections), the SLD could not have made its decision on DIS's funding request until, at the earliest, at least one week *after* the SLD received DIS's corrected figures.

The corrected numbers that DIS submitted on August 18, reflected a \$4.5 million reduction in the total requested state-wide funding as compared to the uncorrected submission. The SLD's web site states, "if there are *any other reductions you would like to make* in your Year 2 requests [,] we urge you to delete or reduce the relevant requests accordingly. (You cannot,

³⁶ *Letter of Appeal* at 1.

³⁷ <http://www.sl.universalservice.org/apply/5ral.asp#ralb>. (Italics added, capital letters in original.)

however, use this process to request any INCREASES in funding.[)]"³⁸ DIS did not attempt to alter the underlying information in its Form 471,³⁹ nor did DIS attempt to file new or additional supporting documents that would have placed additional burdens on SLD staff or resources.⁴⁰ Rather, DIS submitted only the corrected numbers for each of its four FRNs.

Despite the fact that DIS provided corrected information for each FRN shown on the RAL as instructed by SLD's PIA team member and explained that the corrected figures represented the costs attributable only to the K-12 portion of the network,⁴¹ the SLD chose to ignore the corrections and deny each FRN with the notation, "Inel. entity receiving service." This was factually wrong. DIS's corrected figures included no amounts that could be attributable to ineligible entities, and no ineligible entities were included in the forty one pages of supporting detail included in DIS's original Form 471. The SLD had been apprised of these facts by telephone and by letter *prior* to the SLD's making its decision regarding DIS's funding request.

DIS is well aware that the Commission has rejected other applicants' contentions that the SLD should have considered late-filed or post-FCR changes to their Form 471 information. In such cases, the Commission has stated that, "[i]n light of the thousands of

³⁸ <http://www.sl.universalservice.org/apply/5ral.asp#ralc>. (Italics added; capital letters in original.)

³⁹ *See* RAL at 3.

⁴⁰ *See e.g. Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy, Brooklyn, New York; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-105791, CC Dkt. No. 96-45, CC Dkt. No. 97-21, ¶¶ 10, 16 (rel. Jan. 7, 2000) (hereinafter *United Talmudical*) (noting that USAC should not be required to "stand in the shoes" of the applicant in the performance of its necessary resources review or to "be placed in a position of making . . . choices on behalf of applicants.").

⁴¹ *August 18 letter.*

applications that SLD must review and process each year, we find that it is administratively appropriate to require an applicant to be responsible for correctly calculating and reporting its estimated pre-discount costs in completing its FCC Form 471 upon which its ultimate funding is dependent."⁴² DIS respectfully points out that this is precisely what the RAL and subsequent two-week correction window are for: a final check to ensure that the information the SLD has on file for each FRN is correct and has been accurately reported.⁴³

⁴² *Request for Review of the Decision of the Universal Service Administrator by Scranton School District, Scranton, Pennsylvania, On behalf of Intermediate Unit #19 Consortium, Archbald, Pennsylvania; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-112318, CC Dkt. No. 96-45, CC Dkt. No. 97-21, (rel. Jan. 7, 2000) (hereinafter *Unit #19*). In *Unit #19*, the SLD granted in part Intermediate Unit #19's request for discounts for the disputed FRN based on a \$557.76 monthly charge for a total of \$5,979.19. On appeal, Intermediate Unit #19 asserted that its monthly amount should have been \$6,693.16 rather than the \$557.76 figure that it originally entered, and that the total estimated annual pre-discount cost should have been \$80,317.92. The SLD rejected the appeal, and the Commission affirmed. *Unit #19* is distinguishable from DIS's case in several important respects: first, the SLD in fact *granted* Intermediate Unit #19's request for the disputed FRN; albeit in the amount requested before the error was discovered; in DIS's case, DIS's application was denied in full. In *Unit #19*, the SLD based its decision on the only figures available to it at the time of the decision; in DIS's case, SLD had the correct figures -- provided within the time allotted for corrections -- at the time it made its decision, but refused to acknowledge the correct data. Finally, in *Unit #19*, Intermediate Unit #19 sought a significant *increase* over the amount originally requested; in DIS's case, DIS sought a \$4.5 million *decrease*.

⁴³ RAL at 2-3, *stating that* "[i]f we (or you) have made errors in Form 471 data entry, or if your Block 1 information has changed, the Receipt Acknowledgement Letter offers you the opportunity to make corrections." The Commission has also stated that "in certain circumstances, it may be appropriate for applicants to supplement the information contained in their application forms in order to clarify that information." *Request for Review of the Decision of the Universal Service Administrator by New Kensington-Arnold School District, New Kensington, Pennsylvania; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Order, File No. SLD-28754; CC Dkt. No. 96-45, CC Dkt. No. 97-21, rel. Dec. 21, 1999 (hereinafter *New Kensington*). In *New Kensington*, the applicant provided a table of cost details to the SLD one week prior to receipt of the Funding Commitment Letter which denied its requests for discounts. After an unsuccessful appeal to the SLD, New Kensington appealed to the Commission. In rejecting the appeal, the Commission noted (at ¶4) that New Kensington had submitted entirely new cost data in its appeal *to the Commission*, "facially similar to the detailed cost data it submitted to SLD." The Commission noted that "New Kensington asks that it be permitted to do

Continued on following page

The SLD's refusal to acknowledge DIS's timely corrections to the information contained in its RAL was an abuse of discretion. Further, the assertion by the SLD Appeals Unit that "[w]e are unable to remove the ineligible entities portion from the funding requests since the April 6, 1999 deadline for amendments . . . has passed" is wholly specious in light of the stated purpose of the RAL and in light of the fact that the SLD made several corrections to DIS's Form 471 -- including the amendment of DIS's original Block 5 information -- in late July. Moreover, there was no need for the SLD to "remove the ineligible entities portion from the funding requests" since there was no "ineligible entities portion" to remove: there were four numbers that had been created on the basis of DIS's data entry error that needed to be replaced. DIS had, on its own initiative and immediately upon discovery of its mistake, applied the missing ratio to its reported funding requests, and had supplied the corrected numbers to the SLD.

The decision by SLD to include one set of corrections submitted by DIS but to exclude corrections to the information contained in the RAL that DIS submitted within the two-week window for making such corrections was not only confusing and misleading, but was completely arbitrary and capricious. The reason for these disparate actions, if any, should have been addressed by the SLD Appeals Unit, especially since these actions had been drawn to the

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much more than clarify the information contained in its original FCC Form 471." *Id.* DIS's case is distinguishable from *New Kensington* in that: 1) DIS submitted corrected FRNs, not a table of new cost details; 2) DIS submitted its information within the time allotted for corrections and prior to the SLD's funding commitment decision, not after the decision had been made; 3) DIS sought to *reduce* its requested amounts, while *New Kensington* sought an increase over its originally requested amount, and 4) DIS has not attempted to introduce new figures on appeal -- either to the SLD or to the Commission, while *New Kensington* involves an attempt to include new cost data, in its appeal for the first time to the Commission.

Appeals Unit's attention in DIS's *Letter of Appeal*.⁴⁴ The SLD's appeals process supposedly exists so that straightforward problems arising in the funding commitment process can be addressed and resolved,⁴⁵ thus avoiding arbitrary and punitive outcomes that conflict with Congressional intent -- not so that the SLD's initial funding decisions simply can be rubber-stamped and left to the Commission for resolution.⁴⁶

The response of the Appeals Unit in this instance indicates that the SLD deliberately sandbagged DIS by using DIS's identification of its own inadvertent error as the basis for its assertion that [d] "Documentation you provided in support of your Form 471 application shows that 47.3% of the above FRNs are requests for Grade 13 to 20"⁴⁷ In fact, DIS's own identification of the percentage of network participation attributable to eligible entities (.527, or 52.7%) was provided in support of DIS's corrected figures (not in support of its uncorrected Form 471) and "showed" that exactly *zero* percent of DIS's FRNs were requests for Grades 13 to 20.

⁴⁴ Letter of Appeal at 1.

⁴⁵ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Third Report and Order in CC Docket No. 97-21; Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058, ¶ 67 (rel. Nov. 20, 1998) (hereinafter *Eighth Reconsideration Order*) (stating "[w]e encourage parties to seek redress in the first instance from [USAC] for matters that involve straightforward application of the Commission's rules. To the extent that affected parties can obtain prompt resolution of such disputes, support mechanism participants will be better served and limited Commission resources will be conserved.").

⁴⁶ *Id.* See generally *id.* at ¶¶ 15-18, 66-69 (discussing limitations on USAC's authority, accountability to the Commission and to Congress, and the review process, and rejecting, at ¶ 69, USAC's and SLD's "recommendation that the Commission uphold USAC decisions without considering the merits of the appeal if the Commission finds that USAC has not exceeded its authority and has acted consistently with the Commission's rules.").

⁴⁷ *Decision on Appeal* at 1.

This abuse of the limited authority that Commission has vested in the Administrator to gather information necessary to the fair administration of the universal service support mechanism can only discourage applicants from coming forward with information concerning errors which they identify in their own applications for fear that the information they submit to SLD will be used to deny their requests. Punishing those applicants who volunteer information reducing claims that were originally higher because of inadvertent errors discovered in a timely fashion and discouraging such applicants from stepping forward in the future can only lead to precisely the kinds fraud and abuse within the universal service support mechanism that the Administrator has been charged with preventing.

Because the SLD: 1) refused to consider DIS's permissible corrections to the information contained in its August 11, 1999, RAL; 2) allowed amendments to DIS's Form 471 in July; and 3) used DIS's volunteered information against DIS in a manner that supported a claim that was factually wrong, the SLD did not administer the schools and libraries support mechanism in a manner that can be characterized in any way as "predictable." The SLD's actions therefore violate Section 254(b)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §254(b)(5), and are arbitrary and capricious and an abuse of discretion. Therefore, DIS respectfully requests that the Commission overturn the decision of the Universal Service Administrator and direct the SLD to process DIS's application forthwith using the corrected information that DIS timely supplied to the SLD on August 18, 1999.

2. The Administrator exceeded its authority and violated Section 54.702(c) of the Commission's rules, 47 CFR §54.702(c), by promulgating a decisional rule which sets a 30% error rate as an absolute bar to e-rate funding.

USAC's stated reason for denying DIS's appeal was: "More than 30% of Ineligible Entities Receiving Service."⁴⁸ Thirty percent has also been cited in other cases as a cutoff for further consideration of specific FRNs.⁴⁹ The FCRs and Decision Letters associated with these cases indicate that if, upon initial review, 30% or more of the total amount of a funding request is for ineligible entities or ineligible services, the request is rejected without further action.

The reasoning on which this "rule" appears to be based is that there are so many applications to process and so little money to distribute that USAC's resources are better spent in processing error-free requests than in using those same resources to track down and correct errors. A secondary rationale appears to be that high error-rates are often an indication of waste or attempts at fraud and abuse. The Administrator has an implicit duty to guard against waste, fraud and abuse under Section 54.702(h) of the Commission's rules,⁵⁰ and the 30% "rule" provides a shortcut method of fulfilling that obligation by eliminating a class of funding requests with the highest probability of contributing to waste, fraud or abuse.

DIS does not challenge USAC's development, or internal use, of a 30% "rule" or any other rule that helps in processing the thousands of applications submitted to USAC each

⁴⁸ *Id.*

⁴⁹ See *Request for Review by Winterset Community School District, 302 West South St., Winterset, Iowa 50273-0030 of Decision of the Universal Service Administrator on Funding Request Number 201905 (Reference FCC Docket Nos. 97-21 & 96-45, SLD No. 201905, Appeal filed Apr. 13, 2000, at 2-3 and Funding Commitment Report attached thereto as Exhibit C, at 5 (more than 30% for ineligible products and services); Request for Review by Richland Parish School Board of Decision of Universal Service Administrator, Letter of Appeal filed May 10, 2000, Funding Commitment Report attached thereto as Attachment 1, at 5 (more than 30% for an ineligible service), and see Administrator's Decision on Appeal attached thereto as Attachment 3 ("Your funding request included more than 30% of ineligible services, which resulted in the denial of the entire amount of the FRN.")*

⁵⁰ 47 CFR §54.702(h) requires confirms the Administrator to submit annual reports with the Commission and Congress detailing, *inter alia*, "administrative action intended to prevent waste, fraud and abuse."

year, so long as any such rule is applied only *as an administrative aid*. DIS does take issue, however, with USAC's application of such a rule *as a rule of decision* in making its final determinations regarding the disbursement of universal service funds.

USAC's authority to administer the schools and libraries program⁵¹ is limited. The Commission has emphasized that USAC's authority is "exclusively administrative," in keeping with Congress directive that the single Administrator's role be "limited to implementation of the FCC[']s rules," and that the administrator must not be permitted to "interpret the intent of Congress in establishing the programs or interpret any rule promulgated by the Commission in carrying out the programs . . ."⁵²

Such limited functions as the Commission has vested in USAC⁵³ give it ample room to develop whatever internal procedures it deems necessary to administer the schools and

⁵¹ The contorted history of the establishment of USAC and the Commission's vesting of authority in it as set forth in various Commission documents and orders is incorporated herein by reference. DIS explicitly reserves the right to raise the issue of the legality of USAC's authority on appeal to the courts, if necessary.

⁵² *Eighth Reconsideration Order* at ¶¶ 15-17.

⁵³ The Commission has elsewhere described the SLD's authority as follows: "Administration of the schools and libraries support mechanism is the responsibility of the Schools and Libraries Division (SLD) of USAC, under the oversight of the Schools and Libraries Committee of USAC. Under the rules adopted in the Commission's Eighth Reconsideration Order, the Schools and Libraries Committee's functions include "development of applications and associated instructions," "review of bills for services that are submitted by schools and libraries," and "administration of the application process, including activities to ensure compliance with Federal Communications Commission rules and regulations." Thus, under the Eighth Reconsideration Order, the Commission vested in the Schools and Libraries Committee and the Schools and Libraries Division the responsibility for *administering the application process* for the universal service support mechanism for eligible schools and libraries. Moreover, under the Commission's rules, it is the responsibility of SLD, subject to the oversight of the Schools and Libraries Committee, *to process and review* each FCC Form 470 and FCC Form 471 filed with SLD to ensure that the funding applicant is in compliance with applicable rules and regulations of the Commission." *United Talmudical, supra* note 39 at ¶ 4 (emphasis added).

libraries support mechanism⁵⁴ and to disburse universal service funds⁵⁵ pursuant to the Commission's universal service rules. Indeed, Section 54.705(a)(iii) of the Commission's rules gives the Schools and Libraries Committee of the USAC Board specific "authority to make decisions concerning . . . [a]dministration of the application process, including activities to ensure compliance with Federal Communications Commission rules and regulations."⁵⁶ Therefore, if USAC were to decide that it needed some way to determine which requests to process first, which to move into a "problem" pile, which to investigate for waste, fraud or abuse, or any other classification necessary to the Administration of the fund, USAC could, pursuant to the authority vested in it by the Commission, develop and apply a 30% (or any other percentage) cut-off to make those kinds of preliminary assessments.

Nothing in the Commission's rules, however, can be construed as authorizing USAC to employ such an administrative aid [to triage] as the basis for its ultimate funding commitment decisions. To the contrary, the Commission's directives to administer the support mechanism and to disburse funds grant no authority to USAC to devise *decisional* rules, but rather grant USAC the limited authority to make funding decisions based on those rules which the Commission has already provided to USAC as well as to applicants, *i.e.*, those rules which are publicly set forth in Part 54 of *the Commission's* rules.⁵⁷

⁵⁴ 47 CFR §54.702(a).

⁵⁵ 47 CFR §54.702(b).

⁵⁶ 47 CFR §54.705(a)(iii).

⁵⁷ There is also a question as to whether USAC's employment of a 30% "rule" in a decisional context, rather than an administrative context, violates the notice and comment requirements of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (APA), or whether USAC's promulgation and use of the rule implicates the Commission in a violation of the APA. While Section 553(a)(2) of the APA, 5 U.S.C. § 553(a)(2), creates an exception to the APA's notice and comment requirements for matters involving public

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When USAC uses an arbitrary cut-off figure for anything more than a preliminary assessment, it violates Section 54.702(c) of the Commission's rules, which states in relevant part: "The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."⁵⁸

The promulgation of a decisional rule -- especially one in which the substantial rights of a significant number of regulated individuals are affected on the basis of whether an entity falls on one side or another of an arbitrary line -- is an act of policy-making that imposes an additional eligibility requirement on applicants for universal service funding that is nowhere

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benefits, courts have long recognized that the basic policy of the APA requires that notice and an opportunity for comment should be provided when a rule has a substantial impact on regulated individuals. *See e.g., Rivera v. Patino*, 524 F. Supp. 136, 148-149 (N.D. Cal., 1981) (citing *Thompson v. Washington*, 497 F.2d 626 (U.S. App. D.C. 1976) for the proposition that notice and comment is appropriate even where literal terms of the APA clearly do not apply). *See also American Medical Association v. Reno*, 57 F.3d 1129, 1132-33 (U.S. App. D.C. 1995) (scope and budget of DEA's diversion control program not exempt from APA requirements), and *see Petry v. Block*, 737 F.2d 1193, 1200 (U.S. App. D.C. 1984) (legislative history of APA makes clear that exceptions to notice and comment requirements are not "escape clauses" to be used at agency's whim, but should be limited to emergency situations). DIS explicitly reserves the right to challenge on appeal to the courts, if necessary, the validity of the SLD's promulgation and application of a 30% "rule" on APA grounds.

⁵⁸ 47 CFR § 54.702(c). The rule continues: "Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission." The Commission delegated authority to the Common Carrier Bureau to oversee USAC and to "issue orders" pursuant to that delegated authority whenever USAC seeks guidance from the Commission pursuant to Rule 54.702(c). *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration in CC Docket No. 97-21; Eleventh Order on Reconsideration in CC Docket No. 96-45 and Further Notice of Proposed Rulemaking, 14 FCC Rcd 6033, separate statements of Chairman Kennard and Commissioner Ness, separate statement of Commissioner Furchtgott-Roth (dissenting in part) (rel. Nov. 20, 1998). If USAC has ever sought guidance from the Commission regarding its promulgation or use of a 30% "rule", such guidance does not appear to be evident in any of the Orders issued to date by the Common Carrier Bureau pursuant to its delegated authority.