

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Waiver and Review of a
Decision of the
Universal Service Administrator by
Alamogordo Public School District
Alamogordo, New Mexico
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-377799
CC Docket No. 02-6

ORDER

Adopted: June 30, 2014

Released: June 30, 2014

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

1. Consistent with precedent, we deny the request from the Alamogordo Public School District (Alamogordo) seeking review of a decision by the Universal Service Administrative Company (USAC) to reduce funding under the E-rate program (more formally known as the schools and libraries universal service support program) for funding year 2003 (FY2003). We find that USAC properly reduced Alamogordo's funding because it sought support for services that were ineligible for E-rate support.

2. Background. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts on eligible services. Every year, the Commission releases an Eligible Services List (ESL) to provide applicants with notice of any changes to the services and products that are eligible for E-rate funding before the applicants seek bids for services and apply for E-rate support. Applicants who wish to substitute for their approved services must submit

1 See Request for Review of the Decision of the Universal Service Administrator by New Albany-Floyd County Consolidated School Corp., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Rcd 7190 (Common Carrier Bur. 2001) (holding that applicants may only seek support for eligible services); Requests for Review of Decisions of the Universal Service Administrator by Clark County School District et al., Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 24 FCC Rcd 12710 (Wireline Comp. Bur. 2009) (denying appeals for funding requests that sought ineligible services).

2 Letter from Ward Kenyon, Business, Finance and Technology Director, Alamogordo Public Schools, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 25, 2008) (Request for Review).

3 See 47 C.F.R. § 54.504 (2003). For purposes of this Order, we cite to the rules and were in effect during the relevant time period.

4 See, e.g., USAC website, Eligible Services List, http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx (last visited June 30, 2014) (showing yearly release of ESLs).

a request for a service substitution to USAC and have that request approved.<sup>5</sup> Duplicative services are not eligible for E-rate support.<sup>6</sup>

3. In FY2003, Alamogordo initially sought support for, among other things, server engine and chassis components.<sup>7</sup> After filing its application for E-rate support, but before USAC had reviewed the application, Alamogordo filed a request to substitute one set of server engine and chassis components for another.<sup>8</sup> USAC granted that request.<sup>9</sup>

4. Subsequently, USAC found that Alamogordo violated the E-rate program's competitive bidding rules because Alamogordo did not consider the price of eligible services as the primary factor in its bid evaluations, and denied funding for Alamogordo's application. Alamogordo appealed the denial<sup>10</sup> and the Wireline Competition Bureau (Bureau) reversed USAC's decision, finding that USAC applied an incorrect standard for determining whether Alamogordo considered the price of eligible services as the primary factor in its bid evaluations.<sup>11</sup>

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<sup>5</sup> See *Request for Guidance by the Universal Service Administrator Concerning the Request of Los Angeles Unified School District, Los Angeles, CA et al.*, CC Docket Nos. 96-45, 97-21 and 02-6, Order, 16 FCC Rcd 3496 (Common Carrier Bur. 2001). Under program rules applicable to this appeal, USAC grants requests for substituted service from the service identified in the FCC Form 471 when: (1) the service or product has the same functionality, (2) the substitution does not violate any contract provisions or state or local procurement laws, (3) the substitution does not result in an increase in price and (4) the applicant certifies that the requested change is within the scope of the controlling FCC Form 470. *Id.* at 3499, para. 9. The Commission codified these requirements as rules but amended the "substitution does not result in an increase in price" requirement to "the substitution does not result in an increase in the percentage of ineligible services or functions." See *Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 and 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26930, para. 43 (2003) (*Schools and Libraries Third Report and Order*). Since 2011, these rules have been codified under 47 C.F.R. § 54.504(d).

<sup>6</sup> See USAC website, Eligible Services List for FY2003, at 16, [http://www.usac.org/\\_res/documents/sl/pdf/ESL\\_archive/EligibleServicesList\\_101802.pdf](http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_101802.pdf) (last visited June 30, 2014) (2003 Eligible Services List). The 2003 Eligible Services List states that "'backup equipment' used in the context of spare parts is not eligible for a discount." *Id.* (differentiating "backup equipment" used for spare parts from "backup equipment" used to store data). The 2003 Eligible Services List goes on to clarify that "spare parts" are "components on hand to replace hardware that fails and are ineligible." *Id.* at 27. Currently, the Eligible Services List uses the term "failover products" to describe equipment that serves as a replacement unit in case of failure. See USAC website, Eligible Services List for FY2013, [http://www.usac.org/\\_res/documents/sl/pdf/ESL\\_archive/EligibleServicesList-2013.pdf](http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList-2013.pdf) (last visited June 30, 2014).

<sup>7</sup> See Letter from Tony Korwin, Alamogordo Public School District, to USAC, Service Substitutions, Schools and Libraries Division (dated Apr. 17, 2005).

<sup>8</sup> *Id.*

<sup>9</sup> See Letter from USAC, Schools and Libraries Division, to Tony Korwin, Alamogordo Public School District (dated June 15, 2005).

<sup>10</sup> See Notification of Commitment Adjustment Letter from USAC, Schools and Libraries Division, to Tony Korwin, Alamogordo Public School District (dated Oct. 13, 2005); Funding Commitment Adjustment Report for Form 471 Application Number: 377799 (dated Oct. 13, 2005).

<sup>11</sup> See *Requests for Review of the Decision of the Universal Service Administrator by Academia Discipulos de Cristo Bayamon, Puerto Rico et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 9210, 9213, para. 9 (Wireline Comp. Bur. 2006).

5. After the Bureau granted Alamogordo's appeal, Alamogordo filed a second service substitution request for different server engine and chassis components.<sup>12</sup> USAC granted this second service substitution request, but reduced the funding commitment by \$87,530 on the basis that it contained a request for multiple units of the same model of server engine, and that only one unit was eligible for E-rate support.<sup>13</sup> Alamogordo appealed to the Commission, arguing that a waiver is warranted because USAC should have detected the error in time for Alamogordo to amend its request to seek only eligible equipment.<sup>14</sup>

6. *Discussion.* We deny Alamogordo's Request for Review. The FY2003 ESL was clear that equipment serving as a backup unit in the event that eligible equipment fails is ineligible for E-rate support.<sup>15</sup> Here, Alamogordo requested only one chassis but several server engines that corresponded to the chassis and served as backup equipment.<sup>16</sup> Because the extra server engines were backup units, they are ineligible for E-rate support.

7. Further, we reject Alamogordo's contention that a waiver of the Commission's rules to direct USAC to provide E-rate support for ineligible services is warranted on the ground that USAC did not give Alamogordo the chance to change its service substitution to request only eligible equipment. Applicants are obligated to submit funding requests only for those services that are eligible for E-rate support.<sup>17</sup> At all points in the application process, USAC has an obligation to ensure that E-rate funds support only eligible services.<sup>18</sup> The consequences of failing to request E-rate eligible support properly fall on the applicant.<sup>19</sup>

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<sup>12</sup> See Letter from Tony Korwin, Alamogordo Public School District, to USAC, Service Substitutions, Schools and Libraries Division (dated July 1, 2008) (Service Substitution Request).

<sup>13</sup> See Administrator's Decision on Service Substitution Request from USAC, Schools and Libraries Division, to George McDonald, E-Rate Central (dated July 17, 2008); see also 2003 Eligible Services List at 16. The 2003 Eligible Services List states that "'backup equipment' used in the context of spare parts is not eligible for a discount." *Id.* (differentiating "backup equipment" used for spare parts from "backup equipment" used to store data). The 2003 Eligible Services List goes on to clarify that "spare parts" are "components on hand to replace hardware that fails and are ineligible." *Id.* at 27. Currently, the Eligible Services List uses the term "failover products" to describe equipment that serves as a replacement unit in case of failure. See USAC website, Eligible Services List for FY2013, [http://www.usac.org/\\_res/documents/sl/pdf/ESL\\_archive/EligibleServicesList-2013.pdf](http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList-2013.pdf) (last visited June 30, 2014).

<sup>14</sup> See Request for Review at 2. When Alamogordo made its July 1, 2008 service substitution request, it had not yet received or been invoiced for any of the duplicate equipment.

<sup>15</sup> See 2003 Eligible Services List at 16, 27.

<sup>16</sup> See Service Substitution Request at 2.

<sup>17</sup> See 47 C.F.R. § 54.504(c) (2003).

<sup>18</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 18 FCC Rcd 27090, 27092, para. 7 (1999).

<sup>19</sup> See *Review of the Decision of the Universal Service Administrator by Davis School District, Schools and Libraries Universal Service Support Mechanism et al.*, CC Docket No. 02-6, Order, 17 FCC Rcd 6491, 6493, para. 8 (Wireline Comp. Bur. 2006) (noting that "[i]t is incumbent upon applicants to determine whether each of their applications are in compliance with program requirements prior to filing . . . Applicants that fail to follow program rules[] run the risk that their applications may not be considered for funding."). Indeed, even where a party receives erroneous advice from USAC, the government is not estopped from enforcing its rules in a manner that is inconsistent with the advice provided by the employee, particularly when relief is contrary to a rule. See, e.g.,

(continued . . .)

8. 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 pursuant to the authority delegated in sections 0.91, 0.291. 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), that the Request for Review filed by the Alamogordo Public School District IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Vickie S. Robinson  
Acting Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau

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*Request for Waiver by Lombard School District 44 et al.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13166 (Com. Car. Bur. 1999).