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A PROFESSIONAL LIMITED LIABILITY COMPANY

Summary of Recent Universal Service Fund Decisions

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The Commission recently released several decisions regarding waivers of its E-rate rules and one decision reviewing a denial of funding. Following is a summary of those decisions:

”Urban” or “Rural” Designation

The Commission denied the request of the Otsego Local School District for waiver of the sits designation as “urban” for purposes of calculating its discount level. Under the rules, schools and libraries are designated by the Universal Service Administrative Company (“USAC”) as “rural” if they are located in either a non-metropolitan county as defined by the Office of Management and Budget (“OMB”) or in an area specifically identified in the most recent Goldsmith Modification list published in the ORHP. Designation as “rural” by USAC can mean an additional discount of up to 10%.

USAC granted Otsego’s 2003 funding year application at a discount rate of 44% for its eligible services. Because of its “urban” designation, the school district did not receive the additional 10% discount to which it would have been entitled had it been recognized as “rural.”

Otsego presented a number of arguments in support of a “rural” designation, including:

- its residents pay a premium for phone calls to Toledo, the nearest urban area (as well as to its suburbs);
- its district covers over 150 square miles and includes only four small villages;
- both the AAA Tour Book and the PRIZM lifestyle segmentation system view Otsego as rural.

It further contended that “any visitor to the school district traveling from any direction would immediately recognize its local district as rural.”

The Commission, however, dismissed these factors as merely “general observations ... about some of the rural characteristics of [Otsego’s] local school district.” The Commission suggested that Otsego should have either challenged the method for classifying whether a school or library is “rural” or demonstrated how “the current definition unfairly discriminates against [it] as compared to any other school districts that have some rural characteristics, but which to do not meet the current definition of ‘rural’ under the E-rate program.”

Use of State Master Contracts

Here, the Commission granted the Kentucky Department of Education’s request for waiver of Section 54.504(c) of the rules, enabling Kentucky schools to use state master contracts to apply for universal service support for Funding Year 2005 and future funding years.

The rules require that an applicant must file with USAC, for posting to its website, an FCC Form 470 requesting services. After the FCC Form 470 is posted, the applicant must wait at least 28 days before entering into a competitively bid agreement with a service provider. Section 54.504(c) requires applicants to submit a completed FCC Form 471 to USAC upon signing a contract for eligible services.

Kentucky negotiated state master contracts for the benefit of eligible entities in the state of Kentucky. It posted appropriate FCC Forms 470 for these contracts on USAC’s website, indicating its intent to permit annual renewals or extensions.

As noted above, Section 54.504(c) requires applicants to enter into binding service agreements with their chosen providers before submitting an FCC Form 471. But, because Kentucky's state procurement regulations prohibit annual contract renewals until after the filing deadline for the FCC Form 471, Kentucky schools filing FCC Form 471 using Kentucky state master contracts do not have signed contracts in place for the funding year for which they are applying. Absent a waiver, such applicants were left with several equally unpalatable options: (1) timely file the FCC Form 471 without a signed contract in place, which would result in rejection for failure to comply with section 54.504(c) and the FCC Form 471 contract certification requirement; (2) submit the FCC Form 471 after Kentucky signed the contract extensions or renewals, which would result in rejection for filing after the close of the filing window; or (3) obtain services through contracts other than the state master contracts, which may not result in the most cost-effective rates. Kentucky sought a waiver of the rule so as to permit Kentucky applicants to use the state master contracts at issue without having to certify that they have a signed contract in place at the time of their FCC Form 471 submissions.

Given the circumstances, the Commission decided to waive section 54.504(c) to permit Kentucky schools to submit FCC Form 471 applications using Kentucky state master contracts without having a signed contract extension or renewal in place.

Untimely Filing

In this case, the Commission granted requests for waiver filed by 44 applicants ("Petitioners") seeking waivers of the FCC Form 471 filing window deadline for Funding Years 2004, 2005, 2006, or 2007. USAC denied Petitioners' applications for failure to timely file their FCC Forms 471. Petitioners asserted that waiver was appropriate for one of two reasons: (1) someone on the applicants' staff failed to file on time due to misunderstanding or personal emergencies, or (2) the delay in the filing or the receipt by USAC of the FCC Form 471 was due to circumstances out of the applicants' control.

The Commission found, as it did in the *Bishop Perry* case decided last year, that the complete rejection of these applications was unwarranted, given that the violation at issue is procedural, not substantive. More specifically, it found that "rigid adherence to filing procedures does not further the purposes of section 254(h) of the Telecommunications Act of 1996 or serve the public interest." The Commission took pains, however, to make clear that this decision should be read only within the "context of the purposes of section 254" (i.e., to "enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries") "and cannot be applied generally to other Commission rules that are procedural in nature."

The Commission also made it clear that its decision should not be read as a finding as to the ultimate eligibility of the services but merely as a remand to USAC. It instructed USAC to issue an award or denial based on a complete review of the applications within 90 days of the order's release.

Evidence of Representation

In this case, the Commission granted Tri-River Educational Computer Association's (TRECA) request for review of USAC's decision denying funding for TRECA's failure to provide evidence of its authority to represent its consortium members.

TRECA, as the lead member of a consortium and having obtained letters of agency ("LOA") from each member, applied for funding for telecommunications services and Internet access on behalf of its consortium for Funding Year 2004. Subsequent to filing its FCC Form 471, and after the filing window had closed, one member verbally notified TRECA it was withdrawing from the consortium.

Shortly thereafter, in response to a USAC request for copies of TRECA's signed LOAs, TRECA informed USAC that a member had withdrawn and that it would not be requesting reimbursement on its FCC Form 472 for that member. Based on its understanding that it needed to submit copies of LOAs only for the 34 members that would be included on its FCC Form 472, it provided LOAs only for those consortium members.

Even though only one LOA was missing --and at that, one from a withdrawn member about which USAC had been advised -- USAC denied TRECA's entire application on the grounds that it had failed to provide evidence of authority to file an FCC Form 471 "on behalf of, or evidence of the authority of, a substantial number of the members included" in the consortium. The Commission granted TRECA's appeal finding that "to deny an entire application because one member withdrew would unfairly penalize the entire consortium."

The Commission's decision here was consistent with its decision in the *Kan-ed* case. There, more than 30% of the consortium members failed to submit an LOA or submitted a deficient LOA and the Commission still had found that denial of the entire application unfairly penalized the entire consortium.

Please contact Mark Palchick (202/857-4411) or Howard Barr (202/857-4506) if you have any questions regarding this advisory.