

## FCC Grants 261 Appeals of USAC E-Rate Funding Denials

In a massive outpouring of decisions, the Federal Communications Commission has reversed 261 e-rate funding denials by the Universal Service Administrative Company (“USAC”). Most of the cases involved relatively minor applicant errors, which the Commission chose to overlook as not disqualifying. The Commission generally held that the applicants had followed the core goals of the e-rate program and concluded that their lapses should not warrant rejection of their applications and complete loss of their funding.

It is important to note at the outset that while all of these decisions are consistent with the recent trend by the Commission to overturn USAC denials based on unintentional applicant errors, this is merely an informal policy and so it is possible that a change may arise. Now that the e-rate program is maturing and applicants acquire more experience with its requirements, the Commission may come to expect a higher level of competence by those seeking funding and may not be as indulgent as it has been in the recent past. As a result, the Commission may be less willing to devote its resources to overseeing USAC’s work and applicants may find themselves held to stricter compliance standards. Therefore, applicants and service providers should not rely on this trend of leniency to continue in the future and should remain diligent in correctly filing their paperwork.

In this memorandum, we summarize the actions taken by the Commission in deciding these cases. The Commission’s analyses are fact-specific, and so a catalog providing sufficient detail necessarily is lengthy. However, we have grouped these into some general categories and headings to facilitate finding matters of particular potential interest.

### PROCEDURAL ERRORS.

- **Clerical or Ministerial Errors** by applicants in completing Form 471 or the associated Item 21 attachments. These include:
  - Mistakenly requesting a lower discount amount than the applicant was entitled to
  - Failing to include the contract expiration date
  - Failing to include a request for Internet access in the certified 471, even though it was included in a copy provided to USAC
  - Mistakenly understating the amount of recurring charges
  - Accidentally interchanging the funding amounts for two schools in a district
  - Entering the monthly amount for a single school as the amount being requested for an entire district
  - Failing to reference half of the schools on which a requested amount was based
  - Entering the wrong (lower) pre-discounted amount for an Internet access service
  - Entering the incorrect number of students eligible for a school lunch program, which would raise the appropriate discount by 10%
  - Entering the dollar amount for one month of Internet service rather than for 12 months
  - Submitting a monthly service charge for one line rather than two.
  
- **USAC misinterpretation of applicant information.** Two applicants attempted to remedy problems in their forms; the Commission found that “the applicants’ errors could not have resulted in an advantage for them in the processing of their applications:”
  - A petitioner claimed that the words “maintenance/custodial” in its budget reports included in its Item 21 attachment did not mean it was seeking funding for phone service for maintenance and custodial personnel. The terms were merely a budget heading under which certain eligible services were placed.

- Another petitioner claimed that it did not submit a duplicate request, but rather deducted the cost of one service (frame relay Internet service) from the invoice it submitted in its Item 21 attachment for telecommunications and then used a copy of the same invoice to support the cost of the deducted service in its Internet access request.
- **Missed Deadline** for the Form 486. The Commission waived its rules mandating a deadline for filing the Form 486 after finding that the deadline had been missed due to an unintentional clerical error. The applicant had timely filed a Form 486, but inadvertently posted an incorrect service start date, due in part to the fact that the office containing its e-rate documentation had become flooded and much of the paperwork destroyed.
  - **Incorrect reporting of SPIN Numbers.** USAC had found that applicants' service providers were not registered as telecommunications carriers. Three were unaware that their provider had changed their Service Provider Identification Number (SPIN); three accidentally entered incorrect SPINs; one was mistakenly told by its two registered telecommunications carriers to use the SPIN of the joint venture they created, which was not registered; and one filed a SPIN change request to switch to a new provider but inadvertently omitted the new provider's SPIN. The Commission granted the appeals based on its previous findings in the May 2007 *Brewster Academy Order*, in which it explained that accidentally using the incorrect SPIN for an otherwise eligible telecommunications provider does not warrant rejection of applications.
  - **Other issues involving service provider SPINs.** In another decision, the Commission reviewed appeals of USAC denials based upon findings that the applicants' service providers were not registered telecommunications carriers or that the SPINs of providers seeking payment did not match the SPINs in the funding requests. USAC had alleged that some applicants' providers were not registered, but they turned out to have been telecommunications carriers at the relevant time who had either simply had not yet registered, were substituting for a bankrupt entity and had not yet registered in their own name, failed to be registered because of a miscommunication with USAC, were registered by the relevant city authority, or whose provider status had been inadvertently changed by USAC and was in the process of being corrected. The remaining petitioners had mismatched SPIN numbers on their documentation resulting from ministerial errors due to SPIN change requests. The Commission found that these applicants had merely committed ministerial errors and that, under the 2006 *Bishop Perry Order*, those errors did not warrant rejection of the applications.

## **FAILURE TO TIMELY SUBMIT DOCUMENTS**

- **Form 486.** The Commission excused applicants' failure to timely submit Forms 486 resulting from immaterial clerical or ministerial errors or due to circumstances that it found to be beyond the petitioners' control:
  - Technical problems during electronic filing
  - Complications related to Hurricane Katrina
  - Proof of timely mailing, which USAC had no record of receiving
  - Claimed non-receipt of the Funding Commitment letter and failure to receive notice that the 486 was due because of a recent move
  - 486 timely filed, but with incorrect service start date due in part to the fact that the office containing e-rate documentation for the applicant had been flooded and much of the paperwork destroyed
  - Entities that either didn't receive notification because of a recent move or a major staffing change; one had tried to contact USAC personnel earlier in the process and was only five days late with its appeal.
- **Form 471:**
  - Filings within 14 days of the relevant deadline
  - Late filings because of an illness of the e-rate staff person or due to death of a member of the staff person's family.
  - Filings over 14 days after the deadline that resulted from circumstances beyond the applicant's control, including a technical problem with USAC's online filing system and the failure of USAC to process a request submitted online.

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- Applicants who either timely filed their 471s or filed them within 14 days of the deadline but who failed to timely file their certifications.
- **Invoice Forms (Forms 472 and 474) untimely filed or never received by USAC.** Applicants variously claimed that: (1) they were confused about the funding year based on communication with USAC; (2) they relied upon the service provider to complete and submit the form to USAC but the service provider failed to do so; (3) they withheld the invoice form after the service provider failed to install the equipment as it should have, to ensure that the service provider actually completed the work desired; (4) technical problems at USAC resulted in the invoice not being filed; or (5) staff changes or inadvertent errors by the applicant's staff resulted in incorrect information being submitted or late submission of the invoices.
- **Incompletely signed contracts.** Here, USAC had found that valid contracts were not in place prior to filing Form 471, since the contracts submitted were signed by the applicant but not the service provider. The Commission found that the contracts were valid, because "current USAC guidance does not second-guess the validity of a contract that contains only the applicant's signature and the contract date" if the contract is otherwise valid.
- **Late responses to USAC requests for information:**
  - Applicants did not receive the requests
  - Applicants were able to demonstrate that they actually did submit the information requested in a timely manner
  - USAC never responded to requests for clarification about what information was needed
  - Applicants lacked sufficient staff to submit the information on time.

In these instances, the Commission granted the applicants 15 days to provide the information to USAC, noting that, as in its April 2007 *Alpaugh Order*, "given that any violations that occurred were procedural, not substantive, the complete rejection of these applications is not warranted" because the problems involved processing deadlines, not program rules.

- **Filing an extension request on the wrong form.** The Commission waived the relevant deadline for an applicant who filed an extension request as part of Form 500 instead of the separate form and after the deadline had passed because of confusing instructions from USAC. The Commission based its decision on findings that (1) the request would have been granted on the merits if properly filed, (2) the applicant was confused by the complicated process, (3) the applicant made good faith efforts to comply with extension requirements (albeit belatedly, after it realized that the Form 500 it had filed did not, as intended, serve to extend the deadline), (4) the applicant had instructed the provider to do work in reliance on USAC's acceptance of its Form 500, and (5) the violation was procedural and not substantive.

## **FAILURE TO DISCLOSE RFPs**

Over 20 of the decisions granted appeals to applicants who were denied funding because they failed to disclose on their FCC Forms 470 that they had made their RFPs available to bidders. In most instances, USAC claimed that this oversight constituted a violation of competitive bidding rules. However, the Commission found that this did not violate competitive bidding rules, because in those cases the Form 470 itself (previously held to be the only posting necessary to fulfill the Commission's competitive bidding rules) contained all of the information needed to allow service providers to bid on the services sought.

Some petitioners argued that the documents referenced by USAC in fact were not RFPs. While the Commission disagreed, it granted those appeals because the applicants had provided a "level playing field" for all bidders by including

enough information in their 470s to identify the services required so that providers could formulate bids and also by providing access to any additional information needed in the auxiliary documents. Indeed, one applicant had created an RFP, but had never made it public, and the Commission found as a result that the applicant did not need to indicate that there was an RFP available on its Form 470.

The Commission granted two appeals for applicants who technically had violated the procedural rules surrounding RFPs. One applicant misunderstood USAC's directions and provided RFP responses to USAC itself; the Commission granted its appeal because it found that the applicant otherwise had conducted a fair competitive bidding process. The remaining applicant was located in New Orleans and explained that its omission was a mistake by an employee under stress due to Hurricane Katrina; the Commission granted its appeal as well.

### **IMPROPER SERVICE PROVIDER INVOLVEMENT**

In a number of cases, the Commission reversed USAC funding denials based upon improper service provider involvement, an important factor intended to ensure proper administration of the competitive bidding rules

- The Commission waived its competitive bidding rules in appeals by an applicant and its service provider where the applicant, an organization with no fluent English-speakers, listed an employee of the service provider as an alternate contact because it did not fully understand the rules due to the language barrier and also because it thought it needed to list someone who spoke English fluently to translate any conversations with USAC. The Commission stated that to rule otherwise would go against the mission of the Universal Service provision of the Communications Act.
- In another appeal based on competitive bidding violations, USAC had denied the appeal because the applicant's Form 470 stated that its RFP was posted on the website of its consultant, who was also listed as the contact person for a service provider that participates in the e-rate program. The consultant actually had terminated his employment relationship with the service provider years earlier and, when he noticed his name was still being used by the provider, he contacted USAC to notify them. As the Commission noted, he was also not listed as the contact person for the applicant but was merely their consultant. The Commission found no conflict of interest (and thus no violation of the competitive bidding rules).
- Another appeal was overturned for an applicant with four contracts with providers, all of which were denied after USAC found them all tainted by improper service provider contact information. One service provider's employee was listed as the applicant's contact person on one of its RFPs. The applicant explained that this was a clerical error – a failure to change the form after the employee's former capacity as a technology adviser to the applicant ended. Upon realizing its mistake, the applicant attempted to correct it by notifying its service providers, filing an addendum to the RFP, and extending the deadline for response to the RFP.

### **USAC FAILURE TO INVESTIGATE**

In 14 different decisions the Commission found fault with USAC's information-gathering and decision-making processes. While the Commission stated in some decisions that the problems in communication were attributable to applicant error, it found that USAC errors were also responsible.

- **Failure to demonstrate qualification.** The entities involved either: (1) had exceptional financial and personnel problems; (2) sent USAC a letter identical to letters that USAC had accepted in the past, stating that its Board had authorized the required funding, which USAC now considered to be inadequate; (3) was informed by USAC that its budget was inadequate for its funding request without the benefit of knowing what defect USAC found in the documentation; or (4) submitted actual figures for the budget confirming that it had sufficient funds. In reference to the last case, the Commission stated that "if USAC needs additional documentation regarding... the budget... it should provide [the entity] with another chance to submit that documentation on remand." The Commission also found that the petitioners' actions initially warranted "further efforts by USAC to clarify whether the petitioners met the necessary resources requirement..." than had been provided.
- **Failure to certify that the consultant was authorized to prepare responses to USAC's Selective Review Information Request (SRIR).** The consultant provided a consultant agreement, and an employee of the consultant

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was listed as the applicant's contact person. The Commission found that USAC should have contacted the applicant and given it the opportunity to provide the certification before denying the application and directed USAC to do so and to accept the responses submitted.

- **USAC reclassifications of requested services** to the Telecommunications service category, which requires that services be provided by telecommunications carriers. (None of the providers in the cases were telecommunications carriers.)
  - Applicants contracted for bundled Internet access service, because that was most cost-effective, causing USAC to reclassify the bundle from Internet access to Telecommunications service requests. The Commission directed USAC to inquire whether they were using the telecommunications portion of the service and, if not, to process the application as an Internet access funding request. If they were using the telecommunications portion, the Commission instructed USAC to determine whether the Internet services cost could be separately accounted for and, if so, to process the applications on that basis.
  - One applicant requested discounts for Internet access and included a lease agreement for the lease of fibers to transport voice, data and video, as the result of which USAC reclassified the services as Telecommunications services. The applicant maintained to the Commission that the fibers were for data only, and the Commission remanded the case to USAC for a final determination on that issue.
  - One applicant requested Internet access and distance learning (which must be provided by a telecommunications provider). The Commission allowed the applicant to remove the distance learning portion of the request if USAC found, as the applicant claimed, that it was not using distance learning because it failed to get the proper equipment.
- **Failure to account for a delay between the posting date of the Form 470 and the contract award date** during USAC's PIA review process. The Commission found that these delays were the result of unintentional clerical errors in the original Form 471, which was accidentally resubmitted instead of a new 471, and that those mistakes did not warrant USAC's denial.
- **Failure to submit its Form 470 signed certification page before filing its Form 471.** Because the funding requests were part of Virginia state master contracts for which Virginia filed certified Forms 470, and Virginia made sure the applicant complied with the bidding process, the mistake was not deemed a competitive bidding violation.
- **Mistaken submittal of two sets of invoices** for one school and **failure to enter invoices** for another. When USAC conducted a review and asked for more documentation, the applicant submitted a set of invoices with different purchase totals for some schools and included purchases for some ineligible locations; USAC reduced their funding as a result. In granting the appeal, the Commission stated that "it appears that the inconsistencies in the submitted invoices can be resolved through further discussions between USAC and the applicant."
- **Request for telecommunications service from a provider who was not a telecommunications carrier.** Based on the documentation, the applicant had merely made a clerical error in selecting the wrong classification for the service that is received through T-1 lines (which can be used for Internet access or telecommunications).
- **Failure to pay the non-discounted portion of services purchased.** The applicant had previously submitted documentation to prove that it did, in fact, pay its share of the services, but USAC found the documentation to be inadequate to show timely payment. The applicant then appealed again and provided additional documentation, which the Commission instructed USAC to review before making a final determination.

- **Failure to use price as the primary factor in the vendor selection process.** The Commission found that, as with the prior August 2006 *Academia Order* cases, several applicants began the vendor selection process before the release of its December 2003 *Ysleta Order*, which mandated that price be the primary factor in the process. Thus, the applicants needed only to meet the 1999 *Tennessee Order* standard for determining whether price was considered as a primary factor and whether the most cost-effective services were elected. The Commission found that all applicants met this test.
- **USAC reclassification of services from Priority One to Priority Two.** Applicants had appealed USAC reclassification of services listed in their applications from Priority One to Priority Two, which resulted in denying them discounts in funding years when inadequate funds existed for Priority Two services. In all cases, the Commission found that the applicants had correctly initially assessed the services as Priority One. USAC's determinations were based on the existence of lease-purchase options and responses to USAC's PIA questions. The Commission found that under the *Tennessee Order* petitioners had sufficiently rebutted the presumption that their requested services were for internal connections, because (1) those with purchase-lease options either did not intend to exercise them or did not have the option because the provision was nullified by other provisions in the contract and (2) petitioners who answered PIAs by indicating that they had exclusive use of the equipment at issue, that the equipment functioned as a stand-alone network, or that the equipment was not part of an end-to-end service either made a mistake in answering or USAC misunderstood the type of services requested and thus the applicants should be allowed to resubmit the correct answers or clarify the misunderstanding.
- **Direct payments to unlisted providers.** The relevant invoice had indicated that an applicant had paid service providers not listed on its Funding Commitment Decision Letter ("FCDL"). At the service provider's request, the applicant had made payments to its suppliers directly, resulting in USAC's determination that it had paid providers not listed on the FCDL. The Commission found that the matter could be resolved through USAC's review of the additional documentation submitted in the appeal and remanded the case to USAC.
- **Remands for further information.** In several other cases, rather than issue its own decision, the Commission felt that further facts were needed and remanded the cases to USAC for that purpose.
  - In one case, an applicant had failed to submit requested documentation during a USAC audit and tried to submit it on appeal to USAC, which refused to accept it. USAC attempted to recover the disbursed funds because the applicant did not initially provide the information. The Commission granted the applicant's appeal, finding that USAC should accept the documentation provided on appeal.
  - In another case, the Commission reviewed a USAC denial based on: (1) the inability of its auditor to find equipment related to the internal connections services that was billed as delivered; (2) the fact that the applicant's consortium's technology plan indicated that a particular service provider would be used to "incorporate the technology" into the school in violation of competitive bidding requirements; and (3) the applicant had not paid its portion of the invoices because they didn't contain language required by its governing body. In its appeal, the service provider explained that (a) it had delivered the equipment to a different building than was originally intended (which was the address given to USAC's auditors) because of a policy change by the local housing authority; (b) the consortium oversaw the competitive bidding process and the provider did not have a consultant involved in the process; and (c) payment of the applicant's share of its services is the responsibility of the applicant, not the service provider, who in fact is not allowed to pay that portion. The Commission remanded the case to USAC, giving the provider 15 days to provide additional information to support its claims, including but not limited to a signed and notarized statement about the decision to move the equipment, information and documentation regarding the provider's involvement with the consortium and evidence proving that the provider made a bona fide effort to collect the applicant's share of costs from the applicant.
  - The Commission also granted the requests for review of applications denied by USAC after being flagged by the pattern analysis procedure. Specifically USAC had found that the documentation submitted during the selective review process was very similar to the 470s and competitive bidding responses among applicants who selected the same service provider. The Commission remanded the cases to USAC, with strongly worded language that "as with the appeals resolved in the *Academy of Careers Order*, USAC denied the

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petitioners' requests for funding based on its 'pattern analysis' procedure without sufficiently examining whether the Commission's rules were actually violated..."

- **USAC Outreach to Consortia.** In a related development, the Commission released a letter advising an applicant how to proceed in a case appealed to USAC based on a previous Commission decision demanding that USAC do more outreach to consortia leaders (the *Advanced Education Services* decision). The Commission stated that it had specifically addressed the issue in question, which sprang from denials based on failure of the consortium to submit Letters of Agency (LOAs) signed and dated prior to certification of the consortium's Form 471 for Funding Year 2005. In the *Advanced Education Services* decision, the Commission had found that USAC had not provided sufficient notice for consortia applicants to comply with the LOA requirements. Thus, while the Commission claimed to make no finding as to the ultimate eligibility of the application, it effectively ordered USAC to do similar outreach as it had required in *Advanced Education Services*, and to allow the present applicant to correct the problems with its LOAs.

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The common theme through all these cases is the Commission's willingness to focus on the overall purpose and goal of its e-rate program and to give the benefit of most doubts to applicants who made honest mistakes in attempting to follow the highly technical procedures. However, many of these cases were decided only years after funds were needed and only following extensive (and often expensive) appeals of USAC's initial denials. Therefore, even if the Commission were to continue its policy of granting lenient reviews of USAC's work, it remains as important as ever to take extreme care in preparing and filing the required paperwork in the prescribed manner so as to avoid the expense and delay of pursuing an appeal of an adverse USAC funding decision.

If we can provide specific guidance in this area, please contact [Mark Palchick](mailto:MPalchick@wcsr.com) (MPalchick@wcsr.com, (202) 857-4411), [Sarah Miller](mailto:SarMiller@wcsr.com) (SarMiller@wcsr.com, (202) 857-4448), [Peter Gutmann](mailto:pgutmann@wcsr.com) (pgutmann@wcsr.com, (202) 857-4532), [Liz Riley](mailto:LizRiley@wcsr.com) (LizRiley@wcsr.com, (919) 755-2114), or one of Womble Carlyle's [Telecommunications](#) professionals.

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