Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Request for Review of the	)	
Decision of the	)	
Universal Service Administrator by	)	
	)	
South Carolina Division of the	)	CC Docket No. 02-6
Chief Information Officer,	)	
Columbia, South Carolina	)	
	)	
Schools and Libraries Universal Service	)	
Support Mechanism	)	
	)	

Request for Review of the Decision of the Universal Service Administrator of FCC Form 471 Application Number 441106, Funding Request Numbers 1264978, 1265034, 1265113,1266308,1266344,1266357,1266507,1266527,1266628,1266683, 1266724,1266901,12669558 and/or in the Alternative, Petition for Waiver

I. INTRODUCTION AND BACKGROUND

On February 10, 2005, the South Carolina Division of the Chief Information Officer ("SCCIO", "CIO", or "Applicant") timely filed its FCC Form 471 Application 441106 to request support from the Schools and Libraries Universal Service Support Mechanism (commonly referred to as "E-rate") for the South Carolina State Telecommunications Network ("STN") for Funding Year 2005. The Funding Year 2005 application sought discounts on Priority One, telecommunications and Internet access services only, amounting to $16.2 million. No discounts were requested on Priority Two, internal connections services or equipment. E-rate funding is vital to enable the STN to provide connectivity for public schools and libraries across the State to access the Internet and to use technology effectively. The STN has enormous breadth in the State, providing Internet access to 45,000 classrooms and 198 libraries.

Although the CIO successfully has applied for annual E-rate support for the STN in each year since the inception of the E-rate program and is thoroughly familiar with and has ensured compliance with program rules, unfortunately, funding for the STN was denied *in its entirety* for Funding Year 2005, and USAC denied the CIO's timely request for review. This funding denial gives rise to a fiscal crisis which **will literally unplug all the public schools and libraries in South Carolina from technology in the classroom.**

USAC's reason for denying funding is based solely on its conclusion that the CIO did not comply with the USAC-prescribed letter of agency form, despite the fact that the USAC-mandated letter of agency form is not prescribed in any FCC regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act. 44 U.S.C. §3501 *et seq.* As will be explained below, the CIO timely provided ample evidence, documentation and proof to USAC that the CIO was fully authorized to file the Funding Year 2005 FCC Form 471 application on behalf of each school and library that was included in the application. Further, even if the Federal Communications Commission ("FCC") concludes, after conducting a *de novo* review of USAC's decision[1] that USAC properly applied the mandated letter of agency form, the FCC should waive the requirement for the CIO's Funding Year 2005 application for good cause which is in the public interest.

[1] 47 C.F.R. §54.723 prescribes that the Wireline Competition Bureau and/or FCC shall conduct *de novo* review of a request for review of a decision of the Universal Service Administrator. This *de novo* review of administrator decisions was one of the safeguards established by the FCC, as reported to Congress, to insure that the FCC would maintain adequate supervision and oversight of USAC, and insure that USAC "would not make policy *or create the equivalent of new guidelines*, or interpret the intent of Congress, without appropriate consultation and guidance from the Commission." Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, Report to Congress (released May 8, 1998) at ¶ 14 (emphasis added; footnote omitted).

II. THE CIO PRESENTED PERSUASIVE EVIDENCE AND PROOF TO USAC THAT THE CIO WAS AUTHORIZED TO FILE THE FUNDING YEAR 2005 FCC FORM 471 ON BEHALF OF ALL OF THE SCHOOLS AND LIBRARIES INCLUDED IN THE APPLICATION.

A. Introduction

On September 12, 2005 the CIO received from USAC its Funding Commitment Decisions Letter ("FCDL")[2] in which USAC provided the following *single sentence explanation* for why the entire $16.2 million funding request was denied:

> Consortium leader has failed to provide evidence of authority to file forms 471 on behalf of, or evidence of the membership of, a substantial number of members included in this consortium.

The CIO sought additional clarification as to why the entire application was denied in order to be able to prepare its request for review. When the Applicant contacted the individual who was responsible for reviewing the application for program integrity compliance to obtain more specific details as to the errors allegedly made, the CIO was advised that no further information is made available after the issuance of the FCDL. Consequently, the CIO was forced to prepare its request for review informed only by the one sentence explanation contained in the FCDL. The CIO therefore appealed to USAC based only on its intuition and surmising as to USAC's objection to the documentation that the CIO provided during pre-funding commitment review of its FCC Form 471.

It was not until the CIO received its December 28, 2005 letter denying its initial request for review that the CIO became informed for the first time of the specific alleged deficiencies

[2] A copy of the FCDL is attached as Exhibit "A."

which were the basis of the denial of the $16.2 million funding requests.[3] According to the SLD, the root deficiency was that the Applicant did not produce letters of agency which were signed by each consortium member before the Applicant certified FCC Form 471. Moreover, SLD either refused to consider or disregarded the information that the CIO presented in its request for review to demonstrate that, notwithstanding that some of the Funding Year 2005 letters of agency were signed after the 471 certification date, the CIO presented other evidence to demonstrate the CIO's authority to file the FCC Form 471 on behalf of all the schools and libraries included in the application, during pre-commitment review of its Funding Year 2005 application and previously, during review of its Funding Year 2004 application. USAC already had the information on file regarding the Funding Year 2004 application and should have consulted and relied on this information.

B. The Issue That The FCC Should Focus Upon, And Which USAC Should Have Focused Upon, Is Whether The CIO Demonstrated Its Compliance With The Certification That The CIO Was Authorized To File The FCC Form 471 On Behalf Of All Consortium Members, And *Not* Whether The CIO Produced Letters Of Agency In The Specific Format Mandated By USAC.

There is no FCC regulation that mandates the collection and submission of letters of agency to USAC. The genesis of USAC's requirement of letters of agency arises from one of the certifications that applicants are required to make on FCC Form 471. Specifically, Item 33 of Block 6 of Form 471 requires each applicant to certify as follows:

> I certify that I am authorized to order telecommunications and other supported services for the eligible entity(ies) listed on this application. I certify that I am authorized to submit this request on behalf of the eligible entity(ies) listed on this application, that I have examined this request, that all of the information on this

[3] A copy of the December 28, 2005 "Administrator's Decision on Appeal – Funding Year 2005-2006" is attached as Exhibit "B."

> form is true and correct to the best of my knowledge, that the entities that are receiving discounts pursuant to this application have complied with the terms, conditions and purposes of the program, that no kickbacks were paid to anyone and that false statements on this form can be punished by fine or forfeiture under the Communications Act, 47 U.S.C. Secs. 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. Sec. 1001 and civil violations of the False Claims Act.

This certification can be traced to the FCC's regulation which requires that FCC Form 471 be signed by a person who is authorized to order telecommunications or other supported services for the consortium. 47 C.F.R. §54.504(c). The FCC has approved the conceptual use of the letter of agency as the mechanism for USAC's validation of Item 33 certifications of consortium applications. Request for Review of the Decision of the Universal Service Administrator by Project Interconnect, Files No. SLD-146858, 146854, CC Docket No. 96-45, DA 01-1620 (Order released July 11, 2001) ("Project Interconnect"); Request for Review of the Decision of the Universal Service Administrator by Clackamus Education Service District, Files No. SLD-147541, CC Docket No. 96-45, DA 01-2230 (Order released September 27, 2001)("Clackamus ESD"). Both Orders stand for the proposition that SLD is acting within its authority to require consortium applicants to produce letters of agency from each consortium member expressly authorizing the consortium leader to submit a FCC Form 471 on its behalf. Neither of these orders, or any other FCC Order or FCC regulation prescribes the specific elements of information which must be contained in a letter of agency.

In prior years, and most recently in Funding Year 2004, the CIO successfully complied with the letter of agency requirement for each school and library included in the FCC Form 471. In fact, the CIO produced to SLD each letter of agency which it obtained from each school or library listed on the Funding Year 2004 FCC Form 471.[4] These letters of agency were already in

[4] A sample of the CIO's letter of agency for the Funding Year 2004 FCC Form 471 is attached as Exhibit "C."

SLD's possession, therefore, and should have been sufficient to demonstrate compliance with the Item 33 certification on the Funding Year 2005 application.

Notwithstanding the SLD's acceptance of the 2004 letters of agency to substantiate the Funding Year 2004 Form 471, these SLD apparently no longer viewed these documents to be valid because the SLD changed the specific information requirements of letters of agency for Funding Year 2005. Yet, the circumstances and relationship of the CIO to the consortium members is identical between Funding Year 2004 and Funding Year 2005. Further, all of the letters of agency which were produced to substantiate the Funding Year 2004 FCC Form 471 were signed well in advance of the Funding Year 2005 FCC Form 471. There is absolutely no plausible reason why the letters of agency in place for the Funding Year 2004 Form 471 should not be likewise accepted and found to be acceptable for the Funding Year 2005 FCC Form 471.

The only difference between Funding Year 2004 and Funding Year 2005 is that USAC changed the mandatory components which must be included in a valid letter of agency. No longer was it acceptable for the CIO to produce **a** letter of agency which confirmed the authority of the CIO to file the Form 471 on behalf of the consortium member. Now, for the first time, USAC prescribed that each letter of agency must be signed and dated ***before*** the applicant certifies to FCC Form 471, and must contain a specific time frame. These new requirements, however, were not published in a FCC Order or rule, and most certainly were not preceded with any kind of notice and comment period that accompanies FCC rulemaking proceedings as required by the Administrative Procedures Act.[5] Nor were these requirements set forth on a form

[5] Legislative rules which are enacted by administrative agencies, such as the letter of agency requirement, must be preceded with the notice and comment period as required by the rulemaking procedures of the Administrative Procedures Act. *See, e.g.,* United States Telecom. Ass'n. v. FCC, In the United States Court of Appeals for the D.C. Circuit, No. 03-1414 (Slip Opinion issued March 11, 2005). Since the letter of agency requirement is not set forth in any FCC regulation, and the requirement applies across the board to all consortium applications for E-rate support, the FCC should have provided notice and opportunity for comment before adopting any formal letter of agency requirements (or allowing USAC to establish any such requirements).

or information collection document which was approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act.[6]

Compounding these deficiencies, USAC did not clearly or timely communicate the new letter of agency requirements to provide consortium applicants sufficient advance time to collect new letters of agency. The new Letter of Agency advice was not posted to the SLD web site until January 11, 2005,[7] which was just five weeks before the February 18, 2005 deadline for filing FCC Form 471. Further, there was no announcement under the "What's New" feature of the SLD home page to provide an alert to applicants that new Letter of Agency advice had been posted. The sample letter of agency was not posted until February 1, 2005, less than three weeks before the 471 window closed.[8] SLD's lack of timely advance notice of these new requirements made it impossible for the CIO to obtain 100% compliance with the new requirements.[9] It was

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[6]The broad definition of "information" collection under the Paperwork Reduction Act encompasses the letter of agency documentation that USAC requires E-rate consortia applicants to submit. As the Office of Information and Regulatory Affairs of the Office of Management and Budget explains in its "Q&A's" document:

> 24. What kinds of information does OIRA review under the Paperwork Reduction Act?
> Answer: The definition of "information" in the PRA is very broad. Thus, OIRA reviews forms (e.g., the IRS 1040), surveys (e.g., the Census), reporting and recordkeeping requirements (e.g., requirements on business to report workplace safety information to OSHA or air quality monitoring data to EPA) and third party disclosures (e.g., the nutrition labeling requirements of food). *See* http://www.whitehouse.gov/omb/inforeg/qa_062205.pdf.

[7] The SLD web site page is attached as Exhibit "D." The web page "update" date is January 10, 2005.

[8] The new sample Letter of Agency posting announcement on February 1, 2005 from the SLD web site is attached as Exhibit "E."

[9] USAC/SLD may try to assert that advance notice of the new requirements was communicated earlier at the Train-the-Trainer workshop held in September of 2004. The training information, however, was not followed up with any other substantive information for months, during which time the most logical conclusion for this information void was that the SLD had opted not to move forward with the new letter of agency requirements. Further, it is legally unsupportable to claim that applicants were put on notice pursuant to training materials issued by the SLD that a new information collection requirement was being imposed, without any formal imprimatur of the FCC or OMB.

not possible for the CIO to physically collect all of the 125 letters of agency[10] before submitting FCC Form 471.

When presented with a request from the SLD to produce letters of agency for Funding Year 2005, the CIO assumed that the SLD was requesting new letters of agency, since the Funding Year 2004 letters of agency had been submitted in the prior year and the CIO reasonably assumed that USAC knew what information it already had on file. Accordingly, the CIO solicited the new letters of agency from those entities that had not yet signed a new letter of agency. The CIO produced numerous letters of agency which were signed before its February 10, 2005 certification of the FCC Form 471, but numerous other letters of agency were signed after that date. When all of the letters of agency were submitted, the CIO asked SLD whether there were any other outstanding questions, and the SLD reviewer assured the CIO that all information had been submitted and appeared to be in order. The reviewer never mentioned any concern about the date of signing of the letters of agency and never asked for any clarification or any explanation. *The SLD also did not ever ask for any information or evidence to demonstrate that the CIO was exempt from the letter of agency requirement.* Had the CIO been asked, the CIO would have offered the same explanation set forth in this request for review and which was provided to the SLD in the initial appeal.

Notwithstanding the date that the letters of agency were signed, the CIO possesses continuing authority to submit the Form 471 on behalf of *all* consortium members, and in fact, should be exempt altogether from the letter of agency requirement. The SLD's appeal letter stated, incorrectly, that program rules prevent the SLD from reviewing new information on appeal except where an applicant was not given the opportunity to provide information during

[10] There are 45 libraries and 80 districts represented on the Funding Year 2004 FCC Form 471 that is the subject of this appeal.

initial review or an error was made by SLD. In fact, the SLD's own web site makes clear that its review standards were not promulgated by FCC rules, but rather by the Schools and Libraries Programmatic Subcommittee of the USAC board of directors.[11] By failing to engage in a *de novo* review of the merits of the FCC Form 471 application, USAC has failed to comply with the spirit and intent of the FCC appeal regulations.

The CIO is mandated by state statute to work in conjunction with the Department of Education to establish a statewide educational network to provide technology connectivity for K12 public schools throughout the state.[12] Further, pursuant to letter dated March 17, 2004 as confirmed in a letter dated May 18, 2005, the Department of Education conveyed express authority to the CIO to provide telecommunications lines and services to all public school districts and to file for E-rate on behalf of each public school district.[13] By letter dated March 15, 2004, the state library also confirmed that the CIO is authorized to provide services to all South Carolina public libraries.[14] In point of fact, the CIO has provided connectivity for schools and libraries as directed by the South Carolina Legislature annually since 1996.

The legislation makes clear that the CIO is responsible for the financial management of the network and must pursue all available resources. The CIO is the billed entity for the STN charges and the CIO bears all of these costs. Each district and library receives the benefit of the STN without incurring any costs. In light of the fact that each district and library receives the

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[11] The SLD web page in which the appeal guidelines are set forth is attached as Exhibit "F."

[12] See Section 72.37 of Part IB of H.3716, 2005-2006 Appropriations Enacted into Law, attached as Exhibit "G." Please note that the annual appropriation covers the cost of the non-discounted portion of the E-rate eligible services of the STN. The CIO submits reimbursement invoices (FCC Form 474, Billed Entity Reimbursement Forms) to USAC each year, and the reimbursements of the prior year's E-rate discounts which the CIO prepaid to vendors is used to pay for the current year's cost of the E-rate discounts, in addition to the CIO's non-discounted portion. In this way, the CIO assures it is in compliance with the budget requirements prescribed in FCC Form 471.

[13] These letters are attached as Exhibit "H."

[14] The letter is attached as Exhibit "I."

STN services free of charge, none of these entities could have filed for E-rate for the associated STN services; hence, there is no concern here that the consortium application sought discounts on services which were duplicative of the individual school district and/or library FCC Form 471 applications.

C. Conclusion

The FCC should accept the letters of agency that the CIO presented for the Funding Year 2004 FCC Form 471 to substantiate the Item 33 certification of its 2005 FCC Form 471. In the alternative, the FCC should conclude that the CIO is exempt from the letter of agency requirement.

III. IN THE ALTERNATIVE THE FCC SHOULD GRANT A WAIVER OF THE DOCUMENTATION REQUIREMENTS REQUIRED TO SATISFY THE ITEM 33 CERTIFICATION OF FCC FORM 471 FOR THE CIO'S FUNDING YEAR 2005 APPLICATION.

Putting aside any objections to USAC's establishment of new letter of agency requirements, the CIO requests that any deficiencies in its compliance with these requirements be waived for Funding Year 2005. The CIO has shown that the Superintendent of Education and the State Librarian have authorized and empowered the CIO to seek E-rate support on behalf of all public school and libraries that are connected to the STN. Moreover, the CIO has demonstrated that it has complied with the letter of agency requirements in every other E-rate year and was unable to do so in Funding Year 2005 because the new requirements were published by USAC with too little advance time to allow for 100% compliance. If the USAC denial is not overturned, the impact to the public schools and libraries telecommunication network in South Carolina will be devastating and will seriously erode the State's efforts to use technology as a means of complying with the requirements of No Child Left Behind, as well as educational requirements mandated by the South Carolina Legislature.

The FCC has set forth the circumstances under which a waiver of E-rate program rules may be appropriate, particularly when the request has statewide implications:

> Generally, the Commission's rules may be waived for good cause shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.

Request for Waiver of West Virginia Department of Education, Charleston, West Virginia, CC Docket No. 02-6, DA -5-2179 (Released July 27, 2005) at ¶ 8 (footnotes omitted). In this appeal, the CIO has shown its compliance with the intent of each E-rate program requirements, and particularly, with respect to compliance with the Item 33 certification, even if the specific requirements that USAC prescribed may not have been met. Granting this application is consistent with program integrity and with the public interest. The injury to the schools and libraries connected to the STN, if this denial is not rescinded is inescapable: simply put, there are no other adequate sources of funds other than E-rate to enable the STN to continue operating.

IV. CONCLUSION

The South Carolina Division of the Chief Information Officer respectfully requests that the FCC accept the documentation presented to substantiate the Form 471 Item 33 certification, or alternatively to waive the letter of agency documentation requirements, and approve the funding in full of 471 Application # 441106. In the event that the FCC directs that this application be remanded to USAC for further review, the CIO respectfully requests that the FCC direct USAC to complete its review and issue a Funding Commitment Decisions Letter within 30 days of the date of the FCC's issuance of its Order.

Respectfully submitted,

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Dated: February 24, 2006