

Recent FCC Appeals in Favor of Applicants

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On October 31, 2008 the FCC released a slew of appeals regarding various E-rate program issues. A whopping twenty-eight appeals were granted by the FCC, with topics ranging from competitive bidding violations to the untimely submission of forms. Based on these appeals it is clear that the FCC is reversing USAC funding denials based on procedural rather than substantive issues.

We have put together a summary of these recent decisions to demonstrate that denials based on procedural issues can be overturned when the applicant can show it was trying to meet the requirements of the program's rules.

One order involving procedural errors is the [Harvey Public Library District Order](#). In the *Harvey Public Library District Order*, the Commission finds that a clerical error such as listing the incorrect service start date should not be a basis for denying funding, as the applicant was in compliance with all the other core E-rate program requirements. In the [Hillsboro Independent School District Order](#) the Commission finds that all of the USAC funding denials were based on correctable errors, due in part to a new inexperienced technology director who was unfamiliar with the complex nature of the E-rate program. These appeals illustrate that certain clerical issues should not be an issue for denying funding, assuming that the applicant is compliant in all the other areas of E-rate program guidelines.

Violations of the competitive bidding regulations were a major issue in a host of appeals. In the [Approach Learning & Assessment Centers Order](#) the Commission found that the failure to state whether or not an applicant had issued an RFP on a Form 471, even though an RFP was available, was not grounds to deny funding. Citing similar clerical errors in the [Bishop Perry Order](#), the Commission also reversed a USAC funding denial in the [Grand Rapids Public School Order](#), on the grounds that the lapse of time between the posting date of the Form 470 and the contract award date, involved exigent circumstances and thus did not violate the competitive bidding process, as the applicant adhered to all other core E-rate program requirements.

Incorrectly listing an employee of a service provider as a contact person on an RFP or Form 470 also did not rise to the level of a violation of the E-rate competitive bidding rules. In both the [Delano Joint Union High School Order](#) and the [Liberal Unified School District Order](#), the Commission found that this was merely a procedural error and should not be a basis to deny or retract funding. In both appeals, the Commission found that there was no improper vendor involvement.

The Commission was not as decisive on the issue of competitive bidding in the [Hispanic Information and Telecommunications Network Order](#). In this appeal the Biblioteca Residencial Aquadilla relied upon the Puerto Rico Consortium of Schools & Libraries to select its service provider, Hispanic information and Telecommunications Network, even though the consortium's technology plan indicated that the service provider had a partnership with the consortium and would be providing all services. The Commission directs USAC to investigate the competitive bidding issue more carefully upon remand, due to the appearance of a conflict of interest.

Orders Involving Untimely Submission of E-rate Forms

Many of the appeals deal with the untimely submission of certain E-rate application forms and invoices. In [Alcona County Library, et al.](#), the Commission grants thirty-four appeals denying funding on the failure to timely submit FCC Forms 486. In *Archer Public Library, et al.*, the Commission grants thirteen appeals in denying funding to the petitioners, for failure to timely submit FCC Forms 471 with associated item 21 attachments, due to clerical and/or ministerial errors, citing the *Bishop Perry Order*.

The seventy eight petitioners in [Acorn Public Library District, et al.](#), failed to file their Forms 470 during the designated filing window. Citing the *Bishop Perry Order* and the [Academy of Academic Excellence Order](#), the Commission found that the failure to timely file were procedural and not substantive in nature and should not prohibit the petitioners from seeking funding. In the [Canon-McMillan School District, et al. Order](#) and the [New Haven Free Public Library Order](#), the Commission grants the appeals on the grounds that the petitioners' invoice forms were untimely filed or not received by USAC. The Commission finds that USAC should review all subsequent documentation submitted by the applicants and seek any additional information needed to complete its audit and that based on the information provided to the Commission there is no evidence of fraud, waste or abuse on the part of the petitioners.

Orders Involving Non-Telecommunication Service Providers

The next series of appeals deal with service providers who were not telecommunications providers within the context of E-rate program guidelines. In [Bay Shore Free School District et al.](#), the Commission grants eighteen appeals from petitioners whose service providers were not telecommunications providers under the rules of the E-rate program. The Commission grants eight appeals in [Addison Northeast Supervisory Union, et al.](#), also based on the grounds that the service providers were not telecommunications carriers under the defined rules. Additionally, in the *Bay Shore* appeal, the SPIN numbers used on the funding requests were not the same as those submitted by the service provider. In the [Broaddus Independent School District, et al.](#) order, the Commission grants four appeals, again on the basis that the service providers used by Broaddus were not telecommunications providers, as required.

Orders Involving Competitive Bidding Process

Other orders that were handed down by the Commission were appeals related to infractions regarding the competitive bidding process. In the [Liberal Unified School District Order](#), the Commission granted the appeal by the applicant based on a decision by USAC to deny funding for funding year 2003. Citing the [Mastermind Order](#), the Commission found that there were no violations of the competitive bidding process. In the [Colegio Nuestra Senora del Carmen, et al](#) order, citing the [Tennessee Order](#) and ensuing [Ysleta Order](#), the Commission grants six appeals based on USAC's denial of funding for violation of the competitive bidding rules. The USAC decision was based on evidence that the petitioners failed to use price as a primary factor in the vendor selection process, and that the vendors improperly participated in the bidding process as prescribed by the rules of the E-rate program. The applicants had already begun the vendor selection process before the release of the *Ysleta Order* and the Commission found that they were in compliance with the competitive bidding standard at the time. In granting the appeals, the Commission cites the [Academia Order](#) and the [Academy of Careers Order](#).

In the [Hispanic Information and Telecommunications Order](#), the Commission grants the appeal of applicant *Biblioteca Residencial Aquadilla* citing that there were no violations of the competitive bidding process. Additionally, the applicant

was denied funding for funding year 2000 based on issues involving whether applicant had the necessary equipment related to internal connections, and whether or not Biblioteca paid their discounted percentage for services. Another order involving the applicant's failure to demonstrate that the adequate resources required for funding were in place is the [Chester Upland School District, et al.](#) order. The applicants were denied funding for funding years 2002, 2004 and 2006. Citing the *Academy of Excellence Order* the Commission grants the applicants appeal.

A language barrier was the basis for a USAC denial of funding in the [Consortio de Escuelas y Bibliotecas de Puerto Rico, San Juan, Puerto Rico, and Hispanic Information and Telecommunications Network Order](#). The applicant listed a bilingual employee of its service provider as the alternate contact person on the Form 470. The language barrier was a significant bar in the petitioner's lack of understanding of the E-rate guidelines and as such the employee was the only person who could translate E-rate program information and questions from English to Spanish. Further, the Commission also held that due to a language barrier problem, the listing of a bilingual service provider employee as the applicant's contact person was not a violation of the competitive bidding rules and thus not adequate grounds for a denial of funding.

Orders Involving Various Forms 471 Issues

Citing the [Adams County Public Library Order](#), the Commission in the [Barberton City School District Order](#), finds that the applicants secured contracts with their service providers in some form or another, before the Form 471 was submitted. While some of the petitioners' contracts had minor errors and were not signed and dated by both parties prior to the submission of the Form 471, this should not be a basis for a complete denial of funding and the applicants should have an opportunity to correct the errors on their Forms 471. Further, the Commission finds that procedural errors should not preclude the applicants in the *Adams County Public Library Order* from obtaining funding without being given an opportunity by USAC to correct their mistakes.

In the [Radford City Schools Order](#), USAC denied funding to the applicant on the grounds that Radford did not submit its signed Form 470 certification page prior to filing its Form 471. The Commission grants the appeal on the basis that the funding requests that were denied were part of a statewide master contract for which certified Forms 470 were already filed by the Commonwealth of Virginia.

Orders Involving E-rate Support for Ineligible Entities

Submitting incorrect invoices should not be a basis for a complete denial of funding by USAC. In the [Trenton City Schools Order](#) the Commission grants the petitioners appeal on the grounds that the inconsistencies in their submitted invoices can be resolved through further communication between the applicant and USAC and that being given an opportunity to correct such invoices would not result in waste, fraud or abuse on the part of the applicant. Similarly in the [West Branch-Rose City Area Schools Order](#), the Commission grants the petitioners appeal based on the submission of incorrect invoices. In this Order the applicant submitted invoices to USAC showing that it made payments to the approved service provider, via two other entities. Since this arrangement came at the request of the approved service provider the Commission finds that further discussion between USAC and the applicant is necessary to resolve this matter.

Orders Involving Letter of Agency Issues

In the [District of Columbia Public Schools Order](#) the Commission grants the appeal of the USAC denial of funding, on the grounds that the applicant failed to certify that its E-rate consultant was authorized to prepare responses to a USAC SRIR. The Commission finds that the petitioners should have been contacted by USAC and given an opportunity to provide any necessary documentation when USAC failed to garner that information from the E-rate consultant.

Subsequently, the petitioners in the [Midwestern Intermediate Unit IV Order](#) were denied E-rate funding on the grounds that they failed to submit a Letter of Agency prior to the certification of the Forms 471. Citing the [Advanced Education Services Order](#), the Commission finds that USAC did not give the petitioners adequate time to comply with its new policy regarding the timely submission of Letters of Agency. Both of these appeals further illustrate the often tenuous relationship between USAC and applicants when it comes to communication between the parties. Many of the appeals which were released in this wave could have been avoided had USAC communicated with the applicants more effectively and given the applicants more time to present supporting documentation in defense of their arguments.

“Wildcard” Orders

The final two Orders don't specifically fall into any of the above mentioned category of appeals. These “wildcard” issues include a deadline extension for non-recurring services and payments for non-discounted portions of E-rate services purchased. In the [Tekoa Academy of Accelerated Studies Order](#), citing the [Great Rivers Order](#), the Commission grants a waiver of the deadline for implementing non-recurring services. The applicant contends that the equipment could not be installed before the implementation deadline because certain building repairs had not been completed. Consistent with the [Great Rivers Order](#), the Commission grants the appeal stating that this case involves “special circumstances” which would allow for the extension of the USAC procedural deadline for equipment installation.

In the [United Talmudical Academy Order](#), the Commission grants this appeal on the grounds that the applicant submitted additional information on appeal which demonstrated that it did indeed pay its non-discounted portion of the E-rate services it purchased. Citing the [Universal Service First Report and Order](#), the Commission stresses the importance of schools and libraries to pay a share of the costs for non-discounted E-rate services. However the Commission also finds that USAC should review its findings based on the documentation the applicant provided to the Commission on appeal.

Summary

This continues the trend that we've seen in appeals decisions made by the FCC since the [Bishop Perry Order](#) in favor of applicants. While no recent appeal decision directs USAC to modify its procedures, it does indicate that the FCC considers the circumstances surrounding a situation to determine if a violation is substantive. Applicants that are submitting funding requests for FY 2009 should be mindful of the policies and procedures of the E-rate program and strive to fully meet its requirements. If a procedural error is discovered down the road that results in a denial, the applicant should consider filing an appeal rather than assuming that there is no hope to receive funding. But in no case should an applicant attempt to circumvent the rules of the program.