

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Request for Waiver or Review of a Decision of the)
Universal Service Administrator by)
Premio Computer, Inc.) File No. SLD-143513
(Los Angeles Unified School District))
Los Angeles, California)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: July 7, 2014

Released: July 7, 2014

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

1. Consistent with precedent,1 we deny the request of Premio Computer, Inc. (Premio) seeking review of a decision2 by the Universal Service Administrative Company (USAC) rescinding a portion of the E-rate program (more formally known as the schools and libraries universal service support program) funding committed for the Los Angeles Unified School District (LAUSD) for funding year 1999. The record shows that USAC properly determined that Premio should not have received E-rate support for equipment that it did not deliver.

2. Background. LAUSD sought and received a funding commitment for the purchase of computers from Premio that would function as network servers.3 After taking receipt of 30 of 128 computers, LAUSD directed Premio to suspend its delivery of the remaining 98 computers.4

1 Request for Review of a Decision of the Universal Service Administrator by Sprint-Florida, Inc., Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 27 FCC Rcd 14998 (Wireline Comp. Bur. 2012) (recovering funding from service provider after finding that E-rate supported equipment was not installed).

2 Request for Review and Waiver of the Decision of the Universal Service Administrator by Premio Computer, Inc., Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, at 4 (dated Oct. 27, 2006) (Request for Review).

3 See Letter from USAC, Schools and Libraries Division to Steve Newton, Premio Computer, Inc. (dated Oct. 26, 1999) (Funding Commitment Decision Letter).

4 Request for Review at 5-6, 20. Before Premio provided any of the computers, LAUSD learned that its telecommunications contractor would not be able to install wiring for network connectivity, and without that wiring the computers would be ineligible for E-rate funding because they would not function as servers. See USAC website, Eligible Services List for Funding Year 1999, http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_102399.pdf (last visited June 18, 2014).

Notwithstanding LAUSD's direction, Premio made the remaining 98 devices available to LAUSD and made several unsuccessful attempts to deliver them.⁵

3. Even though LAUSD refused to accept delivery of the remaining computers, Premio submitted invoices to USAC for the 128 computers, including the 98 undelivered computers, and received reimbursement from USAC in the amount of \$1,856,980. On April 9, 2001, more than 10 months after LAUSD suspended delivery of the computers, Steve Newton of Premio certified that Premio complied with program rules and that the services for which Premio submitted invoices to USAC were eligible for E-rate support.⁶ At no point did Premio inform USAC that it had not delivered and installed the computers for which it submitted invoices and received payment from USAC.

4. In 2003, Premio sued LAUSD for breach of contract, breach of implied covenant of good faith and fair dealing, intentional interference with a contract and negligent interference with a contract for its refusal to accept and pay for its portion of the 98 remaining devices.⁷ During the pendency of that litigation, LAUSD informed USAC that it had never taken delivery of 98 computers for which USAC had reimbursed Premio.⁸ Upon becoming aware of the situation, USAC initiated commitment adjustment (COMAD) proceedings and issued a Notification of Improperly Disbursed Funds to Premio on August 10, 2005, seeking a refund of \$1,517,769 because services were not delivered.⁹ Premio appealed the decision, and USAC denied the appeal.¹⁰

5. *Discussion.* Based on our review of the record, we deny Premio's appeal. We find that Premio improperly received E-rate support for equipment that it never delivered. The fact that LAUSD refused delivery of the computers does not alleviate Premio of its culpability in this matter.

6. Premio's argument that recovery would contravene the Commission's policy directive that USAC finish its investigations and seek recovery within five years of the final delivery of service for a specific funding year is unavailing.¹¹ As an initial matter, Premio miscalculates the time frame at issue when it claims the five year period of time expired on May 5, 2005.¹² In exhorting USAC to seek recovery within five years, the Commission was clear that the five year period would begin after the last

⁵ Email from Paul Loh, Counsel for Premio Computer, Inc., to Kristy Carroll, USAC (dated Dec. 13, 2004).

⁶ See Schools and Libraries Universal Service, Service Provider Annual Certification Form, OMB 3060-0856 (October 1998) (FCC Form 473).

⁷ First Amended Complaint, *Premio Computer, Inc. v. Los Angeles Unified School District*, Superior Court for the State of California, Case No. BC290348 (filed Apr. 16, 2003).

⁸ See Letter from Richard A. Deeb, Los Angeles Unified School District, to Kristy Carroll, USAC (dated Sept. 16, 2003). This letter references a conversation between LAUSD representatives and USAC representatives, but does not reveal the contents of the conversation.

⁹ See Letter from USAC, Schools and Libraries Division, to Steve Newton, Premio (dated Aug. 10, 2005) (Notification of Improperly Disbursed Funds). The Funding Disbursement Reports attached to the letter stated: "[FCC rules] are violated if the service provider receives payment for services and/or products that it did not deliver to the eligible entity. Since the services were invoiced via a [Service Provider Invoice form], this violation was caused by an act or omission of the service provider because the service provider is responsible for ensuring that it only receives support for services and/or products that it actually provides to its customers."

¹⁰ See Letter from USAC, Schools and Libraries Division, to Paul J. Loh, Counsel for Premio (dated Aug. 30, 2006).

¹¹ See Request for Review at 17-22.

¹² *Id.* at 18.

day of the funding year in which the services could be provided.¹³ In this case, USAC did seek recovery within the five years of the last date the services in question could have been delivered.¹⁴ We also understand the Commission's direction to USAC to initiate and complete investigations within five years to be a policy preference, not an absolute bar to recovery.¹⁵ In some instances, consistent with its general obligation to recover funds improperly disbursed, the Commission has elected to proceed with recovery even when more than five years has lapsed between final delivery of services for a specific funding year and the initiation of an investigation.¹⁶ In this case, upon learning that it had provided E-rate support for undelivered computers, USAC promptly took action, which was both appropriate and consistent with Commission precedent.

7. We further find that Premio has not demonstrated that good cause exists to justify a waiver of Commission rules.¹⁷ Premio argues that the money it expended manufacturing the computers and its willingness to deliver them to LAUSD justifies a waiver.¹⁸ We find these arguments unconvincing. It does not serve the public interest to have Premio, or any other company, receive E-rate funds for products it has not delivered. The fact that LAUSD refused delivery does not change our analysis. Once LAUSD refused delivery, the dispute was between LAUSD and Premio. Indeed, Premio sued LAUSD for breach of contract with respect to the equipment at issue. Even if Premio failed to reach a resolution to the

¹³ See *Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15812, 15818–19, para. 32 (*Schools and Libraries Fifth Report and Order*) (specifying that investigations should be complete “within a five year period after final delivery of service for a specific funding year”). Premio argues that the five-year period should begin on the date services were delivered. See Request for Review at 20.

¹⁴ Services were last provided on May 5, 2000, the last day of the funding year for non-recurring services was September 30, 2000, and the five-year administrative limitations period lapsed on September 30, 2005. USAC issued the Notification of Improperly Disbursed Funds on August 10, 2005, which is within the five-year administrative limitations policy period.

¹⁵ See *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15809, para. 1 (“[W]e announce our policy regarding the timeframe in which USAC and the Commission will conduct audits or other investigations relating to use of E-rate funds.”). See also *id.* at 15818, para. 31 (where the Commission finds that “announcing a general policy in this area is in the public interest”); *id.* at 15818–19, para. 32 (again describing the limitations period as a policy).

¹⁶ In the *Lakehills Order*, the Commission upheld USAC's rescission of funding requests even though the five-year document retention period had lapsed because “USAC's recovery of government funds paid to an applicant or service provider who has no just right to keep the funds is not barred by the passage of time.” *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP*, CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16601, para. 28 (2011) (*Lakehills Order*). See also *United States v. Wurts*, 303 U.S. 414, 416, 58 S.Ct. 637, 638 (1938) (“The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has ‘clearly manifested its intention’ to raise a statutory barrier [to recovery].”) (citations omitted). Congress has imposed no such statutory barrier to recovery but, to the contrary, in the Debt Collection Improvement Act (DCIA), 31 U.S.C. § 3701 *et seq.*, has generally directed agencies to “try to collect a claim of the [U.S.] Government for money or property arising out of the activities of, or referred to, the agency.” 31 U.S.C. § 3711(a)(1).

¹⁷ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

¹⁸ See Request for Review at 22-23.

lawsuit that made it whole, there is no reason that universal service fund contributors should have to shoulder that burden.

8. Consistent with the *Schools and Libraries Fourth Report and Order*,¹⁹ we direct USAC to continue recovery actions against Premio. The Commission has ordered USAC to direct recovery actions against the party or parties that committed the rule or statutory violation in question.²⁰ Here, we conclude that USAC correctly directed recovery against Premio because it submitted invoices for equipment that it never delivered.

9. 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 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), the Request for Review filed by the petitioner IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁹ See *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45, 97-21 and 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) (*Schools and Libraries Fourth Report and Order*).

²⁰ See *id.* at 15255, para. 10 (concluding that recovery actions should be directed to the party or parties that committed the rule or statutory violation in question).