

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver by
Utah Education and Telehealth Network
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-161059087
CC Docket No. 02-6

ORDER

Adopted: May 8, 2018

Released: May 8, 2018

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

I. INTRODUCTION

1. In this Order, we grant a Request for Waiver filed by Utah Education and Telehealth Network (UETN). UETN seeks a waiver of the Commission's rules governing the service implementation deadline applicable to its funding year 2016 E-rate funding request for special construction of a leased lit fiber network. We find that the unique circumstances in this matter warrant a waiver and we remand UETN's application to the Universal Service Administrative Company (USAC) with instructions to extend the deadline by which UETN must complete special construction and begin use of the leased lit fiber service to October 1, 2020.

II. BACKGROUND

2. Under the Commission's Universal Service Fund (USF) schools and libraries program, generally referred to as the E-rate program, eligible schools, libraries, and consortia (comprised of eligible schools and libraries) may request universal service discounts for eligible services, including connections necessary to support broadband connectivity to eligible schools and libraries. In 2010, the Commission expanded the broadband options available under the E-rate program by allowing eligible schools and

1 The Commission may waive any provision of its rules on its own motion and for good cause shown. See 47 CFR § 1.3. In general, the Commission may grant a waiver if: (1) special circumstances warrant a deviation from the general rule; and (2) such deviation would better serve the public interest than strict adherence to the general rule. See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular). In addition, when determining whether to grant a waiver, the Commission may take into consideration questions 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), aff'd, 459 F.2d 1203 (D.C. Cir. 1972) (WAIT Radio). The burden of proving that a waiver is appropriate in a particular case rests with the petitioner. See Tucson Radio Inc. v. FCC, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

2 Request for Waiver of Utah Education and Telehealth Network, CC Docket Nos. 02-6, 13-184 (filed Feb. 21, 2018) (Request for Waiver).

libraries to receive E-rate support for leased dark fiber.<sup>3</sup> In the *2014 Second E-rate Order*, the Commission further expanded the high-speed broadband options available to applicants by equalizing the treatment of leased lit fiber and leased dark fiber, which included making special construction of leased dark fiber eligible for support, and making self-provisioned networks eligible for support.<sup>4</sup> The Commission also adopted several safeguards, including service implementation deadlines, to ensure that E-rate support is not used to purchase unnecessary services.<sup>5</sup> Specifically, applicants may only receive E-rate discounts for special construction charges related to leased lit or dark fiber if the fiber is lit by the end of the funding year,<sup>6</sup> i.e., June 30,<sup>7</sup> and special construction charges related to a self-provisioned network are only eligible for E-rate support if the facilities are constructed and used by the end of the funding year.<sup>8</sup>

3. On July 21, 2016, UETN filed a funding year 2016 FCC Form 471 requesting E-rate discounts for, among other services, special construction of a leased lit fiber network.<sup>9</sup> The special construction implementation deadline for funding year 2016 applications was June 30, 2017.<sup>10</sup> USAC's issuance of funding year 2016 funding commitment decision letters (FCDLs) was significantly delayed, however, due to technical and operational challenges.<sup>11</sup> In light of the delay, USAC notified applicants that if they did not receive an FCDL approving a special construction funding request in time to complete construction and light new fiber by June 30, 2017, the late issuance of the FCDL may constitute an unavoidable delay of construction for the purpose of requesting a one-year extension of the service implementation deadline.<sup>12</sup> USAC explained that factors relevant to whether an extension would be granted on that basis included when an FCDL approving the requested funding was issued (or that it has

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<sup>3</sup> See *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18766-67, para. 9 (2010) (*Schools and Libraries Sixth Report and Order*).

<sup>4</sup> See also *Modernizing the E-rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15555, 15558, paras. 36, 43 (2014) (*2014 Second E-rate Order*).

<sup>5</sup> *Id.*

<sup>6</sup> See 47 CFR § 54.507(d)(1) (stating that a recurring service must be used within the funding year for which discounts are sought to be eligible for support); 47 C.F.R. § 54.507(b); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16738, para.129 (2012) (“In the E-rate program, fiber must be lit within the funding year for non-recurring charges to be eligible.”); see also *2014 Second E-rate Order*, 29 FCC Rcd at 15552, 15558, paras. 37, 49.

<sup>7</sup> 47 CFR § 54.507(b) (establishing July 1 through June 30 as the funding year for the E-rate program).

<sup>8</sup> See *2014 Second E-rate Order*, 29 FCC Rcd at 15558, para. 49.

<sup>9</sup> FCC Form 471 Application No. 161059087, Utah Education and Telehealth Network (certified July 21, 2016).

<sup>10</sup> See 47 CFR § 54.507(b); *Schools and Libraries News Brief, How to Request an Extension of the June 30 Deadline to Complete FY2016 Special Construction Required to Light or Use the Fiber* (dated April 21, 2017), <https://usac.org/sl/tools/news-briefs/preview.aspx?id=767> (*SLD April 2017 News Brief*).

<sup>11</sup> Letter from Chairman Ajit V. Pai, Chairman, Federal Communications Commission to Chris Henderson, Chief Executive Officer, USAC (Apr. 18, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344459A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344459A1.pdf).

<sup>12</sup> See *Schools and Libraries News Brief, Applicants Who Need More Time to Complete Special Construction for FY2016* (dated Feb. 4, 2017), <https://usac.org/sl/tools/news-briefs/preview.aspx?id=745> (*SLD February 2017 News Brief*) (stating that applicants requesting an extension must demonstrate an unavoidable construction delay, “such as receiving an FCDL too late to complete construction and light the associated fiber by June 30”); *SLD April 2017 News Brief* (“Applicants . . . may obtain [a] one-year extension by demonstrating . . . that the late issuance of [an FCDL] (or non-issuance of an FCDL) has unavoidably delayed special construction in a manner that prevents the fiber from being lit (or a self-provisioned network using another technology to be in use) by the June 30 deadline.”).

not been issued),<sup>13</sup> whether the applicant elected to commence special construction before receiving an FCDL,<sup>14</sup> and the breadth and complexity of the build.<sup>15</sup>

4. On April 21, 2017, UETN timely filed a request for a one-year extension of the June 30, 2017 service implementation deadline.<sup>16</sup> USAC granted that extension request on May 5, 2017.<sup>17</sup> In granting the one-year extension, USAC established a new service implementation deadline of June 30, 2018, contingent on the issuance of a funding commitment.<sup>18</sup>

5. On September 19, 2017, USAC issued an FCDL to UETN denying its funding request because UETN failed to substantiate its compliance with E-rate program rules regarding cost allocation.<sup>19</sup> On appeal, UETN worked with its service provider, STRATA Networks (STRATA), to provide USAC with additional information about the funding request which, in turn, demonstrated that UETN had complied with program rules and all ineligible charges had been removed from the funding request.<sup>20</sup> After reviewing this information, USAC issued a Revised Funding Commitment Decision Letter (RFCDL) on December 27, 2017,<sup>21</sup> which granted UETN's funding request.<sup>22</sup>

6. On February 21, 2018, UETN filed the instant Request for Waiver.<sup>23</sup> In its request, UETN seeks an extension of the deadline to complete special construction and light the associated fiber until September 30, 2020. UETN asserts that because of the complexity of the build and the exceptionally challenging terrain at issue, a service implementation deadline of June 30, 2018 would not

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<sup>13</sup> *SLD February 2017 News Brief*; *SLD April 2017 News Brief*.

<sup>14</sup> *SLD April 2017 News Brief*. Applicants may begin special construction of a new fiber network on January 1 prior to the start of the funding year if: (1) the applicant has completed its competitive bidding process, which is initiated by posting an FCC Form 470, and selected a service provider; (2) a category one recurring service depends on the installation of the infrastructure; and (3) the actual service start date for the recurring service is on or after the July 1 start of the funding year. 47 CFR § 54.507(d)(2)(i)-(iii). If an applicant commences special construction prior to receiving an FCDL approving its requested funding, however, the applicant assumes the risk that its funding request will be denied. *2014 Second E-rate Order*, 29 FCC Rcd at 15553, para. 37. If an applicant opts to commence special construction without receiving an FCDL approving its funding request, it has already assumed the risk that the funding request will be denied, and the late issuance of an FCDL is less likely to constitute an "unavoidable delay" in construction. *See id.*; *SLD April 2017 News Brief*.

<sup>15</sup> *SLD February 2017 News Brief*; *SLD April 2017 News Brief*.

<sup>16</sup> Special Construction Deadline Extension Request, FCC Form 471 No. 161059087 (filed Apr. 21, 2017).

<sup>17</sup> Letter from USAC, Schools and Libraries Division, to Sabrina Scott, State E-rate Coordinator, Utah Education and Telehealth Network (dated May 5, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> Letter from USAC, Schools and Libraries Division, to Sabrina Scott, State E-rate Coordinator, Utah Education and Telehealth Network (dated Sept. 19, 2017).

<sup>20</sup> *See* Letter from USAC, Schools and Libraries Division, to Sabrina Scott, State E-rate Coordinator, Utah Education and Telehealth Network (dated Dec. 27, 2017) (UETN RFCDL); *see also* Request for Waiver at 2.

<sup>21</sup> UETN RFCDL.

<sup>22</sup> The RFCDL indicated a service implementation deadline of September 30, 2018. Based on our review of the circumstances presented, we find that this date is incorrect. The correct deadline is June 30, 2018, which was the deadline set by USAC when it granted UETN's one-year extension. Letter from USAC, Schools and Libraries Division, to Sabrina Scott, State E-rate Coordinator, Utah Education and Telehealth Network (dated May 5, 2017). In this regard, we acknowledge that UETN noted the conflicting dates in its filing, and expressed uncertainty regarding which deadline applied. Request for Waiver at 2.

<sup>23</sup> *Id.* at 3.

provide STRATA with enough time to construct the leased lit fiber network.<sup>24</sup> UETN explains that this construction requires traversing the Uinta Mountain range, which has elevations reaching over 8,500 feet.<sup>25</sup> Due to the terrain, UETN states, the annual construction season usually lasts only from May through September, after the snow has thawed.<sup>26</sup> UETN also indicates that STRATA would not purchase materials for the project or begin construction of the leased lit fiber network until funding had been approved.<sup>27</sup>

7. On March 6, 2018, UETN supplemented its Request for Waiver with a letter from STRATA's Chief Operations Officer to UETN.<sup>28</sup> In its letter, STRATA specified that the project requires: (1) significant rock excavation, which entails sawing an 8- to 14-inch wide trench through solid rock and then using a plow to clear the rock fragments;<sup>29</sup> (2) directional drilling to avoid identified environmentally and historically sensitive areas;<sup>30</sup> (3) aerial construction, which can only occur during good weather;<sup>31</sup> and (4) placing infrastructure across a large bridge and through Flaming Gorge Dam.<sup>32</sup> STRATA confirmed that it was hesitant to invest in materials for UETN's special construction project without assurance that the E-rate funding had been fully approved.<sup>33</sup> Due to the complexity of the build and the mountainous and rocky terrain of the build route, STRATA estimated that it would need two full construction seasons (May through September in the build area) to complete the high elevation portions of the project.<sup>34</sup>

### III. DISCUSSION

8. Based on the facts and circumstances of this request, we find good cause to justify a waiver of the deadline to complete special construction and light the fiber, and any USAC procedural deadlines, such as the invoicing deadline, that might be necessary to effectuate our ruling.<sup>35</sup> The Commission may waive any provision of its rules on its own motion and for good cause shown.<sup>36</sup> A rule

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<sup>24</sup>Request for Waiver at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2-3 (stating that "additional delay with respect to the funding decision, which impacts [STRATA's] ability to make commitments regarding materials purchases, jeopardizes the vendor's ability perform [sic] the contract under its original terms").

<sup>28</sup> Letter from Jeff Goodrich, Chief Operations Officer, STRATA Networks, to Dr. Ray Timothy, Executive Director, Utah Education and Telehealth Network, CC Docket Nos. 02-6, 13-184, 1 (filed Mar. 5, 2018) (UETN Supplement).

<sup>29</sup> STRATA estimates that 40% of the route definitely requires rock excavation, and expects the other 60% of the route to contain significant amounts of fractured rock, which also may require rock excavation. *Id.* at 1-2.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1-2 (stating that "STRATA is hesitant to invest in the materials . . . without the funding being fully approved for the project").

<sup>34</sup> *Id.* at 1.

<sup>35</sup> 47 CFR § 54.507(d)(1) (requiring schools, libraries, and consortia to use recurring services within the funding year for which E-rate funds were sought); *see also Request for Waiver by Jemez Pueblo Tribal Consortium; Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 32 FCC Rcd 10238, 10238-39, para. 2, n.11 (*Jemez Pueblo Order*) (applicants must complete special construction in time to commence a leased fiber service by June 30, or the charges will be ineligible for E-rate support).

<sup>36</sup> 47 CFR § 1.3.

may be waived where particular facts make strict compliance inconsistent with the public interest.<sup>37</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>38</sup> In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.<sup>39</sup>

9. We note, as an initial matter, that the Commission's rules allow applicants to obtain a one-year extension of the June 30 deadline to complete special construction and begin use of a leased lit fiber network if they demonstrate that construction was "unavoidably delayed due to weather or other reasons."<sup>40</sup> An applicant seeking an extension on this basis must submit a request to USAC.<sup>41</sup> If USAC concludes that a timely request for extension demonstrates that construction for the applicant's special construction project was unavoidably delayed due to weather or other reasons, USAC will grant the request and extend the applicant's deadline to complete special construction and light the fiber to June 30 of the following funding year.<sup>42</sup> Here, we find it significant that USAC's grant of a one-year extension of time to UETN for its funding year 2016 special construction project funding request was premised solely on the delay in USAC's processing of funding year 2016 applications generally and did not address the geographic and technical challenges that are unique to this build and that are set forth in the instant Request for Waiver.

10. We find good cause to waive the service implementation deadline and give a further extension of time under the circumstances presented. The delay in processing UETN's funding year 2016 application, combined with the lack of assurance regarding funding due to the initial denial of UETN's funding request, left UETN with an inadequate amount of time to complete its complex special construction project. UETN's funding request was initially denied in September 2017 and the RFCDL—which was not issued until the end of December 2017—cited an incorrect service implementation deadline, thereby creating additional uncertainty for UETN regarding the status of the project. The pendency of UETN's present Request for Waiver further delayed construction.<sup>43</sup> Notably, STRATA indicated that it will not purchase materials or begin construction of this complex project absent waiver of the current service implementation deadline because it will not have sufficient time to complete the installation of services.<sup>44</sup>

11. Against this backdrop, we conclude that special circumstances justify a waiver of the service implementation deadline. In this situation, strict adherence to the Commission's rules would leave UETN with inadequate time to complete construction of its planned network. We note, and find significant, UETN's assertion that the annual construction season for the area where its proposed network would be located is very short, normally lasting from May through September. Relatedly, STRATA's supplemental filing demonstrates that constructing this network in the Uinta Mountains, which requires

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<sup>37</sup> See *Northeast Cellular*, 879 F.2d at 1166.

<sup>38</sup> *WAIT Radio*, 418 F.2d at 1159.

<sup>39</sup> *Northeast Cellular*, 879 F.2d at 1166.

<sup>40</sup> See *Jemez Pueblo Order*, 32 FCC Rcd at 10239-40, para. 3; see also *2014 Second E-rate Order*, 29 FCC Rcd at 15553, 15558, paras. 38, 49.

<sup>41</sup> See *SLD April 2017 News Brief* ("The deadline for seeking an extension for FY 2016 funding requests is June 30, 2017. We recommend that you file your request as soon as you are certain that you will not be able to light the fiber by the June 30 deadline.").

<sup>42</sup> *Id.*; see also *2014 Second E-rate Order*, 29 FCC Rcd at 15553, 15558, paras. 38, 49.

<sup>43</sup> UETN Supplement at 1 (explaining that "STRATA was expecting to begin construction in March/April of this year [2018]").

<sup>44</sup> *Id.* at 2 ("STRATA is still hopeful and optimistic regarding this project and committed to its completion *once the funding is approved and the timeline extension period is granted.*") (emphasis added).

significant rock excavation, directional drilling to avoid environmentally and/or historically sensitive areas, laying fiber through and across a gorge, and at least one section of aerial construction, warrants two full seasons to complete the network. We, therefore, direct USAC to set a new deadline of October 1, 2020, by which time UETN is required to complete special construction and begin using the leased lit fiber service associated with its funding year 2016 funding request.

12. We emphasize the limited nature of this decision. We grant this waiver because the applicant and service provider have furnished compelling evidence of the complexity of the build, unforgiving topography of the build route, and very short annual construction season due to weather. Accordingly, we grant an extension of the service implementation deadline to October 1, 2020 because the applicant and service provider have demonstrated that this particular build requires it.

13. Although we grant this Request for Waiver, this Order does not alter the obligation of participants in the E-rate program to comply with the Commission's rules.<sup>45</sup> We continue to require E-rate applicants to submit complete, timely, and accurate information to USAC as part of the application review process. Applicants continue to be responsible for preemptively planning special construction projects so that they can be completed by June 30 of the relevant funding year.<sup>46</sup>

14. Finally, we find no evidence of waste, fraud, or abuse presented by UETN's request for waiver of the June 30, 2018 implementation deadline. We emphasize that the Commission is committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant this Request for Waiver, this action does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or the Commission's rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent that the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. The Commission retains the discretion to evaluate the use of monies disbursed through the E-rate program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred or recovery is warranted. The Commission will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

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<sup>45</sup> 47 CFR §§ 54.501-503.

<sup>46</sup> We remind applicants of the options available to them to ensure that they complete their special construction projects within the service implementation deadline. Applicants who know in advance that a special construction project will take longer than one funding year to complete should consider breaking the project down into stages, and seeking funding for each stage in separate funding years. If applicants believe that the scope of the project might prevent them from completing construction and lighting the fiber by June 30, they should call USAC's Client Service Bureau to review their special construction plan. USAC, Fiber Frequently Asked Questions, Question 6 (last visited Mar. 22, 2018), <https://www.usac.org/sl/about/faqs/faqs-fiber.aspx> ("Applicants can call the Client Service Bureau at (888) 203-8100 to review their special construction plan. It may be possible to break up the special construction project into stages that will allow applicants to complete special construction and light the fiber for some of their eligible school and/or library locations in one year, and complete additional connections to other eligible school and/or library locations in a subsequent funding year."). Additionally, to provide sufficient time to complete builds, the Commission permits applicants to begin construction of category one non-recurring services up to six months before the July 1 start of the funding year. 47 CFR § 54.507(d); *see also 2014 Second E-rate Order*, 29 FCC Rcd at 15552-53, 15558, paras. 38, 49 ("[W]e allow category one infrastructure costs incurred six months prior to that funding year, provided the following conditions are met: (1) the construction takes place only after selection of the service provider pursuant to a posted FCC Form 470 (or any successor form); (2) a category one recurring service must depend on the installation of the infrastructure; and (3) the actual service start date of that recurring service is on or after the start of the funding year (July 1) . . .").

**IV. ORDERING CLAUSES**

15. Accordingly, IT IS ORDERED that, pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, the requirement to use a recurring service within the applicable funding year, as set forth in section 54.507(d)(1) of the Commission's rules, 47 CFR § 54.507(d)(1), IS WAIVED to the extent described above and UETN's new deadline to complete special construction and begin using a leased lit fiber service is October 1, 2020.

16. IT IS FURTHER ORDERED that, pursuant to Section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer  
Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau