

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Application for Review of a
Decision of the
Wireline Competition Bureau by
Pribilof School District
St. Paul Island, Alaska
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-161061517
CC Docket No. 02-6

ORDER

Adopted: August 7, 2018

Released: August 8, 2018

By the Commission: Commissioners O’Rielly and Rosenworcel issuing separate statements.

I. INTRODUCTION

1. Pribilof School District, St. Paul Island, Alaska (Pribilof), an isolated school district that serves 65 low-income students on two islands in the Bering Sea, sought more than \$300,000 in funding from the E-Rate program to provide satellite Internet access service to its students in 2016. After a series of errors associated with the Universal Service Administrative Company’s (USAC’s) roll-out of the E-Rate Productivity Center (EPC), the web-based account and application management portal for the E-Rate program, Pribilof filed its application for funding and its subsequent waiver request after the applicable deadlines. In this Order, we grant relief to Pribilof and give an opportunity for relief to other similarly situated applicants whose applications were rejected because of failures of the EPC platform during funding year 2016. On the latter point, we direct the Wireline Competition Bureau (Bureau) to initiate a process by which other funding year 2016 applicants would have 60 days to demonstrate that they experienced the same special circumstances as Pribilof and that a waiver would be in the public interest for their respective funding year 2016 E-Rate applications.

II. BACKGROUND

2. Under the E-Rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for universal service support for eligible services. Commission rules

1 E-Rate is more formally known as the schools and libraries universal service support mechanism.

2 Letter from Gina Spade, Counsel for Pribilof School District, to the Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed May 30, 2017) (Pribilof Application for Review). See Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 02-6, Public Notice, 31 FCC Rcd 13450, 13462 (WCB 2016) (December 2016 Streamlined Request Resolution PN); Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 02-6, Public Notice, 32 FCC Rcd 3161, 3163, n.7 (WCB 2017) (April 2017 Streamlined Request Resolution PN).

3 Funding year 2016 was from July 1, 2016 to June 30, 2017.

4 47 CFR §§ 54.501-54.505.

require that the applicant make a *bona fide* request for services⁵ by filing an FCC Form 470, which is posted to the Universal Service Administrative Company's (USAC) website for all potential competing service providers to review.⁶ Once a school or library has complied with the Commission's competitive bidding requirements and has entered into an agreement for eligible services, it must file an FCC Form 471 application to notify USAC of the services that have been ordered, the service providers with which the applicant has entered into agreements, and an estimate of the funding needed for eligible services.⁷ Under the E-Rate program rules applicable to funding year 2016, applications received after the close of the filing window would be denied funding by USAC.⁸

3. Funding year 2016 was the first year E-Rate applicants were required to use the EPC portal.⁹ On January 25, 2016, USAC announced that the filing window for funding year 2016 applications would open on February 3, 2016 and close on April 29, 2016.¹⁰ On April 15, 2016, because of the challenges applicants faced in filing their applications largely due to unexpected issues with rollout of EPC, USAC extended the filing window and, for the first time, created a second filing window for a subset of applicants.¹¹ Specifically, USAC extended the close of the funding year 2016 window to May 26, 2016 for schools and school districts, and created a new filing window for libraries and consortia that opened immediately after the first window ended and closed on July 21, 2016.¹²

4. Pribilof sought E-Rate funding for funding year 2016.¹³ Pribilof asserts that in preparing to submit its E-Rate application for funding year 2016, it sought to apply as a consortium.¹⁴ When Pribilof tried to file its application through EPC, it experienced numerous problems and sought USAC's assistance with filing the application.¹⁵

5. On July 25, 2016, Pribilof filed its funding year 2016 FCC Form 471 application for

⁵ See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9076, para. 570 (1997 (citing 47 U.S.C. § 254 (h)(1)(B))), as corrected by *Federal-State Joint Board on Universal Service*, Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*Universal Service Order*).

⁶ 47 CFR § 54.503(c).

⁷ See 47 CFR § 54.504(c).

⁸ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket Nos. 13-184, 10-90. Second Report and Order and Order on Reconsideration, 29 FCC Rcd. 15538, para. 116 (2014) ("we amend the rules to only allow applications to be filed within the filing window"); USAC Website, Schools and Libraries Program News Brief, Submitting Window Waivers (July 29, 2016), <https://www.usac.org/sl/tools/news-briefs/preview.aspx?id=710>.

⁹ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8945, para. 190 (2014) (simplifying the E-Rate application process by requiring the use of electronic filings); see also USAC Website, Schools and Libraries Program News Brief, Introduction to the E-Rate Productivity Center (Sep. 11, 2015), <https://www.usac.org/sl/tools/news-briefs/preview.aspx?id=640>.

¹⁰ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, 30 FCC Rcd 9923, 9923, para. 2 (2015) (authorizing USAC to open the annual application window no earlier than 60 days after release of the Order); see also USAC Website, Schools and Libraries Program News Brief, FY2016 Filing Window Opens Next Wednesday (Jan. 25, 2016), <https://www.usac.org/sl/tools/news-briefs/preview.aspx?id=662>.

¹¹ 47 CFR § 54.507(c) ("the administrator may implement such additional filing periods as it deems necessary"); see also USAC Website, E-Rate Application Window Extension Notice for FY2016 (Apr. 15, 2016), <https://www.usac.org/sl/tools/news-briefs/preview.aspx?id=685>.

¹² USAC Website, E-Rate Application Window Extension Notice for FY2016 (Apr. 15, 2016), <https://www.usac.org/sl/tools/news-briefs/preview.aspx?id=685>.

¹³ Application for Review at 6. The area served by Pribilof is approximately 300 miles from the west coast of Alaska, 250 miles north of the Aleutian Island chain, and 800 miles from Anchorage. Nearly 100 percent of Pribilof's students are Alaska Native, and 68 percent of the students live in poverty. *Id.* The district consists of two

more than \$300,000 in satellite Internet access service for its two schools. This was four days outside the filing window for library and consortia filers, which closed on July 21, 2016.¹⁶ Immediately after Pribilof filed its FCC Form 471 application, EPC generated a confirmation screen that stated: “You have successfully filed FCC Form 471 #161061517 for FY 2016.”¹⁷ Below that header was the following message: “Your application is being filed after the close of FY 2016 filing window. Funding for such requests will be prioritized after all applications submitted during the application window, as well as any other applications filed after the close of the window but before this application.”¹⁸ In light of these messages in EPC, the Pribilof employee submitting the application believed the application had been accepted and that a funding commitment decision would eventually arrive.¹⁹

6. On July 26, 2016, EPC’s news feed, a Really Simple Syndication (RSS)-style feed through which USAC communicates news and information to applicants, including notifications (such as Funding Commitment Decision Letters) and information on program activities, displayed a different message regarding the status of Pribilof’s funding year 2016 E-Rate application. This message indicated that because the application was received after the filing window had closed, Pribilof would not be considered for funding. It also noted that Pribilof could file a waiver of the filing deadline.²⁰ Pribilof did not see this EPC news feed message.²¹

7. On November 18, 2016, when it had not received a funding commitment or other type of communication directly from USAC, and after consulting with the state E-Rate coordinator, Pribilof filed a request with the Commission for waiver of the FCC Form 471 application filing deadline for funding year 2016.²² The Bureau denied the waiver request on the basis that it was late-filed because it should have been filed within 60 days of the EPC news feed notification, or September 24, 2016.²³ Pribilof then filed a petition for reconsideration that was dismissed.²⁴ On May 30, 2017, Pribilof filed the instant Application for Review with the Commission.²⁵

III. DISCUSSION

8. *Waiver of Deadline for Appeal of USAC Decision.* Under E-Rate program rules, an affected party seeking review or waiver of a USAC decision must file the request with the Commission

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K-12 schools and two public libraries that are located within the schools and used by the general public after school hours. *Id.*

¹⁴ See *id.* at n.4; Affidavit of Tammy L. White. Although the Pribilof employee filing the application does not recall changing its designation from “consortium” to “school district,” Pribilof’s application was filed as a school district application in EPC. See Application for Review at 19.

¹⁵ Application for Review at 19.

¹⁶ See 2016 FCC Form 471, Pribilof School District, filed July 25, 2016, (File No. SLD-161061517) (2016 FCC Form 471).

¹⁷ Application for Review at 6.

¹⁸ *Id.*

¹⁹ *Id.* at 10-11.

²⁰ *Id.* at 7.

²¹ *Id.*

²² *Id.*; Letter from Kela Halfmann, E-Rate Coordinator, SERRC – Alaska’s Educational Resource Center, on behalf of Pribilof School District, to the Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Nov. 18, 2016) (Pribilof Request for Waiver).

²³ See *December 2016 Streamlined Request Resolution PN*, 31 FCC Rcd at 13462.

²⁴ See *April 2017 Streamlined Request Resolution PN*, 32 FCC Rcd at 3163, n.7.

²⁵ Application for Review.

within 60 days of the date on which USAC issued the decision.²⁶ Waiver of the Commission's rules is appropriate if (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²⁷

9. We find that Pribilof has demonstrated that grant of a waiver of section 54.720(a) of the Commission's rules is warranted. We find, as an initial matter, that Pribilof reasonably believed that its funding year 2016 application would be considered for funding by USAC despite being filed outside of the filing window, based on the response generated by USAC through the EPC system. In particular, upon submitting its application, Pribilof received electronic notification from USAC stating that the application had been "successfully filed" and that the funding for out-of-window applications "will be prioritized" after all in-window applications, as well as any earlier-filed out-of-window applications. This communication was factually inaccurate and at odds with the Commission's E-Rate program rules for funding year 2016, which provided that out-of-window applications would not be considered for funding at all.²⁸ Though applicants should not rely on informal guidance from USAC that contradicts Commission rules or policy, given the unusual facts present here (including the novelty of a second filing window, complications arising from the rollout of EPC, and uncertainty regarding the relevance of the EPC news feed), we cannot fault Pribilof for relying on what appeared to be a formal acceptance notification it received through EPC from USAC regarding its specific funding application. Pribilof understandably treated the notification as legitimate.

10. We note that USAC did send a message one day later clarifying that Pribilof's funding year 2016 application would not be funded because it was submitted outside the filing window. However, that message was delivered via an EPC news feed. Pribilof asserts that its waiver request was untimely filed precisely because it did not see the EPC news feed message and was unaware that it could check the news feed for application-specific information.²⁹ Under the circumstances of Pribilof's reasonable reliance on USAC's notification of its application status, we find that Pribilof had no reason to expect that the EPC news feed would have information the following day regarding the status of its application. In fact, it had received a notification from USAC just one day before stating that its application had been "successfully filed." Funding year 2016 was the first time that information about specific applications was delivered via EPC news feeds. We take particular note that these events occurred against the backdrop of an EPC rollout that was experiencing significant unforeseen technical difficulties, which ultimately led to the extension of the initial filing window and the opening of a second filing window. We also find it significant that Pribilof's request for review was filed within 60 days of its discovery that its application had been found defective.³⁰

11. We find that the combination of these factors constitutes special circumstances unique to the funding year 2016 application process. Additionally, we believe that granting the requested waiver of the appeal filing deadline would not harm the public interest. The difficulties with the implementation of

²⁶ 47 CFR § 54.720(a).

²⁷ Generally, the Commission's rules may be waived if good cause is shown. 47 CFR § 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).

²⁸ For funding year 2017 USAC changed the notification for out-of-window applications to read, in pertinent part: "Your application is being filed after the close of the FY 2017 filing window. Therefore, your application will not be considered for funding."

²⁹ Pribilof states that it became aware of the news feed notification when its initial waiver request was denied by the Bureau. See Application for Review at 7-8, Affidavit of Tammy L. White.

³⁰ 47 CFR § 54.720(a). See, e.g., *Requests for Waiver and Review of Decisions of the Universal Service Administrator by Ann Arbor Public Schools et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 25 FCC Rcd 17319, para. 1, n.2 (WCB 2010) (waiving the 60-day waiver request deadline when applicants filed their respective appeals or waivers within 60 days of discovering or receiving notice of the defects in their applications).

EPC during the funding year 2016 application process were not within the control of Pribilof,³¹ and granting waiver relief here prevents an outcome whereby Pribilof is foreclosed from seeking to obtain much-needed E-Rate funding. Accordingly, we find that it is in the general public interest to waive our appeal deadline rules in this instance. We therefore grant Pribilof's request to allow submission of its waiver request beyond 60 days from USAC's decision regarding Pribilof's funding year 2016 FCC Form 471 application.

12. *Waiver of Form 471 Application Submission Deadline.* Next, we address Pribilof's request for a waiver of the deadline to submit its FCC Form 471 E-Rate application for funding year 2016. Although Pribilof's application was processed as a "school district" application, we find that Pribilof has demonstrated that it intended to file as a consortium. In particular, we note that Pribilof submitted a sworn affidavit from its business manager asserting that she believed that Pribilof was filing as a consortium entity,³² and that well before the filing deadline, she sought USAC's assistance to file as a consortium.³³ Further, Pribilof had filed as a consortium in previous funding years and indeed met the criteria to file as a consortium under Commission rules.³⁴ Pribilof only learned that its application was filed as a school district application after the Bureau noted that fact in a decision denying Pribilof's petition for reconsideration.³⁵ Based on the information before us, we find that Pribilof's application should be treated as a consortium application. Accordingly, we find that Pribilof filed its application only four days outside the close of the applicable funding year 2016 window. Consistent with precedent regarding the Commission's waiver standard for late-filed E-Rate funding applications,³⁶ we grant Pribilof's waiver request regarding submission of its funding year 2016 FCC Form 471 E-Rate application.

13. Finally, we recognize the possibility that there may be other applicants that filed out-of-window FCC Form 471 applications in funding year 2016, received acceptance notices through EPC from USAC incorrectly indicating that their applications could be funded, and filed waiver requests with the Commission beyond 60 days from the date of USAC's decisions regarding their funding year 2016 FCC Form 471 applications because they believed and relied on the factually incorrect USAC notifications. To the extent this is the case, we find that applicants similarly situated to Pribilof should be afforded the same relief. To ensure that similar facts lead to similar outcomes, we direct the Bureau to initiate a process by which applicants would have 60 days³⁷ to demonstrate that they are similarly situated to Pribilof and that a waiver is in the public interest for their respective funding year 2016 E-Rate applications. In addition, we direct the Bureau to identify pending or resolved waiver requests from

³¹ See, e.g., *Request for Review of a Decision of the Universal Service Administrator by Idaho Falls School District 91; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 25 FCC Rcd 5512, 5514-16 (WCB 2010) (finding waiver was appropriate where applicant's error occurred at a time when "applicants, service providers, and USAC were not yet familiar with the operation of the program," and the error was traceable in part to USAC's own errors).

³² Application for Review at Affidavit of Tammy L. White.

³³ *Id.*

³⁴ See 47 CFR § 54.500 ("A consortium is any local, statewide, regional, or interstate cooperative association of schools and libraries eligible for E-rate support").

³⁵ Application for Review at 19. Indeed, both its initial waiver request and subsequent petition for reconsideration make note that its application was only four days late from the consortia application window deadline. See, e.g., Pribilof Request for Waiver at 1.

³⁶ See, e.g., *Requests for Waiver and Review of Decisions of the Universal Service Administrator by Academy of Math and Science et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 25 FCC Rcd 9256 (2010) (finding special circumstances exist to justify granting waiver requests where, for example, petitioners filed their FCC Forms 471 within 14 days after the FCC Form 471 filing window deadline); *id.* para. 9 (explaining that "unexpected events may cause unanticipated delays" in the E-Rate filing process).

³⁷ The 60-day deadline will begin on a date to be determined by the Bureau.

funding year 2016 that were late-filed with the Commission, and grant waivers in situations where: (1) petitioners demonstrate that their requests for waiver of the deadline to appeal a USAC decision were late-filed because of the same EPC notice issue faced by Pribilof; and (2) meet Commission-established waiver criteria for filing applications beyond the close of the applicable filing window (e.g., within 14 days after the window closes).³⁸

14. In granting relief based on the specific facts and circumstances presented here, we make clear that this order does not alter the obligation of participants in the E-Rate program to fully comply with the Commission's procedural rules, which are vital to the efficient operation of the E-Rate program.

IV. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.115 of the Commission's rules, 47 CFR § 1.115, that the Application for Review filed by Pribilof School District, St. Paul Island, Alaska, on May 30, 2017, IS GRANTED.

16. IT IS FURTHER 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 section 1.3 of the Commission's rules, 47 CFR § 1.3, that sections 54.507(c) and 54.720(a) of the Commission's rules, 47 C.F.R. §§ 54.507(c) and 54.720(a), ARE WAIVED to the extent provided herein.³⁹

17. IT IS FURTHER 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 and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 1.3, we direct the Wireline Competition Bureau to GRANT RELIEF to similarly situated applicants to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁸ See *supra* note 36. If the Bureau determines that waiver is in the public interest, it should grant the application and, in the case of a previously denied waiver request, grant a *sua sponte* reconsideration of the previous determination and direct USAC to process the application.

³⁹ We remand Pribilof's application to USAC and direct USAC to complete its review of the application consistent with this Order. We also waive section 54.514(a) of the Commission's rules, *see* 47 CFR § 54.514(a) (codifying the invoice filing deadline), and direct USAC to waive any other procedural deadlines that might be necessary to effectuate our decision.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Application for Review of a Decision of the Wireline Competition Bureau by Pribilof School District, St. Paul Island, Alaska, File No. SLD-161061517; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6.*

For the past year, I have expressed support for granting relief to Pribilof, an economically disadvantaged school district serving 65 students on remote islands in the Bering Sea. Due to technical problems with the E-rate Productivity Center (EPC) system and unsound policy decisions at earlier stages in this proceeding, Pribilof's application for E-rate funding has been on hold. With this order, the Commission enables the application to proceed and provides similarly situated applicants the opportunity to seek relief as well.

The EPC system's technical problems are well-documented, and I understand that the Chairman and staff are working with USAC to address them, so I will not belabor them here. Rather, my specific concern has been the misguided position that information provided by USAC on the EPC news feed constitutes notice to an applicant of a funding decision and sets the deadline to appeal the decision.

Under past precedent and practice, USAC provides notice of a funding decision directly to an applicant in a funding commitment decision letter (FCDL) mailed or emailed to the applicant's designated contact(s). In contrast, the EPC news feed essentially broadcasts to all users any action taken in the system. Notice by news feed is lazy, inadequate, and wrongly shifts responsibility for some of the failings of the EPC system on to the shoulders of unsuspecting applicants. Given the number of users and actions within the program, the content posted on EPC has been described as voluminous, cluttered, and almost always irrelevant to specific schools or libraries. It is unreasonable to expect applicants – often school and library staff with a primary educational mission to accomplish – to devote resources to continuously monitor a general-purpose news feed in lieu of receiving an FCDL directly from USAC, especially when they were never told they needed to check it.

I thank the Chairman for circulating this order to provide much needed relief and for further addressing my concerns. Specifically, the order has been revised to clarify that items posted on the EPC news feed are merely informational in nature.

Additionally, I recommend that the Commission take the next available opportunity to codify a rule that any funding decision be communicated by letter and distributed directly to the applicant's designated contact(s), preferably by electronic means. Moreover, such decisions should contain a clear statement of each basis for the decision, including citations to any relevant statutory provision or Commission rule, order, or policy. These simple steps could provide even greater clarity and certainty for participants and would improve transparency and accountability for the programs overall. Applicants and the American people deserve no less.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Application for Review of a Decision of the Wireline Competition Bureau by Pribilof School District, St. Paul Island, Alaska, File No. SLD-161061517; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6.*

The E-Rate program is a cherished part of our universal service system. For more than two decades, this program has helped ensure that internet access is available in schools across the country, including, as here, rural Alaskan islands. But great programs do not thrive without regular attention and care. In the case before us, the Pribilof School District of St. Paul Island sought support from the E-Rate program and received an erroneous confirmation that suggested its application was successfully filed. In order to remedy the confusion that followed, due in part to the roll-out of the new portal for applications at the Universal Service Administrative Company, the agency waives its rules concerning appeals and submission deadlines. This is the right call in this case and this decision has my full support.