

February 9, 1999

Cheryl Parrino  
President  
Universal Service Administrative Company  
2120 L Street, N.W., Suite 600  
Washington, D.C. 20037

Dear Ms. Parrino:

I write this letter and urge immediate action on behalf of numerous schools across the country -- and particularly the rural schools at the 70% discount level -- that are in danger of being unfairly excluded from recent Schools and Libraries Division (SLD) distributions that are inconsistent with Federal Communications Commission Orders. Schools with discounts of between 70% and 76% should have been included in the most recent distributions.<sup>1</sup> These excluded schools include many rural schools, in large part because the 70% discount level is only available to rural applicants.

This issue was recently raised by the Schools and Libraries Division of the Universal Service Company (USAC) regarding the method of distributing funds for discounts to schools and libraries. As I am sure you are aware, last June the Commission adopted new rules of priority for the distribution of those funds. These rules ensured that all requests for telecommunications and internet access receive first priority. These rules then provide that the remaining funds should be allocated to requests for internal connections, beginning with the most economically disadvantaged schools and libraries "as determined by the schools and libraries discount matrix."<sup>2</sup> That discount matrix provides a series of steps or levels of discount that are available. Our rules provide that schools eligible for a 90% discount should receive first priority. Our rules then provide that:

To the extent funds remain, SLC shall next allocate funds toward the requests for internal connection submitted by schools and libraries eligible for an 80 percent discount, then for a 70 percent discount, and shall continue committing funds for internal connections in the

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<sup>1</sup> A preliminary list of the schools that have qualified for a discount of between 70% and 76% is Attached to this letter as Attachment I.

<sup>2</sup> Fourth Report and Order, CC Docket No. 96-45, at par. 36. Matrix attached as Attachment II.

same manner to the applicants at each descending level until there are no funds remaining.<sup>3</sup>

Thus, the FCC rules are very clear that requests for internal connection should be examined in steps that correspond to our own discount matrix. Indeed, USAC seems to have interpreted the Commission's rules in such a manner. Their own answers to frequently asked questions sheet seems to make this clear:

10. If funds are available for internal connections requests below the 90% discount level, how will SLC make these funding decisions?

Consistent with FCC rules, we will consider internal connections requests below the 90% discount level by ten-point discount "bands" - for example, 80-89%, 70-79%, and so on. If there are sufficient funds to grant all approved requests within a band, we will set aside funds for the approved requests in that band. A funding commitment letter will be issued for each applicant when we can fully respond to all requests in that application.<sup>4</sup>

To ensure that there was no confusion, the FCC clarified its rules last June with a hypothetical:

If the remaining funds are not sufficient to support all of the funding requests that comply with the commission's rules and eligibility requirements within a particular discount level, SLC shall divide the total amount of remaining support available by the amount of support requested within a particular discount level to produce a pro rata factor. Thus, for example, if all applicants eligible for discounts of 90% may be fully funded, but there are not sufficient funds remaining to fully fund internal connections for applicants eligible for discounts of 80%, SLC shall reduce the support level for each applicant that is eligible for an 80% discount by multiplying the appropriate requested amount of support by the pro-rata factor. SLC shall then allocate funds to each applicant within the 80% discount category based on this reduced discount level.<sup>5</sup>

Recently, this very situation arose. The SLD advised the Commission that it would not be able to provide support for all requests for internal connections below the ninety percent discount level. Despite such previous guidance and explicit examples in the Commission's Order, "SLD propose[d] allocating funds for discounts to schools and libraries beginning with those applicants at the eighty-nine percent discount level and, to the extent funds remain, continuing to allocate

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<sup>3</sup> Fourth Report and Order, CC Docket No. 96-45, at par. 36.

<sup>4</sup> E-Rate Funding Commitments, 20 Questions and Answers for Understanding the "Waves" of funding Commitment Decisions Letters, November 17, 1998. Attachment III.

<sup>5</sup> Fourth Report and Order, CC Docket No. 96-45, at par. 37.

funds for discounts to applicants at each descending single discount percentage."<sup>6</sup> Such a proposal, however, is inconsistent with the Commission's rules, the matrix the Commission has adopted, the Commission's own example that was meant to provide guidance to SLD, and SLD's own earlier interpretation.

Even more astonishing was the Common Carrier Bureau's response. Without consulting the Commission, the Common Carrier Bureau concluded that the proposal is "consistent" with the Commission's direction.<sup>7</sup> To the contrary, this proposal is inconsistent with the Commission's explicit direction. Moreover, the Common Carrier Bureau's role is limited "to the review of issues that raise no novel questions of fact, law, or policy."<sup>8</sup> Thus, even if our rules were ambiguous and would have allowed for such an interpretation, which I question, it would clearly be a novel question of fact, law or policy and as such could only be decided by the full Commission. As such, you should disregard such informal advice provided by the Common Carrier Bureau until the full Commission provides further guidance. Moreover, to the extent that you rely upon such advice, USAC will remain liable for any application that would have received support that was denied because of this misinterpretation of a Commission Order by a Bureau that may not provide advice on new or novel issues. In other words, you should be on notice that such advice may not shield USAC from future liability by disadvantaged applicants.

In addition, I note that I am unpersuaded by the Office of General Counsels' arguments in support of this request by SLD. First, they argue that the rules of priority *must* include the particular percentage points that result from the calculation of average discounts for shared services pursuant to Section 54.505(b)(4). The Commission's rules, however, are very specific on this point and provide only for allocating funds for internal connections to disadvantaged schools and libraries "as determined by the schools and libraries discount matrix in section 54.505(c) of this part."<sup>9</sup> Indeed, there is no mention of Section 54.505(b)(4). Similarly, the next section of the rules provides for the continued allocation of funds "towards the requests for internal connections submitted by schools and libraries eligible for an 80 percent discount, then for a 70 percent discount, and shall continue committing funds for internal connections in the same manner to the applicants at each descending discount level until there are no funds remaining."<sup>10</sup> Thus, these rules of priority clearly envision discount levels that correspond to the discount levels provided for in the discount matrix -- 90, 80, 70, etc..

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<sup>6</sup> Letter from Lisa Zaina, Acting Deputy Chief of the Common Carrier Bureau to Kate Moore, dated Jan. 22, 1999.

<sup>7</sup> Letter from Lisa Zaina, Acting Deputy Chief of the Common Carrier Bureau to Kate Moore, dated Jan. 22, 1999.

<sup>8</sup> Eighth Order on Reconsideration in CC Docket No. 96-45, at par. 64.

<sup>9</sup> 47 CFR 54.507(g)(1)(ii).

<sup>10</sup> 47 CFR 54.507(g)(1)(iii).

Second, the Office of the General Counsel argues that, even if the rules are ambiguous, the Common Carrier Bureau's interpretation is reasonable. Again, I point out that the reasonableness of their interpretation is not the standard. Rather, the question is whether or not this is a new or novel question of fact, law or policy. There may be very good reasons why this should be the rule. There may, however, be equally or even more compelling reasons why it should not. For example, allowing consortia applications to receive funds prior to individual schools may result in some schools with a lower priority (e.g. 60%) receiving funds over other individual applicants with a higher priority (e.g. 70%) merely because they paired with a school with a higher priority (e.g. 90%). Regardless, it is not within the Common Carrier Bureau's discretion to determine the best policy when new or novel questions arise. Rather, that authority remains solely with the full Commission.

I am very disturbed by the arbitrary nature of this decision and the effect it will have on numerous schools across the country. For illustrative purposes, I have attached a preliminary list of the schools that have been disadvantaged by this arbitrary interpretation. All applicants deserve to be treated in a fair and consistent manner. Changing the rules for distribution to favor some schools and disadvantage others in the middle of the distribution process hardly seems fair -- indeed, it seems rather arbitrary.

What is even more disturbing about this flagrant contradiction of clear Commission guidance, however, may be the detrimental effect that this decision is having on many rural applicants. Rural areas should always be the primary beneficiary of universal service programs. But under these revised rules, the rural applicants are the most likely to be disadvantaged. As you are aware, there have been sufficient funds to meet the requests of all applicants that qualify for an 80% discount and above. It appears, however, that there may be insufficient funds to meet all of the requests in the 70-79% range. So what difference does it make to rural America that the 79%, 78% and 77% consolidated applications have been provided 100% of their requests while the 70% applicants will get less and maybe nothing? The 79%, 78%, and 77% applications are predominantly urban in nature, but the 70% discount is one for which only "rural" schools may qualify. Thus, by favoring discounts above 70%, the Commission is favoring consortia applicants who are predominantly urban. Indeed, SLD estimates that the latest wave of commitment letters funding schools between 77%-79% results in funds flowing to schools that are almost 90% urban.<sup>11</sup> In contrast, we know that 100% of the applicants qualifying for a 70% discount are rural. But there may not be *any* money left for them.

To illustrate how this will adversely effect rural America, I have compared the applicants with a 77% to 79% discount, with those applicants qualifying for the 70% discount. Applicants with a 77% to 79% discount requested a total of \$48 million, while applicants with a 70% discount similarly requested about \$51 million. But the distribution among states is dramatically different, as urban schools receive the lion's share of the funds distributed with a 77% to 79% discount. Schools from predominantly rural states receive significantly less. For example, schools from such rural states as Alaska (1 school requesting \$7,000), Montana (3 schools totaling \$16,000), and Kansas (6 schools totaling \$200,000) will receive relatively little money in the 77%

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<sup>11</sup> National Overview: Wave VII.

to 79% discount distribution. Indeed, not a single school from North Dakota will receive any money in such a distribution. In the 70% discount category, however, there are eight schools in Alaska (for a total of over \$200,000), 26 schools in Montana (for a total of more than \$325,000), 48 schools in Kansas (for a total of almost \$1.2 million), and 39 schools in North Dakota (for a total of \$336,000) that would qualify. So who are the big winners in the upper brackets? Schools in urban areas such as New York (almost \$8.5 million) and Washington, DC (almost \$2.7 million). Thus, by excluding the 70% category from the most recent distributions, SLD has funnelled money away from rural areas and towards urban areas. This is not what the Commission intended. Instead, the Commission envisioned the rural schools that qualify for a 70% discount getting a pro-rata share of these remaining funds, not the leftovers after the predominantly urban schools in the 77%-79% range have been fully funded.

Indeed, last June, the Commission recognized that our matrix system with its steps favored rural schools and praised that result:

Because these rules of priority utilize the discount matrix, which provides higher discounts for schools and libraries in rural areas, they also equitably provide greater support to schools and libraries in rural areas. These rules, therefore, further implement the Commission's prior decisions to allocate support for schools and libraries in a manner that provides higher levels of support for rural areas and areas with greater economic disadvantage, while recognizing that every eligible school and library should receive some assistance.<sup>12</sup>

I cannot stand by and watch the Common Carrier Bureau re-interpret our rules arbitrarily benefitting some schools and harming others, and in particular I will not support interpreting these rules in a manner that harms those schools in rural America.

With these concerns in mind, I request that the SLD reallocate on a pro-rata basis the remaining funds to all qualifying applicants in the 70%-79% range. The inclusion of the schools in the 70%-76% range -- particularly those rural schools at the 70% discount level -- will provide them with the same opportunity for a share of the universal service pie that the urban schools in the 77%-79% range are currently receiving.

I would appreciate your prompt attention to these issues and request an official response by Thursday, February 11, 1999. Should you or your staff have any questions, please do not hesitate to contact Kevin Martin on my staff at 418-2000.

Sincerely,

Harold Furchtgott-Roth  
Commissioner

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<sup>12</sup> Fourth Report and Order, CC Docket No. 96-45, at par. 35.

cc: Honorable John McCain  
Honorable Ernest Hollings  
Honorable Conrad Burns  
Honorable Tom Bliley  
Honorable John Dingell  
Honorable W. J. Tauzin  
Honorable Edward Markey  
Chairman William Kennard  
Commissioner Susan Ness  
Commissioner Michael K. Powell  
Commissioner Gloria Tristani  
Lawrence E. Strickling, Chief, Common Carrier Bureau  
Robert Haga, Secretary & Treasurer  
Kate Moore, Schools and Libraries Division