

April 21, 2011

FCC Addresses Timing Issues in Recent E-Rate Orders

The Commission recently released a number of Orders addressing timing-related E-rate issues. As with previous Orders, the Commission tends to be lenient for minor violations of the rules, such as missing a deadline by only a few days, but applies a stricter stance when it comes to egregious violations.

Length of Time Between Signing Contracts or Certifying FCC Forms 471 Before The Allowable Contract Date

The FCC granted 13 appeals of decisions by the Universal Service Administrative Company (“USAC”) and denied 19 others, all concerning violations of the Commission’s competitive bidding rules. For six of the appeals, the Commission waived section 54.504(b)(4) of its rules, which requires E-rate applicants to wait 28 days after their FCC Forms 470 are posted to the USACs website, or after public availability of an applicant’s request for proposal (“RFP”), before entering into a contract with a service provider. In these instances, the Commission found that all of the petitioners had mistakenly signed the contracts only a few days prior to the allowable waiting period. The Commission denied the appeals of 19 other petitioners that had signed contracts with service providers more than a few days prior to the 28-day waiting period. The Commission further granted the appeals of five petitioners that had entered an incorrect Form 470 number on their Form 471 application, which made it seem that the petitioners had violated the 28-day rule. The Commission found that these errors were “ministerial or clerical” and thus should not bar funding. Lastly, the Commission granted the appeals by two petitioners that had not disclosed on their Form 470 that they were seeking a contract with terms of more than one year, because the Form 470 in effect at the time did not require the applicant to disclose that they were entering into a multiple year contract.

Providers That Had Failed To Timely Register As Telecommunications Carriers

The FCC granted six requests for review that involved schools that had sought telecommunications services from providers that were not telecommunications carriers. For five of the appeals, consistent with precedent, the Commission found that the providers actually could be considered telecommunications carriers even though they had not properly registered as such. Two had either failed to file their FCC Form 499 or update their Form 498 in a timely manner. In another instance, a school had sought telecommunications services from a carrier that had merged with a registered telecommunications carrier and had failed to timely update its Form 498 to assign its former SPIN number to the new entity. In the sixth appeal, the Commission found that the school had been misled by its initial service provider into believing that the provider qualified as a telecommunications carrier. Upon realizing the issue, the school filed a SPIN change request to switch to an actual telecommunications carrier. The Commission granted the discount for the portion of the year that the school had used the actual telecommunications carrier.

Missing Form 471 Filing Window

The FCC granted three requests for waiver of Section 54.407(c) of the Commission's rules but denied nine others. Section 54.407(c) states that E-rate funds are to be distributed on a first-come first-serve basis, but that all applications filed during a specific window should be treated as simultaneously filed. The Commission granted three of the waivers based on "special circumstances" presented by the applicants. In the first, the petitioner experienced a technical issue with the USAC website which would not accept its application for filing, and thus prevented the petitioner from filing on time. A second waiver request was granted where the petitioner had filed its Form 471 application 14 days after the window. In the third appeal the petitioner had timely filed its Form 471 application, but had not filed its Form 471 certification. The remaining nine waiver requests were denied because the petitioners had failed to present "special circumstances" justifying waiver of the rule.

Late Release of Funding Commitment Decision Letter Does Not Justify Waiver of Service Delivery Deadline Extension for Recurring Services

The FCC affirmed a decision by the USAC denying a request for extension of the service delivery deadline for requested recurring services. USAC had denied the extension request because the request was for recurring, rather than non-recurring, services. In its appeal, the school argued that the E-rate rules are biased against poor communities, because the rules require the schools to expend funds for non-recurring services prior to knowing whether an award for funds for recurring services will be granted. Moreover, the school argued that because USAC did not release the funding commitment decision letter until May, it was impossible to complete the year's work on services within the remaining two months. The Commission affirmed USAC's denial by relying upon its general policy of adhering to its rule that only provides for an extension of the service delivery deadline for non-recurring services and that the petitioner had not presented any "special circumstances" justifying waiver of the rule.

If you have any questions concerning any of these matters, please contact [Mark Palchick](#) or any member of the firm's [Communications Law Group](#).