

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

In the Matter of
Requests for Review and Waiver of Decisions
of the Universal Service Administrator by
All Hallows Institute School
Bronx, New York
Laurel County School District
London, Kentucky
Rantoul City Schools District 137
Rantoul, Illinois
Youngstown City School District
Youngstown, Ohio
Schools and Libraries Universal Service
Support Mechanism
File Nos. SLD-783775, 808265
File No. SLD-804689
File No. SLD-813621
File No. SLD-566374
CC Docket No. 02-6

ORDER

Adopted: November 4, 2020

Released: November 4, 2020

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

1. In this order we grant requests for review and waiver filed by All Hallows Institute School (All Hallows), Laurel County School District (Laurel County), Rantoul City Schools District 137 (Rantoul), and Youngstown City School District (Youngstown) (collectively, Petitioners)1 of decisions issued by the Universal Service Administrative Company (USAC) under the E-Rate program.2 Petitioners appeal USAC’s rescission of internal connections disbursements in funding years 2010 and 2011 due to violations of the Commission rule limiting E-Rate applicant eligibility for internal

1 See Letter from Paul Krebs, President, All Hallows Institute School, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed June 3, 2014) (All Hallows Request for Review); Letter from Barney Paslick, CIO, Laurel County School District, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 12, 2014) (Laurel County Request for Review); Letter from Marshall Ramme, Technology Coordinator, Rantoul City Schools District 137, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed June 10, 2014) (Rantoul Request for Review); Letter from James E. Roberts and Edward L. Ostrowski, Jr., Attorneys for the Youngstown City School District Board of Education, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Sept. 18, 2014) (Youngstown Request for Review and Waiver).

2 Section 54.719(c) of the Commission’s rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 CFR § 54.719(c). The E-Rate program is more formally known as the schools and libraries universal service support program.

connections discounts to two out of every five funding years (2-in-5 Rule).<sup>3</sup> Based on our review of the record, we conclude that waiver of the 2-in-5 Rule is appropriate in the limited circumstances presented in Petitioners' requests for review.<sup>4</sup>

2. Under the E-Rate program, eligible schools, libraries, and consortia can apply for discounts for eligible services.<sup>5</sup> Prior to funding year 2015, eligible services were funded according to rules of priority. The program funded requests for all telecommunications, telecommunications services, and Internet connections as priority one services.<sup>6</sup> Any remaining funds were allocated to requests for support for internal connections and basic maintenance of internal connections, which the Commission's rules referred to as priority two services.<sup>7</sup> The Commission adopted the 2-in-5 Rule for priority two internal connections discounts in the *Third Report and Order*.<sup>8</sup> Under the 2-in-5 Rule, effective from funding year 2005 through funding year 2014, an individual eligible school or library could receive internal connections discounts twice every five funding years.<sup>9</sup> The 2-in-5 Rule was applied on a rolling basis, meaning that an applicant could not receive internal connections funding more than twice in any given five-year period beginning in any year in which the applicant received discounted priority two services.<sup>10</sup> To aid compliance with the 2-in-5 Rule, USAC created an online tool (2-in-5 Tool) that

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<sup>3</sup> See 47 CFR §54.502(a)(4)(iii) (2013). The Commission in 2014 amended the rule when it temporarily suspended the 2-in-5 Rule and adopted the "category two budget" approach. See *infra* note 9.

<sup>4</sup> Although Petitioners, with the exception of Youngstown, do not explicitly request waiver of the 2-in-5 Rule for the funding years at issue, we treat their requests for review of USAC's decision upholding commitment adjustments as requests for waiver because, as discussed herein, granting Petitioners' appeals requires waiver of the 2-in-5 Rule for the relevant funding years.

<sup>5</sup> See generally 47 CFR §§ 54.501-54.503.

<sup>6</sup> 47 CFR § 54.507(g)(1)(i) (2013).

<sup>7</sup> 47 CFR §§ 54.505(c); 54.507(g)(1)(ii) (2013). Internal connections refer to services necessary to transport or distribute broadband within one or more instructional buildings of a single school campus. 47 CFR § 54.500. The Commission now refers to priority one and two services as "category one" and "category two" services. *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, 8898-99, para. 77 (2014) (*First 2014 E-Rate Order*) ("In place of priority nomenclature, we designate the services needed to support broadband connectivity to schools and libraries as 'category one' services, and those needed for broadband connectivity within schools and libraries as 'category two' services because we recognize that deploying internal connections is an important element in connecting schools and libraries to high-speed broadband.").

<sup>8</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26918-21, paras. 12-19 (2003) (*Third Report and Order*).

<sup>9</sup> The *First 2014 E-Rate Order* temporarily suspended the 2-in-5 Rule and adopted five-year, per-student budgets for internal connections discounts in funding years 2015 and 2016. *First 2014 E-Rate Order*, 29 FCC Rcd at 8902, para. 86. The *Second 2014 E-Rate Order* extended the test period for the per-student budgets to a full five-year cycle through funding year 2019. *Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184 and 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15571, para. 82 (2014) (*Second 2014 E-Rate Order*). In 2019, the Commission made permanent the "category two budget" approach that the Commission adopted in 2014 to fund these internal connections. See *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order, 34 FCC Rcd 11219, 11224, para. 13 (2019). Because the E-Rate program did not fund any priority two internal connections applications in funding years 2013 and 2014, the time period during which potential 2-in-5 Rule violations could have occurred spanned from funding year 2005 to funding year 2012.

<sup>10</sup> For example, an entity seeking internal connections discounts in funding year 2009 would have only been eligible to receive internal connections discounts once more in any of the following five-year periods: funding years 2005-2009, 2006-2010, 2007-2011, 2008-2012, or 2009-2013. See *Third Report and Order*, 18 FCC Rcd at 26918, para. 13. Appendix C to the *Third Report and Order* provided six examples of permissible internal connections funding

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allowed applicants to determine in which funding years individual entities were eligible for internal connections discounts.

3. In 2014, USAC issued Notification of Commitment Adjustment Letters (COMADs) to Petitioners rescinding disbursements for internal connections due to violations of the 2-in-5 Rule. In each case, the petitioner received internal connections support in funding year 2005, once more in either funding year 2007 or 2008, and then in both funding years 2010 and 2011.<sup>11</sup> USAC denied Petitioners' appeals of the COMADs, explaining that Petitioners received internal connections support more than twice in the five-year period from funding year 2007 to funding year 2011.<sup>12</sup> Petitioners argue that they relied on the 2-in-5 Tool, which in each instance indicated that the entity or entities in question were eligible for internal connections discounts in funding years 2010 and 2011.<sup>13</sup> All Hallows and Laurel County also argue that they complied with the 2-in-5 Rule because their original five-year eligibility period should have begun with funding year 2005.<sup>14</sup>

4. We grant Petitioners' requests for review and, on our own motion, waive the 2-in-5 Rule for the applications that are the subject of Petitioners' appeals. Generally, the Commission's rules may be waived for good cause shown.<sup>15</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>16</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>17</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.<sup>18</sup>

5. We find that Petitioners reasonably relied on the 2-in-5 Tool to determine their eligibility for internal connections support in funding years 2010 and 2011 and reasonably concluded that an entity's eligibility under the 2-in-5 Rule reset every five years, as represented by the 2-in-5 Tool.<sup>19</sup> Though the Commission intended the 2-in-5 Rule to be administered on a rolling basis, USAC did not clearly communicate the application of the rule to applicants. In addition to the inaccurate 2-in-5 Tool, the

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timelines to illustrate how USAC would apply the 2-in-5 Rule on a rolling basis. *Third Report and Order*, 18 FCC Rcd at 26977, Appendix C.

<sup>11</sup> See All Hallows Request for Review at Attach. 1; Laurel County Request for Review at 1; Rantoul Request for Review at 1; Youngstown Request for Review at 2.

<sup>12</sup> The permissible internal connections funding examples in Appendix C in the *Third Report and Order* indicate that a recipient of funding in 2005 and once more in either 2007 or 2008 would not then be eligible for funding in both 2010 and 2011. *Third Report and Order*, 18 FCC Rcd at 26977, Appendix C.

<sup>13</sup> See All Hallows Request for Review at 1; Laurel County Request for Review at 2; Rantoul Request for Review at 1; Youngstown Request for Review and Waiver at 2.

<sup>14</sup> See All Hallows Request for Review at 1; Laurel County Request for Review at 2-3 (funding year 2011 was "the second year of our 2 in 5 that started in Funding Year 2010").

<sup>15</sup> 47 CFR § 1.3.

<sup>16</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>17</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>18</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>19</sup> For example, an entity that received internal connections discounts in funding year 2005 would be eligible once more in the following four years, and the five-year period would then reset in funding year 2010.

USAC website and annual applicant training presentations did not clearly describe the rolling application of the rule.<sup>20</sup>

6. Though the Commission is not estopped from enforcing its rules in situations where an E-Rate applicant receives advice from USAC that is contrary to a Commission rule,<sup>21</sup> we find that the limited circumstances of the Petitioners' appeals amount to special circumstances that warrant a waiver of the 2-in-5 Rule and that a waiver would serve the public interest. Although applicants should not rely on informal guidance from USAC that contradicts Commission rules or policy, the Commission has found in certain limited circumstances that a waiver is warranted where, for example, an applicant's reliance on inaccurate official system-generated information combined with other unusual circumstances lead an applicant to rely on erroneous information to its detriment.<sup>22</sup> In 2018, the Commission granted a waiver of its rules in the *Pribilof School District Order* when an inaccurate response was generated by USAC's electronic filing system (E-Rate Productivity Center or EPC), leading the school district to reasonably believe its application would be considered for funding by USAC despite being filed late.<sup>23</sup> Because the notification reasonably appeared to be legitimate, and given complications arising from the rollout of EPC, the Commission said it could not fault the school district for relying on what appeared to be a formal acceptance notification it received through EPC from USAC regarding its specific funding application.<sup>24</sup>

7. Consistent with the waiver standard and precedent, a deviation from the general rule will serve the public interest here, as in the *Pribilof School District Order*, because the Petitioners state that

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<sup>20</sup> The USAC website previously stated that "[T]he five-year period begins in any year in which that entity receives support for internal connections. Entities can use two years within any five-year period, looking back and looking forward." However, the same paragraph directed applicants to the 2-in-5 Tool to determine eligibility. USAC applicant trainings typically included a slide with a bullet stating that entities could only receive funding every two out of five years. See, e.g. USAC Fall 2005 Applicant Training, Program Compliance 2005, slide 26, <http://www.universalservice.org/about/tools/TrainingArchive/Default.aspx?div=3>. The Fall 2006 USAC Training included a separate presentation on the 2-in-5 Rule that stated "Entities can use any two years in a five year span, counting backwards and forwards," but also provided four example scenarios, all of which are accurate under either a rolling or five-year period application of the 2-in-5 Rule. See USAC Fall 2006 Applicant Training, Two-in-Five Rule for Internal Connections, slides 4, 8-11, [http://www.universalservice.org/\\_res/documents/sl/training/2006/two-in-five-guidance.pdf](http://www.universalservice.org/_res/documents/sl/training/2006/two-in-five-guidance.pdf).

<sup>21</sup> See *Request for Waiver of Lombard School District 44, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13166 (CCB 1999); but see *Federal-State Joint Board on Universal Service, Puerto Rico Telephone Company, Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Non-Rural Carriers*, Order, CC Docket No. 96-45, 18 FCC Rcd 26325 (WCB 2003) (granting waiver request based on information error on USAC website).

<sup>22</sup> *Application for Review of a Decision by the Wireline Competition Bureau by Pribilof School District; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 33 FCC Rcd 8378, 8381, para. 9 (2018) (*Pribilof School District Order*) (granting a waiver of the deadline to file a request for waiver with the Commission and the deadline to file an FCC Form 471 where the applicant reasonably believed that its late-filed funding year 2016 FCC Form 471 application would be considered for funding based on the response generated by USAC through EPC and considering the novelty of having a second filing window and the technical difficulties associated with the rollout of EPC).

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

<sup>24</sup> *Id.* As a result of this reliance, Pribilof School District never had an opportunity to timely file a waiver of the application denial and only learned of the problem months later after the deadline to file a waiver request had passed. The Commission granted a waiver of section 54.720(a) of the Commission's rules, which allowed the waiver request to be heard on the merits, resulting in the approval of Pribilof School District's funding request. *Id.* at paras. 11-12; 47 CFR § 54.720(a) (requiring appeals or waivers to be filed with the Commission or USAC within 60 days of the issuance of the decision that the party seeks to have reviewed).

they understood the funding requests to be in compliance with USAC guidelines as communicated through USAC's official 2-in-5 Tool.<sup>25</sup> In addition, we find that USAC gave contradictory explanations in explaining how the rule worked in trainings and directed applicants to the inaccurate tool from the explanation page on USAC's website. Further, the 2-in-5 Rule violations all occurred during the first five-year cycle when applicants were unfamiliar with the new rule and how it worked. We note that, in general, the operation of the 2-in-5 Rule is not intuitive and is difficult to explain in simple, easily understandable language.

8. We find that the internal connections funding already disbursed to these entities has been instrumental to implementing their technology plans and facilitating connectivity in their schools.<sup>26</sup> Also, there is no evidence of waste, fraud, or abuse by Petitioners. Although we grant the requests for review, we also clarify that USAC properly applied the 2-in-5 Rule on a rolling basis.<sup>27</sup> We remind all E-Rate program applicants that they are responsible for familiarizing themselves with any applicable regulations so that they can ensure full compliance with E-Rate program rules. We remand the underlying applications to USAC for further consideration consistent with this order.

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, and 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 54.722(a), that the requests for review filed by the Petitioners ARE GRANTED and that section 54.502(a)(4)(iii) of the Commission's rules, 47 CFR § 54.502(a)(4)(iii) (2013), IS WAIVED for the Petitioners. The Petitioners' underlying applications ARE REMANDED to USAC for further consideration in accordance with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Ryan Palmer  
Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau

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<sup>25</sup> Laurel County Request for Review at 2.

<sup>26</sup> All Hallows Request for Review at 1-2; Rantoul Request for Review at 1-2; Youngstown Request for Review and Waiver at 3-5.

<sup>27</sup> The Commission has now formally eliminated the 2-in-5 Rule and has made permanent the "category two budget" approach. *See supra* note 9.