

**Before the
Federal Communications Commission
Washington, DC 20554**

| | | |
|---|---|---------------------|
| In the Matter of |) | |
| |) | |
| Request for Review of the |) | |
| Decision of the |) | |
| Universal Service Administrator by |) | |
| |) | |
| Copan Public Schools |) | File No. SLD-26231 |
| Copan, Oklahoma |) | |
| |) | |
| Federal-State Joint Board on |) | CC Docket No. 96-45 |
| Universal Service |) | |
| |) | |
| Changes to the Board of Directors of the |) | CC Docket No. 97-21 |
| National Exchange Carrier Association, Inc. |) | |

ORDER

Adopted: March 14, 2000

Released: March 16, 2000

By the Commission:

1. This Order grants the Letter of Appeal of Copan Public Schools, Copan, Oklahoma (Copan), that was received by the Commission on September 17, 1999.¹ Copan's Letter of Appeal seeks review of a decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC or Administrator),² pursuant to which SLD denied Copan's request to change a service provider for the 1998 funding year. This process is referred to as a Service Provider Identification Number (SPIN) change request. For the reasons discussed below, we modify the current categories of permissible SPIN changes and permit a SPIN change whenever an applicant certifies that (1) the SPIN change is allowed under its state and local procurement rules and under the terms of the contract between the applicant and its original service provider, and (2) the applicant has notified its original service provider of its intent to change service providers.

¹ Letter from Delbert W. Moreland, Jr. Superintendent, Copan Public Schools, to Federal Communications Commission (filed Sept. 17, 1999) (Letter of Appeal).

² Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

I. BACKGROUND

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, Internet access, and internal connections.³ In the *Universal Service Order*, the Commission determined that competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed of the choices available to them and receive the lowest prices.⁴ Thus, the Commission's rules require eligible schools and libraries to seek competitive bids for all services eligible for discounts.⁵ To comply with the competitive bidding requirement, the Commission's rules require that an applicant submit to the Administrator a completed FCC Form 470, in which the applicant sets forth its technological needs and lists the services for which it seeks discounts.⁶ The Administrator must post the FCC Form 470 to its web site, where it can be considered by all potential service providers.⁷ The applicant then must wait 28 days and "carefully consider all bids submitted" before selecting a service provider, subject to any state or local procurement rules.⁸ Once the FCC Form 470 has been posted for 28 days and the applicant has signed a contract for eligible services with a service provider, the applicant must submit a completed FCC Form 471 application to notify the Administrator of the services that have been ordered, the service provider with which the applicant has signed a contract, and an estimate of the funds needed to cover the discounted portion of the price of the eligible services.⁹

3. In adopting rules governing the application and competitive bidding processes, the Commission did not address the situation in which a school or library would change service providers after the school or library has submitted an FCC Form 471 application designating a particular service provider. Indeed, section 54.504(c), which makes commitments of support contingent upon the applicant's filing of an FCC Form 471 identifying the service provider with which the applicant has signed a contract, makes no provision for a change of providers once a commitment of support has been made.¹⁰ To avoid penalizing an applicant that discovers only after filing its FCC Form 471 that its service provider is unwilling or unable to provide service to

³ 47 C.F.R. §§ 54.502, 54.503.

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 480 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part, and remanded in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service Order* in part and reversing and remanding on unrelated grounds), petitions for cert. pending.

⁵ 47 C.F.R. § 54.504.

⁶ 47 C.F.R. § 54.504(b)(1), (b)(3).

⁷ 47 C.F.R. § 54.504(b)(3).

⁸ 47 C.F.R. §§ 54.504(b)(3), (b)(4); 54.511(a).

⁹ 47 C.F.R. § 54.504(c).

¹⁰ 47 C.F.R. § 54.504(c).

the applicant, SLD announced, after consultation with Commission staff, that SPIN changes would be allowed when a service provider: (1) refuses to participate in the schools and libraries support mechanism; (2) has gone out of business; or (3) has breached its contract with the applicant.¹¹ The SLD guidelines require an applicant to submit specific documentation to establish the applicant's entitlement to each of these exceptions.¹² The guidelines also require that the substitute service provider selected have participated in the applicant's competitive bidding process.¹³

II. COPAN'S APPEAL

4. On April 5, 1999, Copan submitted a letter to SLD informing SLD of its intent to change service providers.¹⁴ Copan explained that the SPIN change was necessitated by the fact that United Systems, the service provider originally listed on its FCC Form 471 as its provider of internal connections, had relocated to another city and, therefore, was unable to provide Copan with "continuous service."¹⁵ On August 18, 1999, SLD denied the request.¹⁶ In its letter, SLD stated that it could grant SPIN change requests only if the applicant's service provider: (1) refuses to participate in the schools and libraries program; (2) has gone out of business; or (3) has breached its contract with the applicant. The Administrator determined that Copan's submission did not satisfy any of these criteria for granting a SPIN change and, therefore, denied Copan's request.¹⁷

5. In the Letter of Appeal that is before us, Copan asks us to reverse the determination of the Administrator and find that Copan did satisfy the appropriate criteria for granting a SPIN change.¹⁸ Copan states that, in connection with United Systems' decision to relocate to a larger market, United Systems had informed Copan that provision of service to Copan was not a priority and that it presently was not adequately staffed to fulfill its obligations

¹¹ Universal Service Administrative Company, Schools and Libraries Division, "SPIN Correction and Change Procedures," SLD web site, /<http://www.sl.universalservice.org/Reference/spin.asp>.

¹² For example, an applicant alleging that its originally chosen service provider refuses to participate in the schools and libraries support mechanism must provide documentation of the provider's refusal to participate and the applicant's notification to the provider that the applicant is terminating the contract or relationship. Universal Service Administrative Company, Schools and Libraries Division, "SPIN Correction and Change Procedures," SLD web site, /<http://www.sl.universalservice.org/Reference/spin.asp>.

¹³ Universal Service Administrative Company, Schools and Libraries Division, "SPIN Correction and Change Procedures," SLD web site, /<http://www.sl.universalservice.org/Reference/spin.asp>.

¹⁴ Letter from Delbert Moreland, Superintendent, Copan Public Schools, to the Schools and Libraries Corporation, undated (filed April 5, 1999) (April 5, 1999 Letter).

¹⁵ April 5, 1999 Letter.

¹⁶ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Delbert Moreland, Copan Public Schools (dated Aug. 18, 1999) (August 18, 1999 Letter).

¹⁷ August 18, 1999 Letter.

¹⁸ Letter of Appeal at 1.

to the school.¹⁹ Copan understood that United Systems would not be able to provide service to Copan for a full year. Copan interpreted United Systems' pronouncements as indications of breach of contract by United Systems, evidenced by its failure to provide the service as originally agreed upon. Consequently, Copan contracted with a substitute provider that agreed to provide the service at a rate lower than that previously agreed to by United Systems.²⁰ Based on its view that United Systems breached its contract with Copan, Copan argues that its substitution of service providers does fall within one of the enumerated exceptions and, therefore, that SLD should have approved its request to substitute service providers. Finally, to the extent that it had no notice of any restrictions on its ability to substitute service providers during the time period in question, Copan contends that the imposition of such restrictions "after the fact" constitutes a violation of Copan's right to due process.²¹

III. DISCUSSION

A. Revised Policy on SPIN Changes

6. In this Order, we modify the current categories of permissible SPIN changes and permit a SPIN change whenever an applicant certifies that (1) the SPIN change is allowed under its state and local procurement rules and under the terms of the contract between the applicant and its original service provider, and (2) the applicant has notified its original service provider of its intent to change service providers. We will no longer restrict SPIN changes to those categories currently enumerated in the SLD guidelines (*i.e.*, service provider refuses to participate, has gone out of business, or has breached its contract), to avoid penalizing an applicant that either would be entitled to a SPIN change under the current guidelines but for a lack of particular documentation, or whose justification for a SPIN change, however reasonable, may not fit squarely within the existing three exceptions. We therefore need not address whether Copan's situation falls within one of the previously enumerated situations in which an applicant may substitute service providers.

7. We decline to maintain particular categories of permissible SPIN changes based on our belief that we cannot anticipate the variety of circumstances under which it may be reasonable for an applicant to substitute service providers. Although we do not wish to

¹⁹ Letter of Appeal at 1.

²⁰ In a telephone conversation with Commission staff, Copan indicated that the substitute provider, Banner Communications, did not participate in the competitive bidding process for service to Copan. As explained by a representative for Copan, United Systems, Copan's originally selected provider, was the lowest priced bidder among the three providers that participated in the competitive bidding. Copan states that the bids received by the two remaining providers were substantially higher and, had Copan been required to select one of these, Copan could not have afforded the nondiscounted portion of the bid price and would have had to forego receiving the service. Around the time that United Systems had announced its intention to relocate, Copan became aware of Banner Communications, a newly established service provider that offered the service at a lower price than the price at which United Systems had agreed to provide the service.

²¹ Letter of Appeal at 1.

encourage service provider substitutions,²² we recognize that circumstances for applicants and providers may change over the course of a relationship, as appears to have been the case in Copan. Accordingly, where an applicant determines that a SPIN change is allowed under its state and local procurement rules and under the contract between the applicant and its original provider, we will not limit the applicant's ability to substitute providers or otherwise deny the applicant the benefits of universal service support.²³ This policy is consistent with the Commission's express goal of affording schools and libraries maximum flexibility to choose the offering that meets their needs most effectively and efficiently.²⁴

B. Funding Level Not to Exceed Level Requested on FCC Form 471

8. In allowing service provider substitutions, we will not permit a substitute service provider to receive funding for a service in an amount exceeding the amount requested on the applicant's FCC Form 471 for that service. Rather, a funding request in such a situation may be funded only up to the amount originally requested by the applicant on its FCC Form 471. Adopting this limitation on the amount of funds requested is consistent with the position that has been taken in other schools and libraries appeals.²⁵ In addition, such a limitation is critical to enabling the Administrator to project the level of demand for the schools and libraries support mechanism and to implement the Commission's rules of priority, as necessary.²⁶

²² Such changes can be disruptive to the Administrator and the parties and the processing of such requests is likely to entail additional burdens on the Administrator.

²³ We do not anticipate that a school would terminate a contract with a service provider without legal justification, since to do so could place the school in jeopardy of suit in state court. If an applicant's original service provider disputes the applicant's legal justification for terminating a contract with that provider, we note that our determination to permit a SPIN change in that instance should not prejudice the parties' rights under that contract. Rather, in light of the Commission's longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts, a state court and not the Commission is the appropriate forum for rendering such a determination. *See Listeners' Guild v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting with approval Commission's "longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts.").

²⁴ *Universal Service Order*, 12 FCC Rcd at 9029, para. 481. We note, however, that, although we are providing applicants greater latitude to substitute service providers, we continue to require applicants to report and seek approval for SPIN changes from the Administrator. Reporting such changes helps to ensure that applicants and the service providers with whom they contract are in compliance with the Commission's universal service program rules. It continues to be necessary for applicants to apprise the Administrator of SPIN changes in order to allow the Administrator to determine, for example, whether service providers are eligible to furnish the specified services. Moreover, the reporting of SPIN changes is necessary so that the Administrator can correctly process the payment of discounts to service providers.

²⁵ *Request for Review of the Scranton School District, Scranton, Pennsylvania*, CC Docket Nos. 96-45, 97-21, DA 00-20 (Com. Car. Bur. 2000) (notwithstanding applicant's error on its FCC Form 471, applicant was limited to amount of funding requested on the FCC Form 471).

²⁶ The rules of priority, established in the Commission's *Fifth Order on Reconsideration*, govern the manner in which discounts are allocated when available funding is less than total demand and a filing window is in effect. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration, 13 FCC Rcd 14915, 14934, para. 31 (1998).

C. Participation in Initial Bidding by Substitute Service Provider

9. In considering Copan's Letter of Appeal, we permit the service provider substitution that took place, notwithstanding the fact that the substitute service provider selected did not participate in the initial competitive bidding process for service to Copan. Given that Copan fully complied with the 28-day posting requirement, and all service providers had the opportunity to compete to provide the requested service,²⁷ we find that the substitution of a newly identified service provider subsequent to the filing of Copan's FCC Form 471 does not compromise the benefits derived from competition in Copan's initial competitive bidding process. Indeed, the fact that the substitute service provider agreed to provide the service at a lower price than the prices at which the other bidders, including Copan's originally selected service provider, had offered to provide the same service, suggests that the competitive process may be enhanced by permitting substitutions of providers whose bids are received outside the 28-day competitive bidding process.

10. To hold otherwise could place the Commission in a position of requiring a school to select a service provider solely because the provider submitted a bid in connection with the school's initial competitive bidding, despite the fact that the provider's price may be less competitive or the service is in some manner less suitable for the school than that of another provider that submitted a bid later in the process. Such a holding would be inconsistent with our goal of affording schools and libraries flexibility to determine the offering that meets their needs most effectively and efficiently.²⁸ Just as we cannot anticipate the variety of factual circumstances in which it may be reasonable to substitute service providers, we likewise cannot anticipate the circumstances in which it may be reasonable to select a substitute service provider that did not participate in the initial competitive bidding for that applicant. For example, if the original bidders are no longer willing to provide the requested service, or if the applicant discovers a provider offering more competitive prices, then we believe that the applicant should have the flexibility to select the provider whose service offering best meets the applicant's needs. Accordingly, where an applicant has complied with the Commission's competitive bidding requirement, has determined that a service provider substitution is permitted under the terms of the contract with its original service provider and relevant state or local laws, and has notified its original provider of its intent to change providers, we decline to confine an applicant's choice of a substitute service provider solely to those providers that participated in the applicant's initial competitive bidding process.

11. To effectuate the decision above, we will permit Copan to file with SLD documentation consistent with paragraph 6 above within 30 days of the release date of this

²⁷ The competitive bidding requirement is contained in section 54.504(a) of the Commission's rules. That section provides in relevant part that "an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid[ding] requirements apply in addition to state and local competitive bid[ding] requirements and are not intended to preempt such state or local requirements." 47 C.F.R. § 54.504(a).

²⁸ *Universal Service Order*, 12 FCC Rcd at 9029, para. 481.

Order. We direct SLD to consider the submitted documentation and act in accordance with this Order.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 54.719 and 54.722 of the Commission's rules, 47 C.F.R. §§ 54.719 and 54.722, that the Letter of Appeal filed on September 17, 1999, by Copan Public Schools of Copan, Oklahoma IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary