

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

In the Matter of)
Federal-State Joint Board on Universal Service) CC Docket No. 96-45
Children's Internet Protection Act)

ORDER

Adopted: June 28, 2002

Released: June 28, 2002

By the Commission:

1. In this Order, we adopt interim measures to ensure that our implementation of the Children's Internet Protection Act (CIPA) complies with the recent decision issued by a three-judge panel in the United States District Court for the Eastern District of Pennsylvania (hereinafter, the court).1 In its decision, the court held, inter alia, that section 1721(b) of the CIPA,2 a provision imposing specific conditions on libraries seeking discounts under the schools and libraries universal service support mechanism, was facially unconstitutional.3 The court specifically enjoined the Commission from withholding federal funds from any public library for failure to comply with the requirements of the provision.4

2. In keeping with the court's injunction, we suspend enforcement of those portions of section 54.520 of our rules implementing section 254(h)(6),5 pending final judicial action.6 We adopt certain specific measures to ensure that libraries that have applied for discounted telecommunications, Internet access, or internal connections services under the support mechanism are not denied such discounts because of lack of compliance with the CIPA requirements that have been declared unconstitutional and suspend enforcement of our rules pending action by the Supreme Court. We direct the Universal Service Administrative Company (Administrator) in consultation with the Wireline

1 American Library Association, Inc. v. United States, Nos. CIV.A. 01-1303, CIV.A. 01-1322, 2002 WL 1126046 (E.D. Penn. May 31, 2002) (American Library Association).

2 Pub. L. No. 106-554, § 1721(b), codified at 47 U.S.C. § 254(h)(6).

3 American Library Association, 2002 WL 1126046, *7.

4 American Library Association, 2002 WL 1126046, *85. Section 254(h)(5), which imposes filtering requirements on schools, has not been challenged, and remains in effect.

5 We find good cause to issue this Order without notice and comment rulemaking. The actions we take in this Order are intended to bring implementation of the CIPA into compliance with the judgment of the federal court. Because the court declared section 254(h)(6) unconstitutional and because of the need to implement the court's judgment quickly, we find notice and comment unnecessary and impractical. Because Funding Year 2002 begins July 1, 2002, quick action is necessary to inform libraries of their obligations and implement such changes.

6 We note that section 1741 of CIPA provides for review of a decision finding any provision of CIPA unconstitutional "as a matter of right by direct appeal to the Supreme Court." Appeal is now pending before the Supreme Court.

Competition Bureau (Bureau) to implement the necessary procedural changes, including changes to the current CIPA-related certifications required of applicants. We take these steps to respond promptly to the court's mandate and to ensure that the schools and libraries universal service support mechanism continues to operate in accordance with federal law.

I. BACKGROUND

A. The Schools and Libraries Universal Service Mechanism

3. Pursuant to section 254 of the Act, the Commission established the schools and libraries universal service support mechanism.⁷ Under that mechanism, eligible schools and libraries and consortia that include eligible schools and libraries (collectively, recipients) may receive eligible telecommunications, Internet access, and internal connections services at discounted rates.⁸ Eligible entities must apply to receive such discounts on an annual basis, with the funding year extending from July 1 to June 30.⁹

4. The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) administers the schools and libraries support mechanism under the direction of the Commission.¹⁰ After an applicant for discounted services under the schools and libraries support mechanism has entered into agreements for eligible services with one or more service providers, it must file with SLD an FCC Form 471 application.¹¹ The FCC Form 471 notifies SLD of the services that have been ordered and supplies an estimate of funds needed to cover the discounts to be given for eligible services.¹² SLD then issues a funding commitment decision letter indicating the discounts, if any, to which the applicant is entitled. After the funding year begins and the discounted service commences, the approved recipient of discounted services submits to SLD an FCC Form 486, which indicates that the service has begun and specifies the service start date.¹³ After receiving the FCC Form 486, SLD will accept invoices from the service provider and issue disbursements to the provider in cumulative amounts

⁷ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (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, 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), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000).

⁸ 47 C.F.R. §§ 54.502, 54.503.

⁹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, 13 FCC Rcd 14915 (1998).

¹⁰ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 (1998).

¹¹ See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (FCC Form 471).

¹² 47 C.F.R. § 54.504(c).

¹³ Schools and Libraries Universal Service, Receipt of Service Confirmation Form, OMB 3060-0853 (July 2001) (FCC Form 486); Instructions for Completing the Schools and Libraries Universal Service, Receipt of Service Confirmation Form (FCC Form 486), OMB 3060-0853 (July 2001) (Form 486 Instructions). In addition, an early filing option exists for Funding Year 2001 applicants whose services begin on or before October 28, 2001 and for applicants in subsequent funding years whose services begin on or before July 1 of the funding year. See FCC form 486.

up to the amount of the discount awarded.¹⁴

5. Beginning in Funding Year 2001,¹⁵ which extended from July 1, 2001 to June 30, 2002, applicants have been required to mail their FCC Forms 486 within 120 days of the start of their service or the date of the funding commitment decision letter, whichever is later, in order to receive retroactive funding of discounts going back to the service start date.¹⁶ Where FCC Forms 486 are postmarked after the relevant 120 day period, the service start date for funding purposes is treated as the date 120 days before the postmark date rather than the actual start date.¹⁷ The 120 day rule encourages applicants to take the necessary actions to commence the billing process, which, in turn, allows the program to maximize the efficient use of the allotted funds.

B. CIPA

6. With the passage of CIPA, Congress amended section 254 of the Act, imposing new conditions on schools and libraries that “hav[e] computers with Internet access” and request discounted services under the schools and libraries universal service support mechanism.¹⁸ Under section 254(h)(6), no library may receive universal service discounts unless the authority with responsibility for administration of the library makes certain certifications, and ensures the use of such computers in accordance with the certifications.¹⁹

7. Congress established the conditions on the use of computers with Internet access in two separate acts, CIPA, which added sections 254(h)(5) and (h)(6), and the Neighborhood Children’s Internet Protection Act (NCIPA), which added section 254(l).²⁰ Under section 254(h)(6), which governs libraries, applicants are required to certify that they are enforcing a policy of Internet safety as defined in NCIPA, and that their policy of Internet safety also includes the use of a “technology protection measure,” colloquially referred to as a software filter, that is in accordance with requirements specified in the CIPA

¹⁴ See FCC Form 486; Form 486 Instructions.

¹⁵ In prior years, this funding period was referred to as Funding Year 4. Funding periods are now described by the year in which the funding period starts. Thus the funding period which begins on July 1, 2001 and ends on June 30, 2002, previously known as Funding Year 4, is now called Funding Year 2001. The funding period which begins on July 1, 2002 and ends on June 30, 2003 is now known as Funding Year 2002, and so on.

¹⁶ Form 486 Instructions at 7.

¹⁷ *Id.* at 9, 10, 12. SLD has two procedures for disbursement of funds upon receiving an invoice, depending on whether the applicant has paid the discounted price or the full price. If the applicant has paid the discounted price for the service, SLD simply reimburses the provider in the amount of the discount. If the applicant has paid the full price of the service, SLD disburses the discounted share to the provider with the requirement that the provider then remit the amount to the applicant. See Form 486 Instructions at 4; SLD web site, Form 472 BEAR Filing Guidance (April 27, 2001) <<http://www.sl.universalservice.org/reference/8bear.asp>>; Schools and Libraries Universal Service, Billed Entity Applicant Reimbursement Form, OMB 3060-0856 (October 1998) (FCC Form 472). In both cases, however, SLD will not provide payment for invoices until it receives an FCC Form 486 from the applicant indicating that the service has started. Form 486 Instructions at 3.

¹⁸ 47 U.S.C. § 254(h)(5)(A), (6)(A). As explained below at paragraph 19, section 254(h)(5)(A), the codified provision relating to schools, has not been challenged as unconstitutional and thus remains in effect for all participating schools.

¹⁹ Hereinafter we will refer collectively to all of the persons specified in the statute as responsible for making these certifications on behalf of participating schools and libraries as “entities.” In the case of a library, certifying entities include a “library, library board, or other authority with responsibility for administration of a library.” See, e.g., 47 U.S.C. § 254(h)(6)(A)(i).

²⁰ See Neighborhood Children’s Internet Protection Act (NCIPA), Pub. L. 106-554 §§ 1731 *et seq.*

provisions.²¹ Under NCIPA, codified at 254(h)(1), libraries are required to adopt and implement an Internet safety policy that addresses (1) access by minors to inappropriate material on the Internet, (2) the safety and security of minors when using electronic communications, (3) unauthorized access, (4) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (5) measures designed to restrict minors' access to material harmful to minors.²²

8. To implement these new provisions, the Commission issued the *CIPA Order*, which, *inter alia*, added new certifications for CIPA and NCIPA to the FCC Form 486 beginning in Funding Year 2001.²³ In cases of consortium applicants, the Commission put the certifications on a new FCC Form 479, which must be completed by each of the consortium members and then collected and retained by the consortium leader.²⁴ The Commission also amended its rules, adding the CIPA requirements at section 54.520.²⁵

9. In accordance with CIPA's requirement that applicants in Funding Year 2001 make their certifications within 120 days of the start of the funding year, the Commission added an additional deadline to the normal 120 day rule for FCC Forms 486. Under CIPA, Funding Year 2001 applicants were required to file their FCC Forms 486 by no later than October 28, 2001 unless their service began after that date or a funding commitment decision letter issued after that date.²⁶ A Funding Year 2001 applicant with a funding commitment decision letter who failed to meet the October 28, 2001 deadline could obtain discounts only for services received on or after the date that its FCC Form 486 was postmarked.²⁷

10. In *American Library Association*, the court held that requiring public libraries to use filtering technology violated the First Amendment of the United States Constitution.²⁸ It therefore issued an order on May 31, 2002 holding section 254(h)(6), the section of CIPA requiring libraries to use such filtering, facially unconstitutional and permanently enjoining the Commission from withholding federal funds from any public library for failure to comply with the provision.²⁹

II. DISCUSSION

11. The court has determined that section 254(h)(6), which requires libraries to use Internet software filters, is facially unconstitutional.³⁰ The court has enjoined the Commission from withholding

²¹ 47 U.S.C. §§ 254(h)(5), 254(h)(6). These software filters are designed to block access to Internet sites containing sexually explicit or otherwise objectionable material. See *American Library Association*, 2002 WL 1126046, *23-26.

²² See NCIPA, Pub. L. 106-554 § 1732, codified at 47 U.S.C. § 254(l).

²³ See *Federal-State Joint Board on Universal Service, Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 8182 (2001) (*CIPA Order*); 47 C.F.R. § 54.520.

²⁴ *CIPA Order*, 16 FCC Rcd at 8194, para. 25.

²⁵ 47 C.F.R. § 54.520.

²⁶ 47 U.S.C. §§ 254(h)(5)(E), 254(h)(6)(E); *CIPA Order*, 16 FCC Rcd at 8188-89, 8191, paras. 10, 18.

²⁷ See Form 486 Instructions at 9.

²⁸ *American Library Association*, 2002 WL 1126046, *1.

²⁹ *Id.*, 2002 WL 1126046, *85.

³⁰ *American Library Association*, 2002 WL 1126046, *7 ("For these reasons, we will enter an Order declaring . . . 47 U.S.C. § 254(h)(6) . . . to be facially invalid under the First Amendment and permanently enjoining the defendants from enforcing those provisions.").

funds from any public library for failure to comply with section 254(h)(6).³¹ We recognize the importance of providing certainty and stability to applicants, both for Year 2001 funds and Year 2002 funds, pending final action by the Supreme Court in the *American Library Association* case. In particular, we recognize that both program recipients and the Administrator need fixed and predictable standards for determining eligibility for support under this universal service support mechanism.³² Thus, in order to comply with the court's order and with our mandate that universal service be specific and predictable, we take the following actions.

12. Pending Supreme Court action in the *American Libraries Association* case, we suspend enforcement of those sections of 54.520 of our rules which were adopted to implement section 254(h)(6). Specifically, we suspend enforcement of §§ 54.520(c)(2)(i) and (iii), 54.520(c)(3), and 54.520(d) as they apply to all libraries, to the extent that these provisions require any library to filter or certify to such filtering under 47 U.S.C. § 254(h)(6). We further suspend enforcement of § 54.520(g)(1) as it applies to all libraries. Suspension of these provisions is to comply with the court's mandate.

13. We suspend enforcement of section 254(h)(6) as against all library applicants. In its ordering clause, the court only enjoined the Commission from enforcing the requirements of section 254(h)(6) against public libraries.³³ In the same ordering clause, however, the court held that section 254(h)(6) was facially unconstitutional.³⁴ Section 254(h)(6) does not distinguish between different types of libraries, requiring all libraries to filter Internet access.³⁵ Moreover, the court did not provide a clear distinction between public and private libraries. The court's decision is currently being appealed to the United States Supreme Court. Pending further Court action, as an interim approach, we will implement the court's order without distinguishing between public and private libraries.

14. In particular, we direct the Administrator, in consultation with the Bureau, to adopt measures to ensure that Funding Year 2001 library applicants will not be penalized for non-compliance with section 254(h)(6).³⁶ Such retroactive remedies are consistent with Supreme Court precedent for those Funding Year 2001 applicants that successfully challenged the CIPA law in court.³⁷ However, we provide such relief more broadly in light of the large number of litigants in the *American Library Association* case (including all the members of the ALA and other organizations that participated in the litigation) and the resulting administrative difficulty in limiting relief to litigants only.³⁸ Therefore, we direct the Administrator to take the following specific actions, and any other actions necessary to effectuate the principle that library applicants not be penalized for non-compliance with section 254(h)(6).

³¹ *American Library Association*, 2002 WL 1126046, *85.

³² See *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985) (“practical considerations related to the administration of federal grant programs imply that obligations generally should be determined by reference to the law in effect when the grants were made.”).

³³ See *American Library Association*, 2002 WL 1126046, *85.

³⁴ *Id.*

³⁵ 47 U.S.C. § 254(h)(6)(A).

³⁶ We note that administration of Funding Year 2001 is ongoing. While applicants file applications prior to the commencement of the actual funding year, the process of reviewing applications, issuing funding commitments, authorizing disbursement of funds, and returning unused funds typically extends beyond a particular funding year.

³⁷ See *Reynolds Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995).

³⁸ Cf. *Petition for Refund of Fees*, Memorandum Opinion and Order, 50 FCC 2d 730 (1975) (Robinson, concurring) (noting that, following successful challenge to cable fees by National Cable Television Association (NCTA), refund of cable fees was granted to non-litigants, those cable companies that were not members of NCTA, as well as litigants, because “distinguishing these two classes of cable operators is not practicable . . .”).

15. First, some Funding Year 2001 library applicants did not file an FCC Form 486 at all, in part due to the pendency of the litigation and the uncertainty over the resolution of that case. SLD shall accept without penalty all FCC Forms 486 for a period lasting 120 days from the release date of this Order or the release date of a funding commitment decision letter, whichever is later. If a library applicant files an FCC Form 486 after that period, the normal 120 day rule shall be applied to the applicant's service requests, limiting funding to services received on or after the date 120 days prior to the postmark of the FCC Form 486.

16. Second, for those Funding Year 2001 library applicants that filed an FCC Form 486 after the October 28, 2001 deadline, SLD shall not apply any penalty for having missed the October 28, 2001 deadline, but such FCC Forms 486 shall still be subject to the normal 120 day rule.

17. Third, for those Funding Year 2001 library applicants that filed an FCC Form 486 by October 28, 2001 without completing the CIPA certifications, SLD shall accept these forms and process them without penalty for the lack of certification.³⁹

18. Fourth, SLD shall determine if there are consortia applicants that include library members and that either filed their FCC Forms 486 late or reduced the shared discount rate requested by eliminating the library members through an FCC Form 500.⁴⁰ In the former case, SLD shall deal with these consortia in a manner consistent with the measures specified above. In the latter case, the consortia shall be given an opportunity, within 120 days of the release date of this Order, to request funded discounts at the original rate requested.

19. The Funding Year 2001 measures specified above shall be taken only for library applicants. The court's decision does not address the constitutionality of the CIPA requirements as they apply to schools. Therefore, all of the CIPA requirements as codified at sections 254(h)(5) and 254(l) and implemented in the *CIPA Order* remain in effect for schools. This includes schools that are members of consortia, including consortia comprised of both schools and libraries.

20. In addition, because the court's decision holds invalid only the filtering requirements set forth in section 254(h)(6) and does not address the validity of section 254(l), section 254(l) remains in effect with respect to libraries. In the *CIPA Order*, we determined that libraries that only receive telecommunications service discounts are excluded from all of the requirements of section 254(l).⁴¹ Nothing in the court's order affects this determination. Therefore, libraries receiving only discounts on telecommunications services are not required to certify under section 254(l) concerning an Internet safety policy. However, those libraries that receive discounts on Internet access or internal connections must still certify to compliance with section 254(l). Because the current FCC Form 486 and FCC Form 479 do not permit library applicants to certify to compliance only with section 254(l) without also certifying to compliance with section 254(h)(6), a change in these forms will be necessary so that libraries may certify to compliance with section 254(l) only. We therefore direct the Administrator, in consultation with the Bureau, to make any changes necessary to the procedures and to FCC Form 486 and FCC Form 479 consistent with this Order and the court's decision.

³⁹ In Funding Year 2001, upon receiving an FCC Form 486 that had no certification block completed, SLD rejected the form as incomplete and returned it to the applicant. In certain cases, applicants completed the form, checking a certification. Some of these applicants, however, returned the completed FCC Form 486 after the October 28, 2001 deadline. SLD shall not apply any penalty for having missed the October 28, 2001 deadline but such forms shall still be subject to the normal 120 day rule.

⁴⁰ See Schools and Libraries Universal Service, Adjustment to Funding Commitment and Modification to Receipt of Service Confirmation Form, OMB 3060- 0853 (April 2000) (FCC Form 500). Applicants that seek to reduce or eliminate a funding request after they have received a funding commitment from SLD must file an FCC Form 500.

⁴¹ See *CIPA Order*, 16 FCC Rcd at 8196, para. 28.

21. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 1-5 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, and 254, and the Children's Internet Protection Act, Pub. L. 106-554 §§ 1701 *et seq.* as codified at 47 U.S.C. § 254(h) and (l), this Order is ADOPTED. The modifications to a collection of information contained within this Report and Order is contingent upon approval by the Office of Management and Budget.

22. IT IS FURTHER ORDERED that enforcement of sections 54.520(c)(2)(i) and (iii), 54.520(c)(3), 54.520(d), and 54.520(g)(1) of the Commission's rules, 47 C.F.R. § 54.520, as they apply to all libraries and to the extent that they require any library to filter or certify to such filtering under 47 U.S.C. § 254(h)(6), is SUSPENDED consistent with the terms of this Order.

23. IT IS FURTHER ORDERED that AUTHORITY IS DELEGATED to the CHIEF OF THE WIRELINE COMPETITION BUREAU pursuant to section 5(c) of the Communications Act of 1934, 47 U.S.C. § 155(c), to modify any forms that are necessary to implement the decisions adopted in this Order.

24. IT IS FURTHER ORDERED that THIS ORDER IS EFFECTIVE UPON PUBLICATION IN THE FEDERAL REGISTER. Good cause exists to make this effective immediately upon publication in the Federal Register. The actions we take in this Order are intended to bring implementation of the CIPA into compliance with the judgment of the federal court. It is necessary that this Order take effect as soon as possible in order to best fulfill this purpose.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary