

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

In the Matter of	)	
	)	
Petition for Reconsideration by	)	
	)	
Virginia State Department of Education	)	File No. SLD-163045
Richmond, Virginia	)	
	)	
Federal-State Joint Board	)	CC Docket No. 96-45
on Universal Service	)	
	)	
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.	)	

**ORDER ON RECONSIDERATION**

**Adopted: April 17, 2007**

**Released: April 17, 2007**

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

**I. INTRODUCTION**

1. In this Order, we grant and remand a Petition for Reconsideration (Petition) filed by the Virginia State Department of Education (Virginia DOE), Richmond, Virginia, asking the Wireline Competition Bureau to reconsider its order denying Virginia DOE's Request for Review of a decision issued by the Universal Service Administrative Company (USAC).<sup>1</sup> To ensure that Virginia DOE's underlying application is resolved expeditiously, we direct USAC to initiate contact with both Virginia DOE and Autotote Communications (Autotote), its service provider, as described in this Order, and issue a decision based on a complete review and analysis no later than 90 calendar days from the release of this Order.

**II. BACKGROUND**

2. Under the schools and libraries universal service support program (E-rate program), eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.<sup>2</sup> Applicants may only seek support for services eligible for support.<sup>3</sup> In addition, the Communications Act permits only

<sup>1</sup> See Petition for Reconsideration by Virginia State Department of Education, CC Docket Nos. 96-45, 97-21 (filed May 20, 2002) (Petition). The Petition sought reconsideration of *Request for Review of the Decision of the Universal Service Administrator by Virginia State Department of Education, Richmond, Virginia*, File No. SLD-163045, CC Dockets No. 96-45 and 97-21, Order, 17 FCC Rcd. 8677 (Wireline Comp. Bur. 2002) (*Virginia DOE Order*). Parties may seek reconsideration from a final action of the Commission or its designated authority. 47 C.F.R. § 1.106.

<sup>2</sup> 47 C.F.R. §§ 54.501-54.504.

<sup>3</sup> See 47 C.F.R. § 54.504; Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000), at 17 (FCC Form 471 Instructions) (stating that applicants

“telecommunications carriers” to receive direct reimbursement under the E-rate universal service support mechanism for the provision of discounted telecommunications services.<sup>4</sup> The term “telecommunications carrier” includes only carriers that offer telecommunications on a common carrier basis.<sup>5</sup> The Commission stated in the *Universal Service Order* that a carrier may be a common carrier if it holds itself out “to service indifferently to all potential users,” but a “carrier will not be a common carrier ‘where its practice is to make individualized decisions in particular cases whether and on what terms to serve.’”<sup>6</sup> In the *Fourth Reconsideration Order*, the Commission stated that companies that lease transponder capacity on satellites are not providers of telecommunications services.<sup>7</sup>

3. On January 17, 2000, Virginia DOE requested E-rate discounts in the telecommunications category for services to be provided by Autotote.<sup>8</sup> According to the contract for services, Autotote was to provide Virginia DOE with leased satellite transponder time.<sup>9</sup> On May 5, 2000, USAC denied the funding request because it concluded that, because Autotote was not a common carrier, it was not eligible for E-rate funding.<sup>10</sup> Virginia DOE appealed USAC’s decision on May 12, 2000.<sup>11</sup> On March 30, 2001, USAC denied Virginia DOE’s appeal, stating that Autotote was not eligible to receive E-

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may not seek support for ineligible services, entities, or uses); *see also Request for Review by Chelmsford Public Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-121771, CC Dockets No. 96-45 and 97-21, Order, 17 FCC Rcd 761, 762, para. 3 (Com. Car. Bur. 2002).

<sup>4</sup> *See* 47 U.S.C. § 254 (h)(1)(B); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9177-78, 9005-23, 9084-90, paras. 589-600 (1997) (*Universal Service Order*); *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5413-14, paras. 163-164 (1997) (*Fourth Reconsideration Order*). Non-telecommunications providers are eligible for support for providing voice mail, Internet access, and installation and maintenance of internal connections but are not eligible to provide telecommunications services under the universal service support mechanism. *See* 47 C.F.R. § 54.517.

<sup>5</sup> *Universal Service Order*, 12 FCC Rcd at 9177-78, paras. 785-786; *Fourth Reconsideration Order*, 13 FCC Rcd at 5413-14, paras. 163-164.

<sup>6</sup> *Universal Service Order*, 12 FCC Rcd at 9177-78, paras. 785-786 (*citing National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. 1976)).

<sup>7</sup> *Fourth Reconsideration Order*, 13 FCC Rcd at 5479, para. 290 (finding that for purposes of the contribution requirements under section 254 of the Communications Act, satellite providers do not transmit information when they lease bare transponder capacity). According to the comments in that proceeding, when a satellite operator enters into a bare transponder agreement with a customer, the satellite operator is merely providing its customer with the exclusive right to transmit to a specified piece of hardware on the satellite and that, essentially, is the extent of the operator's obligation. *Id.* at para. 290, n. 847.

<sup>8</sup> FCC Form 471, Virginia State Department of Education, filed Jan. 17, 2000.

<sup>9</sup> *Id.* at Attachment.

<sup>10</sup> Letter from Schools and Libraries Division, Universal Service Administrative Company, to Greg Weisiger, Virginia State Department of Education, dated May 5, 2000.

<sup>11</sup> Letter from Lan Neugent, Virginia State Department of Education to Schools and Libraries Division, Universal Service Administrative Company, filed May 12, 2000 (SLD Appeal Letter).

rate support for telecommunications services because it was not a telecommunications carrier.<sup>12</sup> On April 16, 2001, Virginia DOE filed a Request for Review with the Commission that was addressed by the Bureau under delegated authority.<sup>13</sup> Among other things, the Request for Review states that the satellite services leased from Autotote were used to provide distance learning.<sup>14</sup>

4. In the *Virginia DOE Order*, the Bureau denied Virginia DOE's Request for Review and affirmed USAC's determination that Autotote is not a "telecommunications carrier" eligible for E-rate support.<sup>15</sup> The Bureau based this determination on the Commission's earlier finding in the *Fourth Reconsideration Order* that companies that lease transponder capacity on satellites are not providers of telecommunications services.<sup>16</sup> The Bureau also rejected Virginia DOE's assertion that certain advertisements established that Autotote sold satellite capacity to the public on a non-discriminatory basis, stating that Virginia DOE never provided the Commission with copies of such advertisements.<sup>17</sup> Finally, the Bureau stated that the record reflected that USAC was unable to substantiate that Autotote was an eligible telecommunications carrier.<sup>18</sup>

5. In its Petition for Reconsideration, Virginia DOE addresses the Bureau's finding that Virginia DOE did not produce copies of advertisements showing that Autotote appeared to be a telecommunications carrier.<sup>19</sup> Although it admits that the advertisements were not attached to its Funding Year 2000 appeal to the Bureau, Virginia DOE asserts that the advertisements were attached to the related Funding Year 1999 appeal that was still pending with USAC.<sup>20</sup> Virginia DOE notes that the Funding Year 1999 appeal was referenced in the Funding Year 2000 appeal.<sup>21</sup> Virginia DOE also attaches text retrieved in early 2000 from Autotote's website, as well as Autotote Corporation's SEC filing of January 2000,<sup>22</sup> to demonstrate that Autotote provided interstate telecommunications service on a common carrier

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<sup>12</sup> Letter from Schools and Libraries Division, Universal Service Administrative Company, to Lan Neugent, Virginia State Department of Education, dated Mar. 30, 2001.

<sup>13</sup> *Request for Review of the Decision of the Universal Service Administrator by Virginia State Department of Education*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed Apr. 16, 2001 (Request for Review).

<sup>14</sup> Request for Review at 1-2. *See also* Petition at 8.

<sup>15</sup> *Virginia DOE Order*, 17 FCC Rcd at 8679, para. 7.

<sup>16</sup> *Id.* *See Fourth Reconsideration Order*, 13 FCC Rcd at 5479, para. 290.

<sup>17</sup> *Virginia DOE Order*, 17 FCC Rcd at 8681, para. 9.

<sup>18</sup> *Id.* at 8680-8681, para. 8.

<sup>19</sup> Petition at 2.

<sup>20</sup> *Id.* *See* Letter from Lan Neugent, Virginia Department of Education to Schools and Libraries Division, Universal Service Administrative Company, dated December 22, 1999 (Virginia DOE Funding Year 1999 Appeal).

<sup>21</sup> The Funding Year 2000 appeal stated: "[Virginia DOE] also has an appeal pending for year two funding and [we are] awaiting supporting documentation from [USAC]. This appeal will have material impact on the [USAC] year three denial." Letter from Lan Neugent, Virginia Department of Education to Schools and Libraries Division, Universal Service Administrative Company, dated May 10, 2000 (Virginia DOE Funding Year 2000 Appeal).

<sup>22</sup> Autotote Corporation is Autotote's parent company. Petition at 5.

basis.<sup>23</sup> Virginia DOE requests that any new information presented in this Petition be considered as though it was in the initial Request for Review.<sup>24</sup>

6. Virginia DOE also addresses the Bureau's finding that it was Virginia DOE's responsibility to ensure that the service provider was an eligible telecommunications carrier.<sup>25</sup> Virginia DOE notes that although an applicant is now able to identify the telecommunications carrier eligibility status of its service provider using USAC's web site, this feature of the web site was not available when Virginia DOE submitted its original application, its initial appeal to USAC, or its Request for Review.<sup>26</sup> In addition, Virginia DOE contends that because it did not know when it filed the Request for Review that the *Fourth Reconsideration Order* was the reason for its denial, it asks that the facts presented in the Petition be considered new information for the record.<sup>27</sup> Virginia DOE explains that it believed USAC's denial for Funding Year 2000 was an error because Virginia DOE had received E-Rate funding for the same Autotote service in Funding Year 1998.<sup>28</sup> Adding to the confusion is the fact that USAC's decision to fund the Autotote service in Funding Year 1998 occurred after the release of the *Fourth Reconsideration Order*.<sup>29</sup> Finally, Virginia DOE asserts that USAC never cited the *Fourth Reconsideration Order* as the reason for the denial.<sup>30</sup>

### III. DISCUSSION

7. We grant the Petition for Reconsideration and remand Virginia DOE's Funding Year 2000 application to USAC. As a preliminary matter, we grant Virginia DOE's request that the Bureau consider the facts presented in the Petition as new information for the record.<sup>31</sup> Section 1.106(l) of the Commission's rules provides that evidence that the Commission or the designated authority believes should have been taken into consideration in the original proceeding shall be taken into consideration for a petition for reconsideration.<sup>32</sup> There appears to have been confusion on the part of Virginia DOE with regard to why USAC denied its funding request, and this may have impaired Virginia DOE's efforts to appeal the decision. In addition, we find that Virginia DOE's Petition brings forth evidence that should have been considered in the original proceeding.

8. With respect to the merits of the Petition, the record contains conflicting information regarding whether Autotote is a telecommunications carrier eligible for E-rate funding, the findings in the

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<sup>23</sup> Petition at 7-8.

<sup>24</sup> Petition at 10. See Request for Review at 4-5. Virginia DOE explains that its Funding Year 1999 appeal and Funding Year 2000 appeal are "inexorably linked."

<sup>25</sup> Petition at 10-11. See *Virginia DOE Order*, 17 FCC Rcd. at 8682, para. 12.

<sup>26</sup> Petition at 4.

<sup>27</sup> *Id.* at 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Petition at 2.

<sup>32</sup> 47 C.F.R. § 1.106(l).

*Virginia DOE Order* notwithstanding. We find that there are contradictions regarding both Autotote's status as a telecommunications carrier and the nature of the service that Autotote provided to Virginia DOE. With regard to Autotote's status as a telecommunications carrier, the Request for Review and Virginia DOE's Funding Year 1999 Appeal referenced Virginia DOE's original Request for Proposal (RFP) to solicit bids for telecommunications.<sup>33</sup> The RFP specified that "vendors responding to this solicitation must be qualified 'Common Carriers' as defined by the Federal Communications Commission."<sup>34</sup> Autotote appears to have attested to its status as an eligible common carrier when it accepted and signed onto Virginia DOE's RFP.<sup>35</sup> Autotote, however, did not respond to USAC's repeated requests for information to validate the eligibility of its services.<sup>36</sup>

9. In addition, we conclude that the record contains contradictory information about the type of services Autotote provided to Virginia DOE. The record indicates that Autotote provided Virginia DOE with leased satellite transponder time, but also indicates that Autotote provided services to Virginia DOE "on behalf of Virginia public schools with students enrolled in [Virginia DOE's] distance learning program."<sup>37</sup> Leased transponder time, according to the *Fourth Reconsideration Order*, is not considered to be telecommunications.<sup>38</sup> Distance learning, however, is a telecommunications service for purposes of the E-rate program.<sup>39</sup> The record contains nothing more about how distance learning was provided by Autotote. Because of these contradictions and deficiencies in the record, we instruct USAC to contact both Autotote and Virginia DOE to determine exactly what services were provided to Virginia DOE. We direct USAC to reinitiate contact with Autotote to conduct a detailed inquiry regarding all of the services provided by Autotote in order to determine whether Autotote is or was a common carrier.

10. In remanding this matter to USAC, we make no findings as to the ultimate eligibility of the requested services.<sup>40</sup> The inconsistencies noted above indicate that a more detailed inquiry should have been conducted to determine what services were actually provided to Virginia DOE by Autotote and

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<sup>33</sup> Request for Review at 2. See Virginia DOE Funding Year 1999 Appeal at 2.

<sup>34</sup> See Solicitation, Offer and Award; Data Processing Telecommunications, at 3 (Award Date January 13, 2000) (RFP). In its Request for Review, Virginia DOE stated "[c]learly listed as requirement 2 of the RFP is that vendors must be qualified common carriers." Request for Review at 2. This requirement is on page 3 of the RFP and page 3 is initialed by Autotote's representative. RFP at 3.

<sup>35</sup> As explained above, an entity may be a common carrier if it holds itself out as providing "service indifferently to all potential users." See *supra* n. 6.

<sup>36</sup> *Virginia DOE Order*, 17 FCC Rcd at 8680-81, para 8. As Virginia DOE mentions in its Petition, one reason Autotote may not have responded to USAC's previous requests for information could be the potential for USAC to require Autotote to contribute universal service fees based on its revenues derived from the provision of telecommunications. Petition at 11.

<sup>37</sup> Request for Review at 1-2. Also, the Petition states that "[s]atellite service leased by DOE is used to transmit foreign language and advanced placement K-12 classes from "electronic classrooms" located in [Virginia] schools via satellite to numerous receive schools." Petition at 8.

<sup>38</sup> See *Fourth Reconsideration Order*, 13 FCC Rcd at 5479, para. 290.

<sup>39</sup> See, e.g., Schools and Libraries Eligibility List at 4 (Dec. 2, 1999) (as found on USAC's webpage at [http://www.usac.org/\\_res/documents/sl/pdf/ESL\\_archive/EligibleServicesList\\_120299.pdf](http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_120299.pdf)).

<sup>40</sup> We are committed to guarding against waste, fraud and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate purposes.

to determine Autotote's status as a common carrier. Although USAC may ultimately find that Autotote did not provide Virginia DOE with a telecommunications service and that Autotote is not an eligible telecommunications carrier, we find that USAC does not yet have enough information to make that determination. Further, we find that the public interest and the goals of section 254(h) of the Communications Act are best served by requiring USAC to reconsider Virginia DOE's application and to work with Virginia DOE until the contradictions noted above are resolved with certainty.<sup>41</sup> We direct USAC to provide the Bureau with detailed findings as a result of its further investigation and an analysis of how it reached its conclusions. We direct USAC to complete its review of the underlying application and to issue its decision based on a complete review and analysis no later than 90 calendar days from the release of this Order.

#### IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, pursuant to 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 pursuant to authority delegated in sections 0.91, 0.291, and 1.106(j) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.106(j), that the Petition for Reconsideration filed by Virginia State Department of Education, Richmond, Virginia, on May 22, 2002 IS GRANTED and REMANDED.

12. IT IS FURTHER ORDERED that, 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 pursuant to authority delegated in sections 0.91, 0.291, and 1.106(j) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.106(j), USAC SHALL INITIATE contact with the Virginia State Department of Education and Autotote Communications and ISSUE a decision based on a complete review and analysis no later than 90 calendar days from the release of this Order.

13. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 1.102 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Jeremy D. Marcus  
Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau

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<sup>41</sup> See 47 U.S.C. § 254(h).