

November 4, 2011

## FCC GRANTS APPEALS OF DARK FIBER DECISIONS

The Commission granted the appeals of three petitioners that had been denied funding after USAC found that the petitioners had sought E-rate funding for dark fiber for funding years 2004 and 2005 when dark fiber was not an eligible service. For funding years 2004 through 2011, schools were allowed to seek support for services using only lit services. If the school had purchased equipment to light the fiber prior to 2004, the school was permitted to trade the equipment in to the service provider and then lease it back.

In the first appeal, the Commission found that the school district had converted its agreement for dark fiber with its service provider into an agreement for lit fiber, consistent with the requirement that the school could trade in the equipment to the service provider and lease it back. The Commission noted that the modification to the agreement could be considered a permissible minor contract modification to the original contract, because the modification “had no effect or had a negligible effect on price, quantity, quality or delivery under the original contract.”

The Commission found that the other two appellants had applied for funding for lit fiber, not dark fiber as USAC had found. One of the appellants sought funding for a leased wide area network (“WAN”) and supported this claim by providing documents that showed that its service provider provided an Internet connection to transport voice and data service over fiber. The appellant also provided a service provider invoice from the funding year which described the service as “WAN Transport – Monthly Lease.” The other appellant mistakenly applied for dark fiber service even though it was actually provided with lit fiber service. The appellant provided the Commission with a copy of a contract showing that the service provider was activating fiber at the school district buildings.

The Commission denied the appeal of a school district that did not challenge USAC’s finding that the district had been provided with dark fiber service during the period of time that it was not an eligible service. The district had argued that it chose dark fiber, because it was the most cost-effective option.

If you have any questions, contact [Mark Palchick](#), [Rebecca Jacobs](#) or any member of the firm’s [Communications Law Group](#).

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