

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

In the Matter of
Request for Waiver of the Decision of the
Universal Service Administrator by
Berrien County Intermediate School District,
Berrien Springs, Michigan
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-515425
CC Docket 02-6

ORDER

Adopted: October 24, 2006

Released: October 24, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant the appeal filed by Berrien County Intermediate School District (Berrien) of a decision by the Universal Service Administrative Company (USAC) that denied Berrien funding from the schools and libraries universal service support mechanism because USAC determined that Berrien failed to provide evidence of authority to represent its consortium members. We remand the appeal to USAC for action consistent with this Order, and, to ensure that it is resolved expeditiously, we direct USAC to issue an award or denial based on a complete review and analysis no later than 60 days from release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, also known as the 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 connection services. In accordance with the Commission's rules, an applicant must file with USAC, for posting to USAC's website, an FCC Form 470 requesting discounted services. After an applicant has entered into

1 Berrien County Intermediate School District, File No. SLD-515425, CC Docket No. 02-6, Appeal (filed Oct. 11, 2006) (Appeal). 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).

2 47 C.F.R. §§ 54.501-54.503.

3 The applicant must wait 28 days before entering into an agreement with a service provider for the requested services. 47 C.F.R. § 54.504(b). See also Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (Funding Years 2000, 2001, 2002 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (April 2002) (Funding Year 2003 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (May 2003) (Funding Year 2004 FCC Form 470);

(continued...)

agreements for eligible services with one or more service providers, it must file an FCC Form 471 with USAC.⁴

3. The Commission's rules allow schools and libraries to form consortia for purposes of seeking competitive bids on their service requests.⁵ Because discounts are restricted by statute to "bona fide request[s]" for services, a consortium application may only be submitted on behalf of schools and libraries that have actually authorized the consortium to make the request.⁶ By signing the FCC Form 471, the applicant is certifying that it is authorized to submit and certify to the accuracy of the application on behalf of all consortium members.⁷ USAC must ensure that the consortium members are aware of the application to be filed and how that application obligates the expenditure of financial and professional resources.⁸ Ensuring that a school or library is aware of and approves the application on its behalf also helps to avoid cases of duplicative requests from different applicants applying on behalf of the same school or library.⁹ In the *Project Interconnect Order*, the Wireline Competition Bureau (the Bureau) approved USAC's use of a procedure requiring that an applicant applying as a consortium submit a letter of agency (LOA) from each of its members expressly authorizing the applicant to submit an application on its behalf.¹⁰ Specifically, the Bureau found that this procedure was consistent with USAC's authority

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Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (Funding Year 2005 FCC Form 470) (collectively, FCC Form 470).

⁴ The FCC Form 471 notifies USAC of the services that have been ordered, the service providers with which the applicant has entered into an agreement, and an estimate of funds needed to cover the discounts to be given for eligible services. 47 C.F.R. § 54.504(c). See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (December 1997) (Funding Year 1999 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (Funding Year 2000 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (Funding Year 2001 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (Funding Year 2002 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2003) (Funding Year 2004 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (Funding Year 2005 FCC Form 471) (collectively, FCC Form 471).

⁵ 47 C.F.R. § 54.501(d)(1).

⁶ 47 U.S.C. § 254(h)(1)(B).

⁷ 47 C.F.R. § 54.501(c)(1). See also USAC Website, Letter of Agency, <http://www.universalservice.org/sl/tools/reference/letters-of-agency.aspx> (retrieved Sept. 7, 2006) (*LOA Guidance*); FCC Form 471, Item 33, Block 6.

⁸ *Request for Review of the Decision of the Universal Service Administrator by Project Interconnect, Brooklyn Park, Minnesota, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, Order, 16 FCC Rcd 13655, 13659, para. 10 (Common Car. Bur. 2001) (*Project Interconnect Order*). See also *Request for Review of the Decision of the Universal Service Administrator by South Carolina Division of the Chief Information Officer, Columbia, South Carolina*, CC Docket No. 02-6, Order, 21 FCC Rcd 5987 (Wireline Comp. Bur. 2006). The Wireline Competition Bureau was formerly known as the Common Carrier Bureau.

⁹ *Project Interconnect Order*, 16 FCC Rcd at 13659, para. 10.

¹⁰ *Id.* at 13658, para. 8. USAC requires an LOA to contain the following five elements: the name of the person filing the application; the name of the person authorizing the filing of the application; the specific time frame the LOA covers; the signature, date, and title of an official who is an employee of the entity who is authorizing the filing of the application; and the type of services covered by the LOA. See *LOA Guidance*. In certain situations, other documentation, such as evidence that each consortium member knew it was represented on the application, may be accepted as proof of authorization. *Id.*

to implement administrative procedures that ensure compliance with the Commission's rules and requirements as established in the Commission's *Eighth Reconsideration Order*.¹¹ In lieu of an LOA, according to USAC's guidelines, "[c]onsortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory" may provide "copies of the relevant state statute or regulation."¹²

4. *Berrien's Appeal*. Berrien applied for E-rate funding for Internet access and telecommunications services for Funding Year 2006.¹³ On April 12, 2006, during the Program Integrity Assurance (PIA) review process, USAC contacted Berrien to establish its authority to file an FCC Form 471 on behalf of the consortium.¹⁴ On April 19, 2006, Berrien responded by faxing minutes of meetings of its Superintendents Advisory Committee (SAC) and Technology Action Committee (TAC) in order to show the formation of the consortium.¹⁵ Berrien states that, in 1998, the SAC and TAC established a consortium to apply for E-rate funding on behalf of the school districts of the intermediate school district in order to lower the school districts' costs.¹⁶ On August 15, 2006, Berrien received a Funding Commitment Decision Letter from USAC denying its Funding Year 2006 application because the documentation submitted by Berrien to prove its authority to file an FCC Form 471 on behalf of the consortium did not specify the time frame for the consortium's authority.¹⁷ The Commission received Berrien's appeal on October 13, 2006.¹⁸ Berrien argues that it has statutory authority to apply on behalf of its members and therefore does not require LOAs from its members.¹⁹

5. In its appeal, Berrien claims that the Michigan Revised School Code provided Berrien with the authority to apply for E-Rate funding on behalf of the school districts within its intermediate school district.²⁰ Berrien argues that the Michigan state law requiring every local school district to be a member of an intermediate school district and the law granting intermediate school districts certain powers and responsibilities related to its member school districts demonstrate that Berrien has the statutory authority to apply on behalf of its members.²¹ Michigan state law specifically provides

¹¹ See 47 C.F.R. § 54.705(a)(1) (setting forth the functions of the Schools and Libraries Committee) and 47 C.F.R. § 54.701(g)(i) (directing the Administrator to establish the Schools and Libraries Division, and setting forth its functions). See also *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, Third Report and Order 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, 25075-76, paras. 30-31, 34 (1998) (*Eighth Reconsideration Order*) (describing the functions of the Schools and Libraries Committee).

¹² See LOA Guidance.

¹³ Appeal at 3. Funding Year 2006 began on July 1, 2006 and ends on June 30, 2007.

¹⁴ Facsimile from Schools and Libraries Division, Universal Service Administrative Company, to Dennis Lundgren, Berrien County Intermediate School District, dated Apr. 12, 2006 (requesting documentation to show that all of the consortium members were aware of the application filed on their behalf).

¹⁵ Facsimile from Dennis Lundgren, Berrien County Intermediate School District, to Schools and Libraries Division, Universal Service Administrative Company, dated Apr. 19, 2006 (transmitting meeting minutes of SAC and TAC) (Meeting Minutes).

¹⁶ See Meeting Minutes at 11 (TAC Minutes, Wed., Mar. 25, 1998).

¹⁷ See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Dennis Lundgren, Berrien County Intermediate School District, dated Aug. 15, 2006 (Funding Commitment Decision Letter).

¹⁸ See Appeal at 1.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 2. See also Mich. Comp. Laws §§ 380.1 *et seq.* (2006).

²¹ See Appeal at 2. See also Mich. Comp. Laws §§ 380.604, 380.601a(1)(c), (2), 380.627(2) (2006).

intermediate school districts with the authority to, among other things, acquire equipment and technology, enter into agreements with other entities, and conduct or participate in cooperative programs for information technology systems.²² Berrien argues that its technology plan also acknowledges that it is applying as a consortium.²³

6. Berrien notes that it has filed for E-rate funding as a consortium every year since Funding Year 1998, and, until the current funding year, has never been denied funding nor had a funding request reduced.²⁴ Berrien requests that the Commission find it has the statutory authority to apply on behalf of its schools.²⁵ In the alternative, Berrien requests that the Commission waive the deadline for filing LOAs and allow it the opportunity to file LOAs from its members.²⁶

III. DISCUSSION

7. Based on the record before us, we grant Berrien's appeal of the decision by USAC denying Berrien's funding request. USAC's stated policy is that "[c]onsortia which have a statutory or regulatory basis and for which participation by schools or libraries is mandatory must be able to provide documentation supporting this certification, including copies of the relevant state statute or regulation."²⁷ Berrien has provided evidence on appeal to the Commission demonstrating that it has statutory authority to apply on behalf of the members of its consortium. By Michigan state law, every local school district must be a member of an intermediate school district.²⁸ Michigan state law also gives intermediate school districts the authority to, among other things, acquire equipment and technology, enter into agreements with other entities, and conduct or participate in cooperative programs for information technology systems.²⁹ Furthermore, the meeting minutes provided by Berrien during the PIA review process indicate that, prior to the first funding year of the E-rate program, Berrien decided to apply for E-rate funding as a consortium in order to take advantage of the savings.³⁰ These facts are consistent with the Commission's stated goal to "encourage schools and libraries to aggregate their demand with others to create a consortium with sufficient demand to attract competitors and thereby negotiate lower rates."³¹

8. Additionally, we note that, although it appears that Berrien may not have provided USAC with the evidence of Berrien's statutory authority in the manner requested, Berrien intended to be, and believed it was being, responsive with the documentation it provided.³² On the cover sheet transmitting

²² Mich. Comp. Laws §§ 380.601a(1)(c), (2), 380.627(2) (2006).

²³ Appeal at 3. *See also id.*, Attach. D (Berrien County Intermediate School District Technology Plan), at 12.

²⁴ Appeal at 3.

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *See* LOA Guidance.

²⁸ *See* Appeal at 2. *See also* Mich. Comp. Laws § 380.604 (2006).

²⁹ Mich. Comp. Laws §§ 380.601a(1)(c), (2), 380.627(2) (2006).

³⁰ *See* Meeting Minutes at 6, 11.

³¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9027, para. 476 (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*, 530 U.S. 1210 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 530 U.S. 1223 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 531 U.S. 975 (Nov. 2, 2000).

³² *See* Appeal at 5.

the meeting minutes to USAC, Berrien stated that the minutes demonstrated that the school districts had knowledge of the existence of the consortium and approved being part of it.³³ Because Berrien responded in good faith to USAC's request and because the statutory evidence of its authority does exist and Berrien provided it on appeal, we grant Berrien's appeal. Moreover, we note that there is no evidence in the record at this time of waste, fraud, abuse, misuse of funds, or a failure to adhere to core program requirements.

9. Accordingly, we grant Berrien's appeal and remand this appeal to USAC for further processing consistent with our actions in this Order. To ensure that the underlying application is processed expeditiously, we direct USAC to issue an award or denial based on a complete review and analysis no later than 60 days from the release of this Order. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the requested services.

10. We note, moreover, the limited nature of this decision. Our action here does not eliminate USAC's current procedure requiring that an applicant applying for funding on behalf of a consortium have signed LOAs in place prior to submitting an FCC Form 471 or demonstrate its authority through alternative means, such as state statute or regulation.³⁴ We continue to require E-rate applicants to submit complete and timely information to USAC as part of the application review process.

11. Finally, we are committed to guarding against waste, fraud, and abuse, and to ensuring that funds disbursed through the E-rate universal service mechanism are used for appropriate purposes.³⁵ Our action here in no way affects the authority of the Commission or USAC to conduct audits and investigations to determine compliance with E-rate program rules and requirements. Because audits and investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or Commission rules, such proceedings can reveal instances in which universal service funds were disbursed in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate mechanism and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred and whether recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

III. ORDERING CLAUSES

12. ACCORDINGLY, IT IS 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 the authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), that the Berrien County Intermediate School District Appeal IS GRANTED.

13. 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 the authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§

³³ See Appeal, Attach. C at 1.

³⁴ See *supra* para. 3. See also LOA Guidance.

³⁵ See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism, et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006).

0.91, 0.291, 1.3, and 54.722(a), that the Berrien County Intermediate School District Appeal IS REMANDED to the Administrator for further consideration in accordance with the terms of this Order.

14. 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 the authority delegated in sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), USAC SHALL COMPLETE its review of the underlying application of the Berrien County Intermediate School District and issue an award or a denial based on a complete review and analysis no later than 60 days from release of this Order.

15. IT IS FURTHER ORDERED that this Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau