

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of a
Decision of the
Universal Service Administrator by
Friendship House
Scranton, Pennsylvania
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-314307
CC Docket No. 02-6

ORDER

Adopted: December 4, 2006

Released: December 4, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant the Request for Review filed by Friendship House of a decision by the Universal Service Administrative Company (USAC) denying funding for Funding Year 2002 under the schools and libraries universal service support mechanism (E-Rate program). USAC denied funding on the ground that Friendship House violated the Commission's competitive bidding requirements by failing to use price as the primary factor in the vendor selection process. As discussed below, we waive the deadline for filing an appeal of a USAC decision and find that Friendship House complied with the Commission's competitive bidding requirements in place at the time of its application. We therefore grant the Request for Review and remand the underlying application to USAC for further action consistent with this Order. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the application and issue an award or a denial based on a complete review and analysis no later than 90 calendar days from release of this Order.

II. BACKGROUND

2. Competitive Bidding Requirements. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible

1 Letter from James A. Gibbons, Esq. and Robert H. Angeloni, Friendship House, to Federal Communications Commission, filed June 21, 2004 (Request for Review). Although Friendship House did not explicitly request a waiver of the deadline to file an appeal of a USAC decision, because USAC denied its appeal on the grounds that the appeal was filed one day late, we will treat its Request for Review also as a request for waiver.

2 See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Michael Bernhardt, Friendship House School, dated June 27, 2003 (Funding Commitment Decision Letter).

3 For requests seeking review of decisions issued on or after August 13, 2001, the appeal must be filed with USAC within 60 days of the issuance of the decision that the party seeks to have reviewed. 47 C.F.R. §54.720(b).

telecommunications services, Internet access, and internal connections.⁴ After an applicant has entered into agreements for eligible services with one or more service providers, it must file an FCC Form 471 with USAC.⁵ The FCC Form 471 notifies USAC of the services that have been ordered and supplies an estimate of funds requested for eligible services.⁶ USAC then issues a funding commitment decision letter indicating the funding, if any, that the applicant may receive.

3. Prior to Funding Year 2004, the Commission released only one order addressing an appeal of the requirement that price be a primary factor in selecting the winning bid.⁷ Specifically, in the *Tennessee Order*, released in 1999, the Commission determined that a competitive bidding process complies with program rules if price is taken into account during bid selection and the contract is awarded to the most cost-effective bidder.⁸ The Commission further concluded that other factors, such as prior experience, personnel qualifications, and management capability, also may form a reasonable basis on which to evaluate whether an offering is cost-effective.⁹

4. Four years later, after the conclusion of the Funding Year 2003 competitive bidding process, the Commission released the *Ysleta Order* in which it revised the policies established in the *Tennessee Order*.¹⁰ In the *Ysleta Order*, the Commission concluded that price must be the primary factor in selecting a winning bid.¹¹ This policy differs from the direction given in the *Tennessee Order* in that schools are now required to have a separate “cost category” when evaluating bids and that category must

⁴ See 47 C.F.R. §§ 54.501-54.503.

⁵ See, e.g., Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (Funding Year 2002 FCC Form 471).

⁶ 47 C.F.R. § 54.504(c).

⁷ See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734 (1999) (*Tennessee Order*). The Commission, however, used two different phrases to discuss how price should be taken into account; it said price should be “a primary factor,” but in discussing prior precedent, the order also said price should be “the primary factor.” *Id.* at 13739-40, paras. 10-11. Subsequently, in 2003 in the *Ysleta Order*, the Commission acknowledged that the “varying phraseology in the same decision created some ambiguity on this issue.” See *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26406, 26429, para. 50 (2003) (*Ysleta Order*).

⁸ *Tennessee Order*, 14 FCC Rcd at 13737-39, paras. 7-9. See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (*Universal Service Order*) (subsequent history omitted) (stating that price should be the primary factor in selecting a bid, but applicants are given maximum flexibility to take service quality into account and may choose the offering that meets their needs most effectively and efficiently).

⁹ *Id.* at 13739-40, para. 10. See also 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a).

¹⁰ See *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

¹¹ *Id.* This rule was originally codified in 2003. See *Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2004) (codifying 47 C.F.R. § 54.511(a)). See also *School and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) (codifying 47 C.F.R. § 54.504(b)(2)(vii) and 47 C.F.R. § 54.504(c)(1)(xi)).

be given more weight than any other category.¹² The Commission stated that if, for example, a school assigns 10 points to reputation and 10 points to past experience, the school would be required to assign at least 11 points to price.¹³ Because the *Ysleta Order* was released after the completion of Friendship House's competitive bidding process, however, it is not applicable for this Request for Review. We therefore look to the *Tennessee Order* for guidance.

5. Appeal Deadline. Commission rules provide that any person aggrieved by a decision of USAC may file an appeal with the relevant Committee governing the USAC Division or directly with the Commission.¹⁴ Section 54.720 of the Commission's rules establishes deadlines for affected parties to seek review of funding decisions issued by USAC.¹⁵ For those requests seeking review of decisions issued on or after August 13, 2001, the appeal must be filed with the Commission or USAC within 60 days of the issuance of the decision that the party seeks to have reviewed.¹⁶ The time period for filing an appeal commences on the issuance date of the decision. The Commission's rules treat appeals filed with USAC or with the Commission as having been filed on the date the appeal is postmarked.¹⁷

6. Request for Review. Friendship House submitted its FCC Form 470 application to USAC to initiate the competitive bidding process for E-rate eligible services.¹⁸ Subsequently, Friendship House entered into contracts with its service providers and filed its FCC Form 471 application for Funding Year 2002.¹⁹ USAC denied Friendship House's application on the ground that the documentation provided by Friendship House during the selective review process demonstrated that price was not the primary factor it used in selecting its service providers.²⁰ Friendship House filed an appeal of USAC's decision, which USAC dismissed because the appeal was filed one day after the appeal deadline.²¹ Friendship House then filed the instant Request for Review.

¹² See *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

¹³ *Id.* at n.138.

¹⁴ 47 C.F.R. § 54.719.

¹⁵ 47 C.F.R. § 54.720.

¹⁶ 47 C.F.R. § 54.720(a), (b). See *Implementation of Interim Filing Procedures for Filings of Requests for Review*, CC Docket 96-45, Order, 17 FCC Rcd 339, 340, para. 3 (Com. Car. Bur. 2001) as corrected by *Implementation of Interim Filing Procedures for Filings of Requests for Review*, CC Docket No. 96-45, Errata (Com. Car. Bur. rel. Dec. 28, 2001 and Jan. 4, 2002). Petitions for reconsideration, however, must be filed within 30 days. See 47 U.S.C. § 405(a).

¹⁷ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, paras. 52, 57 (2003) (*Second Report and Order*). Prior to the *Second Report and Order*, appeals filed with the Administrator or Commission were treated as having been filed on the date actually received. *Id.*

¹⁸ See FCC Form 470, Friendship House School, filed December 13, 2001 (Friendship House FCC Form 470).

¹⁹ See FCC Form 471, Friendship House School, filed January 17, 2002 (Friendship House FCC Form 471).

²⁰ USAC selects some applications for Selective Review to ensure that certain FCC program rules are followed. Applications are reviewed to examine compliance with the following: 1) competitive bidding process; 2) necessary resources certification; 3) endowment qualifications; and 4) consortia qualifications. See Schools and Libraries website regarding the Selective Review process, <http://www.universalservice.org/sl/applicants/step08/>.

²¹ See Letter from Universal Service Administrative Company to James A. Gibbons, Esq., Friendship House, dated May 4, 2004 (Administrator's Decision on Appeal). The Funding Commitment Decision Letter was dated June 27, 2003, and Friendship House's appeal to USAC was postmarked August 27, 2003. See Letter from James A.

III. DISCUSSION

7. We grant the Request for Review filed by Friendship House. Based on the facts and circumstances of this specific case, we find that special circumstances warrant a waiver of the deadline for filing an appeal of USAC's decision.²² In addition, we find that USAC improperly denied Friendship House's funding requests because it erroneously required Friendship House to give more weight to price in the competitive bidding process than to any other factor.

8. First, we waive the Commission's appeal filing deadline.²³ In general, the Commission has strictly enforced its appeal filing deadlines.²⁴ Unlike other deadlines, filing deadlines for appeals, in particular, are needed to provide finality in the decision-making process. We have strictly enforced the appeals deadlines established for the schools and libraries universal service support mechanism, allowing waivers of deadlines only in limited, compelling situations.²⁵ Specifically, in the *Mescalero Order*, the Commission noted that the Wireline Competition Bureau (Bureau) has consistently held that applicants are responsible for submitting their appeals in a timely fashion, and therefore found no special circumstances warranting waiver of the appeals filing deadline.²⁶ The Bureau has previously held that

Gibbons, Esq. and Robert H. Angeloni, Friendship House, to Universal Service Administrative Company, filed August 27, 2003.

²² The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166.

²³ 47 C.F.R. § 54.720(b).

²⁴ See *Application for Review by Mescalero Apache School*, File No. SLD-317139, CC Docket No. 02-6, Order, 20 FCC Rcd 5848 (2005) (*Mescalero Order*). See, e.g., *In the Matter of Texas Grace Communications, Request to Toll the Period of Construction to Construct Unbuilt Station KRZB(FM)*, Memorandum Opinion and Order, 20 FCC Rcd 4820 (2005) (dismissing Application for Review as untimely filed); *In re 929 MHz Paging Licensees*, Memorandum Opinion and Order, 14 FCC Rcd 20563 (1999) (dismissing Applications for Review because they were untimely filed); *In the Matter of Saint Maarten International Communications, Inc.*, Order on Review, FCC 05-195 (rel. Nov. 22, 2005) (denying Application for Review as untimely filed).

²⁵ See *Mescalero Order*, 20 FCC Rcd 5848 (upholding a Bureau-level decision denying an Request for Review as untimely filed). See also *Request for Waiver by Stephen-Argyle Central School District, Stephen, Minnesota*, File No. SLD-228975, CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Rcd 15879, 15880-81, paras. 4-5 (Com. Car. Bur. 2001); *Petitions for Waiver or Reconsideration of Sections 54.706, 54.709 and/or 54.711 of the Commission's Rules*, CC Docket 96-45, Memorandum Opinion and Order and Seventeenth Order on Reconsideration, 15 FCC Rcd 20769, 20783, para. 28 (1999). But see *Request for Waiver filed by Greenfield Public School District, Shutesbury, Massachusetts*, CC Docket No. 02-6, Order, DA 06-487 (Wireline Comp. Bur. rel. Feb. 28, 2006) (the Bureau granted a waiver request where the district's technology coordinator was unexpectedly called to active military duty in a time of war).

²⁶ See *Mescalero Order*, 20 FCC Rcd at 5849, paras 4-5 (transfer of school to a new location and non-responsive vendor are not special circumstances warranting a waiver of the 60-day rule).

employee illness, staff failure to perform a job properly, or a misunderstanding of the rules do not constitute special circumstances.²⁷

9. Notwithstanding our prior decisions, we find special circumstances warranting a deviation from the general rule with respect to Friendship House's Request for Review. In this case, missing the appeal filing deadline by one day is akin to a ministerial error.²⁸ We do not believe that such a minor mistake warrants the complete rejection of the application, particularly where, as discussed below, the denial of funds was based on a substantive error in applying the then-relevant program rules. In addition, we find that strict compliance with the appeal filing deadline in this case would be inconsistent with the public interest. Friendship House is a not-for-profit mental health institution that provides special education for emotionally disturbed, abused, neglected, and abandoned children.²⁹ Denying funding to Friendship House because it missed the filing deadline by one day would create undue hardship. Accordingly, we waive the filing deadline for Friendship House. We emphasize the limited nature of this decision. As stated above, we recognize that filing deadlines are necessary for the efficient administration of the schools and libraries E-rate program. Although we grant the appeal before us, our action here does not eliminate the deadline for filing appeals of USAC decisions. We continue to require E-rate applicants to file their appeals on a timely basis.

10. Based upon our review of the facts and circumstances of this case, we find that USAC improperly denied Friendship House's funding requests because USAC erroneously required Friendship House to give more weight to price in the competitive bidding process than to any other factor. Similar to the applicants in the Bureau's *Academia Discipulos de Cristo Order*, Friendship House filed its application and initiated its competitive bidding process before Funding Year 2004.³⁰ As the Bureau concluded in the *Academia Discipulos de Cristo Order*, USAC should have applied the standard the Commission articulated in the *Tennessee Order*, rather than the standard from the *Ysleta Order* that it actually applied.³¹ Specifically, USAC should have considered whether price was considered as a primary factor for vendor selection and whether the most cost-effective services were selected, not whether price was weighted the highest during bid evaluations.

11. The record shows that Friendship House conducted a competitive bidding process that complied with the Commission's competitive bidding rules.³² Friendship House submitted documentation to USAC detailing the competitive bidding process, including bid requests, bid proposals, and evaluation criteria.³³ Friendship House also evaluated the responsive bidders and selected vendors

²⁷ See *Request for Waiver by Duncan Public Library, Duncan, Arizona, et al.*, File No. SLD-325536, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 22430, 22431, para. 3 (Wireline Comp. Bur. 2003); *Request for Waiver by Dermott Special School District, Dermott, Arkansas, et al.*, File No. SLD-252777, CC Docket Nos. 96-45 and 97-21, Order, 17 FCC Rcd 5091, 5093-95, paras. 4-6 (Com. Car. Bur. 2002).

²⁸ Cf. *Request for Review by Bishop Perry Middle School, et. al*, File Nos. SLD-487170, *et. al*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) (*Bishop Perry Order*) (waiving rules where applicants committed certain clerical and ministerial errors).

²⁹ See Request for Review at 1.

³⁰ See *Request for Review by Academia Discipulos de Cristo, et. al*, File Nos. SLD 358081, 358083, *et. al*, CC Docket No. 02-06, Order, 21 FCC Rcd 9210 (Wireline Comp. Bur. 2006) (*Academia Discipulos de Cristo Order*).

³¹ See *Tennessee Order*, 14 FCC Rcd at 13737-13739, paras. 7-9; *Academia Discipulos de Cristo Order*, at para. 9.

³² See Request for Review at 2; Fax from Friendship House to Universal Service Administrative Company, dated April 11, 2003 (Friendship House Fax).

³³ See Request for Review at 2; Friendship House Fax at 1.

that offered the most cost-effective offering.³⁴ Friendship House stated both that “price was the only determinant” used in selecting vendors³⁵ and that “price and reputation were equal determinants.”³⁶ In either case, we find that Friendship House’s competitive bidding process did not violate the program rules in place at the time, which required only that price be considered as a primary factor for vendor selection and that the most cost-effective services were selected. In addition, there is no evidence of waste, fraud or abuse, or misuse of funds, or a failure to adhere to core program requirements. We therefore grant the Request for Review and remand the underlying application to USAC for further consideration in accordance with the terms of this Order.³⁷ To ensure these issues are resolved expeditiously, we direct USAC to complete its review of Friendship House’s application and process the application in accordance with this Order no later than 90 calendar days from release of this Order.

12. 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.³⁸ Although we grant this Request for Review, this action in no way affects the authority of the Commission or USAC to conduct audits or investigations to determine compliance with E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or the Commission’s rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or 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 program 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.

IV. ORDERING CLAUSES

13. 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, and 1.3 of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, waiver of section 54.720(b) IS GRANTED to Friendship House.

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), the Request for Review filed by Friendship House, Scranton, Pennsylvania, IS GRANTED, and the application IS REMANDED to USAC for further consideration in accordance with the terms of this Order.

³⁴ Friendship House Request for Review at 2; Friendship House Fax at 1.

³⁵ Friendship House Request for Review at 2.

³⁶ Friendship House Fax at 1.

³⁷ We note that this remand is only for the following FRNs: 864546, 865133, 865440, and 865759. Friendship House states in its Request for Review that it is no longer seeking funding for FRN 865971. Request for Review at 2.

³⁸ See *Bishop Perry Order*, 21 FCC Rcd at 5327-28, para. 27.

15. 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 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, USAC SHALL COMPLETE its review of the application and ISSUE an award or a denial based on a complete review and analysis no later than 90 calendar days from release of this Order.

16. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau