

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

In the Matter of)	
)	
Requests for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
State of Wyoming Department)	File Nos. SLD-202111, 218236
of Administration and Information)	
Cheyenne, Wyoming)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: February 28, 2006

Released: February 28, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. The State of Wyoming Department of Administration and Information, Cheyenne, Wyoming (State of Wyoming), filed Requests for Review of decisions by the Universal Service Administrative Company (USAC or Administrator).¹ The USAC decisions at issue denied funding for discounted services for Funding Years 2000 and 2001 of the schools and libraries universal service mechanism. Consistent with precedent, we deny the Requests for Review. On our own motion, however, we find that waiver of section 54.504(b) of the Commission's rules is in the public interest and warranted by the special circumstances of applicants utilizing state master contracts in Wyoming.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.² The Commission's rules provide that, with one limited exception for existing binding contracts, an eligible school, library, or consortium that includes eligible schools or libraries must seek competitive bids for all services eligible for support.³ In accordance with the Commission's rules, an applicant must file with SLD, for posting to its website, an

¹ Request for Review by the State of Wyoming, to Federal Communications Commission, SLD File No. 202111, filed December 20, 2002; Request for Review by the State of Wyoming, to Federal Communications Commission, SLD File No. 218236, filed February 12, 2003 (collectively, Requests for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company may seek review from the Commission. 47 C.F.R. § 54.719(c).

² 47 C.F.R. §§ 54.501-54.503.

³ 47 C.F.R. §§ 54.504, 54.511(c).

FCC Form 470 requesting discounted services.⁴ The applicant must wait 28 days before entering into an agreement with a service provider for the requested services.⁵ A failure to wait the mandated 28 days, for any reason, will result in the denial of the funding request. Once the school or library has complied with the Commission's competitive bidding requirements and entered into agreements for eligible services, it must file an FCC Form 471 application to notify the Administrator of the services that have been ordered, the service providers with whom the applicant has entered into an agreement, and an estimate of funds needed to cover the discounts to be given for eligible services.⁶

3. Applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity.⁷ The third party initiating the master contract must comply with the Commission's competitive bidding requirements and state procurement laws.⁸ The applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption.⁹ If a third party has negotiated a master contract without complying with the competitive bidding requirements, then the applicant must comply with the competitive bidding requirements before it may receive discounts or reduced rates for services purchased from that master contract.¹⁰

4. The State of Wyoming was directed by the state legislature in 1997 to establish a committee to prepare a request for proposals for a statewide telecommunications network for high-speed data transmission in every school building and two-way video capability in high schools.¹¹ The state received and considered four proposals and began negotiations with US West (now Qwest) in the fall of 1997.¹² The State of Wyoming signed an agreement with Qwest for the state master contract on April 3, 1998, for a period that runs from July 1, 1998 to June 30, 2003.¹³ The State of Wyoming sought funding

⁴ 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) (FCC Form 470).

⁵ 47 C.F.R. § 54.504(b). *See* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (Funding Year 2000 FCC Form FCC 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (Funding Year 2001 FCC Form FCC 471) (collectively, FCC Form 471).

⁶ 47 C.F.R. § 54.504(c). *See* FCC Form 471. The FCC Form 471 is broken up into "blocks" that group related or interdependent requests for information, called "items," together.

⁷ *See* 47 C.F.R. § 54.500(g) (defining "master contract" as a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to an eligible school, library, rural health care provider, or consortium that purchase directly from the service provider).

⁸ *See 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, and 95-72, Report and Order and Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5452-53, para. 233 (1997) (*Fourth Reconsideration Order*).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Requests for Review at 2-3.

¹² Requests for Review at 3.

¹³ *Id.*

in Funding Year 2000 and 2001 but was denied funding in both years since its contracts for new service were signed prior to the 28-day waiting period computed from the date of the posting on the FCC Form 470 on the USAC web site.¹⁴ The State of Wyoming argues that its state requirements for procurement make it impossible to comply with program rules and regulations for competitive bidding and therefore asks the Commission to reverse USAC's decision to deny funding.¹⁵ The State of Wyoming notes that the state cannot legally seek new bids for services provided under the existing contracts because it would be in breach of contract and the covenant of good faith inherent in all contracts.¹⁶

III. DISCUSSION

5. Consistent with precedent, we deny the Request for Review. The State of Wyoming concedes that it did not comply with the Commission's competitive bid requirements of section 54.504(b) of the Commission's rules.¹⁷ It argues that the contract's "availability of funds" clause, which it claims is a standard provision in all state contracts, prohibits the State of Wyoming from seeking new bids as required under the Commission's competitive bidding rules.¹⁸ The Wireline Competition Bureau has consistently denied requests for review by applicants that have violated the Commission's competitive bidding rules by signing the FCC Form 471 or service provider agreement before the allowable contract date.¹⁹ Because the State of Wyoming has violated the 28-day competitive bidding rule, we deny the Request for Review.

6. On our own motion, however, we grant a waiver of section 54.504(b). Generally, the Commission's rules may be waived for good cause shown.²⁰ Waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.²¹

7. Consistent with precedent, we conclude that waiver of section 54.504(b) is appropriate in this instance.²² Under Wyoming's plan for a statewide telecommunications network, hundreds of public

¹⁴ Requests for Review at 4-5.

¹⁵ Requests for Review at 5.

¹⁶ Requests for Review at 8.

¹⁷ Requests for Review at 5, 8.

¹⁸ The clause states that "[t]his provision shall not be construed to permit the State to terminate this Agreement in order to acquire similar services from another party...." Request for Review at 4.

¹⁹ See, e.g., *Request for Review by Currituck County Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-111040, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 5564 (Com. Car. Bur. 2000); *Request for Review by Gustine Independent School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-108651, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 8489 (Com. Car. Bur. 1999).

²⁰ 47 C.F.R. § 1.3.

²¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²² See *Request for Waiver of West Virginia Department of Education, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 02-

schools in Wyoming obtain high-speed data and video network equipment from the state master contracts negotiated by the state. Because Wyoming master contracts are not in compliance with section 54.504(b), hundreds of public schools have been denied universal service support. In order to comply with the Commission's rules, the schools must obtain services from contracts other than the state master contract, which may not result in the most cost-effective rates, as required by the Commission's rules.²³ In light of these circumstances, we find that it is appropriate, in this instance, to waive section 54.504(b) of the Commission's rules to permit Wyoming schools to submit FCC Form 471 applications using the State of Wyoming's master contracts with a contract award date that is less than 28 days after the posting of an FCC Form 470. We emphasize that competitive bidding rules are a central tenet of program funding and a tool for preventing waste, fraud and abuse. However, we find that there is a presumption that if an entity is in compliance with state procurement law, that the competitive bidding process is lawful and in compliance with our rules.

8. Furthermore, we find that granting a waiver here is consistent with the Commission's goal of minimizing universal service costs and will serve the public interest. In many instances, third parties negotiating master contracts may be able to secure lower rates than the eligible entity negotiating on its own behalf.²⁴ Indeed, the State of Wyoming states that its master contract has benefited hundreds of public schools in Wyoming by providing the best alternative for cost-effective service offerings.²⁵ Without this waiver, schools using the State of Wyoming state master contracts may lose funding for essential services or have their services disrupted. Such a result is inconsistent with the public interest. The Commission recognizes the importance of applicants' compliance with their respective state and local procurement processes.²⁶ We must reach a fair balance, however, between our ability to enforce program rules and the enforcement of state procurement laws.²⁷ Thus, in this instance, it is in the public interest to waive section 54.504(b) of our rules so that Wyoming schools have the opportunity to receive support under the schools and libraries support mechanism, provided that all other E-rate application requirements are satisfied. We therefore grant a waiver to the State of Wyoming and remand the applications to USAC for further action consistent with this order.

6, Order, DA 05-2179 (rel. July 27, 2005) (*West Virginia Order*) (finding waiver of Commission rules is in the public interest when rules prevented schools from obtaining E-rate funding from a state master contract).

²³ See 47 C.F.R. § 54.511(a).

²⁴ See *Fourth Reconsideration Order*, 13 FCC Rcd at 5452, para. 232 (concluding that allowing eligible entities to order eligible services from master contracts negotiated by a third party is consistent with the Commission's goal of minimizing universal service costs and therefore is also consistent with section 254(h)(1) of the Communications Act of 1934, as amended).

²⁵ Requests for Review at 4.

²⁶ See 47 C.F.R. § 54.504(a); FCC Form 471, Block 6 (requiring applicants to certify their compliance with state and local procurement laws).

²⁷ See, e.g., *West Virginia Order* at para. 11.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Requests for Review filed by the State of Wyoming, Cheyenne, Wyoming, on December 20, 2002 and February 12, 2003, ARE DENIED.

10. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j) and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-152 and 254, and sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.3, that waiver of section 54.504(b) of the Commission's rules IS GRANTED to the State of Wyoming, Cheyenne, Wyoming, and the applications are REMANDED to SLD for further action consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau