

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Waiver
Kentucky Department of Education
Frankfort, Kentucky
Schools and Libraries Universal Service
Support Mechanism
CC Docket No. 02-6

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 2007 Released: March 9, 2007

By the Acting Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant the petition of the Kentucky Department of Education (Kentucky) seeking a waiver of section 54.504(c) of the Commission's rules to enable Kentucky schools to use state master contracts to apply for universal service support under the schools and libraries support mechanism for Funding Year 2005 and future funding years. As explained below, we find that this waiver is in the public interest and warranted by the special circumstances surrounding the use of state master contracts in the state of Kentucky.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, commonly referred to as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, Internet access, and internal connections. 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. In accordance with the Commission's rules, an applicant must file with the Universal Service Administrative Company (USAC), for posting to its website, an FCC Form 470 requesting services. After the FCC Form 470 is posted, the applicant must

1 Request of Kentucky Department of Education for Waiver of Form 471 Line 30, Commission's Rule 54.504(c), filed April 22, 2005 (Waiver Petition).

2 47 C.F.R. §§ 54.501, 54.502, 54.503.

3 47 C.F.R. §§ 54.504, 54.511(c).

4 See Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470).

wait at least 28 days and then, pursuant to section 54.504(c) of the Commission's rules, enter into binding service agreements with its chosen providers before submitting an FCC Form 471.<sup>5</sup>

3. The FCC Form 471 requires applicants to certify, among other things, that they have signed contracts covering all of the services listed on their respective Forms 471.<sup>6</sup> The completed forms notify USAC of the services that have been ordered, the carrier 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.<sup>7</sup> Using information provided by the applicant in its FCC Form 471, USAC determines the amount of discounts for which the applicant is eligible.

4. Although applicants typically negotiate their contracts individually, they may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity.<sup>8</sup> In such instances, the third party initiating the master contract must comply with the Commission's competitive bidding requirements and state procurement laws.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

5. The Kentucky Department of Education negotiated state master contracts for the benefit of eligible entities in the state of Kentucky.<sup>12</sup> Consistent with the Commission's competitive bidding rules, Kentucky posted the appropriate FCC Forms 470 for these contracts on USAC's website and indicated on these forms its intent to permit annual renewals or extensions.<sup>13</sup> Under Kentucky's state procurement regulations, annual contract renewals cannot take place until after the filing deadline for the FCC Form 471.<sup>14</sup> As a result, when schools file an FCC Form 471 using Kentucky state master contracts,

---

<sup>5</sup> 47 C.F.R. § 54.504(c).

<sup>6</sup> FCC Form 471, Line 30.

<sup>7</sup> 47 C.F.R. §§ 54.504(b)(1), (b)(3), (c); *see also* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 471).

<sup>8</sup> *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).

<sup>9</sup> *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*).

<sup>10</sup> *Fourth Reconsideration Order*, 13 FCC Fcd at 5452-53, para. 233. *See also supra*, para. 2.

<sup>11</sup> *Fourth Reconsideration Order*, 13 FCC Fcd at 5452-53, para. 233.

<sup>12</sup> Waiver Petition at 1.

<sup>13</sup> Because Kentucky's FCC Forms 470 and/or Request for Proposal indicated the state's intent to have year-to-year extensions or renewals, such extensions or renewals may be exercised without the posting of a new FCC Form 470. *See* Waiver Petition at 1; *see also* <<http://www.universalservice.org/sl/applicants/step04/contract-guidance.asp>>.

<sup>14</sup> Waiver Petition at 1-2.

they do not have a signed contract in place for the funding year for which they are applying, which is inconsistent with the requirement of section 54.504(c) of the Commission's rules.<sup>15</sup>

6. In its petition, Kentucky asks the Commission to waive section 54.504(c) and the contract certification requirement on Line 30 of the FCC Form 471.<sup>16</sup> Specifically, Kentucky requests that the Commission permit applicants in the state of Kentucky to use the state master contracts at issue without having to certify that they have a signed contract in place at the time of their FCC Form 471 submissions.<sup>17</sup> Absent this waiver, Kentucky applicants exercising their options to extend or renew the terms of the state master contracts will not be able to submit completed FCC Form 471 applications in a timely manner. Kentucky states that good cause exists for waiving the contract certification requirement and that doing so furthers the public interest by ensuring that Kentucky schools receive the full amount of E-rate support for which they are eligible.<sup>18</sup>

### III. DISCUSSION

7. Consistent with precedent, we grant Kentucky's request for waiver of section 54.504(c) of the Commission's rules and the contract certification requirement on Line 30 of the FCC Form 471.<sup>19</sup> We find that Kentucky has demonstrated that special circumstances exist and that granting such a waiver is in the public interest.

8. Generally, the Commission's rules may be waived for good cause shown.<sup>20</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>21</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>22</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.<sup>23</sup>

9. We find that Kentucky has identified special circumstances that warrant a waiver of section 54.504(c) of the Commission's rules. As noted above, section 54.504(c) and, more specifically, Line 30 of the FCC Form 471, requires applicants to have signed contracts for eligible services in place

---

<sup>15</sup> See 47 C.F.R. § 54.504(c); FCC Form 471, Line 30.

<sup>16</sup> Waiver Petition at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Request for Waiver by 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. 96-45, 20 FCC Rcd 12890 (2005) (granting a waiver of section 54.504(c) of the Commission's rules to enable West Virginia schools to use state master contracts).

<sup>20</sup> 47 C.F.R. § 1.3.

<sup>21</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972).

<sup>22</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>23</sup> *Northeast Cellular*, 897 F.2d at 1166.

prior to submitting their FCC Form 471 applications.<sup>24</sup> Hundreds of public schools in Kentucky obtain telecommunications services, Internet access, and/or internal connections from state master contracts negotiated by the Kentucky Department of Education.<sup>25</sup> The record reveals that these schools are unable to comply with section 54.504(c) of the Commission's rules because of Kentucky's procurement requirements. In particular, these requirements preclude schools from signing contract extensions or renewals before the filing deadline for the FCC Form 471. Thus, schools seeking E-rate support using Kentucky state master contracts have two options: (1) they can file their FCC Form 471 applications without a signed contract in place and have their applications rejected for failing to comply with section 54.504(c) of the Commission's rules and the FCC Form 471 contract certification requirement; or (2) they can submit their FCC Form 471 applications after Kentucky has signed the contract extensions or renewals and have their applications rejected because they were filed after the close of the filing window.<sup>26</sup> Given these alternatives, Kentucky schools may be forced to obtain services from contracts other than the state master contracts, which may not result in the most cost-effective rates, as required by the Commission's rules.<sup>27</sup> In light of these circumstances, we believe that it is appropriate, in this instance, to waive section 54.504(c) of the Commission's rules to permit Kentucky schools to submit FCC Form 471 applications using Kentucky state master contracts without having a signed contract extension or renewal in place.

10. Furthermore, we find that granting Kentucky's Waiver Petition will serve the public interest and is consistent with the Commission's goal of minimizing universal service costs. We believe that, in many instances, third parties negotiating master contracts may be able to secure lower rates than the eligible entity negotiating on its own behalf.<sup>28</sup> Indeed, the state master contracts at issue have benefited hundreds of public schools in Kentucky by providing the best alternative for cost-effective service offerings.<sup>29</sup>

11. Without this waiver, schools using Kentucky state master contracts may lose funding for essential services or have their services disrupted merely because the E-rate application time line and Kentucky state purchasing processes do not align. We find that 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.<sup>30</sup> Often, however, we must reach a fair balance between our ability to enforce program rules and the enforcement of state procurement laws. We believe that it is in the public interest to waive section 54.504(c) of our rules and the FCC Form 471 contract certification requirement so that Kentucky schools will have the ability to obtain services from state master contracts

---

<sup>24</sup> 47 C.F.R. § 54.504(c).

<sup>25</sup> Waiver Petition at 2.

<sup>26</sup> The filing window is the period in which applicants must submit their completed FCC Forms 471 in order to have their requests for funding considered.

<sup>27</sup> See 47 C.F.R. § 54.511(a).

<sup>28</sup> 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).

<sup>29</sup> Kentucky Waiver Petition at 2.

<sup>30</sup> 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).

as well as the opportunity to receive support under the schools and libraries support mechanism, provided all other E-rate application requirements are satisfied. We therefore grant the instant request for waiver.

#### **IV. ORDERING CLAUSES**

12. ACCORDINGLY, IT IS ORDERED, pursuant to authority contained in sections 1-4 and 254 of the Communications Act, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated under 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 the Waiver Petition filed by the Kentucky Department of Education, on April 22, 2005, IS GRANTED.

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

Renée R. Crittendon  
Acting Deputy Chief  
Wireline Competition Bureau