

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of a
Decision of the
Universal Service Administrator by
Hispanic Information and Telecommunications
Network, Inc.
New York, NY
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-194580
CC Docket No. 02-6

ORDER

Adopted: October 30, 2008

Released: October 30, 2008

By the Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant an appeal of a decision by the Universal Service Administrative Company (USAC) seeking recovery of funding already disbursed to the Hispanic Information and Telecommunications Network (HITN) for discounted services provided to Biblioteca Residencial Aguadilla (Aguadilla) under the schools and libraries universal service mechanism, also known as the E-rate program.

II. BACKGROUND

2. Under 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 connections.

1 Letter from Rudolph Geist, on behalf of Hispanic Information and Telecommunications Network, to Federal Communications Commission, CC Docket No. 02-6 (filed Dec. 13, 2004) (Request for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 See Letter from KPMG to Universal Service Administrative Company (dated April 24, 2003) (independent accountants' report on Biblioteca Residencial Aguadilla: Funding Year 2000) (KPMG Audit Report).

3 See 47 C.F.R. §§ 54.501-54.503.

as part of its competitive bidding process.⁴ Moreover, in its *Mastermind Order*, released in 2000, the Commission observed that an “applicant irreparably impairs its ability to hold a fair and open competitive bidding process” when it delegates significant power over the service provider selection process to an entity that also competes in the process to be a service provider.⁵ In addition, the Commission’s rules provide that eligible schools and libraries must pay the full non-discounted portion of the services or products purchased with universal service discounts.⁶ Subsequently, in the *Fifth Report and Order*, the Commission held that beneficiaries should pay the discounted price of eligible services within 90 days after delivery of service.⁷ The Commission determined that allowing schools and libraries to delay for an extended time their payment for services would subvert the intent of our rule that the beneficiary must pay a portion of the cost of supported services.⁸ Thus, the Commission concluded that all funds disbursed should be recovered for any funding requests in which the beneficiary failed to pay its non-discounted share.⁹

3. *HITN’s Request for Review*. On October 27, 2000, USAC granted Aguadilla’s Funding Year 2000 funding request for internal connections (Funding Request No. 423091) for \$21,880 in support (a 90 percent discount on a \$24,310 purchase) and subsequently disbursed the full amount to HITN.¹⁰ On April 24, 2003, however, KPMG sent USAC an audit report it prepared concerning Aguadilla’s Funding Year 2000 application.¹¹ The KPMG report found three alleged rule violations: (1) KPMG could not find the equipment related to internal connections for the Dr. Agustin Stahl Library that was billed as delivered;¹² (2) Aguadilla relied upon the Puerto Rico Consortium of Schools and Libraries to select its service provider, but the consortium’s technology plan indicated that “HITN had a partnership with the

⁴ 47 C.F.R. § 54.504(a). There is, however, one limited exception for preexisting, binding contracts. 47 C.F.R. § 54.511(c).

⁵ See *Request for Review by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SPIN-143006149, CC Docket No. 96-45, 16 FCC Rcd 4028, 4033, para. 10 (2000). The Commission also recognized that prospective bidders may decline to participate in a competitive bidding process if they believe that the bidding will not be conducted in an open and fair manner, given that another bidder is involved in the selection process. *Id.* at 4033, para. 11. Under such circumstances, the Commission found that “a fair and open competitive bidding process has not occurred and the requirement that an applicant make a bona fide request for services has been violated.” *Id.*

⁶ 47 C.F.R. § 54.523; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776, 9036, para. 493 (1997) (*subsequent history omitted*) (*Universal Service First Report and Order*). See also *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26929, para. 41 (2003).

⁷ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15816, para. 24 (2004) (*Fifth Report and Order*). The Commission clarified that a failure to pay more than 90 days after completion of service presumptively violates the rule that the beneficiary must pay its share. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See Letter from Universal Service Administrative Company, to Moises Velasquez, Biblioteca Residencial Aguadilla (dated Oct. 27, 2000).

¹¹ See KPMG Audit Report.

¹² *Id.* at A-10.

consortium and that HITN would be responsible for incorporating the technology into the school”,¹³ and (3) Aguadilla had not paid its \$2,431 portion of the invoice from HITN because the invoice did not include the “certification” wording required by its governmental funding body.¹⁴ Although HITN appealed, USAC upheld all three KPMG findings, explaining: (1) Aguadilla did not provide any confirmation that the equipment was delivered and installed by HITN; (2) the audit disclosed a violation of the competitive bidding rules and the applicant concurred that believes that the procurement procedures were not followed; and (3) Aguadilla failed to pay its portion of the non-discounted amount, which was submitted for reimbursement by HITN.¹⁵ Based on these findings, on May 14, 2004, USAC sent commitment adjustment (COMAD) letters to Aguadilla and HITN, concluding that the funds associated with this funding request had been issued in violation of Commission rules and seeking full recovery of the disbursed funds.¹⁶ On July 13, 2004, HITN appealed USAC’s COMAD decision, and USAC subsequently denied the appeal on October 13, 2004.¹⁷

4. On December 13, 2004, HITN filed its Request for Review with the Commission, responding to the three charges in KPMG’s audit report.¹⁸ Specifically, with respect to the missing equipment, HITN states that it delivered the equipment at issue on May 15, 2000, and installed it on July 7 and July 14, 2000, in the Dr. Agustin Stahl building, and that the equipment is still located in that building.¹⁹ HITN reports that the equipment was originally installed in the Juan Ducos building, which is part of Aguadilla, but that a subsequent policy change by the Puerto Rico Housing Administration (PRHA) caused the equipment to be transferred within Aguadilla to the Dr. Agustin Stahl building.²⁰ It claims that KPMG did not find the equipment because KPMG looked in the Juan Ducos building, which was the address specified in Aguadilla’s FCC Form 471.²¹ HITN provides a signed statement from Eliel Cruz, an HITN employee, who visited the Aguadilla housing complex on June 24, 2004, verifying that HITN’s assertions are true, to the best of his belief.²² Second, with respect to the competitive bidding issue, HITN asserts that the competitive bidding process was overseen by the Consorcio de Escuelas y

¹³ *Id.* at A-4 to A-5.

¹⁴ *Id.* at A-8.

¹⁵ *See* Letter from Universal Service Administrative Company, to Loretta Garcia, HITN, on behalf of Biblioteca Residencial Aguadilla at 2 (dated Oct. 13, 2004) (USAC Appeal Decision).

¹⁶ *See* Letter from Universal Service Administrative Company, to Moises Velasquez, Biblioteca Residencial Aguadilla (dated May 14, 2004); Letter from Universal Service Administrative Company, to Jose Rodriguez, Hispanic Information and Telecommunications Network (dated May 14, 2004); 47 C.F.R. §§ 504(a), 54.511(c), 54.523.

¹⁷ *See* Letter from Loretta Garcia, counsel to HITN, to Universal Service Administrative Company (dated July 13, 2004) (HITN Appeal to USAC); USAC Appeal Decision.

¹⁸ *See* Request for Review.

¹⁹ *Id.* at 2, 4.

²⁰ *Id.* at 2. HITN states that, after the installation, PRHA decided to place libraries only in larger buildings, such as the Dr. Agustin Stahl building, and so HITN moved the equipment from the Juan Ducos building and reinstalled it in the Dr. Agustin Stahl building. *Id.* at 2-3.

²¹ *Id.* at 3.

²² *See* HITN Appeal to USAC at Att. 3.

Bibliotecas de Puerto Rico (CEBPR), and that HITN did not have a consultant involved in CEBPR's process.²³

5. Lastly, HITN argues that payment of the non-discounted portion of the E-rate services price is Aguadilla's responsibility, not HITN's.²⁴ It states that "HITN was not responsible for ensuring that [Aguadilla] pay its non-discounted portion of funding; in fact, HITN has absolutely no control over whether the applicant will ultimately pay its debts."²⁵ Nevertheless, HITN states that it made "commercially reasonable efforts to inform all parties . . . of the obligation to pay, and to collect any and all debts owed."²⁶ HITN claims that it sent bills for its services to Aguadilla on September 20, 2001, and May 13, 2002.²⁷ It also submits a letter it sent to the Puerto Rico Housing Authority (PRHA) in January 2003, demanding payment of \$329,953.19 in debts incurred over "the past several years" and threatening litigation if payment was not made immediately.²⁸ HITN observes that it would violate the Commission's rules for HITN to pay Aguadilla's share, and that HITN is the only party harmed by the non-payment.²⁹ Thus, HITN suggests that USAC should pursue payment from Aguadilla for this rule violation.³⁰

III. DISCUSSION

6. We grant HITN's appeal to permit it an additional opportunity to provide evidence in support of its claims, as explained below. We direct USAC to give HITN 15 days to provide additional explanations and documentation to address the three grounds upon which USAC based its decision to seek recovery of funds disbursed to HITN. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services or the petitioner's application.³¹ To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the applications and issue a decision based on a complete review and analysis no later than 90 calendar days from release of this order.³²

²³ Request for Review at 4-5.

²⁴ *Id.* at 5.

²⁵ *Id.* at 6.

²⁶ *Id.* at 7.

²⁷ Although HITN did not include this information in its appeal to the Commission, it stated this in its appeal to USAC. See Letter from Loretta Garcia, on behalf of HITN, to USAC, Schools and Libraries Division at 6 (dated July 13, 2004).

²⁸ Request for Review at Attachment 5. The letter states that PRHA has jurisdiction over Aguadilla. *Id.*

²⁹ *Id.* at 6.

³⁰ *Id.*

³¹ Additionally, nothing in this order is intended: (1) to authorize or require payment of any claim that previously may have been released by a service provider or applicant, including in a civil settlement or plea agreement with the United States; or (2) to authorize or require payment to any person or entity that has been debarred from participation in the E-rate program.

³² In performing a complete review and analysis of the underlying application, USAC shall either continue or stop its recovery action on the underlying application before it, or, if continuing the recovery of funds, provide the applicant with any and all grounds for that decision.

7. *Missing equipment.* We direct USAC to give HITN another opportunity to provide additional evidence that the equipment found to be missing by KPMG was actually in the Dr. Agustin Stahl Library in spring of 2003, when KPMG conducted its audit. We find the signed, but not notarized, statement of HITN's own employee, based on a visit to Aguadilla a year after the audit, to be insufficient to refute the audit finding. To support its statement of facts, HITN should provide USAC with at least one signed and notarized statement from a current or former employee of Aguadilla who was directly involved in the decision to transfer the specific equipment at issue here from the Juan Ducos building to the Dr. Agustin Stahl building.³³

8. *Competitive bidding.* We also direct USAC to look more carefully at the competitive bidding issue. In particular, USAC should examine the "partnership" between the Puerto Rico Consortium of Schools and Libraries and HITN as described by the technology plan. Most troubling is Aguadilla's apparent admission in its response to the audit report findings that it did not follow procurement procedures.³⁴ We direct USAC to determine whether the relevant services were competitively bid. Another key question is whether HITN improperly influenced its selection as Aguadilla's service provider. The essence of the competitive bidding process is that applicants will select service providers independently, based on the merit of their proposals, without any undue influence from service providers. We direct USAC to determine whether HITN's involvement with the consortium compromised the fairness of the bidding process by deterring other bidders from competing. USAC should request additional information from the relevant parties regarding HITN's relationship with the Puerto Rico Consortium, along with supporting documentation.

9. *Failure of the applicant to pay the non-discounted price of E-rate services.* The Commission's rule requiring applicants to pay the non-discounted price of any purchases subject to E-rate discounts is an essential component of the E-rate program's safeguards against waste, fraud, and abuse.³⁵ HITN does not dispute that this rule was violated, but instead contends that the rule violation was by Aguadilla, not HITN, and, therefore, USAC should seek recovery from Aguadilla, not HITN.³⁶ As a service provider, however, HITN is required to certify in the Service Provider Annual Certification Form 473 that it has billed the applicant for the applicant's non-discounted portion.³⁷ This step is crucial to ensuring that the applicant actually pays its non-discounted share. HITN is correct that the E-rate program rules require beneficiaries to pay the non-discounted portion of their service bills, but the current record is unclear on whether HITN made a bona fide effort to collect that share from Aguadilla.³⁸

10. The current record shows that HITN's effort to secure payment for services delivered during Funding Year 2000 consisted of: (1) a bill sent to Aguadilla in September 2001; (2) a follow-up bill eight months later (May 2002); and (3) eight months after that (January 2003), a letter to PRHA demanding payment of more than \$300,000 and threatening litigation. HITN does not indicate that it

³³ Other evidence might include physical proof of the equipment's location.

³⁴ KPMG's audit report stated that Aguadilla "believes that the procurement procedures were not followed." See KPMG Audit Report at 4-5.

³⁵ See *Universal Service First Report and Order*, 12 FCC Rcd at 9036, para. 493.

³⁶ Request for Review at 5-6.

³⁷ See *Universal Service for Schools and Libraries*, Service Provider Annual Certification Form, OMB 3060-0856, at Block 2 (April 2007).

³⁸ See 47 C.F.R. § 54.523.

made any subsequent efforts thereafter, or that it ultimately did obtain payment for the services from Aguadilla.

11. We direct USAC to give HITN an opportunity to provide additional information, explanation, and documentation to demonstrate that it made a bona fide effort to collect the payment due it from Aguadilla. In particular, HITN should explain why it limited its efforts to secure payment on this application to three written requests over a 16-month period, with no further efforts over the following years. HITN should also explain whether it made any inquiries – by phone or in person – concerning Aguadilla’s non-payment, and whether it disputes Aguadilla’s statement that the obstacle to payment was HITN’s failure to include the “certification” wording required by the relevant funding body. HITN should also inform USAC whether or not the payment was ever made. In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services or the petitioners’ applications. We remind USAC of its obligation to independently determine whether the disbursement of universal service funds would be consistent with program requirements, Commission rules and orders, or applicable statutes and to decline to disburse funds where this standard is not met.

12. Finally, we emphasize that the Commission is 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. The Commission reserves the right to conduct audits and investigations to determine compliance with the 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 improperly or in a manner inconsistent with the statute or the Commission’s rules. To the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains 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. The Commission remains 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 CLAUSE

13. ACCORDINGLY, IT IS ORDERED, 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 section 54.722(a) of the Commission’s rules, 47 C.F.R. § 54.722(a), that the request for review filed by Hispanic Information and Telecommunications Network on December 13, 2004, IS GRANTED and Aguadilla’s application is REMANDED to USAC for further consideration in accordance with the terms of this order.

14. IT IS FURTHER 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 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 Universal Service Administrative Company SHALL COMPLETE its review of the remanded application and ISSUE a decision based on a complete review and analysis no later than 90 calendar days from release of this order.

15. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Jennifer K. McKee
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