

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of )
Request for Review of a )
Decision of the )
Universal Service Administrator by )
Idaho Falls School District 91 ) File No. SLD-232506
Idaho Falls, ID )
Schools and Libraries Universal Service ) CC Docket No. 02-6
Support Mechanism )

ORDER

Adopted: May 20, 2010

Released: May 20, 2010

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant a request for review of a decision by the Universal Service Administrative Company (USAC) denying a request by Idaho Falls School District 91 (Idaho Falls) to change its service provider for the E-rate program (more formally known as the schools and libraries universal service support program). Specifically, the Bureau grants a waiver of the Commission's competitive bidding rules and permits USAC to allow Idaho Falls to change its service provider. The Bureau finds that Idaho Falls' leased WAN service should have been categorized as Internet access rather than telecommunications by USAC. Idaho Falls' failure to seek bids for this service as Internet access was arguably a violation of the Commission's competitive bidding requirements because of the possibility that its FCC Form 470 did not describe its desired service sufficiently to enable potential service providers to submit bids. The Bureau finds, however, that the facts in this case rise to the level of the "special circumstances" necessary for a waiver of the Commission's rules. We therefore grant the request for review and remand the underlying application to USAC for processing 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 denial based upon a complete review and analysis no later than 90 calendar days from the release date of this order.

1 Letter from John A. Christensen, Idaho Falls School District 91, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Jul. 12, 2002) (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 We estimate that the appeal granted in this order involves an application for approximately \$40,781 in funding. We note that USAC has already reserved sufficient funds to address outstanding appeals. See, e.g., Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2010 (Apr. 30, 2010). Thus, we determine that the action we take today should have minimal impact on the universal service fund as a whole.

## 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, basic maintenance of internal connections, and internal connections.<sup>3</sup> The applicant must file an FCC Form 470 to request discounted services and specify whether the service is telecommunications, Internet access, internal connections, or basic maintenance of internal connections and provide a description of the services being sought.<sup>4</sup> The applicant must describe the desired services with sufficient specificity to enable potential service providers to submit bids for E-rate eligible services.<sup>5</sup> The FCC Form 470 must be posted on USAC's Schools and Libraries Division website for at least 28 days before the applicant can file its FCC Form 471.<sup>6</sup> To demonstrate compliance with the competitive bidding requirements, the applicant must, in connection with each funding request, reference an FCC Form 470 seeking the same category of service later contracted for and reflected in the FCC Form 471.<sup>7</sup>

3. Applicants may obtain discounts on Internet access and internal connections irrespective of whether they purchase those offerings from telecommunications or non-telecommunications carriers.<sup>8</sup> To receive E-rate discounts on "telecommunications services," however, applicants must purchase those services from entities legally recognized as "telecommunications carriers."<sup>9</sup> The term

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<sup>3</sup> 47 C.F.R. §§ 54.501-54.503.

<sup>4</sup> 47 C.F.R. § 54.504(b).

<sup>5</sup> *Id*; see also *Federal-State Board on Universal Service*, CC Docket 96-45, Report and Order, 12 FCC Rcd 8776, 9078, para. 575 (1997) (*Universal Service First Report and Order*) (subsequent history omitted).

<sup>6</sup> 47 C.F.R. § 54.504(b)(4). The FCC Form 471 is the Services Ordered and Certification Form, available at [http://www.universalservice.org/res/documents/sl/pdf/471\\_FY05.pdf](http://www.universalservice.org/res/documents/sl/pdf/471_FY05.pdf) (last visited May 20, 2010).

<sup>7</sup> Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 at 19 (December 2004) (FCC Form 471 Instructions), available at [http://www.universalservice.org/res/documents/sl/pdf/471i\\_fy05.pdf](http://www.universalservice.org/res/documents/sl/pdf/471i_fy05.pdf) (last visited May 20, 2010). Generally, there are three categories of service for which an applicant may request services on the FCC Form 470: telecommunications services, Internet access, and internal connections. See Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470 Instructions), available at <http://www.universalservice.org/res/documents/sl/pdf/470i.pdf> (last visited May 20, 2010). The FCC Form 470 must seek funding for the same services later requested in the FCC Form 471. If it does not, the FCC Form 471 will be rejected for violating the Commission's competitive bidding requirements. See, e.g., FCC Form 471 Instructions at 22; 47 C.F.R. §§ 54.504(b)-(c); *Request for Review by Aberdeen School District No. 5, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-327601, CC Docket No. 96-45, Order, 19 FCC Rcd 22910 (2004).

<sup>8</sup> See 47 C.F.R. §§ 54.501(a), 54.503 (eligibility for services provided by telecommunications carriers); 54.517(b) (services provided by non-telecommunications carriers).

<sup>9</sup> See 47 U.S.C. § 254 (h)(1)(B); *Universal Service First Report and Order*, 12 FCC Rcd at 9177-78, 9005-23, 9084-90, paras. 589-600; *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, 95-72, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5413-14, paras. 163-164 (1997) (*Fourth Reconsideration Order*).

“telecommunications carrier” includes only carriers that offer telecommunications on a common carrier basis.<sup>10</sup>

4. To provide services under the E-rate program, service providers must obtain a SPIN from USAC.<sup>11</sup> USAC will assign a SPIN to each company that files an FCC Form 498 to register with USAC as a service provider that receives support from the universal service support mechanisms.<sup>12</sup> An applicant may request a corrective SPIN change, where either the applicant or USAC made a data entry error, or a change occurred that was not initiated by the applicant.<sup>13</sup>

5. For funding year 2000, Idaho Falls posted an FCC Form 470 requesting, under the telecommunications service category, a leased Wide Area Network (WAN) to provide Internet access, and eventually signed a multi-year contract with AT&T Broadband Network Solutions.<sup>14</sup> USAC initially concluded that the requested service was Priority 2 internal connections.<sup>15</sup> Because Idaho Falls qualified for a 59 percent discount in funding year 2000, and funding for internal connections was only disbursed to applicants that qualified for a discount rate of 82 percent and above in that funding year, this decision effectively denied Idaho Falls’ funding request.<sup>16</sup> Idaho Falls appealed USAC’s decision to categorize its leased WAN as internal connections.<sup>17</sup> In its March 8, 2001 decision on appeal, USAC agreed with Idaho

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<sup>10</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 9177-78, paras. 785-786; *Fourth Reconsideration Order*, 13 FCC Rcd at 5413-14, paras. 163-164.

<sup>11</sup> See USAC website, Step 1: Obtain a Service Provider Identification Number (Submit FCC Form 498), <http://www.usac.org/sl/providers/step01/> (last visited May 20, 2010).

<sup>12</sup> *Id.*

<sup>13</sup> Corrective SPIN changes include the following: (1) FCC Form 471 data entry errors made by the applicant or USAC; (2) the original service provider has merged with, or been acquired by, another company and the SPIN indicated on the Funding Request Number (FRN) has changed; (3) other instances when the SPIN indicated on the FCC Form 471 changed and the change was not initiated by the applicant. See USAC website, Service Provider Identification Number (SPIN) Change Guidance, <http://www.universalservice.org/sl/about/changes-corrections/spin-change-guidance.aspx> (last visited May 20, 2010).

<sup>14</sup> See FCC Form 470, Idaho Falls School District 91 (filed Nov. 29, 1999); Request for Review at 1, 3.

<sup>15</sup> See Letter from USAC to Idaho Falls School District 91 (dated Apr. 28, 2000) (Funding Year 2000 Funding Commitment Decision Letter). If it is determined that a service is an internal connection rather than a telecommunications or Internet access service, the service is categorized as a Priority 2 internal connection. See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, et. al, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13754, para. 37 (1999) (listing factors to consider when distinguishing between a telecommunications or Internet access service and an internal connection).

<sup>16</sup> See FCC Form 471, Idaho Falls School District 91, at Line 23j (filed Jan. 14, 2000) (Idaho Falls 2000 FCC Form 471) (establishing eligibility for a 59 percent discount); Funding Year 2000 Funding Commitment Decision Letter. The Commission’s priority rules provide that requests for telecommunications and Internet access services shall receive first priority for available funds and that requests for internal connections shall receive secondary priority. See 47 C.F.R. § 54.507(g)(1). If sufficient funds are not available to fund all requests for discounts for internal connections, USAC shall allocate funds for discounts beginning with those applicants eligible for a 90 percent level and, to the extent funds remain, continue to allocate funds for discounts to applicants at each descending single discount percentage, e.g., 89 percent, 88 percent, and so on. *Id.*

<sup>17</sup> See Letter from John A. Christensen, Idaho Falls School District 91, to Schools and Libraries Division, USAC (dated May 3, 2000).

Falls that the requested service was a telecommunications service.<sup>18</sup> USAC then issued a letter that granted the requested funding as Priority 1 service, but also changed the category of service from telecommunications to Internet access without explanation.<sup>19</sup>

6. Before its appeal was decided, on January 9, 2001, Idaho Falls filed its FCC Form 471 for funding year 2001, referencing the same FCC Form 470 that it had referenced in its funding year 2000 application.<sup>20</sup> On March 1, 2001, AT&T Broadband Network sold Idaho Falls' contract to Cable One, Inc. On May 15, 2001, Idaho Falls applied for, and was granted, a SPIN change from AT&T Broadband Network to Cable One, Inc. for funding year 2000.<sup>21</sup> On September 12, 2001, Idaho Falls applied for another SPIN change for funding year 2001.<sup>22</sup> This time, however, USAC denied the SPIN change because Cable One, Inc. was not a telecommunications carrier and the requested service was categorized as telecommunications on the originating funding year 2000 FCC Form 470.<sup>23</sup> USAC explained that only eligible telecommunications providers may provide telecommunications services under the E-rate program.<sup>24</sup>

7. In its request for review to the Commission, Idaho Falls states that it believes that the proper category of services should have been Internet access, rather than telecommunications services, because USAC had changed the categorization of the same requested service to Internet access for the funding year 2000 application.<sup>25</sup> Accordingly, Idaho Falls believes that USAC should have changed the funding category from telecommunications to Internet access for funding year 2001, just as it did for funding year 2000.<sup>26</sup> This would therefore permit USAC to grant the SPIN change to CableOne, Inc., a non-telecommunications provider.<sup>27</sup>

### III. DISCUSSION

8. Based on the facts and circumstances of this case, we grant Idaho Falls' request for review and remand the underlying application to USAC for processing consistent with this order. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review of the

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<sup>18</sup> See Letter from USAC to John A. Christensen, Idaho Falls School District 91 (dated Mar. 8, 2001) (Funding Year 2000 Administrator Decision on Appeal).

<sup>19</sup> See Letter from USAC to John Christensen, Idaho Falls School District 91, at 4 (dated May 21, 2001) (Funding Year 2000 Revised Funding Commitment Decision Letter).

<sup>20</sup> See FCC Form 471, Idaho Falls School District 91 (filed Jan. 9, 2001).

<sup>21</sup> Request for Review at 1. See also Letter from John A. Christensen, Idaho Falls School District 91, to Schools and Libraries Division, USAC (dated May 15, 2001).

<sup>22</sup> See Letter from John A. Christensen, Idaho Falls School District 91, to Schools and Libraries Division, USAC (dated Sept. 12, 2001).

<sup>23</sup> See Letter from USAC to Idaho Falls School District 91 (dated July 5, 2002) (Administrator's Decision on SPIN Change).

<sup>24</sup> *Id.*

<sup>25</sup> See Request for Review at 2, 4.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

application and issue an award or denial based upon a complete review and analysis no later than 90 calendar days from the release of this order.<sup>28</sup>

9. We find that the facts in this case rise to the level of the “special circumstances” necessary for a waiver of section 54.504(b) of the Commission’s competitive bidding rules.<sup>29</sup> In this case, we conclude that, because Idaho Falls sought a leased WAN for Internet access service, the service should have been categorized as Internet access rather than telecommunications.<sup>30</sup> As a result, the services that Idaho Falls sought were eligible for funding as Priority 1 services. However, Idaho Falls’ failure to categorize this service as Internet access on the FCC Form 470 was arguably a violation of the Commission’s competitive bidding requirements because of the possibility that the FCC Form 470 did not describe the desired service sufficiently to enable potential service providers to submit bids.<sup>31</sup> To the extent this was the case, we find that special circumstances justify a waiver of our competitive bidding rules in this instance. First, we note that this error took place in the very early stages of the E-rate program, when applicants, service providers, and USAC were not yet familiar with the operation of the program. In fact, in this case, it appears that USAC erred when it stated on appeal that the leased WAN was a telecommunications service, but then categorized it as Internet access in the Funding Year 2000 Revised Funding Commitment Decision Letter.<sup>32</sup> Second, when Idaho Falls filed its FCC Form 470 for funding year 2000 on November 29, 1999, the relevant eligible services list discussed leased WANs only in the context of telecommunications services:

In terms of the “E-Rate” program, a MAN [Metropolitan Area Network] and WAN [Wide Area Network] are considered the same... The cost of purchasing MANs, as is the WAN, to provide telecommunications service is not eligible for support. However, schools and libraries are not precluded from receiving support for a metropolitan area network run over leased telephone lines because such an arrangement constitutes a telecommunications service.<sup>33</sup>

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<sup>28</sup> In performing a complete review and analysis of the underlying application, USAC shall either grant the underlying application before it, or, if denying the application, provide the applicant with all grounds for denial.

<sup>29</sup> See 47 C.F.R. § 54.504(b). Generally, the Commission’s rules may be waived for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *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). 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*, 418 F.2d at 1157. 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. *Northeast Cellular*, 897 F.2d at 1166. *Accord*, *Network IP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

<sup>30</sup> See, e.g., Letter from John Christensen, Idaho Falls School District 91 to Schools and Libraries Division, USAC at Attachment (dated May 3, 2000) (ATT Summary of Services). The ATT Summary of Services states that it is providing “Internet transport as well as internal e-mail transport.” *Id.* See also Idaho Falls 2000 FCC Form 471 at Attachment 1 (stating that ATT/TCI Network Solutions, Inc. was providing the applicant with a WAN that would include “Internet delivery from the administration site to each school...”).

<sup>31</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 9078, para. 575.

<sup>32</sup> See Funding Year 2000 Administrator Decision on Appeal; Funding Year 2000 Revised Funding Commitment Decision Letter.

<sup>33</sup> See FCC Form 470, Idaho Falls School District 91 (filed on Nov. 29, 1999); Schools and Libraries Eligible Services List (dated October 23, 1999), available at

The eligible services list therefore only discussed a leased WAN's eligibility in connection with telecommunications service and did not mention the use of a leased WAN for Internet access.<sup>34</sup> We find that, pursuant to the eligible services list available at the time, it was understandable for Idaho Falls to make the mistake of assuming that a leased WAN should be listed as a telecommunications service on the FCC Form 470 even if the service would be used for Internet access. Third, because Idaho Falls' Internet access service could be provided by Cable One, Inc. under the E-rate program rules, a SPIN change is appropriate here, consistent with USAC's guidance, because the change of service providers was not initiated by the applicant, but by AT&T Broadband Network, which sold the contract.<sup>35</sup> Accordingly, we find that good cause exists to grant Idaho Falls a waiver of section 54.504(b) of the Commission's competitive bidding rules to allow it to re-categorize the leased WAN as Internet access.<sup>36</sup> We also direct USAC to grant Idaho Falls' requested SPIN change for funding year 2001, because, as Idaho Falls correctly states, Internet access service may be supplied by any provider, whether or not it is a telecommunications carrier.

10. We emphasize the limited nature of this decision. Although we grant the Idaho Falls' request for review, this order does not alter the obligation of participants in the E-rate program to comply with the Commission's rules.<sup>37</sup> We continue to require E-rate applicants to submit complete, timely, and accurate information to USAC as part of the application review process.

11. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services or the petitioner's application.<sup>38</sup> 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 USAC has evidence that this standard has not been met. The direction we provide USAC will not lessen or preclude any application review procedures of USAC. Indeed, we retain our commitment to detecting and deterring potential instances of waste, fraud, and abuse by ensuring that USAC continues to scrutinize applications and takes steps to educate applicants in a manner that fosters program participation. All existing E-rate program rules and requirements will continue to apply, including the existing forms and documentation, USAC's Program Integrity Assurance review procedures, and other processes designed to ensure applicants meet the applicable program requirements.

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[http://www.universalservice.org/res/documents/sl/pdf/ESL\\_archive/EligibleServicesList\\_102399.pdf](http://www.universalservice.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_102399.pdf) (last visited May 20, 2010) (Funding Year 2000 ESL).

<sup>34</sup> See Funding Year 2000 ESL.

<sup>35</sup> See USAC website, Service Provider Identification Number Change Guidance, <http://www.usac.org/sl/about/changes-corrections/spin-change-guidance.aspx> (last visited May 20, 2010) (explaining that an operational SPIN change is a request to change the service provider associated with an FRN). See also USAC website, Operational SPIN Change, <http://www.usac.org/sl/about/changes-corrections/operational-spin.aspx> (last visited May 20, 2010).

<sup>36</sup> See FCC Form 471 Instructions at 22; 47 C.F.R. §§ 54.504(b)-(c); *Universal Service First Report and Order*, 12 FCC Rcd at 9078, para. 575.

<sup>37</sup> 47 C.F.R. §§ 54.501-503.

<sup>38</sup> 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.

12. Finally, we are committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-rate program are used for appropriate purposes. Although we grant the request for review addressed here, this action in no way affects the authority of the Commission or USAC to conduct audits and investigations to determine compliance with the 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 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, it 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 program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that 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 the Commission's procedures and in cooperation with law enforcement agencies.

#### IV. ORDERING CLAUSES

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 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 request for review filed by Idaho Falls School District 91, Idaho Falls, Idaho on July 12, 2002, IS GRANTED and the application is REMANDED to USAC for further consideration in accordance with the terms of this order.

14. IT IS FURTHER 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 pursuant to authority 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 section 54.504(b) of the Commission's rules, 47 C.F.R. § 54.504(b), IS WAIVED to the limited extent provided herein.

15. 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 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 USAC SHALL COMPLETE its review of this application and ISSUE an award or a denial based on a complete review and analysis no later than 90 calendar days from the release date of this order.

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

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey  
Deputy Chief  
Wireline Competition Bureau