

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of
Decision of the
Universal Service Administrator by
Independent School District of Boise City
Boise, Idaho
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-314699
CC Docket No. 02-6

ORDER

Adopted: October 2, 2012

Released: October 2, 2012

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

1. Consistent with precedent,1 we grant and remand requests filed by the Independent School District of Boise City (Boise ISD) and its service provider, IDACOMM, seeking review of a decision made by the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program) denying Boise ISD funding on the basis that Boise ISD was purchasing exclusive access to a wide area network (WAN) in violation of E-rate rules.2 Based on our review of the record, we find that Boise ISD's leasing of dark

1 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, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5431 (1997) (Fourth Order on Reconsideration) (finding that although schools and libraries are not permitted to build or a purchase WAN using E-rate support, they are permitted to lease WAN telecommunications services); Requests for Review of the Decisions of the Universal Service Administrator by the Department of Education of the State of Tennessee et al., CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13750 (Tennessee Order) (1999) (concluding that relevant indicia for determining whether an applicant is seeking to purchase a WAN include: what services are provided over the WAN, whether there are exclusivity or lease purchase arrangements, and the structure of the contract (e.g. whether there is a substantial payment for upfront capital costs); Request for Review by Brooklyn Public Library of a Decision of the Universal Service Administrator, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 18598, 18606-07 (Brooklyn Order) (2000) (finding that because the non-recurring charge for capital investment vastly exceeded the monthly recurring charge, Brooklyn must prorate the non-recurring capital investment charges equally over a term of at least three years in duration).

2 Letter from Jim Marconi, The Independent School District of Boise City, to Office of the Secretary, Federal Communications Commission (filed May 19, 2003) (Boise ISD Request for Review); Letter from Michael K. Feiler, Executive Vice President, IDACOMM, to Office of the Secretary, Federal Communications Commission (filed May 28, 2003) (IDACOMM Request for Review). See also Letter from Jim Marconi, The Independent School District of Boise City, to Office of the Secretary, Federal Communications Commission (dated Nov. 21, 2003) (Appeal (continued...))

fiber did not constitute purchase of a WAN, and that its lease of dark fiber service in funding year 2002 was eligible for E-rate funding, subject to certain other program requirements.

2. Schools and libraries may use universal service funds to lease telecommunications services provided by WANs and to fund equipment and infrastructure build-out associated with the provision of such services.³ By contrast, schools and libraries are not permitted to build or purchase WANs using E-rate support.⁴ The Commission has found that some leasing arrangements for WAN services are in effect purchase agreements that grant the lessee *de facto* ownership status.⁵ The Commission has concluded that relevant indicia for determining whether an applicant is seeking to purchase a WAN include: what services are provided over the WAN, whether there are exclusivity or lease purchase arrangements, and the structure of the contract (*e.g.* whether there is a substantial payment for upfront capital costs).⁶ For instance, if the applicant seeks universal service funding to purchase dedicated facilities for its exclusive use, it is likely that its funding request would be denied on the basis that the applicant is constructing an ineligible WAN.⁷ None of these factors alone is determinative, but each must be considered in light of the facts presented.⁸

3. Boise ISD sought E-rate program support to lease dark fiber from IDACOMM as Internet access in funding year 2002.⁹ It sought \$555,000 in annual recurring charges and \$365,000 in non-recurring charges to install the dark fiber to Boise ISD's schools throughout the city.¹⁰ USAC denied funding because it determined that Boise ISD's request for E-rate funding in the Internet access category for "an exclusive access WAN reaches the same result as that prohibited by section 54.518 of [the

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Addendum). Section 54.719(c) of our 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).

³ *Fourth Order on Reconsideration*, 13 FCC Rcd at 5431, para. 193 n.585; *Tennessee Order*, 14 FCC Rcd at 13749, para. 29 (recognizing that all service providers include within their customer rates some amount of the cost of building the facilities used to provide such services to customers and that universal service funds may be used to fund equipment and infrastructure build-out associated with the provision of eligible services to eligible schools and libraries); *Brooklyn Order*, 15 FCC Rcd at 18604, para. 12 (reaffirming the principle that universal service funds may be used to fund equipment and infrastructure build-out associated with the provision of eligible services to schools and libraries).

⁴ 47 C.F.R. § 54.518. *See Fourth Reconsideration Order*, 13 FCC Rcd at 5430-31.

⁵ *Tennessee Order*, 14 FCC Rcd at 13750, para. 31.

⁶ *Id.*

⁷ *See Brooklyn Order*, 15 FCC Rcd at 18604, para. 14, n.35.

⁸ *Tennessee Order*, 14 FCC Rcd at 13750, para. 31.

⁹ Boise ISD Request for Review at 1.

¹⁰ *See IDACOMM Request for Review*; Letter from Schools and Libraries Division, USAC to Jim Marconi, The Independent School District of Boise City, dated Dec. 3, 2002 (Funding Commitment Decision Letter). *See also* Facsimile from Jim Marconi, The Independent School District of Boise City, to Ali Raza, Schools and Libraries Division, USAC, Attachment-Dark Fiber Strands Master License Agreement (dated Apr. 25, 2002)(IDACOMM Contract); The Independent School District of Boise City, FCC Form 471, dated Jan 16, 2002; Item 21 Attachment 6 – IDACOMM invoice.

Commission's] rules."¹¹ Both Boise ISD and IDACOMM filed appeals with USAC seeking review of the decision to deny funding, asserting that Boise ISD does not have exclusive access to the fiber because IDACOMM retains the right to provision new circuits for additional clients on the fiber currently utilized by Boise ISD.¹² USAC denied the appeal.¹³ Boise ISD and IDACOMM then filed the instant petitions for review with the Commission.¹⁴

4. Based on our review of the record, we find that the service requested by Boise ISD, leased dark fiber, is eligible for E-rate funding.¹⁵ As was the case with the applications at issue in the *Tennessee Order*, Boise ISD and IDACOMM did not have an exclusivity arrangement limiting the use of the IDACOMM network to Boise ISD.¹⁶ Under the terms of the contract, IDACOMM retained ownership of all of the fiber within its network including the fiber supplying connectivity to Boise ISD, as well as the right to provision new circuits for additional clients on the same fiber.¹⁷ The Commission has previously held that recipients may receive E-rate discounts for the lease of equipment and infrastructure build-out associated with the provision of services.¹⁸ Because the non-recurring charges for this lease of dark fiber did not vastly exceed the recurring charges sought, Boise ISD did not need to amortize according to the precedent established in the *Brooklyn Order*.¹⁹

¹¹ Funding Commitment Decision Letter; *see also* Letter from Schools and Libraries Division, USAC to Jim Marconi, The Independent School District of Boise City, dated Apr. 1, 2003 (Administrator's Decision on Appeal). *See also* 47 C.F.R. § 54.518.

¹² Letter from Jim Marconi, The Independent School District of Boise City, to Schools and Libraries Division, USAC (dated Dec. 9, 2002) (Boise ISD USAC Appeal); Letter from Michael K. Feiler, Executive Vice President, IDACOMM, to Schools and Libraries Division, USAC (filed Jan. 23, 2003) (IDACOMM USAC Appeal).

¹³ Administrator's Decision on Appeal.

¹⁴ Boise ISD Request for Review; IDACOMM Request for Review.

¹⁵ Dark fiber was eligible as Internet access in funding year 2002, and it appears that Boise ISD met the eligibility criteria. The dark fiber was going to be used immediately, Boise ISD was going to provide the modulating electronics to light the fiber, the electronics were located solely at eligible sites, and they claimed it was the most cost effective solution for Internet access. *See* USAC website, Schools and Libraries Eligible Services List, 2001 Eligible Services List – October; <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx> dated Oct. 17, 2001 at 33 (Funding Year 2002 ESL).

¹⁶ *Tennessee Order*, 14 FCC Rcd at 13750-13751, paras. 31-32.

¹⁷ IDACOMM Request for Review at 2; Boise ISD USAC Appeal at Attachment (Master License Agreement).

¹⁸ *Tennessee Order*, 14 FCC Rcd at 13749, para. 29 (stating that the Commission expects Internet access service providers to include some portion of the cost of facilities to provide Internet access within the charges for providing that access and that it could not find that such costs should be excluded from those charges). The Commission established in the *Fourth Order on Reconsideration* that, while WANs could not be built or purchased using E-rate support, such services could be leased. *See Fourth Order on Reconsideration*, 13 FCC Rcd at 5318, 5431, para. 193 n.585.

¹⁹ *Brooklyn Order*, 15 FCC Rcd at 18606-18607, para. 20 (finding that because the non-recurring charge for capital investment vastly exceeded the monthly recurring charge, Brooklyn could receive funding for the non-recurring charges associated with capital investment in an amount equal to the investment prorated equally over a term of at least three years in duration). The non-recurring upfront charge sought by Boise ISD was also below the \$500,000 threshold used by USAC as a processing standard for amortization of upfront capital charges. *See* USAC website, Wide Area Networks, Capital Investment Costs, <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-> (continued....)

5. Therefore, based on our review of the record, we find that Boise ISD's request for Internet access is eligible and grant the Requests for Review. On remand, we direct USAC to process and grant E-rate support for Boise ISD's funding year 2002 request for leased dark fiber and to reduce the funding request by the amount of any ineligible charges. While the dark fiber Boise ISD sought was eligible for funding, the IDACOMM contract does include two locations described as "Facilities/Operations."²⁰ These would not qualify as eligible applicant sites, and we direct USAC to reduce funding by the costs attributed to servicing these sites. We also direct USAC to reduce the funding request by any other ineligible costs that were included.

6. We also waive any Commission rules and direct USAC to waive any procedural deadlines, such as the invoicing deadline, that might be necessary to effectuate our ruling, given the length of time that has passed since the application was denied. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review and issue an award or a denial based on a complete review and analysis no later than 90 calendar days. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services or the petitioner's application. At this time, there is no evidence of waste, fraud or abuse in the record.

7. 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 authority delegated in 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 Independent School District of Boise City and IDACOMM ARE GRANTED and the underlying application IS REMANDED to USAC for further action consistent with this order no later than 90 calendar days from the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

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[services/wan.aspx](#) (last visited Oct. 2, 2012) (providing that where applicants enter a multi-year contract and the upfront or non-recurring charge is \$500,000 or more, the total charge must be prorated evenly over a period of at least three years, and applicants may not seek to recover more than one-third of the total non-recurring charges in any one funding year if they are \$500,000 or more).

²⁰ IDACOMM Contract.