

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of
Decisions of the
Universal Service Administrator by
Euclid City School District
Euclid, OH
Shannon County School District
Batesland, SD
Schools and Libraries Universal Service
Support Mechanism
File Nos. SLD- 677880, 678171,
741387, 741254, 783913, 784521
File No. SLD-819274
CC Docket No. 02-6

ORDER

Adopted: November 20, 2012

Released: November 20, 2012

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

1. Consistent with precedent, we grant requests from Euclid City School District (Euclid) and Shannon County School District (Shannon) seeking review of decisions 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). USAC initiated recovery actions against Euclid for funding already disbursed pursuant to Euclid's funding year 2009 and 2010 FCC Form 471 applications on the basis that Euclid violated sections 54.503 and 54.511 of the Commission's competitive bidding

1 See Request for Review of the Decision of the Universal Service Administrator by Allendale County School District, et al., Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 26 FCC Rcd 6109, 6115-17, paras. 10-12 (2011) (Allendale County Order) (finding that, among other things, a waiver of the Commission's rules, which require applicants to use price as the primary factor in the vendor selection process, is in the public interest when the applicant selected the least expensive responsive bid).

2 See Letter from Darrell Bartkowski, Euclid City School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Aug. 7, 2012) (Euclid Request for Review) (regarding funding year 2009 FCC Form 471 application numbers 678171 and 677880 (funding request numbers (FRNs) 1851685 and 1850862), funding year 2010 FCC Form 471 application numbers 741387 and 741254 (FRNs 2002048 and 2001504), and funding year 2011 FCC Form 471 application numbers 783913 and 784521 (FRNs 2121229 and 2122540)).

3 Letter from Saul Friedman, Attorney for Shannon County School District, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed July 30, 2012) (Shannon Request for Review) (regarding funding year 2011 FCC Form 471 application number 819274 (FRNs 2229931, 2229967, 2230032, 2230080, and 2230115)).

4 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).

rules by failing to use price as the primary factor in its vendor selection process.⁵ USAC also denied Euclid's and Shannon's funding year 2011 FCC Form 471 applications on the same ground.⁶

2. Upon review of the record, we agree with USAC's determinations that Euclid and Shannon both violated the Commission's rules by failing to assign the highest weight to price when evaluating bids for E-rate supported services.⁷ However, the record shows that for each of the vendor selection processes at issue, the applicant selected the lowest priced responsive bid.⁸ Given that Euclid and Shannon ultimately selected the least expensive responsive service offerings, despite failing to assign the highest weight to price in their vendor evaluation processes, we find that the outcomes of their vendor selection processes were consistent with the policy goals underlying the Commissions' competitive bidding rules.⁹ Therefore, we find that it is in the public interest to waive sections 54.503(c)(2)(vii) and 54.511(a) of the Commission's rules,¹⁰ which require applicants to use price as the primary factor in the vendor selection

⁵ See Letter from USAC, Schools and Libraries Division, to Darrell Bartkowski, Euclid City School District (dated June 27, 2012) (regarding funding year 2009 FCC Form 471 application number 677880 (FRN 1850862)); Letter from USAC, Schools and Libraries Division, to Darrell Bartkowski, Euclid City School District (dated June 27, 2012) (regarding funding year 2009 FCC Form 471 application number 678171 (FRN 1851685)); Letter from USAC, Schools and Libraries Division, to Darrell Bartkowski, Euclid City School District (dated June 27, 2012) (regarding funding year 2010 FCC Form 471 application number 741254 (FRN 2001504)); Letter from USAC, Schools and Libraries Division, to Darrell Bartkowski, Euclid City School District (dated June 27, 2012) (regarding funding year 2010 FCC Form 471 application number 741387 (FRN 2002048)). See also 47 C.F.R. §§ 54.503, 54.511 (2012) and 47 C.F.R. §§ 54.504, 54.511 (2009) (requiring applicants to use price as the primary factor in the vendor selection process). In this order, we describe the requirements of the E-rate program as they currently exist, but because the order involves applications from 2009-2010, and the Commission has re-organized the E-rate rules since then, where the Commission's rules have changed, we also cite to the relevant rule as it existed in 2009.

⁶ See Letter from USAC, Schools and Libraries Division, to Darrell Bartkowski, Euclid City School District (dated June 5, 2012) (regarding funding year 2011 FCC Form 471 application number 784521 (FRN 2122540)); Letter from USAC, Schools and Libraries Division, to Darrell Bartkowski, Euclid City School District (dated June 5, 2012) (regarding funding year 2011 FCC Form 471 application number 783913 (FRN 2121229)); Letter from USAC, Schools and Libraries Division, to Dana Christensen, Shannon County School District (dated March 6, 2012) (regarding funding year 2011 FCC Form 471 application number 819274 (FRNs 2229931, 2229967, 2230032, 2230080, and 2230115)); Letter from USAC, Schools and Libraries Division, to Dana Christensen, Shannon County School District (dated May 29, 2012) (regarding funding year 2011 FCC Form 471 application number 819274 (FRNs 2229931, 2229967, 2230032, 2230080, and 2230115)).

⁷ See 47 C.F.R. §§ 54.503, 54.511 (2012); see also 47 C.F.R. §§ 54.504, 54.511 (2009).

⁸ According to the evaluation worksheet used in Euclid's vendor selection process, two of the three evaluation criteria, cost and perception of needs, were each weighted at 40 percent. See Euclid Request for Review. The third criterion, national presence, was weighted at 20 percent. *Id.* Ultimately, Euclid selected the vendor offering the lowest price. *Id.* Shannon conducted two vendor selection processes in which there were nine equally-weighted evaluation criteria. See Shannon Request for Review. In one of the vendor selection processes at issue, Shannon selected the lowest priced bid. *Id.* In the other vendor selection process, Shannon selected the vendor offering the second lowest price. *Id.* Although Shannon received a lower priced bid in that instance, the bid was late and did not include necessary information about the services Shannon requested. *Id.* Therefore, Shannon could have properly treated it as a non-responsive bid. *Id.*

⁹ See 47 C.F.R. §§ 54.503, 54.511 (2012); see also 47 C.F.R. §§ 54.504, 54.511 (2009); *Allendale County Order*, 26 FCC Red at 6115, para. 10 (finding that the applicant satisfied the policy goals underlying the Commission's competitive bidding rules when it selected the least expensive responsive bid, even though it did not assign the highest weight to the price category in the bid evaluation process).

¹⁰ See 47 C.F.R. §§ 54.503(c)(2)(vii), 54.511(a) (2012); see also 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a) (2009). Generally, the Commission's rules may be waived if good cause is 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*). In addition, the Commission may take into account considerations of hardship, equity, or more effective

(continued...)

process, with respect to the funding requests identified herein.¹¹ This finding is consistent with prior precedent finding good cause for waivers in comparable circumstances.¹² Further, at this time, there is no evidence of waste, fraud and abuse in the record.

3. We therefore remand the underlying applications to USAC for further action consistent with this order. In addition, we direct USAC to discontinue recovery actions against Euclid for its funding year 2009 and 2010 FCC Form 471 applications.¹³ To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each 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. In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services or the underlying applications.

4. Lastly, on our own motion, we waive section 54.507(d) of the Commission's rules with respect to Euclid's and Shannon's funding year 2011 applications and direct USAC to waive any procedural deadline, such as the invoicing deadline, that might be necessary to effectuate our ruling. We find good cause to waive section 54.507(d) because filing an appeal of a denial is likely to cause the petitioners to miss the program's subsequent procedural deadlines in that funding year.

5. 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 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 the Requests for Review filed by Euclid City School District and Shannon County School District ARE GRANTED and the underlying applications ARE REMANDED to USAC for further consideration in accordance with the terms of this order.

6. 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 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 sections 54.503(c)(2)(vii), 54.507(d), and 54.511(a) of the Commission's rules, 47 C.F.R. §§ 54.503(c)(2)(vii), 54.507(d), and 54.511(a), ARE WAIVED for Euclid City School District and Shannon County School District to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

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

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implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

¹¹ See 47 C.F.R. §§ 54.503, 54.511 (2012); see also 47 C.F.R. §§ 54.504, 54.511 (2009).

¹² See *Allendale Order*, 26 FCC Rcd at 6115-17, paras. 10-12.

¹³ See *supra* n.5.