

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Petition for Reconsideration by)
Spokane School District 81) File Nos. SLD- 767972, 768452,
Spokane, WA) 768621, 768701
Schools and Libraries Universal Service)
Support Mechanism) CC Docket No. 02-6

ORDER ON RECONSIDERATION

Adopted: August 13, 2014

Released: August 13, 2014

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

1. Consistent with precedent,¹ we grant a Petition for Reconsideration filed by Spokane School District 81 (Spokane).² In the Spokane Order, we affirmed the decisions of USAC to deny Spokane funding under the E-rate program (more formally known as the schools and libraries universal service support program) for funding year 2010.³ In its decisions, USAC determined that Spokane violated the Commission’s competitive bidding requirements by considering the price of eligible and ineligible items as the primary factor in its vendor selection process.⁴ Based upon our review of the

1 See, e.g., Request for Review of Decision of the Universal Service Administrator by Tulsa Technology Center; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 26 FCC Rcd 13006 (Wireline Comp. Bur. 2011) (finding that, on review, the record did not support the Universal Service Administrative Company’s (USAC) determination that Tulsa included the costs of ineligible services in its bid selection process).

2 See Letter from Clay Gehring, Spokane School District 81, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed June 7, 2013) (Petition for Reconsideration) (regarding funding year 2010 FCC Form 471 application numbers 767972, 768452, 768621, 768701). The Bureau has the authority to act on petitions requesting reconsideration of final actions taken pursuant to delegated authority. 47 C.F.R. § 1.106(a)(1). In this Order on Reconsideration, we describe the requirements of the E-rate program as they currently exist, but because the Order on Reconsideration involves applications from funding year 2010, and the Commission has reorganized the E-rate rules since then, where the Commission’s codification of the rules in the Code of Federal Regulations has changed, we also cite to the relevant rules as they existed during funding year 2010.

3 See Request for Review of a Decision of the Universal Service Administrator by Spokane School District 81; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 28 FCC Rcd 6026 (Wireline Comp. Bur. 2013) (Spokane Order).

4 See Letter from USAC, Schools and Libraries Division, to Diane Boudreau, Spokane School District 81 (dated Oct. 15, 2012) (regarding FCC Form 471 application number 767972); Letter from USAC, Schools and Libraries Division, to Diane Boudreau, Spokane School District 81 (dated Oct. 15, 2012) (regarding FCC Form 471 application number 768452); Letter from USAC, Schools and Libraries Division, to Diane Boudreau, Spokane School District 81 (dated Oct. 15, 2012) (regarding FCC Form 471 application number 768621); Letter from USAC, Schools and Libraries Division, to Diane Boudreau, Spokane School District 81 (dated Oct. 15, 2012) (regarding FCC Form 471 application number 768701).

record, we denied Spokane's Requests for Review.⁵ As discussed below, because Spokane has now provided evidence demonstrating that it segregated E-rate eligible and ineligible costs when evaluating price in its vendor selection processes, we find that those processes did not violate the Commission's competitive bidding rules. We therefore grant Spokane's Petition for Reconsideration.

2. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.⁶ The Commission's rules provide that these entities must seek competitive bids for all services eligible for support.⁷ Applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services or any services for which the applicant is seeking a new contract.⁸ The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and to treat the price of eligible products and services as the primary factor in selecting the winning bid.⁹

3. In the *Spokane Order*, based on the evidence in the record at that time, we found that Spokane failed to comply with the Commission's competitive bidding requirements for the applications at issue because it considered the price of eligible *and* ineligible items as the primary factor in its vendor selection processes.¹⁰ The documentation Spokane initially presented provided a comparison of the total costs of the products and services they were seeking to purchase, and thus included costs that were eligible and ineligible for E-rate support.¹¹ However, in support of its Petition for Reconsideration, Spokane now provides evidence demonstrating that in evaluating the proposals, the district did, in fact, segregate E-rate eligible and ineligible costs from the "capital and life cycle cost criterion" in its vendor evaluation processes, and selected vendors using price of eligible services as the primary factor.¹²

4. The Commission's rules do not favor requests for reconsideration that rely on facts not previously presented to the Commission or to its designated authority.¹³ In this case, however, we find that Spokane has now presented documentation that is responsive to the evidentiary shortcoming

⁵ See *Spokane Order*.

⁶ 47 C.F.R. §§ 54.501-54.502.

⁷ 47 C.F.R. § 54.503 (2011); see also 47 C.F.R. § 54.504 (2010).

⁸ See *id.* See also Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (Oct. 2004) (FCC Form 470).

⁹ See 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2010). See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (subsequent history omitted) (stating that price must be the primary factor in selecting the winning bid); *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District et al.*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26429, para. 50 (2003).

¹⁰ See *Spokane Order*, 28 FCC Rcd at 6028, para. 4.

¹¹ See Letter from Diane Boudreau, Spokane School District 81, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Nov. 16, 2012) (regarding funding year 2010 FCC Form 471 application number 767972); Letter from Diane Boudreau, Spokane School District 81, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Nov. 16, 2012) (regarding funding year 2010 FCC Form 471 application number 768452); Letter from Diane Boudreau, Spokane School District 81, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Nov. 16, 2012) (regarding funding year 2010 FCC Form 471 application numbers 768621 and 768701).

¹² See Petition for Reconsideration at Attachs. 1, 5, 7, and 11.

¹³ See 47 C.F.R. § 1.106(c) (allowing petitions for reconsideration relying on new facts or arguments to be granted only under limited circumstances).

identified in the underlying order.¹⁴ Given that this new evidence demonstrates that the price of eligible items was the primary factor in Spokane's vendor selection process, and that there is no evidence of waste, fraud or abuse in the record, we find that it is in the public interest for us to consider Spokane's newly presented evidence.¹⁵ Based on our review of this evidence, we conclude that Spokane's vendor selection did not violate the Commission's competitive bidding requirements. We therefore grant Spokane's Petition for Reconsideration.

5. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of the underlying applications no later than 60 calendar days from the release date of this Order on Reconsideration. In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the services in the underlying applications. We therefore, on our own motion, waive section 54.507(d) of the Commission's rules for Spokane's funding year 2010 applications at issue,¹⁶ and direct USAC to waive its procedural deadlines, 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 applicant to miss the program's subsequent procedural deadlines in that funding year.

6. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-5 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155 and 254, and sections 0.91, 0.291, 1.106 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.106 and 54.722(a), that the Petition for Reconsideration filed by Spokane School District 81 on June 7, 2013 IS GRANTED and the underlying applications ARE REMANDED to USAC for further consideration in accordance with the terms of this Order on Reconsideration.

¹⁴ See Petition for Reconsideration at Attachs. 1, 5, 7, and 11.

¹⁵ See 47 C.F.R. § 1.106(c)(2) (allowing consideration of new facts or arguments relied upon in a petition for reconsideration when it is in the public interest to do so).

¹⁶ 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). 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 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. See also 47 C.F.R. § 54.507(d) (requiring non-recurring services to be implemented by September 30 following the close of the funding year).

7. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-5 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155 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 section 54.507(d) of the Commission's rules, 47 C.F.R. § 54.507(d), IS WAIVED to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Vickie S. Robinson
Acting Chief
Telecommunications Access Policy Division
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