

Before the
 Federal Communications Commission
 Washington, DC 20554

In the Matter of)	
)	
Request for Review of a)	
Decision of the)	
Universal Service Administrator by)	
)	
Last Mile, Inc., d/b/a Sting Communications)	File No. SLD-527677
)	
and)	
)	
Request for Waiver of the Commission's)	
Rules by)	
)	
Glendale School District)	File No. SLD-527677
Flinton, PA)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: March 19, 2014

Released: March 19, 2014

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

1. Consistent with precedent,¹ we grant an appeal filed by Last Mile, Inc., d/b/a Sting Communications (Sting),² of a decision made by the Universal Service Administrative Company (USAC)

¹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076-80, paras. 570-80 (1997) (*Universal Service Order*) (subsequent history omitted) (requiring applicants to conduct a fair and open competitive bidding process when seeking support for eligible products and services); *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District 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, 97-21, Order, 18 FCC Rcd 26407, 26419, para. 26 (2003) (explaining that the FCC Form 470 puts potential bidders on notice of the applicant's specific need to encourage competitive bids, and that the Commission's rules contemplate that providers will bid on the cost of the desired products and services eligible for discounts); *Federal-State Joint Board on Universal Service; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*; *Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 and 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15255-57, paras. 10-15 (2004) (*Schools and Libraries Fourth Report and Order*) (directing USAC to pursue recovery actions against the party or parties that have violated the Commission's rules); *Requests for Review of Decisions of the Universal Service Administrator by Bell South Telecommunications, Inc. and Union Parish School Board*; *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 27 FCC Rcd 11208 (Wireline Comp. Bur. 2012) (*Bell South Order*) (seeking recovery of funding only from the party that violated the Commission's rules).

seeking to recover funds already disbursed pursuant to Glendale School District's (Glendale's) FCC Form 471 application for discounted services under the E-rate program (more formally known as the schools and libraries universal service support program) for FY 2006.³ We also deny a request from Glendale seeking a waiver of the deadline for it to appeal USAC's decision to seek recovery from Glendale.⁴

2. Under the Commission's competitive bidding rules, applicants must submit for posting on USAC's website an FCC Form 470 requesting bids for E-rate eligible services.⁵ The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁶ The applicant must provide this description on its FCC Form 470 or indicate on the form that it has a request for proposal (RFP) available providing detail about the requested services.⁷ After submitting an FCC Form 470, the applicant must wait 28 days before making commitments with the selected service providers.⁸ The applicant must consider all submitted bids prior to entering into a contract, and price must be the primary factor in selecting the winning bid.⁹ The Commission's rules do not require applicants to post a new FCC Form 470 every funding year during the term of a multi-year contract if that contract was initiated by a competitive bidding process, as provided in the Commission's rules.¹⁰ However, if the applicant posts an FCC Form 470, it must comply with the Commission's competitive bidding rules.¹¹

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² See Letter from Robert Roland, Chief Operating Officer, Sting, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed June 1, 2012) (regarding funding year (FY) 2006 FCC Form 471 application number 527677, funding request number (FRN) 1455006).

³ 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).

⁴ See Letter from Aimee L. Willet, Counsel for Glendale, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed June 1, 2012) (Glendale Waiver Request). See also Letter from USAC, Schools and Libraries Division, to Dennis Bruno, Glendale (dated Apr. 2, 2012) (regarding FY 2006 FCC Form 471 application number 527677, FRN 1455006) (Notification of Commitment Adjustment Letter (Glendale COMAD)). Specifically, Glendale requests a 60-day extension of the filing deadline to enable it to ascertain whether it has a legitimate basis to appeal the recovery action by USAC. See Glendale Waiver Request. The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Accord Network IP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

⁵ 47 C.F.R. § 54.503 (2011); 47 C.F.R. § 54.504 (2006). In this Order, we describe the requirements of the E-rate program as they currently exist, but because the order involves an application from FY 2006, 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 the relevant funding year.

⁶ *Id.*

⁷ See Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470).

⁸ 47 C.F.R. § 54.503 (2011); 47 C.F.R. § 54.504 (2006).

⁹ 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2006).

¹⁰ See USAC, Schools and Libraries, Applicants, <http://www.universalservice.org/sl/applicants/step02/default.aspx> (last visited Mar. 12, 2014).

¹¹ See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Kalamazoo Public Schools; 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, 97-21, Order on Reconsideration, 17 FCC Rcd 22154, 22157, para. 6 (Wireline Comp. Bur. 2002) (*Kalamazoo Order*) (“[W]e recognize that Kalamazoo was not

(continued...)

3. USAC is seeking to recover funds from Glendale and Sting on the basis that Glendale violated the Commission's competitive bidding requirements by indicating on its FCC Form 470 that it intended to continue its existing multi-year service contract with Sting.¹² The record shows that Glendale posted an FCC Form 470 for funding year 2005 to initiate the competitive bidding process for Internet access services.¹³ On Line 13b of the form, however, Glendale indicated that it intended to continue its existing five-year contract with Sting that had been executed pursuant to a competitive bidding process in funding year 2004.¹⁴ On February 18, 2005, Glendale filed its funding year 2005 FCC Form 471 application requesting E-rate support for these services and referenced its funding year 2005 FCC Form 470 application as the initiating FCC Form 470.¹⁵ USAC granted Glendale's funding request on August 3, 2005, and, subsequently, disbursed funds.¹⁶ In funding year 2006, Glendale filed the FCC Form 471 application at issue and, again, referenced its funding year 2005 FCC Form 470 as the initiating FCC Form 470.¹⁷ USAC granted Glendale's funding request and disbursed funds for the services provided by Sting.¹⁸ However, after a thorough investigation, USAC rescinded Glendale's funding year 2006 funding commitment after determining that the initiating FCC Form 470 was tainted by Glendale's representation in its funding year 2005 FCC Form 470 that it intended to continue its existing contract with Sting, thereby failing to conduct a fair and open competitive bidding process in funding year 2005.¹⁹ USAC determined that both Glendale and Sting were responsible for these violations and, accordingly, initiated recovery actions against both parties for funding disbursed pursuant to Glendale's FCC Form 471 application for funding year 2006.²⁰

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necessarily required to sign a new contract to satisfy the competitive bidding rules. Instead, the relevant question is whether, after Kalamazoo posted its service for bidding with a Funding Year 1999 FCC Form 470 and waited the 28-day competitive bidding period, it carefully considered all bids before choosing to continue service under its existing contract."); *see also, e.g., Request for Review by Middle Peninsula Juvenile Detention Commission Merrimac Center; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 19 FCC Rcd 4007, 4009, para. 5 (Wireline Comp. Bur. 2004).

¹² See Letter from USAC, Schools and Libraries Division, to Jennifer Tobia, Sting (dated Apr. 2, 2012) (Notification of Commitment Adjustment Letter (Sting COMAD)); FCC Form 470, Glendale School District (posted Aug. 25, 2004) (Glendale FCC Form 470 number 804410000501012) (stating in Block 2, Line 13b of the form that "[w]e intend to continue the multi-year contract with Sting Communications for Internet access"); 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2006). *See also* Glendale COMAD.

¹³ See Glendale FCC Form 470 number 804410000501012.

¹⁴ *Id.*

¹⁵ See FCC Form 471, Glendale School District (filed Feb. 18, 2005) (regarding FCC Form 471 application number 464846, FRN 1346798); Glendale FCC Form 470 number 804410000501012.

¹⁶ See Letter from USAC, Schools and Libraries Division, to Dennis Bruno, Glendale (dated Aug. 3, 2005) (regarding FY 2005 FCC Form 471 application number 464846, FRN 1346798).

¹⁷ See FCC Form 471, Glendale School District (filed Feb. 16, 2006) (regarding FCC Form 471 application number 527677, FRN 1455006); Glendale FCC Form 470 number 804410000501012.

¹⁸ See Letter from USAC, Schools and Libraries Division, to Dennis Bruno, Glendale (dated Aug. 1, 2006) (regarding FY 2006 FCC Form 471 application number 527677, FRN 1455006).

¹⁹ See Glendale COMAD; Sting COMAD; Glendale FCC Form 470 number 804410000501012. *See also* 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2006).

²⁰ See Glendale COMAD, Sting COMAD. *See also* Letter from USAC, Schools and Libraries Division, to Dennis Bruno, Glendale (dated June 4, 2012) (regarding FCC Form 471 application number 527677, FRN 1455006); Letter from USAC, Schools and Libraries Division, to Jennifer Tobias, Sting (dated June 4, 2012) (regarding FCC Form 471 application number 527677, FRN 1455006).

4. As an initial matter, we agree with USAC's determination that Glendale failed to conduct a fair and open competitive bidding process.²¹ Specifically, we find that the establishing FCC Form 470, posted in funding year 2005, was tainted by Glendale's statement on Line 13b of the form that it intended to continue services under its existing multi-year contract with Sting.²² Statements such as these are likely to deter other entities from making bids on eligible products or services.²³ We are deeply concerned about practices that undermine the framework of the competitive bidding process. When an applicant discourages prospective service providers from participating in a competitive bidding process, the applicant suppresses fair and open competitive bidding and ultimately damages the integrity of the program.²⁴ We therefore find that Glendale's funding year 2005 FCC Form 470 for Internet access services was tainted and that all funding requests related to Sting referencing this form must be denied.²⁵

5. Notwithstanding this determination, we grant Sting's request for review of USAC's decision to seek recovery of funds from Sting. The Commission has held that USAC should recover funds from the party or parties that have violated the Commission's rules²⁶ and, in this case, we find no evidence in the record demonstrating that Sting violated the Commission's competitive bidding rules. We therefore find that USAC erroneously sought recovery from Sting for violations committed by Glendale and that USAC shall discontinue its recovery actions against Sting.

6. We also deny Glendale's request for a waiver of our deadline to file an appeal. Our rules require parties to file requests for review of decisions made by USAC within 60 days of the issuance of the decision.²⁷ In this instance, 60 days after USAC's COMAD letter, Glendale sought a 60-day extension of the filing deadline with the Commission in order to determine whether it has a legitimate basis to appeal USAC's commitment adjustment decision.²⁸ Glendale has not demonstrated that special circumstances exist to warrant a waiver of sections 54.720 and 54.721 of the Commission's rules²⁹ Consequently, we deny Glendale's request and direct USAC to issue a revised COMAD letter to Glendale, the party at fault, for any monies disbursed to Glendale and Sting under FCC Form 471 application number 527677, FRN 1455006.³⁰ In addition, we direct USAC to apply this ruling to all other

²¹ The Bureau must conduct a *de novo* review of requests for review of decisions issued by USAC. 47 C.F.R. § 54.723.

²² See Glendale FCC Form 470 number 804410000501012.

²³ By contrast, in the *Kalamazoo Order*, the Commission found that an applicant under a multi-year contract may issue an FCC Form 470 during the term of that contract, and may elect to continue to receive service from its existing service provider after carefully considering any other proposals it receives. See *Kalamazoo Order*, 17 FCC Rcd at 22157, para. 6.

²⁴ See, e.g., *Universal Service Order*, 12 FCC Rcd at 9029, para. 480 (observing that competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them); *supra* n.1; 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.504, 54.511 (2006).

²⁵ See Glendale FCC Form 470 number 804410000501012. This finding applies to all monies disbursed under FCC Form 471 application number 527677, FRN 1455006, and FCC Form 471 application number 464846, FRN 1346798.

²⁶ See *Schools and Libraries Fourth Report and Order*, 19 FCC Rcd at 15255-57, paras. 10-15; *Bell South Order*.

²⁷ See 47 C.F.R. §§ 54.720, 54.721.

²⁸ See Glendale Waiver Request.

²⁹ See 47 C.F.R. §§ 54.720, 54.721 (requiring requests for review to be filed within 60 days of the issuance of the decision, and requiring such requests to contain a statement of relevant facts with supporting documentation, the question presented for review, and the specific relief sought).

³⁰ See *Schools and Libraries Fourth Report and Order*, 19 FCC Rcd at 15255-57, paras. 10-15.

Sting FRNs that reference Glendale's FCC Form 470 number 804410000501012 as the establishing FCC Form 470.

7. 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, 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 Last Mile, Inc., d/b/a Sting Communications, IS GRANTED.

8. 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 the Request for Waiver filed by Glendale School District IS DENIED.

9. 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 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that USAC SHALL DISCONTINUE its recovery actions against Last Mile, Inc., d/b/a Sting Communications, and SHALL SEEK recovery for any monies disbursed under FCC Form 471 application number 527677, FRN 1455006, and FCC Form 471 application number 464846, FRN 1346798, against Glendale School District no later than 60 calendar days from the release date of this Order.

10. 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, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.722(a), that USAC SHALL APPLY this ruling to all pending applications concerning the underlying issue addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

Kimberly A. Scardino
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau