

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Requests for Review of Decisions of the
Universal Service Administrator by
St. Andrew's Health Center
Bottineau, ND
Nelson Country Health System
McVile, ND
First Care Health Center
Park River, ND
Heart of America Medical Center
Rugby, ND
Rural Health Care Universal Service
Support Mechanism
HCP No. 14311
HCP No. 13203
HCP No. 14314
HCP No. 11749
WC Docket No. 02-60

ORDER

Adopted: December 7, 2015

Released: December 7, 2015

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

I. INTRODUCTION

1. In this order, we deny a consolidated appeal filed by St. Andrew's Health Center, Nelson County Health System, First Care Health Center, and Heart of America Medical Center (collectively, Petitioners) seeking review of decisions made by the Universal Service Administrative Company (USAC) under the Telecommunications Program of the rural health care universal service support mechanism.

1 See Letter from William England, E-Copernicus, on behalf of St. Andrew's Health Center, Nelson County Health System, First Care Health Center, and Heart of America Medical Center, to Office of the Secretary, Federal Communications Commission, WC Docket No. 02-60 (filed June 29, 2015) (regarding St. Andrew's Health Center Funding Year 2013 Funding Request Number (FRN) 1348541, Nelson County Health System Funding Year 2013 FRN 1345722, First Care Health Center Funding Year 2013 FRN 1348628, and Heart of America Medical Center Funding Year 2013 FRN 1348534) (Consolidated Appeal). 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 See Letter from Rural Health Care Division, USAC, to Jodi Atkinson, St. Andrew's Health Center (dated May 1, 2015); Letter from Rural Health Care Division, USAC, to William England, E-Copernicus, on behalf of Nelson County Health System, First Care Health Center, and Heart of America Medical Center (dated May 12, 2015).

earlier than it did, given the dates when Petitioners submitted the necessary documentation to USAC for review.<sup>3</sup> Thus, we agree with USAC's decisions and deny the Petitioners' appeal.

## II. BACKGROUND

2. Under the rural health care universal service support mechanism, eligible rural health care providers and consortia that include eligible rural health care providers may apply for discounts for eligible telecommunications services and Internet access.<sup>4</sup> A significant safeguard in protecting rural health care funds from waste, fraud, and abuse is the competitive bidding requirement.<sup>5</sup> Applicants must make a bona fide request for eligible services by posting an FCC Form 465 to USAC's website for telecommunications carriers to review.<sup>6</sup> Applicants must review all bids submitted in response to the FCC Form 465 and wait at least 28 days before entering into a service agreement with the selected service provider.<sup>7</sup> Once the applicant has selected a provider and entered into a service contract, the applicant must submit its request for discounts to USAC by filing an FCC Form 466.<sup>8</sup> The applicant uses the FCC Form 466 to verify the type of services ordered and to certify that the selected service provider is the most cost-effective option.<sup>9</sup> At that time, the applicant must also provide USAC with a copy of its service contract as well as copies of any bids it receives in response to its FCC Form 465 posting.<sup>10</sup> USAC then reviews each contract to determine whether it is eligible for "evergreen" status and exempt from competitive bidding requirements for the remainder of the contract term.<sup>11</sup> To qualify for evergreen status, the contract must be awarded pursuant to a competitive bidding process that complies with the

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<sup>3</sup> See 47 C.F.R. § 54.723.

<sup>4</sup> 47 C.F.R. § 54.601. Note that funding for Internet access under the Internet Access Program continued through the end of funding year 2013, which ended on June 30, 2014. See Rural Health Care Support Mechanism, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16700, n.120 (2012) (noting that funding under the Internet Access Program would be available through the end of funding year 2013). Beginning in January 2014, applicants receiving support for Internet access may apply for support for those same services through the new Healthcare Connect Fund Program. See USAC, Rural Health Care, <http://www.usac.org/rhc/> (last visited Nov. 30, 2015).

<sup>5</sup> See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, para. 480 (1997) (subsequent history omitted) (requiring competitive bidding processes to be fair and open such that no bidders receive an unfair advantage). Cf. *Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 and 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26939, para. 66 (2003) (*Schools and Libraries Third Report and Order*) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources).

<sup>6</sup> 47 C.F.R. § 54.603; Health Care Providers Universal Service, Description of Services Requested and Certification Form, OMB 3060-0804 (January 2004) (FCC Form 465). Essentially, the FCC Form 465 serves as a request for proposal in that it describes the applicant's planned service requirements, as well as other information regarding the applicant and its competitive bidding process that may be relevant to the preparation of bids. Interested service providers submit bids in response to the applicant's FCC Form 465.

<sup>7</sup> 47 C.F.R. § 54.603(b)(3).

<sup>8</sup> Health Care Providers Universal Service, Funding Request and Certification Form, OMB 3060-0804 (Jan. 2005) (FCC Form 466); Health Care Providers Universal Service, Internet Service Funding Request and Certification Form, OMB 3060-0804 (Nov. 2012) (FCC Form 466-A).

<sup>9</sup> See FCC Form 466; FCC Form 466-A.

<sup>10</sup> See FCC Form 466.

<sup>11</sup> See USAC Website, Rural Health Care, Evergreen Contracts, <http://www.usac.org/rhc/telecommunications/health-care-providers/evergreen-contracts.aspx> (last visited Nov. 30, 2015) (Evergreen Contracts Guidance). An applicant is not required to annually re-bid a service contract that has been designated as evergreen by USAC or post an FCC Form 465 for the life of the contract. See 47 C.F.R. §§ 54.603(b). However, the applicant is still required to apply for support annually by filing an FCC Form 466.

Commission's rules<sup>12</sup> and satisfies certain other requirements.<sup>13</sup> After reviewing the applicant's FCC Form 466, service contract, and accompanying bids, USAC then issues a funding commitment letter informing the applicant of its decisions.

3. *Petitioners' Appeal.* The Petitioners submitted their FCC Form 465 applications to USAC on March 7, 2011 and May 27, 2011, to initiate the competitive bidding process for eligible telecommunications and Internet access services.<sup>14</sup> Pursuant to the Commission's rules, USAC designated April 4, 2011 and June 24, 2011, as the allowable contract service dates (ACSD) (*i.e.*, the earliest date on which an applicant can sign a contract and be in conformance with the 28-day waiting period requirement).<sup>15</sup> While Petitioners waited 28 days before entering into multi-year contracts with their selected service providers,<sup>16</sup> they did not seek funding or receive services in either funding years 2011 or 2012. Consequently, Petitioners did not submit the contracts to USAC for review in funding years 2011 or 2012.

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<sup>12</sup> See 47 C.F.R. §§ 54.603(b). Specifically, the applicant must (1) initiate a competitive bidding process by filing an FCC Form 465, (2) consider all bids submitted in response to the FCC Form 465, (3) wait 28 days before selecting a service provider, (4) select the most cost-effective service offering, and (5) provide USAC with copies of all bids received, if any. *Id.*

<sup>13</sup> See Evergreen Contracts Guidance. To be considered evergreen, the multi-year contract must meet the following criteria: (1) both parties are identified; (2) the health care provider has signed and dated the contract; (3) the contract specifies the type and terms of services; (4) the contract has a specified duration; (5) the contract specifies the cost of services to be provided; and (6) the contract includes the physical addresses or other identifying information of the health care providers purchasing from the contract. *Id.* The evergreen contract exemption applies after USAC has reviewed the contract and accompanying bids and is effective beginning with the funding year in which the contract was submitted for review.

<sup>14</sup> See FCC Form 465, St. Andrew's Health Center (filed Mar. 7, 2011) (requesting bids for "Telecommunications and Internet services for medical purposes. Point to point to remote locations, point to point to Avera's ECARE network, Ethernet connection to Avera's MLS network, transfer images to remote locations, medical billing, private connect with QOS bandwidth for general Internet connectivity, data circuits for sending and receiving medical billing info, files, and/or images to and from remote locations, medical administration & telemedicine."); FCC Form 465, Nelson County Health System (filed May 27, 2011) (requesting bids for "circuits to provide the following services: bandwidth for general Internet connectivity, data circuits for sending and receiving medical billing info, files and/or images to and from remote locations, medical administration & telemedicine. Quality of service is required. Redundant circuit is also required. AVERA POSTING Telecommunications and Internet services for medical purposes. Point to point to remote locations, point to point to Avera's ECARE network, Ethernet connection to Avera's MLS network, transfer images to remote locations, medical billing, private connect with QOS, bandwidth for general Internet connectivity, data circuits for sending and receiving medical billing info, files, and/or images to and from remote locations, medical administration & telemedicine. Redundant circuit required."); FCC Form 465, Heart of America Medical Center (filed May 27, 2011) (requesting bids for "circuits to provide the following services: bandwidth for general Internet connectivity, data circuits for sending and receiving medical billing info, files and/or images to and from remote locations, medical administration & telemedicine. Quality of service is required. Redundant circuit is also required."); FCC Form 465, First Care Health Center (filed May 27, 2011) (requesting bids for "circuits to provide the following services: bandwidth for general Internet connectivity, data circuits for sending and receiving medical billing info, files and/or images to and from remote locations, medical administration & telemedicine. Quality of service is required. Redundant circuit is also required.") (collectively, Funding Year 2011 FCC Forms 465).

<sup>15</sup> *Id.*; 47 C.F.R. § 54.603(b)(3).

<sup>16</sup> St. Andrew's Health Center executed a five-year service contract with South Dakota Network, LLC (SDN) on May 10, 2011; Nelson County Health System executed a three-year service contract with Mid-Continent Communications (MCC) on June 27, 2011; Heart of America Medical Center executed a five-year service contract with SDN on October 31, 2011; and First Care Health Center executed a three-year service contract with MCC on February 8, 2012.

4. In funding year 2013, each of the Petitioners initiated a new competitive bidding process by posting an FCC Form 465 on June 11, 2013.<sup>17</sup> USAC designated July 9, 2013 as the ACSD for each FCC Form 465.<sup>18</sup> The Petitioners, however, elected to take service from the service providers selected pursuant to the 2011 and 2012 contracts. The Petitioners subsequently submitted their funding year 2013 FCC Form 466 applications to USAC seeking support for eligible services underlying the contracts they had executed in 2011 and 2012.<sup>19</sup> The Petitioners also submitted these contracts to USAC to obtain evergreen status.<sup>20</sup> USAC approved support for the Petitioners' funding requests with a funding start date of July 9, 2013, the designated ACSD based on the 2013 FCC Form 465.<sup>21</sup> USAC also subsequently designated the Petitioners' contracts as evergreen effective July 9, 2013 until the end of each contract's term.<sup>22</sup>

5. The Petitioners appealed USAC's determination concerning the funding start date.<sup>23</sup> In particular, the Petitioners argued that funding should commence on July 1, 2013, the beginning of the funding year, and not July 9, 2013, because they each had pre-existing, evergreen contracts that were competitively bid and executed in 2011 and 2012.<sup>24</sup> In its decisions denying Petitioners' appeals, USAC acknowledged that the Petitioners executed contracts in 2011 and 2012 pursuant to a competitive bidding process initiated in 2011.<sup>25</sup> However, the Petitioners did not submit these contracts to USAC for review

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<sup>17</sup> See FCC Form 465, Nelson County Health System (filed June 11, 2013); FCC Form 465, St. Andrew's Health Center (filed June 11, 2013); FCC Form 465, Heart of America Medical Center (filed June 11, 2013); FCC Form 465, First Care Health Center (filed June 11, 2013) (all requesting bids for "multiple redundant circuits and connections for transmission of Internet services, healthcare data, x-rays, clinics information, telemedicine, tele-pharmacy and video/training conference feeds, including but not limited to eEmergency two-way video equipment in our rural emergency room to emergency trained physicians and specialist at a central hub, 24 hours a day, 7 days a week. ATM/T1 or higher DEDICATED BANDWIDTH is required for BT/WAN circuit. This rural health facility requires QOS for telehealth applications which include clinical consultations, video and data. Network management is required. This is a MONTH TO MONTH circuit and part of the NDHA Consortium for the Bioterrorism network.") (collectively, Funding Year 2013 FCC Forms 465).

<sup>18</sup> See Funding Year 2013 FCC Forms 465.

<sup>19</sup> See FCC Form 466, Nelson County Health System (filed June 18, 2014); FCC Form 466, Heart of America Medical Center (filed June 25, 2014); FCC Form 466, First Care Health System (filed June 26, 2014); FCC Form 465, St. Andrew's Health Center (filed June 26, 2014). See also *supra* n.18.

<sup>20</sup> See FCC Form 466, Nelson County Health System (filed June 18, 2014); FCC Form 466, Heart of America Medical Center (filed June 25, 2014); FCC Form 466, First Care Health System (filed June 26, 2014); FCC Form 465, St. Andrew's Health Center (filed June 26, 2014).

<sup>21</sup> See Letter from Rural Health Care Division, USAC, to St. Andrew's Health Center (dated Nov. 24, 2014); Letter from Rural Health Care Division, USAC, to First Care Health Center (dated Dec. 10, 2014); Letter from Rural Health Care Division, USAC, to Nelson County Health System (dated Dec. 10, 2014); Letter from Rural Health Care Division, USAC, to Heart of American Medical Center (dated Dec. 10, 2014).

<sup>22</sup> See Letter from Rural Health Care Division, USAC, to William England, E-Copernicus, on behalf of Heart of America Medical Center, Nelson County Health System, and First Care Health Center (dated May 12, 2015) at n.8.

<sup>23</sup> See Letter from William England, E-Copernicus, on behalf of St. Andrew's Health Center, to Rural Health Care Division, USAC (filed Nov. 25, 2014); Letter from William England, E-Copernicus, on behalf of Nelson County Health System, First Care Health Center, and Heart of America Medical Center, to Rural Health Care Division, USAC (filed Dec. 16, 2014) (collectively, USAC Appeal).

<sup>24</sup> See USAC Appeal.

<sup>25</sup> See Letter from Rural Health Care Division, USAC, to William England, E-Copernicus, on behalf of St. Andrew's Health Center (dated May 1, 2015); Letter from Rural Health Care Division, USAC, to William England, E-Copernicus, on behalf of Heart of America Medical Center, Nelson County Health System, and First Care Health Center (dated May 12, 2015) (collectively, Administrative Decision Letters).

until June 2014, when they submitted their funding year 2013 FCC Form 466 applications.<sup>26</sup> Because the contracts were not designated as evergreen prior to funding year 2013, USAC concluded that the Petitioners were required to conduct a competitive bidding process by submitting an FCC Form 465 and were also required to wait 28 days before electing to stay with the providers selected under those contracts.<sup>27</sup> Based on the Petitioners' funding year 2013 FCC Forms 465 submitted on June 11, 2013, USAC determined that the ACSD would be July 9, 2013, and that the funding start date for the underlying contracted services would also be July 9, 2013.<sup>28</sup> USAC therefore denied the Petitioners' request to change the funding start date to July 1, 2013.<sup>29</sup> Petitioners then filed the instant appeal with the Commission essentially reiterating the arguments made in their appeal to USAC.<sup>30</sup>

### III. DISCUSSION

6. We conclude that USAC correctly denied the Petitioners' appeal. The record shows that the Petitioners signed multi-year contracts in 2011 and 2012 pursuant to competitive bidding processes initiated in 2011.<sup>31</sup> Because the Petitioners did not, at that time, request funding for the eligible services underlying these contracts, USAC was unable to designate the contracts as evergreen and Petitioners were required to re-bid the services every year of the contract term in order to receive support.<sup>32</sup> As indicated above, the Petitioners complied with this requirement by posting FCC Forms 465 in funding year 2013.<sup>33</sup> These postings generated a new 28-day waiting period and ACSD by which the Petitioners were required to abide.<sup>34</sup> The new ACSD established by these forms was July 9, 2013.<sup>35</sup> The Petitioners therefore were not permitted to make service provider selections or receive funding for the eligible services before that date.

7. After posting their funding year 2013 FCC Forms 465 and waiting 28 days, the Petitioners chose to remain with the service providers selected pursuant to the 2011 and 2012 contracts, which is permissible under program rules.<sup>36</sup> The fact that these contracts were executed pursuant to a competitive bidding process in 2011, however, does not automatically qualify them as evergreen and exempt them from competitive bidding for the life of the contract, as the Petitioners seem to surmise.<sup>37</sup>

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

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See Consolidated Appeal.

<sup>31</sup> See Funding Year 2011 FCC Forms 465.

<sup>32</sup> See USAC website, Rural Health Care, Competitive Bidding, <http://www.usac.org/rhc/telecommunications/health-care-providers/competitive-bidding.aspx> (last visited Nov. 30, 2015).

<sup>33</sup> See Funding Year 2013 FCC Forms 465.

<sup>34</sup> Applicants may not receive funding for eligible services before the designated ACSD. See 47 C.F.R. § 54.603. If an applicant seeks support for the entire funding year, it must ensure that its FCC Form 465 is posted no later than June 2 of that funding year.

<sup>35</sup> See Funding Year 2013 FCC Forms 465.

<sup>36</sup> See *Kalamazoo Order*, 17 FCC Rcd 22154, 22157-58, paras. 6-7 (stating that applicants may choose to receive services under an existing contract as long as they follow the procedures outlined in the Commission's *Kalamazoo Order* and the contract is the most cost-effective option for receiving the supported services).

<sup>37</sup> See USAC Appeal. In support of their argument that the funding year 2011 ACSD should apply in this instance, the Petitioners point to the FCC Form 465 Instructions which state the following: "Filing Exception- The filing of a Form 465 may not be required if the health care provider is receiving services under a currently valid contract

(continued....)

8. The evergreen contract exemption applies only to the time period during which the contract has been designated with evergreen status by USAC.<sup>38</sup> Evergreen contract status cannot be applied in an *ex post facto* manner to contracts allegedly signed as a result of a competitive bidding process where the applicant did not file an FCC Form 466 application in the same funding year as the request for services was made (*i.e.*, the posting of an FCC Form 465). USAC would be unable to vet the bid documentation and cost-effectiveness certification that is requested on the FCC Form 466 and thus would not be able to confirm that the selection of the vendor and signed contract complied with program rules.<sup>39</sup> While such contracts may be used as bids for subsequent funding requests, evergreen status can only be applied to the remaining life of the contract, after the designated ACSD, where an FCC Form 466 is filed for the same funding year that the request for services is made.<sup>40</sup> In other words, evergreen status applies once USAC has reviewed the contract for compliance with program rules in conjunction with the applicant's FCC Form 466 and is effective for the remaining life of the contract (or until the contract is modified).<sup>41</sup> We emphasize that these designations do not re-define the length of the applicant's contract term; they merely identify the point at which the evergreen contract exemption begins and ends. In this instance, the Petitioners' contracts received evergreen status after they were submitted to USAC for review (for the first time) in funding year 2013.<sup>42</sup> Thus, USAC correctly determined that evergreen status would apply from July 9, 2013, the ACSD, until the end of each contract's term. The Petitioners have not presented evidence demonstrating that USAC erred in its decision. We therefore deny the Petitioners' appeal and affirm USAC's decision concerning the funding start date for the funding requests at issue.

#### IV. ORDERING CLAUSES

9. 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), the appeal filed by St. Andrew's Health Center, Nelson County Health System, First Care Health Center, and Heart of America Medical Center on June 29, 2015, IS DENIED.

10. IT IS FURTHER ORDERED that, pursuant to the authority delegated in 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

Ryan B. Palmer  
Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau

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executed pursuant to a Form 465 posted in a prior program year." We note, however, that this exception does not apply here because the validity of the contracts at issue had not been reviewed or confirmed by USAC in a prior program year (*i.e.*, funding years 2011 or 2012).

<sup>38</sup> See Evergreen Contract Guidance.

<sup>39</sup> See FCC Form 466.

<sup>40</sup> See Evergreen Contract Guidance.

<sup>41</sup> *Id.*

<sup>42</sup> See FCC Forms 466; Administrative Decision Letters.