

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

In the Matter of )
Requests for Review and/or Waiver of Decisions of ) File Nos. 917099, 919406, et al.
the Universal Service Administrator by )
Sweetwater City Schools et al. )
Schools and Libraries Universal Service Support ) CC Docket No. 02-6
Mechanism )

ORDER

Adopted: December 30, 2016

Released: December 30, 2016

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

I. INTRODUCTION

1. In this Order, we grant the requests for review and/or waiver<sup>1</sup> filed by the Sweetwater City Schools on behalf of members of the Sweetwater Consortium (formally known as the Tennessee E-rate Consortium-Sweetwater) and their service provider, Education Networks of America (ENA) with respect to decisions by the Universal Service Administrative Company (USAC) for funding years 2013, 2014, and 2015 funding requests under the E-rate program (more formally known as the schools and libraries universal service support program).<sup>2</sup> We find that the Sweetwater Consortium did not violate the program’s rules requiring selection of the most cost-effective bid for eligible services.<sup>3</sup> We also find that the consortium members that purchased E-rate eligible services from ENA had legally binding agreements with ENA prior to filing their E-rate applications. As such, they were in compliance with the funding year 2015 requirement for having legally binding agreements prior to filing their E-rate

<sup>1</sup> Letter from Charles W. Cagle, Counsel for Sweetwater Consortium, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed May 9, 2016) (Sweetwater Consortium Request for Review and/or Waiver); Letter from Robert Patterson and Gina Spade, Counsel for ENA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed May 13, 2016) (ENA Request for Review and/or Waiver). The Sweetwater Request for Review and/or Waiver supersedes an appeal filed for the Dayton City School District and the Scott County School District, which are both members of the Sweetwater Consortium. Letter from Charles W. Cagle, Counsel for the Dayton City School District and the Scott County School District, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed Apr. 14, 2016). We dismiss those appeals as moot.

<sup>2</sup> See, e.g., Letter from USAC, Schools and Libraries Division, to Matt Marcus, Dayton City School District (dated Oct. 30, 2015) (Notification of Commitment Adjustment). USAC sent denial and commitment adjustment letters to Sweetwater Consortium members that contained the same description and reasoning.

<sup>3</sup> The Wireline Competition Bureau has authority to review this appeal de novo. 47 CFR § 54.723. See generally Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Third Report and Order, 12 FCC Rcd 22485, 22489, para. 6 (1997); Modernizing the E-rate Program for Schools and Libraries; Connect America Fund, WC Dockets No. 13-184, 10-90, Report and Order Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8892, 8945, paras. 133, 189 (2014) (E-Rate Modernization Order); Modernizing the E-rate Program for Schools and Libraries; Connect America Fund, WC Dockets No. 13-184, 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15544, para. 13 (2014).

applications and, consistent with precedent, in light of their legally binding agreements, we waive the signed contract requirements for funding years 2013 and 2014.<sup>4</sup>

## II. BACKGROUND

### A. E-rate Program Rules

2. Pursuant to E-rate program rules, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts, subsidized by the universal service fund, for eligible services.<sup>5</sup> In order to protect against waste, fraud and abuse, Commission rules require schools, libraries and consortia to seek competitive bids for all services eligible for E-rate support.<sup>6</sup> In order to seek bids on E-rate eligible services, they must post an FCC Form 470 on USAC's website requesting bids for E-rate eligible services.<sup>7</sup> In the FCC Form 470, or its associated RFP, the entity seeking bids must describe the requested services with sufficient specificity to enable potential service providers to submit bids for those services.<sup>8</sup> The Commission's rules require the price of eligible products and services be the primary bid-evaluation factor.<sup>9</sup> Eligible schools, libraries, and consortia may also consider other relevant factors, such as prior experience, personnel qualifications, management capability, and environmental objectives.<sup>10</sup>

3. Prior to funding year 2015, E-rate program rules required that there be a signed contract with the selected provider before the applicant filed an application for E-rate support (an FCC Form 471).<sup>11</sup> Upon request, we routinely waived that requirement when the applicant had a legally binding agreement, but no formally signed agreement.<sup>12</sup> In the *E-rate Modernization Order*, the Commission

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<sup>4</sup> See *infra* para. 32.

<sup>5</sup> 47 CFR §§ 54.501, 54.502.

<sup>6</sup> 47 CFR § 54.503.

<sup>7</sup> See *id.* The FCC Form 470 may include a request for proposals (RFP). USAC's website defines an RFP as a "formal bidding document that describes the project and requested services in sufficient detail so that potential bidders understand the scope, location, and any other requirements." See *In the Matter of Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd. 16678, 16780, para. 234 (2012). See also USAC, Competitive Bidding, <http://www.usac.org/sl/applicants/step01/> (last visited Dec. 22, 2016).

<sup>8</sup> See *id.*

<sup>9</sup> See 47 CFR §§ 54.504, 54.511. 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) (*Universal Service First Report and Order*) (stating that price must be the primary factor in selecting the winning bid).

<sup>10</sup> *Id.*

<sup>11</sup> 47 CFR § 54.504(c) (2013) ("An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart shall, upon entering into a signed contract for eligible services, submit a completed FCC Form 471 to the Administrator"); see also *Request for Review of Waldwick School District, Schools and Libraries Universal Service Support Mechanisms*, CC Docket No. 02-6, Order, 18 FCC Rcd 22994, 22995, para. 3 (WCB 2003).

<sup>12</sup> See, e.g., *Request for Review of a Decision of the Universal Service Administrator by Cincinnati City School District; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 5994, 5997, para. 7 (WCB 2006) (waiving the signed contract requirement where there was evidence of a legally binding offer and acceptance via a purchase order and performance of service). See also *Requests for Waiver by Puerto Rico Department of Education, San Juan, PR*, CC Docket No. 02-6, Order, 29 FCC Rcd 14453, 14455, para. 8 (WCB 2014) (granting a waiver of the signed contract when a legally binding offer and acceptance existed and an executive order prohibited the applicant from signing a contract); *Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District 14, Commerce City, CO et al.*, CC Docket No. 02-6, Order, 22 FCC Rcd 6019, 6022-23, para. 9 (2007) (*Adams County Order*) (granting waiver of signed contract requirement where applicants had agreements with vendors, but applicants did not have signed contracts in place at

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eased the signed contract requirement and since funding year 2015, the Commission's rules have required applicants to have a signed contract "or other legally binding agreement" in place prior to submitting their FCC Forms 471.<sup>13</sup>

## **B. Sweetwater Consortium Formation and Competitive Bidding Process**

4. In 2013, 76 Tennessee schools and school districts formed the Sweetwater Consortium. Sweetwater City Schools initiated a procurement ("the 2013 procurement") by filing an FCC Form 470 and releasing an associated RFP seeking a three-year contract for Managed Internet Access, Voice over Internet Protocol (VoIP), and Video Conferencing services on behalf of the Sweetwater Consortium members.<sup>14</sup> The Sweetwater FCC Form 470 and accompanying RFP requested pricing for a range of wide area network (WAN) and Internet access connections for three hypothetical school districts of 10, 80, and 150 sites.<sup>15</sup>

5. ENA and AT&T were the only service providers that submitted bids. ENA's bid contained average pricing for services to each of the hypothetical districts with 10, 80, and 150 sites.<sup>16</sup> AT&T's bid contained postalized pricing, so the cost per site for the service was the same regardless of the size of the district.<sup>17</sup>

6. Consistent with the questions it asked in its RFP, Sweetwater conducted a bid evaluation that took into account the price of the eligible services, as well as other non-cost factors such as business plan, experience and qualifications, capacity and ability to meet scheduling requirements, past performance and references, and use of the RFP's pro forma contract.<sup>18</sup> Price was the primary factor in Sweetwater's bid evaluation, and accounted for a possible 25 points of out 100.

7. To evaluate eligible pricing, the Sweetwater Consortium, consistent with the bid-evaluation methodology specified in its RFP, added the bids for the services to the hypothetical 10, 80, and 150 sites together.<sup>19</sup> Using this methodology, it determined that ENA's bid for the services to these hypothetical districts was \$9.3 million and AT&T's bid was \$6.0 million. Of the 25 points that Sweetwater's bid evaluators assigned to the price of eligible services, AT&T received the full 25 points and ENA received 16.2 points.<sup>20</sup>

8. The bid evaluators assigned higher points to ENA than AT&T in the non-cost categories.<sup>21</sup> For example, bid evaluators noted that AT&T provided no answer to a question asking for

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the deadline because agreements with service providers had not been approved by district governing boards in accordance with state and local procurement laws).

<sup>13</sup> See *E-rate Modernization Order*, 29 FCC Rcd at 8950-51, paras. 203-04; 47 CFR § 54.504(a) (2016) ("An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart shall, upon entering into a signed contract or other legally binding agreement for eligible services, submit a completed FCC Form 471 to the Administrator.").

<sup>14</sup> See FY2013 FCC Form 470 No. 283390001111946, Funding Year 2013, Sweetwater City School District (filed Jan. 29, 2013); See Sweetwater Request for Review and/or Waiver, at Exh. 3 (Sweetwater RFP).

<sup>15</sup> See Sweetwater RFP.

<sup>16</sup> See Sweetwater Consortium Request for Review and/or Waiver, Exh. 7, at 116 (ENA Bid).

<sup>17</sup> See Sweetwater Consortium Request for Review and/or Waiver, Exh. 6, at Attach. A (AT&T Bid).

<sup>18</sup> See Sweetwater Consortium Request for Review and/or Waiver, Exh. 15 (Sweetwater Consortium Bid Evaluation).

<sup>19</sup> See Sweetwater Consortium Request for Review and/or Waiver, Exh. 15 (Consensus Score Sheet).

<sup>20</sup> See Sweetwater Consortium Request for Review and/or Waiver at 23.

<sup>21</sup> See Consensus Score Sheet.

information about instances where it provided financial restitution to customers under service-level agreements, and that its bid response lacked detail regarding installation timeline, or service expansion capability.<sup>22</sup> Sweetwater's bid evaluation team awarded ENA a total of 90.2 out of 100 possible points in comparison to AT&T's 75.5 points, and therefore awarded the contract to ENA.<sup>23</sup> After selecting ENA as the service provider, the Sweetwater Consortium issued an Award Letter to ENA notifying it of the award of the contract for the 2013 procurement and accepting the terms of ENA's bid.<sup>24</sup> ENA and an already-existing consortium (known as the Tennessee E-rate Consortium) executed an amendment to that consortium's 2011 contract for E-rate supported services that incorporated the terms of ENA's bid response to the Sweetwater Consortium into that consortium's contract, which the Sweetwater Consortium and ENA argue satisfies the E-rate signed contract requirement for the 2013 procurement. No representative of the Sweetwater Consortium signed the amendment. According to ENA, it provided to Sweetwater Consortium members pricing worksheets that contained the total monthly and annual costs that it would charge them for E-rate supported services.<sup>25</sup> After ENA provided the pricing worksheets, districts typically executed a Letter of Intent to purchase the services.<sup>26</sup>

9. Forty-five members of the Sweetwater Consortium ordered services from ENA pursuant to the terms of its RFP response and its pricing worksheets beginning in funding year 2013 and extending through funding year 2015.<sup>27</sup> Before USAC became aware of any issues with the applications, it disbursed \$174,034 to applicants that cited to the Sweetwater Consortium's procurement in their funding year 2013 funding requests.

### C. Application Review and Appeals

10. USAC conducted an extensive special compliance review, ultimately denied pending funding requests, and issued commitment adjustments for committed funding requests from Sweetwater Consortium members for funding years 2013, 2014, and 2015 on the basis that no valid contract existed between ENA and the Sweetwater Consortium, and that the Sweetwater Consortium had failed to select the most cost-effective service offering.<sup>28</sup> USAC found that the existing consortium contract could not have served as a valid contract for the 2013 Sweetwater procurement because there was no provision that would allow the Sweetwater Consortium to join that contract.<sup>29</sup> USAC also found that the Sweetwater Consortium did not select the most cost-effective service offering because the two bids provided were similar and therefore the Sweetwater Consortium could not justify the award given the price difference.<sup>30</sup>

11. The Sweetwater Consortium and ENA appealed the denial to USAC.<sup>31</sup> In the appeals, both argued that the parties had memorialized the terms of the agreement between the Sweetwater Consortium and ENA in the amendment to the existing Tennessee E-rate Consortium contract, that public

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<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See* Letter from Melanie R. Miller, Ph.D., Director of Schools, Sweetwater City Schools, to Bob Collie, Chief Technology Officer, Education Networks of America (dated Mar. 1, 2013).

<sup>25</sup> *See* Letter from Gina Spade, Counsel for ENA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6, at 5-6 (filed Aug. 26, 2016) (ENA Aug. 26, 2016 Supplemental Filing).

<sup>26</sup> *See id.* at 5-6.

<sup>27</sup> Sweetwater Consortium Request for Review and/or Waiver at 12.

<sup>28</sup> *See* Letter from USAC, Schools and Library Division, to Charles W. Cagle, Counsel for Achievement School District et al. (dated March 15, 2016) (Administrator's Decision on Appeal).

<sup>29</sup> Notification of Commitment Adjustment at 4.

<sup>30</sup> *Id.* at 4-5.

<sup>31</sup> *See* Sweetwater Consortium Request for Review and/or Waiver and ENA Request for Review and/or Waiver.

entities could “piggyback” on contracts held by other public entities, and that there was a legally binding agreement between the ENA and the Sweetwater Consortium.<sup>32</sup> With respect to cost-effectiveness, the Sweetwater Consortium and ENA argued that ENA’s pricing was lower than the market rate, AT&T’s bid was actually higher than ENA’s based on their understanding of the offer, the services offered by ENA were of a higher quality than AT&T’s, and the Sweetwater Consortium selected the most cost-effective offering when it complied with the competitive bidding rules.<sup>33</sup>

12. USAC denied the Sweetwater Consortium’s and ENA’s appeals.<sup>34</sup> The Sweetwater Consortium and ENA then filed the instant appeals with the Commission, making many of the same arguments they made to USAC.<sup>35</sup> The Sweetwater Consortium, ENA, and AT&T have made supplemental filings to clarify issues in the appeal.<sup>36</sup> Districts within the Sweetwater Consortium made their own filings with the Commission to explain the financial impact a denial of the appeal would have on the districts.<sup>37</sup>

### III. DISCUSSION

13. We grant the Sweetwater Consortium’s and ENA’s appeals of USAC’s decisions. We find that the Sweetwater Consortium did not violate our cost-effectiveness rule. We also find that the consortium members had a legally binding agreement for all funding requests at issue in this appeal. We therefore grant the appeals with respect to the signed contract issue for funding year 2015, and, consistent with precedent, waive the requirement to have a signed contract for funding years 2013-2014.

#### A. Cost Effectiveness

14. In the course of our *de novo* review of this appeal,<sup>38</sup> we examined the bid evaluation methodology used by the Sweetwater Consortium in order to evaluate whether its selection of ENA violated the Commission’s competitive bid requirements and, in particular the requirement to use price as the primary factor and select the most cost-effective bid. Without knowing precisely which districts or school consortium members would elect to purchase from this consortium-driven process, the Sweetwater Consortium requested and evaluated pricing for services to three hypothetical districts designed to represent potential pricing for Sweetwater Consortium members. Although the requirement to evaluate pricing for services for which an applicant anticipates it is likely to seek discounts is well-rooted in our

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Administrator’s Decision on Appeal.

<sup>35</sup> Sweetwater Consortium Request for Review and/or Waiver; ENA Request for Review and/or Waiver.

<sup>36</sup> *See, e.g.*, Letter from Charles W. Cagle, Counsel for the Sweetwater Consortium, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed Aug. 25, 2016) (Sweetwater Supplemental Filing); ENA Aug. 26, 2016 Supplemental Filing; Letter from Terri L. Hoskins, Executive Director – Senior Legal Counsel, AT&T, to Ms. Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed June 23, 2016).

<sup>37</sup> *See, e.g.*, Letter from Linda Arms Gilbert, Director of Schools, Murfreesboro City Schools to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed July 25, 2016); Letter from Betty Wallace, Interim Director of Schools, West Carroll Special School District to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed July 25, 2016); Letter from Stan Curtis, Ed.D, Director of Schools, Cheatham County Schools, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed June 21, 2016); Letter from Jason Vance, Superintendent of Schools, Loudon County Board of Education to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-6 (filed June 21, 2016).

<sup>38</sup> *See* 47 C.F.R. § 54.723(a) (“The Wireline Competition Bureau shall conduct *de novo* review of requests for review of decisions issued by the Administrator.”)

rules,<sup>39</sup> this is the first instance in which the Bureau has addressed the use of hypothetical districts to evaluate pricing.

15. Under the Commission's competitive bidding rules, Sweetwater was required to carefully consider all bids and select the most cost-effective service offering, using price as the primary factor in determining whether a particular bid is the most cost-effective.<sup>40</sup> To ensure that they are evaluating bids using price as the primary factor, bid evaluators are required to evaluate pricing of the services for which the entities listed on the FCC Form 470 are likely to seek E-rate support.<sup>41</sup> This is particularly challenging for consortia, and even more so for those seeking multi-year contracts. It requires planning by a consortium to ensure that the unique service needs for each district, such as size, geography, and technology needs, are taken into account.

16. The program's competitive bidding requirements reflect the Commission's determination that competition is the most efficient and effective means to select the most cost-effective service offering. The failure of a consortium to compare pricing that represents the services for which the consortium's members are likely to seek support harms the competitive bidding process. If the pricing being evaluated does not reasonably represent the services that entities on the FCC Form 470 anticipate requesting, a consortium cannot comply with the requirement that price be the primary bid evaluation factor because it cannot demonstrate that the prices it is evaluating are indeed representative of the prices its members would likely receive under the contract. E-rate participants should be prepared to demonstrate that price is the most important factor in their vendor selection, and how the pricing being compared is reasonably representative of the services for which the entities on the FCC Form 470 anticipate seeking support. This process is a critical aspect of protecting the E-rate program from wasteful spending and helps ensure that program funds can be distributed as widely and equitably as possible among applicants. As the Commission has explained, "the Commission and USAC have a duty to protect against waste, fraud and abuse in the program" and our price-as-the-primary-factor requirement plays a critical role in fulfilling that duty.<sup>42</sup>

17. We recognize, of course, that it can be difficult to know the precise services that will be requested and by whom. However, *if* a consortium chooses to use hypothetical or sample districts in order to compare multiple bids, the consortium must compare pricing that reasonably represents the pricing for the services that the entities listed on the FCC Form 470 anticipate they are likely to request in order to comply with the requirement that price is the most important factor in selecting a bid.

18. In this instance, the Sweetwater Consortium submitted an FCC Form 470 that appears to have been seeking bids for services to the small, medium, and large districts that comprise its

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<sup>39</sup> See 47 CFR 54.503(c)(i) (2013-14); *see also Ysleta Order*, 18 FCC Rcd at 26418, para. 24 ("Our rules therefore contemplate that applicants will compare different providers' prices for actual services eligible for support.").

<sup>40</sup> See 47 CFR § 54.511(a). ("In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount prices submitted by providers, but price should be the primary factor considered"). Evaluating bids using price as the primary factor is considered so important that the Commission rules for the E-rate program require applicants to certify compliance to it when they file an FCC Form 470 and FCC Form 471. See 47 CFR § 54.503(c)(2)(vii) and 47 CFR § 54.504(a)(1)(xi) (2013-14); 47 CFR § 54.503(c)(2)(ii)(B) and 47 CFR § 54.504(a)(1)(ix). *See also Ysleta Order*, 18 FCC Rcd at 26431, para. 52 ("the prices relevant for our competitive bidding requirements are those of eligible services"); *Requests for Review of Decision of the Universal Service Administrator by La Joya Independent School District; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 28 FCC Rcd 7866, 7867, para. 2 (WCB 2013) ("The Commission's rules require applicants to carefully consider all submitted bids prior to entering into a contract, and that the price of eligible products and services must be the primary factor in selecting the winning bid.").

<sup>41</sup> See *supra* n.39.

<sup>42</sup> See *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11319, para. 46 (2013).

membership. The FCC Form 470 requested bids for three hypothetical districts consisting of 10, 80, and 150 sites, respectively, although these are not actual districts in the Consortium. It then calculated the total bid price by simply adding the cost of the services for each of the hypothetical districts together. As a result, the prices for services to each of the hypothetical districts received equal weight in the bid evaluation despite a relatively larger number of actual districts in the consortium with ten or fewer sites.

19. Although the equal weight given to each of the hypothetical district sizes did not expressly take into account the larger number of *districts* in the consortium that had ten or fewer sites, we find that the number of actual school *sites* was distributed roughly evenly across the small, medium, and large hypothetical districts.<sup>43</sup> Thus, the valuation of the pricing in this instance, while far from precise and not reflecting a best practice in price evaluation,<sup>44</sup> was reasonably representative of the pricing for the services for which the entities listed on the FCC Form 470 were likely to seek support, particularly given the lack of guidance by the Commission on this matter.

20. The Sweetwater Consortium also complied with other requirements under the price-as-the-primary-factor rule.<sup>45</sup> It assigned 25 points to price, which was higher than the points assigned to any other category. Even though it awarded more points to AT&T for price, ENA won the overall bid evaluation because it received significantly more points in the six non-price categories such as business plan, experience and qualifications, capacity and ability to meet scheduling requirements, and past performance and references.<sup>46</sup> The fact that non-price factors ultimately affected who won the bid evaluation does not indicate a violation of program rules, as the Sweetwater Consortium gave price more weight than any other single factor as the Commission's rules require,<sup>47</sup> and the record contains no evidence the Consortium inflated the scores for the non-price factors.

21. We therefore find, based on the specific facts before us in this appeal, that the Sweetwater Consortium complied with the Commission's competitive bidding rules, including the requirement that it evaluate bids using the price of eligible services as the primary factor in bid selection. Sweetwater's bid evaluation methodology allowed a price comparison that we find sufficient to reasonably represent the pricing for entities listed on its FCC Form 470, and price was assigned more points than any other evaluation criteria.

22. We caution, however, that while seeking bids for hypothetical districts may provide an easier comparison of two offerings, not every bid evaluation methodology using hypothetical districts will reasonably represent all of the entities listed on the FCC Form 470. If a hypothetical district did not reasonably represent the entities listed on the FCC Form 470, the pricing structure would not permit applicants to evaluate relevant costs and would therefore violate the price-as-the-primary-factor rule. In determining whether a bid evaluation methodology reasonably represents the entities listed on an FCC

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<sup>43</sup> Each of the three hypothetical districts represented approximately one-third of the total actual sites in the Consortium: 280 sites were located in districts that had ten or fewer sites, 373 sites in districts that had between 11 and 150 sites and 290 sites in the district that had more than 150 sites. All school counts are taken from data for the 2013-14 school year available on the National Center for Education Statistics website, <http://nces.ed.gov/>.

<sup>44</sup> See also *infra* para. 21.

<sup>45</sup> See discussion *supra* para. 2.

<sup>46</sup> Each of these categories contained multiple sub-categories. See Sweetwater Consortium Bid Evaluation. Sub-categories in the business plan category in which ENA received more points than AT&T include understanding the rules of the E-rate program, describing instances in which the company has made financial restitution to customers, and describing the installation plan in detail. Sub-categories in the experience and qualifications category in which ENA received more points than AT&T include describing all network failures affecting customers in the past year and describing scalability of the network. The sub-category in the past performance and references category in which ENA received more points than AT&T is providing a list of previous customers that purchased similar services.

<sup>47</sup> See *Ysleta Order*, 18 FCC Rcd at 26429, para 50.

Form 470, we will look at the totality of circumstances in any given instance, but may consider factors such as the weight that each site or district received in the bid evaluation, the representation of school or district geography and size, whether certain services would be needed for all or only some of the entities listed on the FCC Form 470, the technology needs of each entity, and steps the bid evaluator took to ensure that all entities listed on the FCC Form 470 were reasonably represented.

23. Applicants may avoid the question of whether their bid evaluation methodology reasonably represents all entities listed on the FCC Form 470 by seeking specific bids for each entity listed on the FCC Form 470. This approach is recommended strongly for any applicant faced with uncertainty over their bid evaluation methodology.

24. Even though it did not select the lowest-priced service, we conclude that the Sweetwater Consortium did not violate our cost-effectiveness rules.<sup>48</sup> USAC denied the relevant funding requests because, in taking into account these non-cost factors, the bid evaluators awarded maximum points to ENA while it scored AT&T lower even though USAC's review showed the bids to be "similar in the services offered."<sup>49</sup> Given these scores, USAC determined that Sweetwater Consortium did not justify the selection of ENA with a higher price and that it therefore violated the program's cost-effectiveness requirements.<sup>50</sup>

25. The Commission has not established a bright-line test for determining when a particular service offering is not cost-effective,<sup>51</sup> although it has found that a proposal to sell routers at prices two or three times greater than the prices available from commercial vendors would not be cost-effective absent extenuating circumstances.<sup>52</sup> The Commission has explained that absent evidence to the contrary, the incentive the E-rate applicants have to select the most cost-effective service because they pay for the non-discounted cost of services is generally sufficient to support a conclusion that a school has selected the most cost-effective bid for requested services.<sup>53</sup> Applicants are not required to select the lowest-priced offering,<sup>54</sup> and bid evaluators may take into account factors including prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.<sup>55</sup>

26. Although the Sweetwater Consortium selected the higher bid, based on this set of facts before us, we find that it did not violate the cost-effectiveness rule in selecting ENA. Selecting a bid that is 50 percent more than the lowest-cost bid raises concerns, and USAC was correct to investigate. The selection does not, however, by itself, demonstrate a violation of the Commission's cost-effectiveness

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<sup>48</sup> See 47 CFR § 54.503(c)(vii); 54.511 (2013).

<sup>49</sup> Notification of Commitment Adjustment at 5.

<sup>50</sup> *Id.* at 5.

<sup>51</sup> See *Ysleta Order*, 18 FCC Rcd at 26431-32, para. 54; *Requests for Review of Decisions of the Universal Service Administrator by Net56, Inc. (Palatine, IL)*, CC Docket No. 02-6, Order, 27 FCC Rcd 15799, 15801, para. 5 (WCB 2012).

<sup>52</sup> *Ysleta Order*, 18 FCC Rcd at 26431-32, paras. 54-55.

<sup>53</sup> See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, CC Docket No. 02-6, 14 FCC Rcd 13734, 13739, para. 10 (1999) (*Tennessee Order*).

<sup>54</sup> See *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5423-30, para. 192 (1997) ("Schools and libraries are not required to select the lowest bids offered, although the Commission stated that price should be the 'primary factor.'").

<sup>55</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 480; see also *Tennessee Order*, 12 FCC Rcd 8776, para. 481 (noting that these factors form a reasonable basis on which to evaluate whether an offering is cost-effective).

rules. Here, the record demonstrates that bid evaluators took into consideration six other non-cost factors, as the Commission's rules permit, seeking information from potential bidders about criteria that were important to the Consortium, including any network failures, references for similar applicants, and past performance. Based on those non-cost factors established in the Sweetwater RFP, the Sweetwater Consortium determined that ENA's bid was the most cost-effective service offering. For example, in evaluating bidders' responses to the FCC Form 470 question regarding service outages, the Sweetwater Consortium awarded zero points to AT&T for providing no response, while ENA was awarded four points for its response.<sup>56</sup> Ultimately, the Sweetwater Consortium awarded ENA 14 points more than AT&T in its bid evaluation, even though AT&T received more points for the eligible pricing factor.

## B. Signed Contract

27. We find that the Sweetwater Consortium members had legally binding agreements with ENA at the time they filed the applications for E-rate support. Consistent with rule changes in the *E-rate Modernization Order*, we find that there was no rule violation for the funding year 2015 funding requests. Because having a legally binding agreement entitles the consortium members to a waiver of the signed contract requirement for funding years 2013 and 2014, we grant a waiver for those funding years.

28. We begin by evaluating the funding year 2015 funding requests, which is the first funding year during which Commission requirements did not strictly require applicants to have a "signed agreement" in place, but rather alternatively allowed applicants to have in place any "other legally binding agreement" prior to submitting their FCC Form 471.<sup>57</sup> Based on the facts in this case, we find that legally binding agreements existed between the member school districts and ENA, and therefore we reject USAC's finding concerning funding year 2015. There were sufficiently precise offers and acceptances of terms to constitute legally binding agreements between the individual consortium members and ENA in this instance. Here, each applicant received services consistent with the offer and with the applicant's request for E-rate support, which constitutes evidence of the existence of a sufficient offer and acceptance to constitute a legally binding agreement. According to ENA, it provided a pricing worksheet that contained definite pricing to each consortium member before the member filed its E-rate application for each funding year.<sup>58</sup> Districts typically signed letters of intent indicating interest in purchasing the services listed on the pricing worksheet.<sup>59</sup> Applicants used these pricing worksheets as a basis for filing their FCC Forms 471.

29. Because we find that the applicants had offers and acceptances sufficient to create legally binding agreements in funding year 2015 consistent with the program's policy goals of having contractual terms agreed to when they filed the FCC Forms 471, we find no violation of the rule for that funding year. When changing the requirements for funding year 2015, the Commission recognized that these agreements met the same policy interests and would alleviate the need for waivers in cases where applicants had not strictly met the signed contract requirements.<sup>60</sup>

30. We note that this was not an example of best practices in contracting, and the extended review process here can be linked to the ambiguity in the contract and pricing documents as previously

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<sup>56</sup> See Sweetwater Request for Review and/or Waiver at 12.

<sup>57</sup> See *E-rate Modernization Order*, 29 FCC Rcd at 8950-51, paras. 203-04; 47 CFR § 54.504(a) (2016) ("An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart shall, upon entering into a signed contract or other legally binding agreement for eligible services, submit a completed FCC Form 471 to the Administrator.").

<sup>58</sup> See ENA Aug. 26, 2016 Supplemental Filing at 5-6.

<sup>59</sup> See *id.* at 6.

<sup>60</sup> See *E-rate Modernization Order*, 29 FCC Rcd at 8950, paras. 203-04 (eliminating the signed contract requirement from the rules in funding year 2015 because applicants with legally binding agreements were frequently forced to request, and the Commission ultimately granted, waivers of this requirement).

described. Applicants wishing to avoid the risk of such compliance review and potential appeals should have a signed document with material terms, like pricing, that contains the signatures from the applicants and service provider.<sup>61</sup> However, based on the specific facts before us and under our *de novo* review standard, we conclude that there were offers from ENA and acceptances from the Sweetwater consortium members that created legally binding agreements.

31. With respect to funding years 2013 and 2014, the Sweetwater Consortium members did not meet the then-applicable requirement of section 54.504(a) of the Commission's rules, which required that "an eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services... shall, upon signing a contract for eligible services, submit a completed FCC Form 471."<sup>62</sup> The Sweetwater Consortium argues that, at a minimum, its members had a legally binding agreement in place when the applicants filed their FCC Forms 471.<sup>63</sup> ENA explains that the pricing worksheet that it provided to the consortium members and the consortium members' application for E-rate supported services consistent with the terms of the pricing worksheet constitutes a legally binding agreement.<sup>64</sup> They argue these legally binding agreements meet the policy objectives of the rule and justify a waiver of section 54.504(a) of the Commission's rules.

32. Despite the failure to have a signed agreement in place and consistent with precedent,<sup>65</sup> we find good cause to waive the signed contract rule in place for funding years 2013 and 2014.<sup>66</sup> Generally, the Commission's rules may be waived for good cause shown.<sup>67</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>68</sup> A waiver of a rule 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.<sup>69</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>70</sup>

33. The presence of a legally binding agreement shows that the applicants were aware of and had agreed to contractual terms when they filed their FCC Forms 471. These legally binding agreements provide predictability for applicants and for the program and were consistent with the program's policy interests of requiring a signed contract during those funding years. As such, strict adherence to this rule

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<sup>61</sup> See *id.*, para. 204 (stating that a signed contract will constitute the best evidence that a legally binding agreement exists).

<sup>62</sup> 47 CFR § 54.504(a) (2013-14). In the *E-rate Modernization Order*, the Commission eased the signed contract requirement and changed the wording of this rule. *E-rate Modernization Order*, 29 FCC Rcd at 8950-51, paras. 203-04. Section 54.504(a) now states that the FCC Form 471 may be filed "upon entering into a signed contract or other legally binding agreement for eligible services..."

<sup>63</sup> Sweetwater Consortium Request for Review and/or Waiver at 52.

<sup>64</sup> See ENA Aug. 26, 2016 Supplemental Filing at 5-6.

<sup>65</sup> See *supra* n.12.

<sup>66</sup> We also waive sections 54.507(d) and 54.514(a) of the Commission's rules and direct USAC to waive any procedural deadline that might be necessary to effectuate our ruling. See 47 CFR § 54.507(d) (requiring non-recurring services to be implemented by September 30 following the close of the funding year); 47 CFR § 54.514(a) (codifying the invoice filing deadline).

<sup>67</sup> 47 CFR § 1.3.

<sup>68</sup> See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>69</sup> *Id.*

<sup>70</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

does not advance the objective of ensuring access to advanced telecommunications and information services to schools and libraries.<sup>71</sup>

#### IV. ORDERING CLAUSES

34. 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, sections 0.91, 0.291, 1.3, 1.106, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 1.106 and 54.722(a), and the authority delegated to the Wireline Competition Bureau (Bureau) in the *E-Rate Modernization Order*, 29 FCC Rcd at 8829, 8945, paras. 133 and 189, the Requests for Review and/or Waiver filed by Sweetwater City Schools et al. and ENA ARE GRANTED to the extent provided herein.

35. IT IS FURTHER 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, 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, 54.722(a), and the authority delegated to the Bureau in the *E-Rate Modernization Order*, 29 FCC Rcd at 8829, 8945, paras. 133 and 189, sections 54.504(a), 54.507(d), and 54.514(a) of the Commission's rules, 47 C.F.R. §§ 54.504(a), 54.507(d), and 54.514(a) ARE WAIVED to the limited extent described herein.

36. 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, and 54.722(a), that the Request for Review and/or Waiver filed by the Dayton City School District and the Scott County School District IS DISMISSED.

37. 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, sections 0.91, 0.291, and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.106, and the authority delegated to the Bureau in the *E-Rate Modernization Order*, 29 FCC Rcd at 8829, 8945, paras. 133 and 189, that USAC SHALL DISCONTINUE its recovery actions against Sweetwater City Schools and the other members of the Sweetwater Consortium.

38. 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, 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), and the authority delegated to the Bureau in the *E-Rate Modernization Order*, 29 FCC Rcd at 8829, 8945, paras. 133 and 189, that USAC SHALL APPLY this ruling to all of the pending applications and appeals concerning the underlying issue addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>71</sup> See 47 U.S.C. § 254(b)(6).