

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

In the Matter of
Petition for Reconsideration by
Detroit Public School District
Detroit, Michigan
School and Libraries Universal Service
Support Mechanism
File Nos. SLD-896784, 956114, 1004196
CC Docket No. 02-6

ORDER ON RECONSIDERATION

Adopted: October 16, 2018

Released: October 16, 2018

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

I. INTRODUCTION

1. In this Order, consistent with precedent, we dismiss and deny a petition for reconsideration filed by Detroit Public School District (the district). The Petition seeks review of the Wireline Competition Bureau’s (Bureau) denial of certain appeals and requests for waiver in the May 2017 Streamlined Request Resolution PN concerning applications for discounts under the E-Rate program (more formally known as the schools and libraries universal service support program) for funding years 2013, 2014, and 2015. We dismiss the Petition to the extent the district merely raises the same substantive arguments asserted in its previously filed appeals. We also deny the Petition on the merits, and reaffirm our findings in the May 2017 Streamlined Request Resolution PN that USAC properly rescinded the district’s E-Rate funding on the basis that the underlying applications violated the Commission’s competitive bidding rules by failing to consider the price of eligible services as the primary factor. Finally, we deny the request for waiver sought by the district.

1 See, generally, 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, 26410, para. 52 (2003) (explaining that “[t]he prices relevant to our competitive bidding requirements are those of eligible services”); Requests for Review of Decisions of the Universal Service Administrator by Spokane School District 81, CC Docket No. 02-6, Order, 28 FCC Rcd 6026 (WCB 2013) (denying appeal where applicant failed to use the price of eligible services as the primary factor and it is not clear from the record that the applicant selected the lowest-cost provider).

2 Petition for Reconsideration of Detroit Public School District, CC Docket No. 02-6 (filed June 23, 2017) (Petition).

3 In this Order, we use the term “appeals” to refer to the appeals and waiver requests filed by Detroit Public School District with the FCC and denied in the Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 02-6, Public Notice, 32 FCC Rcd 4612, 4619-20, n.19 (WCB 2017) (May 2017 Streamlined Request Resolution PN). The Bureau has the authority to act on petitions requesting reconsideration of final actions taken pursuant to delegated authority. 47 CFR § 1.106(a)(1).

4 See May 2017 Streamlined Request Resolution PN, 32 FCC Rcd at 4619-20, n.19 (finding that the district violated the Commission’s competitive bidding requirements by considering the price of eligible and ineligible items as primary factor in vendor selection process).

II. BACKGROUND

2. The E-Rate program allows eligible schools, libraries, and consortia that include eligible schools and libraries to apply for universal service support for eligible services.⁵ E-Rate program rules generally require that eligible entities seek competitive bids for services eligible for support.⁶ In accordance with the Commission's competitive bidding rules, applicants must submit for posting on USAC's website an FCC Form 470 to initiate the competitive bidding process.⁷ The applicant must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁸ After submitting an FCC Form 470, the applicant must wait at least 28 days before making commitments with its selected service providers.⁹ The Commission's rules require applicants to carefully consider all submitted bids prior to selecting a service provider, and the price of eligible products and services must be the primary factor in selecting the winning bid.¹⁰ The competitive bidding process must be fair and open, and must not have been compromised because of improper conduct by the applicant, service provider, or both parties.¹¹

III. DISCUSSION

3. *Dismissal.* Our rules provide that a petition for reconsideration will only be entertained if it relies on facts or arguments that have changed or were unknown to the petitioner when it previously filed its appeal.¹² We have already fully considered and rejected the facts and arguments offered by the district in support of its Petition.¹³ Therefore, to the extent the district reiterates previously asserted arguments, we dismiss the Petition pursuant to section 1.106(p)(3) of the Commission's rules.¹⁴

4. *Denial.* In addition, we deny the Petition on the merits. In denying the district's three appeals in the *May 2017 Streamlined Request Resolution PN*, we relied on the Commission's rules and precedent holding that applicants must consider the cost of eligible services as the primary factor in selecting the winning bid.¹⁵

⁵ See 47 CFR §§ 54.501-54.502.

⁶ See 47 CFR § 54.503.

⁷ See 47 CFR § 54.503(c).

⁸ See *id.*

⁹ See 47 CFR § 54.503(c)(4).

¹⁰ See 47 CFR § 54.511(a) (Applicants "shall carefully consider all bids submitted and must select the most cost-effective service offering. In determining 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.").

¹¹ See 47 CFR § 54.503(a) ("All entities participating in the schools and libraries universal service support program must conduct a fair and open competitive bidding process[.]").

¹² See 47 CFR § 1.106(b)(2).

¹³ See *May 2017 Streamlined Request Resolution PN*, 32 FCC Rcd at 4619-20, n.19. See also, e.g., Letter from Jon Brent, Detroit Public School District, to Federal Communications Commission (filed May 12, 2016) (arguing that the cost of eligible services in the first year was lower for Wayne RESA than AT&T, arguing that there was confusion about the free bundled handsets, stating there was an effort to follow evaluation procedures, and arguing that this would cause a severe financial hardship) and Petition for Reconsideration at 2 (again making these four arguments).

¹⁴ 47 CFR § 1.106(p)(3) (allowing the Commission to dismiss petitions for reconsideration that rely on arguments that have been fully considered and rejected by the Commission within the same proceeding).

¹⁵ *May 2017 Streamlined Request Resolution PN*, 32 FCC Rcd at 4619-20, n.19. See, generally, *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, 26410, para. 52 (2003) (explaining that "[t]he prices relevant to our competitive bidding requirements are those of eligible services"); *Requests for Review of Decisions*

5. The district argues that its competitive bidding evaluation process followed Commission guidelines.¹⁶ The record shows that Detroit Public School District received three bids for VOIP services from Wayne RESA, AT&T, and Windstream.¹⁷ Based on the bid evaluation sheets provided by the district,¹⁸ Wayne RESA's bid would have cost the applicant \$3,834,900 over the three-year contract in eligible charges,¹⁹ while AT&T's bid for eligible services would have cost \$2,830,550,²⁰ and Windstream's bid for eligible services would have cost \$7,612,500.²¹ In the category "Total Price and Cost Effectiveness," however, the district awarded Wayne RESA 30 points and AT&T 20 points.²² Because the price of eligible services included in AT&T's bid was lower than the price in the Wayne RESA bid, it is clear that the district did not use the price of eligible services as the primary factor in awarding Wayne RESA the most points for "Total Price and Cost Effectiveness." It therefore violated the Commission's competitive bidding rules.²³

6. The district's argument that there was confusion during funding year 2013 regarding free bundled handsets does not support a grant of its Petition.²⁴ Based on the record before us, the Wayne RESA bid did not break out the cost of ineligible handsets, but instead offered the handsets for free if the district signed a three-year contract. In funding year 2013, the district was permitted to consider the offering of the free bundled handsets in the evaluation of competing bids, if such a deal was otherwise available to the general public or class of users.²⁵ The district still needed to consider, however, the price of eligible services as the primary factor in its competitive bidding evaluation, which it did not do when it gave Wayne RESA a better score than AT&T in its total cost bid factor despite Wayne RESA's higher cost. As explained above, the district gave AT&T a lower score in its "Total Price and Cost Effectiveness" category, when its bid for eligible services was lower than Wayne RESA. This is true regardless of the treatment of the free handsets in the bid evaluation. If the district bundled the phones as eligible, the Wayne RESA bid was over \$1 million higher than AT&T's bid.²⁶ If the district treated the free phones as ineligible, the Wayne RESA bid was still higher.²⁷

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of the Universal Service Administrator by Spokane School District 81, CC Docket No. 02-6, Order, 28 FCC Rcd 6026 (WCB 2013) (denying appeal where applicant failed to use the price of eligible services as the primary factor and it is not clear from the record that the applicant selected the lowest-cost provider).

¹⁶ Petition for Reconsideration at 2.

¹⁷ *Id.*

¹⁸ See Letter from Jon Brent, Detroit Public School District, to Federal Communications Commission, Attachment 5 (filed May 12, 2016) (*DPS Appeal*).

¹⁹ *Id.* at 2 (Total All Items for 36 Months).

²⁰ *Id.* (Subtracting the Total Non-Elig Items Year One from the Total All Items for 36 Months, or \$3,620,550 - \$790,000 = \$2,830,550)

²¹ *Id.* (Subtracting the Total Non-Elig Items Year One from the Total All Items for 36 Months, or \$9,262,500 - \$1,650,000 = \$7,612,500)

²² *DPS Appeal* at Attachment 5.

²³ 47 CFR § 54.503(c).

²⁴ Petition for Reconsideration at 2.

²⁵ See *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Order, 25 FCC Rcd 17324, 17328, n.25 (WCB 2010) (*2010 Clarification Order*). We note that this language was clarified in the *2014 Bundling Order*, but only beginning in funding year 2015. *2014 Bundling Order*, 29 FCC Rcd at 5457, para. 1. See *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Order, 29 FCC Rcd 5457 (WCB 2014) (*2014 Bundling Order*).

²⁶ See *supra* para. 5 (comparing the Wayne RESA bid of \$3,834,900 to the AT&T bid of \$2,830,550).

7. The district argues first that Wayne RESA was the least expensive bidder by showing that in the first year of the contract, the eligible costs were lower in the Wayne RESA bid than in the AT&T bid.²⁸ We are not persuaded by this argument: the bids were for three years with two different pricing models. AT&T had one-time non-recurring costs in the first funding year and smaller monthly recurring costs, while Wayne RESA had smaller one-time non-recurring costs but larger monthly recurring costs.

8. The district then argues that Wayne RESA's bid would be less expensive than AT&T's bid if it removed the cost of the handsets,²⁹ but the district also removed the eligible "project cost one-time fees" from the Wayne RESA bid in its Petition without an explanation of why those fees would be considered ineligible. Again, the record demonstrates that AT&T's total eligible costs over the course of the contract would be less than Wayne RESA's costs.³⁰ The record also indicates that the district was aware that AT&T's bid for E-Rate eligible services was lower, but was concerned about the overall implementation price for the district; and, therefore, the district considered costs that are not permitted under the program's competitive bidding rules.³¹ As a result, we determine that the district has failed to show that our decision in the *May 2017 Streamlined Request Resolution PN* that Detroit Public School District violated the Commission's competitive bidding rules by failing to consider the price of eligible services as the primary factor was incorrect.³²

9. Regarding its waiver request, the district has not demonstrated the existence of any special circumstances warranting a waiver of the Commission's competitive bidding rules. The Commission may exercise its discretion to waive a rule where the particular facts demonstrate that (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.³³ Here, the district does not demonstrate that there were special circumstances meriting a waiver.

10. First, despite the district's claim,³⁴ the district did not select the least-cost service

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²⁷ Even if one subtracts the cost of AT&T's bid for handsets (\$790,000) from the Wayne RESA bid, as the District suggests, AT&T's bid is still less expensive at \$2,830,550 compared to \$3,044,900. Petition for Reconsideration at 2.

²⁸ Petition for Reconsideration at 2.

²⁹ *Id.*

³⁰ See *supra* para. 5.

³¹ See Email from Jim Rarus to Jon Brent (Feb. 4, 2013, 21:08) (stating that AT&T is slightly less over three years than Wayne RESA, but noting that Wayne RESA is less post-discount because "ALL Of the [Wayne RESA] quote is E-Rate eligible and portions of ATT quote is NOT" and stating "Interesting, like to save RESA some money but will need to evaluate on factors that "over-ride" the primary factor price to get a favorable outcome."). See also Email from Mark Bartoski, Executive Director of Technology, Detroit Public School District, to Jim Rarus (Feb. 4, 2013, 22:49) ("I would think that the overall implementation price is a key factor that we need to be concerned about – not just E-Rate eligible costs.").

³² *May 2017 Streamlined Request Resolution PN*, 32 FCC Rcd at 4619-20, n.19. See, generally, *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, 26410, para. 52 (2003) (explaining that "[t]he prices relevant to our competitive bidding requirements are those of eligible services"); *Requests for Review of Decisions of the Universal Service Administrator by Spokane School District 81*, CC Docket No. 02-6, Order, 28 FCC Rcd 6026 (WCB 2013) (denying appeal where applicant failed to use the price of eligible services as the primary factor and it is not clear from the record that the applicant selected the lowest-cost provider).

³³ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

³⁴ Petition for Reconsideration at 2.

provider.³⁵ The circumstances in this case are in contrast to the precedent the district cites, where despite violating the competitive bidding rules, applicants selected the least-cost, and therefore most cost-effective, service provider. Based on those facts and circumstances, the Bureau found it was in the public interest to grant a waiver.³⁶

11. Additionally, the district claims there was confusion about the eligibility of bundled free handsets in funding year 2013, and, in response, it made a best effort that was consistent with the overall goals of the E-Rate program.³⁷ As noted above, based on the record before us, the district has not demonstrated that it selected the winning bid based on the price of eligible services, and thus any confusion cannot excuse its violation of the program rules.

12. The district also argues that a waiver is appropriate because it “is one of the most financially strapped public school districts in the nation” and that there is no question of waste, fraud, or abuse.³⁸ The Commission has consistently held that the assertion of financial need of the applicant and the detrimental impact a denial of support will have on the students who make use of the services does not meet the requirement of special circumstances that warrant a waiver of the Commission’s rules.³⁹ Even assuming arguendo that there is no evidence of waste, fraud, or abuse here, limiting recovery to situations involving waste, fraud, or abuse would place the Commission in the position of condoning violations of the program’s rules.⁴⁰ Thus, because the district does not demonstrate any special circumstances that warrant deviation from the Commission’s competitive bidding rule, the request for a waiver is denied.⁴¹

13. Finally, the district’s argument that the *May 2017 Streamlined Request Resolution PN* did not provide a specific reason for the Bureau’s denial as required by the Administrative Procedure Act is also unavailing.⁴² As we have stated before,⁴³ the Commission’s rules do not require any specific format for disposing of appeals.⁴⁴ The *May 2017 Streamlined Request Resolution PN* clearly and succinctly notified the district of the Bureau’s denial of its appeals, the basis for the denials, and the precedent

³⁵ See, e.g., *Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 6109, 6115-17, paras. 10-12 (WCB 2011) (waiving the requirement that an applicant be able to demonstrate that it used price as the primary factor in vendor selection when the applicant selected the lowest priced option and there was no evidence of waste, fraud, or abuse).

³⁶ *Id.*

³⁷ Petition for Reconsideration at 2.

³⁸ Petition for Reconsideration at 1-2.

³⁹ See, e.g., *Application for Review of a Decision of the Wireline Competition Bureau by Mescalero Apache School; Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 20 FCC Rcd 5848, 5850, para. 5 (2005); *Request for Review by Northern Waters Library Service, 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 and 97-21, Order, 17 FCC Rcd 1756, para. 7 (CCB 2002) (both orders noting that financial need does not meet the requirement of special circumstances that warrant a waiver of the Commission's rules).

⁴⁰ *Id.*

⁴¹ See *Petition for Reconsideration by Chicago Public Schools*, CC Docket No. 02-6, Order on Reconsideration, 29 FCC Rcd 9289 (2014) (denying petition for reconsideration where petitioner failed to present special circumstances that warranted deviation from the general rule).

⁴² See Petition for Reconsideration at 1.

⁴³ See, e.g., *Petitions for Reconsideration by Blessed Sacrament School et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order on Reconsideration, 30 FCC Rcd 14274, 14283-84, para. 24 (WCB 2015).

⁴⁴ The Commission’s rules require only that (1) any person aggrieved by an action taken by USAC may request review from the Commission, and (2) these requests for review shall be considered and acted upon by the Bureau. See 47 CFR §§ 54.722, 54.719(c).

supporting the denial of their appeals. The further explanation provided in this Order addresses any alleged procedural defects from the earlier denials.⁴⁵

14. For these reasons, we affirm our decision in the *May 2017 Streamlined Request Resolution PN*.⁴⁶

IV. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 1.3, 1.106, and 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.3, 1.106 and 54.722(a), that the Petition for Reconsideration filed by Detroit Public School District IS DISMISSED to the extent the district has raised the same arguments, and as an independent and alternative basis for the decision, the Petition for Reconsideration and request for waiver is also DENIED on the merits.

16. 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 1.106 of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.106, that USAC SHALL CONTINUE its recovery actions against Detroit Public School District to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

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

⁴⁵ *May 2017 Streamlined Request Resolution PN*, 32 FCC Rcd at 4619-20, n.19.

⁴⁶ *Id.*