

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

In the Matter of
Request for Review and/or Waiver by
Missouri Research and Education Network
Columbia, Missouri
Schools and Libraries
Universal Service Support Mechanism
File Nos. SLD-926030, 926085, 925888,
926124, 972959, 973440, 973727, 973753
CC Docket No. 02-6

ORDER

Adopted: December 20, 2019

Released: December 23, 2019

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

I. INTRODUCTION

1. In this order, we address a Request for Review and/or Waiver (Request for Waiver) by the Missouri Research and Education Network (MOREnet) involving a decision by the Universal Service Administrative Company (USAC) to rescind and recover a portion of the MOREnet Consortium's (Consortium) funding year 2013 and 2014 E-Rate1 funding. USAC determined that MOREnet incorrectly calculated the discount for some of the Consortium's applications. Based on our review of the record, and the unique circumstances presented here, we find that a limited waiver of the Commission's E-Rate rules is warranted. Accordingly, we direct USAC to discontinue its recovery actions related to the Consortium's funding year 2013 and 2014 E-Rate applications and to reinstate these funding commitments.

II. BACKGROUND

A. E-Rate Program Rules and Requirements

2. Under the E-Rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.2 The Commission's rules require applicants to seek competitive bids for all eligible services for which they are considering requesting E-Rate support by submitting a completed FCC Form 470 to USAC and allow eligible schools and libraries to form a consortium for this purpose.3

3. After competitive bidding is concluded and a contract signed, applicants must file an FCC Form 471 to request E-Rate support for the contracted services.4 Discounts range from 20% to 90% of the price of eligible services based on indicators of the applicant's need.5 If filing as a consortium, the

1 The E-Rate program is more formally known as the schools and libraries universal service support mechanism.

2 47 CFR §§ 54.501-54.505 (2013).

3 47 CFR §§ 54.501(c) (2013), 54.503(a)-(c) (2013).

4 47 CFR §§ 54.504(a)-(c) (2013).

5 47 CFR §§ 54.505(a)-(c) (2013).

consortium lead (*i.e.*, the entity authorized to seek bids and purchase services on behalf of the consortium members) is required to calculate the consortium discount rate by taking a simple average of the discount rates of all members sharing a portion of the contracted services.⁶ In calculating the discount rate, the Commission concluded that the amount of service and consortia discount rates should be as closely tied to the individual entity (school, school district, library, etc.) as possible.⁷ In the *1997 Fourth Order on Recon*, the Commission stated that because members of a consortia use a weighted share for the amount of service for which they are financially liable, “the amount of support likewise should be determined, where possible, on the discount rate to which each individual school or library is entitled.”⁸ The Commission further noted that “the discount rate and the provision of support should be determined for each individual school or library if it is not unreasonably burdensome to do so.”⁹

4. In addition, the FCC Form 471 Instructions for the funding years at issue provided guidance to consortia on how to calculate their discount rate.¹⁰ Specifically, the instructions provide three options for calculating consortia discount rates. Option 1 is for a consortium requesting services “that will go ONLY to an individual consortium member and will not be shared.”¹¹ Option 2 is for a consortium where “ALL consortium members will share one or more services (whether or not those consortium members will also receive site-specific services).”¹² Under this option, the consortium averages all the entities’ discount rates on a single worksheet to create one average. This worksheet is a required part of the FCC Form 471 application, which lists all entities and their student information for discount calculation purposes. Option 3 is for a consortium “where some requested services will be shared by some consortium members and not others (whether or not those consortium members will also receive site-specific services).”¹³ Under this option, the consortium completes a separate worksheet for the shared services for each different group of consortium members sharing the service on the same funding request number (FRN) and then submits the worksheets individually. If calculating the discount rate under Option 3, each FRN on the applications would have an individual discount rate that reflected only the entities taking service from the FRN.

⁶ 47 CFR § 54.505(b)(4) (2013); *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8982-83, para. 286 & n.676 (2014) (*2014 First E-Rate Order*) (“To take the simple average, consortium leads add the discount rates of each member together and divide by the number of members in the consortium.”). USAC has also instructed consortia to calculate their discounts by taking a simple average of the discounts of their members on an application. See Letter from Gina Spade, Counsel for MOREnet, to Marlene Dortch, Secretary, FCC, CC Docket No. 02-6 (filed Oct. 23, 2018), at 2, 4-5 (MOREnet Ex Parte Filing) (referencing a September 26, 2014 USAC News Brief).

⁷ See *In the Matter of Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21 et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5437-38, para. 205 (1997) (*1997 Fourth Order on Recon*); see also *2014 First E-Rate Order*, 29 FCC Rcd at 2982-83, para. 286 & n.677.

⁸ *1997 Fourth Order on Recon*, 13 FCC Rcd at 5437-38, para. 205.

⁹ *Id.*

¹⁰ See Instructions for Completing the Schools and Libraries Universal Ordered and Certification Form, OMB 3060-0806 (Oct. 2013), at 16-17 (FCC Form 471 Instructions).

¹¹ *Id.* at 16.

¹² *Id.*

¹³ *Id.* at 17.

B. MOREnet and Funding Year 2013 and 2014 Funding Requests

5. The Consortium consists of nearly 600 E-Rate eligible schools and libraries from across Missouri.¹⁴ As the consortium lead, MOREnet submits FCC Forms 470 and issues requests for proposals (RFPs) on behalf of its members and files multiple FCC Form 471 applications for its members each year.¹⁵ MOREnet has participated in the E-Rate program since the program's inception in 1998.¹⁶ Over the years, MOREnet has submitted multiple FCC Forms 470 and RFPs to USAC, seeking bids for Internet access services on behalf of its members.¹⁷ After the conclusion of the competitive bidding process, MOREnet enters into agreements with various service providers for the requested services.

6. MOREnet filed four applications in both funding years 2013 and 2014 with multiple service providers providing network aggregation, network Internet access or the last mile circuit from member site to vendor network.¹⁸ To calculate its consortium discount rate, MOREnet calculated the simple average of all Consortium members represented on a specific application. That is, for each application, MOREnet added the discount rates of each Consortium member associated with that application and divided that number by the number of members on that application. In an effort to ensure consortium members receive a discount rate close to what they would otherwise be entitled to on an individual basis and consistent with the Commission's directive in the *1997 Fourth Order on Recon*, MOREnet attempted to group its member entities into "bands" or ranges of discounts so that the higher discount schools and libraries were on applications that receive close to the discount they would have received if they applied on their own.¹⁹ As a result, each of the four applications in funding years 2013 and 2014 had a different overall average discount rate. In funding year 2013, these were 86% for Application No. 926124, 80% for Application No. 926085, 75% for Application No. 926030 and 74% for Application No. 925888.²⁰ In funding year 2014, these were 86% for Application No. 973753, 80% for Application No. 973727, 75% for Application No. 972959 and 74% for Application No. 973440.²¹ Therefore, some Consortium members received higher discounts on their services and others lower discounts than if they had applied on their own.²² MOREnet states it also grouped the Consortium members by vendor and by contract

¹⁴ See *Request for Review and/or Waiver by Missouri Research and Education Network*, CC Docket No. 02-6 (filed Mar. 23, 2018), at 4 (MOREnet Appeal).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, e.g., Description of Services Requested and Certification Form 470, Missouri Research and Education Network, FCC Form 470 No. 210250000595428, filed (Nov. 15, 2006); Description of Services Requested and Certification Form 470, Missouri Research and Education Network, FCC Form 470 No. 736440000595394, filed (Nov. 15, 2006); Description of Services Requested and Certification Form 470, Missouri Research and Education Network, FCC Form 470 No. 117150000916629, filed (Feb. 21, 2011); Description of Services Requested and Certification Form 470, Missouri Research and Education Network, FCC Form 470 No. 520590000427870, filed (Dec. 6, 2002).

¹⁸ MOREnet appeal at Exhibit 7.

¹⁹ *Id.* at 9; see also *1997 Fourth Order on Recon*, 13 FCC Rcd at 5437-38, para. 205.

²⁰ See FCC Form 471 926030, Missouri Research and Education Network, filed (Mar. 14, 2013); FCC Form 471 926085, Missouri Research and Education Network, filed (Mar. 14, 2013); FCC Form 471 925888, Missouri Research and Education Network, filed (Mar. 14, 2013); FCC Form 471 926124, Missouri Research and Education Network, filed (Mar. 14, 2013).

²¹ See FCC Form 471 973753, Missouri Research and Education Network, filed (Mar. 24, 2014); FCC Form 471 973440, Missouri Research and Education Network, filed (Apr. 2, 2014); FCC Form 471 973727, Missouri Research and Education Network, filed (Mar. 24, 2014); FCC Form 471 972959, Missouri Research and Education Network, filed (Apr. 2, 2014).

terms or procurement.²³ According to MOREnet, while not every entity (school or library) has a representative cost in every FRN on the applications, every entity is represented by at least one FRN on the applications. So, for instance, Library A might be taking service from FRN C, but not FRN A or B.

7. On June 27, 2017, following USAC's Payment Quality Assurance reviews of invoices submitted by MOREnet for funding years 2013 and 2014, USAC issued the first of a series of commitment adjustment letters to MOREnet seeking recovery of funds. USAC determined that the discount level should be lowered based on a methodology that uses "the shared discount for only the entities requesting service."²⁴ USAC explained, in an e-mail to MOREnet, that because there were different services being provided by various service providers on the applications, the discount calculation for each FRN should only have included the entities receiving the services.²⁵ USAC further explained that the only time that the discount calculation for the entire consortium would be included in one FRN would be when the service in the FRN was shared by all members.²⁶ If there was a specific circuit that delivered service to a specific applicant or applicants, then only that applicant or applicants should have been included in the FRN for discount calculation purposes.²⁷ Thus, USAC determined that MOREnet should have used FCC Form 471 Option 3 because some of the Consortium's requested services were shared by some members and not by others. To this end, USAC concluded, under those form instructions, that MOREnet should have completed a separate worksheet for the shared services for each different group of consortium members sharing the service on the FRN and submitted the worksheets individually so that the applications would have an individual discount rate that reflected only the entities taking services from the FRN. MOREnet appealed USAC's commitment adjustment letters on August 24, 2017,²⁸ and USAC denied the appeal on January 22, 2018.²⁹ MOREnet subsequently filed its appeal with the FCC on March 23, 2018.³⁰

III. DISCUSSION

8. Based on a review of the record and the special circumstances presented, we grant MOREnet's Request for Waiver and direct USAC to discontinue its recovery actions regarding the Consortium's funding year 2013 and 2014 E-Rate applications and to reinstate these funding commitments. MOREnet does not specify the provision of the Commission's E-Rate rules for which it seeks a waiver; however, because USAC's determination for recovery regarding the FCC Form 471 applications at issue in this proceeding was based on the Consortium's discount calculations, we treat the Consortium's request as seeking a waiver of section 54.505(b)(4).³¹

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²² For instance, Application No. 926030, which had an overall average of a 75% discount rate, contained schools and libraries with discounts ranging from 86% down to a few in the 40-45% range. *See* FCC Form 471 926030, Missouri Research and Education Network, filed (Mar. 14, 2013).

²³ *See* MOREnet Ex Parte Filing at 1.

²⁴ *See, e.g.*, Notification of Commitment Adjustment Letter, from USAC, Schools and Libraries Program, to Chris Schneider, MOREnet (dated June 30, 2017) (MOREnet COMAD).

²⁵ MOREnet Appeal, Exhibit 6, pp. 62-64.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 5-6.

²⁹ *See, e.g.*, Administrator's Decision on Appeal, from USAC, Schools and Libraries Program, to Gina Spade, Broadband Legal Strategies (MOREnet Counsel) (dated Jan. 22, 2018).

³⁰ *See generally* MOREnet Appeal.

³¹ 47 CFR § 54.505(b)(4) (2013).

9. Generally, the Commission's rules may be waived for good cause shown.³² The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.³³ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³⁴ The Commission adopted E-Rate program rules aimed to make it easier for applicants to take advantage of consortium bidding recognizing that consortium purchasing can drive down the prices paid by schools and libraries for E-Rate supported services.³⁵ Here, we note that section 54.505(b)(4), which addresses consortia discount calculations, does not expressly require that the discount calculation be done on an FRN basis. We nonetheless recognize that the FCC Form 471 Instructions provide explicit guidance on how consortia should determine their discount calculations. While MOREnet failed to comply with the FCC Form 471 Instructions regarding the methodology for calculating the applicable discount rate where some but not all consortium members share services, we find that the policy behind our rules is not frustrated by a grant of a waiver in this limited circumstance.

10. Although we believe the FCC Form 471 Instructions were clear, we find that the manner in which MOREnet calculated the Consortium's discounts is reasonable and consistent with Commission rules and overall policy that encourages consortia purchasing.³⁶ In particular, we find relevant that the Commission's rules or orders do not squarely require that consortia applicants calculate their discounts at the FRN level. As discussed above, in the *1997 Fourth Order on Recon*, the Commission concluded that because members of a consortia use a weighted share for the amount of service for which each individual school or library agrees to be financially liable, "the amount of support likewise should be determined, where possible, on the discount rate to which each individual school or library is entitled."³⁷ Thus, the Commission noted that "the discount rate and the provision of support should be determined for each individual school or library if it is not unreasonably burdensome to do so."³⁸ In this instance, due to the size and complex makeup of the Consortium application, creating separate worksheets would arguably have been extremely burdensome due to the hundreds of individual applicants and the many agreements with service providers that MOREnet entered into over the years. The Commission has long encouraged consortia purchasing as a means to drive down the prices paid by schools and libraries for E-Rate supported services and has worked to reduce or eliminate barriers to applicants' participation in consortia.³⁹ In this instance, requiring the leads of large consortia to undertake a burdensome and complicated discount calculation methodology is inapposite to the Commission's goal of encouraging consortia participation and not required under our rules.

11. Further, the record shows that MOREnet attempted to pool similar levels of discount rates together, even if each Consortium member's discount did not exactly match its individual rate. Because MOREnet demonstrated its efforts to group applicants based on both services sought by and the discount levels of the applicants, we find MOREnet's methodology to be reasonable under the circumstances presented and consistent with the Commission's expectation that the consortium lead try to adjust the discount rate received by each applicant to more accurately reflect what the discount rates would be

³² 47 CFR § 1.3.

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

³⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

³⁵ *2014 First E-Rate Order*, 29 FCC Rcd at 8939, para. 168.

³⁶ *See supra* para. 3; *2014 First E-Rate Order*, 29 FCC Rcd at 8939, para. 168.

³⁷ *See 1997 Fourth Order on Recon*, 13 FCC Rcd at 5437-38, para. 205; *see also 2014 First E-Rate Order*, 29 FCC Rcd at 2982-83, para. 286 & n.677.

³⁸ *Id.*

³⁹ *See, e.g., 2014 First E-Rate Order*, 29 FCC Rcd at 8939, para. 168.

outside of the consortium.⁴⁰ Indeed, the Commission has acknowledged that the very nature of combining applicants at different discounts levels means it is “impossible for a consortium lead to give every applicant the discount rate to which it would have been entitled if it had applied for services on its own.”⁴¹ While we find that MOREnet’s discount calculation methodology was reasonable under the circumstances presented, we remind consortia applicants to use the guidance provided in the FCC Form 471 Instructions when calculating their consortia discount rate.

12. We emphasize that it is the totality of circumstances that justify deviation from our general rules. In this case, we recognize that the Consortium took good-faith and reasonable steps to comply with the E-Rate program requirements concerning calculation of consortia discount rates. Moreover, we find no evidence of waste, fraud or abuse in the Consortium’s actions. Additionally, granting a waiver here furthers the general purposes of the E-Rate program by ensuring that eligible entities receive much-needed funding. There is also a legitimate public interest in encouraging participation in E-Rate consortia. Accordingly, we find in this instance that a limited waiver of the Commission’s rules is warranted.

13. 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 1.3, and 54.722(a) of the Commission’s rules, 47 CFR §§ 1.3 and 54.722(a), that the Request for Review and/or Waiver filed by Missouri Research and Education Network, Columbia, Missouri, IS GRANTED.

14. IT IS FURTHER ORDERED, pursuant to the authority contained in section 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 CFR §§ 0.91, 0.291, 1.3, and 54.722(a), section 54.505(b)(4) is WAIVED to the extent described herein.

15. 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, and 0.291 of the Commission’s rules, 47 CFR §§ 0.91, 0.291, and the authority delegated to the Bureau in the *2014 First E-Rate Order*, 29 FCC Rcd at 8829, 8945, paras. 133 and 189, that USAC SHALL DISCONTINUE its recovery actions related to the Consortium’s funding year 2013 and 2014 E-Rate applications and SHALL REINSTATE these funding commitments.

16. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission’s rules, 47 CFR § 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

⁴⁰ *2014 First E-Rate Order*, 29 FCC Rcd at 8982-83, para. 286.

⁴¹ *Id.*