

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: Essential Network Technologies, LLC)	
and MetComm.Net, LLC,)	
Petitioners,)	
)	
v.)	No. 24-1027
)	
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION
TO EMERGENCY MOTION TO EXPEDITE
CONSIDERATION OF THE APPEAL**

The Federal Communications Commission opposes petitioners' motion to expedite consideration of their petition for review. "The Court grants expedited consideration very rarely." D.C. Cir. Handbook of Practice and Internal Procedures 34 (2021). Petitioners have provided no "strongly compelling" reasons for the Court to expedite review in this case. *Ibid.*

Petitioners claim that "the decision under review is subject to substantial challenge." Mot. 8 (quoting D.C. Cir. Handbook at 34). But as petitioners acknowledge, there is no FCC decision for this Court to review. *See* Mot. 10 (complaining that the FCC "has failed ... to render an appealable ... decision"). Insofar as they challenge action (or inaction) by the Universal Service Administrative Company (USAC), the administrator of the Commission's universal service programs, petitioners have not yet exhausted their administrative

remedies by seeking review by (or other intervention from) the FCC. *See* 47 C.F.R. § 54.719. Under the circumstances, far from needing to expedite this case, the Court lacks jurisdiction to decide it. *See* 28 U.S.C. § 2342(1) (conferring jurisdiction to review only “final orders of the Federal Communications Commission”).¹ Moreover, even if the Court did have jurisdiction, petitioners’ claims lack merit. Thus, there is no “unusual interest” or “strongly compelling” reason for expedition. D.C. Cir. Handbook at 34. The Court should deny petitioners’ motion.

BACKGROUND

A. Universal Service And The E-Rate Program

From its inception in 1934, the FCC has pursued the goal of universal service—*i.e.*, “to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151; *see AT&T, Inc. v. FCC*, 886 F.3d 1236, 1241-42 (D.C. Cir. 2018).

In 47 U.S.C. § 254, a provision added to the Communications Act in 1996, Congress directed the FCC to expand its universal service program to subsidize service provided to schools and libraries. *See* 47 U.S.C. §§ 254(b)(6), (c)(3), (h)(1)(B). Pursuant to section 254(h)(1)(B), any telecommunications carrier that

¹ Accordingly, the Commission plans to move to dismiss the petition for review.

offers services designated by the FCC as eligible for universal service support under sections 254(c)(1) and (c)(3) “shall, upon a bona fide request ... , provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.” *Id.* § 254(h)(1)(B); *see also id.* § 254(c)(1), (c)(3) (authorizing discounts for telecommunications services and “additional services” such as internet access).

The Commission establishes the amount of the discount to schools and libraries that purchase such services. *See* 47 U.S.C. § 254(h)(1)(B). Any carrier that provides discounted services shall either (1) “receive reimbursement” for the discount from the FCC’s universal service fund or (2) “have an amount equal to the amount of the discount treated as an offset to” the carrier’s “obligation to contribute” to the universal service fund under section 254(d). *See id.* § 254(h)(1)(B)(i)-(ii).

To implement this subsidy program for eligible schools and libraries (commonly known as the E-rate program), the FCC adopted a rule requiring that any school or library seeking to receive discounted services under the program “conduct a fair and open competitive bidding process” before entering into a contract with a service provider. 47 C.F.R. § 54.503(a). A note to this rule provides “an illustrative list of activities or behaviors that would not result in a fair

and open competitive bidding process”—for example, when an “applicant for supported services has a relationship with a service provider that would unfairly influence the outcome” of the bidding process, or when “the service provider prepares the applicant’s FCC Form 470” (which the applicant must submit to the E-rate program’s administrator, USAC, to initiate the competitive bidding process). *See* Note to 47 C.F.R. § 54.503(a); *see also* 47 C.F.R. § 54.503(c) (describing FCC Form 470).

An applicant requesting discounts under the E-rate program must certify that “[t]he entities listed in the application have complied with all program rules and acknowledge that failure to do so may result in denial of discount funding and/or recovery of funding.” 47 C.F.R. § 54.504(a)(1)(vi). Applicants must also certify that they “carefully considered” all bids submitted and selected “the most cost-effective bid” for the provision of eligible services. *Id.* § 54.504(a)(1)(ix). In adopting this “competitive bidding” requirement, the Commission explained that it felt compelled by “fiscal responsibility”: “Absent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand [for] universal service support ... would be needlessly great.” *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9029 ¶ 480 (1997).

The competitive bidding rule “ensur[es] that funds support services that satisfy the precise needs of an applicant and that services are provided at the lowest possible rates.” *Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15808, 15816 ¶ 21 (2004). The rule thus provides a critical safeguard “against waste, fraud, and abuse in the administration” of the E-rate program. *Id.* at 15809 ¶ 1.

Recognizing the importance of effective enforcement of this rule, the FCC determined years ago that the agency “should recover the full amount disbursed for any funding requests in which [a] beneficiary fail[s] to comply with the Commission’s competitive bidding requirements.” *Id.* at 15815 ¶ 21. Consistent with this policy, USAC has rigorously enforced the competitive bidding rule. For example, after learning of credible allegations that contracts between the Houston Independent School District and its E-rate provider violated the rule, USAC placed a “hold” on E-rate payments under the contracts while it investigated the matter. *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill*, 26 FCC Rcd 16586, 16591 ¶ 10 (2011) (*Lakehills*), *pet. for review denied*, *Hill v. FCC*, 496 F. App’x 396 (5th Cir. 2012). Ultimately, USAC determined—and the FCC agreed—that the parties and their contracts violated the competitive bidding rule. *Id.* at 16596-97 ¶¶ 20-21. Having found a violation, USAC rescinded funding commitments to the school district, *id.* at 16593 ¶ 14, and sought

full recovery of E-Rate disbursements under the contract, *id.* at 16598-16601

¶¶ 25-28. *See also Lazio Technologies, Inc.*, 26 FCC Rcd 16661, 16661 ¶ 1 (2011) (declining to pay pending invoices for discounted services provided to the Dallas Independent School District by certain service providers “because the underlying contract for the E-rate services was tainted by a bribery scheme that violated the Commission’s competitive bidding requirements”).

B. USAC’s Investigation Of Petitioners

Petitioners in this case, Essential Network Technologies LLC (ENT) and MetComm.Net, LLC (MetComm), have entered into contracts with a number of schools to provide discounted services under the E-rate program. In recent years, USAC has discovered evidence that these parties and their contracts may have violated the Commission’s competitive bidding rule.

On February 3, 2022, USAC sent a Special Compliance Information Request to ENT.² USAC made this request after finding evidence that ENT “assists E-rate clients with creating the FCC Form 470” and “provides technology support, including end-user and/or infrastructure support for a fee to some E-rate clients.”

A-53. This evidence raised doubts about whether ENT’s E-rate clients conducted a “fair and open” competitive bidding process before entering into contracts with

² This document is reproduced in petitioners’ addendum to their petition for review at page A-53. We will hereafter use “A-___” to cite to particular pages in the addendum.

ENT. *See* 47 C.F.R. § 54.503(a). To assess whether those contracts complied with the competitive bidding rule, USAC asked ENT to respond to a series of questions regarding its relationship with the school districts it served. A-53-A-54.

On March 29, 2023—after receiving information that MetComm “assists E-rate clients with creating the FCC Form 470 E-rate requirements and certifying various FCC forms”—USAC sent a Special Compliance Information Request to MetComm. A-61. Assistance of that kind would be inconsistent with the sort of “fair and open competitive bidding process” required by FCC rules. *See* Note to 47 C.F.R. § 54.503(a). To determine whether MetComm’s E-rate customers conducted a fair and open competitive bidding process before they entered into contracts with MetComm, USAC asked MetComm to respond to a series of questions regarding its relationship with the school districts it served. A-61-A-70.

USAC’s investigations regarding petitioners’ E-rate contracts are ongoing. USAC has suspended E-rate payments under the contracts pending completion of its investigations. By letter dated July 23, 2023, MetComm asked USAC to reconsider its suspension of E-rate payments to MetComm. USAC has not yet responded to MetComm’s request. Neither MetComm nor ENT has otherwise sought administrative relief from either USAC or the FCC.

ARGUMENT

Although petitioners contend, on the one hand, that expedited consideration of this case is warranted because “the decision under review is subject to substantial challenge,” Mot. 8 (quoting D.C. Cir. Handbook 34), they also acknowledge that there is no FCC decision for the Court to review. *See* Mot. 10 (the FCC “has failed ... to render an appealable ... decision”). That alone is reason for the Court to deny expedition. *See* D.C. Cir. Handbook 34; *see also* 28 U.S.C. § 2342(1) (conferring jurisdiction to review only “final orders” of the FCC).

Petitioners principally object to *USAC*’s decisions to suspend E-rate payments pending the completion of investigations into the propriety of petitioners’ E-rate contracts. But before petitioners can obtain judicial review of those decisions, they must first exhaust their administrative remedies. FCC rules provide that any party aggrieved by a USAC decision may seek FCC review of the decision. 47 C.F.R. § 54.719. Petitioners cannot obtain judicial review of USAC’s decisions in this case until they first seek FCC review of those decisions. *See Achieve Telecom Network of MA, LLC v. Universal Serv. Admin. Co.*, 2009 WL 10694438 (D. Mass. 2009) (dismissing complaint against USAC for failure to exhaust administrative remedies); *Integrity Commc’ns Ltd. v. Universal Serv. Admin. Co.*, 2008 WL 11338784 (S.D. Tex. 2008) (same); *Computer Consulting & Network Design, Inc. v. Universal Serv. Admin. Co.*, 2008 WL 2435932 (W.D. Ky.

2008) (same). Because neither petitioner has asked the FCC to review USAC's suspension of petitioners' E-rate payments, it is premature for them to seek judicial review.³

Even if their claims were not jurisdictionally barred, petitioners cannot show any "unusual interest in" or "strongly compelling" reason for expedition of this case, D.C. Cir. Handbook 34, because their claims lack merit. Petitioners argue that the Commission "exceeded its authority" under 47 U.S.C. § 254(h)(1)(B) by suspending E-rate payments to petitioners "prior to any FCC decision concluding USAC's investigations." Mot. 9. That contention cannot withstand scrutiny.

To begin with, petitioners mistakenly assert that *the Commission* suspended E-rate payments under petitioners' contracts. USAC—not the FCC—decided to suspend the payments. Petitioners appear to assume that the Commission approved of USAC's decisions in these particular cases. But there is no indication that the FCC ever reviewed these decisions, and petitioners have identified no

³ Petitioners also cannot reasonably claim that "[t]he FCC has failed to comply with its duty under 5 U.S.C. § 555(b) to render an appealable FCC decision" (Mot. 10), or that the agency has "deprived [them] of their constitutional right under the Fifth Amendment's Due Process Clause to prepare an adequate defense" (Mot. 11), when they have never requested that the Commission direct USAC to conclude its investigations by a time certain, as the FCC's rules would have permitted them to do. *See* 47 C.F.R. § 1.41. For the same reason, insofar as petitioners have framed their petition for review as, "[a]lternatively," a request for "a writ of mandamus to compel FCC action that has been unreasonably delayed," Pet. 5, there is no cause for the Court to direct the agency to respond. *See* Fed. R. App. P. 21(b); D.C. Cir. R. 21(a).

Commission order endorsing USAC's action. Until petitioners exhaust their administrative remedies by asking the Commission to intervene, it is premature to assume how the agency would rule on the suspension of E-rate payments under petitioners' contracts.

In any event, even assuming that the FCC, if asked, would approve USAC's decisions, nothing in section 254(h)(1)(B) prohibits the withholding of E-rate payments until USAC determines whether petitioners' contracts violate the FCC's competitive bidding rules. Petitioners maintain that, after a school enters into a contract to receive discounted services under section 254(h)(1)(B), the statute mandates that "the FCC 'shall' provide funding for the schools' discounts."

Mot. 9. This argument ignores the critical statutory phrase "bona fide request."

Section 254(h)(1)(B) states that carriers "shall" provide discounted services to schools and libraries upon receiving "*a bona fide request*" for eligible services. 47 U.S.C. § 254(h)(1)(B) (emphasis added). The Commission has previously concluded that a school's request for discounted services is not "bona fide" under the statute if the school does not comply with the FCC's rules governing the E-rate program, including the competitive bidding requirements. *See Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District*, 18 FCC Rcd 26407, 26433 ¶ 57 (2003) (by violating the Commission's "competitive bidding requirements," a school district "violated

section 254's mandate that applicants submit a *bona fide* request for services"); *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.*, 16 FCC Rcd 4028, 4033 ¶ 11 (2000) ("the requirement that an applicant make a bona fide request for services has been violated" when "a fair and open competitive bidding process has not occurred").

Petitioners recognize that compliance with the Commission's rules is a prerequisite to the receipt of E-rate funding. They take the position that section 254(h)(1)(B) requires the FCC to provide such funding "[a]fter a school enters into a contract for E-rate eligible services and timely files an application *certifying it has complied with the E-rate rules.*" Mot. 3 (emphasis added). But the Commission is under no obligation to continue subsidizing an applicant's discounted services if the agency subsequently learns that the applicant's certification of compliance is false. And when the Commission or USAC discovers credible evidence of potential rule violations by an applicant and/or its service provider, there is no good reason for the FCC to keep providing universal service support to those parties until the agency can assure itself that they are complying with the FCC's E-rate rules and that the applicant is making a bona fide request for discounted services.

The Commission has previously recognized that when USAC discovers evidence of potential rule violations concerning an E-rate contract, it is proper for

USAC to withhold E-rate payments under the contract until it determines whether any violations have occurred. *See Lakehills*, 26 FCC Rcd at 16591 ¶ 10 (USAC placed a “hold” on “E-rate payments to Lakehills” pending an investigation of possible violations of the FCC’s competitive bidding requirements); *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 25417, 25423 ¶ 17 (2003) (“it was appropriate for USAC to defer action” on E-rate applications by the Puerto Rico Department of Education “in light of the ongoing investigation of activities” by the Department that may have violated FCC rules).

The prudence of this practice was demonstrated in *Lakehills*. In that case, USAC ultimately found that the applicant and its service providers violated the competitive bidding rules, and it proceeded to seek full recovery of the E-rate funds that had previously been disbursed under the contracts in question. *See Lakehills*, 26 FCC Rcd at 16596-16601 ¶¶ 20-28. If USAC had not withheld payments under the contracts when it first learned of potential rule violations, it would have had to recover an even larger amount of improperly disbursed money.

Contrary to petitioners’ claims, the suspension of E-rate payments during an investigation into possible violations of the Commission’s competitive bidding rules is fully consistent with the policy goals articulated by Congress in section 254. Strict enforcement of those rules advances the statute’s primary objective, the promotion of universal service: “[A] strict rule denying or recovering funding

when violations of the competitive bidding rules occur greatly encourages strict compliance with the rules, ultimately leading to increased competition, better quality of services, and lower prices. It is unclear how providing funding to service providers who violate the competitive bidding rules for services completed—even if those services are done well—would advance the overall goal of universal service.” *Hill*, 496 F. App’x at 403.

In short, nothing in section 254 requires the FCC to continue making E-rate payments to petitioners while USAC investigates whether petitioners and the schools they serve have violated the FCC’s competitive bidding rules. To the contrary, if the Commission persisted in making E-rate payments to petitioners even after obtaining substantial evidence of potential rule violations, such payments could be used to subsidize services for which there is no “bona fide request,” in violation of section 254(h)(1)(B). Consequently, even if the Court had jurisdiction to consider the merits of the petition for review, petitioners’ challenge to USAC’s decision to suspend payments pending the completion of its investigations is likely to fail.

CONCLUSION

For the foregoing reasons, the Court should deny petitioners' motion for expedited consideration.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on March 7, 2024, I filed the foregoing Opposition of Federal Communications Commission to Emergency Motion to Expedite Consideration of the Appeal with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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