

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of )
Request for Review of a Decision of the )
Universal Service Administrator by )
Cincinnati City School District ) File No. SLD-376499
Cincinnati, Ohio )
Schools and Libraries Universal Service ) CC Docket No. 02-6
Support Mechanism )

ORDER

Adopted: May 26, 2006

Released: May 26, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant an appeal of a decision by the Universal Service Administrative Company (USAC) rescinding funding already committed to the Cincinnati City School District (Cincinnati School) for discounted services under the schools and libraries universal service support mechanism. We waive section 54.504(c) of the Commission's rules, which states that an applicant for schools and libraries funding must have a legally binding agreement in place when it submits its FCC Form 471. We remand the appeal to USAC for action consistent with this Order, and, to ensure that it is resolved expeditiously, we direct USAC to reinstate the funding commitment no later than 60 days from release of this Order.

II. BACKGROUND

2. Under the schools and libraries universal service support mechanism, also known as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections. The Commission's rules provide that, with one limited exception for existing, binding contracts, an eligible school, library, or consortium that includes eligible schools or libraries must seek competitive bids for all services eligible for support. In accordance with the Commission's rules, an applicant must

1 Cincinnati City School District Request for Review, Form 471 Application Number 376499, Funding Request Number 1032245, received March 4, 2005 (Request for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 47 C.F.R. § 54.504(c).

3 47 C.F.R. §§ 54.501-54.503.

4 47 C.F.R. §§ 54.504, 54.511(c).

file with USAC, for posting to USAC's website, an FCC Form 470 requesting discounted services.<sup>5</sup> The applicant must then wait 28 days before entering into an agreement with a service provider for the requested services.<sup>6</sup> Once the school or library has complied with the Commission's competitive bidding requirements and entered into agreements for eligible services, it must file an FCC Form 471 application to notify USAC of the services that have been ordered, the service providers with whom the applicant has entered into an agreement, and an estimate of the funds needed to cover the discounts to be given for eligible services.<sup>7</sup> The Commission's rules state that the FCC Form 471 requesting support for the services ordered by the applicant shall be submitted "upon signing a contract for eligible services."<sup>8</sup> Specifically, the FCC Form 471 instructions state that applicants must have a "signed contract" or a "legally binding agreement" with the service provider "for all services" ordered.<sup>9</sup>

3. Cincinnati School has requested review of USAC's decision to rescind funding because it did not have a legally binding contract in place when it submitted its FCC Form 471 for Funding Year 2003.<sup>10</sup> On January 1, 2003, Cincinnati School signed a Purchase Order with Blackwell Consulting Services (BCS) for network consulting services.<sup>11</sup> Approximately one month later, on February 6, 2003,

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<sup>5</sup> 47 C.F.R. § 54.504(b). See Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (Funding Years 2000, 2001, 2002 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (April 2002) (Funding Year 2003 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (May 2003) (Funding Year 2004 FCC Form 470); Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (Funding Year 2005 FCC Form 470) (collectively, FCC Form 470).

<sup>6</sup> 47 C.F.R. § 54.504(b)(4).

<sup>7</sup> 47 C.F.R. § 54.504(c). See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (December 1997) (Funding Year 1999 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (Funding Year 2000 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (Funding Year 2001 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (Funding Year 2002 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2003) (Funding Year 2004 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (Funding Year 2005 FCC Form 471) (collectively, FCC Form 471).

<sup>8</sup> 47 C.F.R. § 54.504(c). See also *Request for Review of Waldwick School District, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-234540, CC Docket No. 02-6, Order, 18 FCC Rcd 22994, 22995, para. 3 (Wireline Comp. Bur. 2003) (*Waldwick Order*); *Request for Review of St. Joseph High School, Schools and Libraries Universal Service Support Mechanisms*, File No. SLD-234540, CC Docket Nos. 96-45, 97-21, Order, 17 FCC Rcd 22499, 22500-01, para. 4 (Wireline Comp. Bur. 2002) (*St. Joseph Order*).

<sup>9</sup> Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (FCC Form 471 Instructions).

<sup>10</sup> See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Brian Anderson, Cincinnati City School District, dated January 5, 2005 (Commitment Adjustment Letter).

<sup>11</sup> See Request for Review, Attachment G (The Board of Education Cincinnati City School District, Purchase Order No. 396629, dated January 31, 2003) (Purchase Order). The Purchase Order was contingent upon Cincinnati School receiving an E-rate discount of no less than 90 percent, and a successful negotiation of a terms and conditions contract. *Id.* Although the Purchase Order description was for network consulting services, the Statement of Services in the Consulting Services Agreement included that the "[c]onsultant shall furnish all necessary personnel, facilities, equipment and materials for performance of the work hereunder." Cincinnati School FCC Form 471, Blackwell Consulting Services of Ohio, LLC Consulting Services Agreement, dated July 2, 2003, (BCS Services Agreement).

Cincinnati School filed an FCC Form 471 that included Funding Request Number (FRN) 1032245 for internal connections identifying BCS as the service provider.<sup>12</sup> On July 27, 2003, Cincinnati School entered into a signed contract with BCS.<sup>13</sup> On January 5, 2005, USAC notified Cincinnati School that it was rescinding funding in full for FRN 1032245 due to the fact that Cincinnati School did not have a contract or a legally binding agreement in place at the time its FCC Form 471 was submitted to USAC.<sup>14</sup> USAC found that the Purchase Order submitted by Cincinnati School did not constitute a legally binding agreement.<sup>15</sup> On March 3, 2005, Cincinnati School then filed the instant Request for Review with the Commission.<sup>16</sup>

4. In its Request for Review, Cincinnati School argues that USAC erred in rescinding funding already committed for Funding Year 2003 based on a revised and stronger definition of what constitutes a legally binding agreement.<sup>17</sup> Cincinnati School contends that it fully complied with both the letter and intent of the rules in effect at the time it submitted its FCC Form 471.<sup>18</sup> Specifically, Cincinnati School notes that it timely filed an FCC Form 470, adhered to the Commission's competitive bidding rules, and issued a Purchase Order prior to filing an FCC Form 471.<sup>19</sup> Cincinnati School asserts that, during the 17 months between USAC's issuance of its Funding Commitment Decision Letter and its Commitment Adjustment Letter, the service provider performed in good faith more than \$1 million dollars of work.<sup>20</sup> Thus, Cincinnati School requests a reinstatement of the funding commitment to cover the discounted portion of the work already performed by BCS.<sup>21</sup>

5. The Commission may waive any provision of its rules on its own motion and for good cause shown.<sup>22</sup> A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.<sup>23</sup> In addition, the Commission may take into account considerations of hardship,

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<sup>12</sup> FCC Form 471, Cincinnati City School District, certified February 6, 2003 (Cincinnati School FCC Form 471).

<sup>13</sup> See BCS Services Agreement.

<sup>14</sup> See Commitment Adjustment Letter. USAC noted that, prior to Funding Year 2004, the Commission interpreted the requirement that applicants have a signed contract at the time of submission of an FCC Form 471 to mean that it could be a legally binding agreement, not necessarily a signed contract. *Id.* See also FCC Form 471 Instructions (Signed Contracts: You MUST have a signed contract (or legally binding agreement between you and your service provider preparatory to a formal signed contract) for all services you order on your Form 471 . . .”).

<sup>15</sup> Commitment Adjustment Letter.

<sup>16</sup> See Request for Review.

<sup>17</sup> Request for Review at 2.

<sup>18</sup> *Id.* In fact, Cincinnati School argues that the submission of a Purchase Order is consistent with written direction given to service providers by USAC in December 2002 that stated that examples of a legally binding agreement include: a Purchase Order, a bid signed by both the applicant and the service provider, or a letter from the applicant's purchasing department awarding the bid to the named service provider. See Request for Review at 3, Attachment (Minutes from Wednesday Service Provider Conference Call – December 18, 2002) at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 4; see Letter from Schools and Libraries Division, Universal Service Administrative Company, to Brian Anderson, Cincinnati City School District, dated June 30, 2003 (Funding Commitment Decision Letter); Commitment Adjustment Letter.

<sup>21</sup> Request for Review at 5.

<sup>22</sup> 47 C.F.R. § 1.3.

<sup>23</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

equity, or more effective implementation of overall policy on an individual basis.<sup>24</sup> In sum, waiver 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>25</sup>

### III. DISCUSSION

6. We grant the appeal of the decision by USAC rescinding funding to Cincinnati School for discounted services under the E-rate program.<sup>26</sup> Based upon the facts and circumstances of this case, we find that good cause exists to waive section 54.504(c) of the Commission's rules, which states that an applicant for E-rate funding must have a legally binding contract in place when it submits its FCC Form 471.<sup>27</sup>

7. Competitive bidding requirements are necessary to ensure more efficient pricing for telecommunications and information services purchased by schools and libraries. Section 54.504(c) requires that an applicant have a signed contract in place before filing its FCC Form 471.<sup>28</sup> The record demonstrates that while Cincinnati School technically missed the program deadline for having a written contract in place at the time it submitted its FCC Form 471, Cincinnati School had a legally binding agreement in place during Funding Year 2003 and before the vendor, BCS, began providing services.<sup>29</sup> Cincinnati School's FCC Form 471 was certified approximately one month after signing a valid Purchase Order and prior to BCS performing services.<sup>30</sup> We find, therefore, that in this case the policy behind the rule was satisfied even if Cincinnati School did not technically meet the requirements of the rule.<sup>31</sup>

8. We emphasize that our competitive bidding rules are a central tenet of the E-rate program, and a tool for preventing waste, fraud and abuse. Here, we note there is no evidence in the record, at this time, that Cincinnati School engaged in activity intended to defraud or abuse the E-rate program. Finally, we find that, for this applicant, denying its requests for funding would create undue hardship and prevent it from receiving E-rate funding for work already performed by BCS. Accordingly, we find that good cause exists to grant Cincinnati School a waiver of section 54.504(c) of the Commission's rules, and remand this appeal to USAC for further processing consistent with our

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<sup>24</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *aff'd* 459 F.2d 1203 (D.C. Cir. 1972).

<sup>25</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>26</sup> Request for Review.

<sup>27</sup> 47 C.F.R. § 54.504(c).

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

<sup>29</sup> *See* Request for Review. Cincinnati School also had a signed contract in place prior to the submission of its FCC Form 486. *Id.* at 3. The FCC Form 486 (Receipt of Service Confirmation Form) is used by the Billed Entity who filed an FCC Form 471 on behalf of an eligible school, school district, library, or a consortium of those entities to inform USAC when the Billed Entity and/or the eligible entities that it represents is receiving, is scheduled to receive, or has received service in the relevant Funding Year from the named service provider(s).

*See* <http://www.universalservice.org/res/documents/sl/pdf/486i.pdf> (retrieved April 28, 2006).

<sup>30</sup> *See* Cincinnati School FCC Form 471; Purchase Order; Request for Review at 5.

<sup>31</sup> *See Requests for Waiver of the Decision of the Universal Service Administrator by the Illinois School for the Visually Impaired, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-419654, CC Docket No. 02-6, Order, DA 06-785, para. 7 (Wireline Comp. Bur. rel. April 3, 2006).

decision.<sup>32</sup> To ensure that it is resolved expeditiously, we direct USAC to reinstate the funding commitment no later than 60 days from the release of this Order.

9. We note, however, the limited nature of this decision. As stated above, our competitive bidding rules are necessary to ensure more efficient pricing for telecommunications and information services purchased by schools and libraries.<sup>33</sup> Although we grant Cincinnati School's appeal, our action here does not eliminate the requirement that applicants have a signed contract in place when submitting an FCC Form 471.<sup>34</sup> We continue to require E-rate applicants to submit complete and accurate contract information to USAC as part of the application review process.

10. Finally, we are committed to guarding against waste, fraud, and abuse, and to ensuring that funds disbursed through the E-rate universal service mechanism are used for appropriate purposes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate mechanism and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred and whether recovery is warranted. If we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. Although we grant the appeal addressed here, we reserve the right to conduct audits and investigations to determine compliance with the program rules and requirements.

#### IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the Request for Review filed by Cincinnati City School District IS GRANTED.

12. 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, and pursuant to authority delegated in 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 and 54.722(a), that section 47. C.F.R. § 54.504(c) IS WAIVED.

13. 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, and pursuant to authority delegated in 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 and 54.722(a), that the Request for Review filed by Cincinnati City School District IS REMANDED to USAC for further consideration in accordance with the terms of this Order.

14. 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, and pursuant to authority delegated in 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 and 54.722(a), USAC SHALL REINSTATE the funding commitment no later than 60 calendar days from release of this Order.

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<sup>32</sup> See 47 C.F.R. § 54.504(c).

<sup>33</sup> *Supra* para. 7.

<sup>34</sup> See 47 C.F.R. § 54.504(c).

15. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin  
Chief  
Wireline Competition Bureau