

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

In the Matter of
Requests for Review and/or Waiver of a
Decision of the
Universal Service Administrator by
Eastchester UN Free School District
Eastchester, New York
Erie 1 BOCES
West Seneca, New York
Mississippi Department of Information
Technology Services
State of Mississippi
Portales Municipal Schools
Portales, New Mexico
TechLAN, Inc. dba FusionPoint
Macon, Georgia
Schools and Libraries Universal Service
Support Mechanism

File No. SLD-326886

File No. SLD-161021260

File No. SLD-981438

File No. SLD-432673

File No. SLD-306656

CC Docket No. 02-6

ORDER

Adopted: August 28, 2019

Released: August 28, 2019

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

1. In this Order, we resolve five requests for review of decisions by USAC denying requests for funding under the E-Rate program due to an applicant's or service provider's failure to retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for the required amount of time after the last day of service delivered in the respective funding year. For the reasons discussed below, we grant the requests for review from Eastchester UN Free School District and Portales Municipal Schools. In addition, we find that good cause exists to grant a waiver of section 54.516(a) of our rules for Erie 1 BOCES and Mississippi Department of Information Technology Services. Finally, we deny the request for review from TechLAN, Inc. related to the recovery of funding for ineligible services.

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

2 See 47 CFR § 54.516(a) (2003).

3 47 CFR § 54.516(a).

2. Under the E-Rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for universal service support for eligible services.⁴ E-Rate program rules provide that these entities must seek competitive bids for services eligible for support.⁵ In accordance with the Commission's competitive bidding rules, applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-Rate eligible services.⁶ Applicants must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁷ And, after submitting an FCC Form 470, applicants must wait 28 days before making commitments with the selected service providers.⁸

3. 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.⁹ Until funding year (FY) 2015, applicants were required to retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least five years after the last day of service delivered in a particular funding year,¹⁰ and as of July 1, 2015, applicants must retain those documents for ten years.¹¹ These documents include, but are not limited to: documents relating to the competitive bidding process, such as records describing the bid evaluation criteria and weighting; bid evaluation worksheets; and winning and losing bids.¹² Applicants are also required to produce such records upon request from USAC, the Commission or any local, state, or federal agency with jurisdiction.¹³

4. *Discussion.* Upon review of the records, we grant two requests for review, grant two requests for waiver of the document retention rules, and finally, deny one request for review that argued that the document retention rules prevented it from being able to appeal properly. We find that each of these decisions appropriately balance the Commission's goals to protect the integrity of the E-Rate program while carefully considering the facts of each appeal or request for waiver. While the failure to retain documentation can have serious competitive bidding implications or reduce the ability of USAC to properly review the applicant's and service provider's compliance with program rules, we find that where compliance can be verified in other ways, the public interest may be served by waiving the rule.

5. *Eastchester UN Free School District.* In FY2002, Eastchester UN Free School District (Eastchester) requested E-Rate program funding for telecommunications services,¹⁴ but USAC denied funding because the contract was signed two days before the conclusion of the 28 day competitive

⁴ 47 CFR §§ 54.501-54.502.

⁵ 47 CFR § 54.503.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 47 CFR §§ 54.503, 54.511.

¹⁰ *See* 47 CFR § 54.516(a) (2003).

¹¹ *See* 47 CFR § 54.516(a) (2014).

¹² *See Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15824, para. 48 (2004) (*Schools and Libraries Fifth Report and Order*) (concluding that program participants must retain all documents relating to the competitive bidding process, including all winning and losing bids, for at least five years after the last day of service delivered in a particular funding year); 47 CFR §§ 54.504, 54.516 (2006); *see also* 47 CFR §§ 54.503, 54.516 (2011).

¹³ 47 CFR § 54.516(b).

¹⁴ *See* FCC Form 471, Eastchester UN Free School District (dated Dec. 21, 2001).

bidding period.¹⁵ Eastchester requested review by the Commission,¹⁶ and, on April 13, 2011, the Wireline Competition Bureau granted the request for waiver and remanded Eastchester's application to USAC.¹⁷ USAC approved the application but reduced the funding commitment "per vendor documentation."¹⁸ However, when Eastchester submitted requests for disbursements, USAC rejected the requests because Eastchester could not provide the original bills from FY2002 to verify the disbursement request amounts.¹⁹ This decision was appealed to USAC, which denied the appeal for failure to provide documentation from the funding year to support the disbursement request.²⁰ Eastchester now requests review of USAC's 2012 decision rejecting the requests for disbursement.²¹ It argues that it should not be denied funding for failure to produce documentation past the document retention period.²² In addition, Eastchester notes that USAC reduced the funding based on vendor documentation and asserts that the funding request should be granted as USAC and Eastchester had already agreed on the appropriate funding amount.²³

6. Based on the record before us, we grant Eastchester's request. During review of the funding request after it had been remanded to USAC, Eastchester provided USAC with a copy of a bill from FY2001,²⁴ which USAC used to reduce the funding commitment. It is unclear from the record why Eastchester did not provide this documentation when it was later requested, but we find that the bill provides sufficient documentation to support the disbursement amount requested in this instance. We remind applicants that they should maintain all necessary documentation to support invoicing if they appeal a funding denial. However, in this instance, the invoice from March 2002 provides the necessary support for the funding and disbursement request. We therefore grant the request and remand the appeal to USAC for disbursement.

7. *Portales Municipal Schools.* Portales Municipal Schools (Portales) is requesting review of a decision by USAC seeking to recover improperly disbursed funds from FY2004 on the grounds that Portales could not provide documentation of a request for proposal (RFP) that was listed on the associated

¹⁵ See Letter from USAC, Schools and Libraries Division, to Anita Better (dated July 30, 2002) (Eastchester FCDL).

¹⁶ See Letter from Anita Better, Eastchester Technology Department, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (dated Mar. 4, 2003).

¹⁷ See *Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Albuquerque School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 5878 (WCB 2011).

¹⁸ See Letter from USAC, Schools and Libraries Division, to Anita Better, Eastchester (dated June 1, 2011) (Administrator's Decision on FCC Remand – Funding Year 2002-2003).

¹⁹ See Form 472 (BEAR) Notification Letter (dated Sept. 21, 2011; Form 472 (BEAR) Notification Letter (dated Jan. 20, 2012).

²⁰ See March 7, 2012 Letter of Appeal of BEAR Notification for Funding Year 2002, issued January 20, 2012. In its letter of appeal Eastchester made two arguments: (1) the document retention period had expired and the requested documents were no longer in its possession; and (2) USAC and the service provider had previously agreed on a decreased funding amount based on review of vendor documentation; see April 13, 2012 Administrator's Decision on Invoice Appeal.

²¹ See Request for Review from Chuck Egan, E-rate Exchange, LLC, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed April 18, 2012) (Eastchester Request for Review) (regarding FCC Form 471 application number 326886, FRN 876087).

²² Eastchester Request for Review at 1.

²³ Eastchester Request for Review at 2.

FCC Form 470.²⁵ In FY2004, Portales Municipal Schools sought funding for telecommunications and Internet access services.²⁶ USAC committed the funding and it was disbursed.²⁷ Then, on September 9, 2010, during a Special Compliance Review related to a service provider listed on Portales' FY2004 application, USAC sent a detailed information request to Portales related to its funding requests.²⁸ At that time, amongst many other responses, Portales did not provide a copy of a (RFP used when it requested bids for services on its FCC Form 470 in that funding year.²⁹ However, the FCC Form 470 that Portales used to seek bids for these funding requests stated that an RFP was available.³⁰ On June 16, 2017, USAC issued a commitment adjustment to Portales stating that because Portales could not provide a copy of the RFP, USAC was therefore unable to determine if an RFP was issued to allow potential bidders to formulate bids.³¹

8. Based on the record before us, we grant Portales' request for review. Each of the funding requests at issue in the 2017 COMAD Letters was a recurring telecommunications or Internet access service with a last day of delivery of June 30, 2005. Based on the document retention rules in effect at that time,³² Portales was no longer under an obligation to retain the RFP, and as such, we find that failing to produce it in September 2010 was not a sufficient basis for a commitment adjustment. Thus, we direct USAC to discontinue recovery for these funding requests.

9. *Erie 1 BOCES*. Erie 1 BOCES seeks review of a USAC decision denying five funding requests in FY2016.³³ During a review of the competitive bidding processes for the funding requests, Erie 1 BOCES was unable to locate the bids it had received and evaluated.³⁴ Finding that this was a violation of the document retention rules, USAC denied funding for the requests.³⁵ Erie 1 BOCES now seeks review or a waiver of that decision, arguing that while it is unable to locate the bids at issue, the bid evaluations were done in compliance with both state procurement and E-Rate program rules. To support this argument, it states that its procurement policy is to award contracts to vendors with the lowest price,

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²⁴ See Eastchester Board of Education Invoice # 020902570 (dated Apr. 1, 2002) (covering the period from Mar. 1, 2002 through Mar. 31, 2002).

²⁵ See Portales Municipal Schools Request for Review, CC Docket No. 02-6 (filed Dec. 12, 2017) (regarding FCC Form 471 application number 432673); Letter from USAC, Schools and Libraries Division, to Joy Griffith, Portales Municipal Schools (dated Oct. 13, 2017) (Administrator's Decision on Appeal); FCC Form 470 935690000475494 at page 2-3 (dated Dec. 2, 2003).

²⁶ See FCC Form 471 application number 432673 (dated Feb. 4, 2004).

²⁷ See Letter from USAC, Schools and Libraries Division, to Joy Griffith, Portales Municipal Schools (dated June 22, 2004).

²⁸ See Letter from USAC, Schools and Libraries Division, to Joy Griffith, Portales Municipal Schools (dated Sept. 9, 2010) (2010 Information Request).

²⁹ See Response from Joy Griffith, Portales Municipal Schools, to USAC, Schools and Libraries Division (dated Oct. 28, 2010).

³⁰ See FCC Form 470 935690000475494 at page 2-3 (dated Dec. 2, 2003).

³¹ Letters from USAC, Schools and Libraries Division, to Joy Griffith, Portales Municipal Schools (dated June 16, 2017) (COMAD Letters);

³² See 47 CFR § 54.516(a) (2004).

³³ See Erie 1 BOCES Request for Review, CC Docket No. 02-6 (filed Nov. 24, 2017) (regarding FCC Form 471 application number 161021260).

³⁴ See Erie 1 BOCES Request for Review at 2.

³⁵ See Erie 1 BOCES FCDL (dated June 10, 2017).

argues that its bids are publicly opened and awarded, provides copies of the bid evaluation sheets used at the time of the contract awards which includes the pricing from the bids, and states that it has updated its document retention standards to ensure this does not occur in the future.³⁶

10. Based on the record before us, we agree with USAC's determination that Erie 1 BOCES failed to provide documentation of the bids received in response to the FCC Forms 470 in violation of section 54.516(a) of the program's rules.³⁷ However, we find good cause to grant a waiver of this rule for three of the denied funding requests due to the special circumstances presented.³⁸ In the *Fifth Report and Order*, the Commission adopted a document retention policy to "enhance the ability of auditors to determine whether applicants and service providers have complied with program rules."³⁹ In past orders, the Bureau has denied requests for review related to missing competitive bidding documentation because the absence of bids "makes it impossible for us to verify that [an applicant] carefully considered all bids submitted in response to its FCC Form 470 posting, as required by the Commission's competitive bidding rules."⁴⁰ Here, however, Erie 1 BOCES underwent an audit for FY2004 and 2005, during which it provided copies of the bids in question for three of the funding requests at issue in FY2016.⁴¹ The audit report, with which USAC management concurred, concluded that Erie 1 BOCES had carefully considered all of the bids and selected the most cost-effective service in compliance with program rules.⁴² For the other two funding requests, Erie 1 BOCES has provided contemporaneous documents detailing the bids, has copies of the bid evaluations with price as the only factor considered, and public consideration of the bids by the Board with meeting notes.⁴³ These documents were considered publicly and provide sufficient detail for the Commission to determine that all of the bids were carefully considered and the most cost-effective service offering was selected.

11. Because it has already been determined that Erie 1 BOCES complied with the competitive bidding rules for the three funding requests that underwent an audit and we are persuaded by the clear, contemporaneous documentation of the competitive bidding evaluations for the other two funding requests, we find that the failure to now provide the bids received to USAC is more clerical in nature, rather than a substantive violation of our document retention rules preventing us from ensuring compliance with the competitive bidding rules. We find it significant here that Erie 1 BOCES sought and made good faith efforts to create E-Rate compliant, competitive bid contracts for its school districts with a

³⁶ See Erie 1 BOCES Request for Review at 2-3.

³⁷ See 47 CFR §§ 54.516(a).

³⁸ The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 CFR § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), affirmed by *WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). 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. *Northeast Cellular*, 897 F.2d at 1166.

³⁹ See *Fifth Report and Order*, 19 FCC Rcd at 15824, para. 47.

⁴⁰ See, e.g., *Request for Review of a Decision of the Universal Service Administrator by Bell Gardens Christian School; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 28 FCC Rcd 13011 (WCB 2013) (*Bell Gardens Order*) (citing 47 CFR §§ 54.503, 54.511).

⁴¹ See Erie 1 BOCES Request for Review at 4 (discussing providing the bids for FRNs 1699068632, 1699068873 1699068939).

⁴² See Erie 1 BOCES Request for Review at Attach. C.

⁴³ See Erie 1 BOCES Request for Review at Attach. B & D. See FRNs 1699068873, 1699075416.

goal of ensuring schools have access to advanced telecommunications and information services. As such, a waiver, when special circumstances demonstrate that this was a clerical error rather than a substantive error, appropriately promotes the statutory requirements of section 254(h) of the Communications Act of 1934 and is in the public interest.⁴⁴ Therefore, we find good cause to waive the rule and remand the application to USAC to continue its review of all five funding requests.

12. *Mississippi Department of Information Technology Services.* Mississippi Department of Information Technology Services (ITS) also seeks review or requests a waiver of the document retention rules.⁴⁵ During an audit of an FY2014 funding request, ITS was unable to provide USAC with the two losing bids it received in 2005 in response to an FCC Form 470. ITS explains that the Mississippi Department of Archives and History destroyed the bids after six years, in accordance with state policy, despite the E-Rate program document retention rules still being in effect.⁴⁶ It also provides a formal write-up of the bid proposals and bid evaluation matrix that were considered in 2005 by the ITS Board in evaluating the bids and explains that the hearing during which the ITS Board evaluated the bids was public and could be attended by the vendors.⁴⁷ Finally, ITS notes that it has put steps in place to prevent destruction of E-Rate documents by the state in the future.⁴⁸

13. Based on the record before us, we grant Mississippi's request for waiver of the document retention rules. Here, like the special circumstances present for the funding requests for Erie 1 BOCES, ITS provides a detailed, contemporaneous description of the bids and the bid evaluation.⁴⁹ Again, these documents were considered publicly for a statewide contract with an opportunity to protest publicly at the time. The documents provide sufficient detail for the Commission to determine that all of the bids were carefully considered and the most cost-effective service offering was selected. Because this violation of the document retention rules is a clerical error, rather than an error that prevents us from evaluating compliance with our competitive bidding rules, we find that granting a waiver is in the public interest. Like Erie 1 BOCES, ITS sought and made good faith efforts to create E-Rate compliant, competitive bid contracts for its school districts and a waiver, when special circumstances exist, is in the public interest. We stress that the document retention rules are critical to ensuring that USAC and the Commission can evaluate program compliance and that we will not grant waivers of the requirement to maintain the bids absent clear, contemporaneous evidence of the competitive bidding process or other sufficient evidence, such as a USAC-reviewed audit that had previously reviewed the bids.

14. *Telfair.* In FY2002, Telfair County School District requested E-Rate support for internal connections and received a funding commitment in 2003.⁵⁰ During invoicing review, USAC determined that Telfair was seeking discounts on several ineligible items and associated installation charges that had not been listed on the Item 21; and, as such, USAC issued a commitment adjustment.⁵¹ However, USAC

⁴⁴ 47 U.S.C. § 254(h).

⁴⁵ See Mississippi ITS Request for Review, CC Docket No. 02-6 (filed Sept. 13, 2017) (regarding FCC Form 471 application number 981438).

⁴⁶ See Mississippi ITS Request for Review at 2.

⁴⁷ See Mississippi ITS Request for Review at 2, Attach.

⁴⁸ See Mississippi ITS Request for Review at 3.

⁴⁹ See Mississippi ITS Request for Review at Attach., Exhibit B (providing the bid evaluation for dedicated Internet access, using price as the primary factor, and providing a detailed explanation of the function of the bids and the cost comparison).

⁵⁰ See Letter from USAC, Schools and Libraries Division, to Carol Lee, TechLAN, Inc. (dated Apr. 7, 2003) (Funding Commitment Decision Letter) (Telfair FC DL).

⁵¹ See Letter from USAC, Schools and Libraries Division, to Marie Hunt, Telfair County School District (dated Mar. 17, 2004) (2004 COMAD Letter).

failed to adjust the commitment for some of the conditionally eligible equipment requested and then made disbursements of \$8,193.17.⁵² On June 12, 2009, USAC issued a Notification of Improperly Disbursed Funds seeking to recover funds for ineligible items that had been funded.⁵³ After an appeal to USAC that was partially approved,⁵⁴ TechLAN, Inc. dba FusionPoint, the service provider, requests review from the Commission of USAC's decision.⁵⁵ TechLAN, Inc. dba FusionPoint argues that section 54.516 of the Commission's rules should be interpreted to require document retention for five years after the *actual* delivery date of service, and states that it has limited documentation to appeal this decision because actual delivery had occurred more than five years before the letter seeking recovery of the improperly disbursed funds was received.⁵⁶ We disagree with this interpretation. The five-year document retention period begins after the last day of the funding year in which the services could be provided.⁵⁷ For these funding requests, the service delivery deadline had been extended to September 30, 2004 for this funding request. We therefore deny this request for review and direct USAC to continue recovery against the service provider.

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, and 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Eastchester UN Free School District IS GRANTED and REMANDED to USAC for further action consistent with the terms of this order.

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 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Portales Municipal Schools Is GRANTED and USAC SHALL DISCONTINUE recovery actions.

17. 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 sections 1.3 and 54.722(a) of the Commission's rules, 47 CFR §§ 1.3 and 54.722(a), section 54.516(a) of the Commission's rules, 47 CFR § 54.516(a), are WAIVED to the extent provided herein for Erie 1 BOCES and Mississippi Department of Information Technology Services.

18. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254

⁵² Conditionally eligible services are services that only eligible under certain conditions. For example, coax drops are eligible if supporting eligible equipment, but as was the case here, they are ineligible if supporting ineligible equipment.

⁵³ See Letter from USAC, Schools and Libraries Division, to Carol Lee, TechLAN, Inc. dba FusionPoint (dated June 12, 2009) (Notification of Improperly Disbursed Funds Letter) (Telfair RIDF Letter) (seeking recovery for patch cables, UPS SUA 100's, 16-port 10/100 Switch Rackmounts, 10Mbps McBasics, and RG-59 Coax Drops).

⁵⁴ See Request for Review to USAC from Carol Lee, FusionPoint (dated Aug. 7, 2009); Letter from USAC, Schools and Libraries Division, to Carol Lee, FusionPoint (dated Nov. 4, 2009) (Administrator's Decision on Appeal) (ADL).

⁵⁵ See Request for Review from Carol Lee, TechLAN, Inc. dba FusionPoint, CC Docket No. 02-6 (filed Dec. 29, 2009) (TechLAN Request for Review).

⁵⁶ See TechLAN Request for Review at 2.

⁵⁷ See, e.g., *Request for Waiver or Review of a Decision of the Universal Service Administrator by Premio Computer, Inc.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 28 FCC Rcd 8185, 8186-87, para. 6, n.14 (WCB 2014). See also 47 CFR § 54.516(a) (2014) (using amended language making clear that the retention period begins "after the latter of the last day of the applicable funding year or the service delivery deadline for the funding request.").

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 CFR §§ 0.91, 0.291, and 54.722(a), that USAC SHALL COMPLETE its review of the Erie 1 BOCES application no later than 120 calendar days from the release date of this order and USAC SHALL DISCONTINUE recovery actions against Mississippi Department of Information Technology Services.

19. 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 CFR §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by TechLAN, Inc. dba FusionPoint is DENIED to the extent provided herein.

20. 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 Palmer
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau