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LEWIS THOMASON

March 15, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Responses to Supplemental Questions from the FCC regarding the Appeal of the Sweetwater Consortium

Dear Ms. Dortch:

The attachment to this correspondence contains a letter and related exhibits from Mr. Michael Davis, Director of Schools (Superintendent) for the Hardin County, Tennessee school district. These documents that were mailed directly to Chairman Ajit Pai by Mr. Davis on, or about February 27, 2017.

It is requested that this letter, and the attachments be accepted and filed as *ex parte* communication pursuant to the rules of the Federal Communications Commission.

If you have questions concerning this letter or the attachments, do not hesitate to contact me.

Very truly yours,

LEWIS THOMASON KING KRIEG & WALDROP, P.C.

Charles W. Cagle

Charles W. Cagle
ccagle@lewisthomason.com

CWC/cc

Attachments: Letter from Mr. Davis to Chairman Pai and related attachments

CC: Gina Spade, Broadband Legal Strategies
Kitty Conrad, Education Networks of America

Michael Davis
Director of Schools
Ron Ashe
Chairman

HARDIN COUNTY
SCHOOLS

155 Guinn Street
Savannah, TN 38372
Ph (731) 925-3943
Fax (731) 925-7313

February 27, 2017

Dear Chairman Pai,

It was certainly a pleasure meeting you last Friday in Columbia, Tennessee, at the regional meeting and I appreciate very much you taking the time out of your busy schedule to attend the meeting and share your vision on moving forward. It certainly means a lot to Tennesseans when officials from Washington care enough to come into our communities. I also wanted you to know how grateful I was for the opportunity during our meeting to ask a question. I am certain that you are faced with many serious and challenging issues that have profound impacts on our country in your new position. As a school superintendent of a rural county in Tennessee, I know you will appreciate the fact that most of my tough decisions are centered on our budget and the availability of funds to our school system. Because of this, that is the very reason I wanted to take the opportunity at the meeting last Friday to ask you for an update on the status of the 2012 Tennessee Consortium Waiver Request.

On the waiver issue, I asked my attorney to gather all of the relevant information for your review. Please see the attached summary titled, "TN Consortium 2017 Briefing Sheet" and the related appeal and exhibits. The issue has been pending for over three years at WCB. As you already know, this consortium includes forty-three school systems across Tennessee. For my school system alone, the 2012 appeal still pending will have a $196,138 impact on our budget. As most school systems, we desperately need these funds to help cover the costs that directly help our students and teachers. Although to some of the larger school systems in Tennessee this may not seem like a lot of money, for rural counties like ours it would have a tremendous impact for the good in helping provide much needed services and supplies for our children.

Thank you again for coming last week to Tennessee and allowing me the chance to speak to you. It was truly an honor to meet you and I, along with forty-two other school systems in Tennessee, would be forever grateful for your help and support in making sure the open appeal is decided in the best interest of all the students and teachers that are a part of this consortium.

Best wishes always,

Michael Davis

Michael Davis, Director
Hardin County School System

School Board Members
David Baker Gary Vickery Justin Johnson David Burgess
Jeanell Dennis Janie Milender Olga Turnbow Bobby Tucker Brad Jones

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

IN THE MATTER OF:	)	
	)	
THE TENNESSEE E-RATE CONSORTIUM	)	**CC Docket No. 02-6**
	)	

Request for Waiver

The Tennessee E-rate Consortium (Tennessee) respectfully requests the Federal Communications Commission review and waive its competitive bidding requirements as determined by the fund administrator, the Universal Service Administrative Company (USAC), related to multiple 2012-2013 Form 471 applications submitted by 43 members of the Tennessee Consortium. Generally, the Federal Communications Commission's (FCC or Commission) rules may be waived if good cause is shown. 47 C.F.R. §1.3. Further, the Commission may exercise its discretion to waive a rule where particular facts make strict compliance inconsistent with public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166. A waiver of the rules is appropriate in this case because the facts present a special circumstance and public interest will be served by the Commission's actions. The Tennessee Consortium respectfully requests the Commission to waive certain competitive bidding regulations based on just cause and direct the applications to USAC for full review and consideration on their merits.

Background

The Tennessee E-rate Consortium is a consortium of school districts located across the state of Tennessee, with Metro-Nashville Public Schools serving as the consortium lead. Participation in the Tennessee Consortium is voluntary and exists for the purpose of procuring Telecommunications Services, Telecommunications and Internet Access Services. At the inception of the consortium in 2011, 79 school districts joined by executing a Letter of Authorization.

Under the Schools and Libraries Universal Service Support Mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, telecommunications, Internet access, internal connections, and basic maintenance of internal connections[1]. Therefore, under this regulatory authority, the Tennessee Consortium posted an FCC Form 470 on behalf of its member schools. Historically, the Tennessee Consortium obtains Letters of Agency (LOA) from each consortium member when the member joins the consortium. *See Exhibit One, Example of Member Letter of Agency.* Member districts are then responsible for posting their own FCC Forms 471 for services procured by the consortium's Form 470.

On February 4, 2011, the Consortium posted Form 470 534070000900066 and a Request for Proposal (RFP) in accordance with E-rate program rules[2]. Following the 28-day competitive bidding period, a five-year contract for services was awarded to ENA Services, LLC for Telecommunication Services, Telecommunications and Internet access services.

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[1] 47 C.F.R. §§ 54.502, 54.503
[2] 47 C.F.R. § 54.503

By the fall of 2011, 43 additional school districts in Tennessee sought to join the Tennessee Consortium and were considered as members. *See Exhibit 2, List of 43 Additional Consortium Members.*

Because of the addition of new consortium members and the need to make a determination whether such additions were acceptable for E-Rate purposes, the consortium lead noticed a slide during the Fall 2011 Annual USAC Training event that appeared to address this issue and used that training event as an opportunity to ask for clarification of a procedural issue that was noted on Slide 20 of the "Road to Success" presentation *See Exhibit 3 "2011 Fall training USAC Road to Success Slide 20 - LOA timing"*. Based on the information presented on that slide, the consortium lead asked the following question during training, ***"Could new consortium members post a Form 471 funding request based on an awarded multi-year contract even though the new consortium members were not originally listed on the Form 470 posted in February 2011?"*** USAC staff verbally confirmed during the training session – and in front of all training participants, including FCC staff members who were present at the training session - that this was *procedurally* acceptable. The consortium lead, having understood from this training and previous training information that the USAC presentation is reviewed by the FCC prior to presentation, believed that he was receiving guidance from USAC, which had been approved from the FCC.

Erring on the side of caution, the consortium lead followed up the E-rate training discussion with an e-mail to Catriona Ayer, USAC staff member, asking again:

> **Consortium Lead (email dated 9/27/11) paraphrased**: *Since the rules state that the LOA must be signed prior to the posting of the form 471, which will be posted by the individual LEAs, can LEAs sign an LOA at this time for the purpose of posting a 471 for the 2012-2013 program year? The LEAs would cite the 470*

that was posted for the consortium in February 2011, sign an LOA and a cooperative purchasing agreement, providing it to me as the lead of the consortium prior to filing their own form 471 for the 2012-2013 program year? Are there reasons this would not be within the rules?

Leslie Frelow (email response dated 9/30/11): *I reviewed the LOA. It is permissible under E-rate rules to allow those other members to join the Tennessee E-rate Consortium. It is not uncommon for members to join or leave a consortium after the competitive bidding and vendor selection is completed. The new consortium members' LOAs must be signed and completed by the Form 471 certification postmark date.*

Even after receiving written confirmation from a Senior USAC staff member, on October 6, 2011, the consortium lead followed up once again asking about a specific School District scenario and once again, the written advice was that it was procedurally acceptable to add consortium members as long as the associated LOAs were executed in advance of the filing of the individual Forms 471. *See Exhibit 4, E-Mail Conversations Dated 9/27/11 and 9/30/11 and 10/6/11 (read from the bottom).* Based on this seemingly sound advice, consortium members – both existing and new - created funding requests for ENA Services, LLC service and posted Forms 471 for the E-rate funding year 2012-2013, therein referencing the 2011 establishing Form 470. In total, the 43 additional consortium members created funding requests for the ENA service on their Forms 471 totaling more than $17,000,000 in discounts.

At the date of writing this Request for Waiver, 44 of the impacted consortium members' 90 total funding requests have been approved for funding. However, 41 additional funding requests have been denied and 5 additional funding requests are pending further review. In addition, eight of the previously approved districts have received COMAD letters related to the same issue. Those denied were denied on the basis of a competitive bidding violation because the member entity was not listed on the

original Form 470 posted in February 2011. This denial was in direct opposition to USAC's procedural guidance, as shown by the text of the emails in Exhibit 4.

Competitive Bidding

Competitive bidding is a cornerstone of the E-rate program. In accordance with the Commission's competitive bidding rules, applicants must submit to USAC for posting to USAC's website an FCC Form 470, which describes an applicant's planned service requirements and information regarding the applicant's competitive bidding process.[3] The competitive bidding process must be fair and open, not compromised because of improper conduct by the applicant and/or service provider, and all potential bidders must have access to the same information and be treated the same throughout the bidding procurement process.[4]

This is the precise procedure the Tennessee Consortium followed. A Form 470 and detailed RFP were posted for Telecommunications Service, Telecommunications and Internet Access services and a service provider, ENA Services, LLC was selected in accordance with all local, State and FCC rules and regulations. Before the consortium proceeded in the following year with additional members, the consortium sought the procedural guidance of USAC on *three separate occasions* – and was assured *at all times*, once in front of FCC staff members and twice in writing from a senior member of USAC, that the procedure the consortium planned to follow was correct and in

[3] 47 C.F.R. § 54.503, *see* Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form, OMB 3060-0806 (April 2002) (FCC Form 470).
[4] *See, e.g., Schools and Libraries Universal Service Support Mechanism,* Third Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 26912, 26939, para. 66 (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources).

accordance with all E-rate rules and regulations. Because the FCC regulations on the consortium membership change were silent, the consortium believed USAC had the proper authority to provide guidance on proper procedure necessary for filing the 2012-2013 application. At no time did the consortium lead, nor apparently USAC, appear to understand that what was prompted as a procedural question ultimately would have required a policy change because the guidance was in conflict with FCC rules.

It is important to understand the context in which the Tennessee Consortium and associated procurement came to fruition. For several years prior to 2011/2012, there was another consortium contract in place in Tennessee (the Greeneville City Consortium or "Greeneville") that served more than 88% of the Districts in the state (or approximately the total of the combined original 79 districts plus the incremental 43 that are the subject of this waiver request). The Greeneville contract did not expire until June 30, 2012. The consortium lead in this instance decided to post a Form 470 and release a detailed RFP well in advance of the expiration of the existing consortium contract in the event that a provider other than the incumbent provider was awarded. As we're sure you are aware, transitioning network services on the scale contemplated in the RFP to a new provider covering potentially over 100 school systems would require a minimum of six months to a year of preparation and installation - much longer than the time available from the end of the filing window until the start of the next E-Rate year – which was approximately three months. For this reason, the consortium lead proceeded well in advance to allow as seamless a transition as possible, if necessary, with a clear expectation that many users of the new contract would begin such usage in the second year of the contract, when the Greeneville contract expired. The consortium model for procurement of these services

has been widely utilized in Tennessee since nearly the Program's inception and all interested parties were well aware that there was a ***VERY HIGH*** likelihood that all of the consortium members on the Greeneville contract would transition to the new contract upon its expiration.

Discussion

There is absolutely no harm to the fund by allowing the consortium's actions or by waiving any rules inadvertently violated – USAC itself stated that consortium members may come and go during the course of a funding year. The funds requested by the 43 applicants are for Priority One services at a level reasonably consistent with amounts funded in previous years. Therefore, the fund clearly should have expected to provide funding to the 43 districts in the amounts requested for 2012-2013. Additionally, no FCC regulation was knowingly violated by the consortium lead or the consortium members. To the contrary, the consortium lead tried numerous times with ever increasing detailed questions to get USAC to indicate that allowing new entrants to the consortium was ultimately not correct. However, despite those efforts, USAC continued to insist that adding consortium members was allowable and the consortium lead ultimately believed that he had performed the necessary investigation of the question and had the answer to move forward with adding the 43 new districts to the consortium without having to post a new Form 470.

The sole issue is the addition of the 43 new consortium members in the second year of the multi-year contract for services with ENA Services, LLC and whether approval of those applicants harmed the fund in some manner. There is no evidence available which suggests that had the additional 43 members been included on the Form

470, responding prices for service would have been any different. We reasonably contend that it is only subjective speculation that the inclusion of the additional members by way of the Form 470 list would have made an impact to the bid responses and unfortunately, at this stage, it is an issue that cannot be answered because USAC itself told the consortium there was no need to post a new Form 470 with the additional entities. Therefore, we must circle back to the discussion above about the hypothesis regarding the inherent assumption that the Tennessee E-Rate Consortium would ultimately be comprised of substantially the same number of members as the Greeneville City Consortium.

Using this logic, we respectfully contend that our own supposition presents an arguable defense that the pricing in the responses was reflective of the ultimate scope and breadth of the project (aside from the list of entities noted on the Form 470) and further supports our contention that there was no harm to the fund caused by the inclusion or exclusion of Tennessee school districts on the original 470 filing.

C.F.R.

A careful review of the Code of Federal Regulations finds that the regulations do not address the issue of consortium membership change during multi-year contracts – the regulations only state that consortiums are allowed as eligible entities. Therefore, to allege that a competitive bidding violation has occurred without any specific regulatory basis for that allegation is perplexing, at best. FCC rules do not state that a consortium must post a new Form 470 any time that a consortium member joins or leaves a consortium. If that is the FCC's intent, we politely suggest that it be addressed through the federal rule-making process.

USAC's verbal and written guidance on the issue of whether new members could rely on the previously posted Form 470 has a very real impact at the applicant level. Because of USAC's presumably *procedural* guidance, 43 new consortium members posted a Form 471 and indicated their intent to buy services from the establishing consortium Form 470 and contract. In total, more than $17 million worth of services were purchased based on USAC's assurance that the procedure the applicants proposed to follow was correct.

Conclusion

Though USAC potentially erred in issuing their procedural guidance and consortium members potentially erred in following such guidance without further investigation of the issues with the FCC, we feel it is clear that the fund was not harmed by the actions taken based on the guidance. Additionally, strict adherence to this decision would not further the public interest and would in fact cause immeasurable and undue harm to the applicants affected by the unfortunate set of circumstances they are faced with. While we recognize the need for the FCC to enforce its rules even in the event of unintentional guidance by USAC or unintentional misinterpretation of that guidance by an applicant, we believe allowing a waiver regarding this highly complex and perhaps unclear set of issues/procedures/rules, where the applicants have clearly demonstrated repeated efforts to remain compliant with the rules, is in the public interest, supports the FCC's goals of not harshly punishing applicants for these type errors, does not set an inappropriate precedent and it does not harm the fund monetarily. Furthermore, this waiver request relates to interpretation or misinterpretation of issues/procedures /rules and does not present any allegations of waste, fraud or abuse.

Therefore, we request that the Commission waive the applicable sections of 47 C.F.R. §§ 54.502, 54.503 in accordance with their discretion to waive such rules based on the facts presented which clearly represent an extraordinary set of circumstances demonstrating that strict compliance would be inconsistent with the public's interest. Please see *Exhibit 5 BENs and Applications affected* for the full list of currently identified impacted applicants requiring waiver of these rules. In addition, we request that any applicant in Tennessee not yet identified as having been found non-compliant related to this specific issue on any Form 471 or attachment to this request for waiver are eligible to reference this waiver should it be granted. We further request that this waiver apply to any COMAD action that has been or will be started related to impacted applicants who were initially funded but have now had or will have funding denied.

Most Sincerely,

/s/ Kimberly Friends

Kimberly Friends
Tennessee State E-Rate Coordinator
Tennessee Department of Education
kfriends@tennsec.com
909.652.9104

/s/ Tom Bayersdorfer

Tom Bayersdorfer
Tennessee E-Rate Consortium Lead
Metro-Nashville Public Schools
tom.bayersdorfer@mnps.org
615.259.8502

Tennessee E-Rate Consortium

Tom Bayersdorfer
Metropolitan Nashville Public Schools
2601 Bransford Avenue
Nashville, TN 37204

Re: Letter of Agency For Funding Years 2011 - 2015

This is to confirm our participation in the **Tennessee E-rate Consortium** for the procurement of **Internet Access and Telecommunications and Telecommunication Services**. I hereby authorize **Tennessee E-rate Consortium** to submit FCC Forms 470, 471, and other E-rate forms to the Schools and Libraries Division of the Universal Service Administrative Company on behalf of the _____ **(name of Billed Entity)**.

I understand that, in submitting these forms on our behalf, you are making certifications for _____ **(name of Billed Entity)**. By signing this Letter of Agency, I make the following certifications:

(a) I certify that _____ **[LEA Name]** are all schools under the statutory definitions of elementary and secondary schools found in the No Child Left Behind Act of 2001, 20 U.S.C. §§ 7801(18) and (38), that do not operate as for-profit businesses and do not have endowments exceeding $50 million.

I certify that _____ **[library, libraries in your system]** are eligible for assistance from a State Library Administrative Agency under the Library Services and Technology Act of 1996, Pub. L. No. 104-208, § 211 et seq., 110 Stat. 3009 (1996) that do not operate as for-profit businesses and whose budgets are completely separate from any school (including, but not limited to elementary, secondary schools, colleges, or universities).

(b) I certify that our _____ **(e.g. LEA or library(ies))** has/have secured access, separately or through this program, to all of the resources, including computers, training, software, internal connections, maintenance, and electrical capacity, necessary to use the services purchased effectively. I recognize that some of the aforementioned resources are not eligible for support. I certify that to the extent that the Billed Entity is passing through the non-discounted charges for the services requested under this Letter of Agency, that the entities I represent have secured access to all of the resources to pay the non-discounted charges for eligible services from funds to which access has been secured in the current funding year.

(c) I certify that the services the school, library or district purchases at discounts provided by 47 U.S.C.§ 254 will be used primarily for educational purposes and will not be sold, resold, or transferred in consideration for money or any other thing of value, except as permitted by the rules of the Federal Communications Commission (Commission or FCC) at 47 C.F.R. § 54.500(et seq.).

(d) I certify that our _____ **(e.g. LEA or library(ies))** has complied with all program rules and I acknowledge that failure to do so may result in denial of discount funding and/or cancellation of funding commitments. I acknowledge that failure to comply with program rules could result in civil or criminal prosecution by the appropriate law enforcement authorities.

(e) I acknowledge that the discount level used for shared services is conditional, for future years, upon ensuring that the most disadvantaged schools and libraries that are treated as sharing in the service, receive an appropriate share of benefits from those services.

(f) I certify that I will retain required documents for a period of at least five years after the last day of service delivered. I certify that I will retain all documents necessary to demonstrate compliance with the statute and Commission rules regarding the application for, receipt of, and delivery of services receiving schools and libraries discounts, and that if audited, I will make such records available to the Administrator. I acknowledge that I may be audited pursuant to participation in the schools and libraries program.

(g) I certify that I am authorized to order telecommunications and other supported services for the eligible entity(ies) covered by this Letter of Agency. I certify that I am authorized to make this request on behalf of the eligible entity(ies) covered by this Letter of Agency, that I have examined this Letter, that all of the information on this Letter is true and correct to the best of my knowledge, that the entities that will be receiving discounted services under this Letter pursuant to this application have complied with the terms, conditions and purposes of the program, that no kickbacks were paid to anyone and that false statements on this form can be punished by fine or forfeiture under the Communications Act, 47 U.S.C. §§ 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. § 1001 and civil violations of the False Claims Act.

(i) I acknowledge that FCC rules provide that persons who have been convicted of criminal violations or held civilly liable for certain acts arising from their participation in the schools and libraries support mechanism are subject to suspension and debarment from the program. I will institute reasonable measures to be informed, and will notify USAC should I be informed or become aware that I or any of the entities, or any person associated in any way with my entity and/or the entities, is convicted of a criminal violation or held civilly liable for acts arising from their participation in the schools and libraries support mechanism.

(j) I certify, on behalf of the entities covered by this Letter of Agency, that any funding requests for internal connections services, except basic maintenance services, applied for in the resulting FCC Form 471 application are not in violation of the Commission requirement that eligible entities are not eligible for such support more than twice every five funding years beginning with Funding Year 2005 as required by the Commission's rules at 47 C.F.R. § 54.506(c).

(k) I certify that, to the best of my knowledge, the non-discount portion of the costs for eligible services will not be paid by the service provider. I acknowledge that the provision, by the provider of a supported service, of free services or products unrelated to the supported service or product constitutes a rebate of some or all of the cost of the supported services.

(l) I certify that I am authorized to sign this Letter of Agency and, to the best of my knowledge, information, and belief, all information provided to [name of Consortium] for E-rate submission is true.

Name of Entity: _____
(LEA or Library System)

Signature: _____

Date: _____

Name: _____

Title: _____

BEN	Applicant Name
128266	ATHENS CITY SCHOOL DISTRICT
128367	BLOUNT COUNTY SCHOOLS
128255	CANNON COUNTY SCHOOL DISTRICT
128207	CHEATHAM COUNTY SCHOOL DIST
128513	CLAY COUNTY SCHOOL DISTRICT
128338	CLINTON CITY SCHOOL DISTRICT
128515	CUMBERLAND COUNTY SCHOOL DIST
128277	DAYTON CITY SCHOOL DISTRICT
128425	DYER COUNTY SCHOOL DISTRICT
128393	GRAINGER COUNTY SCHOOL DISTRICT
128262	GRUNDY COUNTY SCHOOLS
128398	HANCOCK COUNTY SCHOOL DISTRICT
128488	HARDIN COUNTY SCHOOL DISTRICT
128390	HAWKINS COUNTY SCHOOL DISTRICT
128480	HENDERSON COUNTY SCHOOL DIST
128220	HOUSTON COUNTY SCHOOL DISTRICT
128253	HUMPHREYS COUNTY SCHOOLS
128331	KINGSPORT CITY SCHOOL DISTRICT
128436	LAKE COUNTY SCHOOL
128430	LAUDERDALE COUNTY SCHOOL DIST
128499	LAWRENCE COUNTY SCHOOL DIST
128288	LINCOLN COUNTY SCHOOL DISTRICT
128362	LOUDON COUNTY SCHOOL DISTRICT
128366	MARYVILLE CITY SCHOOL DISTRICT
128443	MCKENZIE SPECIAL SCHOOL DIST
128441	MEMPHIS CITY SCHOOL DISTRICT
128406	MORGAN COUNTY SCHOOL DISTRICT
128241	MURFREESBORO CITY SCHOOL DIST
128386	ONEIDA SPECIAL SCHOOL DISTRICT
128522	OVERTON COUNTY SCHOOL DISTRICT
128238	PERRY COUNTY SCHOOL DISTRICT
128511	PICKETT COUNTY SCHOOL DISTRICT
128269	POLK COUNTY SCHOOL DISTRICT
128509	PUTNAM COUNTY SCHOOL DISTRICT
128350	SCOTT COUNTY SCHOOL SYSTEM
128217	STEWART COUNTY BD OF EDUCATION
128225	SUMNER COUNTY SCHOOL DISTRICT
128401	SWEETWATER CITY SCHOOL DIST
128528	VAN BUREN COUNTY SCHOOL DIST
128328	WASHINGTON COUNTY SCHOOL DIST
128505	WAYNE COUNTY SCHOOLS
128457	WEST CARROLL SPECIAL SCHOOL DISTRICT
128525	WHITE COUNTY SCHOOL DISTRICT

FCC Form 470 & RFPs

Tips for Success

- Third-party entities conducting competitive bidding
  - Non-state agencies that conduct the competitive bidding and contract negotiations on behalf of schools or libraries
    - (e.g., Joint Power Authorities)
  - Must have a Letter of Agency (LOA) from each school and/or library signed on or before the FCC Form 471 certification postmark date

Bayersdorfer, Tom (MNPS)

From: Leslie Frelow <lfullwood@usac.org>
Sent: Thursday, October 06, 2011 1:15 PM
To: Bayersdorfer, Tom (MNPS)
Subject: Re: LOA Issue from training

Yes. Good luck
Leslie

From: Bayersdorfer, Tom (MNPS) [mailto:Tom.Bayersdorfer@mnps.org]
Sent: Thursday, October 06, 2011 01:05 PM
To: Leslie Frelow
Subject: FW: LOA Issue from training

Leslie,

I want to make sure I understand your response:

The Tennessee E-Rate Consortium, for which Metro-Nashville Public Schools (BEN 128258) is the consortium lead and I am listed contact on the form, posted a Form 470 Application Number: 534070000900066 with the Certification Received Date: 02/04/2011.

The form 470 did not include the Loudon County School District (BEN 128362). They now want to sign the LOA, that you reviewed from an email earlier in this email string (see below), and join the Tennessee E-Rate Consortium for the 2012-2013 program year as well as future years on the contract.

Each member school district of the consortium will file their own form 471.

Based on your email, that is allowable under the rules of the program. Am I Correct?

Thanks for your help on this.

Tom

Tom Bayersdorfer
Resource Manager * District E-Rate Coordinator
Technology and Information Services
Metropolitan Nashville Public Schools
2601 Bransford Ave/Nashville, TN 37204
615-259-8502 * 615-291-6068 (Fax)
tom.bayersdorfer@mnps.org

From: Leslie Frelow [mailto:lfullwood@usac.org]
Sent: Friday, September 30, 2011 8:36 AM
To: Bayersdorfer, Tom (MNPS)
Subject: RE: LOA Issue from training

Hello Tom:

I reviewed the LOA. It is permissible under E-rate rules to allow those other members to join the Tennessee E-rate Consortium. It is not uncommon for members to join or leave a consortium after the competitive bidding and vendor selection is completed. The new consortium members' LOAs must be signed and completed by the Form 471 certification postmark date.

L -

From: Bayersdorfer, Tom (MNPS) [mailto:Tom.Bayersdorfer@mnps.org]
Sent: Wednesday, September 28, 2011 10:25 AM
To: Leslie Frelow
Subject: FW: LOA Issue from training

Leslie,

Can you reply that this email made it to you?

Thanks

Tom

Tom Bayersdorfer
Resource Manager * District E-Rate Coordinator
Technology and Information Services
Metropolitan Nashville Public Schools
2601 Bransford Ave/Nashville, TN 37204
615-259-8502 * 615-291-6068 (Fax)
tom.bayersdorfer@mnps.org

From: Bayersdorfer, Tom (MNPS)
Sent: Tuesday, September 27, 2011 10:13 AM
To: 'Cayer@usac.org'
Subject: LOA Issue from training

Catriona,

(I don't have Leslie's email address or I would sent this to her as well)

This email is a follow-up to a discussion we had at the E-Rate training yesterday.

In December 2010, I solicited participation in the "Tennessee E-Rate Consortium" for the procurement of Internet Access and Telecommunications and Telecommunication Services.
I had 79 LEAs sign LOAs (see attached sample). I posted a form 470 listing participating LEAs.

Below is the overview from the beginning of the 2011 RFP:

A. Overview

The Metropolitan Nashville Public Schools (MNPS) is requesting proposals on behalf of MNPS and the Tennessee E-Rate Consortium (Consortium) whose members have furnished a Letter of Agency (LOA) to MNPS for the purpose of securing services.

These services are intended to be eligible for the Federal Communications Commission's (FCC) Universal Service Program for Schools and Libraries known commonly as E-Rate. The method for all of the K-12 public school

districts of Tennessee to purchase from this contract is Tennessee Coda Annotated, Title 12, Chapter 3, Part 10, which effectively allows Local Education Agencies, hereafter referred to as LEA, to make purchases based on the terms of a contract signed by another LEA. The funding for this contract comes from both LEA funds and the Federal E-Rate program. The technical and functional requirements for providing the necessary bundled, Internet access and management of the overall service offering must be flexible, scalable, and creatively approached by the proposing service provider. E-Rate Funding for the public schools will continue to be an overriding factor in determining what kind of technology and service offerings can be deployed throughout the Consortium's public school system environment.

The RFP had two responders, AT&T & Education Networks of America (the incumbent provider). The responses were evaluated and a contract was awarded to ENA. There was also a previous consortium that was based on a 5 year contract that runs through June 30, 2012. Most of the new consortium members were also members of the previous consortium as well.

All of the members of the consortium file their own form 471 based on the form 470 that I posted on behalf of the consortium in February 2011. The 470 referred to an RFP that was issued by Metro-Nashville Public Schools (BEN# 128258) to that reach the stated purpose of securing a contract for five years (see overview above). The LOA that was used is attached to this email.

That brings me to the current question. Since the rules state that the LOA must be signed prior to the posting of the form 471, which will be posted by the individual LEAs, can LEAs sign an LOA at this time for the purpose of posted a 471 for the 2012-2013 program year?

The LEAs would cite the 470 that was posted for the consortium in February 2011, sign an LOA and a cooperative purchasing agreement, providing it to me as the lead of the consortium prior to filing their own form 471 for the 2012-2013 program year.

Are there any reasons that this would not be within the rules?

Thanks for your help on this.

Tom

Tom Bayersdorfer
Resource Manager * District E-Rate Coordinator
Technology and Information Services
Metropolitan Nashville Public Schools
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BEN	Applicant Name	471 Application Number
128266	ATHENS CITY SCHOOL DISTRICT	839671
		839674
		839675
128367	BLOUNT COUNTY SCHOOLS	839045
		839072
128255	CANNON COUNTY SCHOOL DISTRICT	826426
128207	CHEATHAM COUNTY SCHOOL DIST	854571
		854585
128513	CLAY COUNTY SCHOOL DISTRICT	838454
128338	CLINTON CITY SCHOOL DISTRICT	833670
		833671
128515	CUMBERLAND COUNTY SCHOOL DIST	832021
		839066
128277	DAYTON CITY SCHOOL DISTRICT	829969
128425	DYER COUNTY SCHOOL DISTRICT	834106
		835285
		835469
128393	GRAINGER COUNTY SCHOOL DISTRICT	843441
		843442
		843443
128262	GRUNDY COUNTY SCHOOLS	857728
128398	HANCOCK COUNTY SCHOOL DISTRICT	838456
		838459
128488	HARDIN COUNTY SCHOOL DISTRICT	840362
		840365
		840367
128390	HAWKINS COUNTY SCHOOL DISTRICT	834701
128480	HENDERSON COUNTY SCHOOL DIST	839656
		839661
		844234
128220	HOUSTON COUNTY SCHOOL DISTRICT	839052
128253	HUMPHREYS COUNTY SCHOOLS	858374
		858385
		858395
128331	KINGSPORT CITY SCHOOL DISTRICT	835300
		835301
128436	LAKE COUNTY SCHOOL	854749
		854753
128430	LAUDERDALE COUNTY SCHOOL DIST	841585
		841588
		841590
128499	LAWRENCE COUNTY SCHOOL DIST	840358
		840361

BEN	Applicant Name	471 Application Number
128288	LINCOLN COUNTY SCHOOL DISTRICT	844225
		844227
		844228
128362	LOUDON COUNTY SCHOOL DISTRICT	832413
		852000
128366	MARYVILLE CITY SCHOOL DISTRICT	828271
		833091
		841579
128443	MCKENZIE SPECIAL SCHOOL DIST	829967
		835283
128441	MEMPHIS CITY SCHOOL DISTRICT	841031
		841084
		841086
		841087
128406	MORGAN COUNTY SCHOOL DISTRICT	829970
		833089
128241	MURFREESBORO CITY SCHOOL DIST	830590
		830591
128386	ONEIDA SPECIAL SCHOOL DISTRICT	825063
128522	OVERTON COUNTY SCHOOL DISTRICT	845721
		845723
128238	PERRY COUNTY SCHOOL DISTRICT	830587
		831018
128511	PICKETT COUNTY SCHOOL DISTRICT	839051
128269	POLK COUNTY SCHOOL DISTRICT	835888
		835890
		835893
128509	PUTNAM COUNTY SCHOOL DISTRICT	860153
		860171
		860186
128350	SCOTT COUNTY SCHOOL SYSTEM	839067
128217	STEWART COUNTY BD OF EDUCATION	828270
		836760
128225	SUMNER COUNTY SCHOOL DISTRICT	837167
128401	SWEETWATER CITY SCHOOL DIST	860334
		872366
128528	VAN BUREN COUNTY SCHOOL DIST	853185
		853188
128328	WASHINGTON COUNTY SCHOOL DIST	851996
		852001
128505	WAYNE COUNTY SCHOOLS	826423
128457	WEST CARROLL SPECIAL SCHOOL DISTRICT	828273
		831434
128525	WHITE COUNTY SCHOOL DISTRICT	832025
		834111

Tennessee Consortium Waiver Petition
February 2017

Background

- In 2011, a consortium of 79 Tennessee public schools sought bids for Internet access and other telecommunications services (Tennessee Consortium or Consortium). As a result of its procurement that process, the Consortium awarded a five-year contract to ENA.
- The following year, 43 school districts wanted to join the Tennessee Consortium contract.
- USAC provided written guidance assuring these schools that they could use the competitive bidding process used by the other group of schools.
- After these districts had relied upon USAC's written guidance, USAC reversed its position and denied their collective funding requests of approximately $12 million.
- Even though they did not believe the districts had violated any rule, the Consortium members followed FCC staff advice and filed a waiver request with WCB in 2013.
- WCB has not acted upon the waiver request, which now has been pending more than three years.

Analysis

- USAC claimed that "Billed Entities" (school district applicants) must be listed on the Form 470 that established the competitive bidding process. There is no such program rule. The rule required (1) a list of specific service for which entities are likely to seek discounts and (2) "sufficient information" to enable bidders to "reasonably determine" the needs of the applicants.[1]
    - The addition of more districts did not change the services to be provided. The demographic characteristics of the two sets of schools were very similar.
- In competitive bidding issues, the Commission has also investigated whether the scope of the bid would have meant additional vendors would have submitted bids.
    - Two bidders submitted bids for the original 2011 procurement. Following USAC's decision to deny funding, the schools created a separate consortium. Again, AT&T and ENA were the only bidders.[2] There is no reason to believe additional vendors would have submitted bids if all of the schools had been listed on the original Form 470.
- It is in the public interest to grant the waiver request.
    - There was no rule violation. By seeking guidance from USAC, these schools made every effort to follow E-rate program rules.
    - There was no harm to the fund. Broadband services were provided to all the schools. There was no waste, fraud and abuse.
    - USAC's decision frustrates Commission policy encouraging consortia applications by not allowing schools to join an existing consortia that may offer the best pricing.

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[1] 47 C.F.R. § 54.503 (2011).

[2] AT&T and ENA have been the only qualified vendors for statewide Internet contracts in Tennessee since 1998.