

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

In the Matter of)	
)	
Schools and Libraries)	CC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Request for Review and/or Waiver)	
By Azle Independent School District)	Application No. 161046319

**REQUEST FOR REVIEW AND/OR WAIVER BY THE
AZLE INDEPENDENT SCHOOL DISTRICT
OF A FUNDING DECISION BY THE
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY**

Pursuant to sections 54.719 and 54.722 of the Commission’s rules,¹ Azle Independent School District (Azle ISD)² hereby respectfully requests a review of a Universal Service Administrative Company (USAC) decision to deny Schools and Libraries Universal Service (E-rate) funding for Funding Year 2016.³

USAC denied the above-captioned application for Schools and Libraries Universal Service (E-rate) funding for Funding Year 2016 because it determined that Azle ISD violated the Commission’s competitive bidding requirements by failing to wait the requisite 28 days before selecting a service provider. USAC based this decision on an RFP addendum “that modified locations of recipients of service and contained significant information for the bidders to be able to respond to the FCC Form 470 and RFP” that “was not available in the E-rate Productivity Portal for 28 days.”⁴

¹ 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

² The BEN for Azle Independent School District is 140842.

³ Exhibit 1, FRN Status Tool Spreadsheet.

⁴ See Exhibit 1.

Azle ISD respectfully asks the Bureau to reverse USAC's decision. The RFP addendum at issue simply corrected the street address for one of the buildings for which service was requested.⁵ Judicial and Commission precedent are clear that the mere correction of a single school's street address cannot reasonably be considered an RFP modification significant enough to restart the 28-day clock.

In the alternative, if the Bureau agrees with USAC that Azle ISD violated the 28-day rule, Azle ISD requests a waiver of that rule. Azle ISD received 11 bids in response to the RFP and selected the most cost-effective bid, so it is clear that the correction of a single street address caused no harm to the competitive bidding process. It is contrary to the public interest to deny \$129,072.00 in funding to a school merely because it corrected a single street address in its RFP.

⁵ Exhibit 2, Addendum #1, dated Feb. 10, 2016.

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I. BACKGROUND

On January 25, 2016, Azle ISD filed an FCC Form 470 and a request for proposals seeking bids for 1 gigabit and 10 gigabit ethernet fiber optic or dark fiber wide area network service. The deadline for submitting bids was February 24, 2016. On February 10, 2016, Azle ISD filed Addendum #1.⁶ Addendum #1 notified potential vendors that the demarcation point for the Forte Junior High School circuit was located at a specific building on the junior high's campus. The addendum clarified that the address for the circuit's delivery was 483 Sandy Beach Road, an instructional services building located on the same contiguous campus as the junior high, instead of the main junior high building at 479 Sandy Beach Road.⁷ The two buildings are 300 yards apart, and the instructional services building is identified as an annex to Forte Junior High School in the EPC system.⁸

Six vendors submitted 11 bids by the February 24, 2016 deadline. Unite Private Networks, Conterra, WanRack, Fidelity Link, Fiberlight, and USA Fiber submitted bids for dark fiber. Unite Private Networks, Conterra, WanRack, Fidelity Link and Charter submitted bids for leased lit fiber.

Azle ISD selected Unite Private Networks' dark fiber bid as the most cost-effective. Azle ISD submitted its funding year 2016 application for E-rate services on May 19, 2016, seeking \$129,072 .00 in funding. USAC denied Azle's application on March 2, 2017.⁹ USAC

⁶ See Exhibit 2.

⁷ *Id.*

⁸ Exhibit 3, map showing location of two buildings.

⁹ See Exhibit 1.

stated that the reason for denial was a violation of the rule that RFPs must be available for 28 days:

Documentation that contained information needed for potential bidders to respond to your RFP was not available for 28 days in the E-rate Productivity Portal before selecting your service provider. On 2/10/2016 you uploaded an RFP addendum that modified locations of recipients of service, that contained significant information for the bidders to be able to respond to the FCC Form 470 and RFP. However, this documentation was not available in the E-rate Productivity Portal for 28 days. Therefore, this FRN is denied. Program procedures require the FCC Form 470, RFP and any documentation providing the additional or modifying the original information in your FCC Form 470 and/or Request for Proposal be uploaded into the FCC Form 470 in the E-rate Productivity Portal and made available for 28 days before selecting a service provider.¹⁰

Azle appealed USAC's denial on May 1, 2017. USAC denied the appeal on January 25, 2018, restating its previous finding.¹¹ Appeals to the Commission are due within 60 days.¹²

As such, this appeal is timely filed.

II. AZLE ISD'S CORRECTION OF A SINGLE STREET ADDRESS IN ITS RFP DID NOT REQUIRE A RESTART OF THE 28-DAY COMPETITIVE BIDDING PERIOD

Azle ISD urges the Bureau to reverse USAC's decision that the mere correction of a single street address in an RFP constitutes a change significant enough to require the applicant to restart the 28-day clock. Such a tiny change—not announcing a new or different site or changing the total number of sites requiring service, merely correcting the street address for a single school—in

¹⁰ *See id.* USAC originally cited two reasons for denying Azle ISD's application, but during PIA review, USAC concluded that Azle had sufficiently addressed one of those reasons. *See* Exhibits 1 and 4. Accordingly, Azle ISD's appeal to USAC and the instant appeal address only DR1, the violation of the 28-day requirement. USAC only cited to the 28-day issue as the reason for denying the appeal. *See* Exhibit 5, FRN Status Tool Spreadsheet with Post-Commitment Rationale.

¹¹ Exhibit 5, FRN Status Tool Spreadsheet with Post-Commitment Rationale.

¹² 47 C.F.R. § 54.720.

no way affected bidders' ability to respond to the RFP. USAC's decision is unreasonable and is inconsistent with Commission and judicial precedent.

In order to demonstrate how minor a change Azle ISD made, it is helpful to look at precedent regarding the "cardinal change" principle for determining whether a contract modification is within the scope of the original contract, or whether it changes the contract substantially enough that the contract must be rebid. USAC did not use the term "cardinal change" in its denial, but it uses that term in training. As such, the analysis of what constitutes a material modification to a contract for purposes of determining whether a new competitive bidding process is required is a useful analogy here.

The Commission discussed the "cardinal change" doctrine in its *Fourth Order on Reconsideration* in 1997.¹³ The Commission adopted the doctrine in order to allow universal service recipients to make minor modifications to contracts without having to initiate a new competitive bidding process.¹⁴ The Commission explained that the cardinal change principle "recognizes that a modification that exceeds the scope of the original contract harms disappointed bidders because it prevents those bidders from competing for what is essentially a new contract."¹⁵ The Commission identified "adding a few additional lines to an existing contract" as an example of what would not constitute a cardinal change.¹⁶

In the *Fourth Order on Reconsideration*, the Commission relied on precedent from the United States Court of Appeals for the Federal Circuit.¹⁷ In *AT&T v. Wiltel*, the Federal Circuit

¹³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997) (*Fourth Order on Reconsideration*).

¹⁴ *Id.* ¶¶ 224-228.

¹⁵ *Id.* ¶ 228.

¹⁶ *Id.* ¶ 224.

¹⁷ *See id.* ¶ 227 & n.692.

concluded that a contract modification that changed the level of bandwidth provided by a service provider was not a cardinal change.¹⁸

USAC itself describes “cardinal change” in a blog post on its website.¹⁹ In that post, USAC appears to be discussing both changes to an FCC Form 470 and an accompanying request for proposal as well as a Form 471.²⁰ USAC specifically states that “cardinal changes” are “changes that if you had included them in your original FCC Form 470, other service providers who didn’t bid on your request may have done so.”²¹

This precedent makes it difficult to understand how a change to a single street address in an RFP could possibly require a new 28-day waiting period. The Commission and the Federal Circuit have found, respectively, that “a few additional lines” and a significant modification of the bandwidth provision do not constitute cardinal changes, even though both of these things indisputably change—or have the potential to change—the substance of the contract.

Here, Azle ISD did not change the number of entities included in the RFP. Azle ISD did not change the scope or type of services. All it did was correct the street address for a single location (not locations, as USAC stated in the FCDL), not across town or even a few blocks away, but literally around the corner from the address originally listed. That tiny correction could not possibly have convinced a provider that was not planning to bid to do so, or have convinced a provider that was planning to bid not to do so. It is thus baffling that USAC

¹⁸ *AT&T v. Wiltel*, 1 F.3d 1201, 1205-06 (Fed. Cir. 1993) (finding that a contract modification that upgraded T1 dedicated transport circuits to T3 circuits was not a cardinal change).

¹⁹ <http://filealongwiththerate.org/cardinal-changes/>.

²⁰ *Id.*

²¹ *Id.*

identified this one address correction as “significant information” that should have restarted the 28-day clock.

Furthermore, program rules permit the correction of clerical errors. In the *Bishop Perry Order*, the Commission directed USAC “to provide all E-rate applicants with an opportunity to cure ministerial and clerical errors on their FCC Form 470 or FCC Form 471.”²² The *Bishop Perry Order* further required USAC to “inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications, along with a clear and specific explanation of how the applicant can remedy those errors.”²³ Azle ISD’s original RFP contained a clerical error: The address of the junior high was used instead of the address for the instructional services building literally around the corner, just 300 yards away, where the circuit for the junior high should be delivered. Rather than deny Azle ISD’s funding application because of this clerical error, USAC should have allowed Azle ID to correct it without penalty.

In light of the precedent discussed above, as well as the fact that USAC permits the correction of ministerial and clerical errors, Azle ISD does not understand how USAC could have concluded that correcting a single street address constitutes a significant change in the scope or terms of an RFP. Azle ISD respectfully asks the Bureau to reverse USAC’s decision.

²² *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) (*Bishop Perry Order*).

²³ *Id.*

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD WAIVE THE 28-DAY RULE BECAUSE THERE WAS NO HARM TO THE COMPETITIVE BIDDING PROCESS

As we have explained, Azle ISD did not violate the Commission's competitive bidding rules. If the Commission disagrees, however, we respectfully ask the Commission to waive its rules.

Any of the Commission's rules may be waived if good cause is shown.²⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁶ Furthermore, the Commission has previously waived the E-rate rules in cases where the applicants have merely committed ministerial or clerical errors.²⁷

The incorrect address listed in Azle ISD's original FCC Form 470 clearly had no effect on the competitive bidding process. All Azle ISD did was correct a street address in the original RFP, a minuscule change that could not possibly have affected any provider's decision to bid. Potential bidders were not misled as to the scope of the services. And the fact that Azle ISD received 11 bids in response to its RFP is strong evidence that the competitive bidding process was successful.

We ask that the Bureau consider the point of E-rate competitive bidding rules. The Commission established the 28-day rule to ensure that potential bidders have sufficient time to review bid solicitations and respond to them, thus helping ensure that the competitive bidding

²⁴ 47 C.F.R. § 1.3.

²⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁷ See, e.g., *Bishop Perry Order; Requests for Waiver and Review of Decisions of the Universal Service Administrator by Ann Arbor Public Schools*, CC Docket No. 02-6, Order, 25 FCC Rcd 17319 (2006).

process is fair and open. Here, restarting the 28-day clock after correcting one street address would have done nothing to strengthen the competitive bidding process, because it is inconceivable that any service provider would have had to reconsider its decision whether or not to bid, or revise its bid in any significant way, in the wake of that tiny correction. Denying an application because a school district corrected one address (on the same school campus, only 300 yards away) does not serve the policy purpose underlying the rules; in fact, it does the opposite. Azle ISD therefore respectfully asks the Bureau to waive the 28-day rule.

IV. CONCLUSION

For the foregoing reasons, the Bureau should grant Azle ISD's request for review and direct USAC to fund Azle ISD's 2016 funding request as described herein. In the alternative, the Bureau should waive the 28-day rule to grant the requested relief.

Respectfully submitted,

/s/ Russell Neal

Russell Neal, CEMP
VST Services, LP
905 Trophy Club Drive # 202
Trophy Club, TX 76262
682-237-7670

/s/ Gina Spade

Gina Spade
Broadband Legal Strategies
1629 K Street, NW Suite 300
Washington, DC 20006
DC Bar # 452207
gina@broadbandlegal.com
202-907-6252

Counsel for VST Services, LP

March 19, 2018

CERTIFICATE OF SERVICE

This is to certify that on this 19th day of March, 2018, a true and correct copy of the foregoing Request for Review was sent via email to:

SLD, Universal Service Administrative Company, Appeals@sl.universalservice.org

/s/ Theresa Schrader

LIST OF EXHIBITS

- Exhibit 1: FRN Status Tool Spreadsheet
- Exhibit 2: Addendum #1, dated Feb. 10, 2016
- Exhibit 3: Google Earth map showing location of 479 and 483 Sandy Beach Road
- Exhibit 4: Email from Anthony Samuel, PIA reviewer, to Russell Neal, VST Services, dated March 3, 2017
- Exhibit 5: FRN Status Tool Spreadsheet with Post Commitment Rationale

Exhibit 1

FRN Status Tool Spreadsheet

FRN	FRN Status	471 Application Number	BEN	Billed Entity Name	Applicant City	Applicant State	Applicant Zip Code	471 Consulting Firm Name	Service Provider Name	Fund Year	Orig Funding Request	Cmtd Funding Request	Orig FRN Service Type	Cmtd FRN Service Type	Wave Number	FCDL Date	FCDL Comment for 471 Application	FCDL Comment for FRN	Total Authorized Disbursement
1699144929	Denied	161046319	140842	AZLE INDEP SCHOOL DISTRICT	AZLE	TX	76020	VST Services LLC	Unite Private Networks, LLC	2016		\$0.00		Data Transmission and/or Internet Access	36	3/2/2017		DR1: Documentation that contained information needed for potential bidders to respond to your RFP was not available for 28 days in the E-rate Productivity Portal before selecting your service provider. On 2/10/2016 you uploaded an RFP addendum that modified locations of recipients of service, that contained significant information for the bidders to be able to respond to the FCC Form 470 and RFP. However, this documentation was not available in the E-rate Productivity Portal for 28 days. Therefore, this FRN is denied. Program procedures require the FCC Form 470, RFP and any documentation providing the additional or modifying the original information in your FCC Form 470 and/or Request for Proposal be uploaded into the FCC Form 470 in the E-rate Productivity Portal and made available for 28 days before selecting a service provider. ;DR2:FCC Rules require applicants to evaluate the cost effectiveness of the fiber solutions and to choose the most cost effective solution. Documentation provided failed to demonstrate that the requested Dark Fiber (No Special Construction) solution is more cost effective than the offered Dark Fiber Special Construction solutions based on total cost. Therefore, the applicant has violated the competitive bidding program rules.;MR1:This is a new FRN. It was created in order to change the service type requested on FRN 1699104380 from Maintenance And Operation to Dark Fiber (No Special Construction) in accordance with Program Rules. ;MR2:The WAN Indicator for FRN Line Item 1699144929.001 was modified from 'No' to 'Yes' to agree with the applicant documentation.	

Exhibit 2

Addendum #1, dated Feb. 10, 2016

February 10, 2016

To: Vendors Responding to RFQ LF DF Fiber Azle 02 25 2016

Subject: Addendum #1:

Purpose: The purpose of this Addendum is to inform vendors of an address correction for Forte Junior High School Circuit

Remove the Following Address From Tables A, B, and C in the RFQ Document.

Forte Junior High School – 10 Gigabit Connection
479 Sandy Beach Road
Azle, TX 76020

Add the Following Address to Tables A, B, and C in the RFQ Document.

Instructional Service Center – 10 Gigabit Connection
483 Sandy Beach Road
Azle, TX 76020

NOTE: Forte Junior High School and Instructional Service Center are physically located on the same contiguous campus in Separate Buildings

Reminder: Bids are due February 24, 2016 at 2:00 pm CST, no late proposals will be accepted.

DATE: _____

COMPANY: _____

AUTHORIZED REPRESENTATIVE: _____
(TYPED NAME AND TITLE)

AUTHORIZED REPRESENTATIVE: _____
(SIGNATURE)

If you have any questions or concerns, please feel free to call me at the number listed below. Thank you for participating in LSD's proposal process. We look forward to working with you in the near future.

Sincerely,




Russell Neal on behalf of Azle LSD
VST Services, LP
905 Trophy Club Drive # 202
Trophy Club, TX 76262
Office: 682-237-7670
rneal@vstservices.com

Exhibit 3

Google Earth map showing location of 479 and 483 Sandy Beach Road

Azle 479 to 483

Legend

-  Distance 479 to 483
-  Feature 1

 479 Sandy Beach Road Forte Junior High School

 483 Sandy Beach Road ISC

Sandy Beach Rd

Google Earth

© 2016 Google

900 ft



Exhibit 4

**Email from Anthony Samuel, PIA reviewer,
to Russell Neal, VST Services, dated March 3, 2017**

Russell Neal

From: Samuel, Anthony <Anthony.SAMUEL@sl.universalservice.org>
Sent: Friday, March 03, 2017 1:58 PM
To: Russell Neal
Subject: RE: 161046319 - E-rate Review Information

We apologize but we were not able to review your denial response in time before the application hit the wave.

After review, we have determined that we can overturn the denial for not selecting the most cost effective option. Your documentation sufficiently shows that the selected option is the most cost effective option.

However, we cannot overturn the other denial reason. Failure to post and restart 28 days for addendums containing significant information is a violation of the program rules. The documentation provided is not sufficient to overturn this denial.

Therefore, the decision on the FRN remains the same.

If you still disagree with our determination, you may utilize the appeal function in EPC to submit an appeal.

Also, please let me know if you have any additional questions.

Thank you,

Anthony Samuel
Quality Assurance Associate, Fiber Reviewer
30 Lanidex Plaza West | Parsippany, NJ 07054
T: 973.581.5161 | F: 973.599.6570
anthony.samuel@sl.universalservice.org

From: Samuel, Anthony
Sent: Friday, March 03, 2017 8:52 AM
To: 'Russell Neal'
Subject: RE: 161046319 - E-rate Review Information

I escalated it and have not heard anything back as yet.

Anthony Samuel
Quality Assurance Associate, Fiber Reviewer
30 Lanidex Plaza West | Parsippany, NJ 07054
T: 973.581.5161 | F: 973.599.6570
anthony.samuel@sl.universalservice.org

From: Russell Neal [<mailto:rmeal@vstservices.com>]
Sent: Thursday, March 02, 2017 5:26 PM
To: Samuel, Anthony
Cc: Russell Neal
Subject: RE: 161046319 - E-rate Review Information

Hi Anthony,

Just curious ... Do you know if they reviewed the documents we submitted on Tuesday?

The FCDL was issued this morning is the reason I ask?

Thank you.

Exhibit 5

FRN Status Tool Spreadsheet with Post Commitment Rationale

FRN	FRN Status	471 Application Number	BEN	Billed Entity Name	Applicant City	Applicant State	471 Consulting Firm Name	Service Provider Name	Fund Year	Orig Funding Request	Cmt'd Funding Request	Orig FRN Service Type	Cmt'd FRN Service Type	Wave Number	FCDL Date	PC Wave Number	Revised FCDL Date	Post Commitment Rationale	FRN Committed Amount
1699144929	Denied	161046319	140842	AZLE INDEP SCHOOL DISTRICT	AZLE	TX	VST Services LP	Unite Private Networks, LLC	2016		\$0.00		Data Transmission and/or Internet Access	36	3/2/2017	35	01/24/2018	35-FCC rules require applicants to submit a complete description of the services they seek so that it may be posted for competing service providers to evaluate and formulate bids. See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076, FCC 97-157, para. 570, 575 (rel. May 8, 1997). The applicant's FCC Form 470 should inform potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form. To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days. See Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal-State Joint Board of Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., SLD Nos. 321479, et al., CC Docket Nos. 96-45 and 97-21, Order, 18 FCC Rcd 26423-26424, FCC 03-313 para. 39 (rel. Dec. 8, 2003). On the FCC Form 470 associated with your funding request, you indicated that you had a Request for Proposal (RFP) for the products and/or services that you sought. During the review of your FCC Form 471, USAC determined that your RFP was not available for bidders for the required 28 days. USAC denied your funding request(s) as you did not comply with the competitive bidding requirement that your RFP be available to bidders for 28 days. In your appeal, you did not demonstrate that USAC's determination was incorrect. Consequently, your appeal is denied.	\$0.00