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April 26, 2019

CC Docket No. 02-6

Petition for Appeal/Waiver of a Decision by the Universal Service Administrative Company

To:

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

From:

Billed Entity Number: 16055092
Applicant: Networkmaine
Contact: Anne Perloff
Email: anne.perloff@maine.edu
Phone: (207) 581-3584

Regarding:

Decision Letter: RFCDL
Decision Letter Date: 4/3/2019
Funding Year: 2018
Form 471 Application Number: 181003379
Funding Request Number: 1899026540

Dear Ms Dortch:

Networkmaine, pursuant to and in accordance with Sections 54.719 – 54.725 of the Federal Communications Commission’s (“FCC” or “Commission”) rules, is hereby respectfully requesting the FCC to overturn an appeal decision issued by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC” or “Administrator”) per the Revised Funding Commitment Decision Letter dated April 3, 2019.

Background

Networkmaine is a state consortium providing its approximately 900 E-Rate eligible school and library members with access to high-bandwidth, low-latency broadband connectivity and complimentary services that enhance their ability to successfully deliver on their missions. Networkmaine submits Forms 470 and issues requests for proposals (RFPs) for services on behalf of its member entities, and annually submits multiple Form 471 applications for those services on behalf of the 900 E-Rate entities.

On January 16, 2019 USAC denied Funding Year 2018 Form 471 #181003379 / FRN #1899026540 filed by Networkmaine on the grounds that the 28 day waiting period was not restarted when an addendum was added to Form 470 #180001991. FRN #1899026540 seeks Dark Fiber service funding for 178 different eligible entities.

The full text of the funding decision was as follows (emphasis added):

“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 11/2/2017 **you uploaded RFP addendum which modified list of recipients of service that contains significant information for the bidders to be able to respond to the FCC Form 470 and RFP**. However, this documentation was not available in Erate Productivity Portal for 28 days before the RFP due date on 11/22/2017. 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 E-rate Productivity Portal and made available for 28 days before selecting a service provider.”

Networkmaine disputed the underlying assessment that the addendum modified the list of recipients of service on our Form 470 and RFP by immediately submitting appeal #132213 to USAC on January 17, 2019. In our appeal, we explained that the same five entities were already included in the scope of the original RFP and Form 470 and that the addition of five entities to one of the the three tables was a minor and modest clarification. Because the clarification did not constitute a material change in the scope of the RFP, there was no need to extend the RFP deadline notwithstanding USAC’s claim to the contrary.

On April 3, 2019 USAC denied the appeal with the following explanation (emphasis added):

“Upon review of the documentation presented in your request for funding for Funding Request Number (FRN) 1899026540, USAC has determined that the 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 11/2/2017 you uploaded RFP addendum which modified list of recipients of service that contains significant information for the bidders to be able to respond to

the FCC Form 470 and RFP. However, this documentation was not available in E-rate Productivity Portal for 28 days before the RFP due date on 11/22/2017. 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 E-rate Productivity Portal and made available for 28 days before selecting a service provider. **On appeal, you did not show that USAC's determination was incorrect. Consequently, your appeal is denied."**

Networkmaine fundamentally disagrees with USAC's analysis and conclusion for the following reasons and requests that their decision be overturned and that this matter be remanded for processing and issuance of a Revised Funding Commitment Decision Letter.

History of the Procurement at Issue

The fundamental claim that USAC has made, that Networkmaine substantively modified its list of entities and added five entities to the scope of the RFP and Form 470, is incorrect. Contrary to the position that USAC is taking, Networkmaine did not substantively modify the list of recipients contained in its RFP.

The following events occurred:

1. Networkmaine released an RFP on 10/10/2017.
2. The Form 470 and RFP were posted to EPC on 10/16/2017. The due date for bid responses was specified as 11/16/2017, or 32 days from the posting date of the Form 470.

Exhibit 1 of the RFP is an Excel file consisting of five separate worksheets. Three worksheets are provided for the three different services included and defined in the RFP: Intra-district (E-LAN) Service for local transport services between schools or libraries within a school district or library system, Uplink (E-LINE) Service to connect district networks along with individual schools and libraries to one or more Networkmaine Points of Presence, and Dark Fiber Service to connect district networks along with individual schools and libraries to one or more Networkmaine Points of Presence. Two additional worksheets are provided for bid responders to summarize their proposed recurring and non-recurring charges for various circuit speed bands for Intra-District (E-LAN) and Uplink (E-LINE) services. As Dark Fiber Service is not a lit service, no such bandwidth breakdown was necessary for that particular service.

3. Addendum #02 was posted in EPC on 11/2/2017, correcting the Up-Link (E-LINE) Service table contained in the RFP to include five entities that were already listed in other tables in the RFP.

Note: The addendum simply corrected a clerical error that left those five entities out of the table requesting bids for Up-link (E-LINE) Service. These five entities were already included in both the Dark Fiber Service and Intra-District (E-LAN) Service tables contained in the RFP.

The entity names that are the subject of this dispute are:

- MORSE HIGH SCHOOL (Entity #4281, part of Entity #121554, Regional School Unit 1)
- ENFIELD STATION SCHOOL (Entity #4271, part of Entity #121528, MSAD 31)
- PENQUIS VALLEY HIGH SCHOOL (Entity #4242, part of Entity #121544, SCHOOL ADMIN DISTRICT 41)
- PENOBSCOT VALLEY HIGH SCHOOL (Entity #4221, part of Entity #121528, MSAD 31)
- WOODLAND JR/SR HIGH SCHOOL (Entity #4381, part of Entity #121656, UNION SCHOOL DISTRICT 107)

4. Addendum #03 was also posted in EPC on 11/2/2017, which extended the due date of proposal submissions from 11/16/2017 to 11/22/2017. In total, therefore, the bidding period was 38 days, and 21 days from the issuance of the addendum in question.
5. Vendors were selected and contracts were awarded beginning February 2018.

Because the five entities were already included in the scope of the RFP, simply correcting the Uplink (E-LINE) Service worksheet to include these five entities was not a material change in the scope of the RFP that required the bidding clock to restart.

E-Rate regulations as defined in 47 C.F.R. Section 54. 503(c)(4) require that once a Form 470 is posted on the Administrator's website, the applicant must wait at least four weeks before making commitments with the selected providers of services. The regulations also prescribe in 47 C.F.R. Section 54. 503(b) that the E-Rate competitive bidding requirements are in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements. Also relevant is the requirement in 47 C.F.R. Section 54.503(c)(i) and (c)(ii) that the Form 470 and RFP must include a list of specified services and sufficient information to enable bidders to reasonably determine the needs of the applicant.

The regulations are silent on the question of whether changes to the RFP mandate the restarting of the four-week (28 day) bidding period.

Our review of FCC Orders did not uncover any decisions that address this issue either. In fact, the Administrator cited only "program procedures" as the basis for the original denial and the denial of the appeal of that decision. Given that the Administrator does not have the authority to make policy¹, any such procedures must be grounded in FCC directives – either in an order or regulation – and we can find neither.

¹ 47 C.F.R. Section 54.702(b) states: "The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."

Thus, we believe that the issue boils down to whether the Form 470 and RFP as originally issued (a) included the list of specified services and (b) included sufficient information to enable bidders to reasonably determine the needs of the applicant. We believe that the Form 470 and RFP did both and that the Administrator unfairly found otherwise.

All of the requested services were specified in the original Form 470 and RFP. This does not appear to be a matter in contention, nor should it be.

Any dispute, therefore, focuses on whether the Form 470 and RFP contained sufficient information to enable bidders to reasonably determine the needs of the applicant.

With respect to answering this question affirmatively, we note that there is no place on the Form 470 to list all of the specific entities that are included in the scope of the Form 470. Indeed, our billed entity number classifies our consortium as a statewide consortium that includes the parent entities as consortium members that are covered by this Form 470.

When considering the RFP documents, we further note that each of the five entities was already included in the original Exhibit 1 that listed the various sites for which services were requested. Addendum #02 simply corrected the Up-link (E-LINE) Services table contained within the RFP and the complete list of recipients of service was not modified in any way.

Importantly, the denied FRN that is the subject of this appeal requested funding for only three of the five entities that were added to the Up-link (E-LINE) Services worksheet as part of Addendum #02. Specifically, the entities who were awarded to Maine Fiber Company for Dark Fiber Service and included in FRN #1899026540 are MORSE HIGH SCHOOL, PENQUIS VALLEY HIGH SCHOOL, and WOODLAND JR/SR HIGH SCHOOL. All 178 entities contained in the denied FRN (including these three entities) were listed in the Dark Fiber Service table as part of the original Exhibit 1. While we do not believe that it is fair to deny funding for any of the five entities, at the very most, a more measured and balanced approach would have been to deny funding only for the three entities and not to penalize the other 175 entities included in this FRN.

There is no program directive from FCC Orders or regulations that prescribes that when five sites already listed in a statewide RFP containing over 700 sites were added to the list of sites for another service, that this correction meant that bidders were unable to reasonably determine the needs of the applicant when the Form 470 and RFP were released.

Sufficient information was provided in the RFP to enable prospective service providers to identify and formulate bids. All bidders ultimately had the opportunity to submit bid responses that included these five entities. This modest update to Exhibit 1 did not prejudice any bidder or exclude any bidders from the potential pool of bidders.

The procurement resulted in multiple awards where every bidder was awarded some portion of the services for which they bid based on our competitive bidding evaluation, which included cost as the most heavily weighted component.

The original RFP requested bids on both Dark Fiber Service and Intra-District (E-LAN) Service for these five entities. Awards for either or both Dark Fiber Service and Intra-District (E-LAN) Service were granted for four of the five entities (MORSE HIGH SCHOOL, ENFIELD STATION SCHOOL, PENQUIS VALLEY HIGH SCHOOL, and WOODLAND JR/SR HIGH SCHOOL).

Ultimately, Networkmaine ended up contracting for Up-link (E-LINE) Service for only one of the five entities (PENOBSCOT VALLEY HIGH SCHOOL). An award was granted for both Up-link (E-LINE) Service and Intra-District (E-LAN) Service for that entity.

Networkmaine feels strongly that simply correcting a clerical error that left five entities out of the table requesting bids for Up-link (E-LINE) Service – entities that were already included on the Form 470 and in the original RFP – should not warrant a rejection of our application.

Request for Relief

For the reasons outlined above, we believe that the clarification made in the addendum did not materially affect our RFP and competitive bidding process, that the clarification was insignificant on its face, and that the original Form 470 was untainted. We feel that USAC's decision to deny the application was made based on an erroneous conclusion and that we did not add recipients to our RFP as was stated in the FCDL and RFCDL.

Networkmaine therefore urges the Bureau to overturn USAC's decision to deny FRN #1899026540.

We ask that the Bureau determine that USAC erred in its conclusion and that there was no regulation prescribing the need to restart the 28-day clock upon the issuance of the amendment which corrected the Up-link (E-LINE) Services table.

Alternatively, we respectfully request a waiver of the Commission's rules to the extent necessary to grant the requested relief. Any of the Commission's rules may be waived if good cause is shown² and the Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest³. The Commission has previously used its authority to waive the 28-day Competitive Bidding rule when the applicants allowed their requests for service to be competitively bid for a meaningful period of time, and there was no evidence of waste, fraud, or

² 47 C.F.R. § 1.3.

³ Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

abuse⁴. The Commission has also shown precedence in granting a waiver for a technical violation of the competitive bidding rules, and there was no evidence of waste, fraud, or abuse⁵.

In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis⁶. USAC's denial of our appeal jeopardizes approximately \$941,000 in reimbursement for FY2018, which will in turn create an undue financial hardship for Networkmaine, and its member schools and libraries, in acquiring necessary services to enable 178 schools and libraries to achieve their broadband goals. Because the competitive bidding process resulted in a multi-year contract, FY2019 and FY2020 funding is also potentially at risk.

Funding Year	Number of Affected Schools and Libraries	Requested Reimbursement
FY2018	178	\$941,715.12
FY2019	178	\$642,762.08
FY2020	179 (projected)	\$646,134.68 (projected)

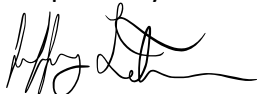
A waiver would further the goals of the E-Rate program without undermining the purpose of the Commission's rules and would thus be in the public interest.

Networkmaine respectfully requests a reversal of USAC's original funding decision to deny FRN #1899026540 and for the Commission to direct USAC to issue a Revised Funding Commitment Decision Letter with a favorable decision to fund the eligible request.

Thank you for your consideration of this matter.

I declare that the statements made and information contained above are true and correct to the best of my knowledge, information, and belief.

Respectfully submitted,



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Executive Director, Networkmaine

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Attachments:

Networkmaine FCDL and RFCDL 1899026540

⁴ See, e.g., Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District et al.; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 22 FCC Rcd 8757 (2007)

⁵ See, e.g., Requests for Waiver and Review of Decisions of the Universal Service Administrator by Aberdeen School District et al.; Schools and Libraries Universal Support Mechanism, CC Docket No. 02-6, Order, 27 FCC Rcd 1878, 1941, para. 1 (WCB 2012)

⁶ WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); Northeast Cellular, 897 F.2d at 1166.

RFP-22-18_Exhibit-1_Data-Transport-Services-for-NetworkMaine

RFP-22-18_Exhibit-1_Data-Transport-Services-for-NetworkMaine-updated-for_addendum

RFP-22-18 Addendums 02 and 03