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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:

I represent the Sweetwater Consortium (TN) (hereafter "Consortium") in its ongoing appeal of the determination that E-Rate funding should be withheld. On July 19, 2016, I received a request for further information from Mr. Chas Eberle in the Wireline Competition Bureau relative to the request for proposal (RFP) process that was used by the Consortium. Subsequent to that, I requested that the questions be provided to me by E-mail so that I could provide more thorough responses. An E-mail was received with the questions on July 29, 2016.

Before I begin answering the questions posed, there is an observation regarding them that must be considered. The answers to several of the questions involve an explanation of information that was received after the RFP was drafted and the bid responses were received from ENA and AT&T. In some cases, there is no way that either the drafters of the RFP or the reviewers/evaluators could know the information in advance of receipt of the proposals. Looking back on the process from a perspective that is now more than three years old is handy; however, we must remember that the gift of divination was not available to the dedicated Consortium representatives who were either designing the RFP or evaluating the submittals. Hence, answers to some of the questions will state that information sought was not available until after the bid responses were received.

QUESTION 1. What was the rationale for seeking bids for sample districts consisting of 10, 80, and 150 sites in the 2013 RFP? (Comment from FCC: With the exception of Shelby County (186 schools and Sumner County (46 schools), it appears that no other member district had more than 21 schools. In fact, 56 of the 76 schools and school districts on the RFP consist of 10 or fewer schools.)

RESPONSE: It was the standard means to compare vendors' bids on an apples-to-apples basis. When the RFP was developed and just before it was published for bid, no party to the process knew which school districts would seek to become members of the newly-formed

Sweetwater Consortium. Now that the Consortium is formed, it is easy to ascertain those school districts having interest and to take note of those who actuall y chose to participate in the consortium. The drafting of the RFP was primarily completed in the fall of 2012. Most school districts did not make a final decision regarding whether or not to join until early January, 2013. Once the RFP was completed, in order to be in compliance with FCC regulations, the Consortium had to post the Form 470/RFP, give the vendors adequate time to respond, and allow districts time to properly file their FCC application forms.

Additionally, the districts knew that their needs for services would likely change during the course of the contract in ways that were not known when the RFP was issued. Therefore, the Consortium adopted the industry-standard practice of writing an RFP that contemplated both the current and future needs of those who might join the Consortium.

To that end, the RFP drafters thought it would be wise to request bids for the different sizes of school districts in Tennessee on an average need basis, and that is what the RFP did.

QUESTION 2. Given the size of the districts in the consortium, why didn't the cost comparison worksheet weigh the small district pricing more heavily? (Comment from FCC: The worksheet sums up total pricing for each sample district, meaning that pricing for the 150 site district accounts for the majority of the total dollar amount assigned to both the ENA and AT&T bids.)

RESPONSE: The response to this question raises the issue of review of the procurement with the benefit of hindsight that is addressed in paragraph 2 above. First, there was no way of knowing at the time the RFP was written how many small schools would participate in the Consortium or how their needs would change over time. However, making a reasoned conjecture about the possible relevance of this question, one arrives at the conclusion that the answer to this question would be relevant only if WCB thinks that somehow giving more weight to the smaller districts would have advantaged AT&T. It also summons the following question: how could the creators of the RFP have possibly known what pricing the vendors were going to submit in advance of the receipt of the completed RFPs? I have been unable to ascertain from any source that other consortia or state procurements have a weighting mechanism that is based on the size of participant districts. The most often cited reason is that because, like Sweetwater, the purchasers from the contract are unknown at the time the bids are submitted.

Second, this responder is unaware of any program rule that requires – or even recommends – such weighting based on the size of the potential purchasers. The organizers of the Sweetwater Consortium have demonstrated dedication to following the rules which are known to it. However, to require that it know all information about every school, school district and/or library which may join the consortium is both unreasonable and unrealistic.

As the Bureau is aware, AT&T received full credit for pricing using an objective formula, and, accordingly, the novel notion that should have been some weighting factor is irrelevant to the outcome of the evaluation. Any revisions the RFP drafters would have made to the pricing matrix would not have changed that fact. Both companies were subject to the same rules and hypothetical example districts so that the evaluators could compare them on price.

QUESTION 3. The RFP requested Internet access pricing for 50 Mbps, 200 Mbps, and 350 Mbps connections. However, in FY2015, approximately half of the Internet access FRNs from Sweetwater members were for either 1 Gbps or 500 Mbps circuits. Were those services competitively bid? (Comment from the FCC: the cost of 1 Gbps Internet access connections requested on member district FY2015 FCC Form 471s varies considerably. What is the basis for the pricing? The ENA bid only states that prices for higher service levels "will be derived based on the price points and service levels listed above.)

RESPONSE: Yes. Both fiber-optic WAN and internet access services were bid as required by the Commission rules. See the Sweetwater RFP at pages 4-5. However, the Commission has not required <u>every possible</u> level of bandwidth to be bid. USAC's website indicates that the RFP should describe the project and requested services in sufficient detail so that "potential bidders understand the scope, location and any other requirements." That is what the Consortium's RFP did.

In addition, the Consortium did seek bids for specific levels of bandwidth, just not every specific level of bandwidth that its districts may need for three years after the formation of the consortium. The speeds that were used for evaluation matrix were typical at the time and the RFP indicated that respondents would be expected to provide additional bandwidth as needed. Either one of the experienced companies that submitted bids could have asked questions in advance regarding the scope of the services requested, but no such questions were submitted.

Additionally, events occurred that dramatically changed the levels of service that were needed. First, in 2012, districts did not have any idea what bandwidth would be required by the state for districts to perform online state testing. The state did not provide that information until fall of 2014. Second, many districts introduced BYOD – bring your own device – for both students and teachers. The result was a huge increase in the need for capacity as many students were using multiple devices (e.g., both smartphones and iPads) simultaneously for most of the school day. That significant shift in the use of technology for many districts could not be reasonably anticipated at the time the RFP was drafted.

With regard to the question about the basis for the pricing, the successful vendor would be the best person to whom to pose the question. In this case, ENA developed the pricing. School districts are fully aware of the charges because the schools get an annual quote on price to which the school districts give annual approval. The ENA bid states that prices for higher service levels ". . . will be derived based on the price points and service levels listed above." See ENA's

bid response at p. 116. Our understanding is that member districts are receiving the benefit of the best pricing ENA has available. Please keep in mind, however, that Consortium member districts are still free to choose from ENA's quote, purchase from the state master contract with AT&T, or conduct their own competitive bidding process.

QUESTION 4. ENA's bid states that prices were "average pricing" and that "[i]ndividual site prices may vary and certain services may not be available in all areas." How could the reviewers analyze prices without knowing the exact prices?

RESPONSE: It seems that the Bureau is asking whether the reviewers could analyze price without knowing the exact price for all individual schools and the school district as a whole. The successful bidder's proposal constituted an agreement to provide an average rate or price for the districts at a particular service level (i.e., number of sites). The evaluators understood that individual districts might have a higher or lower price than the average price. However, the average price provided the evaluators with a means to compare the bids of competing vendors, and the evaluators were able to analyze the bid based on the average price that ENA had to meet as a minimum requirement. Each district then had the failsafe of either purchasing under the NetTN contract or conducting its own procurement.

Because the schools have to pay part of the cost for the services, schools have an incentive to seek quality services sufficient for the needs of the school. School boards also possess a duty to the taxpayers to purchase services that are not only cost-effective, but also services that are reliable, consistent, and sufficient for the needs of the students. In reality, this bid process is not unlike every other one faced by a local education agency every year. The goal of the school system is utilitarian – keeping cost as a primary consideration, to get the best service that can be obtained so that the greatest good can provided for the students in the district. It is not a mistake that the FCC has also recognized this fact. In the Tennessee Order, the FCC itself stated that deference is due to local and state officials as they best know the needs of their schools as they have every incentive to get the best value for the services they are purchasing.

It is also worth noting that the winning bidder of this procurement was guaranteed no business. The winner had to present its pricing to each district and obtain their agreement to participate in this consortium bid as evidenced by the district's Form 471 filing. If the pricing offered by ENA varied unfavorably from its bid or from market conditions, each applicant could still choose to use another contract vehicle.

QUESTION 5. The "Pricing Notes" on p. 116 of ENA's bid state that "Certain make-ready costs such as conduit, electrical power, ground and backer board may be required. ENA will work with customer to minimize these costs." Were the reviewers concerned that ENA did not include all installation costs?

RESPONSE: This is one of those questions that falls within the explanation provided in paragraph 2 of this response because it wrongly assumes that "installation" and "make ready" refer to the same activities. ENA did provide all installation costs. It is generally recognized that there is difference between "make ready" and "installation." Responses to the question regarding installation costs in the RFP were measured by a standard that was applicable to all proposers; i.e., what does it take to provide service **to** the building where the internet is to be used? In that regard, the responses of ENA were complete in all aspects. See ENA's bid response at p. 117. The FCC is now addressing a different question i.e., what does it take to "make ready" the service **within** a building? At the time the RFP was released, a number of school districts, 76 to be exact, had expressed some interest in joining the consortium. Of those districts expressing interest, although ENA was serving many of them previously, it is impossible to know how many of the schools may not have possessed proper infrastructure to accommodate the installation of fiber to the building. Also, districts may build new buildings or remodel existing structures. A school or school system with a more sophisticated technology or maintenance staff may be able to properly prepare the building for fiber installation. However, a very small school or school system may be forced to contract with an outside agency to complete the task. In clear and unambiguous terms, the response submitted by ENA addressed all costs associated with getting internet service **to** the building; however, ENA stated quite clearly that once the service is present at the building, certain infrastructure requirements within a building may have to be modified so that the building could be "made ready" to use the service.

QUESTION 6. Did the reviewers ask AT&T to clarify whether installation costs were included?

RESPONSE: No. It cannot be stated strongly enough that it is the duty of any company submitting an RFP to provide all clear, concise, and cogent information that is necessary for a proper and complete evaluation. Questions concerning ambiguities in an RFP should be decided against any submitting company that does not conform to this legally-supported standard. Calls to the submitting company for "clarification" purposes should not be necessary and, in the alternative, may in fact serve as a basis for a valid bid protest by another unsuccessful bidder whose bid contents are clear and unambiguous. With due regard to the foregoing statements, it should be remembered that AT&T was awarded full score on its pricing. Asking this question would have served no useful purpose.

Moreover, it must be emphasized that asking the question could have only disadvantaged AT&T. AT&T was awarded all of the points available in the grading paradigm for pricing. If, as the question suggests, the evaluators had stopped mid-evaluation to confirm their understanding that AT&T's pricing did not include installation, the only possible consequence would have been that AT&T lost points as compared to the maximum award or had its entire bid rejected as non-conforming to the requirements of the RFP.

The FCC should carefully consider the policy implications of asking reviewers to consider or, in the alternative, requiring funding applicants to ask questions of the vendor in the middle of an evaluative process when a submitted bid is ambiguous. The better practice, utilized by most governmental agencies, is to reject a non-conforming or ambiguous bid or to evaluate only the information provided by the bidder.

QUESTION 7. Did the reviewers ask AT&T to clarify whether AT&T was required to charge rates from the NetTN contract instead of the rates in its bid response?

RESPONSE: No. It cannot be stated strongly enough that it is the duty of any company submitting an RFP to provide all clear, concise, and cogent information that is necessary to proper and complete evaluation. Questions concerning ambiguities in an RFP should be decided against any submitting company that does not conform to this legally-supported standard. Calls to the submitting company for "clarification" purposes should not be necessary and, in the alternative, may in fact serve as a basis for a valid bid protest by another unsuccessful bidder whose bid contents are clear and unambiguous.

While AT&T may now assert that it was undercutting its NetTN pricing in response to the Sweetwater Consortium RFP, that facile explanation does not resolve the issues evident in a plain reading of AT&T's response to that RFP.

The FCC should carefully consider the policy implications of asking reviewers to consider or, in the alternative, requiring funding applicants to ask questions of the vendor when a submitted bid is ambiguous. The better practice, utilized by most governmental agencies, is to reject a non-conforming or ambiguous bid or evaluate the information provided by the bidder.

QUESTION 8. Did each member district enter into a signed contract with ENA before submitting an FCC Form 471?

RESPONSE: Yes. Each school district member of the Sweetwater Consortium has a contract with ENA that was entered into before with the submission of the FCC Form 471. Each member of the consortium completes an annual letter of intent to continue purchasing services that incorporates the Sweetwater Consortium contract terms. It is interesting to note, however, that a review of the language of the Coahoma County decision issued by the FCC states that schools that purchase services from master contracts are not required to enter into a separate bidding process or to sign another contract to memorialize the purchase.

If you have questions regarding the content of this reply, do not hesitate to contact me.

Very truly yours,

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