



LEWIS THOMASON

LEWIS, THOMASON, KING, KRIEG & WALDROP, P.C.
424 Church Street, Suite 2500
P.O. Box 198615
Nashville, TN 37219
T: (615) 259-1365 F: (615) 259-1389

Charles W. Cagle
DL: (615) 259-1365
ccagle@lewisthomason.com

September 14, 2017

Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Sweetwater Consortium

Dear Mr. Chairman Pai:

This firm represents the forty-three Tennessee school systems that remain concerned about a pending denial of E-rate funds; a denial that was first appealed to the Commission in 2012. During your meeting with Rep. Marsha Blackburn in Columbia, TN in May, 2017, you were approached by a Tennessee Director of Schools (school superintendent) regarding the only remaining issue yet to be resolved, that being the waiver request pending for the districts who sought to join the Tennessee E-rate Consortium.

A history of this remaining issue may be helpful. The Metropolitan Nashville Public Schools formed a consortium (the Tennessee Consortium) in 2012 for the purchase of internet services. There was another pre-existing consortium in Tennessee which had a year remaining on its agreement. One year after the formation of the Tennessee Consortium, the members of the other consortium sought to join. These school districts were initially informed by executives at USAC that they could join an existing, funded consortium and these school districts relied upon that advice. Some months later, the Tennessee consortium was informed by USAC that the late-joining forty-three districts in fact could not join the Tennessee Consortium and funding was denied for these districts. It is important to note here that no rules were broken and that the districts relied, to their detriment, upon the advice initially provided by the executives at USAC. As a result of the reversal of its initial decision by USAC, yet another consortium had to be formed.

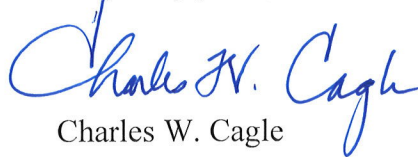
As you will note, this matter has now been ongoing for just over five years without resolution. I realize that these matters take time; however, we should strive to work together to get this matter finally resolved. To that end, I have attached several documents to this to detail the history of this matter in concise form. The first is a letter from this firm dated May 2, 2017 that has an attachment with the history of the 2012 Waiver Request. Also attached is the correspondence to you from Mr. Michael Davis, the Director of Schools in Hardin County, TN relative to the funding for the 2012 application. Finally, I have taken the liberty of drafting a proposed final order granting the waiver which would have the effect of awarding the much-anticipated funding to the schools. While there may be stylistic edits that may be required, I

Agit Pai, Chairman
September 14, 2017
Page 2

believe the order states the facts correctly and succinctly, that it makes the proper determination that no rules or regulations were violated, and that it recognizes that all of this could have been avoided had a proper determination been initially provided to the school districts in 2012.

After review, if you have questions, do not hesitate to contact me. I look forward to hearing from you soon.

Very truly yours,



Charles W. Cagle

CWC/cwc

cc: Mr. Michael Davis, Superintendent Hardin County Schools
The Honorable Marsha Blackburn, U.S. House of Representatives (TN)
Charles Flint, Legislative Director and Counsel, Congressman Blackburn
Rachael Bender, Wireless Advisor
Dr. Jay Schwarz, Wireline Advisor
Kris Monteith, Wireline Bureau Chief
Aaron Garza, Deputy Division Chief
Amy Bender, Wireline Advisor
Susan Fisenne, Confidential Assistant
Sweetwater Consortium Member School Districts



LEWIS THOMASON

LEWIS, THOMASON, KING, KRIEG & WALDROP, P.C.
424 Church Street, Suite 2500
P.O. Box 198615
Nashville, TN 37219
T: (615) 259-1365 F: (615) 259-1389

Charles W. Cagle
DL: (615) 259-1365
ccagle@lewisthomason.com

May 2, 2017

Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 02-6, Request for Waiver of the Tennessee E-Rate Consortium

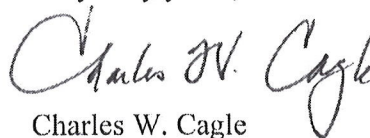
Dear Mr. Chairman,

This firm represents the forty-three Tennessee school systems that remain concerned about a pending denial of E-rate funds; a denial that was first appealed to the Commission in 2012.¹ The Director of Schools (Superintendent) of one of those member schools, Mr. Michael Davis of the Hardin County (TN) school system recently attended a Broadband Summit that Congressman Blackburn hosted in Columbia, Tennessee. You graciously came to Tennessee and spoke to a group of community leaders at that Summit. Mr. Davis asked you for status on the 2012 waiver request and you asked him to email your office. [See attached.] He emailed the FCC on February 27, 2017 and I subsequently filed a copy of this communication as an *ex parte* communication on my client's behalf. To date, Mr. Davis has not received a reply from the FCC on this matter. The other consortium member school districts ask me almost daily for a status report on this issue.

Please let me know when you can provide a status update to me so that I can provide the information to the Sweetwater Consortium. The attached summary documents contain further details of the issue; the original email from Mr. Davis; and the *ex parte* communication. Because this issue sits squarely at the Commission, I know that you and your staff have the ability to provide relief to the schools.

Contact me with any questions you may have.

Very truly yours,



Charles W. Cagle

¹ *Request for Waiver of the Tennessee E-Rate Consortium* in CC Docket No. 02-6 (filed Feb. 11, 2013); *Supplement to Request for Waiver* (filed Dec. 17, 2013) ("2012 Waiver Request").

cc: Mr. Michael Davis, Superintendent Hardin County Schools
The Honorable Marsha Blackburn, U.S. House of Representatives (TN)
Charles Flint, Legislative Director and Counsel, Congressman Blackburn
Rachel Bender, Wireless Advisor
Dr. Jay Schwarz, Wireline Advisor
Kris Monteith, Wireline Bureau Chief
Sweetwater Consortium Member School Districts

Summary of Tennessee 2012 Waiver Request

USAC denied 43 Tennessee school districts' ability to join an existing consortium to access services eligible for E-rate funding. The districts' only error was relying on USAC to provide guidance as to the program rules. Hardin County and the rest of the 42 school districts are still waiting on a response. Given the hardships these delays in funding have caused the districts and their students, we respectfully urge the Wireline Competition Bureau grant the outstanding appeal expeditiously.

This relief, at this point, would simply allow these *eligible* districts to receive funding for *eligible* services they received that were purchased from a contract that was formed completely in compliance with E-rate rules – a contract that USAC had no issues with for the 79 other school districts that took service using its terms for four years.

The facts and law are as follows:

In 2011, 79 school districts in Tennessee joined together to form the Tennessee Consortium ("Consortium"). Upon its creation, the Consortium applied for E-rate support by posting an FCC Form 470 and a Request for Proposals ("RFP") on February 4, 2011 for funding year 2011-2012.² Some months later, the 43 additional school districts sought to join the existing Consortium after their existing contract had expired.³

Joining the Consortium would save them the effort of rebidding for Internet access and telecommunications services and would allow them access to the best pricing in the state due to greater purchasing power of a larger contract. There is no program rule that prohibits new members from joining a consortium after the competitive bidding process has been completed.⁴ To the contrary, it has been Commission policy to encourage Consortium applications.

The Consortium Lead participated in a USAC annual E-rate training session in September 2011, in which one of USAC's slides seemed to confirm his understanding of the rules, that additional members could indeed join the Consortium prior to the filing of each school district's application. Making sure he properly interpreted the guidance, the Consortium Lead then exchanged a series of follow-up emails in which USAC management executives confirmed twice that new members could join and take service under the existing multi-year contract without having to undergo a completely new competitive bidding process, provided that the new consortium members' letters of agency (LOAs) were signed and completed by the

² FCC Form 470 Application Number 534070000900066 (posted Feb. 4, 2011); Metropolitan Nashville Public Schools Request for Proposal No. 11-4 (Feb. 4, 2011).

³ Waiver Request at 3.

⁴ Neither the Commission's E-rate rules in effect in 2011-2012, nor the revised rules adopted in the Commission's recent *E-rate Modernization Order* indicate any intention to freeze the membership of a consortium. The Commission issued an order in 2006 that indicated members could not join a consortium in the middle of a funding year, but indicated no prohibition on members joining at the beginning of a funding year. *Request for Waiver of the Decision of the Universal Service Administrator by Kan-ed, Kansas Board of Regents*, CC Docket No. 02-6, Order, FCC 06-170 (2006) (*Kan-ed Order*).

Form 471 certification postmark date, as required by Commission precedent.⁵ Adhering to this guidance from USAC, the 43 new members executed LOAs with the Consortium and then timely submitted individual FCC Forms 471 for funding year 2012, referencing the Consortium's February 2011 Form 470.

USAC then surprisingly denied E-rate funding to these applicants for funding year 2012, claiming that "the addition of your [school district] would cause a change in the scope of services sought in the solicitation. Program rules require that [school districts] on a FCC Form 471 must be listed in . . . the cited FCC Form 470 that established the competitive bidding process." The forms do not appear to require such a result and USAC failed to cite to an FCC rule supporting its position. Further, the districts' use of the contract did not change the "scope of services." The districts purchased telecommunication and Internet access. If the districts had joined the Consortium the year before, it would have had zero effect on which carriers bid to provide the services. As several competitive bidding processes have subsequently borne out, only two carriers have submitted bids for the scope of services requested in the Tennessee Consortium RFP – AT&T and Education Networks of America ("ENA"). Both of those carriers participated in the 2011 Tennessee Consortium bidding process.

On the advice of the Wireline Competition Bureau, the 43 school districts filed the pending appeal, asking the Commission to waive any applicable Commission rules to allow the districts to receive E-rate funding for funding year 2012. The waiver request set forth the legitimate and rational reasons why the Commission should grant the relief requested.

As noted above – and it bears repeating – this relief, at this point, would simply allow these *eligible* districts to receive funding for *eligible* services they received that were purchased from a contract that was formed completely in compliance with E-rate rules – a contract that USAC had no issues with for the 79 other school districts that used it for four years.

Most critical to the analysis of the waiver request should be two points:

(1) The grant of this appeal would further E-rate program goals by allowing these districts to receive funding they can use to pay for advanced telecommunications and Internet access services that benefit their students. Absent any harm to the fund, there is simply no reason why the Commission should deny these districts funding they are otherwise entitled to under the statute and Commission rules.

(2) Here, USAC provided – more than once – guidance that the applicants followed that resulted in the denial. This guidance was not provided by a low-level staff member at USAC, but was *written* guidance by senior management that "[i]t 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."⁶

⁵ 2012 Waiver Request at pp. 3-4; *see also Kan-ed Order*.

⁶ 2012 Waiver Request.

Even if the Commission believes some program violation occurred, there is ample evidence here to demonstrate that the public interest waiver standard has been met. Of course, the Commission cannot always grant an appeal simply because an applicant relied upon incorrect USAC advice. For example, if someone at USAC told an school that a school employee could accept \$500 from a service provider in exchange for selecting that company, and the employee did so, the Commission would not be serving program interests to allow that bribery to occur. In this case, however, no such violation of Commission rules or program integrity exists. As the districts have explained in their waiver petition, there was no waste, fraud and abuse, and the applicants relied upon USAC advice in good faith.

As such, the districts respectfully renew their request for a waiver of whatever rules the Commission believes may have been inadvertently violated. Given the passage of time, we request such a decision be issued as expeditiously as possible.

From: Rachael Bender <Rachael.Bender@fcc.gov>

Sent: Friday, June 9, 2017 11:14 AM

To: Michael Davis

Subject: RE: Update Request

Mr. Davis,

Thank you for reaching out regarding the status of your appeal. Please know that the FCC's Wireline Competition Bureau is looking into this matter and the Chairman is aware of the situation. We have heard from a number of parties on this issue and want to make sure all appeals are carefully considered. This includes review by our staff attorneys and their superiors. As I'm sure you can appreciate, this process takes time.

If you would like to speak to someone in the Wireline Bureau, please feel free to reach out to Aaron Garza. His contact information is Aaron.Garza@fcc.gov.

Have a great weekend!

-Rachael

Rachael Bender

Legal Advisor for Wireless & International Issues

Office of Chairman Ajit Pai

Federal Communications Commission

(202) 418-0563

From: Michael Davis [mailto:michael.davis@hctnschools.com]

Sent: Tuesday, June 06, 2017 8:25 AM

To: Rachael Bender <Rachael.Bender@fcc.gov>

Subject: Update Request

Ms. Bender,

Good morning and hope all going well.

Attached is a copy of an email that I had sent you on February 27 after I had the pleasure of meeting you and Chairman Pai in Columbia, Tennessee.

I have never heard back from you or anyone else to date on this appeal and wanted to reach out today and see if you could possibly provide an update.

Recently, our school system has eliminated five teaching positions and made additional cuts to our FY 2017/2018 budget. While \$200,000 may not seem like a lot of money to Washington, it is a tremendous amount to rural school systems in Tennessee, especially like ours. I know in talking to other Directors in school systems in Tennessee, they are having to make the same tough decisions as well.

I would really appreciate you seeing that Chairman Pai has the opportunity to read this email and plea for help. With his help on this 2012 appeal, he would be helping thousands of school children and many teachers throughout Tennessee.

I thank you for your attention to this very important matter and I look forward to hearing from you soon.

Best regards,

Michael Davis

**Director of Hardin County Schools
155 Guinn Street
Savannah, TN 38372**

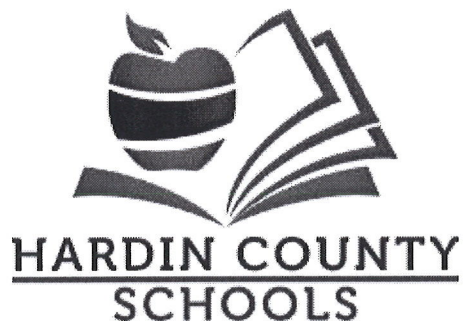
O - (731)-925-3943

F - (731)-925-7313

C - (731)-607-0295

Email: michael.davis@hctnschools.com

www.hardincoschools.com



From: Michael Davis
Sent: Monday, February 27, 2017 5:59 PM
To: Rachael.Bender@fcc.gov
Subject: Letter to Chairman Pai & Information

Ms. Bender,

Good afternoon!

I had the distinct honor of meeting you and Chairman Pai last Friday in Columbia, TN at regional meeting held by Congresswoman Blackburn. I appreciate the opportunity I was given to ask Chairman Pai for an update on the 2012 Tennessee Consortium appeal and very grateful for his offer of checking into it for me and letting me know. As directed, I am sending you the letter I prepared for him with supporting documents about this matter. I have mailed you a copy of this as well in case that would be better for you.

Please be sure to thank Chairman Pai for me and let him know how much I appreciate him taking the time to look into this issue and would appreciate any help and support he could give. This appeal will have a tremendous financial impact on forty-three school systems across the state of Tennessee and most are just like me anxiously awaiting the decision in order to make budget decisions that have huge impacts on our students and teachers. For my school system alone, the 2012 appeal still pending will have a \$196,138 impact on our budget depending on the decision.

Thanks again for your time and I look forward to hearing from you or Chairman Pai soon. I wish both of you the very best always please feel free to call on me any time if there were to be any further questions.

Best regards,

Michael Davis

**Director of Hardin County Schools
155 Guinn Street
Savannah, TN 38372**

O - (731)-925-3943

F - (731)-925-7313

C - (731)-607-0295

Email: michael.davis@hctnschools.com

www.hardincoschools.com



HARDIN COUNTY
SCHOOLS

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

In the Matter of)	
)	
Request for Waiver of the)	
Tennessee E-rate Consortium)	
)	
)	
School and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
)	

ORDER

Adopted:

Released:

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

I. INTRODUCTION

1. Based on our review of the record, we grant the request for waiver filed by the Tennessee E-rate Consortium on behalf of its member applicants.¹ The Universal Service Administrative Company (USAC) found that program rules require that all billed entities on an FCC Form 471 application must be listed on the associated FCC Form 470 that established the competitive bidding process and that the competitive bidding rules were violated because new Consortium members joined a year after the completion of the selection of a vendor.² First, we find there was no competitive bidding violation. Second, because we find that the FCC Form 470 application instructions do not clearly require that all billed entities be listed on the FCC Form 470 and because the Consortium members relied in good faith on USAC guidance, we find that the Consortium has met the requirements of the Commission's waiver standard.

II. BACKGROUND

2. The E-rate program allows eligible schools, libraries, and consortia that include eligible schools and libraries to apply for universal service support for eligible services.³ E-rate program rules generally require that eligible entities seek competitive bids for services eligible for support.⁴ In accordance with the Commission's competitive bidding rules, applicants must submit for posting on USAC's website an FCC Form 470 to initiate the competitive bidding process.⁵ The FCC Form 470 and

¹ See *Tennessee E-rate Consortium*, CC Docket No. 02-6, Request for Waiver (filed Feb. 11, 2013 and supplemented on Dec. 17, 2013) (*Tennessee Consortium Waiver Request*). This decision applies to all of the affected members of the Tennessee E-rate Consortium that applied for funding in 2012.

² See Letter from James M. Smith and Danielle Frappier, Davis Wright Tremaine LLP, counsel for Education Networks of America and ENA Services LLC, to Marlene Dortch, Secretary, Federal Communications Commission re: CC Docket No. 02-6, Request for Waiver of the Tennessee E-rate Consortium (filed Oct. 1, 2014) (*ENA Ex Parte*).

³ See 47 C.F.R. §§ 54.501-54.502.

⁴ See 47 C.F.R. § 54.503.

⁵ See 47 C.F.R. § 54.503(c).

any related Request for Proposal (RFP) must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁶ The FCC Form 470 used in funding year 2012 stated that “funding may be denied for the Form 471 funding requests associated with this Form 470 if the Form 471 Billed Entity is not listed in Item 15.”⁷ After submitting an FCC Form 470, the applicant must wait at least 28 days before making commitments with its selected service providers.⁸

3. The Tennessee E-rate Consortium (Tennessee Consortium or Consortium) is a consortium of school districts located across the state of Tennessee, with Metro-Nashville Public Schools serving as the consortium lead.⁹ The Tennessee Consortium exists for the purpose of procuring telecommunications services, telecommunications and Internet access services, and its members voluntarily join. At the inception of the consortium in 2011, 79 school districts joined by executing a letter of agency (LOA).¹⁰

4. On February 4, 2011, the Consortium posted Form 470 # 534070000900066 and a Request for Proposal (RFP) in accordance with E-rate program rules.¹¹ Following the 28-day competitive bid waiting period, bids were evaluated and a five-year contract for services was awarded to ENA Services, LLC, for telecommunication services, telecommunications and Internet access services.¹²

5. In the fall of 2011, 43 additional school districts in Tennessee sought to join the Consortium, and use the contract awarded by the Consortium the prior year to purchase services. These school districts were not in the initial group of Consortium members because they had decided to finish out the last year using a contract established by a prior consortium.¹³ The 43 school districts were participants in a predecessor consortium with other 79 districts, and the marketplace likely was aware they might join the new consortium in the future. Indeed, once the existing contract neared expiration, the 43 districts expressed interest in joining the new Consortium.

6. During a USAC E-rate training session in September 2011, one of USAC’s slides stated that schools and libraries could join a consortium as long as the letter of agency was signed before an E-rate application was filed.¹⁴ Tom Bayersdorfer, the Tennessee E-rate Consortium lead, followed up with a question regarding whether new consortium members could apply for funding based on an awarded multi-year contract even if those members were not listed on the original FCC Form 470.¹⁵ Mr. Bayersdorfer indicated that USAC staff members at the training answered that the new consortium members could use the existing contract to purchase services, after they joined the consortium.¹⁶ Mr.

⁶ See *id.*

⁷ See Public Notice, Wireline Competition Bureau Announces Implementation Date for Revised Forms 470 and 471 and Accompanying Instructions, CC Docket No 02-6, DA 10-2218 (Nov. 19, 2010).

⁸ See 47 C.F.R. § 54.503(c)(4).

⁹ *Tennessee Consortium Waiver Request* at 2.

¹⁰ The Tennessee Consortium obtained Letters of Agency (LOA) from each consortium member when the member joined the consortium. Member districts were then responsible for posting their own FCC Forms 471 for services procured under the consortium’s Form 470 and competitive bidding process.

¹¹ *Id.*

¹² *Id.*

¹³ See *ENA Ex Parte* at 1.

¹⁴ *Tennessee Consortium Waiver Request* at 3.

¹⁵ *Id.*

¹⁶ *Id.*

Bayersdorfer then followed up with two emails to USAC, receiving written confirmation from USAC that districts could join the consortium even though they had not been listed on the original FCC Form 470.¹⁷

7. Relying in good faith on this guidance from USAC, the 43 school districts filed FCC Form 471 applications for funding year 2012.¹⁸ Notwithstanding the guidance, USAC then issued FCDLs denying funding requests for most of the new consortium members. USAC's denials alluded to competitive bidding violations, such as "[t]he addition of your [billed entity number] would cause a change in the scope of services sought in the solicitation. Program rules require that Billed Entities on a FCC Form 471 must be listed in . . . the cited FCC Form 470 that established the competitive bidding process."¹⁹ While USAC's language varied from denial to denial, it appears that the key reasons for denying these funding requests were (1) that the addition of school districts not listed on the FCC Form 470 changed the scope of the services sought, in violation of the competitive bidding rules, and (2) that the "program rules" require that every school district that takes service pursuant to a consortium contract must have been identified on the corresponding FCC Form 470.

8. Based on advice from the Wireline Competition Bureau, the Tennessee State Department of Education and the lead for the Tennessee E-rate Consortium then filed the instant request for waiver with the Commission on behalf of the 43 affected school districts.²⁰

III. DISCUSSION

9. We find that there was no competitive bidding violation due to the additional Consortium members' use of the FCC Form 470 established by the Tennessee E-rate Consortium. We also find that, while the FCC Form 471 instructions may imply that all billed entities should be listed on the FCC Form 470, the Commission's rules and orders contain no such requirement. Accordingly, we conclude that the circumstances here – the application instructions were unclear, the Consortium tried in good faith to get the requirements clarified, USAC provided written guidance, and there is no harm to the fund – satisfy the standard for a waiver request.

10. *Compliance with competitive bidding rules.* First, while we emphasize that the Commission's competitive bidding rules are intended to help ensure that the program funds are being used in the most cost-effective manner possible, we disagree with USAC that the addition of school districts not listed on the FCC Form 470 changed the scope of the services sought. We therefore find that there was no competitive bidding violation. When the FCC Form 470 was posted, the Consortium conducted a fair and open competitive bidding process, sought bids for eligible services, received bids, used price as a primary factor, and waited 28 days before selecting the most cost-effective service provider. The fact that other schools tried to opt into the Consortium contract does not undermine the original valid competitive bidding process. In fact, USAC had no issue funding other Consortium members' applications filed in 2011 and for the remainder of the five-year contract.

11. We find that, in these circumstances, the addition of the 43 districts that were not listed on the original FCC Form 470 did not constitute a change in the scope of services requested. That is, there is no evidence that the 43 districts' inclusion in the RPF would have changed either the ultimate number of bidders or the prices offered by the bidders.²¹ ENA and AT&T were the only companies that

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *ENA Ex Parte* at 2. Some of the Consortium members' denials were worded slightly differently, but we believe this description fairly captures USAC's rationale.

²⁰ *ENA Ex Parte* at 3.

²¹ *See ENA Ex Parte* at 5-8.

responded to the Consortium's FCC Form 470 with bids. They were also the only two companies that offered bids to provide requested telecommunications and Internet access services for a state master contract, and the only two companies to bid in 2013 when these same schools issued their own RFP after their FY 2012 applications were denied. Nearly 80 school districts, including large urban and small rural districts, were listed on the original FY 2011 RFP. It is unlikely that any other company in Tennessee had either the ability or the desire to serve those Consortium members, but chose not to because the number of schools on the FCC Form 470 was too small. Furthermore, given the volume of districts to be served in FY 2011, it is unlikely that the unit pricing offered by either ENA or AT&T would have been altered by the additional districts. If anything, because there were more rural districts in the 43 additional districts, it is likely that the companies may have offered higher prices because those districts would have been more expensive to serve. Regardless, USAC cannot base its decision on pure speculation, as it appears to have done here. To the contrary, if speculation was allowable, one could also speculate that each of these 43 school districts had an extra year from the completion of the consortium contract to understand the available pricing, compare it to other available options in the market, and make an informed decision regarding the cost effectiveness of the consortium offerings versus other options.

12. *Waiver request.* We further find that the school districts have demonstrated special circumstances warranting the grant of a waiver of those rules. The Commission may exercise its discretion to waive a rule where the particular facts demonstrate that (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.²²

13. We find that a waiver is justified because special circumstances warrant a deviation from the general rule and that deviation will serve the public interest. First, USAC determined that "[p]rogram rules require that Billed Entities on a FCC Form 471 must be listed in . . . the cited FCC Form 470 that established the competitive bidding process." There is no such Commission rule. USAC may have been referring to a sentence on the FCC Form 470 that states funding may be denied if a billed entity was omitted from the FCC Form 470. The operative word in that sentence, however, is *may*. "May" means granting permission or possibility.²³ In drafting language requiring a certain action, "must" or "shall" should be used. As such, it was not clear that it was a requirement that every billed entity must be listed on the FCC Form 470. Further, the Commission has never required a consortium to post a new Form 470 any time that a consortium member joins or leaves a consortium.²⁴ These facts could easily lead both the Consortium members and USAC to believe that Consortium members who join the Consortium in the middle of a multi-year contract by relying on the earlier FCC Form 470.

14. To the extent that the Form 470 instructions could be read as prohibiting new Consortium members from joining an existing Consortium, we believe those instructions are contrary to other Commission policies. As a policy matter, the Commission has often encouraged districts to join consortia

²² Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. 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. *Northeast Cellular*, 897 F.2d at 1166. See also 47 C.F.R. § 54.507(d) (requiring non-recurring services to be implemented by September 30 following the close of the funding year).

²³ See *English Oxford Living Dictionary*, <https://en.oxforddictionaries.com/definition/may>.

²⁴ In fact, the Commission has allowed consortium members to join a consortium after its creation. In its *Kan-ed* order, while addressing a slightly different issue, the Commission implicitly found that districts could join a consortium the year after it was formed as long as they signed an LOA; however, districts could not join a consortium in the middle of a funding year. *Request for Waiver of the Decision of the Universal Service Administrator by Kan-ed, Kansas Board of Regents*, CC Docket No. 02-6, Order, FCC 06-170 (2006).

as they can result in efficiencies and cost-effective pricing for participants.²⁵ It would certainly be contrary to Commission policy to encourage such arrangements but then deny districts the ability to join a consortium after their formation because they did not have the foresight to join the consortium during the year it conducted a competitive bidding process. In fact, it may be because a district learns that the consortium was able to obtain better pricing than the district did on its own that the district decides to join the consortium. Given that many consortia sign multi-year contracts, requiring every school or library to be listed on the FCC Form 470 would consign those districts to a significant wait for a new competitive bidding process or to unnecessarily undertake the additional time and expense of conducting a new competitive bidding process. Such a result would frustrate Commission policy encouraging consortia.

15. Second, USAC's written guidance to the Tennessee E-rate Consortium satisfies the special circumstances in this case. Applicants should be able to ask questions of USAC and receive dependable responses. The Commission has delegated significant responsibilities to USAC in this regard: USAC conducts annual trainings, periodic webinars, and operates a call center for applicant and service provider questions. We also note that USAC does not have the authority to interpret Commission rules, and instead must defer to the Commission any issues of interpretation.²⁶ In this case, however, USAC did not tell the Tennessee E-rate Consortium that it did not know the answer to the question or decline to respond because there was a gray area with respect to the Consortium's question. USAC did not think such a gray area existed and confidently responded to the inquiry. Not only was USAC's response in writing, but it was written by USAC upper management.

16. Of course, the Commission cannot always grant an appeal simply because an applicant relied upon incorrect USAC advice. For example, if someone at USAC told a school district that a district employee could accept \$500 from a service provider in exchange for selecting that company, and the employee did so, the Commission would not be serving program interests to allow that bribery to occur. In this case, however, no such violation of Commission rules or program integrity exists. As the districts have explained in their waiver petition, there was no waste, fraud and abuse, and the applicants relied upon USAC advice in good faith.

17. Third, 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 believe 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 or procedures, where the applicants have clearly demonstrated repeated efforts to remain compliant with the rules, is in the public interest, supports the Commission's goal of not harshly punishing applicants for these types of errors, does not set an inappropriate precedent, and does not harm the fund monetarily.

18. While the applicants' actions did not harm the fund – indeed, they received the same services at the same prices as did 79 other Tennessee school districts – USAC's actions certainly harmed

²⁵ Even though released after the facts at issue here, the *First Modernization Order* provides continued support for the Commission's policies encouraging consortia. The Commission found that "[c]onsortium purchasing can drive down the prices paid by schools and libraries for E-rate supported services." In light of this core finding, the Commission determined to "adopt rules to make it easier for applicants to take advantage of consortium bidding" and to "reduce or eliminate some of the existing barriers to applicants' participation in consortia" by, among other things, "direct[ing] Commission staff to work with USAC to prioritize review of consortia applications, . . . particularly with respect to state and regional consortia applications." By so doing, the Commission "expect[s] that the improved processing times for consortia applications will result in more funding commitments flowing faster to schools and libraries, which will motivate more applicants to join consortia in future funding years." ¶¶ 168-169.

²⁶ 47 C.F.R. § 702(c).

these applicants. Without USAC's guidance to the Consortium, assuring new members they could use the existing contract, it is likely the Consortium would have posted another FCC Form 470 for the 43 new school districts. It would have been additional unnecessary work to competitively bid for the services again, but all of the districts would not have lost a year's worth of funding.

19. In short, it simply makes no policy sense to prohibit the addition of school district members to a successor statewide E-rate consortium within months of its initial formation and penalize those schools by denying the E-rate funding they had received in prior years, or to effectively force the consortium to re-bid its multi-year E-rate services contract within such a short period, *unless* such a result is demanded by overarching competitive bidding concerns that are completely absent in this case. As such, we find that a waiver would be in the public interest.

20. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of the underlying applications no later than 60 calendar days from the release date of this Order. For those applications that USAC had already committed funding, we direct USAC to reinstate the earlier funding commitment decision letter. We direct USAC to cease its efforts to recover any funds based on this rationale. We direct USAC to waive its procedural deadlines as might be necessary to effectuate our ruling.²⁷

IV. ORDERING CLAUSES

21. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-5 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155 and 254, and sections 0.91, 0.291, 1.106 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.106 and 54.722(a), that the Request for Waiver filed by the Tennessee Consortium on Feb. 11, 2013 IS GRANTED and the underlying applications ARE REMANDED to USAC for further consideration in accordance with the terms of this Order.

22. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that section 54.503(c) of the 2012 Code of Federal Regulations, 47 C.F.R. § 54.503(c) (2012), IS WAIVED to the extent necessary to effectuate the requested relief.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

²⁷ We do not believe it necessary at this time to waive our invoicing rule in section 54.514. The rule states that the deadline is 120 days after receipt of the FCC Form 486 notification letter, which the applicants will receive after USAC issues their revised FCDLs. 47 C.F.R. § 54.514(a)(2).