

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

In the Matter of	)	
	)	
	)	
Schools and Libraries	)	CC Docket No. 02-6
Universal Service Support Mechanism	)	
	)	
Request for Review and/or Waiver	)	
By Sweetwater City Schools <i>et al.</i>	)	Application Nos. 917099, 919406,
of Funding Decisions by the	)	945733, 947375, 1012581, <i>et al.</i>
Universal Service Administrative Company	)	

**CONSOLIDATED REQUEST FOR REVIEW AND/OR WAIVER  
BY SWEETWATER CITY SCHOOLS ET AL.  
OF FUNDING DECISIONS BY THE  
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY**

Pursuant to sections 54.719 and 54.722 of the Commission’s rules,<sup>1</sup> the Sweetwater City Schools and the other members of the Tennessee E-rate Consortium-Sweetwater (the Sweetwater Consortium<sup>2</sup>) hereby respectfully request a review of the Universal Service Administrative Company (USAC) decisions to deny Schools and Libraries Universal Service funding to Sweetwater City Schools and the other members of the Sweetwater Consortium for Funding Years 2013, 2014 and 2015.<sup>3</sup> As a result of USAC’s decisions, these schools – many of them

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

<sup>2</sup> Throughout, we will use the terms “Sweetwater Consortium,” “Sweetwater,” or “the Consortium.”

<sup>3</sup> See Exhibit 1 for a list of the schools, application numbers and funding commitment decisions at issue in this appeal. In addition to the funding denials, this appeal includes the revised funding commitment decisions and demands for recovery issued on March 15, 2016 by USAC to Dayton City, Clinton City, and Scott County public school districts. Dayton City and Scott County filed an appeal on April 14, 2016, seeking Commission review of those decisions by USAC. See *Schools and Libraries Universal Service Support Mechanism*, WC Docket No. 02-6, Request for Review by Dayton City (TN) School District and Scott County (TN) School System of Funding

rural – face the denial of more than \$36 million in E-rate reimbursement for services that they purchased pursuant to a competitively bid, valid contract for broadband and telecommunications services.<sup>4</sup>

For the reasons set forth below, the Wireline Competition Bureau (the Bureau) should grant this appeal, and/or any waivers necessary or warranted, and remand the relevant applications to USAC for immediate approval. Because the issues raised by this appeal are governed by the standards and analysis in orders the Commission and Bureau have previously issued, and because it is now three years after these applicants initially filed some of the applications at issue in this appeal, we also request an expedited review and inclusion in the next available Public Notice streamlined order to be released by the Bureau.<sup>5</sup>

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Decisions by the Universal Service Administrative Company (April 14 2016). The instant appeal supersedes the appeal filed on April 14, 2016, for Dayton City and Scott County.

<sup>4</sup> *Id.*

<sup>5</sup> See 47 C.F.R. § 54.722(a) (delegated authority for the Wireline Bureau to decide appeals as long as they do not raise novel questions of fact, law or policy); *Streamlined Process for Resolving Requests for Review of Decisions by the Universal Service Administrative Company*, CC Docket Nos. 96-45 and 02-6, WC Docket Nos. 02-60, 06-122, 08-71, 10-90, 11-42, and 14-58, Public Notice, 29 FCC Rcd 11094 (Wireline Comp. Bur. 2014); see also 47 C.F.R. § 54.724 (establishing a deadline of 90 days for Bureau or Commission review of an appeal).

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## EXECUTIVE SUMMARY

The Commission should reverse USAC’s decision to deny funding for more than 200 E-rate applications filed by 45 school districts in Tennessee because the Sweetwater Consortium selected the most cost-effective bid and had a contract with its service provider.

USAC improperly negated the outcome of the lawfully conducted procurement process with its unfounded conclusion that the bid selected by the Sweetwater Consortium was not “cost-effective.”<sup>6</sup> In its denial, USAC does not contest the validity of the competitive bidding process conducted by these schools; instead, it substitutes its arbitrary conclusion – unsupported by facts, Commission precedent, or any analysis whatsoever – that the outcome of the procurement process was simply wrong. USAC has effectively overruled the considered judgment of three Tennessee school executives who have significant experience with K-12 school curricula, technology needs, and procurements. USAC’s decision to second-guess the detailed, objective process conducted three years earlier by experienced schools personnel eviscerates the point of having local school officials conduct their own competitive bidding processes. USAC’s decision also provides no guidance for the Consortium or any future E-rate applicant as to how to conduct a competitive bidding process without running afoul of whatever “standard” USAC has apparently adopted. As will be shown, contrary to Commission precedent, USAC elevated price to be the outcome-determinant factor of the evaluation of cost-effectiveness even while failing to appreciate the material differences in the bids offered by the vendors competing for the award.

In fact, the Consortium conducted a competitive bidding process that fully complied with Commission rules. The Consortium sought bids; treated all potential vendors in a fair and open

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<sup>6</sup> 47 C.F.R. § 54.511(a). As will be discussed, price is not the only component of “cost-effective.”

manner; and used multiple, detailed, objective criteria, including using price as a primary factor in the evaluation, to carefully consider all bids and select the most cost-effective services. Under the Commission's previously articulated standards for cost-effectiveness, the Consortium selected the most cost-effective bid for its member schools. If the Commission were to uphold USAC's decision, it would render meaningless the local competitive bidding process. Schools and libraries could no longer rely on following the E-rate rules to ensure that their processes would be respected as legitimate evaluations of the bids they received. They would be forced to select the cheapest bidder – contrary to Commission rules and policy and without regard to the “effectiveness” of the services offered – as the only means to protect themselves against USAC allegations that the bid was not cost-effective. This would result in many applicants selecting services that do not provide the best value for them and, therefore, do not provide the best value for the E-rate program. Such an outcome would not serve the E-rate program or its statutory goals.

In addition to finding fault with the outcome of the Consortium's competitive bidding process, USAC denied applications filed by the members of the Sweetwater Consortium because USAC claims they did not have a legally binding agreement or contract with their service provider in place prior to filing their FCC Forms 471. USAC erred in reaching this conclusion: the Consortium's members had a contract with their service provider that was recognized under Tennessee law and fully compliant with the E-rate rules. Specifically, the Consortium members' service provider, Education Networks of America (ENA), had offered written, definite terms, and the Consortium, on behalf of its members, accepted that offer after using a detailed procurement process to select ENA as the winning bidder.

Further, even if the Consortium members did not have a written contract in place, it would not be in the public interest to deny the 45 school districts that exercised their contractual right to purchase services – many of which are small and rural – a total of \$36 million in E-rate funding for the three years that they have been purchasing services – simply because of a procedural requirement that here does nothing to advance the Commission’s program goals. This is particularly true where the contract was performed nearly in its entirety before USAC denied the associated funding requests.

The services delivered by this procurement and supported by these E-rate filings are crucial to the education of our school children and the administration of our school systems. Approximately a quarter of a million students rely on these services to expand their horizons and reach their full potential. The districts purchased services, and incurred these costs, pursuant to a valid contract, and owe their service provider for the provided services. Thus, consistent with Commission precedent, we respectfully ask that the Commission grant the requested appeal, or, in the alternative, the requested waivers.

## I. BACKGROUND

The Sweetwater Consortium was formed to bid for E-rate eligible services for 76 schools and school districts in Tennessee.<sup>7</sup> Sweetwater City Schools is the lead school district in the Consortium.<sup>8</sup> The Consortium includes a variety of schools, including suburban school districts, such as Blount County schools, with nearly 12,000 students; many rural districts, such as the Sweetwater City Schools, with 1,500 students; the Achievement School District, a state-operated school district that spans the state; and the Aspire public charter schools in Memphis.<sup>9</sup>

*Predecessor E-rate Consortia in Tennessee.* In 2007, approximately 120 Tennessee school districts, including many of the Sweetwater Consortium schools and districts, participated in a statewide E-rate consortium led by Greeneville City Schools.<sup>10</sup> This contract ran through June 30, 2012, and the applicants received E-rate approvals and payments without exception during its lifetime.<sup>11</sup>

In 2011, one year prior to the expiration of that contract, a consortium of 78 school districts in Tennessee conducted a competitive procurement for E-rate eligible services and

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<sup>7</sup> FCC Form 470 No. 283390001111946, posted Jan. 29, 2013. See Exhibit 2. Sweetwater had an allowable contract date of February 26, 2013. More than 70 school systems participated in the bidding process and accepted ENA's offer of services with the award. Initially, 43 districts or schools exercised their right to purchase E-rate services under the contract awarded pursuant to the Sweetwater Consortium Request for Proposal that issued on February 27, 2013 (the Sweetwater RFP). Because of the re-organization of some of these districts after the contract was awarded, there are currently 45 districts purchasing services.

<sup>8</sup> Affidavit of Dr. Melanie Miller, supervisor of curriculum and instruction, Athens (TN) City School System, and former director of schools, Sweetwater City School System, ¶ 14. (Dr. Miller Aff.). Dr. Miller was one of the three people who evaluated the bids in the competitive bidding process at issue in this appeal.

<sup>9</sup> Exhibit 1.

<sup>10</sup> Affidavit of Thomas Bayersdorfer, E-rate Coordinator, Metropolitan Nashville Public Schools, ¶ 16 (Bayersdorfer Aff.).

<sup>11</sup> *Id.*

awarded a contract to ENA.<sup>12</sup> Although the existing statewide procurement contract lasted through June 30, 2012, Metropolitan Nashville Public Schools (MNPS), the lead district in the 2011 consortium, decided to execute a procurement one year in advance of the 2012 expiration date of the Greeneville contract to allow a winning vendor, if not ENA as the existing vendor, to have one year to design, engineer and install a replacement network. Slightly more than half of the 120 participating school districts in the Greeneville Consortium signed a letter of agency to participate in the MNPS procurement.<sup>13</sup>

The remaining school districts planned on conducting a procurement for the following year, as Greeneville initially indicated that it was going to lead another procurement in 2012.<sup>14</sup> This changed, however, when, relying on guidance received at the annual E-rate training conducted by USAC staff, and later confirmed by specific written guidance from USAC, the 43 additional Tennessee school districts contracted for services under the MNPS contract, as allowed by state law.<sup>15</sup> These districts ordered and received services from the MNPS contract with ENA, and applied for E-rate funds utilizing that contract for funding year 2012.<sup>16</sup> Despite its own prior written guidance, USAC subsequently denied funding for all 43 districts.<sup>17</sup> A request for waiver of the Commission's rules to allow the school districts to take services under

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<sup>12</sup> *Id.* ¶ 16(c).

<sup>13</sup> *Id.* ¶ 16(d).

<sup>14</sup> *Id.* ¶ 16(e).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* ¶ 16(f).

<sup>17</sup> *In the Matter of the Tennessee E-rate Consortium*, CC Docket No. 02-6, Request for Waiver, at 4-5, filed Feb. 11, 2013.

the five-year MNPS contract was filed with the Commission on February 11, 2013.<sup>18</sup> Three years later, the Commission has yet to issue a decision on that waiver request.

*The Sweetwater Consortium's Procurement and Selection of ENA.* Due to the denials in 2012, the 43 districts combined with others and formed the Sweetwater Consortium and, through a lead district, Sweetwater City Schools, conducted a new competitive bidding process.<sup>19</sup> The consortium was formed as a protection against further delay of E-rate funding, despite the belief that no FCC rules were broken in the previous procurement.

Accordingly, the Consortium initiated and completed a new procurement process. On January 29, 2013, the Sweetwater Consortium issued Request for Proposal Number 31-2 entitled "Managed Internet Access, Voice-Over-IP and Video Conferencing, (Sweetwater RFP) on behalf of 76 local education agencies (LEAs)<sup>20</sup> located in Tennessee and serving approximately 350,000 Tennessee public school students."<sup>21</sup> Sweetwater City Schools recruited the services of the MNPS assistant director of technology, Thomas Bayersdorfer, to assist with the development of the RFP.<sup>22</sup> Mr. Bayersdorfer has significant experience with the E-rate program and

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<sup>18</sup> *Id.* The MNPS contract is effective through June 30, 2016.

<sup>19</sup> Dr. Miller Aff. ¶ 14.

<sup>20</sup> "Local Education Agency" is a defined term in the Tennessee Code that includes all forms of schools systems. T.C.A. §49-1-103(2) provides: "Local education agency (LEA)," "school system," "public school system," "local school system," "school district," or "local school district" means any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly.

<sup>21</sup> Sweetwater City Schools Request for Proposal, Number 13-1, Managed Internet Access, Voice-Over-IP and Video Conferencing at 5 (Jan. 29, 2013) (Sweetwater RFP). *See Exhibit 3.*

<sup>22</sup> Bayersdorfer Aff. ¶ 4. Prior to his position at MNPS, Mr. Bayersdorfer also served as the director of information technology for the State of Tennessee. He managed the issuance of requests for proposals under the rules of the E-rate program in 2002, 2007, and 2011, among many other procurements, and assisted with the Sweetwater Consortium RFP. *Id.* ¶ 2(e).

conducting competitive bidding processes.<sup>23</sup> To evaluate the bids, Sweetwater selected three representatives of the Consortium – a director of technology and the executive director of the Tennessee Educational Technology Association, in addition to the Sweetwater director of schools.<sup>24</sup>

The RFP was structured to require those responding to offer the entire range of services required by all 76 LEAs, and not just those required by the Sweetwater school district.<sup>25</sup> Bids were due March 1, 2013.<sup>26</sup> The Sweetwater Consortium received two bids by the due date – from AT&T and ENA.<sup>27</sup> After a nine-hour review process on March 1, 2013, Sweetwater selected ENA as the winning bidder, and notified ENA of the award at the conclusion of the competitive bidding process that day.<sup>28</sup> ENA had offered to use and signed the form contract<sup>29</sup> that Sweetwater included in the RFP, or, in the alternative, offered to use the form of ENA's existing contract with MNPS to memorialize the parties' contract.<sup>30</sup> Sweetwater elected to use

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<sup>23</sup> Bayersdorfer Aff. ¶¶ 2-4.

<sup>24</sup> Dr. Miller Aff. ¶ 21. The evaluators for Sweetwater were Dr. Melanie Miller, director of schools, Sweetwater City School System; Joan Gray, executive director of the Tennessee Educational Technology Association; and Stephen B. Johnson, director of technology, Hardin County Schools. Biographies in Exhibit 4.

<sup>25</sup> Sweetwater RFP at 4.

<sup>26</sup> Sweetwater RFP Amendment No. 2 at 7, Exhibit 5.

<sup>27</sup> AT&T Response to Sweetwater RFP (AT&T Bid Response), Exhibit 6; ENA Response to Sweetwater RFP (ENA Bid Response), Exhibit 7.

<sup>28</sup> Letter from Melanie Miller, director of schools, Sweetwater City Schools, to Bob Collie, senior vice president and chief technology officer, ENA (dated March 1, 2013), awarding the bid to ENA (Sweetwater Award Letter), Exhibit 8.

<sup>29</sup> The form contracts each contain standard terms and conditions that apply generally to all procurements, and each adopt the winning response to commemorate the duties and obligations of each party to the contract. *See, e.g.*, Sweetwater RFP at Attachment E.

<sup>30</sup> ENA Bid Response at 11, 146.

the form of the MNPS contract to memorialize the contract that was formed on March 1, 2013.<sup>31</sup> The Consortium members received the prices ENA offered in the Sweetwater procurement, not the pricing in the MNPS contract.<sup>32</sup>

Pursuant to the contract, 45 members of the Sweetwater consortium ordered services for which E-rate funding was requested.<sup>33</sup> In accordance with its contractual obligation, ENA has performed under the contract by delivering telecommunications and broadband services for those 45 districts, and these districts are bound to pay for the services.<sup>34</sup> The Consortium members filed individual applications for funding pursuant to Commission rules for funding years 2013, 2014 and 2015.<sup>35</sup> Despite starting its review in October 2013, USAC took nearly two years to tell the Consortium that USAC did not approve of the outcome of the competitive bidding process.<sup>36</sup> In October 2015, USAC denied requests for more than \$36 million in funding for the 45 districts for funding years 2013, 2014, and 2015.<sup>37</sup>

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<sup>31</sup> Sweetwater Award Letter.

<sup>32</sup> *See, e.g.*, Sweetwater Invoice from ENA dated July 31, 2013, Exhibit 9. In fact, shortly after it was awarded the Sweetwater bid, ENA lowered the pricing for the MNPS Consortium members as well effective July 1, 2013. *See, e.g.*, MNPS Invoice from ENA dated July 31, 2013, Exhibit 10. It memorialized this action with an amendment to the MNPS contract effective November 11, 2013. *See* Amendment Number 3 to Metropolitan Board of Public Education Contract with ENA Services, LLC, for Purchase of Goods and Services (MNPS Contract Amendment Number 3), Exhibit 11.

<sup>33</sup> *See* Exhibit 1.

<sup>34</sup> Originally, 43 districts took service but two additional districts were created from one district due to a reorganization of the districts. As such, 45 districts have taken service under this contract.

<sup>35</sup> *See* Exhibit 1.

<sup>36</sup> *See* Intent to Deny Letter from Fabio Nieto, associate manager, Special Compliance, USAC, to Larry Stein/Diana Howard, Sweetwater City Schools, (May 21, 2015), Exhibit 12.

<sup>37</sup> *See, e.g.*, Notification of Commitment Adjustment Letter from USAC to Dayton City School District dated Oct. 30, 2015 (Initial Denial Letter). Due to the volume of denial letters, only this example is attached. The same denial language was included on each decision. Exhibit 13.

On December 4, 2015, the Consortium appealed USAC’s decision on these applications to USAC, pursuant to Commission rules.<sup>38</sup> USAC denied the appeal on March 15, 2016.<sup>39</sup> The Consortium herein timely files its request for review and/or waiver with the Commission.<sup>40</sup>

## **II. CONSISTENT WITH EXISTING COMMISSION STANDARDS FOR COST-EFFECTIVENESS, THE SWEETWATER CONSORTIUM SELECTED THE MOST COST-EFFECTIVE BID FOR ITS MEMBER SCHOOLS**

The Commission’s rules set forth requirements for applicants to seek funding from the E-rate program for eligible services. Foremost among these requirements is the obligation of schools and libraries to conduct a competitive bidding process to ensure the eligible services selected are the “most cost-effective.”<sup>41</sup> Specifically, schools and libraries are required to “carefully consider all bids submitted” and to select “the most cost-effective service offering.”<sup>42</sup>

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Because the funding denials were issued for multiple funding years, the denial dates ranged from October 14, 2015 to November 30, 2015. See Exhibit 1.

<sup>38</sup> 47 C.F.R. § 54.719(a).

<sup>39</sup> Administrator’s Decision on Appeal, Letter to Charles Cagle, Lewis, Thomason, King, Krieg & Waldrop, P.C., from Schools and Libraries Division, USAC (March 15, 2016) (Appeal Denial Letter). See Exhibit 14. USAC sent each applicant a copy of the Administrator’s Decision on Appeal. Again, due to the volume of the letters, only one example is included as an exhibit.

<sup>40</sup> 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a). Also note that Scott County and Dayton City filed an appeal with the Commission on April 14, 2016, appealing the recovery actions USAC was taking against them. *In the Matter of the Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *Request for Review by Dayton City (TN) School District and Scott County (TN) School System of Funding Decisions by the Universal Service Administrative Company* (April 14, 2016).

<sup>41</sup> 47 C.F.R. § 54.511(a) (2012).

<sup>42</sup> *Id.* at § 54.511(a) (2012) and (2014). See also 47 C.F.R. §§ 54.503(c)(2)(vii), 54.504(a)(1)(xi) (2012) (requiring applicants to certify on FCC Forms 470 and 471 respectively that the most cost-effective bid will be or was selected); 47 C.F.R. §§ 54.503(vii) & 54.504(a)(1)(xi) (2012) (“All bids submitted to a school, library, or consortium seeking eligible services were carefully considered and the most cost-effective bid was selected in accordance with §54.503 of this subpart, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals.”); *Request for Review of the Decision of*

Under section 54.511(a) of the Commission’s rules, in determining which service offering is the most cost-effective, an applicant “may consider relevant factors other than the pre-discount prices” submitted by providers, so long as price is the primary factor considered.<sup>43</sup>

The Commission has declined to establish a bright-line test or standard for cost-effectiveness,<sup>44</sup> except for a presumption that wireless data plans and air cards are not the most cost-effective services when applicants can already access the Internet using wi-fi or other wireless means.<sup>45</sup> Instead, it has provided “useful guidance”<sup>46</sup> for applicants on how to select cost-effective services in two Commission-level orders appealing USAC decisions.<sup>47</sup> In

*Tennessee*, the Commission found that a school or library applicant could *itself* determine

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*the Universal Service Administrator by Ysleta Independent School District El Paso, Texas, et al., Order, FCC 03-313, 18 FCC Rcd 26407, ¶ 47 (2003) (Ysleta Order).*

<sup>43</sup> 47 C.F.R. § 54.511(a).

<sup>44</sup> *See, e.g., Universal Service Schools and Libraries Program, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-323 at ¶ 87 (2003)* (“Our rules do not expressly require, however, that the applicant consider whether a particular package of services are the most cost effective means of meeting its technology needs. Nor do our rules expressly establish a bright line test for what is a “cost effective” service.”). The Commission has sought comment on defining further cost-effectiveness at least twice – in 2003 and again 10 years later. *Id.* at ¶ 87; *Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184, Notice of Proposed Rulemaking, FCC 13-100, at ¶¶ 211-216 (2013) (Modernization NPRM).*

<sup>45</sup> *Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-99, at ¶ 151 (2014)* (data plans and air cards will receive funding only if applicant can demonstrate they are cost-effective; these services are not cost-effective when the applicant can already access the Internet through wi-fi or wireless devices without data plans or air cards).

<sup>46</sup> *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13740 at ¶ 9 (1999) (Tennessee Order).*

<sup>47</sup> *Tennessee Order; Ysleta Order.*

whether services were cost-effective based upon price and other factors.<sup>48</sup> Further, the Commission noted that USAC generally does not need to independently make a finding of cost-effectiveness because the Commission's requirement that a school or library must pay its share of the costs of eligible services ensures that the services selected are the most cost-effective.<sup>49</sup> In *Ysleta*, the Commission cautioned that the charges for eligible services might not be cost-effective if they are significantly higher than the prevailing market rates.<sup>50</sup>

In this case, as further described below, the Consortium's choice of service provider was entirely consistent with the Commission's rules and guidance: the Consortium determined after a thorough evaluation that ENA's was the most cost-effective bid; it considered price as the primary factor; and ENA's prices were not higher than the prevailing market rates. USAC thus based its finding that ENA's bid was not the most cost-effective bid on a single factor: that the price was higher than AT&T's bid. As will be shown, USAC is incorrect in that finding. More importantly to the E-rate program, if the Commission were to uphold USAC's decision here, the Commission would effectively be adopting a rule under which price is the *only* factor that applicants may consider. Such a decision is contrary to current Commission rule and policy, and can only be established through a notice-and-comment rulemaking. Moreover, as the Consortium demonstrated in its appeal to USAC, the Consortium did in fact choose the least expensive vendor.

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<sup>48</sup> *Tennessee Order* at ¶ 10.

<sup>49</sup> *Tennessee Order* at ¶ 10.

<sup>50</sup> *Ysleta* at ¶ 54. We note that in this case the Commission was referring to equipment, not services.

**A. The Commission Has Stated That Cost-Effectiveness Is Assured Via a Lawful Competitive Bidding Process and the Payment of the Applicant's Non-Discount Share**

The Commission has found that a competitive bidding process using multiple criteria to evaluate bidders, coupled with the applicant paying part of the cost of services as required by Commission rules, ensures that applicants will select the most cost-effective services.<sup>51</sup> The Consortium satisfied the E-rate requirements for the competitive bidding process – including conducting a fair and open process, carefully considering all bids received, and using price as a primary factor – to select the most cost-effective services. In addition, because the members of the Sweetwater Consortium paid their share of the eligible services, they had every incentive to select the most cost-effective services and provider.

**1. The Consortium's competitive bidding process complied with Commission rules.**

As noted above, Commission rules require that applicants conduct a fair and open competitive bidding process, carefully consider all bids received, and use price as a primary factor to evaluate those bids.<sup>52</sup> Sweetwater satisfied all of these requirements, and, notably, USAC did not allege any violations of these Commission rules. The result was a competitive bidding process that not only met all of the Commission's E-rate requirements, but provided the best value for the Consortium members that received broadband services under the Consortium contract. Although USAC did not allege any violations of these requirements, we address them here because the Commission has looked to the sufficiency of the competitive bidding process in

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<sup>51</sup> *Tennessee Order* at ¶ 10; see also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9002 at ¶ 481 (1997) (subsequent history omitted).

<sup>52</sup> 47 C.F.R. §§ 54.503(c)(ii)(2)(viii), 54.503(c)(ii)(4).

its orders analyzing whether the most cost-effective services were selected.<sup>53</sup> Contrary to USAC's implication that the parties should have received the same scoring on the technical categories, the evaluators found AT&T's bid deficient in several important ways. Further, this explanation should help the Commission to understand the Consortium's confidence in the process that it utilized to make its selection.

First, the process was unquestionably fair and open. Commission rules require that applicants conduct a fair and open competitive process, initiated by the posting of an FCC Form 470 to begin the competitive bidding process.<sup>54</sup> The Commission has identified several activities that would inhibit a fair and open process, including the applicant relinquishing the selection process to a service provider or not providing sufficient information for a service provider to offer a responsive bid.<sup>55</sup> The Consortium engaged in none of these activities, and USAC did not suggest that it had. The Consortium posted its FCC Form 470 and RFP with a description of the services requested.<sup>56</sup> The Consortium recruited Mr. Bayersdorfer, the MNPS E-rate Coordinator, who has conducted as many procurements as anyone in Tennessee, to assist with the procurement process.<sup>57</sup> The Sweetwater RFP provided detailed instructions for potential bidders to respond to the request for bids.<sup>58</sup> The RFP listed all of the Consortium members that were planning to purchase the requested broadband and telecommunications services.<sup>59</sup> Further, there

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<sup>53</sup> *Ysleta Order* at ¶¶ 47-55.

<sup>54</sup> 47 C.F.R. §§ 54.503(a).

<sup>55</sup> *Id.* at note.

<sup>56</sup> See Sweetwater FCC Form 470 283390001111946; Sweetwater RFP.

<sup>57</sup> Dr. Miller Aff. ¶ 15.

<sup>58</sup> See Sweetwater RFP.

<sup>59</sup> Sweetwater RFP at Attachment C.

was no collusion with any service providers on the RFP or otherwise during the competitive bidding process.<sup>60</sup> The three school officials selected by the Consortium to evaluate the bids (“evaluators” or “reviewers”) did not have a bias toward one provider.<sup>61</sup> Using a detailed evaluation form, they spent nine hours evaluating each section of the vendors’ response, and carefully documented their analysis with numerical grades and comments.<sup>62</sup> They used the competitive bidding process to select the best and most cost-effective provider, considering all of the evaluation factors, for the members of the Consortium.<sup>63</sup>

Second, the Consortium used price as the primary factor to evaluate the bids received.

The Commission has stated that if a school or library uses multiple criteria to select the winning bidder, the price of eligible services must receive more points than any other factor.<sup>64</sup> Significantly, the Commission’s rules have never required schools and libraries to select the cheapest service provider, even among bids for “comparable” services.<sup>65</sup> In fact, the Commission has stated repeatedly that price cannot be the only factor for the obvious reason that “price cannot be properly evaluated without consideration of what is being offered.”<sup>66</sup> The

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<sup>60</sup> Bayersdorfer Aff. ¶¶ 6, 9, 13(i).

<sup>61</sup> Dr. Miller Aff. ¶¶ 29-30, 35; Affidavit of Joan Gray, executive director of the Tennessee Educational Technology Association (Gray Aff.) ¶ 18.

<sup>62</sup> Bayersdorfer Aff. ¶¶ 11, 12; Dr. Miller Aff. ¶ 19; Gray Aff. ¶¶ 20-22.

<sup>63</sup> Bayersdorfer Aff. ¶¶ 13, 15; Dr. Miller Aff. ¶ 35; Gray Aff. ¶¶ 18, 27.

<sup>64</sup> See 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a); *Universal Service Schools and Libraries Program, CC Docket No. 02-6*, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 03-101 at ¶ 24 (2003). See also *Ysleta Order* at ¶ 50, n. 138 (if, for example, a school assigns 10 points to reputation and 10 points to past experience, the school would be required to assign at least 11 points to price).

<sup>65</sup> *Universal Service Order* at ¶ 481 (“Even among bids for comparable services, however, this does not mean that the lowest bid must be selected.”); *Tennessee Order* at ¶ 9.

<sup>66</sup> *Tennessee Order* at ¶ 8.

Commission has also explicitly noted that consideration of other factors, such as prior experience and technical excellence, help to ensure that the applicant is receiving the most cost-effective services.<sup>67</sup>

In the Consortium's bid evaluation process, the price for E-rate eligible services had a possible 25 points – 25 percent of the total points possible. The next two highest categories had a possible total of 20 each. All of the evaluated categories and their possible total points were:

- (1) Price of eligible services (25 points);
- (2) Business plan (20 points);
- (3) Past performance and references (20 points);
- (4) Experience and qualifications (10 points);
- (5) Capacity and the ability to meet scheduling requirements (10 points);
- (6) Pro forma contract (10 points); and
- (7) Ineligible costs (5 points).

These criteria plainly show that, consistent with Commission rules and precedent, the Consortium considered price as the primary factor.

Third, the evaluators' careful consideration of both of the bids, reviewing not just pricing but all of the categories listed in the RFP, led it to the inescapable conclusion that ENA's bid was the most cost-effective. The result of this process should be respected by USAC and this Commission, but the Consortium is also willing to explain its decision on the merits.

As an initial matter, the fact that there are 100 total points and price constitutes 25 percent of the points illustrates how the lowest priced bid could – again, consistent with Commission rules and precedent – fail to be the winning bid, given the six other criteria the Consortium used to evaluate bids. That is exactly what happened when the Consortium

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<sup>67</sup> *Universal Service Order* at ¶ 481.

evaluators carefully reviewed the two bids received: ENA received 69 points and AT&T received 50.5 points for the non-cost categories.<sup>68</sup>

Without any factual basis – and ignoring the expertise and experience of the three evaluators – USAC appears to be saying that AT&T and ENA should have received the exact same points for those six categories. As the Commission stated in *Tennessee*, the evaluators are encouraged to use multiple factors, including price as the primary factor, to determine for itself the most cost-effective offering.<sup>69</sup> The evaluators took this charge seriously and carefully compared both bids for their responsiveness to the RFP’s specific requirements.

The three evaluators worked methodically through the categories in the following order: (1) Business Plan (tab I of the RFP); (2) Experience and Qualifications (tab II of the RFP); (3) Capacity and Ability to Meet Scheduling Requirements (tab IV of the RFP); (4) Past Performance and References (tab V of the RFP); (5) Pro Forma Contract (tab VI of the RFP); and (6) Pricing of both eligible and ineligible services (tab III of the RFP).<sup>70</sup> The five non-price categories had 17 sub-categories for evaluation, with the total points for each major category divided between them.<sup>71</sup>

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<sup>68</sup> Sweetwater Consensus Point Score Sheet (Consensus Score Sheet), Exhibit 15.

<sup>69</sup> *Tennessee Order* at ¶ 10.

<sup>70</sup> *See* Consensus Score Sheet.

<sup>71</sup> *See* Consensus Score Sheet. The RFP categories were focused on identifying the best provider for the needs of the applicants. For example, some of the requirements listed under “Business Plan” were important because the quality of the service was critical and because of the engineering challenge of providing service to predominantly small and rural districts strewn across the state of Tennessee. The winning bidder had to prove a core competency to work with the approximately 25 incumbent local exchange carriers or other fiber providers that had facilities in those areas and, on occasion, the creativity to arrange service when the local providers refused to do so because it was not in their economic interests. *Bayersdorfer Aff.* ¶ 5.

As the evaluators reviewed the bids, they walked through the RFP requirements for each category. The reviewers read the RFP to determine what was requested, compared each bid response to the RFP, first scored each category independently, then met to discuss their individual scores to arrive at a consensus score, entered the score on the master score sheet, and moved on to the next section.<sup>72</sup>

The Consortium does not think it is necessary or relevant to rehash every point awarded to the bidders for each of the 17 subcategories. However, to explain the differences in scoring between the two bids, detailed additional information for the categories in which ENA received more points can be found in the attached affidavits.<sup>73</sup> One key example illustrates the evaluators' careful review of what was actually in the bid responses as opposed to what USAC apparently assumed would be offered by a large company such as AT&T. Because the schools were concerned about service quality,<sup>74</sup> one requirement under "Business Plan" asked bidders to "[d]escribe in detail all instances in which you have had to make a financial restitution to your customers in the last year as it pertains to SLAs [service level agreements]."<sup>75</sup> This requirement was asking bidders to tell the Consortium the number of times there were service outages that resulted in real damage and therefore required reimbursement under service agreements with other customers.<sup>76</sup> For schools, the timely and continuous provision of service is extremely important as curriculum relies on access to the Internet during the school day.<sup>77</sup> Cheap service

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<sup>72</sup> Bayersdorfer Aff. ¶ 11; Gray Aff. ¶ 20; Dr. Miller Aff. ¶ 19.

<sup>73</sup> Dr. Miller Aff. at ¶¶ 24-25; Gray Aff. at ¶¶ 23-25.

<sup>74</sup> Bayersdorfer Aff. ¶ 5(c), (d), (e); Gray Aff. ¶¶ 9-13; Dr. Miller Aff. ¶¶ 9-13.

<sup>75</sup> Sweetwater RFP at 14.

<sup>76</sup> *Id.*

<sup>77</sup> Gray Aff. ¶¶ 9-12; Dr. Miller Aff. ¶¶ 9-13.

that is not available when it is needed is not cost-effective service. ENA responded that it had not made any restitutions to customers in the previous year,<sup>78</sup> while AT&T refused to answer the question.<sup>79</sup> Not only was AT&T's failure to provide an answer not responsive to the bid requirements, its non-responsiveness suggested that AT&T did not want to reply to this question because its answer would not demonstrate a quality service. ENA received four points under this sub-category, and AT&T received zero because it did not provide an answer.<sup>80</sup> This is just one example of an area in which ENA received more points than AT&T in a technical category. The evaluators could not simply ignore that AT&T had completely failed to answer the question.<sup>81</sup>

After the evaluation of the technical categories was complete, the reviewers considered pricing.<sup>82</sup> In the RFP, the Consortium sought Internet access pricing based on hypothetical districts and varying bandwidth needs – a small district with 10 sites, a medium-sized district with 80 sites, and a large district with 150 sites.<sup>83</sup> Bids were also requested for email, web

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<sup>78</sup> ENA Bid Response at 20.

<sup>79</sup> AT&T Bid Response at 22. (“Contractual non-disclosure and confidentiality restrictions prohibit AT&T from describing relationships with other customers. Moreover, in view of the score of AT&T's operations, AT&T cannot possibly determine with certainty if AT&T had to make restitution to any customer in connection with an SLA. AT&T stands behind the quality of the services offered in this RFP Response.”).

<sup>80</sup> Consensus Score Sheet at 1.

<sup>81</sup> Even if AT&T were actually concerned about a confidentiality restriction, it could have provided a response. AT&T could have provided the information about service outages without stating the names of the customers or otherwise provided redacted information. Even though AT&T is a large company, it should be able to determine if it had paid customers for service outages, and its inability to do so calls into question its management practices. Alternatively, it could have, at a minimum, provided the information for its Tennessee customers.

<sup>82</sup> Bayersdorfer Aff. ¶ 13; Gray Aff. ¶ 24; Dr. Miller Aff. ¶ 25.

<sup>83</sup> Sweetwater RFP at 18-20.

hosting, CIPA filtering, managed VoIP, firewall, and managed video conferencing.<sup>84</sup> The RFP requested that the service providers detail “all lifecycle costs.”<sup>85</sup> The reviewers took the costs detailed in the bid responses and totaled them.<sup>86</sup>

The points awarded to each carrier for pricing were based on a straightforward, objective formula.<sup>87</sup> The lowest bidder receives the most points possible for the category – 25 – and the next highest bidder receives points proportional to the amount that the bid was higher than the lowest bid.<sup>88</sup> The evaluators took AT&T’s and ENA’s bids and entered them into this predetermined formula, with the result that AT&T received 25 points and ENA received 16.2 points for pricing.<sup>89</sup>

However, reaching this conclusion was not straightforward as the AT&T bid contained several key inconsistencies, apparent errors and omissions. The truth is, no one – including AT&T – could determine AT&T’s “lifecycle” or “all-in” costs for the services until after the contract had been awarded. First, the evaluators discussed the fact that AT&T’s bid, unlike ENA’s, did not include the cost of installation.<sup>90</sup> Second, AT&T’s bid had originally included pricing for CIPA-compliant content filtering that equaled the pricing it bid for managed Internet access. The evaluators thought that AT&T had erred in preparing its response, and revised the

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<sup>84</sup> RFP at 20-22.

<sup>85</sup> Sweetwater RFP at 18-20.

<sup>86</sup> Bayersdorfer Aff. at ¶ 13.

<sup>87</sup> *Id.*

<sup>88</sup> The cost section has points assigned by a formula. The lowest cost receives the full points allotted to that bidder. The points for the other bidders are assigned as follows: (lowest-cost bid divided by the higher bid) multiplied by (total points per cost section divided by 1) = points earned.

<sup>89</sup> Consensus Score Sheet at 5.

<sup>90</sup> Bayersdorfer Aff. ¶ 13; Dr. Miller Aff. ¶ 25; Gray Aff. ¶ 24(a).

bid – significantly downward – for AT&T after discussing with an AT&T representative.<sup>91</sup>

Third, they noticed during their earlier review of the bid responses that, in the introduction section of its bid, AT&T had stated that “notwithstanding anything contained in the RFP to the contrary,” the bid for managed Internet service was subject to the terms and conditions of AT&T’s statewide master contract, NetTN.<sup>92</sup> AT&T’s qualification specifically included pricing as AT&T further noted that:

AT&T understands that offering the NetTN Services Contract as a contract vehicle for the Internet services may be deemed to be an exception to the requirement of using the contract template set forth in Attachment E to this RFP. However, the pricing offered under the NetTN Services Contract is the lowest corresponding price that AT&T is required to offer to Sweetwater under the lowest corresponding price requirements of E-rate Rules (emphasis added).<sup>93</sup>

With this language, AT&T effectively replaced all of the pricing it had included in the pricing charts in response to the RFP with the prices it was charging in its state master contract.

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<sup>91</sup> If the reviewers had used the prices AT&T included in its bid response, the total cost for the hypothetical districts would have been more than \$10 million. During the evaluation process, the reviewers surmised that the pricing must be a mistake and discussed this concern with AT&T during the evaluation process. The filtering price was \$0.25 per “active session” per month. AT&T Response at Tab III, at 3-5. Although the reviewers had no idea how many active sessions per month might be realistic, they tried to estimate the number of sessions to determine a charge for the service, and once again, gave AT&T the benefit of the doubt when it came to pricing. Bayersdorfer Aff. ¶ 13(e); Dr. Miller Aff. ¶ 25(c); Gray Aff. ¶ 24(c).

<sup>92</sup> AT&T Bid Response at 12. Bayersdorfer Aff. ¶ 13(b)(c); Dr. Miller Aff. ¶ 25; Gray Aff. ¶ 24(b). The state of Tennessee sought bids in 2007 for a statewide 10-year contract for a statewide wide area network with multiple virtual private networks to serve state agencies, including schools and other public entities. It awarded the contract to AT&T in 2008.

<sup>93</sup> AT&T Bid Response, at 12-13.

The evaluators struggled to account for this contradiction as it scored the bids,<sup>94</sup> and AT&T did not include a copy of the state master contract with its bid so the evaluators could not actually compare the pricing.<sup>95</sup> This fact concerned the evaluators, but despite this uncertainty about AT&T's pricing, the evaluators nevertheless plugged in the raw numbers included by AT&T and ENA, adjusted for AT&T's perceived pricing errors, into the spreadsheet to compare pricing. Then they assigned points to the relative pricing, and when they calculated the point total across all categories, they saw that the winner of the bid would not change if AT&T's bid pricing differed from AT&T's prices in the state master contract. Either way, ENA had won the competitive bidding process. Giving AT&T every benefit of the doubt when reviewing and adjusting the pricing section information, ENA received a total of 90.2 points to AT&T's 75.5 points.<sup>96</sup> Because the issue made no difference to the outcome of the bid selection, the evaluators did not pursue it further.<sup>97</sup> If they had, they would have determined, as illustrated herein below, that AT&T in reality was proposing prices that were higher than those offered by ENA.

In the letter denying the Consortium's appeal, USAC claimed that the Consortium "did not provide any supporting documentation to justify the selection of ENA's bid."<sup>98</sup> It is not clear why USAC did not consider the competitive bidding process and four-page bid evaluation matrix (titled Consensus Point Score Sheet), which was the product of a nine-hour evaluation process,

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<sup>94</sup> Bayersdorfer Aff. ¶ 13; Dr. Miller Aff. ¶ 25; Gray Aff. ¶ 24.

<sup>95</sup> See generally AT&T Bid Response. Based on their familiarity with services and pricing in the state of Tennessee, the evaluators knew these included rates were likely significantly lower than those included in the AT&T NetTN contract. Dr. Miller Aff. ¶ 25(f).

<sup>96</sup> Consensus Score Sheet at 5.

<sup>97</sup> Bayersdorfer Aff. ¶ 13; Dr. Miller Aff. ¶ 25; Gray Aff. ¶ 24(e).

<sup>98</sup> USAC Appeal Denial at 2.

as documentation of the cost-effectiveness of the selection, especially when Commission precedent tells USAC to rely upon the competitive bidding process and a school's financial incentive to get the best deal when it is reviewing applications.<sup>99</sup> The Consortium provided USAC with its four-page Consensus Point Score Sheet, which clearly demonstrates why the Consortium selected ENA instead of AT&T. In neither its initial denial nor the denial of the appeal did USAC question any of the calculations or assessments made by the evaluators.<sup>100</sup> The evaluation process worked as it was intended to.

The Initial Denial Letter also noted that Sweetwater awarded more points to ENA in all categories besides eligible cost, and scored AT&T lower in those categories.<sup>101</sup> Those are true statements; the evaluation panel conducted a thorough, category-by-category analysis of the bid responses. The fact that ENA earned more cumulative points than AT&T is not evidence of problems with the competitive bidding process or its outcome; rather, it is proof of a diligently conducted fair and objective review of the bid responses. The RFP, the competitive bidding process, the analysis of the bids, and the Consensus Point Score Sheet demonstrate that the schools complied with the Commission's rules in choosing the most cost-effective services for their needs by using a reasoned and thorough evaluative process.

**2. The Commission's requirement that schools and libraries pay a share of the cost ensures they have the incentive to select the most cost-effective services.**

In addition to the competitive bidding process described above, another Commission rule operates to ensure the most cost-effective services are selected. As the Commission is aware, the

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<sup>99</sup> *Tennessee Order* at ¶ 10.

<sup>100</sup> Initial Denial Letter; Appeal Denial Letter.

<sup>101</sup> Initial Denial Letter at 4-5.

E-rate program requires that schools and libraries pay a portion of the price for the services.<sup>102</sup> Requiring local funds to pay part of the costs, the Commission has explained, will result in the most cost-effective program because local applicants will spend their own money wisely.<sup>103</sup> It is without a doubt that the Commission surely appreciates the constraints on every school district's finances.<sup>104</sup>

Further, the Commission has noted that USAC generally does not need to make a finding of cost-effectiveness because of the Commission's requirement that a school or library must pay its share of the costs of eligible services.<sup>105</sup> The Commission explained that, absent evidence to the contrary, "[s]uch a finding is not generally necessary because a school has an incentive to select the most cost-effective bid, even apart from any procurement requirements, because it must pay its *pro rata* share of the cost of the services requested."<sup>106</sup>

This program requirement provides an incentive for the schools and libraries to select the service provider that offers the best value when providing the services that meet their needs. Public schools and libraries must answer to their taxpayers as to the use of their limited funds, further motivating them to choose the best offering from multiple vendors. When there is more than one bidder for services, market forces encourage service providers to offer the best combination of pricing and value for the services sought so they may be selected as the winning bidder.

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<sup>102</sup> See 47 C.F.R. § 54.505.

<sup>103</sup> *Universal Service Order*, 12 FCC Rcd at 9029, ¶ 480.

<sup>104</sup> Dr. Miller Aff. ¶ 30.

<sup>105</sup> *Tennessee Order* at ¶ 10.

<sup>106</sup> *Id.* See also 47 C.F.R. § 54.505.

Here, the member schools paid their share of the costs – with discounts ranging from 30 percent to 90 percent, with the majority receiving an 80 percent discount.<sup>107</sup> The reviewers – two of whom were officials from schools that took service under the resulting contract – had every incentive to get the best value for their districts.<sup>108</sup> As the Commission noted in *Tennessee*, this payment is sufficient to demonstrate that schools have the incentive to obtain the best value for the services possible.<sup>109</sup> It would be the rare school district in America today that has extra resources sitting around to use for high-speed broadband services. As the Commission well understands, the opposite is the reality for most school districts.<sup>110</sup>

The incentive, as the Commission noted in *Tennessee*, ensures the selection of the most cost-effective services, absent “evidence to the contrary.” There is no evidence to the contrary. There is no allegation of fraud or collusion. “Evidence to the contrary” cannot simply be a higher price because the Commission has repeatedly said applicants do not have to select the lowest bid and charges schools to choose the most cost-effective services. It is unclear what USAC thought the issue was in this procurement, other than that it disagreed with the outcome of the process because the price for the services selected was apparently higher than the bid not selected. There is no benefit to be derived by the schools in selecting a higher bidder other than obtaining the best value for the services that they are requesting.

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<sup>107</sup> See Exhibit 1.

<sup>108</sup> Dr. Miller Aff. ¶ 30.

<sup>109</sup> *Tennessee Order* at ¶ 10.

<sup>110</sup> *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN 15-191, 2016 Broadband Progress Report, FCC 16-6 (Jan. 29, 2016).

Finally, it is notable that the Consortium members had two alternatives to the Sweetwater contract. They could have purchased services from the NetTN contract or the MNPS contract. The choice by 45 LEAs of the Sweetwater contract confirms the intentionality of the analysis of “cost-effectiveness” on the RFP process.

With multiple vendors submitting bids, a competitive bidding process that meets the Commission’s requirements, and the built-in incentive that applicants must pay their non-discount share of the costs, the Sweetwater Consortium met the Commission standard for selecting the most cost-effective services. USAC’s criticism of the Consortium’s decision was thus unfounded.

**B. The Prices Offered by ENA Were Below the Prevailing Market Rates, Including Prices Offered by AT&T in the Bid and Elsewhere**

While schools and libraries have never been required to select the cheapest offering when selecting a service provider for their E-rate eligible services,<sup>111</sup> the Commission noted – in dicta in *Ysleta* – that there may be situations where a price is so exorbitant that it cannot, on its face, be cost-effective, absent extenuating circumstances.<sup>112</sup> There, the Commission suggested that a price for equipment<sup>113</sup> that was “two or three times greater than the prices available from [other]

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<sup>111</sup> *Ysleta Order* at ¶ 48 (quoting *Tennessee Order*, 14 FCC Rcd at 13739, ¶ 9).

<sup>112</sup> *Ysleta Order* at ¶ 54. The facts in *Ysleta* are not relevant to this appeal. In *Ysleta*, the school district had not actually conducted a competitive bidding process for E-rate eligible services, included every service on its FCC Form 470, released an RFP even though it had indicated it did not intend to, and did not use price of E-rate eligible services as the primary factor (or any factor as it did not compare pricing). The Commission concluded that the program’s competitive bidding rules had been violated as the district had failed to remotely comply with Commission requirements. *Ysleta Order* at ¶ 57.

<sup>113</sup> Equipment such as switches can be priced as a commodity. Services, which are tailored to each customer and each site’s needs, cannot.

commercial vendors” would not be cost-effective, even if it were the only bid received.<sup>114</sup> The Sweetwater Consortium selection of ENA is not one of the situations the Commission was concerned about in *Ysleta*.

First, the bids offered by ENA were not just comparable to prevailing market rates, but were, in fact, lower than prevailing market rates. Second, ENA’s bid was actually lower than AT&T’s competing bid. As explained further below, while on its face AT&T inserted lower numbers for some facilities in its pricing grid, certain inclusions and omissions in AT&T’s bid language caused AT&T’s to be the *higher*-priced of the two bids. Even if ENA’s pricing was 50 percent more than AT&T’s pricing, the Consortium’s selection of ENA did not violate any articulated Commission standard regarding cost-effectiveness.

**1. ENA’s bid was lower than prevailing market rates.**

Other market rates demonstrate that ENA’s bid was in line with current market rates. First, the existing contract between ENA and MNPS had rates that were comparable to those in ENA’s contract with Sweetwater, although the MNPS contract contained slightly higher rates as the former contract had been consummated two years before the Sweetwater procurement, and Sweetwater’s contract thus reflects the general trend of falling prices for those services. In fact, after the conclusion of the Sweetwater procurement, ENA voluntarily lowered the prices to the Sweetwater rates for the MNPS school district as well, even though it was not required to do so under that contract.<sup>115</sup> Second, as explained below, AT&T’s NetTN state master contract had pricing that was higher than ENA’s successful bid.<sup>116</sup>

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<sup>114</sup> The Commission in *Ysleta* was discussing situations in which there was no competitive bidding. *Ysleta Order* at ¶ 54.

<sup>115</sup> USAC is mistaken that ENA charged the Sweetwater districts the MNPS pricing for “nearly a year” after the contract was formed. *See Sweetwater Invoice*. Sweetwater used the MNPS

In addition, service providers have been aggressively competing with each other during the past several years, offering school districts an option to determine the best value for their needs on an annual basis. Moreover, the procurement provided the Consortium members with a second option since they already had the right to purchase off the NetTN contract. Given this choice, each school district was assured of purchasing from its most cost-effective provider.

**2. ENA’s bid was in fact lower than AT&T’s bid in response to the Sweetwater procurement, notwithstanding the evaluators’ review of figures included in one section of the bid response.**

USAC’s denial letter places great weight on the fact that AT&T ostensibly bid \$6 million in response to the Consortium bid request while ENA’s winning bid was \$9.3 million. USAC’s claim ignores the clear and unambiguous language in AT&T’s bid document that disavows the numbers in its pricing grid, and, instead, specifically adopts the pricing it was offering in its NetTN state master contract.<sup>117</sup> In addition, AT&T’s bid did not include installation; the rate for managed services is only applicable once fiber is available to the site.<sup>118</sup>

It is true that the Consortium reviewers used AT&T’s proffered figures, after favorable adjustments to AT&T’s submitted pricing, from the pricing section of its bid to calculate the

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contract for the form of the contract, with the pricing bid in the Sweetwater procurement – a fact that USAC could have confirmed if it would have simply asked Sweetwater or any of the member schools for copies of the invoices, or reviewed the invoices in its possession. Sweetwater Consortium schools were charged the Sweetwater-bid pricing as of July 1, 2013.

<sup>116</sup> The state of Tennessee sought bids in 2007 for a statewide 10-year contract for a statewide wide area network with multiple virtual private networks to serve state agencies, including schools and other public entities. It awarded the contract to AT&T in 2008 for service beginning July 1, 2008.

<sup>117</sup> It was understandable for USAC to miss this language in its initial review of the bid response as it might not have focused its review on the entire bid response. However, USAC gave no reason as to why this provision of AT&T’s bid response was not relevant or an accurate reflection of AT&T’s bid in its denial letter. Appeal Denial Letter at 2.

<sup>118</sup> AT&T Response, Tab III at 1.

pricing part of its evaluation.<sup>119</sup> However, the reviewers knew that the \$6 million figure did not reflect rates that AT&T actually intended to charge under the contract. USAC notes that Sweetwater “assumes” that AT&T’s bid price was actually the pricing from the NetTN contract referenced in AT&T’s bid. That is not an assumption; AT&T itself said so. In the introduction section of its bid, AT&T stated that, “notwithstanding anything contained in the RFP to the contrary,” the bid for managed Internet service was subject to the terms and conditions of AT&T’s statewide master contract, NetTN.<sup>120</sup> Furthermore, that provision of the bid response went on to say that the prices in the NetTN contract were the lowest corresponding prices.<sup>121</sup>

Below is the quote from the AT&T Response:

Notwithstanding anything contained in the RFP to the contrary, AT&T Corp. on behalf of itself and its service-providing affiliates (“AT&T”) submits this RFP response (the “Response”) subject to the provisions of this response and the Terms and Conditions of the following proposed contract documents . . . .

(2) For the Managed Internet Services – AT&T’s proposal is submitted subject to the Terms and Conditions contained in the outstanding contract between the State of Tennessee, Department of Finance and Administration, and AT&T Corp. for the provision of NetTN Services (“State NetTN Services Contract”), and all present and subsequent exhibits and attachments and amendments thereto. The provisions of the State NetTN Services Contract allow Sweetwater as an authorized entity within the State of Tennessee to purchase pursuant to the terms of said State NetTN Services Contract, upon execution by Sweetwater of a Confirmation Agreement or and [sic] AT&T indicating Customer’s agreement with and acceptance of all of the terms of said State NetTN Services Contract (the “Confirmation Agreement”), together with an E-rate rider and any associated transaction-specific attachments.

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<sup>119</sup> Bayersdorfer Aff. ¶ 13(d); Dr. Miller Aff. ¶ 25; Gray Aff. ¶ 24.

<sup>120</sup> AT&T Bid Response at 12.

<sup>121</sup> *Id.* at 13.

AT&T understands that offering the NetTN Services Contract as a contract vehicle for the Internet services may be deemed to be an exception to the requirement of using the contract template set forth in Attachment E to this RFP. However, the pricing offered under the NetTN Services Contract is the lowest corresponding price that AT&T is required to offer to Sweetwater under the lowest corresponding price requirements of E-rate Rules (emphasis added).<sup>122</sup>

Notwithstanding the figures that AT&T included in its response to the Sweetwater RFP, AT&T qualified its response by stating that AT&T was required to offer the pricing in its NetTN contract.<sup>123</sup> As AT&T's NetTN pricing was approximately twice that for some services that it included in the tables in response to the RFP, ENA's bid was not actually \$3 million more than AT&T's bid. For 1 Gbps broadband services, for example, AT&T's price in the state master contract was \$2,137 per Gbps<sup>124</sup> while the price it included in the pricing charts was \$980 per Gbps.<sup>125</sup> The figures included in its Sweetwater bid also differed from its NetTN contract. When those prices are input into the bid response pricing chart instead of the figures AT&T included, the actual bid would have been not \$6 million, but \$11.1 million. *See* Table 1.

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<sup>122</sup> AT&T Bid Response at 12-13.

<sup>123</sup> Notably, AT&T is required to give the state the lowest rate available in the market. NetTN Contract at 3, 18, Exhibit 16. The contract requires an annual assessment of the rates to ensure that is the case. If the numbers included in the Sweetwater bid were truly the best prices available, AT&T was required to offer those prices to the state and all schools and libraries taking service under the NetTN contract. Those prices were never included in the NetTN contract.

<sup>124</sup> NetTN contract, Attachment B, NetTN Catalog of Service Offering (1 Gbps as shown at \$2,037/month/site, 100 Mbps is priced at \$1,187/month/site), Exhibit 17. This portion of the NetTN contract obtained on April 25, 2016, and the entire catalog is available at <https://nettn.net/>. See also Exhibit 18, which contains a chart showing the "commodity codes" for the services and pricing in the AT&T catalog and illustrate how the figures in Table 1 were derived.

<sup>125</sup> AT&T Response, Tab III, Compensation and Cost Data, at 3 (1 Gbps is shown for three sites at \$35,280 a year, which is \$980 per month per site. 100 Mbps is shown for 60 sites at \$360,000 a year, of \$500 per month.).

**Table 1**

Category	Description		ENA's Total Cost	AT&T's Figures – as evaluated by reviewers <sup>126</sup>	AT&T's Actual Pricing as bid using its NetTN pricing <sup>127</sup>
Category I	District with 10 sites	Managed Internet Access-Priority 1 Services	\$523,380	\$263,700	\$412,092
Category II <sup>128</sup>	District with 10 sites	CIPA-Compliant Content Filtering	\$0	\$20,625	\$20,625
Category III	District with 80 sites	Managed Internet Access-Priority 1 Services	\$2,963,820	\$1,737,936	\$3,336,012
Category IV	District with 80 sites	CIPA-Compliant Content Filtering	\$0	\$216,000	\$216,000
Category V	District with 150 sites	Managed Internet Access-Priority 1 Services	\$5,778,780	\$3,329,640	\$6,678,000
Category VI	District with 150 sites	CIPA Compliant Content Filtering	\$0	\$342,000	\$342,000
Category VII	E-mail Hosting (per account)		\$0	\$37,500	\$37,500
Category VIII	Web-Site Hosting (per site)		\$4,500	\$4,032	\$4,032
Category IX	Managed VOIP (per site)		\$55,836	\$98,201.52	\$98,201.52
Category X	Managed Video Conferencing (per site cost)		\$2,880	\$4,169.52	\$4,169.52
Category XI	Firewall		\$7,200	\$0	\$0
<b>TOTAL COSTS*</b>			<b>\$9,336,396</b>	<b>\$6,053,804.04</b>	<b>\$11,148,632.04</b>

To make matters worse and in explanation of the objective discrepancies in AT&T's various bids, the \$6 million bid did not include installation charges. Thus, not only did AT&T's nominal bid price not reflect the actual prices AT&T intended to charge for services contemplated by the bid, it also did not include essential services required by the RFP *at all*. An

<sup>126</sup> As described above, evaluators had to call AT&T to try to determine what AT&T was charging for content filtering. If the evaluators had used the prices AT&T had included, the total cost for the hypothetical districts would have been more than \$10 million. AT&T Response, Tab III, at 2-5.

<sup>127</sup> NetTN contract at 18.

<sup>128</sup> Services not eligible for E-rate funds are removed via cost-allocation. *See, e.g.*, Sweetwater Invoice.

“apples-to-apples” comparison to ENA’s prices, which did include installation charges, is therefore not possible. As the Commission has noted, price is an important factor, but “price cannot be properly evaluated without consideration of what is being offered.”<sup>129</sup>

AT&T did not include installation charges in its bid pricing because it had not yet engineered, much less installed, the circuits required to render the services required by the RFP. This fact is critical because the school districts seeking bids were mostly small, rural districts outside of AT&T’s existing territory. Specifically, of the more than 600 sites to be served under this RFP, AT&T had only a small number of its own existing circuits at the time of its bid.<sup>130</sup> The schools were principally served through circuits from multiple other carriers, including cable companies, electric companies and independent phone companies. School districts had paid fiber build-out charges in the past, so additional charges for installation were not speculative.<sup>131</sup>

AT&T qualified its bid by stating that “AT&T will bill for services *as they are rendered for installation and equipment charge*. Billing will occur for managed services on a monthly basis.” (emphasis added).<sup>132</sup> AT&T clearly stated that its installation and service charges would be separately billed.

With respect to installation charges, AT&T admitted that it did not develop a cost to install service to sites it was not serving. As AT&T noted in its bid response,

“*Upon award, AT&T will designate project and technical leads to plan and prepare for the deployment of WAN and VOIP . . . . During the project preparation phase, AT&T will produce the*

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<sup>129</sup> *Tennessee Order* at ¶ 8.

<sup>130</sup> *Bayersdorfer Aff.* ¶ 5.

<sup>131</sup> *Gray Aff.* ¶ 16.

<sup>132</sup> AT&T Response, Tab III at 1. It is unclear why USAC believes AT&T’s installation charges are included in the pricing, given this statement in the bid response. See Appeal Denial Letter at 2-3.

following . . . . Technical architecture including all on-site and network components . . . .” (emphasis added).<sup>133</sup>

Indeed, AT&T further made it clear that it would make no effort to engineer the circuits required until it had been awarded the contract:

“We will submit Service inquiries for all school locations and our engineering and outside plant staff are prepared to begin as soon as orders are in the system.”<sup>134</sup>

As a result, in order to be informed as to the true cost of the installation charges, the Consortium would be required to select AT&T as the winning bidder, await AT&T design of the technical architecture, await AT&T’s decision about whether it would connect a school, await AT&T’s advice as to the cost of installation, and then individual districts would have to wait to find out what the installation charges were and whether they were affordable. This is exactly what any valid bid process seeks to avoid. The total price of the bid would thus eventually be much higher than the \$6 million sticker price, and also higher than the \$11.1 million figured calculated under AT&T’s state master contract. ENA’s lower pricing, in contrast, accurately reflected the total price of its bid, so the districts knew with certainty what their total costs would be.<sup>135</sup>

Because AT&T would not begin to engineer the required circuits until the award of a contract and receipt of orders, it is critically important to appreciate how these prerequisites impacted both the pricing of services and the timing of the delivery of the services required. AT&T expressly conditioned its performance upon completion of these steps:

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<sup>133</sup> AT&T Response, Tab II, at 5.

<sup>134</sup> AT&T Response, Tab IV, at 2.

<sup>135</sup> ENA Bid Response at 118 (“For E-rate eligible services proposed in our Cost Grid, ENA does not anticipate any cost overrun risks as (1) almost every participating Consortium school district is served currently by ENA, and (2) ENA presents pricing any service change/upgrade to the customer for approval prior to beginning any work.”).

“The typical installation period for Metro Ethernet type circuits is 90 days, providing there is no Special Construction required and that conduit, backboard, rack and power have been provided at each site. Assuming that this is the case, the Project Manager will create a spreadsheet for review by all parties depicting the services to be provided, the expected circuit delivery and expected cutover dates.”<sup>136</sup>

In other words, a yet-to-be-identified project manager would begin engineering circuits only after the award of a contract and issuance of work orders;<sup>137</sup> only after completion of that work could the yet-to-be-identified project manager disclose the cost and expected delivery dates of those circuits.

Finally, to provide a little more context regarding AT&T’s pricing in the Sweetwater procurement, it is instructive to review additional activities that have occurred since the Sweetwater bid. As its contract with ENA expires this June, MNPS issued an RFP to seek bids for Internet access and telecommunications services for more than 1,800 school sites in Tennessee, including the school district members of the MNPS Consortium and the Sweetwater Consortium.<sup>138</sup> AT&T, among others, responded to that procurement but refused to provide pricing for any districts other than Metro Nashville.<sup>139</sup> AT&T told Brad Wyatt, Metro

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<sup>136</sup> AT&T Response, Tab IV, at 2.

<sup>137</sup> AT&T Response at 9 (“The individual that will be assigned overall responsibility for the project will be assigned as soon as AT&T is notified of the award. Because the assignment(s) for specific tasks are not made until the contract is awarded, specific name(s) and biographical information for specific tasks cannot be supplied at this time. The required documentation will be furnished if AT&T is your vendor of choice.”).

<sup>138</sup> See FCC Form 470 No. 160017344.

<sup>139</sup> The pricing that AT&T submitted to MNPS that was confirmed available only to MNPS was very similar to the pricing AT&T used to fill in the Sweetwater procurement pricing grid and that was purportedly available to all school systems in 2013. It is telling that three years later AT&T was unwilling to bid such pricing to any school district other than MNPS. The 2016 MNPS bid was structured to require each vendor to delineate site by site any additional install charges or additional ongoing charges for any reason. AT&T, consistent with its decision not to bid to

Nashville’s procurement officer, that “AT&T could not provide the offered MNPS rates to the smaller districts.”<sup>140</sup> Further, one school district in the Sweetwater Consortium, Cannon County Schools, sought a bid from AT&T as it was conducting its own bidding process.<sup>141</sup> AT&T did not submit a bid, as it said it did not serve the Cannon County district area.<sup>142</sup> These facts help demonstrate that, in addition to its own statement in its bid response, AT&T never intended to provide, or indeed, could not provide service to all of the member schools at the price USAC believed was AT&T’s valid price.

USAC based its conclusion that Sweetwater did not choose the most cost-effective services solely on the fact that Sweetwater chose the “higher-priced” bid – an objectively wrong conclusion. On appeal, Sweetwater demonstrated to USAC that the pricing offered by ENA was consistent with prevailing market rates, including ENA’s pricing offered to other schools, AT&T’s state master contract, and even AT&T’s own bid to Sweetwater, especially when considering that AT&T’s bid was wholly deficient in specific information required to make an informed decision and to award a bid. In the face of all of this evidence, it is mystifying that USAC denied the appeal and continued to insist that Sweetwater failed to choose the most cost-effective bid.

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provide services for school districts other than MNPS, did not provide that detailed information in its bid for other than MNPS sites. However, even for the large urban MNPS, AT&T was forced to reveal additional installation costs and additional ongoing charges for certain MNPS sites. AT&T 2016 MNPS Bid Response (relevant pages only), Exhibit 19.

<sup>140</sup> Bayersdorfer Aff. ¶ 17, attachment (business record of Brad Wyatt).

<sup>141</sup> See Email from Bryan Cofer, Cannon County Schools, to Carrie Spears, AT&T, April 21, 2016, Exhibit 20.

<sup>142</sup> *Id.*

**C. Nearly 2½ Years After the Lawfully Conducted Competitive Bidding Process, USAC Arbitrarily Substituted Its Judgment for That of the Consortium’s Evaluators, Violating Commission Rules and Policy**

From the E-rate program’s initiation, the Commission has acknowledged that, absent fraud, state and local school authorities are in the best position to judge whether offered services were “cost-effective.” In the *Universal Service Order* establishing the E-rate program, the Commission agreed with the recommendation of the Federal-State Joint Board on Universal Service that schools and libraries should not be required to choose the lowest-priced service but instead should be allowed the “‘maximum flexibility’ to take service quality into account and to choose the offering or offerings that meets their needs ‘most effectively and efficiently.’”<sup>143</sup> Importantly, the Commission noted that price cannot be the only factor for the obvious reason that “price cannot be properly evaluated without consideration of what is being offered.”<sup>144</sup> USAC does not have the authority nor is it in a position to substitute its opinion for the considered judgment of the three-person evaluation panel. In essence, what USAC is saying in this case is “we know the price is not cost-effective when we decide it is not.” This is not a workable standard.

Notably, USAC’s analysis boils down to its judgment that the winning bidder’s price was “too high” in comparison to the losing bidder. That position is not supported by the Commission’s rules or the facts in this case. Even if it were true, how much is too much more? Is 10 percent higher acceptable or 30 percent? In *Ysleta*, the Commission suggested that a price that was “too high” was more in the range of 200 percent or 300 percent – even for a commodity

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<sup>143</sup> *Universal Service Order* at ¶ 481 (quoting the Joint Board’s recommendation).

<sup>144</sup> *Tennessee Order* at ¶ 8 (emphasis added).

such as equipment as opposed to custom-designed Internet access services and where there was no competition to provide the services.<sup>145</sup> Where will USAC draw the line in the future?

USAC's denial letter implies the price differential is the determining factor for the denial. However, the evaluating panel – after giving AT&T every benefit of the doubt – took that price differential into consideration.<sup>146</sup> The denial suggests the price differential should have been weighted more heavily than the panel weighted it; to make a difference in the outcome, the Consortium would have had to weight price at 40 percent of the total points available. To reach such a result, USAC is effectively overruling Commission precedent that only requires that pricing be given at least one more point than any other individual category. Absent guidance on how the procurement process should have been handled differently or the pricing weighted more than it was, it will be impossible for any district to enter into a contract that will not be subject to an after-the-fact reversal.

Upholding the denials of these applications also would render the local competitive bidding process meaningless. Commission precedent required that the Consortium satisfy the Commission's rules regarding the competitive bidding process.<sup>147</sup> USAC has not challenged the competitive bidding process itself. There was no way for the Consortium to be aware that its competitive bidding process and its outcome did not satisfy some ad hoc undefined standard

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<sup>145</sup> When there is a competitive bidding process, the applicant has a choice in service providers. Because the applicant is required to pay its non-discount share, the presumption is, absent fraud, it will choose the most cost-effective services for its needs. In *Ysleta*, the Commission was concerned about those instances in which the service provider knows there is no competition and will attempt to overcharge the applicant because market conditions do not exist that would restrain the service provider's pricing.

<sup>146</sup> Recall this is so even though AT&T offered the prices in its NetTN contract, instead of the prices listed in the bid response and even though AT&T did not provide any pricing on installation charges.

<sup>147</sup> *Tennessee Order* at ¶ 10.

established by USAC.<sup>148</sup> How are districts to evaluate bid responses when there is such uncertainty as to the standard of review being utilized by USAC – especially when the USAC reviewer is so far removed from the needs of the local school districts?

The result of this uncertain and undefined conclusion by USAC<sup>149</sup> will force applicants in every case to select the cheapest offering, regardless of quality or other criteria that is important to them. Such a result will most certainly compel schools to enter into contracts that do not meet their needs and therefore are not the best use of taxpayer dollars at the local level or of universal service funds. If the Commission intends to change the standard it articulated in the *Tennessee Order*, it needs to provide notice, at a minimum, to applicants before attempting to hold applicants to that standard.<sup>150</sup>

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<sup>148</sup> The Commission itself has declined to identify a standard other than reliance on a lawfully conducted competitive bidding process. *See supra* pp. 14-15.

<sup>149</sup> The E-rate program cannot function under the uncertainty of an after-the-fact merits review of each element of the responses, a fact that the FCC has recognized. In the *Second Modernization Order*, the Commission directed USAC to analyze “its approach to cost-effectiveness reviews, and *find ways to share information with applicants and vendors about its approach to such reviews*, in order to encourage cost-effective purchasing by applicants.” *Modernizing the E-Rate Program for Schools & Libraries Connect America Fund*, Second Report and Order and Order on Reconsideration, WC Docket Nos. 10-90 and 13-184, FCC 14-189 at ¶ 126 (2014). This directive indicates that USAC should review its approach to cost-effectiveness reviews and then share the information with applicants and services providers before it attempts to implement a new approach. We further respectfully note that this directive may conflict with Commission rules stating USAC does not have the authority to interpret Commission rules. 47 C.F.R. § 54.702(c).

<sup>150</sup> The Administrative Procedure Act (APA) establishes the procedures federal administrative agencies use for “rule making,” defined as the process of “formulating, amending, or repealing a rule.” 5 U. S. C. §551(5). The APA distinguishes between two types of rules: So-called “legislative rules” are issued through notice-and-comment rulemaking, see §§553(b), (c), and have the “force and effect of law,” *Chrysler Corp. v. Brown*, 441 U. S. 281, 302–303. Even if the Commission decides to issue an “interpretive rule,” which by contrast, are “issued . . . to advise the public of the agency’s construction of the statutes and rules which it administers,” *Shalala v. Guernsey Memorial Hospital*, 514 U. S. 87, 99, the implication is that notice is provided to the public. While interpretive rules do not require notice-and-comment rulemaking, they also “do not have the force and effect of law.” *Id.* In orders resolving appeals when the

**III. THE COMMISSION SHOULD GRANT THE SWEETWATER CONSORTIUM'S REQUEST FOR REVIEW OR WAIVE THE REQUIREMENTS OF RULE 54.504(A) BECAUSE THE CONSORTIUM MEMBERS HAD A VALID CONTRACT WITH ENA**

The Commission should grant the Sweetwater Consortium's request for review or waiver. First, under both Tennessee state law and E-rate rules and orders, the Sweetwater Consortium complied with section 54.504(a) because it had a valid, written contract in place with ENA, its service provider, before the members filed their FCC Forms 471. USAC appears to think Sweetwater did not have a contract because it used the standard terms of the MNPS contract to memorialize its contract with ENA. But the contract was formed before the decision was made on how to memorialize the binding agreement that had already been reached by the parties.

Basic contract law requires offer and acceptance. ENA responded to the Consortium's RFP, which constituted an "offer" to provide services to all members of the consortium. In its offer, ENA offered to memorialize its contract by using the form provided by Sweetwater, which ENA had signed, or by using the form contract being used by MNPS. Both forms simply added standardized terms and conditions to the contract formed when Sweetwater issued its award. The Consortium accepted that offer. It elected to use the form MNPS contract. As a consequence, ENA was obligated to provide services to every member of the Consortium who elected to purchase services from ENA. Every step of this process complied with Tennessee law and E-rate orders regarding the formation of a valid contract. ENA and the Consortium entered

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Commission has announced guidance for compliance with Commission rules, the Commission has applied the new guidance prospectively. *See, e.g., Request for Review of a Decision of the Universal Service Administrator by Queen of Peace High School, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, DA 11-1991 (Wireline Comp. Bur. 2011) at ¶¶ 7-8.

into a valid contract, ENA provided services under that contract, and ENA invoiced for services in accordance with that contract.

Second, even if the Commission somehow doubts the evidence of the written contract that satisfies Commission rules, the Consortium can demonstrate it nonetheless had a legally binding agreement under Tennessee law. A legally binding agreement between the parties is sufficient under the Commission's rules for funding year 2015.<sup>151</sup> For funding years 2013 and 2014, the Commission and Bureau have repeatedly granted waivers of the "signed contract" rule where a legally binding agreement was in place prior the filing of an FCC Form 471. Such a waiver would be in the public interest, consistent with prior Commission orders. Finally, the fact that the parties have fully performed the entire contract at this point provides the clearest evidence that a legally binding agreement existed. Forty-five districts chose the Consortium contract over AT&T's NetTN contract. ENA has been providing services to school districts that it would not have provided without a promise of payment. The Consortium has been accepting those services, and approving payment of invoices for services, that it would not accept without an agreement as to services and pricing. These activities would not have taken place in the absence of a valid contract.

#### **A. The Consortium Had a Written Contract in Place When It Filed FCC Form 471**

The Commission's rules governing funding years 2013 and 2014 required applicants to file their FCC Form 471 "upon signing a contract for eligible services."<sup>152</sup> In funding year 2015, applicants needed a contract or other "legally binding agreement" in place prior to submitting

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<sup>151</sup> See 47 C.F.R. § 54.504(a) (2015).

<sup>152</sup> See 47 C.F.R. § 54.504(a) (2011).

their FCC Forms 471 to USAC.<sup>153</sup> For all three funding years, the Consortium had a contract with ENA under Tennessee law and therefore met the requirements of section 54.504(a). The contract subsequently was memorialized in the MNPS contract, as one of the offers made by ENA in response to the Sweetwater RFP.

**1. A valid contract was formed because there was an offer and acceptance under Tennessee law.**

In Tennessee, as elsewhere, a valid contract is formed when there has been an offer and acceptance.<sup>154</sup> An RFP is a solicitation of an offer. The response to the RFP is an offer. The award is the acceptance of an offer. The contract is formed when the offer is accepted, an objective and undisputed fact in this case in which the members of the Consortium have requested and accepted ENA's performance under a validly formed contract.<sup>155</sup>

On January 29, 2013, the Consortium issued Request for Proposal Number 31-2 entitled "Managed Internet Access, Voice-Over-IP and Video Conferencing," ("RFP") on behalf of "76 Local Education Agencies (LEA)<sup>156</sup> located in Tennessee and serving more than approximately

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<sup>153</sup> See 47 C.F.R. § 54.504(a) (2015).

<sup>154</sup> *Levering and Carncross v. Mayer*, 26 Tenn. 553 (1847); *Murray v. Grissom*, 40 Tenn. App. 246, 290 S.W.2d 288 (1956); *Precision Rubber Products Corp v. George McCarthy, Inc.*, F.2d 187, 188 (6<sup>th</sup> Cir. 1989) ("A contract may be formed even before the specific details of time, place and quantity of delivery are fixed."); *Strickland v. Cartwright*, 117 S.W.3d 766 (Tenn. Ct. App. 2003) ("The terms of a contract are reasonably certain if they provide a basis for determining a breach and for giving an appropriate remedy.").

<sup>155</sup> *Moody Realty Co. v. Huestis*, 237 S.W.3d 666,674 (Tenn. Ct. App. 2007) ("The parties' actions or inactions, as well as spoken words, can establish mutual consent.").

<sup>156</sup> "Local Education Agency" is a defined term in the Tennessee Code that includes all forms of schools systems. T.C.A. §49-1-103(2) provides: "Local education agency (LEA)," "school system," "public school system," "local school system," "school district," or "local school district" means any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly.

350,000 Tennessee public school students.”<sup>157</sup> On behalf of those 76 LEAs, the Consortium administered the RFP process in accordance with the letters of agency that each of the LEAs had provided Sweetwater. Accordingly, the RFP was structured to require those responding to price the entire range of services required by all 76 LEAs, and not just those required by the Sweetwater school district. When ENA responded to the RFP, it was making an offer of services to all 76 school districts. The “offer” made by ENA was requested by, and extended to, all members of the Consortium.<sup>158</sup> The contract was formed when the Consortium accepted that offer with its award.<sup>159</sup> The Consortium accepted that offer in its letter of March 1, 2013.<sup>160</sup>

## **2. Tennessee law and E-rate rules authorize the Consortium members to use the Sweetwater contract.**

While unnecessary to the analysis of whether a valid contract exists, USAC’s mistaken analysis of how offers might be solicited from vendors requires rebuttal.<sup>161</sup> Beyond the basic

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<sup>157</sup> Sweetwater RFP at 5.

<sup>158</sup> ENA recognizes that each school district participating in this Consortium will have individual requirements concerning the scope of services desired and the timing for the delivery of those services. ENA Response at 62.

<sup>159</sup> Tennessee law authorizes both “cooperative purchasing agreements” and “piggyback” purchasing agreements. The Consortium asserts that its acceptance of the ENA bid response created a contract by which ENA was obligated to every member of the consortium, and the members could then elect whether to exercise their right to purchase services. Under Tennessee law, the contract is also valid if this contract was deemed a “piggyback” arrangement whereby Sweetwater City Schools created a contract individually and other members then elected to purchase the same services. T.C.A. § 12-3-1203. Under *Paterson*, “piggyback” arrangements are similar allowed under E-rate rules, as a school or district can take service off an existing master contract.

<sup>160</sup> See Sweetwater Award Letter. USAC noted that Sweetwater did not provide evidence of the letter’s existence. USAC Appeal Denial Letter at 2. However, it could have easily requested a copy if it doubted that Sweetwater informed ENA that it had won the competitive bid.

<sup>161</sup> USAC Administrator’s Decision on Appeal at 2.

principle that an offer and acceptance form a contract, Tennessee law has long authorized every “flavor” of cooperative purchasing arrangements when soliciting an offer from a vendor. In challenging the formation of a valid contract, USAC has conflated state statutory authorization of the method to be used by governmental entities to solicit the offers with the requirements for forming the contract based upon those offers. Tennessee statutes authorizing cooperative purchasing arrangements govern the means by which a governmental entity obtains an offer from a vendor. At page 4 of the RFP, Sweetwater stated as follows:

The method for all of the K-12 public school districts of Tennessee to purchase from this contract is TCA Title 12, Chapter 3, Part 10, which effectively allows Local Education Agencies ... to make purchases based on the terms of a contract signed by another LEA.

As with most statutes, the laws found at Title 12, Chapter 3, Part 10, are reorganized and re-numbered over time. Effective July 1, 2012, Part 10 of Title 12, Chapter 3 was renumbered as Part 12, so that the reorganized laws are now found at Title 12, Chapter 3, Part 12, or within T.C.A § 12-3-1200 *et seq.* While reorganized, the substance of those laws remains unchanged by their current organizational form. The Consortium had provided cites to the re-organized law; USAC has challenged that authority with selective citation to the prior numbering and organizational regime for cooperative purchasing laws. In order to assure that the Commission has access to the complete statute of which only portions have been cited by USAC, we have attached a complete copy of the 2013 version TCA Title 12, Chapter 3, Part 10.<sup>162</sup> For the sole purposes of rebutting USAC’s arguments without conceding their materiality, we will reference it herein. With regard to the ability of governmental entities to use cooperative purchasing arrangements when forming contracts, the following language is especially relevant:

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<sup>162</sup> See Exhibit 21 for statutory provisions.

(a) Any municipality, county, utility district, or other local government of the state may participate in, sponsor, conduct or administer a cooperative purchasing agreement for the procurement of any supplies, services or construction with one (1) or more other local governments in accordance with any agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi-party contracts between local governments. Where the participants in a joint or multi-party contract are required to advertise and receive bids, it shall be sufficient for those purposes that the purchasing entity comply only with its own purchasing requirements.<sup>163</sup>

In addition to “cooperative purchasing agreements.” Tennessee law has long authorized “piggyback arrangements” whereby one governmental entity takes advantage of a vendor’s offer to another governmental entity. T.C.A. §12-3-1004(a), currently, T.C.A. §12-3-1203(a), specifically authorizes “piggyback” contracts whereby cities, counties, and other local governmental authorities may purchase supplies, goods, equipment and services under the same terms as a legal bid initiated by any other city, county, utility district or other local government unit.

**a)** Any municipality, county, utility district, or other local governmental unit of the state may, upon request, purchase supplies, equipment, and services for any other municipality, county, utility district, or other local governmental unit.

**(1)** The purchases shall be made on the same terms and under the same rules and regulations as regular purchases of the purchasing entity.

**(2)** The cost of the purchase shall be borne by the local government for which the purchase was made.

**(3)** Where the local government making the request is required to advertise and receive bids, it shall be sufficient for those purposes that the purchasing entity comply only with its own purchasing requirements.

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<sup>163</sup> T.C.A. § 12-3-1009. What was formerly T.C.A. §12-3-1009(a) is currently T.C.A. §12-3-1205(a). For ease of reference and comparison, a complete copy of T.C.A. §12-3-1200 et seq. is attached hereto as Exhibit 21.

These are in addition to other types of cooperative purchasing arrangements. T.C.A. §12-3-1001, currently T.C.A. §12-3-1201, provides that counties can buy under a state contract. T.C.A. §12-3-1009(b), currently T.C.A. §12-3-1205(b), authorizes purchases with “local governments outside this state.” Despite statutory authorization of the full range of cooperative purchasing methodologies, USAC argues that one of those means, currently T.C.A. §12-3-1203(b)(1)-(2), and formerly T.C.A. §12-3-1004(b)(1)-(2), is inapplicable to this contract methodology.<sup>164</sup> USAC’s argument, principally based upon a numbering system that “did not become effective until July 1, 2013” ignores the substance of laws that have long authorized every type of cooperative purchasing arrangement in Tennessee.<sup>165</sup>

This parsing of legislative history is unnecessary to the analysis of whether there is a valid Sweetwater contract. A contract requires an offer and acceptance. Cooperative purchasing arrangements are simply one method by which a governmental entity can solicit an offer. In this case, various types of governmental purchasing arrangements in Tennessee merely confirm that regardless of how one might view the methodology by which ENA made an offer to the Consortium and its members – regardless of whether it is considered generally a cooperative

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<sup>164</sup> It is useful to consider where this section falls within the continuum of cooperative purchasing methodologies approved under Tennessee law since subsection b allows purchasing WITHOUT competitive bidding. T.C.A. § 12-3-1203(b)(1) and (2) is commonly referred to in this state as the “Wilson County Purchasing Law.” The statute allows an LEA, as distinct from other governmental bodies, to purchase equipment directly from a vendor without the necessity of bidding if another LEA has purchased the same equipment and the bid awarded by the first LEA was in compliance with the bidding laws of this state. T.C.A. § 12-3-1203(b), far from undermining the validity of this contract, is an example of additional rights granted to LEA’s to make purchases of equipment within the continuum of cooperative purchasing arrangements that may give rise to the “offer” and “acceptance” necessary to form a valid contract.

<sup>165</sup> USAC itself notes that “there are provisions in the Tennessee code that would allow [Sweetwater] to use certain contracts that are executed by other local governmental units or LEAs.” Administrator’s Decision on Appeal at 2. However, we will note here, as above, that Sweetwater did not use a contract executed by another local governmental unit; it formed its own contract after conducting its own procurement.

purchasing arrangement or more specifically a piggyback arrangement – that methodology is expressly authorized by Tennessee law.<sup>166</sup> ENA made an offer to all 76 members of the Consortium. The Consortium accepted that offer, binding ENA to provide those services to all members of the Consortium. The individual members then decided whether to exercise their contractual right to purchase those services.

Quite frankly, it is surprising to the Consortium that it is required to recount these basic public contracting principles to USAC in light of the Commission’s own orders.<sup>167</sup> As in the instant case, the *Paterson* order dealt with USAC denial of funding to a district that had purchased services under a master contract.

Under program rules, applicants may purchase services from “master contracts” negotiated by an appropriate third party such as a state governmental entity.<sup>168</sup>

The Commission reversed USAC’s finding that there was no valid contract, stating among other things:

The record demonstrates that Paterson accepted the service provider’s offer of services pursuant to an existing state master contract before filing its FCC Form 471 and that the state master contract was continuously in effect throughout Funding Year 2004.<sup>169</sup>

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<sup>166</sup> USAC seems to think that the Consortium is piggybacking on the MNPS contract, when that is not the case, as described above. The cooperative purchasing agreement and/or piggyback agreement referenced here explains the authorization under Tennessee law for members of the Consortium to use the contract formed pursuant to the Sweetwater procurement, not for the Consortium to take services using the MNPS procurement.

<sup>167</sup> See *In the Matter of Request for Review of Decision of the Universal Service Administrator by Paterson School District*, Paterson, New Jersey, CC Docket No. 02-6, DA 06-2269 (Wireline Comp. Bur. 2006) (*Paterson*).

<sup>168</sup> *Paterson* at ¶ 3. See also USAC’s guidance for applicants at <http://www.usac.org/sl/applicants/step02/state-master-contracts.aspx>.

<sup>169</sup> *Paterson* at ¶ 7.

As noted in *Paterson*, cooperative purchasing arrangements are routine under state law and expressly authorized by the Commission's orders. If what USAC is trying to argue is that the Consortium members could not take off the Sweetwater contract, Tennessee law and E-rate rules allow them to do so.

**3. The Sweetwater Consortium used the MNPS contract as the form of its contract; it did not “piggyback” onto the MNPS contract.**

Finally, USAC's analysis of this issue further seems to confuse the form of the contract with the formation of the contract. In its response to the RFP, ENA offered the Consortium the choice of two written contracts, both of which simply added standard terms and conditions to the contract formed by the award. ENA signed and returned the Sweetwater form contract attached to the RFP.<sup>170</sup> As an alternative, it offered to use the form of the MNPS contract.<sup>171</sup> The MNPS contract was obviously familiar to the Consortium members because they had purchased services off of that contract for two years. The Consortium chose the form of the MNPS contract to memorialize the agreement made in 2013.<sup>172</sup> When USAC asserts that “the former Tennessee statutes for allowing local governmental units to purchase off of existing contracts would not apply to the 2011 Metro-Nashville contract,” it chooses form over substance.<sup>173</sup> While the form

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<sup>170</sup> See ENA Bid Response at 146 (“ENA accepts all the terms and conditions of the proposed contract without exceptions. A signed and notarized contract is included in this section.”).

<sup>171</sup> See ENA Bid Response at 118 (“In addition to the enclosed Proposal Response, we also encourage you to consider accepting the Metropolitan Nashville Public School (MNPS) contract-2-225071-00 as an additional proposal response.”).

<sup>172</sup> Bayersdorfer Aff. ¶14.

<sup>173</sup> The Consortium cannot help but comment on the ever-evolving challenges to the simple fact that its members ordered services off a valid contract for which they now owe payment. At one point, an examiner suggested “there was no provision in the MNPS contract . . . that allows for [Sweetwater] to piggy-back onto the contract,” which is yet another example of USAC's conflation of form over substance. The MNPS contract is simply the form used to memorialize

of the MNPS contract dates back to 2011, the date of the Consortium contract with ENA, which was only memorialized using the form of the existing MNPS contract, dates the award to March 1, 2013.<sup>174</sup>

Sweetwater embarked upon a new procurement process that required a maiden and primary review of a new set of responses to a new RFP, a review that was conducted by a different reviewing panel than the one that reviewed the responses to the MNPS RFP two years previous. That process resulted in the choice of the same vendor, ENA, and ENA then offered the choice of continuing to use the form of the MNPS contract (which would include the pricing offered in response to the Sweetwater RFP) or the Sweetwater form contract, which ENA had signed and returned with its bid response. Sweetwater effectively accepted both options with its signed award letter. The Consortium then selected the existing contract form as its method of documenting its contract, simply because it was administratively easier.<sup>175</sup>

Let us be clear: contrary to USAC's allegation, the use of the MNPS form contract did not incorporate the 2011 MNPS pricing; instead, the pricing to the Consortium was exactly as bid by ENA in 2013. As explained previously, ENA agreed to use either the Sweetwater form contract or the MNPS form contract, and Sweetwater chose the MNPS form contract.

Regardless of the form of its contract, ENA was bound by Sweetwater's acceptance of its offer to use the pricing that it offered in its response to the RFP, which it did. The objective fact is

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the agreement formed through the acceptance by the Consortium of the offer made by ENA in response to the RFP. While that position was not repeated in USAC's denial, it is an example, much like the foray into legislative history, of the lengths to which USAC has gone to confuse a basic analysis of contract law.

<sup>174</sup> Bayersdorfer Aff. ¶ 14.

<sup>175</sup> *Id.*

proven by the invoices to the members of the Consortium that elected to purchase services.<sup>176</sup> In fact, even the MNPS schools, which were not a part of the Consortium, received the lower pricing bid by ENA in response to the Consortium's RFP.<sup>177</sup>

The analysis of whether there is a valid contract is basic. ENA made an offer – in writing – which the Consortium accepted – in writing – to provide services to all members of the Consortium. Forty-three members of the Consortium exercised their contractual right to demand that ENA perform those services.<sup>178</sup> ENA has performed those services, and the Consortium members who ordered those services owe ENA payment for those services.

**B. The Consortium, at a Minimum, Had a Legally Binding Agreement in Place When It Submitted Its FCC Form 471, Which Is Sufficient to Satisfy Commission Legal Requirements and Policy Goals**

As noted above, in funding year 2015, a legally binding agreement was sufficient to satisfy the Commission's E-rate program goals.<sup>179</sup> Furthermore, although the rule in place prior to funding year 2015 appears to require a written contract ("upon signing a contract"), the FCC Form 471 itself and other Commission orders acknowledged that a legally binding agreement or an unwritten contract was sufficient to satisfy Commission requirements. Regardless, the Commission has significant precedent waiving the requirement of a contract if a legally binding agreement existed when the applicants filed their FCC Forms 471.

Even for funding years prior to 2015, the Commission's FCC Form 471 did not require a signed, written contract. The FCC Form 471 instructions in place in funding years 2013 and

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<sup>176</sup> See, e.g., Sweetwater Invoice.

<sup>177</sup> See, e.g., MNPS Invoice; see also MNPS Contract Amendment Number 3.

<sup>178</sup> As noted above, there are now 45 school districts taking service under this contract due to district reorganization.

<sup>179</sup> See 47 C.F.R. § 54.504(a) (2015).

2014 inform an applicant that it “MUST have a signed contract for all services you order on your Form 471 if required by state law,” except tariffs, month-to-month and state master contracts (emphasis added).<sup>180</sup> The phrase “if required by state law” leads to the conclusion that a signed contract is not required under E-rate rules if not also independently required by state law. In Tennessee, there is no such requirement.

Further, the Commission has repeatedly found a legally binding agreement is sufficient to justify a waiver of section 54.504(a) of the Commission’s rules. The Commission has a long history of granting appeals of funding denials based on the lack of a proper or timely executed contract. In the *First Modernization Order*, the Commission itself noted that it “has consistently waived the requirement of a signed contract for petitioners who have demonstrated that they had a legally binding agreement in place for the relevant funding year.”<sup>181</sup>

The Commission has not held applicants to a strict standard of a signed, written contract in the past. Specifically, in the *First Modernization Order*, the Commission pointed to several prior orders for support in adopting the new rule. In *Bayfield School District*, the Commission found that four applicants had a legally binding agreement in place when they filed their FCC Forms 471 and granted a waiver of the rule apparently requiring a signed contract.<sup>182</sup> Similarly,

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<sup>180</sup> See FCC Form 471 Instructions.

<sup>181</sup> *First Modernization Order* at ¶ 203.

<sup>182</sup> *Requests for Review and/or Requests for Waiver of the Decisions of the Universal Service Administrator by Bayfield School District, et al.*, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 27 FCC Rcd 15890 (Wireline Comp. Bur. 2012).

in *Barberton City School District*, several applicants had legally binding agreements in place when they submitted their FCC Forms 471.<sup>183</sup>

As described above, under Tennessee law, the parties had a contract and therefore a legally binding agreement. If the Commission believes that the signed acceptance of the offer was not sufficient – and contrary to its own rules allowing parties to take service from a master contract without signing a contract<sup>184</sup> – that some additional form must have been signed, there is no doubt the parties had a legally binding agreement in place. Here, the Consortium members had – at a minimum – a legally binding agreement in place, as described above. The parties certainly believe they are bound by the terms of the agreement and have been performing under the contract. It is contrary to comity that a federal administrative agency would reach out to make a judgment on state law when none is necessary. As such, the Commission should find that the Consortium members met the requirements of the rule, or waive it, as necessary, to be consistent with prior Commission and Bureau decisions.

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<sup>183</sup> See *Request for Waiver of the Decision of the Universal Service Administrator by Barberton City School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, 23 FCC Rcd 15526 (Wireline Comp. Bur. 2008) (*Barberton City Order*); see also *Requests for Review and/or Requests for Waiver of the Decisions of the Universal Service Administrator by Animas School District 6, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, 26 FCC Rcd 16903 (Wireline Comp. Bur. 2011); *Request for Review and/or Requests for Waiver of the Decisions of the Universal Service Administrator by Al Noor High School, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, 27 FCC Rcd 8223 (Wireline Comp. Bur. 2012).

<sup>184</sup> *Paterson* at ¶ 3.

**IV. IF THE COMMISSION BELIEVES THE CONSORTIUM’S PROCESS SOMEHOW RESULTED IN A VIOLATION OF A RULE, WAIVING THAT RULE IS IN THE PUBLIC INTEREST BECAUSE OF THE SIGNIFICANT HARM TO THE CONSORTIUM PUBLIC SCHOOLS AND BECAUSE THE LENGTH OF TIME IT TOOK USAC TO MAKE A DECISION INCREASED THE HARM**

As we have explained, the Sweetwater Consortium’s procurement process was fully consistent with Commission rules and precedent, both with respect to selecting the most cost-effective bid and with respect to having a contract in place. However, even if the Commission concludes that the Sweetwater Consortium violated its rules in conducting its competitive bidding process and contracting for the services, granting Sweetwater’s requested relief is in the public interest nonetheless. Any of the Commission’s rules may be waived if good cause is shown.<sup>185</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>186</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>187</sup>

First, as discussed above, the Commission has routinely granted waivers for its rule requiring a signed contract be in place as long as there was a legally binding agreement. There is no reason here why the Commission should deviate from its precedent to reach a different result here. Second, there is no evidence of fraud in this case, and the services were E-rate eligible and used for educational purposes as required by the statute.

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<sup>185</sup> 47 C.F.R. § 1.3.

<sup>186</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

<sup>187</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

Second, the harm to these schools would be significant. The 45 school districts now taking service under this procurement should be able to receive \$36 million in E-rate commitments.<sup>188</sup> The award formed a contract. The districts have been purchasing services from ENA and owe ENA the rate charged for those services. That means, absent a reversal of this decision, these schools will have to decrease future expenditures for advanced telecommunications and Internet access as well as cut other critical services to students in order to pay for the services already received. These cuts are likely to include reducing the number of teachers.<sup>189</sup> Many of these schools are in rural Tennessee.<sup>190</sup> Many of them have only recently been able to procure sufficient bandwidth to serve their needs and meet the Commission's goals for broadband.<sup>191</sup> One of the Commission's goals for the E-rate program is to expand the reach of fiber to improve access to the Internet for schools and libraries.<sup>192</sup> To deny this funding request would be inconsistent with program goals and therefore would not serve the public interest.

Even worse, the denial of Sweetwater's requested relief would be tantamount to applying a new cost-effectiveness standard to applications that were filed three funding years ago. As explained above, the only fact USAC relied upon in finding fault with Sweetwater's procurement process was that ENA's bid was priced higher than AT&T's. Given the seeming ease of determining that \$9 million is more than \$6 million, it is therefore inexplicable – and USAC never attempted to explain it – that it took USAC 18 months to even ask a question about the

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<sup>188</sup> See Exhibit 1.

<sup>189</sup> Gray Affidavit at ¶ 29.

<sup>190</sup> *Id.*

<sup>191</sup> Gray Affidavit at ¶ 16.

<sup>192</sup> *First Modernization Order* at ¶ 26.

cost-effectiveness of the procurement.<sup>193</sup> If the bid selected was not “cost-effective” simply because of the raw numbers provided in the responses, USAC should have told the districts two years ago. If USAC had not dallied with its review, the schools could have conducted another procurement process to attempt to satisfy Commission rules and obtain funding for the second and third years of this contract.<sup>194</sup> USAC’s delay resulted in the loss of approximately \$36 million in funding that could have been avoided with a prompt decision by USAC. The schools should not have to bear the consequence of USAC’s failure to timely act.

In the alternative, the Commission could grant the waiver requested in 2012 for these same schools to use the MNPS procurement,<sup>195</sup> which was approved and fully funded by USAC. Pursuant to this request, the Commission could extend the waiver to cover the funding years at issue in this case, notwithstanding the relief requested originally.<sup>196</sup> As noted in that waiver request, these schools should have been allowed to use the MNPS procurement process and contract in the first place.<sup>197</sup> USAC’s interpretation that an FCC Form 470 must include the name of every school intending to take service using that procurement is not required by Commission rule.<sup>198</sup> The rules requires that an applicant’s FCC Form 470 must include enough

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<sup>193</sup> See Letter to Larry Stein, Sweetwater City Schools, from Fabio Neito, USAC, dated Sept. 2, 2014, Exhibit 22.

<sup>194</sup> The Consortium says “attempt” here because it still would not have known what to do differently in its procurement process than it did here.

<sup>195</sup> *In the Matter of the Tennessee E-rate Consortium*, Request for Waiver, CC Docket No. 02-6 (filed Feb. 11, 2013).

<sup>196</sup> *In the Matter of the Tennessee E-rate Consortium*, Supplement to Request for Waiver, CC Docket No. 02-6 (filed Dec. 17, 2013).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 7-8.

information for a service provider to understand the scope of the bid, which they did here.<sup>199</sup>

With more than 70 schools on the MNPS procurement, it was clear that MNPS was seeking bids for a wide variety of schools across the state of Tennessee. Granting that waiver request and expanding it to include the three funding years at issue in this Application will allow the schools to be funded using a lawful procurement process, while they – and the Universal Service Fund – received the benefit of the lower pricing acquired through the Sweetwater procurement process.

## V. CONCLUSION

For the foregoing reasons, the Commission should grant the Consortium members' request for appeal, or, in the alternative, request for waivers. In addition, the members request that the Commission remand the instant funding requests back to USAC for commitments consistent with the relief requested in this appeal, including any additional waivers of Commission rules necessary to effectuate the relief sought.

Respectfully submitted,



Charles W. Cagle

May 9, 2016

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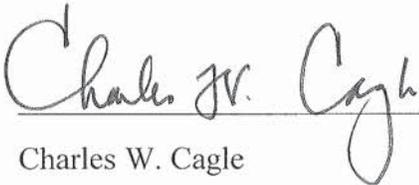
<sup>199</sup> 47 C.F.R. § 54.503(c). *See also Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District*, CC Docket No. 02-6, Order, 18 FCC Rcd 26407, 26410, ¶ 7 (noting that the requirement for a bona fide request for services means that “applicants must submit a list of specified services for which they anticipate they are likely to seek discounts consistent with their technology plans, in order to provide potential bidders with sufficient information on the FCC Form 470, or on an RFP cited in the FCC Form 470, to enable bidders to reasonably determine the needs of the applicant”).

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document has been served on the following counsel of record in the manner of service indicated below:

- By placing postage prepaid envelope in United States Mail Service, addressed to:
  
- By placing document in third party express delivery carrier, i.e., Federal Express, for overnight delivery to the following counsel of record:
  
- By sending document via electronic mail to: USAC –  
appeals@sl.universalservice.org
  
- By causing the foregoing to be hand delivered to counsel of record at the following address on this \_\_\_\_\_ day of \_\_\_\_\_, 2016:

This the 9<sup>th</sup> day of May, 2016.

  
\_\_\_\_\_  
Charles W. Cagle

## ATTACHMENTS

### Affidavits

Affidavit of Dr. Melanie Miller dated May 3, 2016

Affidavit of Tom Bayersdorfer dated May 4, 2016, with attachment

Affidavit of Joan Gray dated May 3, 2016

### Exhibits

- Exhibit 1 List of Appellants, application numbers, FCDL dates, discount rates and amount of funding requested
- Exhibit 2 Sweetwater 2013 FCC Form 470 No. 283390001111946
- Exhibit 3 Sweetwater RFP
- Exhibit 4 Bid Evaluation Reviewers biographies
- Exhibit 5 Sweetwater RFP Amendment No. 2
- Exhibit 6 AT&T Response to Sweetwater RFP
- Exhibit 7 ENA Response to Sweetwater RFP
- Exhibit 8 Sweetwater Award Letter
- Exhibit 9 Sweetwater Invoice from ENA dated July 31, 2013
- Exhibit 10 MNPS Invoice from ENA dated July 31, 2013
- Exhibit 11 MNPS Contract Amendment Number 3
- Exhibit 12 USAC Intent to Deny Letter
- Exhibit 13 USAC Initial Denial Letter
- Exhibit 14 Appeal Denial Letter
- Exhibit 15 Consensus Score Sheet
- Exhibit 16 AT&T NetTN contract terms
- Exhibit 17 NetTN contract, Attachment B, NetTN Catalog of Service Offering
- Exhibit 18 Chart supporting Table 1
- Exhibit 19 AT&T 2016 MNPS Bid Response
- Exhibit 20 Email from Bryan Cofer
- Exhibit 21 Relevant Tennessee statutory provisions
- Exhibit 22 September 2014 PIA letter