

**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 Education Networks of America	)	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 EDUCATION NETWORKS OF AMERICA  
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> Education Networks of America, Inc. and ENA Services, LLC (ENA) hereby respectfully requests 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 (or the Consortium) for Funding Years 2013, 2014 and 2015.<sup>2</sup>

ENA is the telecommunications and Internet access services provider for the Tennessee schools that are members of the Sweetwater Consortium. Contrary to USAC’s determinations,

---

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

<sup>2</sup> See Exhibit 1 to the Sweetwater Request for Review for a list of the applications at issue in this appeal. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Consolidated Request for Review and/or Waiver by Sweetwater City Schools et al. of Funding Decisions by the Universal Service Administrative Company, filed May 10, 2016 (Sweetwater Appeal). Where the Sweetwater Consortium has provided the relevant documents, ENA will refer to the exhibit numbers in the Sweetwater filing so that the documents do not have to be submitted into the record again.

ENA had a contract with the school districts it serves, and the evidence demonstrates that ENA's services were cost-effective for these districts. USAC's decisions resulted in the denial of \$36 million in funding for 45 mostly rural school districts.

For the reasons set forth below, the Commission or 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 it is three years after the filing of the initial applications, we request that the Bureau move as quickly as possible before the schools and their students are further harmed by USAC's delayed decision-making. Accordingly, we request an expedited review of the issues raised in this appeal and inclusion in the next available Public Notice streamlined order to be released by the Bureau.<sup>3</sup>

---

<sup>3</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).

## TABLE OF CONTENTS

I. SUMMARY.....	4
II. BACKGROUND.....	5
III. THE COMMISSION SHOULD REVERSE USAC’S DECISION AS SOON AS POSSIBLE AND REMAND THE APPLICATIONS FOR COMMITMENT .....	10
A. ENA Offered Cost-Effective Services to the Members of the Sweetwater Consortium. ..	11
B. The Sweetwater Consortium Had a Contract with ENA. ....	16
IV. IN THE ALTERNATIVE, THE FCC SHOULD GRANT WHATEVER WAIVERS IT DEEMS NECESSARY SO THAT THESE SCHOOLS CAN RECEIVE E-RATE FUNDING. 19	
V. CONCLUSION .....	21

## I. SUMMARY

ENA respectfully requests that the Commission grant this appeal of decisions USAC made to deny and seek recovery of E-rate funding for the applicants detailed above.<sup>4</sup> The Commission should grant this appeal and/or waive any relevant rules for several reasons. First, from ENA's perspective, the Consortium complied with the E-rate program rules, including using price as a primary factor in its bid evaluation process. USAC has not provided any evidence to show the competitive bidding process was flawed, except to arbitrarily second-guess the reviewing panel's grading of the responses. Second, contrary to USAC's determination, ENA's bid was cost-effective considering both price and service quality. It provided the best value for the Sweetwater Consortium, as demonstrated by the fact that it received the most points in the bid evaluation, including the most points for non-price factors. In addition, even though the evaluators appear to have given AT&T every benefit of the doubt with respect to pricing when presented with conflicting information regarding the actual prices proposed, AT&T's bid states that the prices being offered were those from its state master contract – and those prices actually totaled more than *\$11 million*, not even including its unknown installation charges. Finally, ENA and the Sweetwater Consortium had a valid contract and performed for the past three years in accordance with that contract. There is no reason the Commission should reach out to disturb that valid contract under Tennessee law.

---

<sup>4</sup> ENA is an aggrieved party pursuant to 47 C.F.R. § 719 because the denials for these applicants have impeded its ability to collect funds owed to it under its contract with the affected schools. In addition, USAC's decision that ENA's services were not cost-effective harms its reputation and standing in the educational community and could hamper its ability to win competitive bidding processes in the future.

## II. BACKGROUND

ENA is a leading provider of technology solutions to schools and libraries. In 1996, ENA created one of the first statewide K–12 networks in the U.S. and has earned a reputation as experts in the design, deployment, and management of broadband, Wi-Fi/LAN, voice, and video solutions for schools and libraries.<sup>5</sup> ENA has been involved in the E-rate program since its inception and has nearly two decades of successful experience, working with a diverse group of schools and libraries, including rural and urban, large and small, system-wide and statewide, and supporting every type of demographic.<sup>6</sup> Today, ENA manages multiple statewide and district-wide networks, including 15 of the largest school systems in the country, successfully serving approximately 5,000 end sites; 570 school districts; 3.2 million students, teachers, and administrators; 280 libraries; and 3.2 million library patrons.<sup>7</sup> In the Tennessee market alone, ENA serves 127 of the 142 school systems.<sup>8</sup>

No single facilities-based transport provider can deliver fiber-optic connections statewide in Tennessee.<sup>9</sup> At a high level, ENA and AT&T are both providing telecommunications and Internet access services for schools in Tennessee. ENA, however, is not simply reselling AT&T's or any other vendor's circuits.<sup>10</sup> Instead, ENA, free to pick the best solution for each individual school, has designed its own network solutions.<sup>11</sup>

---

<sup>5</sup> Affidavit of Rex Miller, Senior Vice President and Chief Financial Officer, Education Networks of America, ¶ 3 (May 13, 2016) (R. Miller Aff.).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> R. Miller Aff. ¶ 4.

<sup>10</sup> R. Miller Aff. ¶ 4.

<sup>11</sup> R. Miller Aff. ¶ 4.

In order to provide service throughout Tennessee, ENA has solicited bids from other service providers to engineer a network that can provide Internet access service from the Internet backbone to the classroom.<sup>12</sup> ENA has established relationships with a number of transport providers, including cable companies, utilities, incumbent and competitive local exchange carriers, municipal networks, wireless carriers, third-party fiber providers, and emerging higher education networks.<sup>13</sup> Because ENA is not bound to use any one provider's network, ENA can compare and contrast the facilities offered by the local cable operator against those offered by local telco operator or against that offered by the local electric company.<sup>14</sup>

As noted in Sweetwater's Request for Review, on January 29, 2013, the Sweetwater Consortium sought bids on behalf of 76 local education agencies (LEAs)<sup>15</sup> located in Tennessee."<sup>16</sup> ENA provided a bid response dated March 1, 2013, the due date of the RFP.<sup>17</sup>

ENA was the current provider for most of the schools participating in the Sweetwater Consortium when Sweetwater solicited bids for telecommunications and broadband services in

---

<sup>12</sup> R. Miller Aff. ¶¶ 5(b), 6.

<sup>13</sup> R. Miller Aff. ¶ 6.

<sup>14</sup> *Id.*

<sup>15</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>16</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* Sweetwater Appeal Exhibit 3.

<sup>17</sup> ENA Bid Response, Sweetwater Appeal Exhibit 7.

2013.<sup>18</sup> After analyzing all available options for cost-effective service, ENA selected and had contracted with more than 40 vendors to deliver these services.<sup>19</sup> In some cases, ENA selected an existing circuit and, in others, ENA worked with those service providers to build fiber to the school buildings.<sup>20</sup> In many cases, ENA was able to contract with a local provider who otherwise would not have participated in a bid for a statewide contract.<sup>21</sup> To try to provide the lowest price for its bid, ENA had an economic incentive to select the lowest cost but highest-quality solution for each of the circuits it needed.<sup>22</sup>

In contrast, AT&T appears to prefer the use of its own circuits to provide service,<sup>23</sup> even though it does not have facilities in much of Tennessee outside of the urban areas.<sup>24</sup> As such, to provide service to a new customer, or when it does not have the facilities to provide the requested level of service for that customer, AT&T must design, engineer, and construct its own

---

<sup>18</sup> R. Miller Aff. ¶ 11.

<sup>19</sup> R. Miller Aff. ¶ 11. For example, ENA pioneered the installation of fiber in many rural school districts such as the school districts in northwest Tennessee. Traditional carrier facilities were not available to service a number of school sites in that area. ENA developed a partnership with Gibson Electric, the local electric utility, to build fiber to serve the Gibson County Special School District schools. Based on the success of this project, Gibson facilitated introductions to a number of its sister cooperatives throughout Tennessee and ENA replicated this model in other underserved areas. R. Miller Aff. ¶ 9.

<sup>20</sup> R. Miller Aff. ¶ 9.

<sup>21</sup> R. Miller Aff. ¶ 9.

<sup>22</sup> R. Miller Aff. ¶¶ 6, 11.

<sup>23</sup> AT&T prefers to use its own circuits even when they are inadequate to the school's needs. Sweetwater Appeal, Affidavit of Melanie Miller, ¶ 13(e).

<sup>24</sup> R. Miller Aff. ¶ 12. ENA is aware of many situations in which AT&T refused to install the circuits required because the school was located outside of AT&T's service area. *Id.* See [http://www.aeneas.com/admin/FileUploads/EditorImages\\_38.pdf](http://www.aeneas.com/admin/FileUploads/EditorImages_38.pdf) for the incumbent telephone companies' service areas.

facilities.<sup>25</sup> In many cases – if not all cases – such an approach will be more expensive for the school districts because they will have to pay special construction costs upfront<sup>26</sup> or those costs will need to be amortized over the life of the contract.<sup>27</sup>

ENA did not have an expectation that it would win the bid unless it provided the best, most cost-effective offering at the best price for all of the schools in the Consortium.<sup>28</sup> ENA knew AT&T would also submit a bid.<sup>29</sup> ENA worked extremely hard to respond to the Sweetwater bid including significant time invested in engineering, design, operations, project management/project planning, pricing/finance and executive level review to develop the comprehensive response to the Sweetwater bid.<sup>30</sup> ENA spent approximately 250 hours preparing its bid response.<sup>31</sup>

At part of its bid response, ENA offered to use and signed the form contract that Sweetwater included in the RFP.<sup>32</sup> In the alternative, ENA offered to use the form of ENA's existing contract with MNPS to memorialize the parties' contract.<sup>33</sup> These are form contracts that incorporate the terms of the contract formed when an award is issued to accept an offer, and

---

<sup>25</sup> R. Miller Aff. ¶ 12.

<sup>26</sup> AT&T's bid response expressly states that its installation costs will be billed separately. AT&T Response, Tab III at 1, Sweetwater Appeal Exhibit 6.

<sup>27</sup> R. Miller Aff. ¶ 12.

<sup>28</sup> R. Miller Aff. ¶ 13.

<sup>29</sup> R. Miller Aff. ¶ 13.

<sup>30</sup> R. Miller Aff. ¶ 13.

<sup>31</sup> R. Miller Aff. ¶ 14.

<sup>32</sup> ENA Bid Response at 11, 146. Sweetwater Appeal, Exhibit 7. 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, Sweetwater Appeal Exhibit 3.

<sup>33</sup> ENA Bid Response at 11, 146, Sweetwater Appeal Exhibit 7.

then add certain boilerplate terms and conditions.<sup>34</sup> ENA offered to use the MNPS form as doing so would make it administratively easier for the school districts.<sup>35</sup> To use the form of the MNPS contract instead of using a new form would mean one fewer piece of paperwork, and thus would reduce the burden on the districts. ENA learned that it had won the bid on March 1, 2013.<sup>36</sup> Sweetwater elected to use the form of the MNPS contract to memorialize the contract that was formed with the award on March 1, 2013.

Pursuant to the contract, members of the Sweetwater Consortium ordered services for which E-rate funding was requested. In accordance with its contractual obligation, ENA has performed under the contract by delivering telecommunications and broadband services for those districts, and the districts are bound to pay for the services.<sup>37</sup> The Consortium members filed individual applications for funding pursuant to Commission rules for funding years 2013, 2014 and 2015.<sup>38</sup> In October and November 2015, USAC denied requests for more than \$36 million in funding for the 45 districts for funding years 2013, 2014, and 2015.<sup>39</sup>

---

<sup>34</sup> See Sweetwater RFP at 28, Sweetwater Appeal Exhibit 3.

<sup>35</sup> R. Miller Aff. ¶ 15.

<sup>36</sup> Sweetwater Appeal Exhibit 8.

<sup>37</sup> R. Miller Aff. ¶ 17. 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 now take service under this contract.

<sup>38</sup> See Sweetwater Appeal Exhibit 1.

<sup>39</sup> See, e.g., Sweetwater Appeal Exhibit 13 (Funding Commitment Decision Letter from USAC to Dayton City School District (Initial Denial Letter)). The same denial language was included in each decision. See also Sweetwater Appeal Exhibit 1.

On December 11, 2015, ENA appealed USAC's decision on these applications to USAC, pursuant to Commission rules.<sup>40</sup> USAC denied the appeal on March 15, 2016.<sup>41</sup> ENA herein timely files its request for review and/or waiver with the Commission.<sup>42</sup>

### **III. THE COMMISSION SHOULD REVERSE USAC'S DECISION AS SOON AS POSSIBLE AND REMAND THE APPLICATIONS FOR COMMITMENT**

ENA respectfully requests that the Commission grant this appeal of decisions USAC made to deny and seek recovery of E-rate funding for the applicants detailed above. In addition, ENA respectfully requests that the Commission act to grant this appeal as quickly as practicable. The schools in the Sweetwater Consortium have not received E-rate funding since 2011. USAC took 2½ years to deny the funding requests at issue and the schools now are struggling financially.

As an initial matter, ENA incorporates by reference the facts and arguments included in the Sweetwater Request for Review filed May 10, 2016 with the Commission.<sup>43</sup> ENA supports the positions of the Sweetwater Consortium as described therein. In its appeal, ENA would like to highlight a few key additional points for the Commission.

First, ENA's bid was the most cost-effective considering both price and service quality. It provided the best value for the Sweetwater Consortium, as demonstrated by the fact that it received the most points in the bid evaluation, including the most points for non-price factors. In addition, even though the evaluators appear to have given AT&T every benefit of the doubt with

---

<sup>40</sup> 47 C.F.R. § 54.719(a).

<sup>41</sup> See Appeal Denial Letter, Sweetwater Appeal 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>42</sup> 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

<sup>43</sup> See Sweetwater Appeal.

respect to pricing despite the confusion as to pricing created by AT&T in its response. AT&T's bid stated that the prices being offered could not be less than those from its state master contract ("NetTN") – the NetTN prices that actually totaled more than \$11 million, not even including installation charges, which was more than ENA's bid. From ENA's perspective, the Consortium complied with the E-rate program rules, including using price as a primary factor in its bid evaluation process. USAC has not provided any evidence to show the competitive bidding process was flawed, except to second-guess the reviewing panel's grading of the responses.

Second, ENA and the Sweetwater Consortium had a valid contract and performed for the past three years in accordance with that contract. There is no reason the Commission should reach out to disturb that valid contract under Tennessee law.

**A. ENA Offered Cost-Effective Services to the Members of the Sweetwater Consortium.**

ENA's bid was cost-effective considering both price and the technical factors evaluated by the Consortium. ENA provided the best value for the Sweetwater Consortium, as demonstrated by the fact that ENA received the most points in the bid evaluation, including the most points for non-price factors.<sup>44</sup> Dr. Melanie Miller and Joan Gray, two of the three evaluators of the bids, eloquently describe their reasoned review and deliberations comparing the two bids. When comparing the two bid responses, it appears that ENA simply took the process

---

<sup>44</sup> See Consensus Score Sheet, Sweetwater Appeal Exhibit 15. In the Appeal Letter, USAC claimed that "SCSDC did not provide any supporting documentation to justify the selection of ENA's bid. . . ." Administrator's Decision on Appeal to members of the Sweetwater Consortium, dated March 15, 2016, at 2, Sweetwater Appeal Exhibit 14. The Consensus Score Sheet demonstrates why the Consortium selected ENA instead of AT&T.

more seriously, developed a thorough, responsive bid, and proved its ability as the most cost-effective provider.<sup>45</sup>

For example, ENA provides a quality of service that is unmatched. Each of ENA's contracts have Service Level Agreements that include quality measurements on ongoing service and time to repair when outages occur.<sup>46</sup> As noted in its Sweetwater Consortium bid response, ENA had no service level agreement violations (and has not had any since the Consortium bid).<sup>47</sup> ENA's competitor, AT&T, chose to not respond to this critical question.<sup>48</sup>

Because existing precedent requires price only to be weighted one more point above any other factor,<sup>49</sup> the regulatory scheme anticipates that the "effectiveness" factors may outweigh the "cost factors" when complying with the directive to choose the most cost-effective provider. That is exactly what happened in this case. Price was worth 25 percent of the total evaluation.

---

<sup>45</sup> Miller Aff. ¶ 14.

<sup>46</sup> Miller Aff. ¶ 7. ENA employs a staff of customer support engineers (CSEs) that are dedicated 24 x 7 x 365 to provide immediate customer assistance to the schools over the network engineered by ENA for those schools. For example, ENA maintains a Customer Technical Assistance Center that proactively monitors the performance of the network dedicated to each school in an effort to anticipate and prevent outages. Realizing that the delivery of these services is time-sensitive and that schools that cannot access the Internet will likely lose valuable instruction time as Internet-based resources continue to be integrated into everyday lesson plans, ENA does not await a call to alert it to a service problem. ENA continually monitors the performance of the network that it designed to assure that they are performing as required to meet the needs of the school as engineered by ENA and, once built, remains in place to everything running smoothly and reliably. More than 95 percent of the time, ENA alerts the schools of a network issue and begin resolving it before they even know an issue exists. ENA Bid Response, Sweetwater Appeal Exhibit 7 at 91.

<sup>47</sup> ENA Bid Response at p. 20, Sweetwater Appeal Exhibit 7.

<sup>48</sup> AT&T Response to RFP, Sweetwater Appeal Exhibit 6.

<sup>49</sup> *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District El Paso, Texas, et al.*, Order, FCC 03-313, 18 FCC Rcd 26407, n. 138 (2003) (*Ysleta Order*).

ENA's higher points in the non-price categories outweighed the higher points AT&T received in the price category.<sup>50</sup>

Beyond the directive to make a decision based on cost-effectiveness, the evaluators gave AT&T every benefit of the doubt with respect to all elements of its submission, most especially in their efforts to reconcile the confusion created by AT&T as to its pricing. Although asked to submit an "all in" cost as ENA did, AT&T supplied numbers that did not include the cost of installation.<sup>51</sup> AT&T also stated in its bid that it could not charge prices that were lower than those to which AT&T committed to charge in its NetTN contract with the State of Tennessee,<sup>52</sup> yet the prices listed in AT&T's bid were not available in the marketplace nor subsequently offered to the group of Tennessee schools through any other contract vehicle. Because AT&T stated its bid could not be less than the pricing offered in its NetTN contract, it is a fact that AT&T's bid using the NetTN pricing was actually more than \$11 million, even though the evaluators used the meaningless figures AT&T included in its bid response to compare the two bids.

Finally, ENA wonders what USAC would have had the Consortium do differently in this bidding process. At the end of the nine-hour bid review process, after which ENA earned the most total points under the criteria established in the RFP, was the Consortium supposed to look

---

<sup>50</sup> See Consensus Score Sheet, Sweetwater Appeal Exhibit 15.

<sup>51</sup> AT&T Bid Response, Tab III, at 1, Sweetwater Appeal Exhibit 6 ("AT&T will bill for services as they are rendered for installation and equipment charges. Billing will occur for managed services on a monthly basis.").

<sup>52</sup> AT&T Bid Response at 12-13, Sweetwater Appeal Exhibit 6 ("However, the pricing offered under the NetTN Services Contract is the lowest corresponding price that AT&T is obligated to offer Sweetwater under the lowest corresponding price requirements of the E-rate rules. AT&T is obligated to offer the NetTN Services pricing and terms to Sweetwater for the Internet services in order to be E-rate compliant.").

at the results of the process, and, ignoring the criteria and point schedule it had developed and announced in the RFP, instead select AT&T as the winner of the bid simply based on price?<sup>53</sup> If it had done so, USAC could have found that the Consortium did not follow the process it had announced in the RFP, failed to choose the most cost-effective bidder, and denied funding on those grounds instead.<sup>54</sup> ENA is still unclear as to what standard USAC has used to conclude the bid was not cost-effective.<sup>55</sup> It appears as if USAC has denied the funding solely because it thought ENA's bid was higher, which – even if that were accurate – is not and never has been against Commission rules.<sup>56</sup>

---

<sup>53</sup> It is also still true that AT&T did not, in fact, offer a lower price than ENA, nor did it include all of the applicable charges in its bid.

<sup>54</sup> Additionally, ENA would have had grounds to challenge the award and the Consortium would have been at risk of not receiving needed services.

<sup>55</sup> USAC noted that its review of the bids found the services offered by both of providers “contain similar Network infrastructure, similar Network Support, similar On Premise Network Equipment, similar Monitoring Service, both have similar experience and operate in Tennessee, both have extensive experience with the e-rate program, and both service providers provided references from past customers who were satisfied with the service providers.” In other words, USAC decided – three years later – to ignore the actual bids submitted, the evaluation by the actual users of those services, and the corresponding points to be awarded as detailed in the RFP and pursuant to a careful and comprehensive review process, and to substitute its own *belief* that AT&T and ENA should have received the same points for the non-price categories. That decision was not based on facts and should not replace the judgment of three school officials in Tennessee who have extensive experience with technology, procurements, and Tennessee service providers.

<sup>56</sup> *Federal State Joint Board on Universal Service* (CC Docket No. 96-45); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge* (CC Docket Nos. 96-262, 94-1, 91-213, 95-72), Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5429 at ¶ 192 (1997); *See, e.g., 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*

The ultimate result is that ENA provides higher-quality services for schools at a lower cost, as is evident in its bid response to Sweetwater. ENA proactively develops the highest levels of broadband availability for all schools through its ongoing research and interactions with the entire service provider community. ENA delivers its services on time based on clear project plans easily understood by the school systems. ENA proactively monitors and maintains its systems to deliver the highest levels of availability during the school day.

Accordingly, from ENA's perspective, the Consortium complied with the E-rate program competitive bidding rules, including using price as a primary factor in its bid evaluation process. USAC has not provided any evidence to show the competitive bidding process was flawed; it has only second-guessed the outcome.<sup>57</sup> As demonstrated above and by the Sweetwater Consortium, USAC has failed to take into account the legitimate differences between the two bids. In addition, USAC has chosen to ignore the actual pricing as proposed by AT&T, which was actually higher than ENA's when using the NetTN rate that AT&T stated it was required by the NetTN contract to charge. Not only has USAC exceeded its authority by interpreting Commission rules, it also acted arbitrarily when it decided to substitute its analysis for the Consortium's.<sup>58</sup>

---

*Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13740 at ¶ 7 (1999) (*Tennessee Order*);

<sup>57</sup> USAC appears to be ignoring Commission precedent finding when school districts conduct a lawful competitive bidding process and the rates do not exceed market rates, the services selected are cost-effective. *Tennessee Order* at ¶¶ 9-10; *Requests for Review of Decisions of the Universal Service Administrator by Net56, Inc.*, CC Docket No. 02-6, Order, DA 12-1792 at ¶¶ 12-14 (WCB 2012).

<sup>58</sup> 47 C.F.R. § 54.702(c); *see also In re Incomnet, Inc.*, 463 F.3d 1064, 1072 (9<sup>th</sup> Cir. 2006) (Quoting 47 C.F.R. § 54.702(c), USAC "is prohibiting from 'mak[ing] policy, interpret[ing] unclear provisions of the statute or rules, or interpret[ing] the intent of Congress" quoting 47 C.F.R. § 54.702(c).").

The evaluation process was thorough and fair to all parties. Insofar as the Commission desires to second-guess that process, ENA respectfully requests that the Commission carefully compare the two bids, and take into consideration as evidence the sworn affidavits submitted by three respected school leaders in Tennessee, who were closest to the needs of the schools. Even if the Commission desires to engage in a merits review three years into the performance of this contract, the facts compel the same conclusion the Consortium evaluators reached – ENA provided the most cost-effective services for the member schools.

**B. The Sweetwater Consortium Had a Contract with ENA.**

As Sweetwater has also explained, under both Tennessee law and E-rate rules and precedent, the Consortium and ENA had a valid, written contract in place prior to when the Consortium members filed their FCC Forms 471. For the past three years, the Consortium has been ordering, and ENA has been providing, E-rate eligible services. Yet USAC asserts that the parties do not have a valid contract, a position that is unfounded in the law.

A contract is formed by the acceptance of an offer.<sup>59</sup> ENA made an offer of services when it responded to the Consortium’s RFP.<sup>60</sup> The Consortium accepted that offer when it issued its award on March 1, 2013. As a consequence, a contract was formed pursuant to which ENA was obligated to provide services to all of the members of the Consortium. Of those members, forty-three ordered services, which ENA has provided for the last three years. While

---

<sup>59</sup> 7 Tenn. Juris. CONTRACTS § 16 (2015). A contract must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced. *Staubach Retail Services-Southeast, LLC v. H. G. Hill Realty Co.*, 160 S.W.3d 521 (Tenn. 2005).

<sup>60</sup> ENA Response at 6, Sweetwater Appeal Exhibit 7 (“ENA is pleased to provide this Proposal Response to the Sweetwater City Schools (SC) RFP Number 13-1....”); *id.* at 11 (“ENA appreciates your consideration of our Proposal Response....”).

acceptance of an offer can be proven by performance, the facts are that the Consortium formally accepted ENA's offer with the award and the districts who ordered services under that contract have acknowledged their contractual responsibility to pay for those services.<sup>61</sup>

In asserting that a contract was not formed, USAC focuses not on the fundamental elements of offer and acceptance, but rather the means by which the Consortium solicited the offer from ENA and AT&T. While irrelevant to the analysis of whether the parties have a valid contract, the Consortium has provided a detailed analysis of Tennessee law on public procurements. In summary, Tennessee has long authorized every type of public procurement including "cooperative purchasing arrangements" and "piggyback" arrangements.<sup>62</sup> These sort of cooperative purchasing arrangements are neither new nor unique to Tennessee. The means used by the Consortium to solicit an offer<sup>63</sup> from ENA was expressly authorized by Tennessee

---

<sup>61</sup> "Consideration exists when the promisee does something that it is under no legal obligation to do or refrains from doing something it has a legal right to do." 7 Tenn. Juris. CONTRACTS § 33 (2015).

<sup>62</sup> Current Code Section T.C.A. §12-3-1205(a), which was numbered T.C.A. §12-3-1009(a) in 2013, authorizes "cooperative purchasing agreements." Both begin, "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 supplies, services or construction with one (1) or more other local governments in accordance with an agreement entered into between the participants." Current Code Section T.C.A. §12-3-1203(a), which was numbered T.C.A. §12-3-1004(a) in 2013, authorizes piggyback purchasing relationships.

<sup>63</sup> See Request for Proposal Number 13-1, Sweetwater City Schools at 1 ("...this solicitation document will facilitate the entering into contracts...."; at 4 (The Sweetwater City Schools SCS (SCS) is requesting proposals...." and "The SCE is requesting sealed proposals...."); at 5 (Awards, if made, ...."), and at 13 ("The Supervisor of instruction reserves the right to accept or reject, in whole or in part, any or all proposals submitted."). *Duckworth Pathology Group, Inc. v. Reg'l Medical Ctr. at Memphis*, 2014 Tenn. App. LEXIS 215, 2014 WL 1514602 (Tenn. Ct. App. Apr. 17, 2014). See also T.C.A. §49-3-368 that required Comptroller approval of the bid issuance as condition of state funding. The Comptroller approved this RFP.

law.<sup>64</sup> Regardless, the contract was formed when the Consortium accepted ENA's offer with its award, a conclusion that cannot be denied given the performance of the parties in the three years since the award.

The contract was formed when the Consortium accepted ENA's proposal. ENA's proposal offered the Consortium alternative form documents to memorialize the contract. In its offer, ENA signed and returned the Consortium's proposed contract.<sup>65</sup> ENA also offered the "Metropolitan Nashville Public School (MNPS), MNPS2-225071-00" as an additional response.<sup>66</sup> Both forms incorporated the bid response into standard, boilerplate terms and conditions, and specifically acknowledged the "Contractor's Bid/Proposal, date [insert date]"<sup>67</sup> as the operative provisions of the contract. That option was offered as an administrative convenience for the districts that had already obtained approval of the form of the MNPS contract. In effect, it saved those districts the additional administrative task of notifying a different school district of their intent to use the contract. Because of this administrative convenience, the Consortium choose the MNPS form to memorialize the contract.

In conclusion, the Sweetwater Consortium did not "piggyback" off the MNPS contract. The Consortium conducted its own procurement, formed its own separate contract with ENA on

---

<sup>64</sup> See also *EnGenius Entertainment v. Herenton*, 971 S.W.2d 12, 1997 Tenn. App. LEXIS 759 (Tenn. Ct. App. 1997), which, in dismissing a claim for failure to allege that a contract was formed, includes an extensive discussion of why a request for proposal cannot be the basis for a contract since it is only a solicitation of an offer.

<sup>65</sup> ENA Bid Response at 146, Sweetwater Appeal Exhibit 7 ("ENA accepts all terms and conditions of the proposed contract without exceptions. A signed and notarized contract is included in this section.").

<sup>66</sup> ENA Bid Response at 11, 118, Sweetwater Appeal Exhibit 7.

<sup>67</sup> Sweetwater RFP at 28, Sweetwater Appeal Exhibit 5.

March 1, 2013, and then used the form of the MNPS contract to memorialize the agreement between the parties.

#### **IV. IN THE ALTERNATIVE, THE FCC SHOULD GRANT WHATEVER WAIVERS IT DEEMS NECESSARY SO THAT THESE SCHOOLS CAN RECEIVE E-RATE FUNDING**

As noted above, ENA asserts that the Sweetwater Consortium did not violate any E-rate requirements for the applications at issue. If the Commission disagrees, we respectfully request that the Commission grant whatever waiver it deems necessary to allow E-rate funding for these schools for funding years 2013, 2014 and 2015.<sup>68</sup>

First, as the Consortium has noted, USAC's delay in making a decision on these applications more than doubled the harm suffered by the schools. If USAC had come to its conclusion – erroneous as it may be – within the first funding year after the filing of the 2013 applications, the schools may have been able to remedy whatever issues USAC identified. However, the schools had no idea that the applications were in danger of rejection. The initial questions asked by USAC were not regarding the Consortium's contract with ENA, the

---

<sup>68</sup> The Commission has granted waivers for violations of these rules on numerous occasions. For “no contract” waivers, *see, e.g., 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*); *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). For competitive bidding waivers, *see, e.g., Application for Review of the Decisions of the Universal Service Administrator by Aberdeen School District*, CC Docket No. 02-6, Order, FCC 07-63, ¶ 9 (2007) (“We find that Petitioners’ errors related to the competitive bidding process do not warrant a complete rejection of their applications. We have examined the facts of each of these appeals and found that a waiver is warranted based on the circumstances presented and based on the facts that there is no evidence of waste, fraud or abuse.”) (*Aberdeen Order*).

competitive bidding process, or the cost-effectiveness of the services selected. The schools would have never guessed that USAC would later take issue with the cost-effectiveness of the services and the contractual arrangements.<sup>69</sup>

Second, there is no waste, fraud or abuse in this case.<sup>70</sup> The schools purchased the services, used them for their statutory purpose, and the students in their districts received the benefit of them.

Finally, it would be contrary to program and statutory goals, which are to increase access to telecommunications and Internet access, to deny this funding. If the funding is denied, it is likely that technology purchases for years to come would be reduced for these schools in order to pay for the past services. There is no program goal that would be furthered by denying these funds to the schools. As ENA and the Consortium have shown, the prices offered by ENA were the lowest prices available in the market, and the most cost-effective services. As such, there was zero harm to the Universal Service Fund. To deny funding to these schools would undermine the very purpose for which the program was created.

---

<sup>69</sup> USAC asked initial questions on October 7, 2013. Additional questions were not posed until nearly a year later in September 2014.

<sup>70</sup> The Commission has repeatedly granted appeals or waived its rules when there was no waste, fraud or abuse. *See, e.g., Aberdeen Order* at ¶ 9; *Net56 Order* at ¶ 16.

**V. CONCLUSION**

For the foregoing reasons, the Commission should grant ENA's request for appeal, or, in the alternative, its request for waiver. In addition, ENA requests that the Commission remand the applications at issue back to USAC for commitments as soon as practicable, consistent with the relief requested in this appeal, including any additional waivers of Commission rules necessary to effectuate the relief sought.

Respectfully submitted,

Robert Patterson/gs



Robert Patterson  
Bradley Arant Boult Cummings LLP  
1600 Division Street, Suite 700  
Nashville, TN 37203  
(p) 615-252-2335  
(f) 615-252-6335  
[bpatterson@bab.com](mailto:bpatterson@bab.com)

Gina Spade  
DC Bar # 452207  
Broadband Legal Strategies  
1629 K Street, NW Suite 300  
Washington, DC 20006  
(p) 202-907-6252  
(f) 202-789-3530  
[gina@broadbandlegal.com](mailto:gina@broadbandlegal.com)

Attorneys for ENA

May 13, 2016

## CERTIFICATE OF SERVICE

This is to certify that on this 13<sup>th</sup> day of May, a true and correct copy of the foregoing Request for Review was sent via email to:  
Schools and Libraries Division, Universal Service Administrative Company  
Appeals@sl.universalservice.org



---

Gina Spade