

**Before the  
Federal Communications Commission  
Washington, DC 20554**

|   |   |                      |
|---|---|----------------------|
| In the Matter of                        | ) |                      |
|   | ) |                      |
| Application for Review of a             | ) |                      |
| Decision of the                         | ) |                      |
| Wireline Competition Bureau of the      | ) |                      |
| Federal Communications Commission       | ) |                      |
|   | ) |                      |
| Henrico County School District          | ) | File No. SLD- 607894 |
| Henrico, VA                             | ) |                      |
|   | ) |                      |
| Schools and Libraries Universal Service | ) | CC Docket No. 02-6   |
| Support Mechanism                       | ) |                      |

**Application for Review by Henrico County Schools**

Henrico County Schools, Richmond, Virginia (Henrico) respectfully requests the full Commission (Commission) review and overturn a decision by the Wireline Competition Bureau (Bureau). This request comes timely filed in accordance with 47 C.F.R § 1.115(b)(2)(i) and/or (iii). Specifically, this Application for Review requests the Commission overturn the Bureau’s decision based on a conflict with case precedent.

Henrico has exhausted all arguments with the Bureau and now pleads to the full Commission to overturn the Bureau’s denial. Henrico introduces no new arguments or facts here, asking only that the Commission review the facts and conclude, as Henrico has, that the Sprint bid was so deficient as to not warrant serious consideration, and that no amount of “re-engineering” of the scoring could resurrect Sprint’s bid. The Bureau erred when rejecting the Henrico argument that a waiver was justified in light of the Allendale Decision.

## Background

In Fund Year 2008 Henrico issued an RFP for E-Rate eligible services. Henrico posted a Form 470 indicating an RFP was available. Four potential vendors submitted bids to provide service. Henrico recorded and evaluated all bids, as was required by E-Rate regulations at the time, and selected Verizon as the vendor best qualified to provide services and signed contracts.

During application review the Universal Service Administrative Company (Administrator) determined that price was not the primary consideration in bid evaluation, as required under program rules, and denied the E-Rate funding request for FRN 1700654 and 1700625. Henrico appealed directly to the Bureau. In its appeal Henrico admitted that price was not the primary consideration during bid review but argued that if price was made the primary consideration, Verizon still would have won the bid.<sup>1</sup> The appeal remained pending at the Bureau for the next four years.

Henrico inquired to the Bureau about the appeal status in the spring of 2013. On May 3, 2013 the Bureau issued its decision, DA 13-999, denying Henrico's 2009 appeal. The Bureau stated:

*The fact that Henrico can, with the benefit of hindsight, find one way to re-engineer its bidding process to reach an identical result using price as the primary factor does not demonstrate compliance with the Commission's rules. There is no way to know what weight Henrico would have assigned to price, if it had properly assigned the greatest weight to price in its bid evaluation process, nor is there a way to know what weight it would have then assigned to the other criteria. As a result, there is no way to know whether Henrico would have reached the same outcome. We note that, on occasion, we have waived the Commission's rules for applicants that failed to use price as the primary factor in its vendor evaluation process, but selected the lowest-cost provider.(footnote 16) In this case, however, the record demonstrates that the winning vendor's cost proposal was higher than competing bids.<sup>2</sup>*

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<sup>1</sup> Henrico County Schools Request for Review dated March 3, 2009 and accepted March 12, 2009.

<sup>2</sup> Henrico County Schools Decision, DA 13-999, Rel. May 3, 2013, CC Docket No. 02-6, at 4

In the Henrico denial, the Bureau notes that the Bureau has on occasion waived the Commission's rules for applicants that failed to use price as the primary consideration. The footnote for that statement (footnote 16) referred to the Bureau's *Allendale* decision. The *Allendale* decision was issued two years *after* Henrico submitted its appeal and established new precedent regarding waivers for failure to use price as the primary consideration. *Allendale* held that when applicants failed to use price as the primary consideration, excluded non-responsive bids, and ultimately selected the lowest cost provider then waivers of the rule should be granted.

Henrico filed a Petition for Reconsideration with the Bureau arguing that it relied on facts or arguments unknown to Henrico since the last opportunity to be heard. Specifically, Henrico argued that the standard established in *Allendale* should be applied. *Allendale* was not decided until two years after Henrico's initial appeal, thus making it impossible for Henrico to have referenced it. The Bureau determined the argument presented by Henrico in its Petition for Reconsideration did not rely on arguments that have been fully considered and rejected by the Bureau (Attachment A).

**Form 471 Application Number: 607894**  
**FRN: 1700625 and 1700654**  
**Billed Entity Number: 126514**  
**FCC Registration Number: 0011680741**

## **Discussion**

In denying the Henrico Petition, the Bureau acknowledged Henrico raised new, previously unavailable arguments while simultaneously denying the new arguments because they were not presented in the original appeal.<sup>3</sup> Further, the Bureau contends that Henrico re-engineered its competitive bidding process to reach the desired result. The Bureau goes still

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<sup>3</sup> Henrico County School District Decision, Da 13-1884, Rel. September 11, 2013, CC Docket 02-6 at 4.  
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further by suggesting that regardless of the *Allendale* decision, Henrico should have somehow known to disregard Sprint's bid entirely.

### New Arguments

Henrico raised new arguments based on facts unknown and unknowable to Henrico during their initial appeal. Prior to *Allendale* there was no framework for applicants dealing with non-responsive bids. Henrico believed at the time, that all bids must be "considered" under existing E-Rate rules and that eliminating bids would result in a denial of funding.

The Bureau contends Henrico should have argued that the Sprint bid was non-responsive even though the precedent for non-responsive bid exclusion was not established until over two years later in *Allendale*<sup>4</sup>.

However, it is clear in Henrico's initial appeal that Sprint's failure to adequately respond to the RFP was the reason it was not awarded the contract. Henrico provided ample documentation of the bid review process including a breakdown of each vendor's points per category. Sprint's consistently low scores in "Functional Requirements and Implementation Services" were the result of Sprint's failure to address Henrico's specific requirements. Even though Henrico did not use the term "non-responsive" in its initial appeal, the scores in the bid evaluation constitute a *prima facie* showing that Sprint's bid was so fundamentally flawed that its dismissal from consideration was the only reasonable conclusion. With the new facts in *Allendale*, unknown to Henrico at the time of the initial appeal, the Bureau opened the door for outright bid rejection. Under these circumstances, the Bureau should have entertained Henrico's Petition for Reconsideration rather than dismissing it out of hand, as it appears to have done.

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<sup>4</sup> Allendale County School District, DA 11-723, Rel. April 21, 2011  
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## Re-Engineering

Additionally, it is unjust for the Bureau to penalize Henrico for reframing their bid evaluation when the records turned over were only intended for internal use and not meant to fully comply with a then non-existent standard for notating non-responsive bids.

Throughout its Petition denial, the Bureau accuses Henrico of manipulated or “re-engineered” the bid results, saying,

“...the record does not support a determination that the Sprint Communications bid was unresponsive. Instead, it appears that on reconsideration, Henrico is simply offering yet another way to re-engineer its competitive bidding process after the conclusion of that process to reach its desired result.”

Henrico has admitted to erring in not using price as the primary consideration but contends that since the Sprint bid was so clearly nonresponsive that it should be treated like the applicants in *Allendale* where a reevaluation of the bids showed that the lowest price vendor was selected. When the Sprint bid is removed from consideration it is clear that Verizon was in fact the lowest priced option. Despite the Bureau’s claims, this conclusion is evident from the bid evaluations provided with the original appeal. Four independent reviewers gave Sprint a score of zero in 17 out of 20 categories, resulting in a total of 840 points compared to the winning bidder’s 3210. It would be quite impossible to re-engineer an outcome where Verizon didn’t win.

## Removing Bids

The Bureau further contends that since Henrico considered Sprint’s bid non-responsive it should have removed the bid from the evaluation process entirely. For the Bureau to suggest that applicants should unilaterally decide to erase from the record bids considered non-responsive undermines the program’s commitment to transparency and opens the door to fraud, waste and

abuse. The Bureau claimed that Henrico's bid evaluation sheets should have specified that Sprint's bid was being excluded as non-responsive, though clearly the extraordinarily low score signified a numerical rejection of the Sprint bid even without articulating its insufficiency in words. Not only did the rules in place at the time require all bids to be considered, but doing so remains good policy. By including even non-responsive bids in the evaluation process, a more complete record was maintained for just this type of future analysis.

### **Conclusion**

Henrico evaluated four bids responding to a 2008 RFP, including a substantially deficient bid from Sprint. Under review, the Administrator determined that price had not been Henrico's primary criteria in evaluating the bids and denied funding for the FRN in question. Henrico appealed, admitting to the procedural error in weighting categories but clearly demonstrated through re-scoring that if price had been given the most weight, Verizon, the vendor selected, would have still prevailed. The Bureau rejected Henrico's appeal more than three years later on the grounds that Henrico's re-scoring allegedly amounted to an ex post facto "re-engineering" designed to manipulate the data to get to the desired result. The Bureau did not address the fact that the scoring of the bids in this instance was not a close call susceptible to manipulation. Henrico then filed a timely Petition for Reconsideration contending that the newly released precedent in *Allendale* should be applied. In the *Allendale* decision, the Commission granted waivers for applicants in the exact same position: that is, applicants who did not use price as a primary factor, but where, after discounting non-responsive bids and re-scoring the initial evaluations, the lowest price vendor had been selected. The Bureau rejected Henrico's Petition, essentially holding that even though the *Allendale* case had not been decided at the time of the

initial appeal, it could not be considered in the Petition because the Bureau had not previously had the opportunity to respond to that argument. The Bureau also repeated their claim that Henrico's re-scoring was somehow deceitful and additionally claimed that Henrico should have dismissed Sprint's bid without including it in the evaluation, despite the fact that to do so would have violated existing program rules and policy. Fundamentally, the Bureau has erred in failing to apply the standard established in *Allendale* and has continuously misconstrued Henrico's efforts to demonstrate compliance as duplicitous scheming.

Henrico has brought up no new arguments or facts in this Application and now asks the Commission to review the record and grant a waiver consistent with the precedent established in *Allendale*. At all times, Henrico has acted in good faith and now seeks the Commission's review in order to restore badly needed funding to the district.

Respectfully submitted this 21st day of October, 2013,

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