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August 8, 2016

**SUBMITTED ELECTRONICALLY VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: MEETING SUMMARY PER SECTION 1.1208 OF THE FCC'S RULES**

Request for Review or Waiver of a Decision of the Universal Service Administrator by  
Sweetwater City Schools et al., Docket No. 02-6

Dear Ms. Dortch:

On August 5, 2016, Gina Spade, attorney for ENA, met with Claude Aiken, wireline legal advisor for Commissioner Clyburn. The meeting was regarding ENA's request that the Commission grant its appeal of the USAC decisions to deny funding to 45 school districts in Tennessee, which serve about one-third of the public school students in Tennessee. The denials cover funding years 2013, 2014 and 2015, and affect about \$50 million in funding requests. The handout provided at the meeting is attached.

The undersigned addressed the following issues:

- The Sweetwater Consortium selected the most cost-effective services using a detailed, objective competitive bidding process with price given the most weight, as required by Commission rules. The Consortium assigned price 25 points or 25% of the total points awarded. USAC's sample competitive bidding evaluation matrix on its website suggests 30% (see attached). Commission rules only require one more point for price than for the next weighted criteria, which the Consortium met by assigning the next highest category 20 points.<sup>1</sup>
- To pay for the broadband and telecommunications services provided following the procurement at issue, schools in the Sweetwater Consortium are in the process of cutting teachers and programs for the school year that begins this month. Unless the

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<sup>1</sup> USAC's website provides the following guidance: "To evaluate the bids you receive, you must construct an evaluation. You decide what factors you want to consider in your evaluation and how important each factor is to you. You can use as few or as many evaluation factors as you like, and you can assign percentages or points to the factors you use to reflect their relative importance. However, you must include the price of the eligible products and services as a factor and that factor must be weighted more heavily than any other single factor."

Commission acts expeditiously, hundreds of thousands of Tennessee schoolchildren are likely to suffer irreparable harm.

- The Commission can avoid the harm to these schools and students by granting the appeal in a streamlined Public Notice.
- There are no Commission rules or guidance that would have mandated a different selection process or winning bidder.
- The Sweetwater Consortium had a contract with ENA, the winning bidder, based on ENA's offer to provide the services, and the Consortium's acceptance via the award letter.
- There was no waste, fraud or abuse as the services were delivered and used for their intended purposes, satisfying program rules and goals. Further, when the bids are totaled, AT&T's bid using its state master contract pricing, as detailed in the bid response, was nearly \$2 million more than ENA's bid.
- ENA and the Consortium believe every E-rate requirement was met. Even if the Commission identifies some error in the process, however, a waiver of the rules is in the public interest because of the significant harm to these schools.
- If the Commission wants to adopt best practices or change its rules on competitive bidding, the Commission should do so in a declaratory ruling, clarification order, or rulemaking, and provide applicants adequate notice of those decisions as required by law.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed for inclusion in the above-referenced dockets and sent to attendees. Please direct any questions regarding this filing to me.

Respectfully submitted,

*/s/ Gina Spade*

Gina Spade  
Counsel for ENA

cc: Claude Aiken  
Chuck Cagle, Counsel for the Sweetwater Consortium

## Sweetwater TN Consortium Issues

July 2016

Issue: USAC has denied E-rate funding for 45 school districts (Sweetwater Consortium) for the past four funding years (2012 through 2015).

- Total amount at issue is approximately **\$60 million**.
- The school districts will have to lay off teachers, cancel programs, and cancel technology initiatives to pay for past-due broadband bills in the absence of federal funding.

### Application Denials (FYs 2013, 2014 and 2015)

- In 2013, the Sweetwater Consortium schools released their own RFP to bid for broadband services. A panel of three respected educators spent nine hours in an exhaustive review of the bids before awarding a contract to ENA.
- USAC denied the applications and subsequent appeals, which were appealed to the FCC in May.
- Approximately \$49 million was denied in the funding requests.
- USAC claimed two reasons for the denials:
  - USAC alleges that the schools did not select the most cost-effective services. What USAC really means is that the Consortium did not select the cheapest provider, which is not required by E-rate rules.
    - To the contrary, the Consortium used price as a primary factor and met all other E-rate requirements in the competitive bidding process.
    - The schools have an economic incentive to choose the most cost-effective services. Schools pay between 70 percent and 10 percent of the cost; most schools pay 20 percent.
    - Because of the “fine print” in AT&T’s bid, ENA actually offered a lower price than its competitor.
    - The school district could not have changed to a different provider at the end of the competitive bidding process. To do so, would have been a violation of E-rate rules.
    - If the Commission wants to require changes to the competitive bidding process, it should change its rules – prospectively.
  - USAC alleges that the schools did not have a contract when they applied for funding.
    - The schools had a contract under Tennessee law. The service provider offered its services with its bid response and the Consortium accepted the offer when it awarded the bid.
    - The districts and ENA have performed pursuant to this contract. The districts have ordered services, which ENA has provided, since 2013.

**Bottom line: E-rate program goals were met; E-rate eligible services were delivered to eligible schools; schools got the best deal.**

First Denial (FY 2012)

- In 2012, the school districts joined an existing consortium contract that had been competitively bid by another group of schools in Tennessee the previous year.
- USAC provided written guidance assuring these schools that they could use the competitive bidding process used by the other group of schools.
- After these districts had relied upon USAC's written guidance, USAC reversed its position and denied their funding requests (approximately \$12 million).
- Following FCC staff advice, the Consortium members filed a waiver with WCB in 2013. Three years later, WCB has not acted upon the waiver request.

# Sample Bid Evaluation Matrix

Hover over each paragraph on the right to see the area of the bid evaluation matrix with which it corresponds.

FACTOR	POINTS AVAILABLE	VENDOR 1	VENDOR 2	VENDOR 3
Price of the eligible products and services	30*	15	30	25
Prior experience with the vendor	20	20	0	20
Prices for ineligible services, products, and fees	25	20	15	25
Flexible invoicing: FCC Form 472 or FCC Form 474	15	0	15	15
Local or in-state vendor	10	10	8	7
<b>TOTAL</b>	<b>100</b>	<b>65</b>	<b>68</b>	<b>92</b>

\*This number must be higher than all other numbers in the same column.

## List of Disqualified Bidders:

### Vendor 1

Reason for disqualification: All interested bidders received two weeks' notice of a required pre-bid conference. Vendor 1 did not attend this conference and did not provide a reason for their absence.

## Important things to note about this sample:

The price of the eligible products and services must be the most heavily weighted factor. This means that it must have the highest number of "Points Available."

Vendors are rated on how well they meet each factor. Point values for all factors are totaled for each vendor.

In this sample, Vendor 3, with a total of **92** points, is the winning bid because that vendor has the highest total points.

If a bidder is disqualified, the reason for disqualification should be noted for that vendor (see the "List of Disqualified Bidders" below the matrix).