

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

In the Matter of )
Request for Review and/or Waiver of a Decision of ) File No. SLD-161033938
the Universal Service Administrator by Farmington )
Municipal School District 5 )
Schools and Libraries Universal Service Support ) CC Docket No. 02-6
Mechanism )

ORDER

Adopted: September 28, 2018

Released: September 28, 2018

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

I. INTRODUCTION

1. In this Order, we address a request for review and/or waiver filed by Farmington Municipal School District 5 (Farmington) regarding the Universal Service Administrative Company's (USAC) decision denying Farmington's funding year 2016 funding request for special construction of a self-provisioned network under the E-Rate program (more formally known as the schools and libraries universal service support program).1 Based on our review of the record before us, we find that Farmington complied with the Commission's cost-effectiveness rule; thus, we grant Farmington's request and reverse USAC's decision denying its funding year 2016 funding request.

II. BACKGROUND

A. E-Rate Rules

2. Under the E-Rate program, eligible schools, libraries, and consortia (comprised of eligible schools and libraries) may request universal service discounts for eligible services, including connections necessary to support broadband connectivity to eligible schools and libraries.2 Commission rules require schools, libraries and consortia to seek competitive bids for all services eligible for E-Rate support by posting an FCC Form 470 on USAC's website requesting bids for E-Rate eligible services.3 In evaluating bids received for E-Rate supported services, applicants must select the most cost-effective service offering,4 with the price of E-Rate eligible services being the single most heavily weighted factor in determining cost-effectiveness.5 Other relevant factors, such as prior experience, personnel

1 See Letter from Charles Thacker, Executive Director of Technology, Farmington Municipal Schools, to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed May 30, 2017) (Request for Review and/or Waiver).

2 See 47 CFR § 54.501-02.

3 47 CFR § 54.503.

4 47 CFR § 54.511(a).

5 Id.

qualifications, management capability, and environmental objectives may also be considered.<sup>6</sup> After selecting the most cost-effective service offering, applicants may then file an FCC Form 471 to request E-Rate support.<sup>7</sup>

3. In 2014, the Commission expanded the high-speed broadband options available to applicants by equalizing the treatment of leased lit fiber and leased dark fiber under the E-Rate program rules,<sup>8</sup> and making self-provisioned networks eligible for E-Rate support when they are the most cost-effective option for an applicant's connectivity needs.<sup>9</sup> In so doing, the Commission established certain safeguards to ensure that cost-effectiveness remains the benchmark principle of E-Rate-supported purchases and that E-Rate discounts are not used to purchase unnecessary services.<sup>10</sup> Consistent with the Commission's cost-effectiveness rule, applicants may receive E-Rate support for special construction charges<sup>11</sup> only when special construction is the most cost-effective way to deliver the applicant's needed connectivity.<sup>12</sup> Applicants considering bids with special construction charges must evaluate cost-effectiveness based on the total cost of ownership over the expected useful life of the facility,<sup>13</sup> which includes all costs associated with constructing and maintaining the network such as special construction charges, equipment charges, maintenance charges, and charges to transmit data over the network. The pre-discount cost of the service, not the cost to the applicant after the E-Rate discount is applied, must be the basis for the cost-effectiveness analysis.<sup>14</sup>

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<sup>6</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (*Universal Service First Report and Order*).

<sup>7</sup> See 47 CFR § 54.504(a).

<sup>8</sup> See *Modernizing the E-rate Program for Schools and Libraries, Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15552, para. 36 (2014) (*2014 Second E-Rate Order*).

<sup>9</sup> A "self-provisioned network" is a network that an eligible school or library hires a vendor to construct, and thereafter owns and maintains. See *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, para. 43; *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, 32 FCC Rcd 1189, 1193, para. 9, n.35 (WCB 2017) (*FY 2017 ESL Waiver Order*). When an eligible school or library self-provisions a network, it "owns a full network or fiber run, including all the fiber strands and conduit." *2014 Second E-Rate Order*, 29 FCC Rcd at 15550, para. 31, n.49. Consistent with the Commission's mandate that the E-Rate program be competitively neutral with respect to service providers and technology, a self-provisioned network may be constructed using transport technology other than fiber, such as fixed microwave. See 47 USC § 254(h)(2)(A) (requiring the Commission's rules for the E-Rate program to be competitively neutral); *Universal Service First Report and Order*, 12 FCC Rcd at 8801, para. 46 (adopting a principle of competitive neutrality that requires the E-Rate program and its rules to "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another") (subsequent history omitted); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking, 23 FCC Rcd 11703, 11707, para. 12 (2008) (noting that the policy of competitive neutrality supports allowing E-Rate discounts for interconnected Voice over Internet Protocol as an eligible voice service along with other technologies).

<sup>10</sup> *2014 Second E-Rate Order*, 29 FCC Rcd at 15552-53, 15557-58, paras. 38-39, 47-49.

<sup>11</sup> For purposes of the E-Rate program, special construction charges are the one-time, upfront costs of deploying new or upgraded fiber to eligible school and library locations. See *FY 2017 ESL*, 31 FCC Rcd at 9775. The components of special construction costs eligible for E-Rate discounts are construction of network facilities, design and engineering, and project management. *Id.*

<sup>12</sup> See, e.g., *2014 Second E-Rate Order*, 29 FCC Rcd at 15553, 15556, paras. 39, 44.

<sup>13</sup> *Id.* at 15537, para. 48.

<sup>14</sup> See *id.* at 15601, para. 159 ("Indeed our rules require that entities use the actual, i.e. pre-discount, cost of the service offered as a baseline for comparison, not the cost after the E-rate discount is applied.").

**B. Farmington's Funding Year 2016 Funding Request and Appeal**

4. On March 9, 2016, Farmington posted an FCC Form 470 to USAC's website seeking bids on leased lit fiber, leased dark fiber, and a self-provisioned network based on the district's connectivity needs.<sup>15</sup> Farmington received bids from several service providers, including one from Network Cabling, Inc. (NCI) for special construction of a self-provisioned network and one from Lightstream for leased dark fiber with special construction.<sup>16</sup> Farmington evaluated the bids, assigning price of the total cost of ownership of eligible services as the primary factor. Farmington determined that the total cost of ownership over a 20-year period for the NCI bid was \$1,454,785. The total cost of ownership for the Lightstream bid over the same period was \$1,303,400. Farmington assigned 10 points (the maximum possible points assigned to price) to Lightstream and nine points to NCI.<sup>17</sup> Farmington also considered other factors in its determination of the most cost-effective service offering, including ability to adhere to the rollout timeframe, supporting requirements in the RFP, proposed contract terms, service reliability, offering turn-key solution, scalability, and references.<sup>18</sup> Farmington determined that the NCI bid was the most cost-effective service offering and it filed a funding year 2016 FCC Form 471 requesting funding for the NCI service offering. Farmington's funding request included a request for state match funding provided by the State of New Mexico Public School Capital Outlay Council.<sup>19</sup>

5. During USAC's review of Farmington's funding request, USAC requested an explanation of Farmington's cost-effectiveness analysis. Farmington explained that it evaluated costs using the total cost of ownership.<sup>20</sup> In addition, Farmington mentioned that it would save more under the NCI bid than under the Lightstream bid even though the total cost of ownership on a pre-discount basis was slightly more under the NCI bid than under the Lightstream bid because a greater proportion of NCI's bid was for special construction, which is eligible for state match funding.<sup>21</sup>

6. On June 30, 2017, USAC denied Farmington's application, finding that it did not select the most cost-effective service offering because it considered the cost to the district rather than the total cost of ownership over the expected useful life of the facility on a pre-discount basis.<sup>22</sup> As support for its finding, USAC stated that the applicant impermissibly considered the availability of state match funding in its cost-effectiveness analysis, which USAC interpreted as indicating that the district evaluated the bids based on costs to the district.

7. Farmington appealed the denial of its application to USAC on July 26, 2017, which

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<sup>15</sup> FCC Form 470 Application No. 160033866, Farmington Municipal School District 5 (certified Mar. 9, 2016).

<sup>16</sup> Our analysis is limited to the bids from NCI and Lightstream because they were the winning bid and the lowest-cost bid.

<sup>17</sup> See Letter from Charles Thacker, Executive Director of Technology, Farmington, to USAC PIA Review (dated May 23, 2016), at 4 (May 23, 2016 Letter).

<sup>18</sup> See *id.*

<sup>19</sup> The Commission's rules provide additional funding to match state funding for certain special construction funding requests that meet the Commission's long-term capacity targets for the E-Rate program. 47 CFR § 54.505(f). An applicant's discount rate for special construction can be increased up to an additional 10 percent to match state funding (or, for Tribal applicants, funding from states, Tribal governments, or other federal agencies) on a one dollar-to-one dollar basis. See 47 CFR § 54.505(f); see also *2014 Second E-Rate Order*, 29 FCC Rcd at 15560-62, paras. 56-58. This match funding is available only for special construction funding requests. See *2014 Second E-Rate Order*, 29 FCC Rcd at 15561, para. 58.

<sup>20</sup> See May 23, 2016 Letter at 9.

<sup>21</sup> See *id.* at 9 (“[NCI's bid for self-provisioned fiber] provides a cost savings [for the district] of \$29,880 over 20 years.”).

<sup>22</sup> Notification from USAC to Farmington Municipal School District 5 (dated June 30, 2017).

USAC denied on February 7, 2018 on the same basis as its original denial of Farmington's application. Farmington then filed the instant Request for Review and/or Waiver to the Commission on April 9, 2018.<sup>23</sup> In its request, Farmington argues that its cost-effectiveness analysis was based on the total cost of the build. Farmington contends that the fact that it mentioned its post-discount costs in its explanation to USAC does not mean that it based its winning bid selection on its post-discount costs.<sup>24</sup> It also noted that the E-Rate program rules do not require applicants to select the lowest-cost service.<sup>25</sup>

### III. DISCUSSION

8. Based on our review of the record before us, which includes Farmington's bid evaluation documentation, we find that Farmington complied with the Commission's rule requiring selection of the most cost-effective service offering.

9. We conclude that Farmington properly considered the pre-discount total cost of ownership over the expected useful life of the facility when evaluating the bids. Specifically, the documentation Farmington provided to support its selection of NCI as the most cost-effective service offering, and the context within which Farmington later made statements regarding its post-discount costs, show that it based its cost-effectiveness analysis on the total cost of ownership over the expected useful life of the facility on a pre-discount basis as the Commission's rules require, and not on its post-discount costs as USAC concluded. Farmington's later mention of the post-discount costs it would incur under the service options it was considering does not establish that those costs formed the basis of its cost-effectiveness analysis. In the same letter in which it comments that its post-discount costs would be lower under NCI's bid, Farmington also clearly states that its cost consideration was based on the total cost of providing service on a pre-discount basis.<sup>26</sup> Further, despite the fact that its post-discount costs would be lower under NCI's bid, Farmington assigned more points in the price category of its bid evaluation matrix to Lightstream's bid than to NCI's bid.<sup>27</sup> Had Farmington indeed based its cost-effectiveness analysis on the post-discount costs it would incur, it seems that the reverse outcome would be more likely – namely, Farmington would have awarded more points in the price category to NCI's bid than to Lightstream's.<sup>28</sup>

10. In the absence of any other findings in the record by USAC that Farmington's funding year 2016 funding request does not comply with E-Rate program rules, we conclude that a grant of Farmington's funding request is warranted. To permit Farmington sufficient time to complete construction and submit invoices for E-Rate supported services, we also waive the applicable special

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<sup>23</sup> Request for Review and/or Waiver.

<sup>24</sup> *Id.* at 8-11.

<sup>25</sup> *Id.* at 11-13.

<sup>26</sup> See May 23, 2016 Letter at 6 (“[T]he evaluation of cost-effectiveness can be made over the useful life of the facility based on total cost of ownership, which inherently includes the costs to all stakeholders.”); *id.* at 8 (“While we recognize that USAC is looking to maximize savings to the Universal Service Fund, although this is not clearly identified as a criteria for identifying the most cost-effective solution, it cannot be ignored that cost savings to the district and the state are also important.”).

<sup>27</sup> Farmington assigned 10 points (the maximum possible) for Lightstream's bid and nine points for NCI's bid. See May 23, 2016 Letter at 4.

<sup>28</sup> Applicants are not required to select the lowest-priced offering. See *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5423-30, para. 192 (1997) (“Schools and libraries are not required to select the lowest bids offered, although the Commission stated that price should be the ‘primary factor.’”); *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, CC Docket No. 02-6, 14 FCC Rcd 13734, 13739, para. 9 (1999) (“Even among bids for comparable services, however, this does not mean that the lowest bid must be selected.”).

construction delivery deadline until June 30, 2019.<sup>29</sup> We direct USAC to waive any other procedural deadlines that were missed while this issue was on appeal with the Commission.

#### IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, 54.511(a) and 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, 54.511(a) and 54.722(a), that the Request for Review filed by Farmington Municipal School District 5 on April 9, 2018 IS GRANTED and the underlying application IS REMANDED to USAC for further action in accordance with the terms of this order.

12. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, that the requirement to build and use a self-provisioned network within the applicable funding year, as set forth in paragraph 49 of the *2014 Second E-rate Order*, 29 FCC Rcd at 15558, para. 49, IS WAIVED to the extent described above.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>29</sup> See *2014 Second E-Rate Order*, 29 FCC Rcd at 15558, para. 49. We also waive sections 54.514(a) of the Commission's rules and direct USAC to waive any procedural deadline that might be necessary to effectuate our ruling. See 47 CFR § 54.514(a).