

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

In the Matter of)	
)	
Request for Review of)	
Decisions of the)	
Universal Service Administrator by)	
)	
Consortio de Escuelas y Bibliotecas)	
de Puerto Rico)	File Nos. 327608, <i>et al.</i>
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: January 8, 2013

Released: January 8, 2013

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

I. INTRODUCTION

1. In this order, we grant a consolidated appeal filed by Consortio de Escuelas y Bibliotecas de Puerto Rico (Consortio) on behalf of 52 schools and libraries (collectively, the applicants) seeking review of decisions by the Universal Service Administrative Company (USAC) denying funding under the E-rate program (more formally known as the schools and libraries universal service support program) for funding year 2002.¹ USAC found that 32 of the applicants violated the Commission's competitive bidding rules by seeking E-rate support for services pursuant to a contract that included a right-of-first-refusal provision.² USAC also found that some of the applicants violated the Commission's rules concerning the use of equipment, eligibility of services, and the availability of funding.³ Upon review of the record, we find that right-of-first-refusal provisions violate the Commission's competitive bidding requirements, but that a limited waiver of the relevant competitive bidding rules is warranted in this

¹ The school and library applicants and the relevant application numbers are identified in Appendices A-C. In this order, we use the term “appeals” to generally refer to requests for waiver and requests for review of decisions issued by USAC. Section 54.719(c) of the Commission’s rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

² See Letter from USAC, Schools and Libraries Division, to Jose Rodriguez, Hispanic Information and Telecommunications Network, Inc., at Ex. A (dated Nov. 24, 2003) (Funding Commitment Decision Letter (FCDL)); Letter from Ramsey L. Woodworth and Michelle A. McClure, Counsel to Consortio de Escuelas y Bibliotecas de Puerto Rico, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6 (filed Jan. 23, 2004) (Request for Review). See also Appendix A (identifying as Petitioner Group A those Consortio members whose applications were denied because of perceived competitive bidding violations).

³ See Request for Review; Appendix B (identifying as Petitioner Group B those Consortio members whose applications were denied because of improper use of equipment); Appendix C (identifying as Petitioner Group C those Consortio members whose applications were denied because of issues concerning eligibility of services or availability of funding); 47 C.F.R. §§ 54.502, 54.503, 54.505, 54.507, 54.511 (2012). See also 47 C.F.R. §§ 54.504, 54.505, 54.507, 54.511, 54.517 (2002). In its Request for Review, Consortio asked that the Commission also address an earlier appeal filed by three of the Petitioners in Group C. See Request for Review at 11. Because the legal issues are the same as the other applications identified in Group C, we agree that it makes sense to resolve that appeal through this order, and have therefore included those applications among those listed in Appendix C.

instance given the circumstances presented.⁴ With respect to USAC's findings concerning the use of equipment, eligibility of services, and the availability of funding, we find that USAC improperly denied the applicants' requests for support, and we remand the underlying applications to USAC for further consideration.

II. BACKGROUND

2. *E-rate Program Rules and Requirements.* Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.⁵ The Commission's rules provide that an eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support.⁶ Specifically, applicants must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services, such as tariffed telecommunications services, month-to-month Internet access, or any services for which the applicant is seeking a new contract.⁷ Applicants must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁸ Applicants must provide this description on their FCC Forms 470 or indicate on the form that they have a request for proposal (RFP) available providing detail about the requested services.⁹ The RFP must be available to all potential bidders for the duration of the bidding process.¹⁰ A service provider participating in the competitive bidding process cannot be involved in the preparation of the entity's FCC Form 470.¹¹

3. After submitting an FCC Form 470, applicants must wait 28 days before making commitments with the selected service providers.¹² An applicant must carefully consider all submitted

⁴ See 47 C.F.R. §§ 54.503, 54.511 (2012). See also 47 C.F.R. §§ 54.504, 54.511 (2002). In this order, we describe the requirements of the E-rate program as they currently exist, but because the order involves applications from 2002, and the Commission has re-organized the E-rate rules since then, where the Commission's rules have changed, we also cite to the relevant rule as it existed in 2002.

⁵ 47 C.F.R. §§ 54.501-502 (2012). See also 47 C.F.R. §§ 54.501-54.502 (2002).

⁶ 47 C.F.R. §§ 54.503 (2012). See also 47 C.F.R. § 54.504 (2002). The Commission's rules provide an exception to the competitive bidding requirement for existing, binding contracts signed on or before July 10, 1997. See 47 C.F.R. § 54.511(c) (2002). A contract signed after July 10, 1997, but before the date on which the universal service competitive bidding system became operational, is exempt from the competitive bidding requirements only with respect to services that are provided under such contract between January 1, 1998 and December 31, 1998. *Id.* Thus, the exemption from the competitive bidding requirements does not apply to Consorcio applications submitted in funding year 2002.

⁷ 47 C.F.R. § 54.503 (2012). See also 47 C.F.R. § 54.504 (2002).

⁸ See *Federal-State Joint Board on Universal Service*, CC Docket No.96-45, Report and Order, 12 FCC Rcd 8776, 9078-79, para. 575 (1997) (*Universal Service First Report and Order*) (subsequent history omitted); 47 C.F.R. § 54.503 (2012). See also 47 C.F.R. § 54.504 (2002).

⁹ See, e.g., *Schools and Libraries Universal Service, Description of Services Requested and Certification Form*, OMB 3060-0806 (September 1999) (FCC Form 470); *Schools and Libraries Universal Service, Description of Services Requested and Certification Form*, OMB 3060-0806 (October 2004) (current FCC Form 470).

¹⁰ See FCC Form 470.

¹¹ See *Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033 (2000) (*Mastermind Order*).

¹² 47 C.F.R. § 54.503 (2012). See also 47 C.F.R. § 54.504 (2002). See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Approach Learning and Assessment Center, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 15510 (2008) (*Approach Learning Order*).

bids prior to entering into a contract, and price must be the primary factor in selecting the winning bid.¹³ Once an applicant has selected a provider and entered into a service contract, the applicant must file an FCC Form 471 requesting support for eligible services.¹⁴ USAC assigns a funding request number (FRN) to each request for discounted services and issues funding commitment decision letters (FCDLs) approving or denying the requests for discounted services.¹⁵

4. Applicants may obtain discounts on Internet access and internal connections irrespective of whether they purchase those offerings from telecommunications or non-telecommunications carriers.¹⁶ To receive E-rate discounts on “telecommunications services,” however, applicants must purchase those services from entities that are “telecommunications carriers.”¹⁷ In order to be considered a “telecommunications carrier” eligible to receive E-rate support for the provision of “telecommunications services,” a provider must “offer telecommunications on a common carrier basis.”¹⁸ The Commission has articulated a two-part test to determine whether an entity is offering telecommunications on a common carrier basis: first, whether the provider holds itself out “to serve indifferently all potential users” and, second, whether the provider “allows customers to transmit intelligence of their own design and choosing.”¹⁹

5. E-rate Program’s Discount Mechanism. In accordance with the Commission’s rules, the discount available to a particular applicant is determined by the level of economic disadvantage based on indicators of poverty and high cost.²⁰ The level of poverty for schools and school districts is measured by the percentage of student enrollment that is eligible for a free or reduced price lunch under the National School Lunch Program (NSLP) or a federally-approved alternative mechanism, such as a survey.²¹ Libraries’ discount percentages are based on the public school district in which they are physically located.²² A school’s discount level status is derived from rules that classify it as urban or rural.²³ The rules provide a matrix reflecting both a school’s urban or rural status and the percentage of its students

¹³ 47 C.F.R. § 54.503 (2012). See also 47 C.F.R. § 54.504 (2002).

¹⁴ See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (current FCC Form 471).

¹⁵ See USAC website, Schools and Libraries, Application Review, available at <http://www.universalservice.org/sl/applicants/step05/> (last visited Dec. 13, 2012).

¹⁶ See 47 C.F.R. §§ 54.501, 54.502 (2012). See also 47 C.F.R. §§ 54.501, 54.503, 54.517 (2002).

¹⁷ See 47 U.S.C. § 254(h)(1)(B); *Universal Service First Report and Order*, 12 FCC Rcd at 9177-78, 9005-23, 9084-90, paras. 589-600; *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5413-14, paras. 163-164 (1997) (*Universal Service Fourth Reconsideration Order*). Applicants may receive E-rate support if they use non-telecommunications providers for the provision of voice mail, Internet access, and installation and maintenance of internal connections, but not for the provision of telecommunications services. See 47 C.F.R. § 54.502 (2012). See also 47 C.F.R. § 54.517 (2002).

¹⁸ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, 16 FCC Rcd 571, 572, para. 2 (2000) (*Iowa Communications Network (ICN) Order on Remand*).

¹⁹ *Id.* at para. 5.

²⁰ See 47 C.F.R. § 54.505(b) (2012). See also 47 C.F.R. § 54.505(b) (2002).

²¹ See 47 C.F.R. § 54.505(b) (2012). See also 47 C.F.R. § 54.505(b) (2002).

²² See 47 C.F.R. § 54.505(b) (2012). See also 47 C.F.R. § 54.505(b) (2002).

²³ See 47 C.F.R. § 54.505(b)(3)(i), (ii) (2012). See also 47 C.F.R. § 54.505(b)(3)(i), (ii) (2002). USAC’s website provides a table of rural areas by state. See USAC website, Schools and Libraries, Urban/Rural Status, available at <http://www.usac.org/sl/applicants/step04/urban-rural.aspx> (last visited Dec. 13, 2012).

eligible for the school lunch program to establish a school's discount rate, ranging from 20 percent to 90 percent, to be applied to eligible services.²⁴ The United States Department of Agriculture (USDA) has created an exception for Puerto Rico and the U.S. Virgin Islands regarding the reporting of NSLP data.²⁵ In accordance with a USDA survey of the private schools within Puerto Rico, USAC considered such schools in funding year 2002 to qualify for the 80 percent discount, unless the schools requested a different discount percentage.²⁶

6. As part of the application process, schools and libraries are required to provide information that establishes their appropriate discount rate.²⁷ Pursuant to its operating procedures, USAC performs a program integrity assurance (PIA) review to verify information contained in each application.²⁸ During this process, USAC may ask for additional documentation to support the statements made on the application. For example, USAC routinely requests that applicants provide documentation supporting their assertions regarding their student bodies' eligibility for the NSLP or alternative methods permitted by the rules governing the discount calculation.²⁹ If USAC finds during PIA review that the applicant does not have the supporting documentation to justify its discount rate, then USAC will lower the discount rate requested by the applicant and approve the discount rate based on the supporting documentation available.

²⁴ See 47 C.F.R. § 54.505(c) (2012). See also 47 C.F.R. § 54.505(c) (2002).

²⁵ Because Puerto Rico and the U.S. Virgin Islands "provide free meals or milk to all children in schools under their jurisdiction, regardless of the economic need of the child's family, they are not required to make individual eligibility determinations or publicly announce eligibility criteria." 7 C.F.R. § 245.4. The rule permits Puerto Rico and the U.S. Virgin Islands to conduct a statistical survey to determine the number of students eligible for free or reduced price meals under the NSLP. In accordance with this rule, a different percentage is calculated for public and private schools. *Id.*

²⁶ See Letter from Robert J. Freiler, United States Department of Agriculture, Food and Nutrition Service, to Cesar Ray Hernandez, Department of Education Puerto Rico (dated Feb. 14, 2001). The letter established that the statistical survey results for private schools in Puerto Rico showed that 30.42% of students qualified for free lunch and 21.88% qualified for reduced lunch in FY 2002. This resulted in 52.3% of students qualifying for free or reduced price lunch in funding year 2002. Thus, based upon the Commission's discount matrix, the private school discount for the territory of Puerto Rico was 80 percent in funding year 2002. See 47 C.F.R. § 54.505(c) (2012). See also 47 C.F.R. § 54.505(c) (2002) (providing that, if the percentage of students eligible for the national school lunch program is between 50 and 74 percent, whether urban or rural, the eligible discount level is 80 percent).

²⁷ Block 4 of the FCC Form 471 application asks the school to provide information regarding the school's status such as whether the applicant is rural or urban, the number of students enrolled in the school, the number of students eligible for the NSLP, and the discount rate. See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2010) (FCC Form 471). Schools choosing not to use an actual count of students eligible for the NSLP may use only the federally-approved alternative mechanisms contained in the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (Pub. L. No. 107-110). This rule states, in relevant part, that private schools without access to the same poverty data that public schools use to count children from low-income families may use comparable data "(1) [c]ollected through alternative means such as a survey" or "(2) [f]rom existing sources such as AFDC [Aid to Families with Dependent Children] or tuition scholarship programs." See 34 C.F.R. § 200.78(a)(2). Schools using a federally approved alternative mechanism may use participation in other income-assistance programs, such as Medicaid, food stamps, or Supplementary Security Income (SSI), to determine the number of students that would be eligible for the NSLP. See Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form (FCC Form 471), OMB 3060-0806, at 12-13 (October 2010) (Form 471 Instructions).

²⁸ See USAC website, Schools and Libraries, Application Review, available at <http://www.universalservice.org/sl/applicants/step05/default.aspx> (last visited Dec. 13, 2012).

²⁹ See 47 C.F.R. § 54.505(b)(1), (2) (2012). See also 47 C.F.R. § 54.505(b)(1), (2) (2002).

7. E-rate program funding is based on demand up to an annual Commission-established cap of approximately \$2.3 billion.³⁰ E-rate funds are allocated according to rules of priority, with first priority provided to requests for telecommunications services and Internet access (priority 1 services).³¹ The remaining available funds are allocated to requests for support for internal connections and basic maintenance of internal connections (priority 2 services).³² Requests for priority 2 services are allocated first to applicants whose applications are eligible for 90 percent discount levels, then to those eligible for 89 percent discount levels, and so on, until the available funds are exhausted.³³

8. *Consortio's Request for Review.* The applicants are members of Consortio, a consortium of schools and libraries in Puerto Rico.³⁴ On January 29, 1998, Consortio entered into a master services agreement (Agreement) with Hispanic Information and Telecommunications Network, Inc. (HITN) pursuant to which the applicants were to obtain telecommunications services, Internet access, and internal connections.³⁵ On November 24, 2003, USAC denied the applicants' funding year 2002 applications for several reasons.³⁶ First, USAC determined that by purchasing services from HITN pursuant to the Agreement, 32 applicants violated the Commission's competitive bidding requirements.³⁷ Second, USAC found that, in some instances, the applicants did not use the requested services or products in accordance with program rules.³⁸ Third, USAC found that, for some applicants, funding was not available for internal connections at the requested discount level.³⁹ In its request for review, Consortio argues that USAC erred in denying the applicants' funding requests.⁴⁰

III. DISCUSSION

9. In this order, we grant one consolidated appeal of decisions denying 49 applications seeking E-rate funding based on competitive bidding violations, improper use of equipment, and failure to qualify for funding for internal connections due to the discount rate. We also waive, to the extent set forth herein, sections 54.504 and 54.511 of the Commission's competitive bidding requirements.⁴¹ We

³⁰ See *Universal Service First Report and Order*, 12 FCC Rcd at 9054-55, paras. 529-31. Starting in 2011, the Commission began to adjust the \$2.3 billion annual cap for inflation. See *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan For Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762 (2010).

³¹ See 47 C.F.R. § 54.507(g) (2012). See also 47 C.F.R. § 54.507(g) (2002).

³² See 47 C.F.R. § 54.507(g) (2012). See also 47 C.F.R. § 54.507(g) (2002).

³³ See 47 C.F.R. § 54.507(g) (2012). See also 47 C.F.R. § 54.507(g) (2002).

³⁴ See Request for Review.

³⁵ *Id.* at 4. The Agreement was for a five-year term. *Id.*

³⁶ See FCDL.

³⁷ See FCDL (for specific funding request numbers (FRNs) involving competitive bidding violations).

³⁸ See FCDL, Ex. A at 11, 16, 21, 26, 36, 41, 46, 51, 56, 61, 66, 71, 76, 81, 96, 101, 106, 112, 117, 122, 127, 132, 147, 157, 162, 172, 183, 188, 198, 203, 208, 213, 218, 223, 233, 243, and 248 (concerning FRNs 879917, 887499, 887617, 887647, 887992, 888174, 888183, 888209, 888241, 888261, 888350, 888361, 888461, 888526, 888846, 888979, 888438, 888454, 889550, 889625, 889715, 889781, 889807, 889859, 890097, 890116, 890397, 890426, 890662, 890726, 890901, 890911, 890930, 890950, 890975, 891158, 892964, 898093, 900039).

³⁹ See FCDL, Ex. A at 90, 92, 176, 178, 192, 193, 194, 227, 228, 229, and 237 (concerning FRNs 890453, 890455, 893387, 891578, 891579, 891580, 888698, 8886960, 890882, 890883, and 890884).

⁴⁰ Request for Review at 3, 12-13.

⁴¹ See 47 C.F.R. §§ 54.503, 54.511 (2012). See also 47 C.F.R. §§ 54.504, 54.511 (2002).

remand these applications to USAC and make no finding as to the ultimate eligibility of the services or the petitioner's applications.⁴² We consider the three groups of funding requests separately below.

10. *Competitive Bidding Issues.* Consorcio challenges USAC's decision to deny 32 applications on the ground that the Agreement gave HITN a right of first refusal in violation of the Commission's competitive bidding rules (hereinafter referred to as Petitioner Group A). Specifically, USAC found that Section 3 of the Agreement harms competition because it contains a right-of-first-refusal provision that compromises the selection of vendors.⁴³ Section 3 provides, in pertinent part:

In the event that USF competitive bidding requirements necessitate at any time during the Term of the Agreement it is subject to competitive bidding, [Consorcio] and the Schools and Libraries agree that if the Agreement does not result in the lowest bid price for Services similar to those provided for under the Agreement, HITN has a right of first refusal to offer a bid lower than the lowest price bid, which [Consorcio] and the Schools and Libraries agree they will accept.⁴⁴

11. In its appeal, Consorcio argues that the right-of-first-refusal provision does not violate the Commission's competitive bidding rules, but rather provides a balance between its objective to obtain the lowest price for its members with the service provider's reasonable expectation to provide continuing services over the term of the five-year Agreement.⁴⁵ Consorcio explains that the service provider retained the ability to continue to provide services for the agreed term, but only if it was prepared to meet a lower bid received in response to the FCC Forms 470 that are posted in each funding year.⁴⁶ Consorcio states that it is illogical to penalize applicants that desire the benefit of a long-term service agreement with the additional potential for an annual cost adjustment downward, if the service provider matches any lower bid received from another party.⁴⁷ Consorcio further argues that the existence of the provision is not known to other bidders until the competitive bidding process is completed.⁴⁸ Thus, Consorcio argues that the provision comes into play after the bid evaluation and selection process has been completed, if at all.⁴⁹ According to Consorcio, HITN has never exercised its right of first refusal, as no other entities demonstrated an interest in servicing Consorcio members during the first five years of the program.⁵⁰

⁴² Additionally, nothing in this order is intended: (1) to authorize or require payment of any claim that previously may have been released by a service provider or applicant, including in a civil settlement or plea agreement with the United States; or (2) to authorize or require payment to any person or entity that has been debarred from participation in the E-rate program.

⁴³ FCDL, Ex. A.

⁴⁴ Request for Review at 4, Ex. B.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* According to Consorcio, all services under the contract were subjected to the FCC Form 470 competitive bidding process in every program year to ensure that Consorcio members obtained the lowest price for the services each year. *Id.* at 4-5. We note that the Commission's rules do not require applicants to post a new FCC Form 470 every funding year if they have a multi-year contract that was initiated by a competitive bidding process. See USAC website, Schools and Libraries, Selecting Service Providers, available at <http://www.usac.org/sl/applicants/step03/contracts.aspx> (last visited Dec. 13, 2012).

⁴⁷ Request for Review at 6-7.

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 5-6.

⁵⁰ See Letter from Adrienne E. Arnold, RJGLaw, LLC, on behalf of Hispanic Information and Telecommunications Network, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-6, at 5 (dated Dec. 23, 2004) (Dec. 24, 2004 *Ex Parte*).

12. A fair and open competitive bidding process is fundamental to the integrity of the E-rate program.⁵¹ As the Commission has observed, competitive bidding is vital to limiting waste and assisting schools and libraries in receiving the best value for their limited funds.⁵² Because of the importance of the competitive bidding process to the program, the Commission has consistently required that all bidders be treated equally, and that no bidders receive an unfair advantage.⁵³ By their very nature, right-of-first-refusal provisions give the holder of the right of first refusal an unfair advantage in the bidding process by enabling it to wait until all of the bids have been submitted to match the lowest bid. None of the other potential bidders have the same opportunity. We recognize that in commercial contexts, right-of-first-refusal provisions may be widely accepted and frequently incorporated in many types of contracts involving the purchase, sale, or lease of assets, goods, or services, especially where there are long-standing relationships between customers and suppliers. These provisions benefit suppliers by giving them the opportunity to match the lowest price that their customer can get elsewhere. They also benefit customers, by providing a ceiling, but not necessarily a floor, for the price of the product or service the customer wants to purchase. But such provisions are not appropriate for contracts between service providers and applicants seeking funding under the E-rate program where fair and open competitive bidding is required. These provisions create an uneven playing field among prospective service providers and can deter entities from submitting bids on eligible products or services thus undermining the competitive bidding process. Potential bidders who know or suspect the existence of a right of first refusal could reasonably decide not to expend time and resources to enter into the bidding process knowing that their bids will be undercut by the entity holding the right of first refusal. Therefore, we conclude that these provisions distort the competitive bidding process required under the Commission's E-rate rules and make it difficult to determine whether the applicant has obtained the lowest price for the eligible products or services.⁵⁴

13. As HITN notes, USAC approved other Consorcio requests in previous funding years that relied on service provider agreements containing such provisions.⁵⁵ The fact that USAC did not deny those requests, however, does not limit our discretion and obligation to evaluate in this case whether right-of-first-refusal provisions harm the competitive bidding process. We now conclude that these provisions undermine the competitive bidding process and violate sections 54.504 and 54.511 of the Commission's rules.⁵⁶ Notwithstanding this finding, we decline to penalize Consorcio. As Consorcio argued, having a contract with HITN that included a specific price for telecommunications, Internet access and internal connections, coupled with a right of first refusal should another provider offer a lower

⁵¹ See *Universal Service First Report and Order*, 12 FCC Rcd 8776, 9076-80, paras. 570-80 (requiring applicants to conduct a fair and open competitive bidding process when seeking support for eligible products and services); *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Report and Order and Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5425-26, para. 185 (1997) (*Schools and Libraries Fourth Order on Reconsideration*) (stating that competitive bidding is a key component of the Commission's effort to ensure that universal service funds support services that satisfy the precise needs of an institution, and that the services are provided at the lowest possible rates).

⁵² *Universal Service First Report and Order*, 12 FCC Rcd 8776, 9076, para. 480. See also *Schools and Libraries Fourth Order on Reconsideration*, 13 FCC Rcd 5318, 5425-26, para. 185.

⁵³ See, e.g., *Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 26912, 26939, para. 66 (2003) (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources).

⁵⁴ *Id.* We note further that such right-of-first-refusal provisions may also be in conflict with state and local competitive bidding requirements.

⁵⁵ See Dec. 24, 2004 *Ex Parte*.

⁵⁶ See 47 C.F.R. § 54.503, 54.511 (2012). See also 47 C.F.R. §§ 54.504, 54.511 (2002).

price, gave Consorcio's members certainty about the maximum price they would have to pay for those services, while also giving them the opportunity to pay an even lower price (and therefore seek less E-rate support) should another provider decide to offer Consorcio the same services at a lower price.⁵⁷ Therefore, Consorcio may have reasonably believed that such provisions were permissible. Furthermore, in this case, the record reveals that the right-of-first-refusal provision would not have been known to other bidders until the competitive bidding process was completed, and that HITN was the only bidder during the funding years at issue. Thus, the right-of-first-refusal-provision was not exercised nor is there reason to believe that its existence actually deterred bidders in this specific instance. Given these circumstances, we find that a limited waiver of the Commission's competitive bidding rules is in the public interest.⁵⁸ Moreover, in the record at this time, we find no other improper behavior on the part of the applicants or HITN during the bidding process. Thus, rejecting Petitioner Group A's funding requests is not warranted in this instance. We therefore waive the Commission's competitive bidding rules with regard to Petitioner Group A's FRNs that were previously denied because their contract contained a right-of-first-refusal provision and remand these FRNs to USAC for further consideration.⁵⁹ Given our finding that right-of-first-refusal provisions violate the E-rate competitive bidding rules, we expect Consorcio to ensure that such provisions are removed from any existing agreements and, not included in, any future E-rate service provider agreements.⁶⁰

14. *Use of Equipment.* Consorcio challenges USAC's decision to deny several of the applicants' funding requests on the ground that the service or product requested is not being used in accordance with program rules (hereafter referred to as Petitioner Group B).⁶¹ In their funding year 2002 applications, each member of Petitioner Group B applied for funding for internal connections.⁶² Specifically, the applicants requested three coaxial cable connections to be used for distance learning.⁶³

15. On November 24, 2003, USAC denied Petitioner Group B's funding requests for the coaxial cable connections, stating that the service or product requested was not being used in accordance with program rules.⁶⁴ Specifically, USAC denied Petitioner Group B's request because it determined that the distance learning wiring was intended to support telecommunications services for distance learning

⁵⁷ See Consorcio Request for Review.

⁵⁸ The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166.

⁵⁹ See Appendix A.

⁶⁰ Moreover, we encourage Consorcio and all other applicants to obtain a legally binding determination from the Commission or seek informal guidance from USAC in the event of uncertainty about whether certain contractual approaches would be consistent with E-rate competitive bidding requirements.

⁶¹ See Request for Review at 8-9; see also Appendix B.

⁶² See, e.g., FCC Form 471, Biblioteca Municipal De Juncos (filed Jan. 17, 2002); FCC Form 471, Biblioteca Electronica Dr. Carlos Hernandez Rodrig (filed Jan. 17, 2002).

⁶³ See, e.g., FCC Form 471, Biblioteca De La Ciudad Rosa M. Sanchez (filed Jan. 17, 2002); FCC Form 471, Biblioteca Publica Coamo (filed Jan. 17, 2002).

⁶⁴ See FCDL at 5.

from a provider that was not a telecommunications carrier in funding year 2002.⁶⁵ Petitioner Group B filed the instant request for review, arguing that the coaxial cable connections were necessary to provide connections to HITN's on-premises equipment that would be installed to deliver distance-learning telecommunications services.⁶⁶

16. Upon review of the record, we find that USAC improperly denied Petitioner Group B's funding requests. Distance learning is a telecommunications service and therefore eligible for E-rate discounts only if it is provided by a telecommunications carrier.⁶⁷ While USAC initially determined that HITN was not a telecommunications carrier in funding year 2002, it later reversed its initial determination and found that HITN was, in fact, eligible to provide telecommunications in funding year 2002.⁶⁸ We therefore grant the requests for review for Petitioner Group B and remand the underlying applications to USAC with instructions to process these funding requests consistent with USAC's determination that HITN was a telecommunications carrier in funding year 2002. If USAC requires any additional information from the applicant, it shall request the information in writing and provide the applicant with a 30-day window to submit the information.

17. *Eligibility of Services and Availability of Funding.* Consorcio challenges USAC's decisions regarding the funding requests for internal connections by certain applicants (hereafter referred to as Petitioner Group C).⁶⁹ The applicants are private schools that requested a 90 percent discount rate in their funding year 2002 applications for internal connections.⁷⁰ USAC requested that Petitioner Group C provide documentation to support the requested discount rate.⁷¹ In response to USAC's request, Petitioner Group C submitted a letter explaining that the applicants were entitled to a 90 percent discount due to the eligibility of all students for free lunch in Puerto Rico.⁷² Consorcio's consultant then negotiated an extension with USAC to allow the applicants to conduct surveys to support their requested discount level.⁷³ Prior to the completion of the surveys, USAC informed Petitioner Group C that the consultant no longer represented Consorcio and gave the applicants seven days to submit survey documentation.⁷⁴ When Petitioner Group C failed to submit the surveys, USAC reduced the applicants' discount level to 80 percent because, in funding year 2002, all private schools in Puerto Rico

⁶⁵ See, e.g., USAC, Schools and Libraries Division, Exceptions and PIA Comments, Biblioteca Publica Loiza, Entries for Sept. 24, 2002 (stating that this FRN is for wiring for distance learning from an ineligible service provider; therefore, all FRNs associated with the request for distance learning from this provider are denied).

⁶⁶ Request for Review at 8-9. Petitioner Group B also argued that it was "virtually impossible to conceive of how a very basic piece of internal connection equipment like this could be used in a manner not in accordance with program rules" and that USAC provided no explanation as to how it made this determination. *Id.* at 8.

⁶⁷ See USAC website, Schools and Libraries, Funding Year 2002 Eligible Services List, available at http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_101802.pdf (last visited Dec. 13, 2012) (listing distance learning as a telecommunications service); 47 C.F.R. §§ 54.501-54.502 (2012). See also 47 C.F.R. §§ 54.501-54.503 (2002)

⁶⁸ See, e.g., Letter from USAC, Schools and Libraries Division, to Antonio Lopez, Consorcio de Escuelas y Bibliotecas de Puerto Rico, at 4-5 (dated Jun. 24, 2004)

⁶⁹ See Request for Review at 11-12; see also Appendix C.

⁷⁰ See, e.g., Request for Review at Exhibit E.

⁷¹ See, e.g., Letter from USAC, Schools and Libraries Division, to Hector Valentin, Consorcio de Escuelas y Bibliotecas de Puerto Rico (dated Aug. 17, 2002); *supra* para. 6.

⁷² See, e.g., Letter from Ramsey L. Woodworth, counsel to Consorcio de Escuelas y Bibliotecas de Puerto Rico, to USAC, Schools and Libraries Division (dated Oct. 2, 2002) (Woodworth Letter).

⁷³ See Letter from USAC, Schools and Libraries Division, to Carlos Padilla, Consorcio de Escuelas y Bibliotecas de Puerto Rico (dated Feb. 21, 2003).

⁷⁴ *Id.*

automatically qualified for a minimum 80 percent discount.⁷⁵ Because funding for internal connections in funding year 2002 was not disbursed to applicants that qualified for a discount rate below 81 percent, however, this decision effectively denied these applicants' funding request.⁷⁶ In addition, USAC denied the funding requests of two applicants in this group, Academia Alexandria and Liceo Aguadillano, on the ground that these two applicants failed to provide sufficient documentation to determine the eligibility of the services requested.⁷⁷

18. Based on our review of the record, we find that USAC improperly denied Petitioner Group C's funding requests. Consistent with precedent, we find that the seven-day notice USAC gave to the applicants was insufficient under the circumstances.⁷⁸ It appears that Petitioner Group C was relying on its consultant to handle the completion of the surveys to support the requested discount level.⁷⁹ It also appears that members of Petitioner Group C did not realize that its consultant was no longer representing them until USAC informed them of that fact.⁸⁰ Taking these factors into consideration, we believe that seven days did not provide sufficient time for Petitioner Group C to complete and submit the surveys. In addition, with regard to Academia Alexandria and Liceo Aguadillano, it does not appear from the record that USAC requested documentation to determine the eligibility of the services requested. We therefore grant the request for review for Petitioner Group C and remand the underlying applications to USAC with instructions to reconsider the claim that the applicants were entitled to a 90 percent discount rate and, in the case of Academia Alexandria and Liceo Aguadillano, that the services were eligible. Specifically, USAC must review each application and inform the applicants of any errors that are detected in their applications, and, if appropriate, provide a specific explanation of how the applicants can remedy such errors. USAC shall provide the applicants with a limited 30-day opportunity to file additional documentation, if necessary. Except that, if Petitioner Group C chooses to provide surveys to support the requested discount level, USAC shall direct the applicants to submit the completed surveys no later than 120 days from the release date of this order.

IV. ORDERING CLAUSES

19. 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

⁷⁵ See Letter from USAC, Schools and Libraries Division, to Ines O'Neill, Consorcio de Escuelas y Bibliotecas de Puerto Rico, on behalf of Colegio Catolico Notre Dame Secundario (dated Nov. 24, 2003); Letter from USAC, Schools and Libraries Division, to Ines O'Neill, Consorcio de Escuelas y Bibliotecas de Puerto Rico, on behalf of Colegio Marrimee, Inc. (dated Nov. 24, 2003); Letter from USAC, Schools and Libraries Division, to Ines O'Neill, Consorcio de Escuelas y Bibliotecas de Puerto Rico, on behalf of Colegio Presbiteriano San Sebastian (dated Nov. 24, 2003); Letter from USAC, Schools and Libraries Division, to Ines O'Neill, Consorcio de Escuelas y Bibliotecas de Puerto Rico, on behalf of Colegio San Jose (dated Nov. 24, 2003); Letter from USAC, Schools and Libraries Division, to Ines O'Neill, Consorcio de Escuelas y Bibliotecas de Puerto Rico, on behalf of Piaget Bilingual Academy of Manati, Inc. (dated Nov. 24, 2003) (collectively, Petitioner Group C FCDLs); see also *supra* para 5.

⁷⁶ Funding for priority 2 services in funding year 2002 was capped at the 81 percent discount level. See USAC website, Schools and Libraries, March 2003 Announcements, available at <http://www.sl.universalservice.org/whatsnew/2003/032003.asp#033103a> (last visited Dec. 13, 2012).

⁷⁷ See Letter from USAC, Schools and Libraries Division, to Ines O'Neill, Academia Alexandria (dated Nov. 24, 2003) (Academia FCDL); Letter from USAC, Schools and Libraries Division, to Ines O'Neill, Liceo Aguadillano, Inc. (dated Nov. 24, 2003) (Liceo FCDL).

⁷⁸ See *Request for Review of the Decision of the Universal Service Administrator by Alpaugh Unified School District, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-523576, et al., CC Docket No. 02-6, Order, 22 FCC Rcd 6035, 6037, para. 5 (2007) (granting petitioners additional time to provide information after they were unable to meet USAC's seven-day deadline for filing additional information).

⁷⁹ See Request for Review.

⁸⁰ *Id.*

0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the request for review filed by Consorcio de Escuelas y Bibliotecas de Puerto Rico, on January 24, 2004, IS GRANTED and the applications as listed in the Appendices ARE REMANDED to USAC for further consideration to the extent provided herein.

20. IT IS FURTHER ORDERED that, 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, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that sections 54.504 and 54.511 of the Commission's rules, 47 C.F.R. §§ 54.504, 54.511, ARE WAIVED to the limited extent described herein.

21. 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, that USAC SHALL COMPLETE its review of each remanded application listed in the Appendix and ISSUE an award or a denial based on a complete review and analysis no later than 150 calendar days from the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

Appendix APetitioner Group A – Competitive Bidding

Applicant	City	Application Number
Biblioteca Municipal de Juncos, Jose M. Gallado	Juncos, PR	327616
Biblioteca Electronica, Dr. Carlos Hernandez Rodrig	Carolina, PR	329122
Biblioteca Publica Aguada	Aguada, PR	329147
Biblioteca de la Ciudad, Rosa M. Sanchez	San Juan, PR	329153
Biblioteca Publica Coamo, Julio Rivera Bermudez	Coamo, PR	329245
Biblioteca Publica Gurabo, Jose Emilio Gonzales	Gurabo, PR	329315
Biblioteca Publica Loiza	Loiza, PR	329318
Biblioteca Municipal Mayagüez, El Mani	Mayagüez, PR	329323
Biblioteca Publica Ceiba, Alejandrina Quiñónez	Ceiba, PR	329330
Biblioteca Publica Hatillo	Hatillo, PR	329336
Biblioteca Publica Humacao, Antonia A. Roig	Humacao, PR	329357
Biblioteca Publica Maunabo, Rafael Rodriguez Gonza	Maunabo, PR	329361
Biblioteca Publica Rio Grande	Rio Grande, PR	329400
Biblioteca Publica Javana, Nemesio R. Canals	Javana, PR	329404
Biblioteca Publica Sabana Grande, Augusto Malaret	Sabana Grande, PR	329491
Biblioteca Publica Lajas, La Parguera	Lajas, PR	329519
Biblioteca Municipal Caguas, Dr. Pedro Alivios Campo	Caguas, PR	329584

Applicant	City	Application Number
Biblioteca Publica Santa Isabel, Pedro M. Alomar	Santa Isabel, PR	329590
Biblioteca Municipal de Cayey	Cayey, PR	329609
Biblioteca Publica Adjuntas	Adjuntas, PR	329630
Biblioteca Publica Anasco	Anasco, PR	329656
Biblioteca Publica Municipal Computadorizada	Naranjito, PR	329675
Biblioteca Municipal de Corozal, Teofilo Maldonado	Corozal, PR	329683
Biblioteca Publica de Area Ciales	Ciales, PR	329707
Biblioteca Municipal de Mayagüez	Mayagüez, PR	329773
Biblioteca Publica Yauco	Yauco, PR	329778
Biblioteca Publica de Area Arecibo	Arecibo, PR	329863
Biblioteca Municipal Las Piedras Aurea M. Perez	Las Piedras, PR	329870
Biblioteca Publica Toa Baja	Toa Baja, PR	329928
Biblioteca Publica Pennuelas	Pennuelas, PR	329940
Biblioteca Publica Aguas Buenas	Aguas, PR	329975
Biblioteca Publica Arroyo	Arroyo, PR	329978
Biblioteca Electronica Municipa de Aibonito	Aibonito, PR	329982
Biblioteca Municipal de Hormigueros	Hormigueros, PR	329986
Biblioteca Municipal de Bayamon Pilar Barboza	Bayamon, PR	329990
Biblioteca Municipal Publica Toa Baja Jaime Fonalledas Garr	Toa Baja, PR	330045
Biblioteca Publica Villalba	Villalba, PR	330454

Applicant	City	Application Number
Biblioteca Publica Salinas, Clemencia Philemon Vida	Salinas, PR	331495
Biblioteca Publica Guayanilla	Guayanilla, PR	331546
Colegio Catolico Notre Dame Secundario	Caguas, PR	329881
Colegio Marrimee, Inc.	Guaynabo, PR	330580
Colegio Presbiteriano San Sebastián	San Sebastián, PR	330178
Colegio San Jose	Lares, PR	329454
Piaget Bilingual Academy of Manati, Inc.	Manati, PR	329967
Biblioteca Municipal Rincón, Luis Murioz Marin	Rincón, PR	327608
Biblioteca Publica Camuy, Barrio Quebrada	Camuy, PR	329226
Academia Alexandra	Ponce, PR	329415
Liceo Aguadillano, Inc.	Aguadilla, PR	329700
Biblioteca Publica Isabela, Candido Bernal	Isabela, PR	329741

Appendix BPetitioner Group B – Use of Equipment

Applicant	City	Application Number
Biblioteca Municipal de Juncos, Jose M. Gallado	Juncos, PR	327616
Biblioteca Electronica, Dr. Carlos Hernandez Rodrig	Carolina, PR	329122
Biblioteca Publica Aguada	Aguada, PR	329147
Biblioteca de la Ciudad, Rosa M. Sanchez	San Juan, PR	329153
Biblioteca Publica Coamo, Julio Rivera Bermudez	Coamo, PR	329245
Biblioteca Publica Gurabo, Jose Emilio Gonzales	Gurabo, PR	329315
Biblioteca Publica Loiza	Loiza, PR	329318
Biblioteca Municipal Mayagüez, El Mani	Mayagüez, PR	329323
Biblioteca Publica Ceiba, Alejandrina Quiñónez	Ceiba, PR	329330
Biblioteca Publica Hatillo	Hatillo, PR	329336
Biblioteca Publica Humacao, Antonia A. Roig	Humacao, PR	329357
Biblioteca Publica Maunabo, Rafael Rodriguez Gonza	Maunabo, PR	329361
Biblioteca Publica Rio Grande	Rio Grande, PR	329400
Biblioteca Publica Javana, Nemesio R. Canallas	Javana, PR	329404
Biblioteca Publica Sabana Grande, Augusto Malaret	Sabana Grande, PR	329491
Biblioteca Publica Lajas, La Parguera	Lajas, PR	329519
Biblioteca Municipal Caguas, Dr. Pedro Alivios Campo	Caguas, PR	329584

Applicant	City	Application Number
Biblioteca Publica Santa Isabel, Pedro M. Alomar	Santa Isabel, PR	329590
Biblioteca Municipal de Cayey	Cayey, PR	329609
Biblioteca Publica Adjuntas	Adjuntas, PR	329630
Biblioteca Publica Anasco	Anasco, PR	329656
Biblioteca Publica Municipal Computadorizada	Naranjito, PR	329675
Biblioteca Municipal de Corozal, Teofilo Maldonado	Corozal, PR	329683
Biblioteca Publica de Area Ciales	Ciales, PR	329707
Biblioteca Municipal de Mayagüez	Mayagüez, PR	329773
Biblioteca Publica Yauco	Yauco, PR	329778
Biblioteca Publica de Area Arecibo	Arecibo, PR	329863
Biblioteca Municipal Las Piedras Aurea M. Perez	Las Piedras, PR	329870
Biblioteca Publica Toa Baja	Toa Baja, PR	329928
Biblioteca Publica Penuelas	Penuelas, PR	329940
Biblioteca Publica Aguas Buenas	Aguas Buenas, PR	329975
Biblioteca Publica Arroyo	Arroyo, PR	329978
Biblioteca Electronica Municipa de Aibonito	Aibonito, PR	329982
Biblioteca Municipal de Hormigueros	Hormigueros, PR	329986
Biblioteca Municipal de Bayamon Pilar Barboza	Bayamon, PR	329990
Biblioteca Municipal Publica Toa Baja Jaime Fonalledas Garr	Toa Baja, PR	330045

Applicant	City	Application Number
Biblioteca Publica Villalba	Villalba, PR	330454
Biblioteca Publica Salinas, Clemencia Philemon Vida	Salina, PR	331495
Biblioteca Publica Guayanilla	Guayanilla, PR	331546

Appendix CPetitioner Group C – Eligibility of Services and Availability of Funding

Applicant	City	Application Number
Academia Alexandra	Ponce, PR	329415
Colegio Catolico Notre Dame Secundario	Caguas, PR	329881
Colegio Marrimee, Inc.	Guaynabo, PR	330580
Colegio Presbiteriano San Sebastián	San Sebastián, PR	330178
Colegio San Antonio	Isabela, PR	329300
Colegio San Jose	Lares, PR	329454
Colegio San Tomas Alva Edison	Caguas, PR	329371
Escuela Evangelica Unida de Fajardo	Fajardo, PR	329287
Liceo Agudillano, Inc.	Agudilla, PR	329700
Piaget Bilingual Academy of Manati, Inc.	Manati, PR	329967