

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of a Decision of the
Universal Service Administrator by
Billings School District 2
Billings, Montana
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-525485
CC Docket No. 02-6

ORDER

Adopted: May 4, 2012

Released: May 4, 2012

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

1. Consistent with precedent, we grant a request by Billings School District 2 (Billings) seeking review of a decision made by the Universal Service Administrative Company (USAC) under the E-rate program (more formally known as the schools and libraries universal service support program). We find that USAC's decision to deny funding was based on a misunderstanding of Billings' request for digital transmission telecommunications services and associated fiber installation charges and remand the application for further processing.

2. Schools and libraries may use universal service funds to lease telecommunications services provided by wide area networks (WANs) and to fund equipment and infrastructure build-out associated

1 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, 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 (1997) (Fourth Order on Reconsideration); 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 Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734 (Tennessee Order) (1999); Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., File No. SLD-149423, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 18598 (Brooklyn Order); Requests for Review of Decisions of the Universal Service Administrator by Adams County Public Library, et al, File Nos. SLD-234818, et al, CC Docket No. 02-6, 23 FCC Rcd 15486 (Wireline Comp. Bur. 2008) (Adams County Order).

2 Letter from Richard Larson, Consultant, Billings School District 2, to Office of the Secretary, Federal Communications Commission (dated May 14, 2007) (Request for Review). Section 54.719(c) of our 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).

with the provision of such services.³ By contrast, schools and libraries are not permitted to build or purchase WANs using E-rate support.⁴ The Commission has found that some leasing arrangements for WAN services are in effect purchase agreements that grant the lessee *de facto* ownership status.⁵ The Commission concluded that relevant indicia for determining whether an applicant has actually purchased a WAN include what services are provided over the WAN, whether there are exclusivity or lease purchase arrangements, and the structure of the contract (*e.g.* whether there is a substantial payment for upfront capital costs).⁶ For instance, if the telecommunications service will be provided by a service provider other than the provider installing the WAN, this may give the appearance that the applicant is building the WAN instead of leasing it.⁷ None of these factors alone is determinative, but each must be considered in light of the facts presented.⁸

3. In this case, Billings sought E-rate support in funding year 2006 for digital transmission services from Bresnan Communications, LLC (Bresnan). Specifically, it sought support to lease fiber optic WAN telecommunications services for \$17,500 per month and for a \$300,000 non-recurring charge to cover installation of fiber between school buildings.⁹ USAC denied the request, finding that Billings sought E-rate support for ineligible WAN construction costs, based on USAC's erroneous belief that Bresnan would not be providing telecommunications services in connection with the WAN.¹⁰

³ *Fourth Order on Reconsideration*, 13 FCC Rcd at 5431, para. 193 n.585 (finding that although schools and libraries are not permitted to build or purchase WANs to use E-rate support, they are permitted to lease telecommunications services provided by a WAN because such an arrangement constitutes a telecommunications service); *Tennessee Order*, 14 FCC Rcd at 13749, para. 29 (recognizing that all service providers include within their customer rates some amount of the cost of building the facilities used to provide such services to customers and that universal service funds may be used to fund equipment and infrastructure build-out associated with the provision of eligible services to eligible schools and libraries); *Brooklyn Order*, 15 FCC Rcd at 18604, para. 12 (reaffirming the principle that universal service funds may be used to fund equipment and infrastructure build-out associated with the provision of eligible services to schools and libraries).

⁴ 47 C.F.R. § 54.518. *See Fourth Reconsideration Order*, 13 FCC Rcd at 5430-5431.

⁵ *Tennessee Order*, 14 FCC Rcd at 13750, para. 31.

⁶ *Id.*

⁷ *Id.* at 13747-13752, paras. 26-33.

⁸ *Id.* at 13750, para. 31.

⁹ *See Billings School District 2*, FCC Form 471, dated Feb. 14, 2006 (Billings FCC Form 471).

¹⁰ During program integrity assurance review (PIA), USAC asked Billings for the names of its telephone service provider and Internet service provider. Letter from Christopher Pelesky, USAC, to Karen Palmer, Billings School District, dated Sept. 13, 2006 (asking "[s]ince the request is for Telco service, and Bresnan is providing the WAN, please provide the name of your Telephone Service Provider" and "[s]ince the request is for a private data network, please provide the name of your Internet Service Provider"). Billings provided the names of its existing telephone service provider and Internet access service provider and did not reference the services to be provided by Bresnan. Letter from Karen Palmer, Billings School District, to Christopher Pelesky, USAC, dated Sept. 18, 2006. USAC took that to mean that Bresnan would not be providing services in connection with the WAN. *See* Letter from Schools and Libraries Division, Universal Service Administrative Company, to Karen Palmer, Billings School District 2, dated Oct. 3, 2006; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Steven Tenzer, eRate Consulting Services, Administrator's Decision on Appeal – Funding Year 2006-2007, dated Mar. 13, 2007 (Administrator's Decision Letter); PIA Review, Product/Service Eligibility Request, Comments, dated Sept. 21, 2006. After an E-rate applicant files an FCC Form 471 and the associated Item 21 attachment(s) within the filing window, PIA reviewers at USAC check the form for completeness and accuracy and

4. Based on our review of the record, we find that USAC's basis for denying funding for the leased WAN services was incorrect. Bresnan was providing digital transmission service over the WAN to Billings,¹¹ and digital transmission service was eligible for funding in 2006 as telecommunications services.¹² Therefore, contrary to USAC's finding, Bresnan was providing both the fiber installation for the WAN and the leased eligible telecommunications services to be provided by the WAN. We therefore grant the Request for Review. At this time, there is no evidence of waste, fraud or abuse in the record.

5. On remand, we direct USAC to process and grant E-rate support for Billings' funding year 2006 request for leased digital transmission telecommunications services and associated fiber installation from Bresnan. We also direct USAC to accept Billings' documentation asking for its funding request to be reduced by the amount of ineligible charges for service to ineligible locations.¹³ USAC should also reduce the funding request by the amount of any other ineligible charges. For example, to the extent a portion of the non-recurring charge for installation of fiber between school buildings included installation between school buildings on the same property – *i.e.* it did not cross a public right of way – that portion of the charge is ineligible as priority one telecommunications services and should be cost allocated from Billings' funding request.¹⁴ Also, in its Request for Review, Billings asserts that it answered one of the PIA review questions incorrectly, but that it later corrected its response.¹⁵ Although the record does not demonstrate that USAC relied on this incorrect answer as a basis to deny funding, consistent with precedent, we direct USAC to accept the stated correction on remand and work with Billings as it evaluates any remaining questions about this application.¹⁶

6. On our own motion, we also waive section 54.507(d) of the Commission's rules and any USAC procedural deadlines, such as the invoicing deadline, that might be necessary to effectuate our

may have questions related to eligible services, eligible entities, discount calculations, etc. See USAC website, Step 5 - Application Review, <http://www.usac.org/sl/applicants/step05/>, last visited Apr. 26, 2012.

¹¹ See Billings FCC Form 471, Item 21 Attachment, Funding Request Number 1448250.

¹² See USAC website, Eligible Services List, Schools and Libraries Support Mechanism for Fund Year 2006, http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList_041206.pdf, at 6, last visited, Apr. 24, 2012 (defining "digital transmission services" as data links that connect multiple points, using any available technology and stating that leased data circuits for voice, video, and/or data that connect an eligible school or library facility to other locations beyond the school or library are eligible for discount; adding that digital transmission services used to link local networks are commonly called WANs) (2006 ESL).

¹³ Letter from Steven Tenzer, eRate Consulting Services, LLC, to Schools and Libraries Division, USAC, dated Dec. 1, 2006, at 2.

¹⁴ 2006 ESL at 71.

¹⁵ See Request for Review at 5 (stating that Billings misunderstood the question based on the *Tennessee Order* and answered the question incorrectly).

¹⁶ See *Adams County Order*, 23 FCC Rcd at 15491 (granting appeals in cases where petitioners asserted that they made mistakes when answering PIA questions or that USAC misunderstood the type of services requested, and stating that denial of funding without providing the applicants an opportunity to correct their mistakes would inflict undue hardship, would not further the purposes of section 254(h) of the Communications Act or serve the public interest). In its appeal to USAC, Billings also stated that Bresnan had incorrectly referred to one of the services it was to provide as "plant construction." See Letter of Appeal from Steven Tenzer, eRate Consulting Services, LLC, to Schools and Libraries Division, USAC, dated Dec. 1, 2006, at 2. Although the record does not demonstrate that USAC used Bresnan's incorrect characterization of its services as a basis to deny funding, we direct USAC to accept Billing's correction of Bresnan's terminology in the record.

ruling.¹⁷ We find good cause to waive section 54.507(d) because filing an appeal of a denial of funding is likely to cause a petitioner to miss the program's subsequent procedural deadlines in that funding year. We therefore remand the underlying application to USAC for further action consistent with this order. To ensure that the underlying application is resolved expeditiously, we direct USAC to complete its review and issue an award or a denial based on a complete review and analysis no later than 90 calendar days from the release date of this order. In remanding this application to USAC, we make no finding as to the ultimate eligibility of the services or the petitioner's application.

7. 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, 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 Billings School District 2, Billings, Montana, IS GRANTED and the underlying application is REMANDED consistent with the terms of this order.

8. 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, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, that 54.500 *et seq.* of the Commission's rules, 47 C.F.R. § 54.500 *et seq.*, ARE WAIVED for the Billings School District 2, Billings, Montana, to the limited extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Trent Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

¹⁷ See 47 C.F.R. § 54.507(d).