

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Application for Review of a)
Decision of the)
Wireline Competition Bureau by)
Dooly County School System) File Nos. SLD-482677, 531942
Vienna, Georgia)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: June 5, 2013

Released: June 10, 2013

By the Commission:

1. In this order, we deny in part and dismiss in part an Application for Review filed by Dooly County School System (Dooly County)1 of that portion of the Wireline Competition Bureau’s (Bureau) Al-Ihsan Academy Order affirming a decision of the Universal Service Administrative Company (USAC) rescinding funding commitments to Dooly County under the E-rate program (more formally known as the schools and libraries universal service support program) for funding years 2005 and 2006.2 USAC found that Dooly County violated the Commission’s competitive bidding rules by failing to make available its request for proposals (RFP) for the entire 28-day period after the FCC Forms 470 referencing those RFPs were posted to USAC’s website.3 Upon review of the record, the Bureau affirmed USAC’s decision and therefore denied Dooly County’s appeal of USAC’s recovery actions.4 For the reasons discussed below, we deny in part and dismiss in part Dooly County’s Application for Review. We also take this opportunity to rescind the remaining interim filing procedures established by the Commission in the 2001 Interim Filing Procedures Order.5

1 See Application for Review of a Decision of the Wireline Competition Bureau by Dooly County School System, CC Docket No. 02-6 (filed Jan. 10, 2012) (Dooly County Application for Review).

2 See Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Al-Ihsan Academy et al.; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 26 FCC Rcd 16415 (Wireline Comp. Bur. 2011) (Al-Ihsan Academy Order). 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).

3 See Al-Ihsan Academy Order; 47 C.F.R. § 54.503(c) (requiring an entity “to wait at least four weeks from the date on which its description of services is posted on the Administrator’s website before making commitments with the selected providers of services”).

4 See Al-Ihsan Academy Order.

5 See Implementation of Interim Filing Procedures for Filings of Requests for Review; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, 17 FCC Rcd 339 (2001) (Interim Filing Procedures Order); see also infra paras. 7-8.

2. *Background.* Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible services.⁶ 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.⁷ 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.⁸ Applicants must describe the requested services with sufficient specificity to enable potential service providers to submit bids for such services.⁹ Applicants must provide this description on their FCC Forms 470 or indicate on the form that they have an RFP available providing detail about the requested services.¹⁰ The RFP must be available to all potential bidders for the duration of the bidding process.¹¹ After submitting an FCC Form 470, the applicant must wait at least 28 days after the date that the FCC Form 470 is posted and the date the RFP is issued, whichever is later, before closing the competitive bidding process and making commitments with the selected service providers.¹² Once an applicant has selected a provider and entered into a service contract, the applicant must file an FCC Form 471 application requesting support for eligible services.¹³

3. In the *Al-Ihsan Academy Order*, the Bureau upheld USAC's determination that Dooly County violated the Commission's competitive bidding rules by failing to make available its RFPs for the entire 28-day period after the FCC Forms 470 referencing those RFPs were posted to USAC's website.¹⁴ Upon release of the Bureau's *Al-Ihsan Academy Order*, Dooly County submitted a request to the Bureau to hold in abeyance the relevant demand payment letters issued by USAC and subsequently filed the instant Application for Review with the Commission.¹⁵ The Bureau dismissed Dooly County's request to hold the demand letters in abeyance because the request provided no basis for holding the demand letters in abeyance, and Dooly County had not filed a timely petition for reconsideration that satisfied the requirements of section 1.106(d) of the Commission's rules.¹⁶

⁶ 47 C.F.R. §§ 54.501-502 (2005); *see also* 47 C.F.R. §§ 54.501-502 (2012).

⁷ 47 C.F.R. § 54.504 (2005); *see also* 47 C.F.R. § 54.503 (2012).

⁸ *Id.*

⁹ *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).

¹⁰ *See, e.g.*, Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (October 2004) (FCC Form 470).

¹¹ *See id.*

¹² 47 C.F.R. § 54.504(b)(4) (2005); *see also* 47 C.F.R. § 54.503(c) (2012); USAC, Schools and Libraries, Competitive Bidding, available at <http://www.usac.org/sl/applicants/step02/default.aspx> (last visited June 6, 2013).

¹³ *See* Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (FCC Form 471).

¹⁴ *See Al-Ihsan Academy Order.*

¹⁵ *See* Letter from C. Scott Nutgrass, President, Universal Funding Consultants, Inc., on behalf of Dooly County School System, to the Office of the Secretary, Federal Communications Commission (filed Jan. 6, 2012) (Dooly County Request for Review); Dooly County Application for Review.

¹⁶ *See* Dooly County Request for Review; 47 C.F.R. § 1.106(d). The Bureau has authority to act on petitions requesting reconsideration of final actions taken pursuant to delegated authority. 47 C.F.R. § 1.106(a)(1).

4. *Denial.* In its Application for Review, Dooly County reiterates its previous argument that, although vendor responses to the RFP were due prior to the 28-day period, in each case, Dooly County entered into a contract for the supported services after the allowable contract date.¹⁷ We find this argument unpersuasive. As the Bureau found in the *Al-Ihsan Academy Order*, while Dooly County posted its FCC Forms 470 for funding years 2005 and 2006 for the entire 28-day period, Dooly County's RFPs specified a precise time when bids were due that was more than a few days before the allowable contract date.¹⁸ Thus, consistent with precedent, Dooly County's bid submission dates ended the competitive bidding processes too soon before the end of the required 28-day period, in violation of the Commission's competitive bidding procedures.¹⁹ We therefore deny in part Dooly County's Application for Review with respect to its argument previously raised with and denied by the Bureau.

5. *Dismissal.* In its Application for Review, Dooly County also raises new arguments that it did not previously raise either as part of its initial request for review or its request to the Bureau to hold in abeyance the demand payment letters. Specifically, Dooly County now argues that there is no Commission rule or precedent requiring applicants to make available an RFP for 28 days.²⁰ Dooly County argues that the Bureau cannot rely on language in the Commission's *Aberdeen Order* because this order was not issued until 2007, which was more than a year after Dooly County had completed its funding year 2006 competitive bidding process.²¹ Further, Dooly County argues that neither the *Aberdeen Order* nor the *Ysleta Order* explicitly requires that the 28-day posting periods for an FCC Form 470 and an RFP coincide.²² Dooly County also argues that the Bureau failed to establish the factual elements necessary to support a finding of a violation because both Dooly County's RFPs for funding years 2005 and 2006 were undated, containing only the response dates for the bids, and therefore there is no factual record to determine whether Dooly County's RFPs were available for 28 days.²³ Dooly County also argues for the first time that a waiver of the Commission's rules is appropriate and in the public interest due to its economic challenges and because there is no claim of any adverse impact on Dooly County's competitive bidding processes.²⁴ The Commission's rules specify that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been

¹⁷ See Dooly County Application for Review at 10; Dooly County Request for Review at 2-3. The allowable contract date is the earliest date that an applicant can sign a contract for E-rate supported services. The allowable contract date is always the later of 28 days from the posting of the FCC Form 470 or 28 days from the public availability of the related RFP if one is issued. See USAC, Schools and Libraries, Acronyms and Terms, available at <http://www.usac.org/sl/> (last visited June 6, 2013).

¹⁸ See *Al-Ihsan Academy Order*, 26 FCC Rcd at 16418, para. 9 n.31.

¹⁹ See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District et al.; 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, 97-21, Order, 18 FCC Rcd 26407, 26424, para. 39 (2003) (clarifying that applicants with RFPs that provide more detailed solicitations for bidders than the FCC Form 470 must indicate on their FCC Forms 470 that they have released or will release an RFP, and that the RFP must be available for 28 days); 47 C.F.R. § 54.504(b)(4) (2005); see also 47 C.F.R. § 54.503(c) (2012).

²⁰ See Dooly County Application for Review at 11-12.

²¹ See *id.* at 12; *Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 22 FCC Rcd 8757, 8758-59, para. 4 (2007) (requiring an applicant to wait 28 days after the FCC Form 470 is posted to the USAC website or public availability of an applicant's RFP, whichever is later, before entering into an agreement with a service provider for the requested services).

²² See Dooly County Application for Review at 12-13.

²³ *Id.* at 13-14.

²⁴ *Id.* at 14-17.

afforded no opportunity to pass.”²⁵ We therefore conclude that, because Dooly County did not afford the Bureau an opportunity to address these arguments raised in its Application for Review, we will not consider those arguments at this stage of the process.²⁶

6. *Waiver Request.* As noted above, Dooly County also requests, in the alternative, a waiver of the Commission’s competitive bidding rules.²⁷ As an alternative and independent basis for rejecting Dooly County’s request for waiver of the Commission’s rules via dismissal of its Application for Review, we deny the request on the merits.²⁸ As the Commission has observed, a fair and open competitive bidding process is fundamental to the integrity of the E-rate program.²⁹ Competitive bidding is vital to limiting waste and assisting schools and libraries in receiving the best value for their limited funds.³⁰ 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.³¹ We find that Dooly County has not provided special circumstances justifying a waiver of the Commission’s rules and has not otherwise demonstrated that such waiver will serve the public interest. Economic challenges alone do not outweigh the Commission’s responsibility to ensure that all bidders receive the same opportunity to provide schools and libraries with services under the E-rate program. We therefore also deny, on the merits, Dooly County’s request, in the alternative, for waiver of the Commission’s competitive bidding rules. We thus direct USAC to continue its recovery actions in the instant matter.

7. *Rescission of Interim Filing Procedures.* As codified in the Code of Federal Regulations, the Commission’s rules state that “the application for review and any [supplement] thereto shall be filed within 30 days of public notice of such action.”³² Dooly County’s Application for Review was filed on

²⁵ 47 C.F.R. § 1.115(c). The note to section 1.115(c) states that “new questions of fact or law may be presented to the designated authority in a petition for reconsideration.” 47 C.F.R. § 1.115(c).

²⁶ *Id.*

²⁷ *See supra* para. 5.

²⁸ *See* Dooly County Application for Review at 14-17. Generally, the Commission’s rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule 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, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

²⁹ *See Universal Service First Report and Order*, 12 FCC Rcd at 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).

³⁰ *Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 480; *see also Schools and Libraries Fourth Order on Reconsideration*, 13 FCC Rcd at 5425-26, para. 185.

³¹ *See, e.g., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 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).

³² 47 C.F.R. § 1.115(d).

January 10, 2012, which was more than 30 days after public notice of the Bureau's *Al-Ihsan Academy Order*, which was released on December 5, 2011.³³ Therefore, in its Application for Review, Dooly County also seeks a waiver of the application for review filing deadline, if needed.³⁴ As an initial matter, however, Dooly County argues that a waiver of the deadline for filing an application for review is unnecessary because the current deadline for filing an application for review arising from USAC-related proceedings is 60 days from public notice of such action as established in the Commission's December 2001 *Interim Filing Procedures Order*, and not 30 days as provided in the Code of Federal Regulations.³⁵ Because we dismiss in part Dooly County's Application for Review on the basis that Dooly County did not afford the Bureau an opportunity to address the arguments raised in its Application for Review, and deny it in part with respect to its argument previously raised with and denied by the Bureau, and because Dooly County did not demonstrate good cause exists warranting a waiver of the Commission's rules, we need not address the question of whether Dooly County's filing was timely.³⁶

8. However, to provide clarity and certainty as to the filing deadline for applications for review arising from USAC-related proceedings, we take this opportunity to rescind the interim emergency filing procedures for applications for review arising from USAC-related proceedings established by the Commission the *Interim Filing Procedures Order*.³⁷ In the *Interim Filing Procedures Order*, due to emergency events in Washington, D.C. arising from the September 11, 2001 terrorist attacks, the Commission amended its procedural rules "on an emergency, interim basis . . . to extend the period of filing a request for review, or applications for review arising from [USAC-related] proceedings, from the current 30 day period to 60 days, to provide applicants with the option of electronic filing (via either electronic mail or facsimile) for requests for review and petitions for reconsideration or applications for review that arise from such pleadings." until further notice.³⁸ Subsequently, in April 2003, the Commission released the *Schools and Libraries Second Report and Order*, which permanently extended the deadline for filing initial appeals with USAC or the Commission to 60 days.³⁹ The *Schools and Libraries Second Report and Order* did not, however, address the extended filing period for applications for review. Subsequently, the Commission rescinded all other emergency filing procedures adopted in late 2001 with the exception of the emergency filing procedures established in the *Interim Filing Procedures Order*.⁴⁰ By this Order, we therefore rescind the interim filing procedures established by the Commission in the *Interim Filing Procedures Order*.⁴¹ As stated by the Commission in the *Interim Filing Procedures Rescission Order*, mail delivery in the Washington, D.C. area has greatly improved since

³³ See *Al-Ihsan Academy Order*.

³⁴ See Dooly County Application for Review at 5-10.

³⁵ See *id.*; *Interim Filing Procedures Order*; 47 C.F.R. § 1.115(d).

³⁶ See *supra* paras. 4, 5, and 6.

³⁷ See *Interim Filing Procedures Order*.

³⁸ *Id.*, 17 FCC Rcd at 339-40, paras. 1, 3. These procedures were not codified in the Commission's rules. See generally *Interim Filing Procedures Order*.

³⁹ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, 9221, para. 56 (2003) (*Schools and Libraries Second Report and Order*). The Commission noted that the filing period for petitions for reconsideration was still 30 days, because the period for filing petitions for review is set in the Act and cannot be altered by regulations. *Id.* at n.105; 47 U.S.C. § 405(a).

⁴⁰ See generally *Implementation of Interim Electronic Filing Procedures for Certain Commission Filings*, Order, 22 FCC Rcd 11381 (2007) (*Interim Filing Procedures Rescission Order*).

⁴¹ See *Interim Filing Procedures Order*.

2001 and the United States Postal Service has greatly reduced the delay in processing mail.⁴² Also, the Commission has since 2001 expanded its electronic filing capabilities, and implemented its own processes to combat the threat of contamination of incoming mail.⁴³ Given these circumstances, we conclude that the interim electronic filing procedures adopted by the Commission in 2001 are no longer necessary.⁴⁴ Accordingly, we rescind those procedures, effective 30 days after publication of this Order in the Federal Register. Thereafter, filings of applications for review arising from USAC-related proceedings will no longer be accepted by facsimile or e-mail and will be due within 30 days from public notice of such action, as provided in the Commission's rules.⁴⁵ Once these clarifications take effect, the Bureau will issue a Public Notice announcing their effectiveness and explaining the correct procedures.

9. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed by Dooly County School System, Vienna, Georgia, on January 10, 2012, IS DENIED IN PART and IS DISMISSED IN PART.

10. IT IS FURTHER ORDERED, pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the request for waiver filed by Dooly County School System, Vienna, Georgia, on January 10, 2012, IS DISMISSED, and as an alternative and independent basis for the decision, IS DENIED on the merits.

11. IT IS FURTHER ORDERED that, pursuant to the authority of section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the interim electronic filing procedures adopted in the *Interim Filing Procedures Order*, FCC 01-376, ARE RESCINDED.

12. IT IS FURTHER ORDERED that the rescission of the interim electronic filing procedures adopted in the *Interim Filing Procedures Order* shall become effective 30 days after publication of this Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴² See *Interim Filing Procedures Rescission Order*, 22 FCC Rcd at 11382, para. 3.

⁴³ *Id.*

⁴⁴ See *Interim Filing Procedures Order*.

⁴⁵ 47 C.F.R. § 1.115(d).