

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

In the Matter of )
Request for Review and/or Waiver of a Decision of ) File Nos. SLD - 161049598, 171035440
the Universal Service Administrator by )
Park Hill School District )
Kansas City, Missouri )
Schools and Libraries Universal Service Support ) CC Docket No. 02-6
Mechanism )

ORDER

Adopted: April 27, 2020

Released: April 27, 2020

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we address a request for review and/or waiver filed by Park Hill School District (Park Hill) regarding the Universal Service Administrative Company’s (USAC) decision to rescind funding for and deny Park Hill’s funding year 2016 and 2017 funding requests, respectively, for special construction of a self-provisioned network under the E-Rate program.1 Based on our review of the record, we find that Park Hill did not violate the Commission’s rules by sharing its self-provisioned network with the city of Kansas City, Missouri (Kansas City). We therefore grant Park Hill’s request and direct USAC to reinstate Park Hill’s funding year 2016 and 2017 funding requests consistent with this Order.

2. In granting Park Hill’s request for review and/or waiver, we also waive the invoice filing deadline in section 54.514(a) of the Commission’s rules and direct USAC to waive any procedural deadlines, including the special construction service delivery deadline, that might be necessary to effectuate our ruling.2 We clarify that E-Rate eligible entities may share self-provisioned networks supported by the E-Rate program with ineligible entities so long as the ineligible entities pay their fair share of the undiscounted costs associated with constructing and/or operating the network. We further clarify that E-Rate eligible entities that elect to share their self-provisioned network with an ineligible entity bear the burden of demonstrating that the cost allocation method used to determine the ineligible entity’s fair share is reasonable. As discussed below, we find that Kansas City paid its fair share of the undiscounted costs associated with Park Hill’s construction of the network and that, while Park Hill did not submit documentation demonstrating the reasonableness of the methodology used to determine Kansas City’s fair share when it submitted its funding year 2016 funding request, we find good cause to waive this requirement under the specific circumstances present here.

1 Request for Review and/or Waiver by Park Hill School District, CC Docket No. 02-6 (filed Aug. 21, 2018) (Park Hill Request for Review and/or Waiver). The E-Rate program is more formally known as the schools and libraries universal service support mechanism.

2 See, e.g., 47 CFR § 54.514(a).

## II. BACKGROUND

### A. Legal Background

3. Under the E-Rate program, eligible schools, libraries, and consortia (comprised of eligible schools and libraries) may request universal service discounts for eligible services, which includes connections necessary to support broadband connectivity to eligible schools and libraries.<sup>3</sup> 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.<sup>4</sup> When evaluating bids received for E-Rate-supported services, applicants must select the most cost-effective service offering, with the price of E-Rate eligible services being the single most heavily weighted factor in determining cost-effectiveness.<sup>5</sup> Other relevant factors, such as prior experience, personnel qualifications, management capability, and environmental objectives may also be considered.<sup>6</sup> After selecting the most cost-effective service offering, applicants may file an FCC Form 471 to request E-Rate support.<sup>7</sup> Pursuant to section 254(h)(3) of the Communications Act of 1934, as amended (the Act), and section 54.313 of the Commission's rules, E-Rate eligible services cannot be sold, resold, or transferred in consideration of money or any other thing of value.<sup>8</sup>

4. 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>9</sup> and making self-provisioned networks eligible for E-Rate support under certain limited circumstances.<sup>10</sup> In so doing, the Commission adopted certain safeguards to ensure, among other things, that cost-effectiveness remains the benchmark principle of E-Rate-supported purchases.<sup>11</sup> For example, following the model for self-construction the Commission adopted in the *2012 Healthcare Connect Order*,<sup>12</sup> the Commission determined that applicants may receive E-Rate support to construct their own or

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<sup>3</sup> See 47 CFR §§ 54.501-02.

<sup>4</sup> 47 CFR § 54.503.

<sup>5</sup> 47 CFR § 54.511(a); see, e.g., *Request for Review and/or Waiver of a Decision of the Universal Service Administrator by Farmington Municipal School District*, CC Docket No. 02-6, Order, 33 FCC Rcd 8542, 8542, para. 2 (WCB 2018).

<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).

<sup>7</sup> 47 CFR § 54.504(a).

<sup>8</sup> 47 U.S.C. § 254.(h)(3) ("Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value."); 47 CFR § 54.513(a) ("Eligible supported services provided at a discount under this subpart shall not be sold, resold, or transferred in consideration of money or any other thing of value . . .").

<sup>9</sup> The Commission equalized the treatment of leased lit fiber and leased dark fiber under the E-Rate program rules by allowing applicants to request universal service discounts for: (1) special construction charges related to leased dark fiber beyond the applicant's property line and (2) modulating electronics and other equipment necessary to light leased dark fiber. 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>10</sup> *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, para. 43.

<sup>11</sup> *Id.*

<sup>12</sup> See *id.* at 15556, para. 45 ("We follow the model the Commission adopted in the *2012 Healthcare Connect Order* here, to ensure that the Fund supports self-construction only when it is the most cost-effective option."); see also *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 27 FCC Rcd 16678, 16712-14, paras. 73-75 (2012) (*2012 Healthcare Connect Order*).

portions of their own networks only when self-construction<sup>13</sup> is demonstrated to be the most cost-effective option after competitive bidding.<sup>14</sup>

5. Similarly, as in the *2012 Healthcare Connect Order*, E-Rate applicants interested in pursuing self-construction must solicit bids for both service and construction on the same FCC Form 470 and provide sufficient detail so that cost-effectiveness can be evaluated over the useful life of the facility.<sup>15</sup> To ensure that E-Rate discounts are not used to purchase unnecessary services, the Commission further required that applicants only receive funding for self-construction if the facilities are built and used within the same funding year,<sup>16</sup> while delegating authority to the Wireline Competition Bureau (Bureau) to adopt any additional administrative requirements for self-construction that may be warranted to protect against waste, fraud, and abuse.<sup>17</sup>

## **B. Factual Background**

6. Funding year 2016 was the first year that self-provisioned networks were eligible for E-Rate support and the first year that E-Rate applicants were required to use the E-Rate Productivity Center (EPC), the web-based account and application management portal for the E-Rate program. In November 2015, Park Hill posted FCC Forms 470 and Requests for Proposal (RFPs) on USAC's website seeking bids for leased lit fiber service, leased dark fiber service, and a self-provisioned network based on the school district's connectivity needs.<sup>18</sup> At the time, Park Hill was considering the possibility of a self-provisioned network, having learned that Kansas City would potentially be interested in sharing Park Hill's facilities, and sought guidance from USAC to ensure compliance with the Commission's rules.<sup>19</sup> In response, USAC explained which aspects of a shared network would be eligible for funding, and advised Park Hill to cost allocate the costs of ineligible components.<sup>20</sup> Based on this understanding of the Commission's rules, in its RFP for a self-provisioned network, Park Hill asked bidders to provide a separate bid for the fiber strands and other ineligible network elements that Park Hill intended to install for Kansas City's use if it determined that self-provisioning was the most cost-effective solution after competitive bidding.<sup>21</sup>

7. In response to its FCC Forms 470 and RFPs, Park Hill received bids from several service providers, which included bids for special construction of a self-provisioned network and bids for services

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<sup>13</sup> In this Order, we use the terms "self-construction" and "self-provisioned" interchangeably, as we have in previous orders. See, e.g., *2014 Second E-Rate Order*, 29 FCC Rcd at 15556-57, para. 46, n.99.

<sup>14</sup> *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, 15557-58, paras. 43, 47-48.

<sup>15</sup> *Id.* at 15557-58, para. 48; see also *2012 Healthcare Connect Order*, 27 FCC Rcd at 16712-13, para. 73 (entities interested in pursuing self-construction "must solicit bids both for services and for construction, in the same Request for Proposals [RFPs] (submitted with Form 461), so that they will be able to show either that no vendor has bid to provide[] the requested services, or that the bids for self-construction were the most cost-effective option. RFPs must provide sufficient detail so that cost-effectiveness can be evaluated over the useful life of the facility.").

<sup>16</sup> *2014 Second E-Rate Order*, 29 FCC Rcd at 15558, para. 49.

<sup>17</sup> *Id.* at 15557-58, para. 48, n.101 ("In addition to the safeguards we adopt in this section, we expect that the Bureau and USAC will monitor instances of waste, fraud, and abuse, and we delegate authority to the Bureau and OMD to adopt any additional administrative requirements that may be warranted.").

<sup>18</sup> Park Hill Request for Review and/or Waiver at 5-7; see also FCC Form 470 Application No. 160005260, Park Hill School District (certified Nov. 18, 2015); Park Hill Request for Review and/or Waiver at Exhibit 2 (Park Hill FY2016 Self-Construction RFP).

<sup>19</sup> Park Hill Request for Review and/or Waiver at 4-6.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> *Id.*; Park Hill FY2016 Self-Construction RFP at 4-7.

provided over third-party networks.<sup>22</sup> Park Hill evaluated the bids, assigning price of the total cost of ownership over the useful life of the network as the primary factor,<sup>23</sup> and determined that the bid for a self-provisioned network was the most cost-effective service offering and awarded the contract for that service in January 2016.<sup>24</sup> Around the same time, Park Hill entered into a cooperative agreement with Kansas City to share a portion of each other's network facilities.<sup>25</sup> Pursuant to the agreement, Kansas City would provide Park Hill access to Kansas City's conduit, assume "locate responsibilities" to mark and locate the conduit system lines and facilities for Park Hill's network,<sup>26</sup> and provide all permits and rights of way access required for the construction of Park Hill's network in exchange for Park Hill's installation of 72 strands of fiber and a 12-strand fiber buffer tube throughout certain portions of the network for Kansas City's use.<sup>27</sup> Park Hill estimated that its partnership with Kansas City would result in total savings of up to \$430,000, and given Park Hill's 50% discount rate under the E-Rate program, would result in cost savings to the program of approximately \$215,000.<sup>28</sup>

8. On May 26, 2016, Park Hill filed its funding year 2016 FCC Form 471, requesting E-Rate funding for, among other services, the special construction costs of a self-provisioned network.<sup>29</sup> Consistent with guidance from USAC regarding shared and multi-purpose fiber build projects,<sup>30</sup> Park Hill did not request E-Rate funding on its FCC Form 471 for the facilities designated for Kansas City's use, thereby ensuring that it only requested E-Rate funding for eligible services provided to eligible entities. On March 2, 2017, USAC issued a funding commitment decision letter approving funding for Park Hill's funding year 2016 funding request.<sup>31</sup> When it submitted its funding year 2016 funding request, Park Hill did not provide USAC with documentation regarding the terms of the agreement with Kansas City, including the methodology used to allocate costs.<sup>32</sup>

9. Subsequently, on May 9, 2017, Park Hill filed a funding year 2017 FCC Form 471, requesting E-Rate funding for the special construction costs needed to connect a new high school to the existing self-provisioned network.<sup>33</sup> USAC denied the funding request on December 14, 2017, finding that Park Hill's self-provisioned network would not be exclusively owned and used by the school district

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<sup>22</sup> Park Hill Request for Review and/or Waiver at Exhibits 3-5, 7.

<sup>23</sup> See 47 CFR § 54.511(a) (requiring price to be the primary factor); *2014 Second E-Rate Order*, 29 FCC Rcd at 15557-58, para. 48 (requiring applicants seeking funding for self-provisioned networks to evaluate cost-effectiveness "based on the total cost of ownership over the useful life of the facility").

<sup>24</sup> Park Hill Request for Review and/or Waiver at Exhibits 3-5, 7.

<sup>25</sup> *Id.* at 7, Exhibit 6 (Park Hill Cooperative Agreement).

<sup>26</sup> "Locate responsibilities" include marking and locating the conduit system lines and facilities in connection with utility contractors and other third-party requests. Park Hill Cooperative Agreement at 4.

<sup>27</sup> *Id.* at 2-5.

<sup>28</sup> Park Hill Request for Review and/or Waiver at 7.

<sup>29</sup> FCC Form 471 Application No. 161049598 (certified May 26, 2016).

<sup>30</sup> USAC Fall 2015 Applicant Training PowerPoint Presentation, 22 (Oct. 2, 2015), <https://apps.usac.org/res/documents/SL/training/2015/Applicant-Training-05-Fiber-Options.pdf#page=22> (noting that, for shared or multi-purpose fiber build projects, E-Rate applicants must remove the cost of fiber strands they are not using).

<sup>31</sup> Letter from USAC, Schools and Libraries Division, to Derrick Unruh, Director of Technology, Park Hill School District (dated Mar. 2, 2017) (Park Hill FY2016 Funding Commitment Decision Letter).

<sup>32</sup> Park Hill Request for Review and/or Waiver at 7-8.

<sup>33</sup> FCC Form 471 Application No. 171035440, Park Hill School District (certified May 9, 2017).

and that an ineligible entity (i.e., Kansas City) would be using a portion of the network.<sup>34</sup> Shortly thereafter, on January 9, 2018, USAC issued a commitment adjustment letter rescinding the funding year 2016 funding commitment associated with Park Hill's self-provisioned network for the same reasons.<sup>35</sup> Both the funding year 2017 denial and the funding year 2016 commitment adjustment letter indicated that, among other things, Park Hill's funding requests violated the resale prohibition in section 254(h)(3) of the Act and the Commission's implementing rules.<sup>36</sup>

10. Park Hill appealed USAC's decisions on February 9, 2018.<sup>37</sup> USAC denied these appeals on June 22, 2018 and June 23, 2018, respectively, on the same bases as its original denial and rescission.<sup>38</sup> Park Hill then filed the instant request for review and/or waiver with the Commission on August 21, 2018, and supplemented the filing on November 27, 2018.<sup>39</sup> On appeal, Park Hill argues, among other things, that Commission rules do not require self-provisioned networks to be exclusively used by the entity that owns the network; that the resale prohibition does not apply to the fiber strands and other network elements that Park Hill installed for Kansas City's use because Park Hill cost-allocated those costs from its funding request; and that such an arrangement with Kansas City does not violate the Commission's rules.<sup>40</sup> Park Hill also notes that Kansas City does not have access to Park Hill's network and that the network is separate from the fiber strands and other network elements installed for Kansas City's use for public safety purposes.<sup>41</sup>

### III. DISCUSSION

11. Based on a review of the record, we grant Park Hill's request for review and/or waiver and find that the school district did not violate our rules by sharing its self-provisioned network with Kansas City. As discussed below, although Park Hill did not provide documentation demonstrating the reasonableness of the methodology used to determine Kansas City's fair share of the undiscounted costs of the network when it submitted its funding year 2016 funding request, we find good cause to waive this requirement under the specific circumstances presented here.<sup>42</sup> We therefore direct USAC to reinstate Park Hill's funding requests from funding years 2016 and 2017 consistent with this Order, and waive any procedural deadlines, including the invoice filing deadline in section 54.514(a) of the Commission's rules and the special construction service delivery deadline, that might be necessary to effectuate our ruling.

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<sup>34</sup> Park Hill Request for Review and/or Waiver at 8-9; Letter from USAC, Schools and Libraries Division, to Derrick Unruh, Director of Technology, Park Hill School District (dated Dec. 14, 2017) (Park Hill FY2017 Funding Commitment Decision Letter).

<sup>35</sup> Letter from USAC, Schools and Libraries Division, to Derrick Unruh, Director of Technology, Park Hill School District (dated Jan. 9, 2018) (Park Hill FY2016 Commitment Adjustment).

<sup>36</sup> Park Hill FY2017 Funding Commitment Decision Letter; Park Hill FY2016 Commitment Adjustment; *see also* Park Hill Request for Review and/or Waiver at 9.

<sup>37</sup> Park Hill Request for Review and/or Waiver at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *See generally* Park Hill Request for Review and/or Waiver; Letter from Gina Spade, Counsel for Park Hill School District, Broadband Legal Strategies, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-6 (filed Nov. 27, 2018) (Park Hill *Ex Parte*).

<sup>40</sup> Park Hill Request for Review and/or Waiver at 10-22; Park Hill *Ex Parte* at 1-3.

<sup>41</sup> Park Hill *Ex Parte* at 1-2.

<sup>42</sup> Generally, the Commission's rules may be waived for good cause shown. 47 CFR § 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). 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.

12. In its request for review, Park Hill argues that: (1) USAC erred when it rescinded and denied funding for Park Hill’s funding year 2016 and 2017 funding requests on the basis that a self-provisioned network must be exclusively used and owned by E-Rate eligible entities, (2) the arrangement it entered into with Kansas City was the sort of partnership the Commission has encouraged, and (3) nowhere in the *2014 Second E-Rate Order* or in any subsequent order does the Commission prohibit E-Rate eligible entities from sharing a self-provisioned network with ineligible entities.<sup>43</sup> We agree, and clarify that an E-Rate eligible entity may—consistent with our rules—share the services and equipment used to construct and/or operate a self-provisioned network supported by E-Rate funding with an ineligible third-party entity so long as the ineligible third-party entity pays its fair share of the costs, i.e., its pro-rata portion of the undiscounted costs of the network.

13. The Commission has defined “sharing” as a “non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying the communications related costs associated therewith according to its pro rata usage of the communications services and facilities.”<sup>44</sup> These arrangements differ from resale, which is prohibited by section 254(h)(3) of the Act and section 54.513(a) of the Commission’s E-Rate program rules.<sup>45</sup> The Commission has defined resale as “an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public for profit.”<sup>46</sup> Based on our reading of the definitions of “sharing” and “resale,” we find the agreement between Park Hill and Kansas City, in which one entity provides another with access to excess capacity installed in a self-constructed network supported by E-Rate funding in exchange for free ongoing access to the other’s existing infrastructure, to be more akin to sharing than resale.

14. Further, the Commission has found in the Rural Health Care context that, while section 254(h)(3) of the Act prohibits the resale of *universal service-funded* telecommunications service and network capacity, the parts of a network not subject to universal service discounts can be paid for and used by third parties.<sup>47</sup> It is therefore reasonable to interpret the same statutory language in the E-Rate context to extend the resale prohibition only to E-Rate-supported services.<sup>48</sup> Accordingly, contrary to USAC’s determination, we find that the agreement between Park Hill and Kansas City amounts to a sharing arrangement permissible under our rules, and does not violate the statutory prohibition on resale.<sup>49</sup> Park Hill is sharing 72 single mode fiber strands with Kansas City in a portion of its network and one 12-count single mode fiber buffer tube with Kansas City in the remainder of its network.<sup>50</sup> In return, Kansas

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<sup>43</sup> Park Hill Request for Review and/or Waiver at 1-2, 10.

<sup>44</sup> *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, RM-1997, RM-2218, Report and Order, 38 Rad. Reg. 2d 141, 143-44, para. 4 (1976) (*Resale and Shared Use Order*).

<sup>45</sup> See 47 U.S.C. § 254(h)(3); 47 CFR § 54.513(a).

<sup>46</sup> *Resale and Shared Use Order*, 38 Rad. Reg. 2d at 151, 187-88, paras. 17, 101.

<sup>47</sup> *2012 Healthcare Connect Order*, 27 FCC Rcd at 16715-16, para. 80; see also Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, Federal Communications Commission to Scott Barash, Acting Chief Executive Officer, Universal Service Administrative Company, WC Docket No. 02-6 (dated Oct. 24, 2008).

<sup>48</sup> 47 CFR § 54.513(a) (stating that “eligible supported services provided at a discount under this subpart shall not be sold, resold, or transferred in consideration of money or any other things of value,” with limited exceptions).

<sup>49</sup> See *2012 Healthcare Connect Order*, 27 FCC Rcd at 16715-16, para. 80 (finding that “the prohibition on resale does not prohibit for-profit entities, paying their fair share of network costs, from participating in a selected participant’s network” and concluding “that the resale provision is ‘not implicated when for-profit entities pay their own costs and do not receive discounts provided to eligible health care providers’ because only subsidized services and network capacity can be said to have been ‘provided . . . under this subsection.’”).

<sup>50</sup> Park Hill Cooperative Agreement at 5.

City is providing Park Hill with free ongoing access to Kansas City's conduit to install, operate, maintain, and repair Park Hill's network, is assuming the locate responsibilities for the portion of Park Hill's network housed in Kansas City's conduit, is securing all permits required for Park Hill's network, along with future extensions of Park Hill's network, and, if feasible, is providing Park Hill access to 12 strands of single mode fiber from a designated portion of Kansas City's existing fiber network.<sup>51</sup>

15. Having concluded that the agreement between Park Hill and Kansas City is the kind of sharing arrangement permitted under our rules, we next clarify that our rules do not require E-Rate applicants to exclusively own and use the entire self-provisioned network. In the *2014 Second E-Rate Order*, the Commission sought to maximize schools' and libraries' options for purchasing affordable high-speed broadband connectivity.<sup>52</sup> To achieve that goal, the Commission allowed E-Rate eligible entities to construct their own network or portions of their own network when it is the most cost-effective solution.<sup>53</sup> In making self-provisioned networks eligible for E-Rate support, the Commission pointed to the success of Rural Health Care Pilot program participants that elected to use support for self-construction for parts of their networks, and confirmed that it would "follow the model the Commission adopted in the [2012] *Healthcare Connect Order* here, to ensure that the Fund supports self-construction only when it is the most cost-effective option."<sup>54</sup> Under the Healthcare Connect program, participants are not required to exclusively own and operate self-constructed networks when they share their facilities with ineligible, for-profit entities that pay their fair share of network costs.<sup>55</sup> This same model applies in the E-Rate context.<sup>56</sup>

16. Accordingly, based on our delegated authority and the Commission's stated intention to treat self-construction of E-Rate-supported networks in a manner similar to its treatment of self-constructed networks under the Healthcare Connect program,<sup>57</sup> we clarify that E-Rate program participants are not required to exclusively own and operate self-provisioned networks.<sup>58</sup> Further, we clarify that E-Rate eligible entities may share their self-provisioned networks with ineligible third-party entities so long as the ineligible entities pay their fair share of the undiscounted costs associated with the network, including costs associated with the initial construction of the network and/or the ongoing maintenance and operation of the network.<sup>59</sup> In general, "fair share" is the price or cost that an ineligible entity must pay to participate in a supported network, or share supported services and equipment with, an

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<sup>51</sup> *Id.* at 3-4.

<sup>52</sup> *2014 Second E-Rate Order*, 29 FCC Rcd at 15541, para. 6.

<sup>53</sup> *Id.* at 15555-56, para. 44.

<sup>54</sup> *See id.* at 15556, para. 45.

<sup>55</sup> *2012 Healthcare Connect Order*, 27 FCC Rcd at 16715-16, 16760-61, paras. 80, 180.

<sup>56</sup> *See 2014 Second E-Rate Order*, 29 FCC Rcd at 15556, para. 45.

<sup>57</sup> In general, the Bureau has delegated authority to clarify Commission orders. *See* 47 CFR §§ 0.91, 0.201(d), 0.291(d). Consistent with these provisions, in the *2014 Second E-Rate Order*, the Commission delegated authority to the Bureau to adopt any additional administrative requirements for self-construction that may be warranted. *2014 Second E-Rate Order*, 29 FCC Rcd at 15557-58, para. 48, n.101.

<sup>58</sup> We previously stated that self-constructed networks are those "in which a school or library owns a full network or fiber run, including all the fiber strands and conduit." *See, e.g., Request for Waiver by Jemez Pueblo Tribal Consortium*, CC Docket No. 02-6, Order, 32 FCC Rcd 10238, 10243, para. 11, n.46 (WCB 2017) (citing *2014 Second E-Rate Order*, 29 FCC Rcd at 15550, para. 31, n.49). We clarify, however, that the cited footnote in the *2014 Second E-Rate Order* was intended to explain the difference between self-construction and leased dark fiber networks, not to define self-construction.

<sup>59</sup> *2012 Healthcare Connect Order*, 27 FCC Rcd at 16760-61, para. 180.

E-Rate eligible entity.<sup>60</sup> An applicant that seeks to share the E-Rate supported network, or other supported services and equipment, with an ineligible entity bears the burden of demonstrating the reasonableness of the allocation methodology used to determine the ineligible entity's fair share of the undiscounted costs associated with the shared network.<sup>61</sup>

17. Based on our review of the record, we find that Kansas City paid its fair share of the costs of construction. Specifically, Kansas City is providing Park Hill with: (1) free ongoing access to its existing conduit; (2) locate responsibilities for the duration of the agreement, a 20-year term; and (3) up to 12 strands of single mode fiber from its existing network for certain locations. Kansas City is not otherwise responsible for the ongoing costs of service or network maintenance and operations because it does not have access to or use Park Hill's network. Accordingly, we find Kansas City's contributions constitute its fair share of the costs.

18. We further find that there is good cause to waive the requirement that Park Hill provide documentation demonstrating the reasonableness of the methodology used to determine Kansas City's fair share of the undiscounted costs associated with the network. Given the lack of guidance on how to determine and demonstrate compliance with the fair share requirements, we find that it is in the public interest not to penalize Park Hill for failing to provide such documentation at the time it submitted its funding year 2016 funding request to USAC.<sup>62</sup> While applicants bear the burden of demonstrating the reasonableness of the cost allocation method chosen,<sup>63</sup> and while such cost allocation method(s) need to be fully documented for USAC,<sup>64</sup> we find that a waiver of this requirement is appropriate here particularly where Kansas City paid its fair share of the undiscounted costs of the network, Park Hill otherwise complied with the Commission's rules, including the requirement that it seek bids for services provided over a third-party network and only select to self-construct a network when it is the most cost-effective service option,<sup>65</sup> and there is no evidence of waste, fraud, or abuse. In waiving this requirement, we note that Park Hill must retain any documentation supporting its cost allocations for a period consistent with E-Rate program recordkeeping rules.<sup>66</sup>

19. Moreover, in granting this waiver, we find relevant the fact that the arrangement between Park Hill and Kansas City resulted in cost savings to the Universal Service Fund, which is consistent with the Commission's obligation to be a responsible steward of the Fund and its ongoing efforts to encourage cost-effective purchasing in the E-Rate program.<sup>67</sup> Park Hill states that its arrangement with Kansas City

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<sup>60</sup> See generally *id.* at 16761-63, paras. 181, 184. If there is no separate and independent price for each site, the applicant must prorate the undiscounted price for the shared facility (including any supported maintenance and operating costs) between eligible and ineligible sites on a proportional fully distributed basis, and the applicant may seek support for only the portion attributable to the eligible sites. Moreover, applicants must make this cost allocation using a method based on objective criteria that reasonably reflects the eligible use of the shared facility. *Id.*

<sup>61</sup> 2012 *Healthcare Connect Order*, 27 FCC Rcd 16761-63, paras. 181, 184.

<sup>62</sup> See *Rural Health Care Support Mechanism, Northeast Ohio Regional Health Information Organization Consortium and OneCommunity Network Services Request to Restructure Pilot Program Project*, WC Docket No. 02-60, Order, 30 FCC Rcd 2138, 2146, para. 13 (WCB 2015); see also *Request for Review of a Decision of the Universal Service Administrator by Queen of Peace High School*, CC Docket No. 02-6, Order, 26 FCC Rcd 16466, 16469, paras. 6-7 (WCB 2011).

<sup>63</sup> 2012 *Healthcare Connect Order*, 27 FCC Rcd at 16761-62, para. 181.

<sup>64</sup> *Id.* at 16763, para. 184.

<sup>65</sup> 2014 *Second E-Rate Order*, 29 FCC Rcd at 15555-58, paras. 43-48.

<sup>66</sup> 2012 *Healthcare Connect Order*, 27 FCC Rcd at 16763, para. 184; see also 47 CFR § 54.516.

<sup>67</sup> See, e.g., *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8934-35, paras. 155-57 (2014).



reduced the costs of the services needed to deliver high-speed broadband connectivity to Park Hill's schools and resulted in cost savings to the Fund of approximately \$215,000.<sup>68</sup>

20. We expect other applicants that wish to share networks or network elements with ineligible entities to comply with the requirements outlined in the *2014 Second E-Rate Order* and clarified here. First, self-provisioned networks—whether or not they are shared—are eligible only in limited circumstances when they are determined to be the most-cost effective option after competitive bidding.<sup>69</sup> Next, the ineligible entities must pay their fair share of the undiscounted costs associated with the funding request, including the cost of the services and equipment needed to provide Internet access and/or data transmission services, as well as the ongoing costs of network maintenance and operations. Applicants must also comply with all other fair share requirements, including the obligation to provide a clear explanation of how the pro-rata share was calculated and demonstration of the reasonableness of the cost allocation methodology used to ensure that E-Rate funding is not used to provide services to ineligible third-party entities.<sup>70</sup>

21. Finally, we emphasize that the Commission is committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-Rate program are used for appropriate purposes. We remind applicants of the authority of both the Commission and USAC to conduct audits or investigations to determine compliance with E-Rate program rules and requirements. To the extent that the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. The Commission retains the discretion to evaluate the use of monies disbursed through the E-Rate program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred, or recovery is warranted. The Commission will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

#### IV. ORDERING CLAUSES

22. 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, 1.3, 54.503(c)(iv), 54.513, 54.514(a), and 54.722(a) of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.3, 54.503(c)(iv), 54.513, 54.514(a), and 54.722(a), that the Request for Review and/or Waiver filed by Park Hill School District on August 21, 2018 IS GRANTED and the underlying application IS REMANDED to USAC for further action in accordance with the terms of this order.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief  
Wireline Competition Bureau

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<sup>68</sup> Park Hill Request for Review and/or Waiver at 7.

<sup>69</sup> *2014 Second E-Rate Order*, 29 FCC Rcd at 15557-58, para. 48.

<sup>70</sup> *2012 Healthcare Connect Order*, 27 FCC Rcd at 16760-63, paras. 180-82.