

**Board of Education**

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Tuesday, October 8, 2019

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

Request for Waiver and Appeal of Funding Decision

CC Docket No 02-6 – In the Matter of Schools and Libraries Universal Service Support Mechanism

WC Docket No 13-184 - Modernizing the E-Rate Program for Schools and Libraries

Billed Entity Name: Powell County Schools
Billed Entity Number: 128798
471 Number: 191029169
FRN: 1999049236

Dear Ms. Dortch;

WAIVER REQUEST

We are requesting a one-time waiver of the competitive bidding rules that requires applicants that seek proposals for dark fiber services to solicit proposals for leased lit fiber services over a comparable time period.

BACKGROUND

Powell County Schools (PCS) is a rural school district in Kentucky, with six schools serving 2,190 students. PCS staff are dedicated to the education of their students and the enrichment of their community. PCS staff have completed all the necessary forms to secure E-Rate funding for our eligible services since the inception of the E-Rate program.

Powell County Schools

Dr. Anthony Orr, Superintendent

691 Breckinridge Street | P.O. Box 430 | Stanton, KY 40380
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In the Fall of 2014, with the knowledge that their existing multiyear WAN contract was due to expire at the end of the funding year, PCS staff evaluated their WAN connectivity needs and determined that leased dark fiber would be the best solution for the District. They posted an FCC Form 470 requesting bids for dark fiber on January 21, 2015. They received two bids for leased dark fiber and one for leased lit fiber. They entered into a new five-year contract with Gearhart Communications that began July 1, 2015.

As part of the FY 2019 PIA review, questions were asked about how PCS compared the dark fiber bids they received by February 19, 2015 against lit fiber services to ensure that the offered dark fiber service was truly the most cost effective way to deliver leased fiber WAN service to PCS's eligible locations. It was only at this point that PCS staff realized that just four weeks prior to the posting of PCS's establishing 470, the FCC had released the 2nd E-Rate Modernization Order (FCC 14-189) which changed in the competitive bidding rules for dark fiber.

ANALYSIS

The 2nd E-Rate Modernization Order revised the competitive bidding requirements for applicants seeking leased dark fiber in ¶39, stating that:

...if a school or library intends to seek support to lease and light dark fiber, the schools or library must also solicit proposals to provide the needed services over lit fiber over a time period comparable to the duration of the dark-fiber lease or IRU.

This Order was released on December 19, 2014. PCS had spent the Fall of 2014 developing their plan for their WAN services which culminated in the release of their FCC Form 470 requesting bids for leased dark fiber on January 21, 2015, just one month later. As an applicant working in the E-Rate program, the PCS staff member filing the FCC Form 470 was not aware of the recently added requirement to request bids for both lit and dark fiber. This was a common lack of information in the early months of 2015. USAC Applicant Training held in the Fall of 2014, where most applicants get the newest and latest advice on filing processes and procedures for the upcoming applications cycle, didn't include any information about changes to the way fiber

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options would be bid because the requirements included in the 2nd Order did not yet exist. The other main source of information for applicants on the 2nd Order was the USAC News Brief. The December 12, 2014 New Brief mentions dark fiber in this way:

“Equalizing the treatment of schools and libraries seeking support for dark fiber with those seeking support for lit fiber. Dark fiber leases allow the purchase of capacity without the service of transmitting data - lighting the fiber. Dark fiber can be an especially cost-effective option for smaller, rural districts.”

The News Brief included a link to an “E-rate Modernization Order” webpage with “additional information”, but for a small rural district like PCS, which had already determined that leasing dark fiber the best solution to their WAN needs, there was no indication that the additional information referenced included new requirements that would affect the way they needed to run their competitive bidding process. There was no mention of dark fiber in any of the other News Briefs issued by USAC between the release of the 2nd Order and the date that PCS issued their FCC Form 470 requesting dark fiber bids.

Applicant confusion surrounding the need to compare dark fiber bids to lit fiber bids has been an issue since the requirement was created. For FY 2016 the FCC Form 470 was updated to supply applicants with a dropdown list of functions sought. This eliminated the ability for applicants to make up their own function descriptions, but it did not end the confusion. USAC updated the FCC Form 470 again for FY 2018 to try to make it impossible to file a request for dark fiber alone – creating a menu dropdown for “Leased Dark Fiber and Leased Lit Fiber”, ensuring that applicants accepted bids for both types of fiber offerings. However, many applicants continue to try to apply for dark fiber only by using the “Other” dropdown option and then describing their dark fiber project in an RFP document.

As part of the FY 2019 PIA review, PCS provided a cost comparison (attached) which clearly demonstrates that in an equalized comparison (accounting for all relevant costs over a reasonable lease period), the bid they received for leased lit service does not change the original finding that the Gearhart bid for dark fiber was the most cost

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effective bid. In fact, the bid PCS received from AT&T for leased lit fiber was 33% to 63% higher (depending on which AT&T service offering you use for the comparison) than the service bid by Gearhart. The comparison clearly supports PCS's determination that leased dark fiber would be the most cost-effective solution for their WAN needs. Despite this analysis, on August 22, 2019 USAC denied the funding request (see attached FCDL) stating:

"FCC rules require that applicants provide sufficient information with the FCC Form 470 and/or RFP in order for potential vendors to be able to formulate valid service solutions. Further, applicants must conduct a fair and open competitive bidding process that does not indicate a preference for one technology solution over another. Specifically, AT&T not being considered due to not offering dark fiber only lit fiber. This FRN is denied because the applicant has not provided sufficient information for all potential vendors to evaluate its service needs and has not conducted a fair and open competitive bidding process."

We differ with USAC's assessment that PCS did not provide sufficient information for all potential vendors to evaluate its service needs. PCS received a bid for leased lit fiber in response to the posted 470 and used that bid in the cost comparison to prove that leased dark fiber was the most cost-effective solution. We do not differ in the finding that at the time of the original bid evaluation PCS did not include the AT&T bid for lit fiber under the assumption that it would not be cost effective, but we do not agree that as a result the bidding process was not fair and open. PCS did contract for the most cost-effective solution to their need for WAN connectivity. We do not agree with USAC's reasons for denying this funding request as they were stated in the FCDL but acknowledge that fundamentally the denial is based on PCS's stated preference for dark fiber bids. For that we request a waiver of requirement that both lit and dark fiber bids be considered.

The FCC has a strong precedent of waiving competitive bidding rules in cases where the applicant inadvertently violated the procedures surrounding competitive bidding but succeeded in upholding the intent of the Commission's rules. We believe this is one of those instances. Beginning with DA 11-723 (Allendale) the FCC recognized that it is

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sometimes in the public interest to waive sections 54.511 (a) of the Commission's rules which require applicants to consider all bids submitted when determining the cost effectiveness of a service offering. Specifically, when applicants do manage to choose the most cost-effective service offering, despite prematurely or inadvertently excluding some bids. This precedent was clarified in DA 12-1843 (Euclid) when the FCC stated that when the outcome of a vendor selection process was consistent with the policy goals underlying the Commission's competitive bidding rules (§2) and when there is no evidence of waste, fraud and abuse in the record, that it is appropriate to waive competitive bidding rules that would block an applicant from otherwise eligible funding. There was no waste, fraud, or abuse in the competitive bidding process that underpins the funding requested by PCS. We believe we have demonstrated that the competitive bidding process arrived at the most cost-effective service for PCS despite the original oversight of failing to include a lit fiber bid in the evaluation.

ACTION REQUESTED

The Powell County School Corporation asks that the FCC waive the competitive bidding requirement that leased dark fiber bids be compared to leased lit fiber bids in the competitive bidding process that lead to the multi-year contract that underlies FRN 1999049236. We ask that the FCC instruct USAC to issue a Revised Funding Commitment Decision Letter approving FRN 1999049236 in the amount of \$58,806.00. We also request that the FCC state that this waiver applies to the previously approved FRNs covered by this competitive bidding process: 1699039154, 1799061443, and 1899006524. Finally, we request that the FCC instruct USAC to waive any procedural deadlines, such as the invoicing deadline, that might be necessary to ensure that PCS is able to receive this funding.

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Thank you for your time and consideration. You are hereby authorized to contact our E-Rate Contact, Rebecca Revely (Phone 765-855-1612 x 1026, or rebecca.revely@adtecerate.com), if there is any additional information necessary for your review of our waiver request and appeal of the funding denial for FRNs

Thank you,

Anthony Orr, EdD
Superintendent
Powell County Schools

Attached:
Cost Comparison
FCDL for FRN 1999049236

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Four options were submitted by AT&T

	Gearhart	ATT-Opt 1, Sol 1	ATT-Opt 1, Sol 2	ATT-Opt 2, Sol 1	ATT-Opt 2, Sol 2
Service Provided:	Dark Fiber	Switched Ethernet	Switched Ethernet	Wavelength Channel	Wavelength Channel
Monthly Total Eligible Cost:	\$ 5,500.00	\$ 14,990.00	\$ 9,014.00	\$ 12,952.00	\$ 8,275.00
Bandwidth, Gbps:	10G	2-10G (10 @ port, 2 @ connections)	2-10G (10 @ port, 2 @ connections)	10G	10G
Term, Months:	60	12	36	12	48
Cost per Gbps, per month:	\$ 9.16	\$ 124.91	\$ 25.03	\$ 107.93	\$ 17.23
Total 60 Month Contract Cost:	\$ 330,000.00	\$ 899,400.00	\$ 540,840.00	\$ 777,120.00	\$ 496,500.00

Funding Commitment Decision Letter

Funding Year 2019

Contact Information:

Jennifer Kincaid
POWELL COUNTY SCHOOL DISTRICT
691 BRECKENRIDGE ST
STANTON, KY 40380
jennifer.kincaid@powell.kyschools.us

FCC Form 471: 191029169**BEN:** 128798**Wave:** 18**Application Nickname:** FY_19Fiber

Totals

Total Committed	\$0.00
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What is in this letter?

Thank you for submitting your application for Funding Year 2019 Schools and Libraries Program (E-rate) funding. Attached to this letter, you will find the funding statuses for the FCC Form(s) 471, Services Ordered and Certification Form, that you submitted and referenced above.

The Universal Service Administrative Company (USAC) is providing this information to both the applicant(s) and the service provider(s) so that all parties are aware of the post-commitment changes related to their funding requests and can work together to complete the funding process for these requests.

Next Steps

1. Work with your service provider(s) to determine if your bills will be discounted or if you will request reimbursement from USAC after paying the full cost for the services you receive.
2. Review the [Children's Internet Protection Act \(CIPA\)](#) requirements and file the [FCC Form 486](#) (Service Confirmation and CIPA Certification Form). **The deadline to submit this form is 120 days from the date of this letter or from the service start date (whichever is later).**



3. Invoice USAC

- **If you (the applicant) are invoicing USAC:** You must pay your service provider(s) the full cost for the services you receive and file the [FCC Form 472](#), the Billed Entity Applicant Reimbursement (BEAR) Form, to invoice USAC for reimbursement of the discounted amount.
- **If your service provider(s) is invoicing USAC:** The service provider(s) must provide services, bill the applicant for the non-discounted share, and file the [FCC Form 474](#), the Service Provider Invoice (SPI) form, to invoice USAC for reimbursement for the discounted portion of costs. Every funding year, service providers must file an [FCC Form 473](#), the Service Provider Annual Certification Form, to be able to submit invoices and to receive disbursements.
- **To receive an invoice deadline extension, the applicant or service provider must request an extension on or before the last date to invoice. If you anticipate, for any reason, that invoices cannot be filed on time,** USAC will grant a one-time, 120-day invoice deadline extension if timely requested.

How to Appeal or Request a Waiver of a Decision

You can appeal or request a waiver of a decision in this letter **within 60 calendar days** of the date of this letter. Failure to meet this deadline will result in an automatic dismissal of your appeal or waiver request.

Note: The Federal Communications Commission (FCC) will not accept appeals of USAC decisions that have not first been appealed to USAC. However, if you are seeking a waiver of E-rate program rules, you must submit your request to the FCC and not to USAC. USAC is not able to waive the E-rate program rules.

- **To submit your appeal to USAC,** visit the Appeals section in the [E-rate Productivity Center \(EPC\)](#) and provide the required information. USAC will reply to your appeal submissions to confirm receipt. Visit USAC's [website](#) for additional information on submitting an appeal to USAC, including step-by-step instructions.
- **To request a waiver of the FCC's rules,** please submit it to the FCC in proceeding number CC Docket No. 02-6 using the [Electronic Comment Filing System](#) (ECFS). Include your contact information, a statement that your filing is a waiver request, identifying information, the FCC rule(s) for which you are seeking a waiver, a full description of the relevant facts that you believe support your waiver request and any related relief, and any supporting documentation.

For appeals to USAC or to the FCC, be sure to keep a copy of your entire appeal, including any correspondence and documentation, and provide a copy to the affected service provider(s).



Obligation to Pay Non-Discount Portion

Applicants are required to pay the non-discount portion of the cost of the eligible products and/or services to their service providers. Service providers are required to bill applicants for the non-discount portion of costs for the eligible products and/or services. The FCC stated that requiring applicants to pay the non-discounted share of costs ensures efficiency and accountability in the program. If using the BEAR invoicing method, the applicant must pay the service provider in full (the non-discount plus discount portion) **before** seeking reimbursement from USAC. If using the SPI invoicing method, the service provider must first bill the applicant **before** invoicing USAC.

Notice on Rules and Funds Availability

The applicants' receipt of funding commitments is contingent on their compliance with all statutory, regulatory, and procedural requirements of the Schools and Libraries Program and the FCC's rules. Applicants who have received funding commitments continue to be subject to audits and other reviews that USAC and/or the FCC may undertake to assure that committed funds are being used in accordance with such requirements. USAC may be required to reduce or cancel funding commitments that were not issued in accordance with such requirements, whether due to action or inaction of USAC, the applicant, or the service provider. USAC, and other appropriate authorities (including but not limited to the FCC), may pursue enforcement actions and other means of recourse to collect improperly disbursed funds.



Funding Commitment Decision Overview

Funding Year 2019

Application Comments for FCC Form 471: #191029169

The applicant did not submit any RAL corrections.

Funding Commitment Decision Overview

Funding Request Number (FRN)	Service Provider Name	Amount Requested	Amount Committed	Status
1999049236	Gearheart Communications, Inc	\$58,806.00	\$0.00	Denied



FRN 1999049236	Service Type Data Transmission and/or Internet Access	Status Denied
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Dollars Committed			
Monthly Cost		One-time Cost	
Months of Service	12		
Total Eligible Recurring Charges	\$65,340.00	Total Eligible One Time Charges	\$0.00
Total Pre-discount Charges		\$65,340.00	
Discount Rate		90.00%	
Committed Amount		\$0.00	

Dates	
Service Start Date	7/1/2019
Contract Expiration Date	6/30/2020
Contract Award Date	
Service Delivery Deadline	
Expiration Date (All Extensions)	

Service Provider and Contract Information	
Service Provider	Gearheart Communications, Inc
SPIN (498ID)	143001570
Contract Number	
Account Number	606-478-0029
Establishing FCC Form 470	190002488

Consultant Information	
Consultant Name	
Consultant's Employer	
CRN	

Funding Commitment Decision Comments

DR1: FCC rules require that applicants provide sufficient information with the FCC Form 470 and/or RFP in order for potential vendors to be able to formulate valid service solutions. Further, applicants must conduct a fair and open competitive bidding process that does not indicate a preference for one technology solution over another. Specifically, AT&T not being considered due to not offering dark fiber only lit fiber. This FRN is denied because the applicant has



BEN Name: POWELL COUNTY SCHOOL DISTRICT **FCC Form 471:** 191029169

BEN: 128798

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not provided sufficient information for all potential vendors to evaluate its service needs and has not conducted a fair and open competitive bidding process.