

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|---|---|----------------------------|
| In the Matter of |) | |
| |) | |
| Request for Review of Decision of |) | CC Docket No. 02-6 |
| Universal Service Administrator by |) | |
| |) | |
| Forsyth County Schools |) | |
| Cumming, Georgia |) | Filing ID: 109111368503742 |
| |) | |
| Schools and Libraries Universal Service |) | |
| Support Mechanism |) | |

**ADDENDUM TO REQUEST FOR REVIEW
OF DECISION OF UNIVERSAL SERVICE ADMINISTRATOR
BY FORSYTH COUNTY SCHOOLS**

This is an addendum to the FY 2016-related Request for Review that Forsyth County Schools (Billed Entity No. 127272) (“School District”) filed on September 11, 2017.¹

I. Change of Designated Appeal Contact to Funds For Learning, LLC

Walter L. Matlock prepared and filed the Request for Review. At that time, he was the School District’s E-rate consultant. Please be advised that Mr. Matlock no longer has authority to represent the School District in connection with this or any other E-rate related matter. The School District has given this authority instead and exclusively to Funds For Learning, LLC (“FFL”). Accordingly, the School District requests that the Commission address all future correspondence related to this matter to FFL. Please change *appeal contact* information as follows:

From:
Walter L. Matlock, Consultant
Matlock Services, LLC
P.O. Box 246
Clarkesville, GA 30523
404-697-6598
matlockwm@windstream.net

To:
John D. Harrington, CEO
Funds For Learning, LLC
2575 Kelley Pointe Parkway, Suite 200
Edmond, OK 73013
(405) 341-4140
jharrington@fundsforlearning.com

¹ FCC Electronic Comment Filing System ID: 109111368503742. FRN No.1699057174.

USAC's Decision

DR1: According to FCC rules, applicants who pursue leased dark fiber services must also solicit proposals for leased lit fiber services. The FRN is denied due to leased lit fiber service was not requested on the FCC Form 470 and RFP that established the competitive bidding process for this FRN

DR2: You provided a Request for Proposal (RFP), as well as addendum issued. The addendum contained the list of schools receiving services. This information is needed for potential bidders to respond to the RFP. When an applicant adds to and/or modifies the RFP or similar documents, the applicant must post this information on the E-rate Productivity Portal for all potential vendors. Documentation demonstrates that the RFP addendum was not posted to EPC; therefore, the addendum was not available for all service providers to review. In order to ensure a fair and competitive bidding process, the FCC Form 470 and RFP or similar documents must be posted/and made available to all potential bidders. Therefore, this FRN is being denied.

II. The Request for Review is Primarily a Request For Waiver

The second reason for this addendum is to clarify that the School District is asking the Commission to (1) waive its competitive bidding rules with respect to leased, dark fiber; and (2) reverse USAC's finding that the School District's failure to post certain information to EPC was a violation of program rules or, if there was a rule violation, to grant the School District a waiver.

A. Overview

For FY 2016, the Commission adopted new competitive bidding rules for fiber-based communications services. One of them required applicants in the market for leased, dark fiber to ask for bids on leased, lit fiber too. The combined efforts of the Commission, a Commission consultant, and USAC to publicize and clarify the new fiber-related rules set off a firestorm of confusion throughout the entire E-rate community -- the Commission's and USAC's good intentions notwithstanding.

Unfortunately, the School District was one of many FY 2016 applicants and service providers that wound up getting burned by the new rules. The School District's consultant told the School District point-blank and unequivocally that the new rules did not require it to request leased, lit fiber bids along with leased, dark fiber bids. This, of course, was incorrect. As the

School District had no reason to question its consultant's guidance in this regard, it went ahead and requested bids on leased, dark fiber only.

USAC refused to process the School District's funding request for this reason and also because of an addendum to the School District's RFP (confirming that the RFP was for a district-wide project), which the School District's posted on its RFP website but not to EPC. As discussed in the Request For Review, and fleshed out in some very important respects below, the mistakes that the School District made were completely unintentional, had no discernable anti-competitive impact, and occurred during the first year implementation of a brand new, very different and confusing set of requirements. In the past, the Commission has considered all of these factors as legitimate grounds for waiving its rules. With respect to the School District's failure to post certain information to EPC, we question whether it was even required, let alone a rule violation.

B. Widespread Confusion Over The New, FY 2016 Fiber Rules, Evidence That Dark Fiber Was More Cost Effective Locally Than Lit Fiber, The Facts Unique to This Case, And The Public Interest Generally All Support The School District's Request For Waiver.

Nature, they say, abhors a vacuum, so as competitive bidding for FY 2016 kicked off, incorrect information, conflicting information, questionable information, and misleading information about the brand new fiber rules whooshed in to fill the void. It came from a wide variety of sources throughout the E-rate community, some of it credible and some of it not.

Add to this caldron of confusion a cadre of individuals and organizations aggressively hawking their wares to schools and libraries by claiming to be E-rate experts steeped in E-rate knowledge and possessing the magic E-rate sauce to make the process run smoothly and the river of funding flow – and there you have it: the recipe for the perfect E-rate storm. That storm, as the Commission and USAC know all too well, hit the E-rate community extremely hard. The E-rate fiber storm of FY 2016 resulted in massive rejections and long delays in application processing. In the minds of many, it was and continues to be, quite literally, a disaster.

Yes, the School District stepped out into this storm voluntarily and yes, of its own volition retained help from a source that turned out not to possess the specific acumen that the

situation required. That, however, does not make the School District any less of a victim or make the damage any less severe. The School District understands and appreciates that responsibility for abiding by program rules rests squarely on its own shoulders, and that there is absolutely no getting around that.

However, since we are discussing the merits of waiver, understanding the context in which the School District's made its FY 2016 fiber bidding error is extremely important. What is noteworthy too is the nature of the information that did not get copied into EPC. It was not new information, but rather (1) confirmation that the RFP was for dark fiber district-wide and (2) the names and addresses of all the school district's sites, which was public information. The absence of this information in EPC could not possibly have made the competitive bidding process unfair. In short, there is no evidence or any reason to believe that there was anything unfair about the School District's competitive bidding process or that the resulting contract was anything but the most cost effective fiber solution available to it in that particular part of the country.

Chained Procurement and Other Context

For FY 2016, the School District was in the market for leased, dark fiber, which the ESL for that year listed as eligible. In every program year before FY 2016, the rules permitted applicants in the market for "X" to request bids only for "X." That made sense of course and, understandably, that is what applicants had become used to doing. For FY 2016, however, depending upon the "X" needed by the School District, the Commission's new rules could chain procurements together. For the first time in E-rate history, the FCC began dictating an applicants' needs by requiring that if an applicant has a need for "X" that they also seek and consider "Y" (and in some cases even "Z").

Because of its concern that applicants' local competitive bidding rules might not be enough to ensure the most cost-effective contracting for fiber, and despite a lack of data in the E-rate record pointing towards either the need or the efficacy of such an approach, the Commission decided to create what we will refer to as a "Chained Procurement" requirement. Competition, at least for some services, will no longer be defined as choosing the best vendor to

meet a specific need *as identified by the applicant*. Instead, if you need X, you might really need Y or Z, and the Commission’s attorneys, consultants, and/or USAC reviewers will let you know after the fact if you chose the right service (not to mention the right vendor). Thus, chained procurement became a new layer of bidding requirements for FY 2016. Unfortunately, the new layer turned competitive bidding for fiber into a complex algorithm – i.e., if applicant needs this, then on the Form 470 applicant must check this box and that box too; if applicant needs that, then on the Form 470, applicant must check all the boxes and so on.

Which box or boxes to check on the FY 2016 Form 470, plus what to include in formal bidding documents, became the subject of widespread debate and controversy.² Speaking from experience, we can honestly say, it took confusing to an entirely new level. In general, schools and libraries find the E-rate program’s rules to be difficult and intimidating and USAC’s instructions to be dense and impenetrable and at times even incomprehensible. Therefore, it is not surprising that the new chained procurement mandate became an especially difficult and stressful time for E-rate applicants.

When it came to bidding fiber optic-based services, discerning exactly what the Commission expected applicants to do, which service requirements were chained together, and how to do it became a challenge for literally everyone in the E-rate community, not just schools and libraries. Organizations like the State E-rate Coordinators Alliance (SECA) and FFL, for example, organizations that were in regular contact with FCC staff and the FCC’s fiber consultant, Joe Freddoso, were having an equally difficult time of it. In one particularly memorable and illustrative incident, Mr. Freddoso described a school district’s FY 2016 fiber bid as “really well done” one day and then, five months later, after the FCC had issued a so-called “clarification,” labeled the exact same bid as “invalid.”³

² See SHLB *ex parte* submission in WC Docket 13-184 submitted on January 24, 2018 (“During the first year of the new regulations, FY 2016, the procedures and guidance for how to apply for fiber projects were not yet finalized when applicants began issuing RFPs and posting Form 470s. Important clarifications continued to be issued throughout the funding year and frequently after the procurements had been conducted”).

³ <https://ecfsapi.fcc.gov/file/1051790736871/RC17-APP-FCC%20Richland%20Fiber%20Waiver.pdf>

Indeed, in the middle of all this, a Commission staff person began actively encouraging applicants that had posted Form 470s for fiber “incorrectly” to file waiver requests.⁴ In one such request, FFL thought it was in the program’s and its client’s best interests to go even further, so it asked the Commission to basically “stop the presses” and issue new guidance for fiber-related bidding -- a request that SECA fully supported:⁵

For these reasons, SECA joins FFL in requesting that the Commission direct USAC to discontinue its enforcement of the “guidance” for Funding Year s 2016 and 2017, and issue public guidance clarifying its position regarding the Form 470 requirement for E-rate stakeholders for Funding Year 2018 and beyond. ...

If leading experts were having this much difficulty wrapping their heads around the new rules, please try to imagine how extraordinarily difficult it must have been for individual schools and libraries to understand them. It was no picnic for consultants either. For anyone in the E-rate consulting community who lacked the aptitude and/or the bandwidth to follow and digest the daily ins and outs of the E-rate program as closely as this demanding situation required and to advise their clients accordingly and cautiously, it was an exceptionally challenging time, as the instant record shows.

This is not an exaggeration. A full two years after the Commission’s fiber rules went into effect, confusion continues to swirl around E-rate fiber procurements. After USAC took a shot in December of last year at clarifying the Form 470 option menu for fiber and other services,⁶ E-Rate Central, a well-respected E-rate consulting firm, described the ongoing disconnect like this:⁷

⁴ *Ibid.*

⁵ <https://ecfsapi.fcc.gov/file/1052463187475/SECA%20Comments%20%20-%20FFL%20Fiber%20Waiver%20Request.pdf>

⁶ In December 2017, USAC posted a “Reference Table for FCC Form 470 Category One Drop-Downs” on its website (see URL in n6 below). USAC made the surprising statement that the guidance in it was effective as of August 26, 2017, several months before. USAC did not publicize this document in its newsletter. Third parties like FFL, E-rate Central and SECA had to bring it to the public’s attention.

⁷ News of the Week: November 6, 2017, <http://e-ratecentral.com/Resources/Newsletters/News-of-the-Week/ArticleID/256/November-6-2017#InnerPageAnchor222>, discussing the Reference Table for FCC Form 470 Category One Drop-Downs <https://www.fundsforlearning.com/docs/2017/12/FCC-Form-470-C1-Dropdown-Table.pdf> (“... applicants who have reviewed the text provided on the online FCC Form 470 for Category One drop-down choices and still need additional information before making their selection(s) can refer to the table below.”).

Category 1 Form 470 Menu Nonsense

For a program targeted to help schools and libraries, one would think that the simplest English words and phrases would have clear meanings — or at least not be misleading. Increasingly, this seems not to be the case. Last week, USAC’s guidance on the Category 1 Form 470 menu options — presumably driven by the FCC — became even more ridiculous. Perhaps out of a sense of embarrassment, USAC seems disinclined to fully and publicly express its guidance in writing. So let us try. ...

The major problems with the Form 470 pulldown menu trace back to USAC’s Special Edition News Brief dated August 22nd announcing the new and “simplified” drop-down options for Category 1 services. The new options, supported by a revised Form 470 User Guide, became effective August 26th and govern all FY 2018 Form 470s filed on or after that date.

E-rate Form 470 Pulldown Menu

The new options appear simple, but are now the source of confusion — and potentially a source of funding denials for applicants not selecting the right options. ...

The fiber bidding-induced milieu that existed during the heart of the competitive bidding season for FY 2016 contracts was one of the reasons why schools and libraries began turning increasingly to third parties for E-rate help. They knew that they could not possibly navigate through the program’s murky waters alone. What had started as a rather simple and straight forward requirement, to purchase what you need and to follow state and local competitive bidding rules to do so, had devolved into a complex maze of administrative gotchas and bureaucratic second-guessing. Without a demonstrated need or justification, and, in hindsight, without any discernable benefit, the Commission had created new sets of requirements, regulations, and guidance so massive, complex, and contradictory that no one could master it on their own. Schools and libraries have organizations to manage, children to teach, and public needs to serve. They simply do not have the time nor the resources to saturate themselves in the E-rate program as it exists today.

For Forsyth County Schools, this meant turning to outside help, and they chose Walter L. Matlock of Matlock Consulting Services. Consistent with our own observations about this difficult time, Mr. Matlock underscored in the Request for Review that “the rules and guidelines

<https://www.fundsforlearning.com/blog/2017/07/special-construction-gets-special-attention> (discussing the large number of funding requests being rejected after the new fiber rules went into effect).

were in great influx [stet] throughout the filing window.” Therefore, he went on to explain, he “neglected to inform the appropriate school staff to include the requirement in the solicitation for lit fiber as well and dark fiber.” *Consequently*, the School District followed its state and local competitive bidding rules and the E-rate program’s “old” requirements, only asking for bids on the service it was seeking: leased, dark fiber. This was a mistake.

It should not be surprising that the FY 2016 efforts of numerous applicants to bid out fiber came up short of what the new rules required. Over the long course of E-rate history, whenever a substantial rule change has gone into effect, the first applicants to test the waters have routinely made mistakes -- and the Commission has routinely granted waivers to the applicants that made them. Accordingly and for all of the same good reasons, the Commission should grant the waiver that the School District has requested here.

The School District Had Already Been Paying For Leased, Lit Fiber

The School District did not go out into the marketplace for leased, dark fiber with blinders on. In other words, it did not decide to just flat out ignore the possibility that leased, lit fiber, or managed fiber, as the School District refers to it, might turn out to be more cost effective than leased, dark fiber for its broadband needs. Indeed, the School District knew, from firsthand experience, that it would not be.

For years, the School District had been using both services – leased, dark fiber for general network traffic and managed fiber for distributing video. Since it had years of experience using and paying for both types of service, the School District knew what each one cost and, in a side-by-side comparison, that managed fiber cost considerably more. This is the reason why the School District went out into the FY 2016 marketplace for dark fiber only: it knew it would save money by doing so.

Because the School District already had one of each type of wide area network, and therefore knew the exact costs associated with each, it knew that replacing its managed fiber network with a leased, dark fiber one would save it (and the E-rate program) a substantial amount of money. In these particular circumstances and as a practical matter, it would have made absolutely no sense for the School District to ask for bids to replace a service that it

(1) already had; (2) knew was not going to be its most cost effective; and (3) knew it did not want with the exact same kind of service. Nevertheless, it was the School District's failure to do exactly that that got its funding request denied.

Therefore, we also urge the Commission to take into account that the School District did not base its decision on simply guesswork: "Between our Dark and Lit fiber," according to Mike Evans, the School District's Chief Technology and Information Officer, "the dark is the most cost effective." So while the School District failed to follow the letter of the new chained procurement law to seek a comparison between leased dark and lit fiber,⁸ it certainly complied with the spirit of it and, in the final analysis, reached an objective conclusion about the costs associated with each.

Where, as here, rigid compliance with the rules has been shown not to further any of the E-rate program's policies or purposes and denying the applicant's funding request does not, in the particular circumstances, serve the public interest, which it clearly does not here, the Commission has routinely granted the applicant's request for waiver. Accordingly and for exactly the same reasons, the School District respectfully requests that the Commission grant the School District's request for waiver.⁹

C. USAC Made An EPC Mistake

DR2: You provided a Request for Proposal (RFP), as well as addendum issued. The addendum contained the list of schools receiving services. This information is needed for potential bidders to respond to the RFP. When an applicant adds to and/or modifies the RFP or similar documents, the applicant must post this information on the E-rate Productivity Portal for all potential vendors. Documentation demonstrates that the RFP addendum was not posted to EPC; therefore, the addendum was not available for all service providers to review. In order to ensure a fair and competitive bidding

⁸ See *Second Report and Order and Order on Reconsideration*, (December 2014), at para. 36 ("... to ensure that applicants treat the price of eligible products and services as the primary factor in selecting winning bids, we adopt measures to ensure that applicants fairly compare dark fiber with other options").

⁹ See *Request for Review of the Decision of the Universal Service Administrator by Idaho Falls School District 91* (2010), waiver granted where the applicant's mistake may have kept some vendors from bidding ("failure to seek bids for this service as Internet access was arguably a violation of the Commission's competitive bidding requirements because of the possibility that its FCC Form 470 did not describe its desired service sufficiently to enable potential service providers to submit bids. WCB finds, however, that the facts in this case rise to the level of the special circumstances necessary for a waiver of the Commission's rules.")

process, the FCC Form 470 and RFP or similar documents must be posted/and made available to all potential bidders. Therefore, this FRN is being denied.

According to USAC, the failure to copy a list of schools from the School District's RFP update page of its website to EPC was such an egregious violation of program rules that it had no choice but to reject the School District's entire funding request for dark fiber connectivity for FY 2016. This cannot possibly be correct. The assertion in particular that "the addendum was not available for all service providers to review," simply because it did not appear in EPC, is shocking. Somehow, schools and libraries managed to bid out countless thousands of E-rate contracts fairly before the advent of EPC. Moreover, as any vendor seriously interested in a school's or library's E-rate business will tell you, it will check the school's or library's website for updates after reviewing its RFP – not EPC. That is where it will find the information it needs.

We cannot imagine why any vendor would go to EPC for RFP updates. It makes no sense for a vendor to go there to click on a link that takes it back to the applicant's RFP update page, which the vendor could have accessed directly in the first place. Nor does it make any sense for a vendor go to EPC to see a document that it could also go to the source to see.

Unless the FCC wants USAC to become the *de facto* National School and Library Procurement Review Board and is pleased with the idea of USAC babysitting vendors that are more than capable of checking a school's or library's website on their own for updates and answers to questions, it should reverse this part of USAC's decision.

Here, the School District's Form 470 included a link to its RFP for a dark fiber WAN with no special construction. Following the link led potential bidders to the RFP. The RFP could not possibly have made it any more plain that the School District would post on its website the answer to any question that any potential bidder might have: "*Questions will be answered in writing and posted on FCSS Purchasing Website.*" It also directed all potential bidders to check the School District's website for updates: "*It is the vendor's responsibility to check the FCSS Current Solicitations website for any addenda, responses to vendor questions, or other communications, which may be necessary during the solicitation period.*"

The nature of the information in issue here is a list of all of the School District's sites, which the project was to cover. From the number of sites the School District included in its Form 470, the information in the RFP, and the common understanding in the industry of the term, "WAN," it was evident from the get-go that this project was going to be district-wide in scope. In an addendum to the RFP, which the School District posted on its website as promised, it made this fact perfectly clear: *"FCS confirms the purpose of this solicitation is to service all FCS locations under this contract."* Contrary to USAC's finding, this was not "new" information that potential bidders "needed" to respond to the School District's RFP. But even if it was -- now they had it!

Thereafter, AT&T asked the School District for "a list of your sites with addresses." Because this was already public information, AT&T and every other potential bidder could have easily found it independently on the School District's website,¹⁰ in an Internet directory, or even in a phone book. Nevertheless and as promised, the School District posted this information on its website, where all potential bidders could easily find it.

"When an applicant adds to and/or modifies the RFP or similar documents," USAC states, "the applicant must post this information on the E-rate Productivity Portal for all potential vendors." To the best of our knowledge, the Commission has never made this an absolute, across-the-board requirement, since individual circumstances can vary so widely and information can run a very long gamut in terms of importance.

Furthermore, state and/or local procurement rules typically require schools and libraries to post on their own websites exactly what USAC is claiming now must, in every instance, also be uploaded to EPC. If USAC is correct -- i.e., this is a strict, zero-tolerance requirement -- then the Commission has created in effect and for all intents and purposes a federally mandated backup requirement that schools and libraries keep a copy of every piece of local procurement information on USAC's servers. We do not believe that this is the direction that the Commission wants to or should be headed. In short, while there is nothing wrong with occasionally putting

¹⁰ <https://www.forsyth.k12.ga.us/listSchools>

on a belt and a pair of suspenders just to be safe, no one should ever be forced to double up like that every single time they go out.

Adopting a zero-tolerance, funding-forfeiture policy for not backing up information from one public website (the applicant's) to another public website (EPC) would not only be incredibly unfair and counterproductive, it would be downright cruel. Participating vendors are responsible adults. If a Form 470 links to an RFP, and the RFP instructs the vendor to check the applicant's website for updates and answers to questions, then it should be on the vendor to do exactly that. Neither USAC nor the Commission should be in the business of attempting to micromanage the competitive bidding processes of thousands upon thousands of applicants.

In our opinion, the failure to copy new, RFP-related information into EPC should never result automatically in the forfeiture of funding. Indeed, we believe that the public interest would be much better served by eliminating this procedural requirement in its entirety.

If this requirement is to remain on the books, however, then the burden should be on USAC to determine in each case whether the evidence is sufficient to show that the applicant's failure to copy either the new, RFP-related information or a link to it into EPC actually compromised the integrity of its competitive bidding process. In other words, USAC should be required to identify the information that did not get copied to EPIC, determine how crucial that information actually was to the competitive bidding process, determine whether it was available elsewhere (e.g., on the applicant's website), and finally, determine objectively and reasonably, based on the foregoing, whether the applicant's failure to copy the information to EPC was more likely than not to have prejudiced potential bidders.

Here, the answer to the last and determinative question is "no." There is absolutely no evidence or any reason even to suspect that the School District's failure to copy to EPC the information in issue might have stopped a vendor from bidding, prejudiced a vendor that did bid, or caused any vendor to question the fairness and integrity of the School District's competitive bidding process for leased, dark fiber.

III. Broader Implications

The significance of this case extends well beyond the boundaries of this one particular school district. This case is important because it shines a very bright spotlight on a wide variety of serious, systemic problems that continue, unfortunately, to plague the E-rate program as a whole – namely, confusing regulations; no timely information or conflicting information about confusing regulations; and USAC issuing way too many FCC-docket-clogging decisions to reject or reduce funding.

Too often we hear, and we have to agree, that USAC's bureaucracy appears to be more concerned about its own application processing statistics than with funding applicant requests and protecting the program. That is why we propose the following:

Whenever common sense and the reason for a particular rule or procedure combine to dictate that USAC should not reject or reduce a funding request -- even though a literal reading of the rule or procedure might seem to dictate otherwise -- USAC should have the power not to reject or reduce that request (e.g., the EPC-related decision here).

Yes, we believe that USAC should be granted the authority to exercise some independent judgment. The status quo gives USAC an excuse to move too many matters off of its desk and on to the Commission's that do not need to be moved. USAC could, should, and would be handling them itself -- if it had the power to do so. Granting this limited authority to USAC will result in fewer appeals and more funding requests being funded more quickly, a proverbial win-win for everyone.

Therefore, in addition to respectfully requesting that the Commission grant to the School District the relief that it is requesting here, we sincerely hope that this case will incent the Commission to examine and address all of the pressing E-rate problems that we have outlined above.

Respectfully submitted
on behalf of Forsyth County Schools,

/s/ John D. Harrington

John D. Harrington
CEO
Funds For Learning, LLC
2575 Kelley Pointe Parkway – Suite 200
Edmond, OK 73013
405-341-4140
jharrington@fundsforlearning.com

January 30, 2018

cc: Mike Evans
Chief Technology and Information Officer
Forsyth County Schools