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

In the Matter of)	
)	
West Virginia Department of Education)	CC Docket No. 02-6
In the Schools and Libraries Program)	

PETITION FOR RECONSIDERATION

WEST VIRGINIA STATE DEPARTMENT OF ED, BEN 126678
FCCRN: 0011863149

Relevant 471s: 181042456, 181042457, 181042458, 181042474, 181005080, 181005084, 181005086, 181005090, 181005092, 181005095, 181005097, 181005102, 181005103, 181005106, 181005107, 181005109, and 181009063.

Pursuant to section 1.106 of the Commission's rules,¹ the West Virginia State Department of Education (WVDE) respectfully requests that the Wireline Competition Bureau (Bureau) reconsider its decision to deny the WVDE's request for waiver that would have allowed WVDE to submit more than \$1 million in E-rate applications funding year 2017.-

¹ 47 C.F.R. § 1.106.

On September 28, 2018, the Bureau denied WVDE's waiver request for their late-filed Form 471s without explaining why WVDE should not receive a waiver consistent with past Bureau and Commission decisions. Specifically, the Commission has set forth a standard that the WVDE meets, allowing applications to be filed within 30 days when the application was late because of "unexpected event...caus[ing] unanticipated delays."² WVDE not only met the special circumstances criteria established by the Commission regarding late-filed applications, but WVDE established that a waiver is in the public interest. The Bureau did not explain how WVDE did not meet that standard and did not explain how it was not in the public interest to grant the waiver. The WVDE is not sure if the Bureau even considered its facts using the standard articulated by the Commission. WVDE therefore respectfully asks the Bureau to reverse its decision and waive the application deadline to allow USAC to commit funding for a handful of applications that were filed only a few hours outside the application window grace period.

² *Request for Review of the Decision of the Universal Service Administrator by Academy of Math and Science, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487009, *et al.*, CC Docket No. 02-6, Order, 25 FCC Rcd 9256 (2010) (*Academy of Math and Science*).

TABLE OF CONTENTS

I. BACKGROUND 4

II. RECONSIDERATION AND ARE WARRANTED BECAUSE THE BUREAU DID NOT EXPLAIN HOW THE WV DEPARTMENT OF EDUCATION’S SPECIAL CIRCUMSTANCES DID NOT MEET THE COMMISSION’S STANDARD FOR WAIVER WHEN WVDE DEMONSTRATED IN ITS REQUEST FOR WAIVER THAT IT DID. 8

III. A WAIVER OF THE COMMISSION’S RULE IS IN THE PUBLIC INTEREST 11

IV. CONCLUSION..... 14

I. BACKGROUND

The West Virginia State Department of Education (WVDE) files consortia Category Two applications on behalf of state school districts. It has done so since 1998. This permits applicants to have access to not only networking technological expertise, but also E-rate filing services free of charge in one of the most complex categories to request.

During the months leading up to the 2018 Filing Window deadline, the WVDE's State E-rate Coordinator, Julia Benincosa Legg, completed required processes to mini-bid on the WV State Master Contract. The WVDE did not wait until the last minute to file these applications. Our staff began the process of determining the needs of the districts and schools beginning back in August 2017, using our newly awarded state master contract. This required districts to post their needs assessment and complete a walkthrough of each school site. Then the vendors provided mini-bids. Despite being short-staffed, the process was started early, as the first walkthroughs occurred on August 14, 2017 and concluded on January 12, 2018. In all, 95 walkthroughs were completed during this time period.

Contract vendors were expected to commence bid submission as of January 23, 2018. These 58 days seemed like a reasonable amount of time to evaluate, award and complete E-rate applications. The bids submitted were problematic in that the vendors did not provide correct or complete bids. To ensure a true cost-effectiveness review, per FCC requirements, the WVDE required vendors to rebid the quotes until a complete bid was submitted for equivalent cost-effectiveness comparisons. Of the remaining bids, 91 percent had critical line items missing that required a rebid. In some cases, this took four rebids to achieve a result that could be utilized to establish that the most cost-effective bid was selected.

While there were some issues with the system used to collect and with the accuracy of the mini-bids submitted by the vendors, the WVDE was on track with a sufficient timeline to complete until February 28, 2018. This was the first day of a historic teacher strike that closed all schools and district board offices statewide, meaning all staff members were rendered unavailable. The stoppage lasted for nine days. Since the consortia applications are on behalf of the applicants, the districts complete the mini-bid process to select and approve the winning bids. This ensures that each district's criteria and points, along with the actual bids themselves, meet the needs of the district. This completely halted the bid review, evaluation and award processes.

These events were completely unexpected, and teachers continued the work stoppage despite threats for legal ramifications from the Governor, Jim Justice, State Attorney General, Patrick Morrisey and State Superintendent, Dr. Steven Paine. "State law and court rulings give specific parties avenues to remedy such illegal conduct, including the option to seek an injunction to end an unlawful strike."³ This strike was historically unprecedented since all staff, including service personnel and board office staff, were involved in the work stoppage.⁴ This was a first on a national level, as previous strikes had not been a full and complete stoppage, with one hundred percent of schools closing and staff being out at the service personnel,

³ Think Progress, *West Virginia threatens legal action against striking teachers, but they aren't backing down*, <https://thinkprogress.org/west-teachers-strike-continues-c27b0be2223b/> (last visited May 5, 2017).

⁴ Charleston Gazette Mail, *WV school employee strike to continue across state*, https://www.wvgazettemail.com/2018_wv_teachers_strike/wv-school-employee-strike-to-continue-across-state/article_d824f764-2c6f-51ac-bf00-68f1873ca2a6.html (last visited May 5, 2017).

teacher and county levels. Were it not for the strike, we would have been able to complete the processes within the timeframes allotted by the FCC.

The strike came with unfortunate and unique timing. As staff were completing reviews and awards of E-rate requests, all work came to a screeching halt. This further affected all processes, as now staff had to deal with the backlog of emails, parent complaints, school re-openings, in addition to ensuring their local E-rate applications were completed. During this time, issues found in the final round of rebid responses from the mini-bid process had to be addressed simultaneously as staff were still trying to resume basic school activities. This nine-day statewide work stoppage was added to already disrupted school schedules due to snow days. Counties included on this waiver request and their additional snow days between the window open and close include: Kanawha County (three additional days closed due to snow), Logan County (four additional days), Monongalia County (six additional days), Ohio County (five additional days), Preston County (six additional days), and Ritchie County (five additional days). With the experience during the October 1 through 17, 2013 government shutdown, the FCC staff can, no doubt, relate to the challenges that are faced when staff has been prohibited from working, then return to a backlog, and attempt to triage all of the previous items pending, along with the newly added issues.

The E-rate Productivity Center (EPC) and USAC-provided bulk upload templates also generated further issues, causing further delay in submissions of these applications. The bulk-upload spreadsheets would validate fine, and then when uploaded into the E-rate Productivity Center, an error would be noted; however, it was impossible to tell which line item(s) were impacted, so identifying the issues-at-large were quite time consuming and like finding a needle

in a haystack. This impacted multiple applications. These include: Form 471s 181042474, 181042456, 181042457 and 181042458.

When the time came to compete the Form 471 applications, the WVDE had all staff members working to complete the Form 471 application process to attempt to file in a timely manner. Even with these challenges, more than two-thirds of the applications were indeed submitted within these timelines and have been subsequently funded. Unfortunately, the WVDE submitted and certified several of the FCC Form 471s for funding year 2018 between April 6, 2018 at midnight and through April 7th at 1:00 a.m. – the latest being filed fifteen days and one hour after the applicable filing deadline. Once Ms. Legg filed the application, she immediately began the process to request a waiver from the FCC of the filing deadline, which was timely filed.⁵

On September 28, 2018 the Bureau denied the WVDE's requests for waiver in a public notice.⁶ The Bureau identified the WVDE's request as within the topic Late-Filed FCC Form 471 Applications.⁷ The Bureau's denial did not explain the reason behind its decision to deny the waiver request, citing only to the *Academy of Math and Science Order* in a footnote, "denying requests for waiver of the FCC Form 471 filing window deadline where petitioners failed to present special circumstances justifying waiver of...[the] rules."⁸

⁵ West Virginia State Department of Education School District Petition for Waiver, CC Docket No. 06-2 (filed May 18, 2018) (Waiver Petition).

⁶ *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, CC Docket No. 02-6, WC Docket Nos. 02-60, 13-184, Public Notice, DA-18-991A1, at 6 (WCB, rel. Sept. 28, 2018) (*Public Notice*).

⁷ *Id.* at 6.

⁸ *Id.* at 6.

The West Virginia Department of Education now timely files this petition for reconsideration.⁹

II. RECONSIDERATION AND ARE WARRANTED BECAUSE THE BUREAU DID NOT EXPLAIN HOW THE WV DEPARTMENT OF EDUCATION’S SPECIAL CIRCUMSTANCES DID NOT MEET THE COMMISSION’S STANDARD FOR WAIVER WHEN WVDE DEMONSTRATED IN ITS REQUEST FOR WAIVER THAT IT DID.

The WVDE believes that the circumstances that caused the late-filing of the Form 471s qualified the WVDE for relief per the *Academy of Math and Science Order* issued by the Commission in 2010. In that order, applicants were granted relief for applications filed more than twice as late as the WVDE applications were.

The Commission has established a “grace period” of 14 days for late-filed Form 471 applications.¹⁰ As long as applicants filed their applications within 14 days of the application deadline and requested a waiver of the deadline from the Commission within 60 days of filing its application, the Commission has granted the waiver request.¹¹ Consistent with Commission precedent, the Bureau had also granted waivers where the applicant filed late due to “delays beyond its control” – some of which were filed significantly beyond 14 days late.¹²

⁹ 47 C.F.R. § 1.106.

¹⁰ Academy of Math of Science,.

¹¹ See, e.g., monthly streamlined public notices issued by the Bureau granted numerous FCC Form 471 waiver requests.

¹² See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Academy for Academic Excellence, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-539076, 539722, et al., CC Docket No. 02-6, Order, 22 FCC Rcd 4747, 4748-49, para. 5 (Wireline Comp. Bur. 2007) (*Academy for Academic Excellence Order*); *Requests for Waiver and Review of Decisions of the Universal Service Administrator by Acorn Public Library District, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-637819, et al., CC Docket No. 02-6, Order, 23 FCC Rcd 15474, at 15476-77, para 5 (Wireline Comp. Bur. 2008) (*Acorn Public Library District Order*). In these orders, the Bureau granted waivers to applicants who missed the FCC Form 471 filing deadline due to technical malfunctions, school reorganizations, a misunderstanding related to the filing deadline, personal staff

In fact, the Bureau just this past October used the 2007 Bureau-level *Academy of Academic Excellence Order* to grant a waiver allowing the filing of a FCC Form 471 submitted about six weeks late in funding year 2017.¹³ In that case, the applicant filed late because of an error apparently created by EPC – a circumstance that was beyond its control.

Most significantly, in 2010, in the *Academy of Math and Sciences Order*, the Commission granted waivers filed up to 30 days beyond the deadline when an application was filed late due to an “unexpected event...caus[ing] unanticipated delays.”¹⁴ As the Commission noted in that order, the late-filed applications were procedural errors that did not warrant a complete rejection of the application, as long as it met one of a few criteria, including being filed within 14 days of the deadline, or when the applications were delayed by an unexpected illness or death of a family member and the application was still filed within 30 days of the filing window deadline.¹⁵ The Commission went on to explain the waivers by noting that, “even when a school official has learned how to correctly navigate the E-rate application process, unexpected events may cause unanticipated delays. For example, the unexpected serious illness or death of a family member for the staff member assigned responsibility for E-rate applications can effectively halt the application process.”¹⁶ The Commission further noted that the applications were filed close enough to the deadline so as not to impair the administration of the program.¹⁷

emergencies, inadvertent errors, or circumstances beyond their control, including inclement weather and USAC system errors.

¹³ *Streamlined Public Notice*, Oct. 31, 2017, n. 10 (Child Care Resource Center).

¹⁴ *Academy of Math and Science Order* at para. 9.

¹⁵ *Id.* at para. 8.

¹⁶ *Id.* at para. 9.

¹⁷ *Id.*

The circumstances that the WVDE faced were similar to the circumstances that warranted waivers in past Commission orders. The teacher strike was certainly an unexpected event that caused unanticipated delays. No one expected all of the teachers in the state to go on strike, resulting in a complete shutdown of the state's school districts. While the WVDE teacher strike was unprecedented, and out of the control of the individual school districts and the state Department of Education. The districts were unable to complete the mini-bid process to select and approve the winning bids, ensuring each district's bides met the needs of the district. The WVDE could not complete its school district's E-rate applications without the assistance of the districts. Just as the unexpected illness or death of a family member can "effectively halt the application process," the teacher strike in West Virginia absolutely halted the application process for the entire state. The WVDE waiver requests appear to be at least as deserving of a waiver as the requests the Bureau and the Commission has granted in the past.

Moreover, in issuing its decision, the Bureau did not describe why the WVDE 's waiver request did not meet the standard articulated by the Commission in 2010 – "unexpected event . . . caus[ing] unanticipated delays" or why WVDE's circumstances were dissimilar from other petitioners who did have their waivers granted. Because the Bureau denied the waiver request without any explanation, it is unclear whether the Bureau analyzed the facts presented in the WVDE 's request waiver using the Commission precedent that allows late-filed applications to receive waivers. It is unclear whether the Bureau used the precedent but found that WVDE 's factual situation for some reason did not meet the Commission's standard. The Bureau has an obligation to follow Commission precedent, and the Bureau has an obligation to explain its

analysis. Simply citing to an order in which late-filed applications were both granted and denied is not helpful to explaining why the waiver request was denied *in this case*.

Further, in the Commission-level *Academy of Math and Science Order*, the Commission denied waiver requests when it found the petitioners “did not file their FCC Forms 471 within 14 days after the FCC Form 471 filing window deadline, did not miss the deadline due to circumstances beyond their control, or did not file their FCC Forms 471 within a reasonable period of time following the death or serious illness of the person responsible for filing the E-rate application or the death of a family member of the E-rate staff person” and they did not present “any other circumstances justifying waiver.”¹⁸

WVDE’s appeal was not similar to the applicants whose petitions were denied. As described above, WVDE did present special circumstances and explained how the circumstances were beyond the control of WVDE. As described above, WVDE’s applications were filed only a few hours outside of the 14-day grace period. The WVDE understand that the Commission needs to have an orderly administration of the program, and that deadlines are an essential component. However, the WVDE respectfully argues that the Bureau’s treatment of late-filed requests for waiver of the application deadline must be consistent with the *Academy of Math and Science* precedent.

III. A WAIVER OF THE COMMISSION’S RULE IS IN THE PUBLIC INTEREST

Any of the Commission’s rules may be waived if good cause is shown.¹⁹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance

¹⁸ *Academy of Math and Science Order* at para. 13.

¹⁹ 47 C.F.R. § 1.3.

inconsistent with the public interest.²⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²¹ In the *Academy of Math and Science Order*, the Commission stated, “we find that rigid adherence to filing procedures does not further the purposes of section 254(h) of the Act or serve the public interest.”²²

This funding is critical to West Virginia schools. The schools have already received major cuts over the past five years. One location has already implemented these services and paid in full. The district was building a new school and the installations were required to permit the district to be able to open the school for students. Without this E-rate support, these schools, in desperate need of network upgrades, will be negatively impacted, and instruction will be harmed without access to a robust wireless network. It is accurate that most schools can re-apply for Category 2 funding that is denied; however, there is no reason the districts should have to wait another year to go through the application process again and wait for USAC to review its applications. A reversal of the Bureau’s initial decision would not harm the program; it would advance the goals of the program by allowing available E-rate funds to reach some of the most economically vulnerable school districts in the United States. As such, granting this petition would be in the best interest of the schools and program.

The WVDE also urges the Bureau to consider the hardships it faced as it attempted to complete required mini-bids from the state master contract during a time that districts were

²⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

²¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²² *See id.*; 47 U.S.C. § 254(h).

completely shut down and unavailable to review bids, evaluate and award contracts. Issues with EPC bulk uploads also delayed the application process for some applications as EPC did not identify where the issues were in the bulk upload form to troubleshoot. The WVDE urges the Bureau to consider the technological and logistical challenges faced by the WVDE navigating a new and complicated State Master Contract mini-bid process for the first time, along with issues posed by USAC's electronic filing system.

Granting these requests for waiver should not unduly task the Universal Service Fund because the monies needed to fund these requests, should they all be fully funded, are available. On February 20, 2018, the Bureau announced that states the cap will be \$4,062,030,726, while the demand is only \$2,770,337,983.²³ This is a difference of more \$1.2 billion dollars so the funding for these request is available. In all, the out-of-window funding commitments at risk are \$1,102,079.79—only 0.085% of the remaining funding cap balance. Gone are the days where granting an out of window waiver will affect the fund in a negative light.

Finally, in this instance, there is no issue regarding waste, fraud, abuse, misuse of funds, or a failure to adhere to core program requirements. We believe that good cause exists for the Commission to grant the requests for petition for reconsideration of the FCC Form 471 filing window deadline found in section 54.507(c) of the Commission's rules and remand the underlying applications listed above to USAC for review and award. The WVDE staff would very much appreciate the Bureau's reconsideration of its decision and grant of this petition. It will

²³ Federal Communications Commission, *Wireline Competition Bureau Announces E-Rate Inflation-Based Cap For Funding Year 2018*, https://apps.fcc.gov/edocs_public/attachmatch/DA-18-163A1.pdf (last visited May 5, 2018).

serve the public interest, the best interests of the program and the best interests of the students of West Virginia to ensure adequate connectivity and communications.

In summary, it would be unjust and contrary to E-rate program goals to penalize the economically disadvantaged school districts represented on the Form 471 application filed on their behalf by the WV Department of Education that did the best it could to comply with the E-rate rules and deadlines.

IV. CONCLUSION

For the foregoing reasons, the West Virginia Department of Education respectfully requests that the Bureau grant this petition for reconsideration and reverse its denial of the WVDE's request for waiver of the application deadline with respect to the above-captioned application.

Respectfully submitted,

/s/ Julia Benincosa Legg

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October 29, 2018



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CERTIFICATE OF SERVICE

This is to certify that on this 29th day of October 2018, a true and correct copy of the foregoing Petition for Reconsideration was sent via email to:

SLD, Universal Service Administrative Company, appeals@sl.universalservice.org

/s/ Julia Benincosa Legg