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December 15, 2016

Via Certified Mail/Return Receipt Requested
And Via Regular U.S. Mail

FCC
Office of the Secretary
445 – 12th Street NW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: ***Appellant: Emmett School District No. 221, Emmett, ID***
Appeal of Funding Commitment Decision Letter for Funding Year 2013
Funding Year 2013: 07/01/2013 – 06/30/2014
FCC Form 471 Application No. 926321
Applicant's Form Identifier: E471-1314
CC Docket No. 02-6

Appeal of Funding Commitment Decision Letter for Funding Year 2014
Funding Year 2014: 07/01/2014 – 06/30/2015
FCC Form 471 Application No. 986659
Applicant's Form Identifier: E471-1415
CC Docket No. 02-6

Billed Entity No. 142705
Billed Entity FCC Registration No. 0009334723

Dear Sir or Madam:

Our office represents the interests of **Emmett School District No. 221** ("School District"). This letter is an appeal of Universal Service Administrative Company's ("USAC's") Adminstrator's Decision on Appeal Letters dated November 4, 2016 notifying the School District of the denial of funding for the federal Universal Service Schools and Libraries Support Mechanism (aka E-rate Program) for Funding Years ("FYs") 2013 and 2014, funding request numbers ("FRNs') referenced below:

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Funding Year	FCC Form 471	FRN	Service Provider	FCC Form 470
2013	926321	2529381	ENA Services, LLC	517380000711547
2014	986659	2691525	ENA Services, LLC	517380000711547

On June 3, 2016, School District provided its response to the letter issued by USAC on April 28, 2016. The response letter was supplemented by the State of Idaho's response letter dated May 26, 2016,[1] the Idaho State Department of Education – Superintendent of Public Instruction ("SDE"),[2] and other responses USAC received from other Idaho school districts or other entities with similarly shared interests. USAC again denied funding in its most recent letter dated August 26, 2016. On October 19, 2016, School District provided its appeal response to the letter issued August 26, 2016. USAC submitted its Administrator's Decision on Appeal dated November 4, 2016.

USAC's decision letter indicated its denial of E-rate Program funding to Idaho school districts based on Idaho courts' determinations that the State of Idaho's IEN contract with ENA Services, LLC ("ENA") is void. Further, USAC issued the funding commitment decision letter ("FDCLs") denying funding to Idaho school districts unless "the State of Idaho is able to provide sufficient documentation or information . . . that demonstrates the State of Idaho complied with all FCC and state competitive bidding requirements in applying for and receiving E-rate Program funding."

The School District acknowledges that the recent Idaho court decisions have rendered the State of Idaho's contract with ENA void. Idaho school districts, and more importantly, Idaho students, are truly innocent victims and should not be punished for a process over which they had no control. Idaho law specifically permits Idaho school districts to acquire like goods or services that have already been competitively bid by the State of Idaho, one of its political subdivisions, or an agency of the federal government.[3] The School District has **no authority** or control over contracts that are bid by state or federal entities.

In relying on the State contract, Idaho school districts fully complied with the State competitive bidding requirements and substantially complied with FCC bidding requirements. The School District should not bear the burden of fees and costs resulting from USAC's denial of funding, based on errors committed by the State.

In addition to the State of Idaho and Idaho Department of Education's equitable arguments; as further established below, USAC's denial in this case would be inconsistent with FCC precedent overruling USAC denials in similar circumstances. Accordingly, the School District requests that USAC's decision denying the School District funding requests for FY 2013 and 2014 be reversed and that the funding be approved for Emmett School District.

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[1] A copy of the State of Idaho's response letter is attached for reference as Attachment A.

[2] A copy of the State Department of Education's response letter is attached for reference as Attachment B.

[3] Idaho Code § 67-2803(1).

Substantial Compliance by Idaho School Districts Does Not Warrant Complete Rejection of Applications for E-Rate Program Funding

In its letter dated April 28, 2016, USAC cites several FCC orders as justification for denying the School District's FY 2013 and 2014 Funding Requests. These orders, and other precedent cited within them, when analyzed in context and applied to the facts in this case, actually lend support to waiver of violations of the rules rather than USAC's denial. In at least three cases with facts that most closely resemble the circumstances in this case, the FCC granted in whole or in part, waivers of USAC's funding denials.[4] Two cited cases upholding USAC's denial are significantly distinguishable from this case and are based on entirely different rationales.[5] Since the cited cases and others with similar facts actually support granting the funding requests, USAC should not deny funding in this case.

USAC cites the FCC's *Animas* Order[6] as supporting the proposition that "FCC rules require applicants to have a signed contract or a legally binding agreement with the selected providers for all services ... at the time the FCC Form 471 is submitted to USAC." However, the FCC's Order in *Animas*, and in at least two other FCC appeal Orders upon which it relies,[7] actually support the proposition that even if an applicant did not have what USAC considered to be a signed contract or legally binding agreement at the time it submitted its FCC Form 471, "the mistakes made by these petitioners do not warrant the complete rejection of these petitioners' applications for E-rate funding."[8]

In the *Barberton* Order, USAC initially denied funding requests on the basis that the school districts did not have valid contracts at the time the Form 471s were submitted, because of various procedural errors in the contracts. On appeal, the FCC found that in spite of the errors, the Petitioners "had some sort of an agreement in place during the relevant funding year prior to the filing of their applications." The FCC went on to state, "[i]mportantly, these appeals do not involve a misuse of funds. The Commission recently found in the *Bishop Perry Order* that, under certain circumstances, rigid adherence to certain E-rate rules and requirements that are 'procedural' in nature does not promote the goals of section 254 of the Act – ensuring access to discounted telecommunications and information services to schools and libraries – and, therefore, does not serve the public interest."[9]

In this case, USAC's denial of funding on the basis that Idaho school districts did not have valid contracts at the time the Form 471s were submitted is incorrect. At the time the School District submitted the Form 471s, the statewide contracts were considered valid, and were awarded and administered by the state of Idaho's Department of Administration ("DOA"), not the School District. Numerous state DOA officials considered the procedure followed by

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[4] *Animas, Barberton, Adams, infra.*

[5] *Spokane* and *Lake County, infra*

[6] USAC Letter to Emmett School District dated April 28, 2016, page 5, note 29.

[7] *Animas, Barberton, Adams, Spokane, and Lake County, infra.*

[8] *Requests for Review and/or Requests for Waiver of the Decision of the Universal Service Adm'r by Animas Sch. Dist. 6 Animas, et al.*, CC Docket No. 02-6, Order, 26 FCC Rcd 16903, 16904 (2008). (Granting in part petitioners request for waiver) (Citing *Request for Waiver of the Decision of the Universal Service Administrator by Barberton City School District, et. al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-400938, *et al.*, CC Docket No. 02-6, 23 FCC Rcd 15526 (2008).

[9] *Barberton*, 23 FCC Rcd 15526, 15529-30 (2008).

the state to be correct.[10] It was not until after a protracted and technical lawsuit that the contract was deemed void due to the procedural errors in splitting the services between two providers—none of which were caused by the School District or within its control. Because there was "some sort of agreement" in place *prior* to the district's Form 471 submission, and since it was a procedural error on the part of the state DOA that ultimately led to the contract's eventual invalidation, and since there is no misuse of funds, the precedent cited in *Barberton* clearly supports the School District's request to waive the funding denial and grant the request for funds. Rigid adherence to the rule would in this case, as in *Barberton*, not promote the goals of section 254 of the Act and would not serve the public interest if the School District were to bear the cost of the State's procedural error in administering the contract.[11]

The FCC's *Adams County* order, cited in *Barberton*, granted school districts waivers for various funding denials based on their lack of legally binding agreements, holding that "[i]n all of these cases, there is no evidence in the record that the Petitioners engaged in activity to defraud or abuse the E-rate program. Finally, we find that, for these applicants, denying their requests for funding would create undue hardship and prevent these otherwise eligible schools from receiving E-rate funding." In this case, as in *Adams County*, there is no evidence in the record, nor does USAC assert in its denial letter, that the School District engaged in activity to defraud or abuse the E-rate program. Rather, the School District relied in good faith upon the State's bid and award of the contract, and it is only because the statewide contract was eventually held to be invalid after a lengthy and technical lawsuit, that USAC now asserts there was not a legally binding agreement in place when the district submitted its Form 471 funding requests. Similar to the school districts in *Adams County*, the School District will face an undue hardship if USAC denies the funding request. School districts that qualify for e-rate funding are unable to afford such services without federal support. In this case, Emmett School District is a high poverty rural district, which qualified for approximately 81 percent e-rate discount (90 percent maximum). The School District, in good faith and in full compliance with Idaho law, relied upon the state of Idaho's purchasing and contracting process with the Department of Administration and thus, should not be punished for doing so.[12]

Cited Funding Denials Upheld by the FCC Differ Factually From the Present Case

Two other Orders cited in USAC Letter to Emmett School District dated April 28, 2016 ("USAC Letter")—specifically, *Spokane* and *Lake County*—in which the FCC upheld USAC's denials upon appeal, are distinguishable because they are based upon facts that differ markedly from the facts in this case. It would be nonetheless consistent with the cited cases for USAC to grant funding given the facts in this case, notwithstanding the result in the *Spokane* and *Lake County* Orders.

Spokane is distinguishable from this matter because the FCC upheld the funding denial based solely on Spokane's consideration of both eligible and ineligible items as the primary factor in its vendor selection process. In the discussion section of the USAC letter, however, USAC cites the Idaho court's finding that the amended agreements violated state purchasing laws by improperly dividing the scope of work. Nowhere does USAC provide an analysis of how this division affects or thwarts the overall policy goals in the Act, a factor routinely taken into consideration by the FCC in previous appeals cited above. The blanket characterization of *Spokane* as an example of a denial being upheld simply because a school district did not follow

[10] *See* State of Idaho Response Letter to USAC dated May 26, 2016, pages 2-3.

[11] *Id.*

[12] *Request for Waiver of the Decision of the Universal Service Adm'r by Adams County School Dist. 14, Commerce City, CO, et. al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-425151, 425211, 425303, 425352, 426285, *et. al.*, CC Docket No. 02-6, Order, 22 FCC Rcd 6019, 6022-6025 (2007).

the rules does not paint an accurate picture of the FCC's holdings over time as noted in the above cases, nor does it accurately apply to the facts in this case.[13]

Lake County is also distinguishable from this case because USAC's denial was upheld by the FCC based on two factors: failure to demonstrate that price was the primary factor in the vendor selection process, and failure to have "a signed contract or legally binding agreement in place ... when it submitted its FCC Form 471 application." Neither factor is similar to the facts in this case. First, USAC appears to be repeating the court's general finding that the vendor selection process was generally flawed and as a result, the contract was ruled invalid by a court. Lake County's lack of a "signed contract or legally binding agreement" is distinguishable because at the time Lake County submitted its Form 471 application, it was still in contract negotiations with the service provider and had yet to sign any agreement at all.

In the current case, there was a valid signed contract which, at the time the School District submitted its Form 471 application, was considered by all parties, including the State Department of Administration, to be a valid and legally binding agreement. It was not until several years later that it was adjudicated to be void—unlike the funding request in Lake County, which was still being negotiated *at the time the Form 471 was submitted.* Although USAC's position in this case appears to be that the state contract was not valid at the time the School District submitted its application, the facts in *Lake County* do not stand for the proposition that USAC should deny the application based upon a retroactive invalidation, especially for a contract administered by the state and upon which the School District in good faith relied upon to be valid and legally binding under Idaho law.[14]

Conclusion

By denying these funds, the School District is in effect being held in a supervisory contracting role over the State Department of Administration, rather than the reverse. Holding as such would require all Idaho school districts to second-guess the decisions of the Department of Administration—or any other state or federal agency—to prevent this situation from reoccurring in the future, or to simply forego the funding altogether, a choice that negates the intent of the Universal Service Order in the first place: access to internet for rural schools and libraries.

Emmett School District complied with the applicable rules and relevant law at the time the Form 471s were filed and by so doing, achieved what Congress and the Joint Service Board intended. To go back in time and enforce a technical procurement rule, over which the School District had no control, contradicts the spirit and intent of the rules themselves. Moreover, high poverty and rural schools and libraries—entities that E-rate was meant to support—will be held responsible for payment for services it could not afford in the first place.

The school districts and libraries (and their students and patrons) who received the benefits envisioned and intended by Congress and the joint service board in good faith under the state's contract should be kept whole. Holding otherwise will create a chilling effect on eligible schools and libraries that must now engage in complex legal analysis of every statewide contract prior to accepting federal funds, or forego those funds (and services) altogether. This thwarts the intent of the program and is contrary to public policy.

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[13] *Review of Decisions of the Decisions of the Universal Service Adm'r by Spokane Sch. Dist.*, CC Docket No. 02-6, Order, 28 FCC Rcd 6026 (2013).

[14] *Request for Review of a Decision of the Universal Service Adm'r by Special Education Dist. of Lake* County, CC Docket No. 02-6, Order, 27 FCC Rcd. 8905, 8906 (2012).

For the foregoing reasons, and as supplemented by the State of Idaho and State Department of Education's and other interested parties' responses to USAC's denial letter(s), the School District respectfully requests that the FCC reverse USAC's denial and approve the School District's E-rate Program appeal regarding the funding request for FY 2013 and 2014.

Please do not hesitate to contact me if you should have any questions or require any additional information.

Sincerely,

MSBT LAW, CHTD.

Lyndon P. Nguyen
Attorney at Law

LPN:kd
Encl.
cc: Wayne Rush, Superintendent Emmett School District No. 221 (w/Encl.)

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

May 26, 2016

Via Federal Express and Electronic Mail

Michael Deusinger, Manager
Universal Service Administrative Company
Schools and Libraries Division
Case Management – Watch and Related Processes
30 Lanidex Plaza West
Parsippany, NJ 07054

Re: *Notification of USAC's Intent to Deny FY 2013 through FY 2014 Funding Requests*

Dear Mr. Deusinger:

On behalf of the State of Idaho, my office is responding to your April 28, 2016 letter notifying Idaho that Universal Service Administrative Company ("USAC") intends to deny Idaho's requests for E-rate funding for the Idaho Education Network ("IEN") for funding years 2013 and 2014. The requests at issue relate to the following:

Funding Year	FCC Form 471	FRN	Service Provider	FCC Form 470
2013	891051	2474963	ENA Services, LLC	517380000711547
2014	945860	2675583	ENA Services, LLC	517380000711547

Your letter indicates that USAC's decision is based on the Idaho courts' recent determinations that the State of Idaho's IEN contract with ENA Services, LLC ("ENA") is void because an amendment to that contract did not comply with Idaho's public contracting statutes. An Idaho district court entered judgment to that effect in February 2015, and the Idaho Supreme Court affirmed that judgment in March 2016. After many years of litigation, the courts resolved a statutory interpretation question of first impression by determining that Idaho law did not permit the State to award part of the services covered by its RFP to one vendor, and to award the remainder of the services to another.

ATTACHMENT "A"

Civil Litigation Division
P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8073
Located at 954 W. Jefferson 2nd Floor

The State of Idaho acknowledges that in light of these recent court decisions, Idaho's funding request does not comply with the letter of the FCC's E-rate eligibility requirements. Nevertheless, Idaho respectfully requests that USAC consider the unique circumstances involved before rendering a final decision. Idaho officials acted in good faith and in a manner consistent with longstanding contracting practices in implementing the ENA contract. The IEN provided substantial public benefits and furthered the purposes of the E-rate program. And Idaho managed the ENA contract to ensure that it resulted in no waste, fraud, or abuse. Accordingly, the State of Idaho requests that USAC grant its funding request for FY 2013 and 2014.

The State of Idaho Acted in Good Faith and Consistent With Established Practice.

Idaho officials made good faith efforts to ensure that they complied with applicable rules and obtained the best available services for the IEN. They chose Laura Hill, a U.S. Army veteran with extensive experience in telecommunications and government procurement, to prepare an RFP, apply for E-rate funding, and work on initial implementation of the ENA contract.[1] Due to the hard work of Ms. Hill and others, Idaho completed a complicated public bidding process. The IEN RFP attracted several competitive bids that were reviewed by an independent team of evaluators.[2]

The flaw in the process, which did not come to light until years later, is that after an initial award to ENA and Qwest, the State issued amendments defining the separate services it wanted the vendors to provide. At the time of the awards and amendments in early 2009, and for several years thereafter, Idaho officials firmly believed that their actions were perfectly legal. The IEN RFP reserved the State's right to award the RFP services to one or more bidders, in whole or in part.[3] This was common practice, used by the State to ensure that it obtained the best available goods and services at the lowest cost.[4] No court had ever construed Idaho public contracting statutes to prohibit this practice. Indeed, when the district court first considered dispositive motions in the *Syringa* litigation, it dismissed all of Syringa's claims. The court did

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[1] *See* Transcript of Videotaped Deposition of Laura Lou Hill ("Hill Dep."), pp. 14-19, 22-27 (relevant experience); 33 (responsible for RFP preparation); 63, 143 (prepared and submitted Form 471; 99, 101-02, 121-41 (IEN implementation) (submitted through the Affidavit of Steven F. Schossberger in Support of Motion for Reconsideration and in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated April 22, 2014, and provided to USAC with May 20, 2014 letter to Mel Blackwell).

[2] *See* Hill Dep., pp. 63-64 (describing evaluation process).

[3] Second Affidavit of Bill Burns, dated April 28, 2014 ("Burns Aff."), ¶ 7 (provided to USAC with May 20, 2014 letter to Mel Blackwell). Section 2.0 of the IEN RFP contains the following language: "The State reserves the right to reject any or all proposals, wholly or in part, or to award to multiple bidders in whole or in part."

[4] *See* Burns Aff., ¶¶ 7, 9, 12, 15.

ATTACHMENT "A"

not even suggest that awarding some services to ENA and others to Qwest would run afoul of Idaho law.

The first suggestion that there was any flaw in Idaho's contracting process did not come until March 2013, more than four years after the awards to ENA and Qwest. When the Idaho Supreme Court issued its first *Syringa* opinion on March 29, 2013 ("*Syringa I*"),[5] it held that Syringa had standing to challenge the amended contract to Qwest. The Court remanded that claim to the district court for further proceedings.

Although the Supreme Court's opinion cast some doubt on the validity of the contract amendments, the State remained convinced that even if the courts ultimately decided that the amendments were procedurally flawed, the initial contracts would remain valid. On remand following *Syringa I*, the district court permitted Syringa to assert a new claim challenging the amendment to the ENA contract as well as the Qwest amendment, but it prohibited Syringa from challenging the initial contract awards.[6] However, the court entered a summary judgment order in November 2014 suggesting that even the initial contract awards were invalid.[7] After a series of motions seeking clarification of its ruling, the court entered judgment in February 2015 declaring both the ENA and Qwest amended contracts to be void.[8] The court held that the State's longstanding practice of reserving the right to award goods or services contracts in whole or in part violated an Idaho statute, Idaho Code § 67-5718A. The State respected the court's decision and terminated the IEN contracts.[9]

Notwithstanding the Procedural Flaw in the ENA Contract Amendment, the State of Idaho Actively Managed the ENA Contract to Control Costs and Provide Valuable Services that Otherwise Would Have Been Unavailable to Idaho's Schools.

In our May 20, 2014 letter to USAC's Mel Blackwell, we provided USAC with some information about the efforts Idaho made to ensure that the IEN was managed to serve the public

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[5] *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 305 P.3d 499 (Idaho 2013).

[6] *See* Memorandum Decision and Order re: Motion for Reconsideration, entered June 24, 2014 (provided to USAC with July 3, 2014 letter to Mel Blackwell).

[7] *See* Memorandum Decision and Order re: Pending Dispositive Motions, entered November 10, 2014 (copy enclosed).

[8] *See* Memorandum Decision and Order re: Motions to Reconsider and Judgment and I.R.C.P. 54(b) Certificate, entered February 11, 2015 (copy enclosed).

[9] *See* H.B. 168, 2015 Idaho Sess. Laws ch. 15 (reducing appropriations to the Department of Administration for the IEN and appropriating funds to the State Department of Education to fund school districts' replacement services) (copy enclosed).

interest by controlling costs and delivering valuable services to Idaho schools. Before USAC makes a final funding decision for FY 2013 and 2014, we would like to make sure USAC has a more complete picture of these efforts and the great benefits they brought to Idaho. USAC can rest assured that the IEN admirably served "Congress's primary purpose in establishing the schools component of the E-rate program: to ensure that educators, students, and school personnel have access to advanced telecommunications and information services for educational purposes."[10]

Idaho officials reviewed all invoices to ensure there were no improper billings. Idaho officials also managed the IEN to control and reduce costs. IEN staff carefully monitored costs throughout the state, identified locations (particularly isolated rural locations) where costs were high, and worked to find alternative solutions that would reduce those costs.[11] As a result, the IEN's actual costs were well below projected costs. The IEN was initially projected to cost $62 million over the first five years. Actual costs for the period were only $36.7 million, a savings of nearly 40 percent.[12]

The IEN staff's efficiency also resulted in program costs that were significantly lower than those in neighboring states. A comparison of IEN costs to those of the Utah Education Network and the Wyoming Equality Network revealed that the IEN costs were 12 to 80 percent lower than those in Idaho's sister states. The cost-conscious IEN got the job done with fewer personnel and innovative solutions to increase bandwidth in hard-to-reach rural schools.[13]

The IEN provided significant benefits to Idaho's schools and students. Before the IEN was launched in 2009, only 20 Idaho school districts enjoyed fiber optic connections.[14] These districts were concentrated in Idaho's urban areas.[15] The vast majority of Idaho's districts are in

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[10] *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, Sixth Report and Order, 25 FCC Rcd 18762, 18774-75, ¶ 23 & n.71 (2010) (citing 47 U.S.C. § 254 (h)(2)).

[11] For a detailed description of some of these efforts, see our letter to Mel Blackwell, dated May 20, 2014, pp. 16-22, along with the supporting Affidavit of Brady Kraft in Support of Defendant's Motion for Reconsideration and in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated April 21, 2014.

[12] Idaho Education Network Annual Report, August 2014, p. 7 (enclosed Affidavit of Greg Zickau, dated May 24, 2016 ("Zickau Aff."), ¶ 5 and Exhibit 3).

[13] Idaho Education Network Annual Report and Business Plan, May 2011, p. 6 (Zickau Aff., ¶ 6 and Exhibit 2).

[14] *See* IEN Request for Proposals ("IEN RFP"), Appendix D (summarizing then-current state of Idaho schools' broadband connectivity) (Zickau Aff., ¶ 3 and Exhibit 1).

[15] *See* IEN RFP, Appendix D.

sparsely populated rural areas, where free market forces did not justify fiber optic infrastructure investments by private telecommunication companies. The IEN was a game changer for these rural districts. By January 2015, the IEN connected 219 high schools in 128 school districts, with 83% of the districts enjoying fiber optic connections.[16]

The technological advances made possible by the IEN significantly improved learning opportunities for Idaho students. Due to Idaho's geography and rural character, 67% of Idaho's high schools have fewer than 600 students. Small schools struggle to provide a full and solid curriculum on their own. The IEN greatly benefited Idaho's rural districts by enabling their students to enroll in distance learning classes. More than 12,000 Idaho students earned nearly 30,000 class credits through the IEN.[17] The IEN enabled students in small rural districts to take advanced math, physics, and foreign language classes that never would have been available without the IEN. And students throughout Idaho benefited from dual credit classes at greatly reduced cost that allowed them to earn credits toward college degrees. By mid-2014, Idaho students had earned more than 18,000 dual credits, saving their families the higher cost of future college tuition, and improving the chances that students would earn college degrees.[18]

Over the years, the State has received numerous testimonials from Idaho educators extolling the benefits the IEN provided.[19] Here are just a few:

- "The use of a statewide contract has allowed the IEN to leverage services across the state at a price point that many districts could not have negotiated on their own. Districts that lacked an option for high speed internet are now able to offer their students courses from outside their district, and many dual credit courses with college partners... The IEN is the answer to creating an equitable education system across Idaho."

  -William Goodman, President
  Idaho Education Technology Association[20]

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[16] Idaho Education Network Mid-Year Report, February 2015, p. 21 (Zickau Aff., ¶ 8 and Exhibit 4).

[17] *See* IEN Distance Learning Summary Data Sheet (Zickau Aff., ¶ 9 and Exhibit 6).

[18] Idaho Education Network Annual Report, August 2014, p.7.

[19] *See, e.g.*, Idaho Education Network Annual Report, August 2014, p. 3; Idaho Education Network Mid-Year Report, February 2015, p. 5.

[20] Idaho Education Network Annual Report, August 2014, p. 3. Mr. Goodman is the Director of Technology for the Mountain Home, ID School District No. 193.

ATTACHMENT "A"

- "The Idaho Education Network has been a game changer for our rural district, helping to 'level the playing field' for our students who do not have access to home computers, internet connections, or the ability to travel. It is helping to create a student population of effective communicators, creative and critical thinkers, global citizens, engaged and self-directed learners, and quality producers. What a valuable resource for this generation and other generations to come."

  -Terri Vasquez, Principal
  Homedale Elementary School[21]

- "The educational value of the IEN and the educational opportunities that have been afforded to the students at Sugar-Salem High School cannot be overstated. The implementation of the IEN in Idaho schools has been the best educational tool that Idaho has adopted in the past twenty five years. The ability for students to take 45-60 college credits in the high school setting has helped students in rural Idaho to have the same opportunities as students in urban Idaho."

  - Jared Jenks, Principal
  Sugar-Salem High School[22]

- "With the power and backing of the State of Idaho, all of the sudden there were backhoes digging across town to my school to bury fiber into my building, and forcing the telecommunication companies to upgrade. Something which never would have happened without the IEN."

  - Dave Holmes, Technology Director
  Homedale School District[23]

The IEN's accolades were not confined to Idaho. The IEN won national recognition for its achievements. In 2011, it received the Computerworld Honors Program – 21st Century Achievement Award for Emerging Technology. In 2013, the IEN was a National Journal Digital Innovation Winner. That same year, it received an honorable mention Digital Education Achievement Award.[24] Idaho is justly proud of the award-winning IEN's achievements.

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[21] Idaho Education Network Annual Report, August 2014, p. 3.

[22] Idaho Education Network Annual Report, August 2014, p. 3.

[23] Idaho Education Network Mid-Year Report, February 2015, p. 20.

[24] Zickau Aff., ¶ 11.

ATTACHMENT "A"

The IEN continues to provide benefits that serve the public interest. The infrastructure improvements the IEN made possible continue to allow Idaho's schools to obtain high-speed internet service. This is a huge benefit to schools in many of Idaho's rural communities where, without the IEN, such service would not be available.

Despite the Procedural Flaw in the ENA Contract Amendment, There Was No Waste, Fraud, or Abuse in the IEN.

The FCC's E-rate rules are designed to prevent waste, fraud, or abuse so that valuable public funds are properly used.[25] The many IEN benefits outlined above provide strong evidence that the IEN was a well-managed program that successfully served the public interest, not one plagued by waste, fraud, or abuse.

Equally compelling evidence is found in the actions of the Idaho legislature. As the IEN got underway, the legislature created the Idaho education network program and resource advisory council ("IPRAC") to oversee the IEN's activities.[26] IPRAC was charged with ensuring that the IEN comply with federal law, and leverage statewide purchasing power for the IEN to "[p]rocure high-quality, cost-effective internet access and appropriate interface equipment to public education facilities."[27] Although IPRAC was not able to prevent the procedural flaw in the contracting process that Idaho courts later determined to be contrary to Idaho law,[28] it oversaw the IEN's implementation to help ensure the program provided its intended benefits in a cost-effective manner. IEN staff took guidance from IPRAC and provided it with regular reports on the program's management and progress.[29]

Perhaps the most compelling evidence dispelling any concern about waste, fraud, or abuse in the IEN is the action the legislature took after USAC suspended funding for the ENA contract in 2013. The Idaho legislature appropriated millions of additional dollars to fund 100%

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[25] *See, e.g., Requests for Review by Macomb Intermediate Sch. Dist. Tech. Consortium*, CC Docket 02-6, Order, FCC 07-64, 22 FCC Rcd 8771, 8774, ¶ 9 (2007) (determining FCC's 30 percent rule did not apply and noting the absence of any "fraud or abuse").

[26] Idaho Code § 67-5745E.

[27] *Id.* § 67-5745E(5), (2)(c), (3)(d).

[28] IPRAC was not created until 2010, after the contract amendments. 2010 Idaho Sess. Laws ch. 357.

[29] Copies of sample IEN reports are Exhibits 2-4 to the Affidavit of Greg Zickau.

of the contract costs for almost two years.[30] This never would have occurred if the State had any reason to suspect any waste, fraud, or abuse in the IEN.[31]

Denying Funding for the IEN Would Unfairly Punish Idaho Taxpayers, Whose Contributions Help Fund the Universal Service Fund.

Idaho citizens help fund the Universal Service Fund by paying fees to their telecommunications providers. If USAC were to deny the State of Idaho's funding requests for the IEN during FY 2013 and 2014, it would unfairly deny Idahoans the benefit of the E-rate program their financial contributions help support.

In his 2009 rural broadband report to Congress, acting FCC Chairman Michael Copps identified the important educational benefits of bringing broadband access to rural schools:

> Broadband buildout to rural America also can enhance educational opportunities and the likelihood of academic achievement. Students without access to broadband cannot do the same type of homework as their counterparts who enjoy access to broadband, and students in certain rural areas are often many miles away from advanced educational institutions, such as colleges and universities. Broadband can significantly improve the quality of education by providing students in rural America with the ability to do online research, interact with their teachers and schools from home, and obtain college credit and college degrees, even though they are not physically on campus.[32]

The IEN stands as a proud testament to the very benefits Acting Chairman Copps promoted in his 2009 report.

In light of the significant achievements and public benefits the IEN provided and continues to provide, the State of Idaho respectfully requests that USAC grant the State's E-rate

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[30] *See* H.B. 550, 2014 Idaho Sess. Laws ch. 84: H.B. 650, 2014 Idaho Sess. Laws ch. 229 (copies enclosed).

[31] The Legislative Services Office reviewed the IEN project and issued a report in 2011 concluding that there were no "significant conditions or weaknesses in the general administrative and accounting controls within . . . Idaho Education Network." State of Idaho Legislative Services Office Management Report, Department of Administration FY2009 and 2010, issued March 30, 2011 (Zickau Aff., ¶ 7 and Exhibit 5).

[32] *Rural Broadband Report Published in FCC Record*, GN Docket No. 09-29, Public Notice, 24 FCC Rcd 12791, 12803, ¶ 19 (2009).

funding requests for FY 2013 and 2014. Please do not hesitate to contact me if you have any questions or would like any additional information.

Sincerely,

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

W. SCOTT ZANZIG
Deputy Attorney General

Enclosures

cc: Robert L. Geddes, Director, Idaho Department of Administration
Greg Zickau, Chief Technology Officer, Office of the Chief Information Officer

ATTACHMENT "A"

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

May 26, 2016

Via Federal Express and Electronic Mail

Michael Deusinger, Manager
Universal Service Administrative Company
Schools and Libraries Division
Case Management – Watch and Related Processes
30 Lanidex Plaza West
Parsippany, NJ 07054

Re: *Notification of USAC's Intent to Deny FY 2013 through FY 2014 Funding Requests*

Dear Mr. Deusinger:

On behalf of the State of Idaho, my office is responding to your April 28, 2016 letter notifying Idaho that Universal Service Administrative Company ("USAC") intends to deny Idaho's requests for E-rate funding for the Idaho Education Network ("IEN") for funding years 2013 and 2014. The requests at issue relate to the following:

Funding Year	FCC Form 471	FRN	Service Provider	FCC Form 470
2013	891051	2474963	ENA Services, LLC	517380000711547
2014	945860	2675583	ENA Services, LLC	517380000711547

Your letter indicates that USAC's decision is based on the Idaho courts' recent determinations that the State of Idaho's IEN contract with ENA Services, LLC ("ENA") is void because an amendment to that contract did not comply with Idaho's public contracting statutes. An Idaho district court entered judgment to that effect in February 2015, and the Idaho Supreme Court affirmed that judgment in March 2016. After many years of litigation, the courts resolved a statutory interpretation question of first impression by determining that Idaho law did not permit the State to award part of the services covered by its RFP to one vendor, and to award the remainder of the services to another.

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Civil Litigation Division
P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8073
Located at 954 W. Jefferson 2nd Floor

The State of Idaho acknowledges that in light of these recent court decisions, Idaho's funding request does not comply with the letter of the FCC's E-rate eligibility requirements. Nevertheless, Idaho respectfully requests that USAC consider the unique circumstances involved before rendering a final decision. Idaho officials acted in good faith and in a manner consistent with longstanding contracting practices in implementing the ENA contract. The IEN provided substantial public benefits and furthered the purposes of the E-rate program. And Idaho managed the ENA contract to ensure that it resulted in no waste, fraud, or abuse. Accordingly, the State of Idaho requests that USAC grant its funding request for FY 2013 and 2014.

The State of Idaho Acted in Good Faith and Consistent With Established Practice.

Idaho officials made good faith efforts to ensure that they complied with applicable rules and obtained the best available services for the IEN. They chose Laura Hill, a U.S. Army veteran with extensive experience in telecommunications and government procurement, to prepare an RFP, apply for E-rate funding, and work on initial implementation of the ENA contract.[1] Due to the hard work of Ms. Hill and others, Idaho completed a complicated public bidding process. The IEN RFP attracted several competitive bids that were reviewed by an independent team of evaluators.[2]

The flaw in the process, which did not come to light until years later, is that after an initial award to ENA and Qwest, the State issued amendments defining the separate services it wanted the vendors to provide. At the time of the awards and amendments in early 2009, and for several years thereafter, Idaho officials firmly believed that their actions were perfectly legal. The IEN RFP reserved the State's right to award the RFP services to one or more bidders, in whole or in part.[3] This was common practice, used by the State to ensure that it obtained the best available goods and services at the lowest cost.[4] No court had ever construed Idaho public contracting statutes to prohibit this practice. Indeed, when the district court first considered dispositive motions in the *Syringa* litigation, it dismissed all of Syringa's claims. The court did

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[1] *See* Transcript of Videotaped Deposition of Laura Lou Hill ("Hill Dep."), pp. 14-19, 22-27 (relevant experience); 33 (responsible for RFP preparation); 63, 143 (prepared and submitted Form 471; 99, 101-02, 121-41 (IEN implementation) (submitted through the Affidavit of Steven F. Schossberger in Support of Motion for Reconsideration and in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated April 22, 2014, and provided to USAC with May 20, 2014 letter to Mel Blackwell).

[2] *See* Hill Dep., pp. 63-64 (describing evaluation process).

[3] Second Affidavit of Bill Burns, dated April 28, 2014 ("Burns Aff."), ¶ 7 (provided to USAC with May 20, 2014 letter to Mel Blackwell). Section 2.0 of the IEN RFP contains the following language: "The State reserves the right to reject any or all proposals, wholly or in part, or to award to multiple bidders in whole or in part."

[4] *See* Burns Aff., ¶¶ 7, 9, 12, 15.

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not even suggest that awarding some services to ENA and others to Qwest would run afoul of Idaho law.

The first suggestion that there was any flaw in Idaho's contracting process did not come until March 2013, more than four years after the awards to ENA and Qwest. When the Idaho Supreme Court issued its first *Syringa* opinion on March 29, 2013 ("*Syringa I*"),[5] it held that Syringa had standing to challenge the amended contract to Qwest. The Court remanded that claim to the district court for further proceedings.

Although the Supreme Court's opinion cast some doubt on the validity of the contract amendments, the State remained convinced that even if the courts ultimately decided that the amendments were procedurally flawed, the initial contracts would remain valid. On remand following *Syringa I*, the district court permitted Syringa to assert a new claim challenging the amendment to the ENA contract as well as the Qwest amendment, but it prohibited Syringa from challenging the initial contract awards.[6] However, the court entered a summary judgment order in November 2014 suggesting that even the initial contract awards were invalid.[7] After a series of motions seeking clarification of its ruling, the court entered judgment in February 2015 declaring both the ENA and Qwest amended contracts to be void.[8] The court held that the State's longstanding practice of reserving the right to award goods or services contracts in whole or in part violated an Idaho statute, Idaho Code § 67-5718A. The State respected the court's decision and terminated the IEN contracts.[9]

Notwithstanding the Procedural Flaw in the ENA Contract Amendment, the State of Idaho Actively Managed the ENA Contract to Control Costs and Provide Valuable Services that Otherwise Would Have Been Unavailable to Idaho's Schools.

In our May 20, 2014 letter to USAC's Mel Blackwell, we provided USAC with some information about the efforts Idaho made to ensure that the IEN was managed to serve the public

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[5] *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 305 P.3d 499 (Idaho 2013).

[6] *See* Memorandum Decision and Order re: Motion for Reconsideration, entered June 24, 2014 (provided to USAC with July 3, 2014 letter to Mel Blackwell).

[7] *See* Memorandum Decision and Order re: Pending Dispositive Motions, entered November 10, 2014 (copy enclosed).

[8] *See* Memorandum Decision and Order re: Motions to Reconsider and Judgment and I.R.C.P. 54(b) Certificate, entered February 11, 2015 (copy enclosed).

[9] *See* H.B. 168, 2015 Idaho Sess. Laws ch. 15 (reducing appropriations to the Department of Administration for the IEN and appropriating funds to the State Department of Education to fund school districts' replacement services) (copy enclosed).

interest by controlling costs and delivering valuable services to Idaho schools. Before USAC makes a final funding decision for FY 2013 and 2014, we would like to make sure USAC has a more complete picture of these efforts and the great benefits they brought to Idaho. USAC can rest assured that the IEN admirably served "Congress's primary purpose in establishing the schools component of the E-rate program: to ensure that educators, students, and school personnel have access to advanced telecommunications and information services for educational purposes."[10]

Idaho officials reviewed all invoices to ensure there were no improper billings. Idaho officials also managed the IEN to control and reduce costs. IEN staff carefully monitored costs throughout the state, identified locations (particularly isolated rural locations) where costs were high, and worked to find alternative solutions that would reduce those costs.[11] As a result, the IEN's actual costs were well below projected costs. The IEN was initially projected to cost $62 million over the first five years. Actual costs for the period were only $36.7 million, a savings of nearly 40 percent.[12]

The IEN staff's efficiency also resulted in program costs that were significantly lower than those in neighboring states. A comparison of IEN costs to those of the Utah Education Network and the Wyoming Equality Network revealed that the IEN costs were 12 to 80 percent lower than those in Idaho's sister states. The cost-conscious IEN got the job done with fewer personnel and innovative solutions to increase bandwidth in hard-to-reach rural schools.[13]

The IEN provided significant benefits to Idaho's schools and students. Before the IEN was launched in 2009, only 20 Idaho school districts enjoyed fiber optic connections.[14] These districts were concentrated in Idaho's urban areas.[15] The vast majority of Idaho's districts are in

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[10] *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, Sixth Report and Order, 25 FCC Rcd 18762, 18774-75, ¶ 23 & n.71 (2010) (citing 47 U.S.C. § 254 (h)(2)).

[11] For a detailed description of some of these efforts, see our letter to Mel Blackwell, dated May 20, 2014, pp. 16-22, along with the supporting Affidavit of Brady Kraft in Support of Defendant's Motion for Reconsideration and in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated April 21, 2014.

[12] Idaho Education Network Annual Report, August 2014, p. 7 (enclosed Affidavit of Greg Zickau, dated May 24, 2016 ("Zickau Aff."), ¶ 5 and Exhibit 3).

[13] Idaho Education Network Annual Report and Business Plan, May 2011, p. 6 (Zickau Aff., ¶ 6 and Exhibit 2).

[14] *See* IEN Request for Proposals ("IEN RFP"), Appendix D (summarizing then-current state of Idaho schools' broadband connectivity) (Zickau Aff., ¶ 3 and Exhibit 1).

[15] *See* IEN RFP, Appendix D.

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sparsely populated rural areas, where free market forces did not justify fiber optic infrastructure investments by private telecommunication companies. The IEN was a game changer for these rural districts. By January 2015, the IEN connected 219 high schools in 128 school districts, with 83% of the districts enjoying fiber optic connections.[16]

The technological advances made possible by the IEN significantly improved learning opportunities for Idaho students. Due to Idaho's geography and rural character, 67% of Idaho's high schools have fewer than 600 students. Small schools struggle to provide a full and solid curriculum on their own. The IEN greatly benefited Idaho's rural districts by enabling their students to enroll in distance learning classes. More than 12,000 Idaho students earned nearly 30,000 class credits through the IEN.[17] The IEN enabled students in small rural districts to take advanced math, physics, and foreign language classes that never would have been available without the IEN. And students throughout Idaho benefited from dual credit classes at greatly reduced cost that allowed them to earn credits toward college degrees. By mid-2014, Idaho students had earned more than 18,000 dual credits, saving their families the higher cost of future college tuition, and improving the chances that students would earn college degrees.[18]

Over the years, the State has received numerous testimonials from Idaho educators extolling the benefits the IEN provided.[19] Here are just a few:

- "The use of a statewide contract has allowed the IEN to leverage services across the state at a price point that many districts could not have negotiated on their own. Districts that lacked an option for high speed internet are now able to offer their students courses from outside their district, and many dual credit courses with college partners... The IEN is the answer to creating an equitable education system across Idaho."

  -William Goodman, President
  Idaho Education Technology Association[20]

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[16] Idaho Education Network Mid-Year Report, February 2015, p. 21 (Zickau Aff., ¶ 8 and Exhibit 4).

[17] *See* IEN Distance Learning Summary Data Sheet (Zickau Aff., ¶ 9 and Exhibit 6).

[18] Idaho Education Network Annual Report, August 2014, p.7.

[19] *See, e.g.*, Idaho Education Network Annual Report, August 2014, p. 3; Idaho Education Network Mid-Year Report, February 2015, p. 5.

[20] Idaho Education Network Annual Report, August 2014, p. 3. Mr. Goodman is the Director of Technology for the Mountain Home, ID School District No. 193.

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- "The Idaho Education Network has been a game changer for our rural district, helping to 'level the playing field' for our students who do not have access to home computers, internet connections, or the ability to travel. It is helping to create a student population of effective communicators, creative and critical thinkers, global citizens, engaged and self-directed learners, and quality producers. What a valuable resource for this generation and other generations to come."

  -Terri Vasquez, Principal
  Homedale Elementary School[21]

- "The educational value of the IEN and the educational opportunities that have been afforded to the students at Sugar-Salem High School cannot be overstated. The implementation of the IEN in Idaho schools has been the best educational tool that Idaho has adopted in the past twenty five years. The ability for students to take 45-60 college credits in the high school setting has helped students in rural Idaho to have the same opportunities as students in urban Idaho."

  - Jared Jenks, Principal
  Sugar-Salem High School[22]

- "With the power and backing of the State of Idaho, all of the sudden there were backhoes digging across town to my school to bury fiber into my building, and forcing the telecommunication companies to upgrade. Something which never would have happened without the IEN."

  - Dave Holmes, Technology Director
  Homedale School District[23]

The IEN's accolades were not confined to Idaho. The IEN won national recognition for its achievements. In 2011, it received the Computerworld Honors Program – 21st Century Achievement Award for Emerging Technology. In 2013, the IEN was a National Journal Digital Innovation Winner. That same year, it received an honorable mention Digital Education Achievement Award.[24] Idaho is justly proud of the award-winning IEN's achievements.

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[21] Idaho Education Network Annual Report, August 2014, p. 3.

[22] Idaho Education Network Annual Report, August 2014, p. 3.

[23] Idaho Education Network Mid-Year Report, February 2015, p. 20.

[24] Zickau Aff., ¶ 11.

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The IEN continues to provide benefits that serve the public interest. The infrastructure improvements the IEN made possible continue to allow Idaho's schools to obtain high-speed internet service. This is a huge benefit to schools in many of Idaho's rural communities where, without the IEN, such service would not be available.

Despite the Procedural Flaw in the ENA Contract Amendment, There Was No Waste, Fraud, or Abuse in the IEN.

The FCC's E-rate rules are designed to prevent waste, fraud, or abuse so that valuable public funds are properly used.[25] The many IEN benefits outlined above provide strong evidence that the IEN was a well-managed program that successfully served the public interest, not one plagued by waste, fraud, or abuse.

Equally compelling evidence is found in the actions of the Idaho legislature. As the IEN got underway, the legislature created the Idaho education network program and resource advisory council ("IPRAC") to oversee the IEN's activities.[26] IPRAC was charged with ensuring that the IEN comply with federal law, and leverage statewide purchasing power for the IEN to "[p]rocure high-quality, cost-effective internet access and appropriate interface equipment to public education facilities."[27] Although IPRAC was not able to prevent the procedural flaw in the contracting process that Idaho courts later determined to be contrary to Idaho law,[28] it oversaw the IEN's implementation to help ensure the program provided its intended benefits in a cost-effective manner. IEN staff took guidance from IPRAC and provided it with regular reports on the program's management and progress.[29]

Perhaps the most compelling evidence dispelling any concern about waste, fraud, or abuse in the IEN is the action the legislature took after USAC suspended funding for the ENA contract in 2013. The Idaho legislature appropriated millions of additional dollars to fund 100%

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[25] *See, e.g., Requests for Review by Macomb Intermediate Sch. Dist. Tech. Consortium*, CC Docket 02-6, Order, FCC 07-64, 22 FCC Rcd 8771, 8774, ¶ 9 (2007) (determining FCC's 30 percent rule did not apply and noting the absence of any "fraud or abuse").

[26] Idaho Code § 67-5745E.

[27] *Id.* § 67-5745E(5), (2)(c), (3)(d).

[28] IPRAC was not created until 2010, after the contract amendments. 2010 Idaho Sess. Laws ch. 357.

[29] Copies of sample IEN reports are Exhibits 2-4 to the Affidavit of Greg Zickau.

of the contract costs for almost two years.[30] This never would have occurred if the State had any reason to suspect any waste, fraud, or abuse in the IEN.[31]

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Sincerely,

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OFFICE OF THE ATTORNEY GENERAL

W. SCOTT ZANZIG
Deputy Attorney General

Enclosures

cc: Robert L. Geddes, Director, Idaho Department of Administration
Greg Zickau, Chief Technology Officer, Office of the Chief Information Officer

ATTACHMENT "B"