

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

In the Matter of	)	
	)	
Schools and Libraries	)	CC Docket No. 02-6
Universal Service Support Mechanism	)	
	)	
Request for Review and/or Waiver by	)	
Missoula County Public Schools	)	Application No. 161047508
of a Decision by the	)	
Universal Service Administrative Company	)	

**REQUEST FOR REVIEW AND/OR WAIVER  
BY MISSOULA COUNTY PUBLIC SCHOOLS  
OF A DECISION BY THE  
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY**

Pursuant to sections 54.719 and 54.722 of the Commission’s rules,<sup>1</sup> Missoula County Public Schools<sup>2</sup> (Missoula or the District) hereby respectfully requests a review of a Universal Service Administrative Company (USAC) decision to deny Schools and Libraries Universal Service (E-rate) funding for Funding Year 2016. Alternatively, Missoula respectfully requests a waiver of the Commission’s rules to the extent necessary to grant the requested relief.

Missoula respectfully appeals USAC’s decision to deny funds for Funding Year 2016. USAC denied the funding request because it found that the District did not upload a competitive bidding document into EPC. The Commission’s rule requires that Forms 470 be posted on the USAC website and that the competitive bidding process be “fair and open.” There is no Commission rule that requires the District to upload every competitive bidding document into

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<sup>1</sup> 47 C.F.R. §§ 54.719(b), 54.722.

<sup>2</sup> Billed Entity Number 135105. The FRNs at issue are 1699109649, 1699109683 and 1699109705.

USAC's IT system, as long as all potential bidders are given access to the same information. All potential bidders had access to and the ability to evaluate the one document at issue.

For this reason, Missoula requests that the Commission reverse USAC's decision to deny funding for the District's FY 2016 application. In the alternative, Missoula respectfully requests a waiver of the Commission's rules to the extent necessary to grant the requested relief.

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## **I. BACKGROUND**

Missoula County Public Schools is located in Missoula, Montana. Missoula County Public Schools serves area students through nine elementary schools, three middle schools, and four high schools (three in Missoula and one in Seeley Lake, Montana). The District also operates an Alternative High School program, Early Learning Preschool program at Jefferson Center, and an adult education program at The Lifelong Learning Center.

On December 10, 2015, Missoula posted its Form 470 No. 160009238 to EPC, along with the Request for Proposal (RFP), seeking bids for Internet access service, including dark fiber, leased lit, and self-provisioned services, for Funding Year 2016.<sup>3</sup> The original RFP, uploaded to EPC, informed all potential bidders that attendance at one of two pre-proposal conference meetings was mandatory and bidders who did not attend the meeting would be disqualified from submitting a bid.<sup>4</sup> Following the mandatory conference meetings, on January 15, 2016, Missoula published an RFP addendum on the District's website.<sup>5</sup> On that same date, Missoula provided via e-mail a copy of the RFP addendum to all qualified bidders who attended the mandatory conference meeting, as only those bidders who attended the meeting were qualified to submit proposals.<sup>6</sup>

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<sup>3</sup> Exhibit 1, Missoula County Public Schools FCC Form 470, No. 160009238, filed December 10, 2015 (Missoula Form 470).

<sup>4</sup> Exhibit 2, Missoula County Public Schools Request for Proposals, December 10, 2015, at 5, 7 (Missoula RFP). The RFP stated that the pre-proposal conference meeting would be held on two dates, December 17, 2015, and January 6, 2016, and a mandatory site visit would follow the meeting on both dates. Bidders only had to attend one of the meetings. *Id.*

<sup>5</sup> Exhibit 3, Missoula County Public Schools Request for Proposals Addendum, dated January 15, 2016 (Missoula RFP Addendum).

<sup>6</sup> The RFP addendum included written questions from potential bidders submitted to the District pursuant to the original RFP and the District's answers to those questions, as well as clarifications to the District's Wide Area Network RFP. Exhibit 3, Missoula RFP Addendum.

Missoula received seven bids and selected WideOpen Networks as the winning bidder. Missoula filed its FCC Form 471 No. 161047508 on May 22, 2016.<sup>7</sup> Missoula requested funding for the construction of a self-provisioned fiber network for a total funding commitment request of \$2,099,365.27.<sup>8</sup> USAC issued a funding commitment decision letter on June 30, 2017, denying Missoula's requested funds for E-rate services.<sup>9</sup>

In its initial denial, USAC denied Missoula's E-rate funding requests for several reasons. First, USAC stated the District did not post all competitive bidding documents in EPC.<sup>10</sup> Second, USAC alleged the District did not choose the most cost-effective option for its requested E-rate services.<sup>11</sup> Third, USAC asserted that the description of products and services requested in the District's Form 470 and RFP did not include the language "or equivalent."<sup>12</sup> Because USAC denied funding for the District's request for self-provisioned fiber, USAC also denied funding for network equipment and maintenance and operations associated with the District's fiber request.<sup>13</sup>

Missoula filed an appeal of this decision with USAC on August 30, 2017.<sup>14</sup> In its appeal, Missoula argued that it adhered to all E-rate program requirements and did not violate any

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<sup>7</sup> Exhibit 4, Missoula County Public Schools FCC Form 471, No. 161047508, filed May 22, 2016 (Missoula Form 471).

<sup>8</sup> Exhibit 4, Missoula Form 471 at 15. FRN 1699109705 sought \$25,771.39 for eligible recurring charges, and FRN 1699109683 and FRN 1699109649 sought \$57,600.00 and \$2,015,993.88, respectively, for eligible nonrecurring charges. *Id.* at 5-6, 9, 13.

<sup>9</sup> See Exhibit 5, FRN Status Tool with Revised Funding Commitment Decision, November 8, 2017 (USAC Initial Appeal Denial)..

<sup>10</sup> FRN 1699109649. *Id.*

<sup>11</sup> FRN 1699109649. *Id.*

<sup>12</sup> FRNs 1699109649 and 1699109683. *Id.*

<sup>13</sup> FRNs 1699109683 and 1699109705. *Id.*

<sup>14</sup> See Exhibit 6, Missoula Appeal to USAC, dated August 30, 2017 (Missoula Appeal to USAC).

program rules and, thus, its funding requests for eligible E-rate services should be approved.

USAC denied this appeal stating that Missoula had filed its appeal late and thus USAC was not permitted to consider the appeal.<sup>15</sup>

On January 4, 2018, Missoula filed an appeal and waiver request with the Commission.<sup>16</sup> Missoula requested a waiver of the 60-day deadline for appeals filed with USAC.<sup>17</sup> Missoula argued that it inadvertently miscalculated the deadline by one day and a waiver of the deadline would correct this clerical error and serve the public interest.<sup>18</sup> Additionally, Missoula requested the Commission reconsider USAC's decision to deny Missoula's funding requests on the merits.<sup>19</sup> On September 28, 2018, the Commission granted Missoula's waiver request and remanded Missoula's application back to USAC to make a determination on the remaining issues.<sup>20</sup>

On remand in its Revised Funding Commitment Decision Letter (RFCDL) issued February 6, 2019, USAC denied Missoula's funding requests, this time limiting the denial reason

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<sup>15</sup> Exhibit 5, USAC Initial Appeal Denial ("Our records show that your appeal was filed more than 60 days after the date your decision letter was issued. Your appeal was filed on 8/30/2017. The Funding Commitment Decision Letter was issued on 6/30/2017. Federal Communications Commission (FCC) rules require appeals to be filed within 60 days of the date on the decision letter being appealed. FCC rules do not permit the Universal Service Administrative Company (USAC) to consider your appeal.").

<sup>16</sup> Exhibit 7, Missoula Appeal to FCC, dated January 4, 2018 (Missoula Appeal to FCC).

<sup>17</sup> *Id.* at 2. The FRNs at issue are 1699109649, 1699109683 and 1699109705.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, DA 18-991, Public Notice, 33 FCC Rcd 8885, 8889 & n.13 (WCB rel. Sept. 28, 2018).

to a finding that Missoula violated the competitive bidding process by not posting all competitive bidding documents in EPC.<sup>21</sup>

Appeals of USAC decisions are due within 60 days.<sup>22</sup> As such, this appeal is timely filed.

## **II. THE COMPETITIVE BIDDING PROCESS WAS FAIR AND OPEN BECAUSE ALL BIDDERS HAD ACCESS TO THE SAME INFORMATION**

The District's competitive bidding process was fair and open because all bidders had access to the same information. The Commission's rules require that competitive bidding processes be "fair and open."<sup>23</sup> The Commission has defined fair and open to mean that "all potential bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process."<sup>24</sup> Furthermore, the Commission has stated that any "additions or modifications to the FCC Form 470, RFP, or other requirements or specifications must be available to all potential providers at the same time and in

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<sup>21</sup> See Exhibit 8, USAC Revised Funding Commitment Decision Letter, Funding Year 2016, dated February 6, 2019, at 4, 8-9 (USAC Revised FCDL) for FRN 1699109649. USAC also denied requested funding for maintenance and operations associated with self-provisioned fiber (FRN 1699109705). See *id.* at 4-5. In its revised FCDL, USAC appears to have dropped two grounds as reasons for denial. It is unclear, however, because USAC changed the status of one FRN—1699109683—to "funded" but noted in the rationale section of the revised FCDL that USAC would not provide funding because the applicant's RFP had listed the manufacturer's name. As such, Missoula is not sure what action USAC was trying to take with respect to this FRN. As Missoula noted in its prior appeal to the Commission, it did not seek to purchase equipment and the references included in its RFP merely stated any equipment used by a service provider had to be compatible with its existing equipment. Exhibit 7, Missoula Appeal to the FCC at 8. The District hereby requests and reserves the opportunity to address those issues if USAC meant to deny that FRN instead of fund it.

<sup>22</sup> 47 C.F.R. § 54.720(a).

<sup>23</sup> 47 C.F.R. § 54.503(a).

<sup>24</sup> *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd 18762, 18798-800, paras. 85-86 (2010) (*Schools and Libraries Sixth Report and Order*).

a uniform manner.<sup>25</sup> The Commission has denied applications where the competitive bidding process was not fair and open because some bidders had information that other bidders did not.<sup>26</sup>

The Commission rules further require that applicants post their Form 470 to request bids.<sup>27</sup> Commission rules and orders do not appear to require applicants to provide additional information to potential bidders in a particular manner.<sup>28</sup> Rather, the Commission has stated that additional information or any modifications must be available in a “uniform manner.”<sup>29</sup> USAC appears to agree: In its revised FCDL, USAC noted that uploading every procurement document into EPC was a “program procedure,” and did not cite to any Commission rules in the denial reason.<sup>30</sup>

The District complied with the Commission’s rules by posting the Form 470 using USAC’s EPC, along with the Request for Proposal (RFP). The original RFP, uploaded to EPC, informed all potential bidders that attendance at a conference meeting was mandatory and bidders who did not attend the conference would be disqualified from submitting a proposal in

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<sup>25</sup> *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799, para. 86.

<sup>26</sup> See, e.g., *Petitions for Reconsideration by Charlton County School System, Folkston, GA and Trillion Partners, Inc., Austin, TX; Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-658765, *et al.*, CC Docket No. 02-6, Order and Order on Reconsideration, 28 FCC Rcd 9967 (Wireline Comp. Bur. 2013); *Petitions for Reconsideration by Falcon School District 49, Falcon, CO and Trillion Partners, Inc., Austin, TX; Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-466641, *et al.*, CC Docket No. 02-6, Order and Order on Reconsideration, 28 FCC Rcd 9980 (Wireline Comp. Bur. 2013) (school district violated competitive bidding process by engaging in numerous discussions with service provider providing detailed information about its needs not available to other bidders).

<sup>27</sup> 47 C.F.R. § 54.503(c).

<sup>28</sup> The Commission rules do not require an applicant to develop and post an RFP. However, if an applicant does create an RFP or additional documents, this fact must be indicated on the FCC Form 470. *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799, n.248.

<sup>29</sup> *Schools and Libraries Sixth Report and Order*, 25 FCC Rcd at 18799, para. 86.

<sup>30</sup> Exhibit 8, USAC RFCDL at 9.



response to the RFP.<sup>31</sup> On January 15, 2016, the District published an RFP addendum on the District's website.<sup>32</sup> On that same date, the District provided via e-mail a copy of the RFP addendum to all qualified bidders who attended the mandatory conference meeting.<sup>33</sup> Because only vendors that had attended the bidding conference could submit a bid, the District only needed to provide the addendum to those vendors. All qualified, potential bidders had access to the RFP addendum at the same time and were given the opportunity to evaluate and respond to information contained in the RFP addendum. Here, all bidders and service providers had access to the same information and were treated the same as all other bidders, as required by Commission precedent. Unlike the Commission orders where funding was denied because the competitive bidding process was not fair and open, there is no allegation here that one or some potential bidders had information that was not available to all potential bidders. No vendor was disadvantaged because the addendum was not posted on EPC, as all qualified bidders received a copy of the addendum. As a result, the competitive bidding process fair and open.

In addition, Commission rules prohibit USAC from adopting new rules or interpreting existing ones.<sup>34</sup> The Commission has not required addenda to be posted on USAC's website, only the Form 470. USAC cannot create "program procedures" that result in the denial of funding when those procedures are not the result of a notice of proposed rulemaking. Applicants have been receiving service provider questions for years and have distributed responsive answers fairly without posting them or any other addenda on USAC's website.<sup>35</sup>

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<sup>31</sup> Exhibit 2, Missoula RFP at 5, 7.

<sup>32</sup> Exhibit 3, Missoula RFP Addendum.

<sup>33</sup> *Id.*

<sup>34</sup> 47 C.F.R. § 54.702(c).

<sup>35</sup> In fact, if an applicant does not post an RFP with its Form 470 in the EPC portal, EPC does not allow the applicant to post additional documents, such as a Q&A document.

Therefore, the District respectfully asks the Commission to grant this appeal and direct USAC to approve the funding requests for this application.

### **III. IN THE ALTERNATIVE, A WAIVER OF THE COMMISSION'S RULES IS IN THE PUBLIC INTEREST**

As set out above, Missoula is entitled to funding for eligible E-rate services as requested. Should the Commission disagree, however, Missoula respectfully requests that the Commission waive its rules in order to grant the requested relief.

Any of the Commission's rules may be waived if good cause is shown.<sup>36</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>37</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>38</sup>

A waiver would further the goals of the E-rate program without undermining the purpose of the Commission's rules and would thus be in the public interest. As explained above, Missoula adhered to all E-rate program requirements that it was aware of. It did not violate any program rules and, as such, its funding requests for eligible E-rate services should be approved. Missoula believes that USAC may find that applicants posting all competitive bidding documents on EPC serves as a "safe harbor" to show that all bidders received the same information. Without a Commission rule, however, applicants should be able to demonstrate they met the requirement that bidding was fair and open in other ways, such as posting additional documentation to their own procurement websites, as is often required by their own rules.

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<sup>36</sup> 47 C.F.R. § 1.3.

<sup>37</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>38</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

Further, USAC has not suggested any concerns about waste, fraud, or abuse in this case, and in fact there was no waste, fraud, or abuse or bad faith on the part of Missoula. Missoula therefore respectfully requests that the Commission waive the Commission's rules to the extent necessary to grant the requested relief and direct USAC to grant the funding requests for this application.

#### **IV. CONCLUSION**

For the foregoing reasons, Missoula respectfully requests that the Commission reverse USAC's decision and direct USAC to grant the funding requests for this application, or, in the alternative, waive the Commission's rules to the extent necessary to grant the requested relief.

Respectfully submitted,

/s/ Fred Brakeman

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Fred Brakeman RCDD, CSI, CEMP  
Chief Executive Officer  
Infinity Communications & Consulting, Inc.  
4909 Calloway Drive, Suite 102  
Bakersfield, California 93312  
(661) 716-1840 Office  
fbrakeman@infinitycomm.com

March 27, 2019

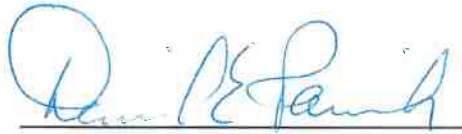
**Affidavit of Daniel E. Parrish**

STATE OF MONTANA                     )  
  ) SS  
COUNTY OF MISSOULA                )

I, Daniel E. Parrish, swear:

1. That I am the Accounting Supervisor for the Missoula County Public Schools. I was hired by the District for that position in August 1994. I have been involved with the District's E-Rate projects since 2004.
2. That I have read the foregoing appeal and avow the information stated therein is true and correct to the best of my knowledge and belief.

Further Affiant Sayeth Not.



Daniel E. Parrish  
Missoula County Public Schools  
215 South Sixth Street West  
Missoula, MT 59801  
406-728-2400

VERIFICATION

STATE OF MONTANA

)

) SS

COUNTY OF Missoula

)

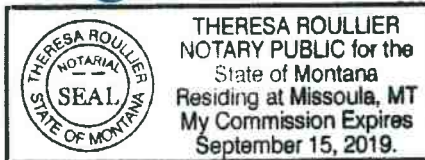
COMES NOW, Daniel E. Parrish, and being first duly sworn upon my oath, state that I have read the foregoing Affidavit, and that the facts contained therein are true and correct to the best of my knowledge, information and belief, and that I sign the same as my free act and deed.

Daniel E. Parrish

On this 27<sup>th</sup> day of March, 2019, before me, a Notary Public in and for said state, personally appeared Daniel E. Parrish, known to me to be the person who executed the within Affidavit, and acknowledged to me that he executed the same for the purposes therein stated and that he executed the same as his free act and deed.

Notary Public

My Commission Expires: 9/15/2019



## **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document will be sent via email to the Schools and Libraries Division, Universal Service Administrative Company at the [Appeals@USAC.org](mailto:Appeals@USAC.org) address.

/s/ Theresa Schrader

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Theresa Schrader