

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)
)
Request for Review by)
San Bernardino City Unified School District of) WC Docket No. 02-6
Decision of Universal Service Administrator)
)

Request for Review of a Universal Service Administrative Company Decision

I. Introduction

San Bernardino City Unified School District (“SBCUSD” or “District”) through its undersigned counsel and pursuant to Section 54.719 of the Rules of the Federal Communications Commission (“FCC” or the “Commission”), seeks FCC review of the decisions of the Administrator in two Universal Service Administrative Company (“USAC”) Commitment Adjustment Letters, dated April 21, 2015 (collectively “COMAD”) and the denial of its appeal to USAC, dated June 14, 2016 (“Appeal Denial”).¹

SBCUSD is the ninth largest school district in the State of California, with 75 school buildings, and nine non-instructional, data centers and administrative facilities. It serves 50,073 students — 44,767 of whom qualify for Free and Reduced Lunch/NSLP (90% discount rate for Telecommunications and Internet Access). SBCUSD has participated in the E-rate program since 1998, and has utilized \$162,616,438.89 of E-rate funding to provide internet access and advanced telecommunications services to the student population. The District has received national recognition as a leader bringing one-to-one initiatives to underserved student populations.

In the COMAD, USAC informed SBCUSD that it was seeking recovery of \$2,140,859 disbursed to SBCUSD under Funding Year 2008 Funding Request Numbers 1756315 and 2083681. SBCUSD timely appealed USAC’s initial determination and was informed by letter on June 14, 2016 that its appeal had been denied.² SBCUSD files this request for review of the Administrator’s decision within the allowable time.³

USAC challenged the method by which SBCUSD prepared its 2008 FCC Forms 470 and Requests for Proposal (collectively, “RFP”). SBCUSD uses a “worst-case sample site” method to prepare its RFPs for E-Rate services across its 77 E-Rate eligible schools and administration

¹ The COMAD is included as Attachment 1. USAC’s Appeal Denial is included as Attachment 2.

² SBCUSD’s appeal to USAC is included as Attachment 3.

³ 47 C.F.R. § 54.720.

facilities. This method is described more fully below. USAC determined that SBCUSD’s worst-case sample site method violated E-Rate competitive bidding requirements.

SBCUSD began using the worst-case sample site method prior to its Funding Year 2006 RFPs. Since Funding Year 2006, SBCUSD has been the subject of 10 USAC/FCC audits and USAC selective reviews, not including the COMAD and Appeal Denial currently at issue. (See the chart below for an overview of these audits and reviews.) Aside from the audit that has generated this request for review, none of the 10 audits or selective reviews undertaken since SBCUSD started using the worst-case sample site process have found any non-compliance with E-Rate competitive bidding rules or resulted in findings or direction indicating that the worst-case sample method was an improper bidding procedure. Nor have any of the audits or reviews uncovered any deliberate wrongdoing by district officials.

A 2010 audit report by the FCC Office of Inspector General (“OIG”) considered SBCUSD’s compliance with 47 C.F.R. Section 54 relative to certain Universal Service Fund (“USF”) disbursements for SBCUSD’s Funding Year 2006 RFP, including the competitive bidding requirements.⁴ The OIG opinion concludes that, except for certain noted unintentional non-competitive-bidding-related violations, SBCUSD “complied, in all material respects” with the E-Rate rules. Thus, the conclusions of the 2010 FCC OIG audit directly conflict with the USAC decision at issue in this appeal.

USAC and FCC Audits and Reviews Examining SBCUSD’s E-Rate Compliance Since SBCUSD Adopted Worst-Case Sample Site Method	
Audit or Review	Scope
Selective Review Information Request starting July 18, 2008	Reviewed contracts awarded in FYs 2006 and 2008 including one of the contracts at issue in this appeal; the scope of the review included the competitive bidding process
USAC Audit conducted by KPMG starting December 17, 2008	Reviewed contracts awarded in FYs 2006 and 2007; the scope of the audit included assessing the competitive bidding process and internal controls
Audit by FCC OIG starting February 24, 2009	Reviewed contracts awarded in FYs 2006 and 2007; the scope of the review included the competitive bidding process and internal controls
Selective Review Information Request starting October 14, 2011	Reviewed contracts awarded in FY 2007 and 2008 including one of the contracts at issue in this appeal; the scope of the review included the competitive bidding process
Selective Review Information Request starting November 30, 2012	Reviewed contracts awarded in FY 2011
Selective Review Information Request starting September 9, 2013	Reviewed contracts awarded in FY 2013

⁴ The FCC OIG Audit Report is included as Attachment 4. Note that the numbering of the E-Rate rules has changed somewhat since 2008. In 2008, the competitive bidding requirements, such as the required contents of FCC Form 470, were included in 47 C.F.R. § 54.504 not 47 C.F.R. § 54.503, which is their location in the current rules. Thus, the competitive bidding requirements were included in the scope of the FCC OIG audit review as described on pages 4-5 of Attachment 4.

Selective Review Information Request starting June 10, 2014	Reviewed contracts awarded in FY 2014
Selective Review Information Request starting July 31, 2014	Reviewed contracts awarded in FYs 2006, 2007, 2009 and 2010
Selective Review Information Request starting September 12, 2014	Reviewed contracts awarded in FY 2006, 2007 and 2008 including one of the contracts at issue in this appeal; the scope of the review included the competitive bidding process
USAC Audit conducted by KPMG starting August 9, 2016	Ongoing Review of contracts awarded in FY 2015 ⁵

II. Description of the SBCUSD Worst-Case Sample Site Process

The SBCUSD worst-case sample site process is summarized as follows. SBCUSD designates four sample sites as the basis for its bidding process: an elementary school, a middle school, a high school, and an administration building. All of the District's 77 sites eligible for E-Rate funding fit into one of these four categories. The sample sites selected represent the worst-case-scenario for each category and thus provide an upper limit on the extent and range of needed material and services for every SBCUSD E-Rate eligible site.

For each sample site, bidders are required to complete three pricing documents. First, the bid packages include a document titled "Attachment A1," listing all of the equipment that bidders may be required to provide for the District's sites. Bidders are required to identify the price they would charge for each item listed in Attachment A1. Second, bidders are required to provide a "Schedule of Values" for each sample site, identifying the specific items from Attachment A1 that they plan to install in each sample site. Finally, bidders complete an "Attachment A" document which lists the total price for each sample site based on Attachment A1 and the Schedule of Values. The District uses Attachment A to determine which bidder offers the lowest price. Attachment A instructions direct all bidders to "include any additional costs that may be anticipated during the term of this bid/agreement for all sites included in this bid."

Bidders are given the list and location of all 77 sites, and they are invited to inspect the sample sites. They have access to the District's technology plan and to all the sites. They are not required to specify equipment and services to be provided at every site, only the worst-case sample sites. The successful bidder is required to provide the equipment listed in Attachment A1 to each of the 77 sites at a price, in each instance, not to exceed the bid cost for the corresponding sample site. The bidding process thus provides certainty and the same representative bidding opportunities to all bidders. The bidders all prepare bids knowing the number of sites and the types of equipment and services to be provided in the worst case, allowing them to determine their bid prices, and thus their maximum exposure. The District can efficiently evaluate bids knowing the maximum cost to the District and to the E-Rate program.

⁵ SBCUSD received e-mail notice of this audit only a few days before filing this appeal and does not know yet what its scope will be.

III. The Worst-Case Sample Site Process is More Reasonable and Efficient than Listing the Precise Needs of Each School.

A. The Worst-Case Sample Site Method Does Not Result in USF Expenditures in Excess of Need.

Although SBCUSD assumes a worst-case-scenario for the purpose of soliciting bids and awarding contracts, it only orders and pays for equipment and services, and only accepts E-Rate discounts, based on its actual need at each site. SBCUSD timely files FCC Forms 500 to release any excess committed funds from USAC funding commitments to the District. The efficiencies created by the system save USF and taxpayer dollars.

B. The Worst-Case Sample Site Method Facilitates a Fair and Open Competitive Bidding Process and Saves School Resources and Taxpayer Funding.

A sample site procedure is the most reasonable way for SBCUSD to establish a fair and open competitive bidding process. USAC states that SBCUSD violated E-Rate rules because the worst-case sample site method “did not specify the actual quantities of products/services needed for each site.” SBCUSD has 77 E-Rate eligible sites. Using the sample site procedure in 2008, SBCUSD’s RFP was over 150 pages long. Had SBCUSD attempted to list precise requirements for every site, its RFP would have required taxpayer-funded surveys of each site to determine each site’s precise needs, and the resulting bidding document would have been, SBCUSD estimates, over 1000 pages long. The printing costs, the bid package preparation expense to the District, and the burden of bid evaluation costs would be significant.

Moreover, a complete list of the needs of each school would be prohibitively expensive for SBCUSD to produce. In 2014, SBCUSD information technology staff completed a full technology review for the school district. Over the course of three years, consultants and/or SBCUSD information technology staff visited each E-Rate eligible site in the District and documented each site’s technology needs. The review required over 3,000 man-hours and cost the District over \$120,000. The requirement of an extensive evaluation like this every time a bid evaluation is conducted would be a needless waste of taxpayer resources.

A site-by-site bidding requirement would have adverse impact on bidders and the bidding process itself. If SBCUSD had published an RFP requiring 77 separate site reviews and more than 1000 pages of submissions for essentially duplicative services, it would have imposed significantly more difficult and needlessly more expensive burdens on potential bidders. The opportunity for bidding errors and irregularities would be increased exponentially, while the quality of bids would not be improved, costs to the District would multiply, and the costs to the USF would not be reduced. The up-front cost to bid would likely have discouraged potential bidders and thus undermined FCC policy to facilitate a fair and open competitive bidding process.

IV. The Worst-Case Sample Site Method is Legal Under California Law and Permitted in Other Federal Government Contracting Contexts.

A. The Worst-Case Sample Site Method is Legal Under California Law.

SBCUSD developed its vendor selection process, including the worst case sample site method, with San Bernardino county counsel in order to ensure compliance with California law. In California, public agencies, including school districts, are generally granted flexibility to create the bid documents to help them determine the service provider who can best meet their needs: "letting of contracts by a governmental entity necessarily requires an exercise of discretion guided by considerations of the public welfare."⁶ Moreover, there is no California law prohibiting the worst-case sample site method, and, under California Education Code 35160 (commonly called the Permissive Education Code), school districts are permitted to take any action deemed necessary to meet their purpose and needs, as long as the act is not specifically prohibited by law.⁷ Thus, because no California law prohibits the worst-case sample site procedure, and because the worst-case sample site procedure was reasonably selected by SBCUSD to help it find a vendor to meet its needs, the process is in compliance with California law.

B. Methods Similar to Worst-Case Sample Site are Permitted in Other Federal Government Contracting Contexts.

The Federal Acquisition Regulation permits indefinite quantity contracts, in which the contracting agency accepts bids for a given item or service but not for a given quantity. The bidder knows the products and services to be provided but does not know the specific amounts that will be required.⁸ As is the case with the SBCUSD worst-case sample site method, in indefinite quantity contracts permitted by the Federal Acquisition Regulation, prices are known and the government's financial exposure is limited to actual purchases.

V. Methods Similar to Worst-Case Sample Site Are Used by Many Large School Districts throughout California and the Country.

SBCUSD is not alone in using a method like worst-case sample site to prepare its E-Rate RFPs. A simple internet search reveals several school districts openly using similar processes:

- Inglewood Unified School District stated in its FY 2015 RFP for Network Infrastructure Upgrades that bidders would be required to visit sample sites to assist in estimating

⁶ *Mike Moore's 24 Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303; *see also Educational & Recreational Services, Inc. v. Pasadena Unified School District* (1997) 65 Cal.App.3d 775; *Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003.

⁷ *See Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1017-1019; *Howard Jarvis Taxpayers Assn. v. Whittier Union High School Dist.* (1993) 15 Cal.App.4th 730, 734-735; *California School Employees Assn. v. Del Norte County Unified Sch. Dist.* (1992) 2 Cal.App.4th 1396, 1404.

⁸ 48 C.F.R. § 16.501-2.

costs.⁹ The worst-case scenario would be used to establish the highest possible range of the actual cost to complete the project work. Detailed surveys of each site would be performed only by the selected vendor.

- Val Verde Unified School District states in its RFP for Basic Maintenance of Internal Connections and Software, FY 2016 that services offered in the Vendor's statement of work are to be provided on an as-needed basis.¹⁰ Further, prices are to be set on a not-to-exceed basis.
- The Georgia Juvenile Justice School System's FY 2015 RFP for Telecommunications Services describes the voice and internet needs of one sample school in order to assist bidders in bidding to provide services to all 25 schools in the district.¹¹

Plainly, many larger school districts use sampling methods for soliciting bids and do not "specify the actual quantities of products/services needed for each site." SBCUSD understands that practices similar to the worst-case sample site method are standard for large, multi-campus districts.

VII. E-Rate Regulations and Orders Permit Use of the Worst-Case Sample Site Method.

A. The Worst-Case Sample Site Process is Not Prohibited by E-Rate Rules or Orders.

The competitive bidding regulations for the E-Rate program do not forbid use of the worst-case sample site method.¹² Moreover, USAC was unable to identify FCC precedent in support of its position. The only legal authority cited by USAC in the COMAD or the Appeal Denial is the 1997 Universal Service Order ("1997 Order").¹³ Contrary to USAC's assertions, nowhere does the 1997 Order require applicants to specify exact quantities of the items they seek. Instead the Order requires "the application to describe the services that the schools and libraries seek in sufficient detail to enable potential providers to formulate bids."¹⁴ The SBCUSD method provides such detail. Further, as discussed above, requiring actual site-by-site quantity specification undermines the explicitly stated purpose of this rule by making it much more difficult for potential providers to submit bids and by discouraging bidders from bidding in the first place. As SBCUSD pointed out in its appeal to USAC, the 1997 Order sought to

⁹ Inglewood Unified School District, *Request for Proposal #002/2015-16: Network Infrastructure Upgrade for High Density Wireless Network* 8 (July 18, 2015), http://myiusd.net/wp-content/uploads/2013/07/IUSD_RFP_Network_Upgrade_002-2015-16_v21.pdf (last visited Aug. 3, 2016).

¹⁰ Val Verde Unified School District, *RFP – Basic Maintenance Internal Connections and Software E-Rate Year 19 (FY 2016)* 13 (Jan. 20, 2016), https://www.valverde.edu/UserFiles/Servers/Server_88899/File/District/E-Rate/RFP%20ERate%20Basic%20Maintenance%20Internal%20Connections%20&%20Software%20YR19%20FY2016.pdf (last visited Aug. 3, 2016).

¹¹ State of Georgia, *Georgia Technology Authority Request for Proposal (RFP): E-Rate Telecommunications Services* at 2, <http://ssl.doas.state.ga.us/PRSapp/bid-documents/1698000980-GTA0001542192627.pdf> (last visited Aug. 3, 2016).

¹² See 47 C.F.R. § 54.503.

¹³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029 (1997).

¹⁴ *Id.* at ¶ 575.

provide “maximum flexibility” to schools and libraries seeking to provide for their technology needs.¹⁵ The Order also emphasized the importance of maintaining low administrative costs.¹⁶ These same goals were echoed in the more recent 2014 Seventh Report and Order.¹⁷ The worst-case sample procedure meets the goal of lowering administrative costs by eliminating unnecessary duplication of evaluation for multiple, very similar, sites. The process allows taxpayer funding to be used to provide for students rather than being consumed by the application process. SBCUSD should be provided with flexibility to implement the worst-case sample site procedure because it is a reasonable and cost-effective way of meeting SBCUSD’s students’ needs.

B. By Rejecting SBCUSD’s Worst-Case Sample Site Process, USAC is Attempting to Set Policy in Violation of FCC Rules.

Pursuant to 47 C.F.R. § 54.702(c), USAC “may not make policy” or “interpret unclear provisions of the statute or rules.” Given USAC’s inability to find FCC precedent supporting its view, a fair description of the USAC denial of the SBCUSD appeal is that USAC has attempted to create a new rule with no grounding in Commission policy.

In the Seventh Report and Order, the Commission announced a new rule that applicants would be required to seek support for Category Two services on a school-by-school and library-by-library basis (“Per-Entity Rule”).¹⁸ The new Per-Entity Rule could potentially be read to support USAC’s position with respect to E-Rate contracts entered into after the 2014 Order went into effect. However, if, pursuant to the new Per-Entity Rule, Districts must now specify the exact needs of each school seeking funding, then it is even clearer that the rule USAC is seeking to enforce did not exist at the time SBCUSD entered into the contracts at issue here. There is no language in the Seventh Report and Order implying that the Per-Entity Rule is merely a clarification or elaboration on an existing policy. Rather it is a new rule. Accordingly, there was no rule in existence in 2008 prohibiting SBCUSD’s worst-case sample site process. USAC is forbidden from setting policy, and the Commission should not tolerate USAC rulemaking in this case.

VIII. The COMAD and the USAC Appeal Process have become an Improper and Inequitable Penalty to SBCUSD.

SBCUSD has been the subject of repeated audits and reviews since 2006, none of which has demonstrated deliberate wrongdoing by the District. As discussed above, SBCUSD’s competitive bidding processes have been examined several times, and at least one audit examined SBCUSD’s competitive bidding process and found that, except for certain unrelated and minor violations, SBCUSD “complied, in all material respects” with E-Rate rules. As noted above, practices similar to worst-case sample site are commonly used by large districts

¹⁵ *Id.* at ¶ 431

¹⁶ *Id.* at ¶ 571.

¹⁷ *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order, 29 FCC Rcd. 15538 (2014) Paragraphs 112, 124 and 132 explain how the FCC’s approach will lead to flexibility for schools and libraries. Paragraph 55 describes how “[s]implification of the E-rate application process also eases the administrative burden on applicants...”

¹⁸ *Id.* at ¶¶ 104-105.

throughout the country, and USAC has been unable to cite any FCC authority rejecting these methods.

The process by which USAC has attacked SBCUSD's bidding process has been highly unusual. USAC sent its initial COMAD on April 21, 2015. SBCUSD timely appealed to USAC on June 19, 2015. Not until almost a year later, on June 14, 2016, did USAC deny SBCUSD's appeal. In 2015, USAC took an average of 82 days to respond to appeals filed in the second quarter.¹⁹ However, despite the irregularly long wait SBCUSD endured, USAC's Appeal Denial did not respond to a single argument SBCUSD made in defense of its process. Instead USAC merely repeated language from the original COMAD. Indeed, *all* of the language included in USAC's Appeal Denial specifically addressing the worst-case sample site procedure is copied directly from the original COMAD, despite the fact that SBCUSD presented USAC with an eight-page appeal, making many of the arguments presented above. Except for the date of SBCUSD's appeal letter and the name and address of the consultant that helped SBCUSD file its appeal, there is no indication in the Appeal Denial that USAC even glanced at SBCUSD's appeal.

In these circumstances, it would be inequitable to penalize SBCUSD by adjusting the 2008 commitment. It would be inequitable to announce and apply all at once this new, retroactive and unauthorized policy rule against the worst-case sample site process, and it would be inequitable to heap punishment and costs on SBCUSD, a public school district, without any showing of bad faith, violation of or even disregard of E-Rate Rules.²⁰ USAC has already forced SBCUSD, through repeated audits and inquiries, to expend taxpayer resources on consultants and attorneys to defend its legitimate and reasonable use of E-Rate funds.

In conclusion, the Commission should reverse USAC's Appeal Denial and reject the COMAD.

Respectfully submitted,



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¹⁹ USAC, *Building the Foundation: 2015 Annual Report 9*, available at http://usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-interactive-2015.pdf (last visited Aug. 3, 2016).

²⁰ See *Northeast Cellular Tel. Co. V. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (the Commission may exercise its discretion to waive a rule where particular facts make strict application of the rule inconsistent with the public interest); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (the Commission may take into account consideration of hardship and equity in implementing its rules).

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