

**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”)<sup>1</sup>, seeks FCC review of the decisions of the Universal Service Administrator in two Universal Service Administrative Company (“USAC”) Commitment Adjustment Letters, dated June 7, 2017 (together, “COMAD”) for funding request years 2006 and 2007 and the denials of the District’s appeals to USAC, dated July 14, 2017 (together, “Appeal Denial”).<sup>2</sup>

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 50,008 students, 44,722 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 approximately \$168 million 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 in bringing one-to-one initiatives to underserved student populations.

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<sup>1</sup> 47 C.F.R. § 54.719.

<sup>2</sup> The COMAD is included as Attachment 1. The Appeal Denial is included as Attachment 2. The instant request for review (“Appeal”) is related to SBCUSD’s 2016 request for review filed on August 12, 2016 (“2016 FCC Appeal”), ECFS Confirmation Number 20160812223978371. This Appeal arises from the same contract as the 2016 Appeal. That contract was awarded pursuant to SBCUSD Technology Infrastructure Bid Number 32-05. The 2016 FCC Appeal dealt with the same alleged competitive bidding process issues, but for the 2008 funding year. The District incorporates by reference all arguments made in the 2016 FCC Appeal. While involving similar parties, neither this Appeal nor the 2016 FCC Appeal are affected by an FCC Order released on June 29, 2017 regarding a request for review submitted by Checkpoint Communications for 2006, 2007, and 2008 funding requests; the FCC Order provided no legal conclusions and the request for review was dismissed as moot. *See Streamlined Resolution of Request Related to Actions by the Universal Service Administrative Co.*, CC Docket No. 02-6, DA 17-618, Dismissed as Moot (2017).

In the COMAD, USAC informed SBCUSD that it was seeking a total recovery of \$4,816,255 disbursed to SBCUSD under Funding Years 2006 and 2007, corresponding to Funding Request Numbers 1484692 and 1578852 respectively.<sup>3</sup> SBCUSD timely appealed USAC's initial determination and was informed by letter on July 14, 2017 that its appeal had been denied.<sup>4</sup> SBCUSD files this request for review of the Administrator's decision within the allowable time.<sup>5</sup>

USAC challenged the method by which SBCUSD prepared its 2006 and 2007 FCC Forms 470 and requests for proposals ("RFPs") for cabling and related equipment. SBCUSD used a sample site method to prepare the RFPs, as described more fully below. USAC determined that SBCUSD's sample site method violated E-Rate competitive bidding requirements because SBCUSD failed to submit "bona fide requests for service, so that potential providers can provide accurate bids." USAC stated that by using the sample site method, the District did not "specify the actual quantities of products/services needed for each site." USAC claimed the District committed a competitive bidding violation because "an extrapolation of [the] sites would lead to overstatement of the needs of the district and does not meet the requirement for a complete and accurate description of the services sought."

USAC's position is without support in law, regulation, or case precedent. The District's sample site method provided bidders with clear and fair bidding information, especially in light of the nature of the services and supplies sought. The method was repeatedly examined and approved over the course of numerous detailed audits. The method is legal under federal and state law. With its interpretation of the sample site method, USAC appears to retroactively apply FCC rule changes for E-Rate bidding processes made in 2014, which changes could not apply to the District's bidding process in 2006 and 2007. Further, USAC attempts to set policy in violation of FCC rules, leading to an improper and inequitable penalty against SBCUSD.

## **II. Description of the SBCUSD Sample Site Method**

The SBCUSD sample site method is summarized as follows. SBCUSD designated 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 represented the largest facility in each category and thus provided an upper limit on the extent and range of needed material and services for every site. While the sample sites were larger than other sites, the cable, cable connectors, other equipment, and the nature of services required for the sample sites were identical to those required at all other sites in each category. The methodology is indistinguishable from indefinite quantity contracts ("IQCs") approved for use under federal and California law.

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<sup>3</sup> In the COMAD for Funding Request Number 1484692, USAC is seeking total recovery of \$2,002,606.70; in the COMAD for Funding Request Number 1578852, USAC is seeking total recovery of \$2,813,647.87.

<sup>4</sup> SBCUSD's appeal to USAC is included as Attachment 3.

<sup>5</sup> 47 C.F.R. § 54.720.

For each sample site, bidders were required to complete three pricing documents. First, the bid packages include a document titled “Attachment A1,” listing all of the equipment that bidders might be required to provide for the District’s sites. Bidders were required to identify the price they would charge for each item listed in Attachment A1. Second, bidders were required to provide a “Schedule of Values” for each sample site, identifying the specific items from Attachment A1 that they planned to install in each sample site. Finally, bidders completed an “Attachment A” document which lists the total price for each sample site based on Attachment A1 and the Schedule of Values. The District used Attachment A to determine which bidder offered the lowest price. Attachment A instructions directed 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 were given the list and location of all 77 sites, and they are invited to inspect the sample sites.<sup>6</sup> They had access to the District’s technology plan. They were not required to specify equipment and services to be provided at every site, only at the sample sites. The successful bidder was required to provide, as needed, the equipment listed in Attachment A1 to each of the 77 sites at a price not to exceed the bid cost for the unit of equipment at the corresponding sample site. The bidding process thus provided certainty of unit pricing and the same representative bidding opportunities to all bidders. All bidders prepared bids knowing the number of sites and the types of equipment and services to be provided, allowing them to determine their unit bid prices, and thus their maximum exposure. The District could efficiently evaluate bids knowing the maximum unit cost to the District and to the E-Rate program.

### **III. USAC’s Sample Site Method Interpretation Conflicts with Past Audits Involving Examinations of SBCUSD’s Competitive Bidding Process**

USAC is retroactively applying a new interpretation of the validity of the sample-site method. SBCUSD began using the sample site method before preparing its Funding Year 2006 RFPs. Since Funding Year 2006, SBCUSD has been the subject of nine USAC and FCC audits and USAC selective reviews, not including the COMAD and Appeal Denial currently at issue or the COMAD and Appeal Denial that is the subject of the 2016 FCC Appeal. The chart below is an overview of these audits and reviews. None of the nine audits or selective reviews found that the sample site method was an improper bidding procedure.

<b>USAC and FCC Audits and Reviews Examining SBCUSD’s E-Rate Compliance Since SBCUSD Adopted Sample Site Method</b>	
<b>Audit or Review</b>	<b>Scope</b>
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

<sup>6</sup> See Affidavit of Jayne Christakos, attached as Attachment 4.

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
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

Notably, the 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 competitive bidding requirements and Universal Service Fund (“USF”) disbursements for SBCUSD’s Funding Year 2006.<sup>7</sup> The OIG opinion noted certain minor violations unrelated to this appeal, but concluded SBCUSD “complied, in all material respects” with E-Rate competitive bidding rules. The conclusions of the 2010 FCC OIG audit directly conflict with the USAC decision at issue in this appeal.

#### **IV. E-Rate Regulations and Orders Permit Use of the Sample Site Method.**

##### **A. The Sample Site Method is Not Prohibited by E-Rate Rules or Orders.**

The competitive bidding regulations for the E-Rate program do not forbid use of the sample site method.<sup>8</sup> USAC was unable to identify authority or 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”).<sup>9</sup> Contrary to USAC’s assertions, nowhere does the 1997 Order require applicants to specify quantities of the items they seek. Instead, the Order requires “the application to describe the services that the schools and libraries seek in sufficient

<sup>7</sup> The FCC OIG Audit Report is included as Attachment 5. 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.

<sup>8</sup> See 47 C.F.R. § 54.503.

<sup>9</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029 (1997).

detail to enable potential providers to formulate bids.”<sup>10</sup> The SBCUSD method provides such detail.

Requiring actual site-by-site quantity specification undermines the stated purpose of the 1997 Order 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 that resulted in its 2016 FCC Appeal, the 1997 Order sought to provide “maximum flexibility” to schools and libraries seeking to provide for their technology needs.<sup>11</sup> The 1997 Order also emphasized the importance of maintaining low administrative costs.<sup>12</sup> The same goals were echoed in the more recent 2014 Seventh Report and Order.<sup>13</sup> The sample site method 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 sample site method because it is a reasonable and cost-effective way of meeting SBCUSD’s students’ needs.

**B. By Rejecting SBCUSD’s Sample Site Method, USAC is Attempting to Set Policy in Violation of FCC Rules.**

Under 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”).<sup>14</sup> 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 school systems must specify the exact needs of each school building for which the system seeks funding, then it is even clearer that the rule USAC is seeking to enforce did not exist at the time SBCUSD published 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 of an existing policy. Rather, it is a new rule. Accordingly, there was no rule in existence in 2006 or 2007 prohibiting use of SBCUSD’s sample site method. USAC is forbidden from setting policy, and the Commission should not tolerate USAC rulemaking in this case.

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<sup>10</sup> *Id.* at ¶ 575. See Attachment 4.

<sup>11</sup> *Id.* at ¶ 431

<sup>12</sup> *Id.* at ¶ 571.

<sup>13</sup> *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...”

<sup>14</sup> *Id.* at ¶¶ 104-105.

**V. The Sample Site Method is More Reasonable and Efficient than Listing the Precise Needs of Each School.**

**A. The Sample Site Method Does Not Result in USF Expenditures in Excess of Need.**

Although SBCUSD relies on sample sites in 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 Sample Site Method Facilitates a Fair and Open Competitive Bidding Process and Saves School Resources and Taxpayer Funding.**

A sample site method is the most reasonable and efficient way for SBCUSD to establish a fair and open competitive bidding process for the cable and cable equipment purchased under these contracts. The method is fair to bidders because it gives each bidder an opportunity to price every foot of cable, every connector, and every unit of service that will be offered to the District because the sample sites require the same cable, equipment, and services that are needed in every facility.<sup>15</sup>

The method is efficient for the District, saving District and E-Rate funds. Using the sample site method in 2006 and 2007, SBCUSD's RFP was 167 pages long. Had SBCUSD attempted to list precise requirements for every site (which requirements would not vary in any degree except quantity), its RFP would have required site-by-site taxpayer-funded surveys of each site to determine each site's precise needs, and SBCUSD estimates the resulting bidding document would have been over 1000 pages long.<sup>16</sup> Indeed, due to the new rules adopted under the 7th Report and Order in 2014, when the District sought bids for Category 2 Network Electronics for FY 2015, the RFP page count jumped by 630% from 167 to 1050 pages, and upon printing stood more than four inches thick.

Preparing 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 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 for every District-wide RFP would be a needless waste of taxpayer resources.

A site-by-site bidding requirement would have adverse impact on bidders and the bidding process. If SBCUSD had published an RFP requiring 77 separate site reviews and more than 1000 pages of submissions for essentially duplicative services for the competitive bidding resulting in the 2006 and 2007 funding requests, the District would have imposed significantly

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<sup>15</sup> See Attachment 4.

<sup>16</sup> See Attachment 4.

more difficult and needlessly more expensive burdens on potential bidders. The opportunity for bidding errors and irregularities would increase dramatically, while the quality of bids would not be improved, evaluation and printing costs to the District would multiply, and the cost to the USF would not be reduced. The cost to bid would likely have discouraged potential bidders and thus would have increased costs by reducing competition and would have undermined FCC policy to facilitate a fair and open competitive bidding process.

## **VI. The Sample Site Method is Legal Under California Law and Permitted in Other Federal Government Contracting Contexts.**

### **A. The Sample Site Method is Legal Under California Law.**

SBCUSD developed its vendor selection process, including the sample site method, with San Bernardino County counsel in order to ensure compliance with California law. In California, public agencies, including school districts, are granted flexibility to design bidding processes that help them select the service provider that 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."<sup>17</sup> No California law prohibits the 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 prohibited by law.<sup>18</sup> Because no California law prohibits the sample site method, and because the sample site method 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 Sample Site Method are Permitted in Other Federal Government Contracting Contexts.**

The District's contracting method is consistent with Federal IQCs.<sup>19</sup> The Federal Acquisition Regulation permits IQCs, in which the contracting agency accepts bids for a given item or service but not for a given quantity.<sup>20</sup> The bidder knows the products and services to be provided and the unit price of the goods, but does not know the precise quantities or services

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<sup>17</sup> *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.App3d 775; *Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003.

<sup>18</sup> 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.

<sup>19</sup> An IQC is an open ended contract where a party, like the United States, cannot estimate its needs except in terms of minimums and maximums. See *Rice Lake v. United States*, 33 Fed. Cl. 144, 153 (1995). An IQC is characterized as a contract where the buyer's promise is specifically uncertain, and such a contract would fail for a lack of consideration if no minimum quantity term was included; "[w]ithout an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable." *Id.* at 152-53.

<sup>20</sup> Courts have considered the legality of IQCs since at least the early 1900s. See e.g., *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923) (discussing whether an IQC was legally enforceable for a lack of consideration and mutuality where the government did not set a minimum requirement of coal to be obtained); *Los Angeles Gas & Electric Corp. v. Amalgamated Oil Co.* (1914) 168 Cal. 140 (discussing an indefinite quantity contract for oil). IQCs have been used for many different kinds of goods and services. See e.g., *id.*; *Appeal of Redlands Oasis Trust*, ASBCA 13979, 69-2 BCA 7990 (1969).

required during a contract period, even if the government commits to an express minimum quantity.<sup>21</sup> As with the SBCUSD sample site method, in IQCs permitted by the Federal Acquisition Regulation, unit prices are known and the government's financial exposure is limited to actual purchases.

## **VII. Sample Site Methods Are Used by Many Large School Districts throughout California and the Country.**

SBCUSD is not alone in using a sample site method to prepare its E-Rate RFPs. A simple internet search reveals several school districts relying on settled law and practice for sample site or IQC bidding 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 costs.<sup>22</sup> The sample site method 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 FY 2016 RFP for Basic Maintenance of Internal Connections and Software that services offered in the vendor's statement of work are to be provided on an as-needed basis.<sup>23</sup> 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.<sup>24</sup>

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 sample site method are standard for large, multi-campus districts.

## **VIII. The COMAD and the USAC Appeals 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 wrongdoing by the District. SBCUSD's competitive bidding processes have been examined several times, and the OIG found that, except for certain unrelated and minor

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<sup>21</sup> 48 C.F.R. § 16.501-2; 48 C.F.R. § 16.504(b).

<sup>22</sup> 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](http://myiusd.net/wp-content/uploads/2013/07/IUSD_RFP_Network_Upgrade_002-2015-16_v21.pdf) (last visited Aug. 3, 2016).

<sup>23</sup> 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](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).

<sup>24</sup> 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).



violations, SBCUSD “complied, in all material respects” with E-Rate rules. As noted above, practices similar to the sample site method are commonly used by large school districts throughout the country, and USAC has been unable to cite any FCC authority disallowing these methods.

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. All of the language included in USAC’s Appeal Denial specifically addressing the sample site method is copied directly from the original COMAD, despite the fact that SBCUSD presented USAC with a three-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 2006 and 2007 commitment. It would be inequitable to announce and apply all at once a new, retroactive, and unauthorized rule outlawing the sample site method, and it would be inequitable to heap punishment and costs on SBCUSD.

In conclusion, SBCUSD respectfully appeals to the Commission to reverse USAC’s Appeal Denial and reject the COMAD.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "G. Foote", is written over the typed name.

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