CAPLAN & EARNEST
ATTORNEYS AT LAW

Elliott V. Hood
ehood@celaw.com

November 14, 2017

To Whom It May Concern:

Enclosed please find a Petition for Waiver in the Matter of Request for Review by Jefferson County Public School District R-1 of Decision of Universal Service Administrator prepared and filed by Caplan and Earnest on behalf of the District (CC Docket No. 02-6).

Should you have any questions, please do not hesitate to contact me at 303-443-8010 or ehood@celaw.com, or the District's contact person, Brett Miller, Chief Information Officer, Jefferson County Public School Schools, at 303-982-2265 or brett.miller@jeffco.k12.co.us.

Sincerely,

CAPLAN AND EARNEST LLC

Elliott V. Hood

EVH/cls
Attachments

November 14, 2017

**PETITION FOR WAIVER**

VIA ELECTRONIC DELIVERY

CC Docket No. 02-6

Federal Communications Commission
445 12th Street SW, Washington, D.C. 20554
Phone: 1-888-835-5322
Fax: 1-866-418-0232

**IN THE MATTER OF REQUEST FOR REVIEW BY JEFFERSON COUNTY PUBLIC SCHOOL DISTRICT R-1 OF DECISION OF UNIVERSAL SERVICE ADMINISTRATOR**

**Billed Entity**: Jefferson County Public School District R-1

**Billed Entity No.**: 143710

**Contact**: Brett Miller, Chief Information Officer
Jefferson County Public Schools
1829 Denver West Drive, Building 27
Golden, Colorado 80401
Phone: 303-982-2265
Email: brett.miller@jeffco.k12.co.us

| Notification from USAC | Funding Year | 471 Number | FRN | Amount Denied | Amount to be Recovered |
|---|---|---|---|---|---|
| Sept. 15, 2017 | 2017-18 | 171041291 | 1799102606 | $987,162.12 | |
| Nov. 3, 2017 | 2015-16 | 1045903 | 2854178 | | $991,575.36 |
| *Not Yet Received* | 2016-17 | 161036005 | 1699076015 | | $440,700.96 |
| *Not Yet Received* | 2016-17 | 161036005 | *Not Yet Requested* | | $547,914.42 |
| TOTALS | | | | $987,162.12 | $1,980,190.74 |
| **GRAND TOTAL** | | | | **$2,967,352.86** | |

## I. INTRODUCTION & SUMMARY OF ISSUE

Jefferson County Public School District R-1 ("Jeffco" or the "District") hereby petitions the Federal Communications Commission (the "Commission") under 47 C.F.R. § 1.3 to waive its E-Rate competitive bidding rules, namely 47 C.F.R. § 54.503(c)(2)(ii)(B) and § 54.511(a), and accordingly reverse the Universal Service Administration Company's ("USAC") decision to deny or rescind from the District much-needed funding for increased bandwidth capacity.

Like many (if not most) school districts in the country, Jeffco is racing to improve its technology infrastructure to provide fast, reliable, and robust broadband access critical for classroom learning and data management. To this end, Jeffco sought bids to increase broadband bandwidth at its schools and central hub facilities. The District closely evaluated each bid in a detailed and multi-tiered process and ultimately selected the most cost-effective bid—by a factor of over $6 million.

Although the District ultimately selected the most cost-effective bid, it did not consider price as the primary factor during the first of two review stages, a technical violation of the Commission's competitive-bidding rules. But the Commission can waive, and has waived, those bidding rules in these exact circumstances (i.e., where the applicant ultimately selected the most cost-effective bid despite not considering price as the primary factor) and should do so here.

Further, denying these funds will cause substantial hardship to the District and its students: the denied funds represent a substantial portion of the District's I.T. budget, and compensating for those lost funds will force the District to cut back on critical technology initiatives in schools and possibly lay off staff. It would be grossly inequitable to force these cut-backs where the District ultimately selected the most cost-effective bid.

Moreover, the District otherwise followed the competitive-bidding rules by carefully considering each bid in a fair and open process, considered price as the primary factor during the second and final review stage, and there is no allegation of waste, fraud, or abuse of funds.

For these reasons, the District respectfully requests that the Commission waive its E-Rate competitive-bidding rules and reverse USAC's denial or rescission of **$2,967,352.86** in funds.

## II. BACKGROUND

### A. The District

Jeffco serves over 85,000 students in grades K-12 at over 150 school sites and facilities covering approximately 800 square miles along Colorado's Front Range. Jeffco is the second largest school district in Colorado and one of the most diverse districts in the state: over a third of our students identify as people of color and nearly a third come from low-income households.[1]

[1] *See* 2016 Annual Report, Jefferson County Public Schools, *available at* http://www.jeffcopublicschools.org/UserFiles/Servers/Server_627881/File/Jeffco%20PS/About%20Jeffco/Publications/Annual%20Reports/2015-16_annual_report.pdf.

### B. Preparing Our Students for the Digital Age

Jeffco's mission is to provide a quality education that prepares all children for a successful future. Today, that means preparing our students to thrive in the Digital Age, which will require them to learn from and use technology with ease.

To accomplish this, Jeffco is using technology to create classrooms that support the needs of the 21st century learner by, among other things, providing students with iPads and tablets and integrating online content with teacher-guided instruction.[2] Jeffco has also developed a Technology Plan to help ensure that all Jeffco schools have access to safe and reliable technology and that our students can be successful members of the digital world.[3] As part of this plan, the District has set a goal of providing a tablet or other technology device to every student (known as the "one-to-one" initiative) to help ensure all students can access the curriculum.

### C. Need for High-Speed Internet

The District cannot adequately integrate these platforms, and thus prepare our students for the Digital Age, without fast and reliable internet access.[4] Most of the technology our students use in the classroom (like iPads, tablets, and online content) require fast and reliable internet access to even function. Indeed, the Commission itself has noted that "[a]ccess to high-speed broadband is crucial to improving educational experiences and expanding opportunities for all of our nation's students, teachers, parents, and communities."[5]

Given the importance of classroom technology and the fast, reliable internet it requires, the District has prioritized implementing high-speed broadband in every classroom. The District also has set a goal of doubling aggregate internet capacity every 18 months and providing at least one gigabyte per 1,000 students (86 gigabyte internet bandwidth) and a 10:1 Wide Area Network (WAN) capacity (860 gigabyte aggregate WAN bandwidth) by 2020. These goals are based on recommendations by the Consortium for School Networking (CoSN) and the U.S. Department of Education's ConnectED Initiative. (*See* Affidavit of Brett Miller, Ex. 1, ¶¶ 5-7.)

### D. The District's High-Speed Internet System

The District uses a "hub and spoke" model. Under this model, all data usage flows through two "hubs" (here the District's Educational Services Center in Golden, Colorado and its

---

[2] *See* http://jeffcopublicschools.org/cms/One.aspx?portalId=627965&pageId=926825.

[3] *See* Jefferson County Public Schools 2016-2019 Technology Plan, *available at* https://docs.google.com/a/jeffcoschools.us/viewer?a=v&pid=sites&srcid=amVmZmNvc2Nob29scy51c3xpbmZvcm1hdGlvbi10ZWNobm9sb2d5fGd4OjJkOGY2YWE2OTMyM2M4YTY.

[4] Indeed, the Commission created the E-Rate program (the nation's largest educational technology program) specifically to connect districts like Jeffco with fast and reliable broadband internet access. *See* https://www.fcc.gov/general/universal-service-program-schools-and-libraries-e-rate.

[5] *See* Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, W.C. Docket No. 13-184, at 8872 (F.C.C. July 23, 2014), *available at* https://www.fcc.gov/document/fcc-releases-e-rate-modernization-order.

Disaster Recovery data center in Lakewood, Colorado) out to the "spokes" (here, schools or other remote facilities). There are 154 hub-and-spoke sites in all. (*See* Affidavit of Betty Standley, Ex. 4, ¶¶ 6-7.)

The District uses Metropolitan Optical Ethernet circuits provided by CenturyLink that terminate at each "spoke." (*See* Req. for Prop., Ex. 2, at 2.) The District originally contracted with CenturyLink's predecessor, Qwest Communications, for this service in July 2008. (*See* Qwest Metro Optical Ethernet Service Agreement, Ex. 3) (the "Qwest Agreement").) The Qwest Agreement is set to terminate on June 30, 2018. (*See* Standley Aff., Ex. 4, ¶ 8.)[6]

The Qwest Agreement initially provided internet service at certain transport speeds to facilities that existed when the contract was executed in July 2008. (*See* Qwest Agreement, Ex. 3, § 1.1, and Exhibits thereto containing Pricing Plans.) Critical here, the Agreement also states that the District is obligated to pay a substantial portion of service costs (either 100% or 40% depending on the service) for the remainder of the contract term (so until June 30, 2018) if the District terminated the contract early. (*See id.* § 6; *see also* Standley Aff., Ex. 4, ¶ 8.)

Between 2008 and 2014, the District's internet and data-storage needs increased dramatically, due largely to the fact that the District was integrating, and continues to integrate, technology into its classrooms. In early 2014, the District determined that it needed to increase substantially the transmission speeds and data-storage capacity at its hub-and-spoke locations. It also determined that it was not financially feasible to accomplish this much-needed increase under the existing terms of the Qwest Agreement. (*See* Standley Aff., Ex. 4, ¶¶ 9-10.)

Rather than attempt to re-negotiate the existing contract, the District opted to issue a request for proposal to see what was available on the open market for a district-wide service change. (*See* Standley Aff., Ex. 4, ¶ 10.)

**E. Request for Proposal**

On December 3, 2014, the District issued a public Request for Proposal ("RFP") to solicit bids to upgrade the District's broadband connections at all its 154 hub-and-spoke sites, including all schools, the District's main voice and data hub and its disaster recovery center hub, and other facilities. (*See* Req. for Prop., Ex. 2, at 2.)[7] That day (December 3), the District also filed its Form 470 with USAC to formally initiate the competitive-bidding process.[8] (*See* Form 470 Screen Shot, Ex. 5; Standley Aff., Ex. 4, ¶¶ 11-12.)

---

[6] The District signed a second ("Small QMOE") contract with CenturyLink effective July 2011, a copy of which is included in Exhibit 3.

[7] The RFP noted that the services requested in the RFP were at that time being provided by CenturyLink pursuant to a contract terminating July 2018. Thus, bidders were notified that CenturyLink was the incumbent service provider.

[8] The RFP notes that it was published in conjunction with the Commission's E-Rate Form 470 schedule. (*See* Req. for Prop., Ex. 2, at 2.)

The RFP specified bid requirements, service needs and preferences, and the selection process, schedule, and criteria. (*See* Req. for Prop., Ex. 2, at 4-15.) Many of the requirements concerned pricing. For instance, the bids had to include "pricing schedules for all services," "pricing schedules for all services available," and "item pricing" that would include shipping or other applicable costs. (*See id.* at 8-9.)

The RFP clarified that the District would conduct a two-stage evaluation process and would consider price among its primary evaluation criteria. (*See id.* at 10.) Indeed, the District emphasized that bids would not be considered if they were not "within the competitive range," (*id.* at 7), meaning bids that were too expensive or too costly considering the services offered would be eliminated in the first stage of review. (*See* Standley Aff., Ex. 4, ¶ 14.)

The RFP also emphasized that the District could reject any proposals that were inadequate, incomplete, or fail to meet minimum requirements specified in the RFP. (*See, e.g.*, Req. for Prop., Ex. 2, at 4, 7.)

### F. Bid-Selection Process

Bids were due on Wednesday, January 7, 2015. The District received seven bids from six vendors: two bids from Education Networks of America ("ENA") ($2,035,340 and $2,651,660) and one each from Comcast ($2,127,045.48), CenturyLink ($2,275,187.52), Affiniti Network ($2,839,008), Windstream ($4,621,922.40), and Unite Private Networks ($7,670,400).[9]

#### 1. First Stage of Review

On or around January 8, 2015, the District initiated the first stage of its review process, which was designed to weed out bids that were not technically or financially competitive based solely on the written proposals. (*See* Req. for Prop., Ex. 2, at 7-8.)

To accomplish this review, the District assembled a Proposal Evaluation Committee to independently evaluate, score, and provide qualitative feedback on each bid. (*See* Standley Aff., Ex. 4, ¶ 18.) Each committee member used the same selection criteria and submitted their individual evaluations (both comments and score sheets) to the group anonymously. (*See* Prop. Eval. Forms, Ex. 6; Prop. Strengths and Weaknesses Doc., Ex. 7; Standley Aff., Ex. 4, ¶¶ 18-19; Responsibilities of Eval. Comm. Members, Ex. 8.) The responses and score sheets were compiled for the whole group to meet and review the selection data. (*See id.*)[10]

Four of the seven bids (Windstream, Unite, Affiniti, and Comcast) were eliminated at the first review stage. The review team deemed the bids from Windstream and Unite not technically or financially competitive—indeed, those bids were at least twice as high as the other bids. (*See*

[9] The pricing information included with each bid proposal is enclosed as Exhibit 17, and an analysis of the bid pricing is enclosed at Exhibit 9.

[10] Price was not included as a factor on the first-stage evaluation form, but the committee considered price as a primary factor, especially when considering if a bid was within the "competitive range." (*See* Standley Aff., Ex. 4, ¶¶ 14, 20.) And the RFP clarifies that price was a primary factor considered at each review stage. (*See* Req. for Prop., Ex. 2, at 4-11.)

Analysis of Bids, Ex. 9; Prop. Eval. Forms, Ex. 6; and Prop. Strengths and Weaknesses Doc., Ex. 7; Standley Aff., Ex. 4, ¶¶ 20-23.) The group determined that Comcast's bid, although within the "competitive range" price-wise, was not technically feasible because the District has recently had a negative experience using that company's services[11] and the District was not confident that Comcast could perform as requested.

The review team also eliminated Affiniti at the first stage. While Affiniti was financially competitive with the remaining bids (although it was roughly $800,000 higher than the lowest bid), the group determined that Affiniti was not technically competitive because it relied on Comcast to deliver services, had submitted inadequate or cursory responses to certain RFP queries, and had not submitted an adequate project plan for implementing requested services, among other reasons. (*See* Analysis of Bids, Ex. 9; Prop. Eval. Forms, Ex. 6; and Prop. Strengths and Weaknesses Doc., Ex. 7; Standley Aff., Ex. 4, ¶¶ 20-23.)

### 2. Second Stage of Review

The bids from CenturyLink and ENA (encompassing three of the four lowest bids) advanced to the second and final review stage, which included an on-site demonstration by each vendor and detailed discussions of each proposal. (*See* Req. for Prop., Ex. 2, at 8; Stage Two Qs. and Eval. Forms, Ex. 10.) The process worked as follows:

- All committee members observed the demonstrations, asked probing questions of the vendors, and scored the demonstrations based on a list of questions that were provided to both CenturyLink and ENA in advance. (*See* Standley Aff., Ex. 4, ¶¶ 24-25; Stage Two Qs. and Eval. Forms, Ex. 10.)

- Each of the questions were assigned a possible score and weight based on the importance of that question to the overall evaluation. (*See id.*) The first question (addressing the company's key differentiators) was worth 20 points,[12] the most number of points possible for any individual question. (*See id.*)

- Each group member's individual scores were averaged, after which the group applied a "price" score to each remaining bid worth 40 points possible—the most points for any individual factor considered in the second review stage. (*See id.*)

[11] The District had contracted with Comcast to provide certain services at its two hub centers. However, the District terminated the contract for cause based on performance issues. (*See* Standley Aff. ¶ 22.)

[12] The possible points for each question can be determined by multiplying the highest score possible (four points) by the weight assigned to the question. The first question was assigned a weight of five (5); thus, the total possible points for that question was 20.

CenturyLink earned the most number of points possible. (*See* Stage Two Final Evaluation Form, Ex. 11.)[13] Notably, CenturyLink received fewer "price" points (38 points) than ENA's lower-priced (40 points) bid but still received a higher overall score. (*See id.*)

On or around March 12, 2015, the District notified all bidders by letter that it intended to award the bid to CenturyLink. (*See* Standley Aff., Ex. 4, ¶ 26.) The District negotiated an amendment to its existing service contract with CenturyLink (the Qwest Agreement) rather than negotiate an entirely new agreement. (*See* 3/24/15 Amendment, Ex. 12.) On or around March 19, 2015, the District's Board of Education approved the contract amendment. CenturyLink began to implement the terms of the amendment on July 1, 2015.

By selecting CenturyLink, the District saved $6,453,131.40 in cancellation fees and internal costs it would have incurred had it switched service providers. (*See* Analysis of Costs and Savings, Ex. 13.)

### G. Audit Process

On June 10, 2017, USAC notified the District that it was conducting a routine audit of the District's reimbursement application (Form 471 Number 171041291, Funding Request Number 1799102606). USAC alleged that the District had not used price as the primary factor in the first stage of its multi-tiered competitive-bidding process. (*See* Audit Letters, Ex. 14.) USAC did not allege that the District failed to use price as the primary factor in the second and final stage of that process. (*See id.*)

The District complied fully with the audit and provided USAC with any documents it requested, including documents showing step-by-step how the District evaluated bids.

On September 15, 2017, USAC notified the District (through a .csv file attached to an email) that it had denied E-Rate funding for the 2017-2018 year in the amount of $987,162.12 to the District relating to its service contract with CenturyLink. (*See* 9/15/17 USAC Denial Notification, Ex. 15.) On November 3, 2017, USAC notified the District through a "Commitment Adjustment Letter" that it is rescinding E-Rate funds committed for the 2015-2016 year (Form 471 1045903, Funding Request Number 2854178) in the amount of $991,575.36.

USAC has also committed $988,615.38 for the 2016-2017 funding year. The District has invoiced USAC for $440,700.96 and has been reimbursed for that amount. (*See* 3/8/17 Commitment Letter, Ex. 16.) The District plans to seek reimbursement for up to the remaining balance of the committed total of $988,615.38, which comes out to $547,914.42. The District anticipates that this amount will also be denied.

Overall, USAC has denied (or will likely deny) or rescinded **$2,967,352.86** in E-Rate funds to the District. Importantly, each of these denials or rescissions arise from the same bidding process and resulting three-year contract with CenturyLink. USAC has notified the

---

[13] The total scores had to be corrected because the points from one question were inadvertently omitted from the tally. That is why there is a second column for corrected scores. The corrected scores did not impact the outcome and the scores were corrected before the bid was awarded.

District that the denial of its application for funding year 2017-2018 (1799102606), which represents the third year of a multi-year contract, "will impact all prior years FRNs support by this contract." (*See* Audit Letters, Ex. 14, ¶¶ 4-5 of 8/14/17 Letter.)

## III. ARGUMENT FOR WAIVER

The District respectfully requests that the Commission waive its E-Rate competitive-bidding rules (namely 47 C.F.R. § 54.503(c)(2)(ii)(B) and § 54.511(a)) and accordingly reverse USAC's denial or rescission of the district's much-needed funding for bandwidth services at its schools and central hub facilities.

As discussed, USAC's denials or rescissions arise from the same bidding process and resulting three-year contract with CenturyLink. Thus, for efficiency and in the interest of judicial economy, the District requests that the Commission waive its competitive-bidding rules for that bidding process and all the resulting denials or rescissions connected with that bidding process listed on the first page of this petition.

The Commission may waive a rule where the facts make strict compliance inconsistent with the public interest. *Ne. Cellular Tele. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing 47 C.F.R. § 1.3). In opting to waive a rule, the Commission may consider hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). The Commission may also consider whether the petitioner has achieved the policy goals underlying its competitive bidding rules. *In Matter of Reqs. for Review of Decisions of the Univ. Serv. Admin. By Euclid City Sch. Dist. Euclid, Oh.*, 27 F.C.C. Rcd. 14169, 2012 WL 5872246, at *1 (F.C.C. Nov. 20, 2012). Waiver is warranted here for several reasons.

First, while the District did not consider price as the primary factor during the first stage of its evaluation process, it ultimately selected the most cost-effective bid—by a magnitude of over $6 million—and in doing so accomplished the objective of the Commission's competitive-bidding rules.

Second, denying these funds will cause substantial hardship to the District and its students: the denied E-Rate funds (nearly $3 million) represent over 10% of the District's annual I.T. budget, and compensating for those lost funds will force the District to cut back on critical technology initiatives in schools, eliminate or stall necessary upgrades to the District's technology infrastructure, or even lay off staff. It would be grossly inequitable to force these cut-backs where the District ultimately selected the most cost-effective bid.

Third, the District otherwise followed the bidding rules. For instance, it carefully considered all bids and conducted a fair and open bidding process. While it did not consider price as the *primary* factor during the first review stage, it did consider price as a crucial factor at that stage and did consider price as *the primary factor* during the second and file review stage.

Finally, there is no allegation of waste, fraud, or abuse of funds.

For these reasons, the District respectfully requests that the Commission waive its competitive-bidding rules and reverse USAC's denial of $2,967,352.86 in E-Rate funds.

### A. The District selected the most cost-effective bid.

The objective of the Commission's competitive-bidding rules is to ensure that applicants select the most "cost-effective" bid. 47 C.F.R. § 54.503(c)(2)(ii)(B); *In Matter of Reqs. For Review and/or waiver of Decisions of the Univ. Serv. Admin. By Sweetwater City Schs. et al.*, 31 FCC Rcd. 13555, 2016 WL 749286, at *4, ¶15. The "price-as-primary-factor" rule is merely a means to help ensure that goal is achieved. *See id.* The Commission recently clarified this point when it overturned USAC's decision to deny funding to a consortium of schools that, like here, did not select the lowest bid (indeed, one that was *50 percent higher* than the second-lowest bid):

> Under the Commission's competitive bidding rules, [the consortium] was required to carefully consider all bids and select the most cost-effective service offering, using price as the primary factor *in determining whether a particular bid is the most cost-effective*.

*Sweetwater*, 2016 WL 7492486, at *4, ¶ 15 (emphasis added).

Along these lines, the Commission has emphasized repeatedly that applicants are not required to select the lowest bid if the most "cost-effective" bid is ultimately selected. *See id.* at *6, ¶25 ("Applicants are not required to select the lowest-cost offering."); *see also* F.C.C. LETTER TO THE HONORABLE LAMAR ALEXANDER, 2015 WL 4910996, at *1 (July 21, 2015) (stating that E-Rate applicants "must select the most cost-effective option" but "do not necessarily need to select the lowest price bid").

Further, the Commission presumes, absent evidence to the contrary, that applicants will select the most cost-effective option since they must ultimately pay for the non-discounted costs of services. *Sweetwater*, 2016 WL 7492486, at *6, ¶ 25.

For these reasons, the Commission routinely waives its competitive-bidding rules where districts ultimately select the least-expensive and most cost-effective offering. *See, e.g.*, *In the Matter of Reqs. For Review of Decisions of the Univ. Serv. Admin. By Allendale Cnty. Sch. Dist. Cedar Mtn., N.C.*, 26 FCC Rcd. 6109, 2011 WL 1525342, at *3-4 (F.C.C. Apr. 21, 2011) (waiving competitive-bidding rules because districts "conducted a competitive bidding process that resulted in the selection of the most cost-effective service offering"); *Euclid*, 2012 WL 5872246, at *1 (waiving rules because district selected "least expensive responsive service offering"); *In the Matter of Reqs. for Review and Waiver of Decisions of the Univ. Serv. Admin. By Colo. Springs Sch. Dist., Colo. Springs, Colo.*, 27 FCC Rcd. 7022, 2012 WL 2366323, at *1 (F.C.C. June 20, 2012) (waiving rules where district "selected the least expensive and most cost-effective service offering").

That is precisely what Jeffco did here. While the District did not select the lowest bid (from ENA), it did select the most cost-effective bid (from CenturyLink, its incumbent provider). Although CenturyLink's bid was roughly $200,000 higher than ENA's, the District saved **<u>more than $6 million</u>** in cancelation fees and other costs by selecting CenturyLink's competitive bid.

In effect, CenturyLink's bid, while slightly higher than ENA's, was substantially less expensive (and thus more cost-effective) by a magnitude of several million dollars.

It would be inequitable to deny E-Rate funding to the District for failing to use price as the primary factor in only one stage of a multi-tiered process when it ultimately selected the most cost-effective option and in doing so accomplished the objective of the Commission's competitive-bidding rules and saved *over $6 million*.

### B. The denial of E-Rate funding will cause substantial hardship on the District and its students.

Further, denying and rescinding these funds will cause substantial hardship on the District and its students. This effectively removes 10% of the District's annual information-technology budget with no foreseeable budget increase to cover that loss.[14] As a result, the District will not have enough money on hand to both manage its core functions (like keeping the lights on) and accomplish its extensive list of critical initiatives. (*See* Miller Aff., Ex. 1, ¶ 12.) This will negatively impact the District and its students in several ways.

First, it will force the District to cut back on important infrastructure projects. For instance, the District desperately needs to upgrade its data-storage capacity (which it usually does every five years) to ensure that its web sites continue to function and student data can be housed safely and effectively. The District also planned to upgrade its network (the connectivity to its servers). These projects will need to be shelved for the foreseeable future. (*Id.* ¶ 13.)

Second, it will force the District to cut back on technology initiatives in schools, like providing tablets to students and upgrading aggregate internet capacity. As a result, the District will not keep pace with its per-student gigabyte goals (one gigabyte per 1,000 students and a 10:1 WAN capacity by 2020), goals that have been set by the federal government—indeed, it will push this effort back between five to ten years. This, in turn, may also force the District to lay off staff who would have contributed to these and other initiatives. (*Id.* ¶ 14-15.)

It would be grossly inequitable to force these cut-backs where the District ultimately selected the most cost-effective option and thus achieved the underlying policy goal of the competitive-bidding rules.

### C. The District otherwise followed the competitive-bidding rules by carefully considering each bid in a fair and open process and weighing cost as the primary factor in the final review stage.

The Commission's competitive-bidding rules require applicants to "carefully consider[]" each bid in a "fair and open" bidding process and weigh cost as the primary factor. *See* 47 C.F.R. § 54.503(a), (c)(2)(ii)(B). While the District did not consider price as the primary factor in the

[14] The District's I.T. Department sets its budget annually based on necessary and targeted expenditures and does not receive annual budget increases through mill levy or other funding. (*See* Miller Aff. ¶ 8.)

first review stage, it did so in the second and final review stage and otherwise carefully considered each bid in a fair and open process.

The competitive-bidding rules spell out the list of activities or behaviors that would not result in a fair and open process. *See* 47 C.F.R. § 54.503(a). None of these activities or behaviors occurred or is alleged to have occurred here. For example:

- It is unfair if "the applicant for supported services has a relationship with a service provider that would unfairly influence the outcome of a competition or would furnish the service provider with inside information." *Id.* While the District had an existing contractual relationship with CenturyLink, that contract did not influence (let alone unfairly influence) the District's bidding process. In fact, the District released the RFP specifically because it wanted to see if there was a better service deal on the open market. (*See* Standley Aff., Ex. 4, ¶ 10.) And CenturyLink was provided with the same information—and held to the same level of scrutiny—as all other bidders. (*See id.* ¶ 29.)

- It is also unfair if "someone other than the applicant . . . prepares, signs, and submits the FCC Form 470 and certification." *See* 47 C.F.R. § 54.503(a). Here, the District prepared, signed, and submitted its Form 470. (*See* Standley Aff., Ex. 4, ¶ 12.)

- It is unfair for "a service provider representative [to be] listed as the FCC Form 470 contact person and allows that service provider to participate in the competitive bidding process." *See* 47 C.F.R. § 54.503(a). The District listed one of its own employees, not a service provider representative, as the relevant contact person. (*See* Standley Aff., Ex. 4, ¶ 12; *see also* Form 470, Ex. 5.)

- It is also unfair for the service provider "to prepare[] the applicant's FCC Form 470 or participate[] in the bid evaluation process," or "turn[] over to a service provider the responsibility of ensuring a fair and open competitive bidding process. *See* 47 C.F.R. § 54.503(a). Neither CenturyLink nor any other service provider prepared the District's Form 470 or participated in the evaluation process. (*See* Standley Aff., Ex. 4, ¶ 12.)

- It is unfair if "an applicant employee with a role in the service provider selection process also has an ownership interest in the service provider seeking to participate in the competitive bidding process." *See* 47 C.F.R. § 54.503(a). No person who evaluated bids on behalf of the District has an ownership interest in CenturyLink or the other service providers. (*See* Standley Aff., Ex. 4, ¶ 18.)

- And it is unfair if "the applicant's FCC Form 470 does not describe the supported services with sufficient specificity to enable interested service providers to submit responsive bids." *See* 47 C.F.R. § 54.503(a). The District's RFP and Form 470

> gave sufficient detail concerning supported services; indeed, all bidders responded with detailed proposals for the precise support services listed in the Form 470 (broadband bandwidth increase), indicating that the Form 470 and RFP were sufficiently clear on this point.

Further, the District carefully reviewed each bid. (*See* Background, *supra*, at 5-7; Standley Aff., Ex. 4, ¶¶ 17-25.) During each of the review stages, a committee of technology experts in the District's I.T. department closely and independently evaluated, scored, and provided qualitative feedback on each bid. In fact, at the second stage, each of the finalist bidders gave on-site demonstrations, during which the committee members asked probing questions and scored those demonstrations based on targeted questions provided to those bidders beforehand.

Thus, while the District did not use price as the primary factor in stage one, the District otherwise followed the bidding rules and did consider price as the primary factor in stage two.

### D. There is no allegation of waste, fraud, or abuse.

Further, the FCC often waives agency rules where, as here, there is no allegation of waste, fraud, and abuse of e-rate funds. *See, e.g.*, *Allendale*, 26 FCC Rcd. 6109, 2011 WL 1525342, at *3-4 (F.C.C. Apr. 21, 2011) (waiving rule that price be considered as primary factor in evaluating bids in part because no allegations of waste, fraud, or abuse); *Euclid*, 27 FCC Rcd. 14169, 2012 WL 5872246, at *1 (same). Because there is no such allegation here, waiver would be warranted for this reason, too.

## IV. CONCLUSION

The District respectfully requests that the Commission waive its E-Rate competitive bidding rules, namely 47 C.F.R. § 54.503(c)(2)(ii)(B) and § 54.511(a), and accordingly reverse the Universal Service Administration Company's decision to deny or rescind E-Rate funding to the District needed to improve its technology infrastructure to ensure fast, reliable, and robust internet access in its schools and central hub facilities. The District ultimately selected the most cost-effective bid by a factor of over $6 million and it would be grossly inequitable to deny the District that critical funding under the circumstances.

Sincerely,

*/s/ Brett Miller*

Brett Miller
Chief Information Officer
Jefferson County Public Schools
1829 Denver West Drive, Building 27
Golden, Colorado 80401
Phone: 303-982-2265
Email: brett.miller@jeffco.k12.co.us

Elliott Hood
Caplan and Earnest LLC
1800 Broadway, Suite 200
Boulder, Colorado 80302-5289
Phone: 303-443-8010
Email: ehood@celaw.com