

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554

In the matter of

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Request for Waiver by

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Delano Union Elementary School District
Delano, CA

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Schools and Libraries Universal Service
Support Mechanism

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CC Docket No. 02-06

REQUEST FOR REVIEW OR WAIVER

Funding year 2016 (7/1/2016 to 6/30/2017)

Billed Entity Name: Delano Union Elementary School District

Billed Entity No.: 143848

Form 471 Numbers: See Below

Funding Request Numbers: See Below

WiFi Equipment Project (Form 471: **161049952** and FRN **1699114160**) and the WiFi
Cable Plant Project (Form 471: **161049961** and FRN **1699114178**) for Almond Tree
Middle School

WiFi Equipment Project (Form 471: **161049988** and FRN **1699114236**) and the WiFi
Cable Plant Project (Form 471: **161049999** and FRN **1699114265**) for Del Vista Math
& Science Academy

WiFi Equipment Project (Form 471: **161050012** and FRN **1699114294**) and the WiFi
Cable Plant Project (Form 471: **161050018** and FRN **1699114336**) for Nueva Vista
Language Academy

WiFi Equipment Project (Form 471: **161049969** and FRN **1699118997**) and the WiFi
Cable Plant Project (Form 471: **161049976** and FRN **1699114208**) for Cecil Avenue
Middle School

WiFi Equipment Project (Form 471: 161050007 and FRN **1699119132**) for LaVina Middle School

I. Introduction and Background.

Delano Union Elementary School District ("DUESD"), through its E-rate consultant, Infinity Communications and Consulting, Inc. ("Infinity") as Agent of DUESD's attorney, Schools Legal Service, respectfully requests a review of USAC's Funding Commitment Decision Letters denying the funding for the their **WiFi Equipment** FRN's 1699114160, 1699118997, 1699114236, 1699119132, and 1699114294 – Funding Year 2016-2017, dated October 24, 2017.

On the same date, USAC denied DUESD's funding for **Cabling projects** at the same school sites, FRN's 1699114178, 1699114208, 1699114265, and 1699114336. We are not requesting a waiver on the funding denials for these cabling projects as we concur with USAC's determination that significant documents were handed out after the 28-day bidding window and the Applicant failed to then extend the 28-day bidding window after these documents were released to Service Providers and broke the "Cardinal Change" rule.

Infinity has been representing DUESD for fourteen years but, while Infinity filed DUESD's Year 2016 Form 471 for Category One services, the District used another entity (E-Rate consultant) for the 2016 Category Two project and this E-Rate consultant assisted the District in filing this Category Two Form 470/471's and handled the PIA response for these Category Two FRNs. Infinity has been retained, through the District's attorney, to file this FCC Request for Waiver.

Background

After the Category Two Year 2016 Form 471's were filed for these WiFi Equipment and Cabling projects, PIA contacted the Applicant and their E-Rate consultant for a standard review of these applications. The PIA reviewer asked several questions requesting clarification on what information was supplied to Service Providers (1) when the Form 470 was posted and RFP's were posted on the EPC portal and (2) what additional communications occurred during the 28 day bidding period. When the E-Rate consultant responded, instead of responding with separate and correct information specifically for the WiFi Equipment projects and separate and correct information for the Cabling projects, they responded in such a way that the PIA reviewer would be left with the impression that the information supplied applied to ALL of the FRN's, which is incorrect. Unfortunately, this lead the PIA reviewer to conclude certain facts that weren't, in fact, correct. While the District agrees the Cabling FRN's should have been denied, we believe the WiFi Equipment FRN's should be approved. Other, peripheral, reasons for denial such as not posting addendums on the EPC portal, we can show there are good reasons to waive this requirement as indicated in the discussion below.

II. Discussion

When the PIA reviewer sent their request for additional information to the Applicant, the PIA document referred to four of the Cabling FRN's and one of the four WiFi Equipment FRN's. When the E-Rate consultant responded, instead of responding to the questions that applied to only the Cabling projects and separately to the WiFi Equipment project, they sent one response, and we assume the PIA reviewer was left with the impression that all questions applied to all FRN's.

Question Number 1 (See Attachment #1 that includes Applicant's response) applied to ONLY the Cabling projects but the E-Rate consultant did not so designate. See the Applicant's response in Attachment #1. See at typical FCDL denial letter for all of the Category Two projects (See Attachment #2). As stated above, we do not believe the cabling projects should be funded because significant additional information was

handed out at the Mandatory Pre-Bid Meeting well into the 28 day bidding period and the District did not extend the bidding period to another 28 days. However, since no significant information was posted during the bidding period during the 28 day bidding period for the WiFi Equipment projects, we believe the WiFi Equipment projects should be funded. And, we can find no evidence during the PIA process that the PIA reviewer ever asked any clarifying questions regarding four of the five WiFi projects so why were these four WiFi projects denied?

Question Number 2 from the PIA reviewer asked for additional information on the three (3) addendums that were sent out to the Service Providers after the Mandatory Pre-Meeting occurred plus asked what information was passed out at the Mandatory Pre-Bid Meeting. The E-Rate consultant should have been clear that this Addendum Number One only applied to the WiFi Equipment project at Almond Tree Middle School only clarifying the number of switches to be installed. This was a very minor clarification and only applied to one of the four WiFi Equipment FRN's. Addendum Number Two only referred to one of the four Cabling projects. Since we are not requesting a waiver on the cabling projects, this becomes a moot item. Addendum Number Three applied to only the WiFi equipment projects, addressing a Service Provider's clarifying question regarding the size of the UPS's and the consultant answered his question. Since we did not add to the RFP and only clarified a point, this certainly not rise to the level of a Cardinal change. Addendums One and Three only contained very minor clarifications.

Questions One, Three and Four of the PIA reviewers request for additional information ONLY referred to the cabling projects, NOT the WiFi Equipment FRN's. But, because the E-Rate consultant was not clear in their response, we can see why the PIA reviewer would assume all answers applied to both the WiFi Equipment and also the Cabling projects. That's simply not the case.

The first reason for denial for all FRN's was, "During the review process you provided a document titled "1. Bid Documents and General Conditions (Base Documents) WiFi or

VoIP Cable Plant Mandatory Paperwork due with bid response" that contains significant information for the bidders to be able to respond to the FCC Form 470 and RFP...". As stated above, we concur that the documents were not handed out in a timely manner, BUT THIS ONLY APPLIES TO THE CABLING PROJECTS, NOT THE WIFI EQUIPMENT PROJECTS.

Another reason for denial is because the addendums were not posted on the EPC portal. While we agree they weren't posted on the EPC portal, since we had conducted a Mandatory Pre-Bid meeting and we can prove that ALL attendees did in fact receive the addendums, the issue of posting on the EPC portal would not have provided any additional information to the bidders who bid the project or attended the Mandatory Pre-Bid Meeting. Had any Service Providers sent in bids who did not attend the Mandatory Pre-Bid Meeting their bids would have been rejected per local and state bid regulations.

While there were some very minor clarifications regarding the WiFi Equipment posted in the addendums, these were merely minor clarifications to the original bid documents. And since the addendum material included only very minor clarifications on two WiFi equipment items and all attendees to the Mandatory Pre-Bid Meeting received these addendums, posting these addendums on the EPC portal would not have provided any additional information to the bidders who bid the project or attended the Mandatory Pre-Bid Meeting. Since they did not rise to the level of Cardinal Changes, we made the determinations that the District we did not need to extend the 28-day bidding period.

Looking at the information provided during the PIA review period, it's clear to our office that some of these issues could have been easily taken care of and resolved had the PIA reviewer had a bit more training or knowledge regarding WiFi Equipment or Cabling systems. Had they looked at the documents supplied, it would have been readily apparent that the additional bid documents handed out on the day of the Mandatory Pre-Bid Meeting would have only applied to the Cabling projects and not the WiFi

Equipment projects. This should have prompted another set of follow-up questions to clarify these matters and then, if both the Applicant and USAC were still not "on the same page", additional review work should have taken place. The *Bishop Perry Order*, which states, "...we direct USAC to provide all future and pending applicants with a 15-day opportunity to cure any ministerial or clerical errors on their FCC Form 470, FCC Form 471, or associated certifications." We interpret this to mean that issues should be able to be corrected during PIA and that the applicant and reviewer must both agree to what the outcome will be based on supporting documentation supplied. The applicant should be given an opportunity to defend why they believe the information supports their funding request.

III. Prayer for Relief

We respectfully request that the Request for Review be granted, consistent with the Bureau's previous decisions relating to these issues. In the alternative, if this cannot happen, we respectfully request that the District be granted a waiver of the requirement that the additional material supplied to Service Providers had to be posted on the EPC portal and that the minor changes made to the bid documents not be considered Cardinal Changes.

Generally, the Commission's rules may be waived if good cause is shown. 47.C.F.R. The Commission may exercise its discretion to waive a rule where the facts make strict compliance inconsistent with the public interest. *Norwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir 1990) (*Northwest Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 969); *Northwest Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.

NetworkIP, LLC v. FCC, 548 f.3d 116, 125-128 (D.C. Cir. 2008; *Norwest Cellular*, 897 F.2d at 1166. Should additional documentation be required, we would be happy to supply it.

Respectfully submitted,

A handwritten signature in cursive script that reads "Fred Brakeman". The signature is written in black ink and is positioned to the left of the typed name.

Fred Brakeman RCDD, CSI, CEMP
Chief Executive Officer
Infinity Communications and Consulting, Inc.

Attachment #1

FY 2016 E-rate Application Information Request

Applicant Name: Delano Union School District BEN 143848

FCC Form 471 Application Number(s): 161049961, 16149999, 161050018, 161049976, 161050007

Question I

Based on the information provided and yesterday's conversation, please provide the packet you mentioned was provided to vendors at the mandatory walk-through on 3/22/2016. You indicated the packet also included a "Substitution Request Form." Please explain how prospective bidders were advised to go about submitting a substitution request form and how these requests were reviewed. Please identify the person(s) that was responsible in determining if a particular service and/or equipment was equivalent.

District Response to Question I

The packet (CD) that was distributed at the mandatory bidders walk on 3/22/2016 has been uploaded. (I. Bid Documents and General Conditions (Base Documents) WiFi or VoIP Cable Plant Mandatory Paperwork Due with bid response.pdf). The Substitution Request Form is found on pages 23-24. Each bidder was to review the documents and complete each page as instructed in the documents. They were advised if they have any questions to please email them to bonnie@pcas4e.com. The question would be reviewed by the project team and the answer, along with the question, would be provided to each bidder.

The reason the Substitution Request Form is such a viable form to support an equivalent product, it allows the bidder to provide the substitution product to be tested by site District evaluation team. By the bidders choice to state "No" under the column "Agree to Provide Specific Item In the Event Request is Denied" they are not giving the evaluation team the option to verify the accuracy of the substitution.

I have uploaded our Bid Evaluation Process we follow for all bids. The District's team consist of the District's Assistant Superintendent – Business, the District's Network Manager, project Chief Technology Officer and myself as chair.

Question II

Within the bids provided, it appears the district released 3 Addendums to RFPs. Please explain and provide copies of any addendums.

District Response to Question II

The District's Addendum's have been uploaded.

- Addendum #1 is for the Almond Tree Middle School WiFi Equipment Project. The quantity changed from 12 to 14 and is identified on page 12 of the Addendum I in blue type.
- Addendum #2 is for Nueva Vista MS SOW 005 WiFi Wiring Plant. This addendum was created to add an open rack in the IDF room. The specifics are found on page 7 of the Addendum 2 in blue type.
- Addendum #3 was for all WiFi Equipment Bids and was distributed via email. The change was to the APC's (or equivalent) requirements to decrease the required up-time from 6 hours down to 10 minutes, due to the weight of the product. It would put too much weight into the cabinets.

Question III

Based on the e-mail correspondence you provided, references a bid protest was filed? Please explain. If yes, please provide a copy of the protest and indicate the final outcome.

District Response to Question III

A bidder showed up at the scheduled board meeting on May 2, 2016, and protested the bidding process via his request to address the board. The forms have been uploaded. After a detailed review of the bidding process, which included communication between the Assistant Superintendent, Sandra Rivera, and the district's counsel, Bill Hornback, the board deemed the information supports the position of the District staff that the substitute cable is not the equal of the specified cable, the bidder was deemed non-responsive and awarded the next lowest responsible bidder.

Question IV

Please explain in writing the reason(s) and requirements that X-Act Technology Solutions failed to meet that resulted in a disqualification. Please reference where this requirement(s) was listed in the RFP. Please provide any documentation to support your response.

District Response to Question IV

1. RFP calls for 2x2" conduit to be installed at each site and to be provided by vendor. (All RFP's for the WiFi Wiring Plant, pg.4 item A). There is no substitution mentioned for only providing a 1" conduit pipe from X Act Corporation. X Act mentions that they will provide an Ortronics Flex Conduit Part number 55094402. Ortronics does not make flex conduit. This part number is for a South Wire Company flex conduit – 1" (one inch). (Attached specifications for Flex Conduit).
2. CommScope will track each box of cable (spool of 1000') that leaves the factory floor. This tracking system includes that every box of cable that leave the CommScope factory floor has been tested to meet strict cable requirement before heading out to a customer – including DUESD. CommScope pretests the cable in each box beforehand to ensure that it will perform when it is installed. Superior Essex provides customer and vendor with a specification sheet with averages of what their cable product should be cable of doing in the field.
3. CommScope warranties the cable plant (in this case district ask for 20 years) from end-to-end because every component is made by CommScope (patch cord, cable, patch panels, RJ45 ends). Superior Essex has entered in an agreement with Legrand North America, Inc. to allow nCompass to provide a 20 year warranty only if the installing vendor agrees to jump through some hoops in order to provide end user (district) with a limited Lifetime warranty. Note that installing vendor must provide onsite maintenance in order to keep warranty. See attached (superior Essex warranty limited). No onsite maintenance bid to stay in compliance with nCompass warranty in this project.
4. Warranty: the network cabling infrastructure must be installed by supplier approved designers and Certified Contractors at the certified installer Plus-Enterprise Solutions partner (CP-ESP) tier or Certified Installer Plus (CIP) tier in accordance with manufacturers installation instructions and specifications. Supplier is not liable for their party design errors or improper construction. So if Superior Essex or Legrand designers do not provide the installation design – warranty may not cover the DUESD WiFi or VoIP cable plant projects. (See attached Superior Essex limited lifetime warranty item #3).

Attachment #2

[Records](#) / [Funding Requests](#)

Y19 ATMS WiFi Cable Plant - 1699114178



[Summary](#) [Service Agreement Details](#) [FRN Line Items](#) [FCDL Comments](#) [FCC Forms](#) [Appeals](#) [SPIN Changes](#) [Service Substitutions](#)

[News](#) [Related Actions](#)

Relevant Dates & Deadlines

FCDL Date

10/24/2017

Last Date to Receive Recurring Services

6/30/2017

Last Date to Receive Non-Recurring Services

9/30/2017

FCC Form 486 Deadline

2/21/2018

Last Date to Invoice Recurring Services

10/28/2017

Last Date to Invoice Non-Recurring Services

1/28/2018

FCDL Comments

No.

Comment

DR1

During the review process you provided a document titled "I. Bid Documents and General Conditions (Base Documents) WiFi or VoIP Cable Plant Mandatory Paperwork Due with bid response" that contains significant information for the bidders to be able to respond to the FCC Form 470 and RFP. Program procedures require the FCC Form 470, RFP as well as documentation providing any additional or modifying the original information in your FCC Form 470 and/or Request for Proposal be uploaded into the FCC Form 470 in the E-rate Productivity Portal for all potential service providers to evaluate. Documentation that contained information needed for potential bidders to respond to your RFP was not uploaded to the E-rate Productivity Portal and thus not made available for all potential vendors to evaluate. Furthermore, you did not demonstrate that the aforementioned document met the posting requirement of 28 days. Program rules require applicants to wait at least 28 days after releasing an RFP or posting a FCC Form 470, whichever is later, before selecting a service provider, signing a contract, or submitting an FCC Form 471. Therefore, this FRN is denied.

[Records](#) / [Funding Requests](#)

Y19 CAMS Wifi Cable Plant - 1699114208

[Summary](#) [Service Agreement Details](#) [FRN Line Items](#) [FCDL Comments](#) [FCC Forms](#) [Appeals](#) [SPIN Changes](#) [Service Substitutions](#)[News](#) [Related Actions](#)

Relevant Dates & Deadlines

FCDL Date

10/24/2017

Last Date to Receive Recurring Services

6/30/2017

Last Date to Receive Non-Recurring Services

9/30/2017

FCC Form 486 Deadline

2/21/2018

Last Date to Invoice Recurring Services

10/28/2017

Last Date to Invoice Non-Recurring Services

1/28/2018

FCDL Comments

No.

Comment

DR1

During the review process you provided a document titled "I. Bid Documents and General Conditions (Base Documents) WiFi or VoIP Cable Plant Mandatory Paperwork Due with bid response" that contains significant information for the bidders to be able to respond to the FCC Form 470 and RFP. Program procedures require the FCC Form 470, RFP as well as documentation providing any additional or modifying the original information in your FCC Form 470 and/or Request for Proposal be uploaded into the FCC Form 470 in the E-rate Productivity Portal for all potential service providers to evaluate. Documentation that contained information needed for potential bidders to respond to your RFP was not uploaded to the E-rate Productivity Portal and thus not made available for all potential vendors to evaluate. Furthermore, you did not demonstrate that the aforementioned document met the posting requirement of 28 days. Program rules require applicants to wait at least 28 days after releasing an RFP or posting a FCC Form 470, whichever is later, before selecting a service provider, signing a contract, or submitting an FCC Form 471. Therefore, this FRN is denied.

MR1

FRN modified in accordance with a RAL request.

MR2

Based on the applicant's request, the One-time Eligible Cost of the FRN's Item 21 was changed from \$72,416.37 to \$31,102.86.