

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554

In the matter of)
)
Request for Waiver by)
)
Infinity Communications and)
Consulting, Inc.)
Bakersfield, California)
)
Central Unified School District)
Fresno, California)
)
Lake Tahoe Unified School District)
South Lake Tahoe, California)
)
Santa Rita Union School District)
Salinas, California)
)
Schools and Libraries Universal Service) CC Docket No. 02-06
Support Mechanism)
)

PETITION FOR WAIVER

I. Introduction and Background

Infinity Communications and Consulting (“Infinity”) represents the applicant entities named above for the purposes of the Universal Service Support Mechanism for Schools and Libraries, commonly referred to as the E-rate program.¹ As the consultant for these entities, Infinity petitions the Commission to waive the competitive bidding rules² for specific applications involving cell phone data plans for Funding Years 2013 and 2014. All of these applications have undergone additional Selective Review after the 7th Report & Order was published (some after having been received a Funding Commitment Decision Letter).

¹ See attached Letters of Agency.

²§54.511(a)

The Universal Service Administrative Company ("USAC"), through its Program Integrity Assurance ("PIA") team has questioned the applicants about their competitive bidding process for cell phone data plans for Funding Years 2013 and 2014. Although the applicants all used a competitive bidding process that involved comparing cell phone data plans, PIA has taken the position that the competitive bidding had to compare the cost of the build out of a wireless Local Area Network ("LAN") to the cost of a cell phone data plan and then determine which solution was the most cost effective for providing mobile Internet access. Infinity maintains that this kind of cost comparison was never announced, implied or even discussed for Funding Years 2013 and 2014, either on the USAC website or at USAC training sessions (for applicants and/or service providers). Infinity represents more than 250+ E-Rate applicants and I can state, unequivocally, that not one of our applicants prior to the 7th Report & Order being released has ever had to comply with the standard as now presented.

Additionally, USAC has in fact made at least two favorable funding decisions in regard to cell phone data plans (see Lake Tahoe USD, Form 471 944657, Funding Commitment Decision Letter dated 06/05/2014 and Santa Rita USA, Form 471 963214, Funding Commitment Decision Letter dated 07/02/2014 ³). USAC then, in October, 2014 sent out new Selective Review requests (on the funded applications) stating they intended to rescind the funding and now questioning the underlying competitive bidding process for said cell phone data plans.

At Central Unified School District, we had all but completed our PIA review and subsequent Selective Review for both their 2013 and 2014 applications, and then after the 7th Report & Order was released, we were hit with a new Selective Review asking us to compare the cost of the build out of a wireless Local Area Network ("LAN") to the

³ Attached.

cost of a cell phone data plan and then determine which solution was the most cost effective for providing mobile Internet access.

Infinity is taking the position that this standard of comparing the price of the build out of a wireless LAN versus the cost for individual cell phone data plans is a new one, not made explicit until the July 23, 2014 Report and Order (FCC 14-99). In paragraph 153 of that Order the FCC stated:

“In order to ensure that individual data plans are the most cost-effective option, applicants that seek funding for individual data plans must be able to demonstrate either that installing a WLAN is not physically possible, or must provide a comparison of the costs to implement an individual data plan solution versus a wireless local area network solution. The cost comparison may be established through the competitive bidding process by seeking and comparing bids on both internal wireless networks and individual data plans.”

It seems pretty evident from a plain reading of the above language that this is a NEW standard, to be applied (like other aspects of the Order) for the Funding Year 2015 and beyond. There is no mention that this applied to previous Funding Years or that it would be applied, retroactively, to applications from past Funding Years that were pending USAC review at the time of the July 23 Order.

If, however, the Commission finds that there was sufficient notice that this standard would be applied retroactively to pending applications (or, even after the fact, to applications that had been funded), then Infinity respectfully requests a waiver of these competitive bidding requirements with respect to the entities and applications listed in Appendix A, attached hereto.

It should be noted that Infinity, on behalf of all the named applicants, has conducted fair and open competitive bidding processes that compared eligible services (cellular

data plans) as required by the E-rate program rules. The waiver we are seeking is only in respect to the requirement that the applicant seek and compare bids on both the build out of internal wireless networks and individual data plans.

II. Discussion

While Infinity recognizes the need to conserve the Universal Service Fund and use it for the highest priority needs, we also believe that changing the rules or requirements while applications are pending (and then applying those new standards to such applications) is both arbitrary and detrimental to the long term effectiveness of the Fund. As more and more states face budget crises and educators have to make long term curricula decisions (in terms of both content and delivery), the blasé enforcement of more restrictive requirements after the fact causes both economic hardship and educational upheaval for school districts. The E-rate program requires applicants to do long range planning, trying to meet their future needs based on available technologies and service offerings often 18 months in advance (or more). Schools (for the most part) do an excellent job of this. However, when their long term plans are interrupted or forestalled because USAC has imposed some new, unannounced and unanticipated requirement, it is more than just frustrating to those schools. For our applicants, it has also created a tremendous financial burden as this E-Rate funding has been delayed for not months, but more than 1 ½ years. Since some of these applications also contained many other FRNs with all of their other Priority One services, this action by USAC has held up this funding as well.

From a review of our clients with cellular data plan requests, we note that a number were funded with no problem or further questions from USAC. It appears that USAC funded applications (barring any other problems or difficulties) where the request for cellular data plans was for fewer than 2000 individual plans. Any application with a request for more than 2000 data plans seems to have come under this newly proclaimed standard for comparing the cost of internal wireless LANs and individual data plans (even if such applications were previously funded).

We feel compelled to point out, however, that just because there is a higher number of individual data plans, this does not automatically mean that this is not a cost effective solution. Based on Infinity's experience (both as a consultant and as a designer of technology systems and solutions), the cost for providing a wireless LAN system including conduit, trenching, raceway systems, fiber optic cabling, Category 6 copper cabling, wireless access points, wireless controller, data POE switches, routers and data racks is about \$250,000 (in California). While that may be a starting point for comparison, there are other factors to be considered (such as educational requirements for off-campus access – even though such access is cost-allocated out of any E-rate application, as an ineligible expense). This does not take into account all of the E-Rate ineligible components including computers, servers, software, etc. It would be inappropriate and unfair to replace the local determination of what best meets the technology and curriculum needs of Districts with a standard imposed (after the fact) by the Commission.

Additionally, there is the fact that installing a wireless LAN is actually a Priority Two (in pre-2015 terms) project, while wireless data access is a Priority One service. To really be accurate in doing the cost comparison to identify the most cost-effective solution, one should be allowed to include in that process the fact that Priority Two funding has been so limited as to be virtually unavailable over the last several years. In terms of overall cost-effectiveness *to the District*, the availability of discounts under the E-rate program must be considered. We do not believe that USAC has even thought through this element, let alone apply it to their determinations.

III. Legal Standard

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). 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, 1157 (D.C. Cir. 1969), *affirmed WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied* 409 U.S. 1027 (1972). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *See Northeast Cellular*, 897 F.2d at 1166.

Given the facts and circumstances described above, waiver would better serve the public interest than strict adherence to the general rule. *See Northeast Cellular*, 897 F.2d at 1166. First, the denial of funding will inflict undue hardship on the listed school districts and the schools they serve. *See Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, ¶ 11 (rel. May 19, 2006). These Districts serve many poor, rural students. It is exactly the target population for the Commission's push for expanded broadband access. These applications provide basic Internet access both in the classroom and off-campus (although such off-campus use has been cost-allocated out of the applications). None of the Districts nor their participating schools have reserved the money necessary to obtain high speed data circuits or begin building out a wireless LAN, anticipating that the cell phone data services provided were properly approved and would be paid for through the E-rate program. Asking Districts to redirect their limited funds would seriously impact both the implementation of broadband access and other classroom initiatives and thus, the denial of a waiver will negatively impact the education and information access of many children.

Finally, strict compliance with the rule would not further the purpose of 47 U.S.C. § 254(h). Section 254 directs the commission to "enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries." The successful implementation of broadband access through whatever technology, across geographical challenges such as exist in Northern California and providing needed (but ineligible) off-campus access to the Internet in low income areas where such access would not otherwise be available, would embody the fulfillment of this directive.

IV. Prayer for Relief

For the reasons set forth above, Infinity respectfully requests that the requirement that a comparison be done between the cost of building out a wireless LAN and individual data plans be waived for the applications listed in Appendix A hereto and that such applications be allowed to proceed through regular review and funding commitment and/or let the current funded projects continue without further review.

Respectfully submitted,

Fred Brakeman

Fred Brakeman RCCD, CSI, CEMP

President

December 31, 2014

Appendix A

<u>Applicant</u>	<u>Application #</u>	<u>FRN#</u>
Central Unified School District	989415	2699573
Central Unified School District	929433	2539020
Lake Tahoe Unified School Dist	944657	2572650
Lake Tahoe Unified School Dist	902120	2453961
Santa Rita Union School District	963214	2617096