

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

Requests for Waiver and/or Review of Decisions)
of the Universal Service Administrator)
by) CC Docket No. 02-6
Chinle Unified School District No. 24)
Chinle, AZ)

TO: Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Chinle Unified School District No. 24 ("CUSD #24" or "Chinle") by and through its E-rate consultant, Educational Funding Group, Inc., CRN 16043587 (LOA is attached), respectfully requests that the Federal Communications Commission ("FCC" or "Commission") Review two (2) decisions of the Universal Service Administrative Company ("USAC") that denied funding for all of the Funding Requests ("FRN") contained in FY2009 Form 471 application #762938 and FY2010 Form 471 application #762938 and further denied the associated appeals to USAC. Since the issues for which review is requested are the same, or substantially similar, therefore the two Requests are being consolidated herein.

Chinle asks that, in the alternative, the Commission grant it Waivers relative to the competitive bidding and contract issues that USAC found to exist in both applications. These

Requests for Waiver and/or Review are made pursuant to 54.719 through 54.723 of the Commission's rules.¹

Billed Entity Number: 143224

(1) **FY2009** FCC Form 471 Application Number: 694368

Date of Date of Administrator's Decision of Appeal Letter: August 28, 2015

Funding Request Numbers Appealed: 1907046, 1907211, 1907453 and 1907530

(2) **FY2010** FCC Form 471 Application Number: 762938

Date of Date of Administrator's Decision of Appeal Letter: August 31, 2015

Funding Request Numbers Appealed: 2061752, 2061877, 2061913, 2061955 and 2095101

Both applications have the same three service providers:

Smith Bagley SPIN 143000989

Verizon Business Global SPIN 143001197

Navajo Communications SPIN 143002575

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¹47 C.F.R. §§ 54.719–54.723

USAC'S REASONS FOR DENYING APPEALS

For both the FY2009 and FY2010 applications the reasons contained in the Administrator's Decision on Appeal Letters are too lengthy to restate herein, so copies of each Letter are attached hereto as Exhibit A and Exhibit B, respectively.

I. STATEMENT IN SUPPORT OF REQUEST FOR REVIEW

A. BACKGROUND

Chinle Unified School District No. 24 is a district comprised of seven school buildings and approximately 3600 students. It has the largest primarily Native American public high school in the entire United States with 99% of the students being *Diné* (Navajo). CUSD #24 is located in a remote corner of Arizona and is the largest school district in the Navajo Nation in both student counts and geographic area, which spans 300 square miles. It is located on the Navajo Nation Reservation amidst 3,000 square miles of barren valleys, deep canyons, high desert, and rough mountains. The schools are so widely dispersed that school buses travel thousands of miles each day to transport the students. Since the CUSD buildings are subject to temperature extremes from the minus 30's in the harsh winters to over one hundred degrees in the summers, the district has been forced to postpone certain projects and often forgo other services. Chinle's location is totally isolated from the conveniences that are available in urban locations; the nearest major city is a four hour drive which explains why there are very few vendors willing or able to provision service to the district.

CUSD #24 has a strong commitment to using the positive relationship between Navajo culture and the western society to develop each student's ability to function competently in a multicultural society. However, the arid desert climate and geography of the area pose unique challenges to accomplishing the district's goal. Striving to service its predominantly

impoverished student population, the needs of CUSD #24 require greater than average commitment and continued perseverance. It has always relied heavily on E-rate funding to help accomplish its goals, particularly when it comes to obtaining adequate broadband, which is crucial given the remoteness of the area.

Despite its noble goals and the difficulties it faces as a school that serves primarily poor Navajo Nation students, over the past six (6) years USAC has been subjecting CUSD #24 to unwarranted and incredibly heightened scrutiny, delaying or depriving it of funding for years at a time.

B. FY 2009 APPLICATION # 694368

i. FRNs 1907046 and FRN 1907211

USAC alleged that no bidding matrices were sent to the Compliance Review team, however, on May 6, 2010, Educational Funding Group (EFG) sent the bid results/evaluation summary for several years, including FY2009, to Natasha Corlett of USAC's Compliance Review Team. Since one of reasons upon which USAC based the funding and appeal denials was that no bid evaluations were sent is not true, the denials based on this reason should be reviewed and reversed. A copy of the email and associated documentation are attached as Exhibit C.

ii. FRN 1907046:

This FRN for cellular service with Smith Bagley/Cellular One was properly bid on Form 470 #637830000724526 and after waiting the requisite 28 days, was filed for as month-to-month ("MTM") service. As the basis for its denying funding and the associated appeal, USAC made the determination that a contract existed, which finding was based solely on the Chinle School Board's approval of the expenditure, which occurred after the filing date. The finding that a contract existed is an erroneous conclusion on USAC's part. At Chinle all expenditures must be approved by the school board – even those for MTM services – and, like every other

public school district in the country, all expenditures require a P.O. to process vendor payments. Although P.O.s can create contracts in Arizona, the issuance of the P.O. to Smith Bagley did not change the agreement and intent of the vendor and the applicant to have this service provisioned on a MTM basis, it just created legal authorization for the school district to pay the vendor.

USAC exceeded its authority by inferring the existence of a contract just because the Board approved the annual expenditure and a P.O. for the cost of the service was issued. In 2009 Chinle had no local procurement requirements and although not required, submitting expenditures to the Board was part of Chinle's ordinary course of business. The purpose of this practice was to facilitate payments to vendors; however, it *did not* create a contractual obligation other than to pay the annual amount for the vendors' services. The Board minutes (submitted to the USAC Compliance Review Team) never mention the existence or approval of a contract with Smith Bagley, only the annual amount they were to be paid, so it was an error on the part of USAC to infer the existence of a contract and deny CUSD's appeal stating that the contract wasn't signed prior to the filing of the Form 471.

iii. FRN 1907211

This FRN for long distance service with Verizon Business Global was properly bid on Form 470 #637830000724526 and after waiting the requisite 28 days, was filed for as MTM service.

In its Administrator's Decision on Appeal letter USAC stated three reasons for denying the appeal for this FRN: (1) that no bidding information was provided; (2) that no contract was in place prior to the filing of the Form 471; and (3) that they determined that the long distance services were services that could not be received on a month-to-month basis.

As to item (1), bidding documentation was, in fact, provided to USAC during the extremely extensive compliance review. EFG sent in the response stating that "it was customary to communicate the winning vendors to the board members to quantify the costs involved". USAC denied funding for this FRN because the Board approval came after the Form 471 certification.

As stated above, in 2009 Chinle had no local procurement policies in place; nonetheless it was customary, although not required, to submit expenditures to the board in order to get official approval for payment, even for MTM expenses. Submitting expenditures to the Board was part of Chinle's ordinary course of business so that payments to any and all of their vendors could be authorized, but it *did not* create a contractual obligation other than to the pay the vendor for its services. The Board minutes never mention approving a contract with Verizon Business Global, only the annual amount they were to be paid, so it was an erroneous conclusion on USAC's part to deny funding based on the fact the Board approval came after the filing because Board approval wasn't a required step in the procurement process for the month-to-month long distance service with Verizon Business Global. Since one of reasons upon which USAC based the funding denial was that no contract was in place prior to the certification of the Form 471, the denial based on this reason should be reversed.

As for denial reason number three, USAC's conclusion that the long distance services requested in this FRN required a contract, is completely unfounded and should be reviewed and reversed. There is nothing in the E-rate program rules that requires a contract for this eligible Priority 1 service.

iv. FRNs 1907453 and 1907530

FRN 1907453 for local telephone service and FRN 1907530 for Internet Access were properly bid on Form 470 #637830000724526 and after waiting the requisite 28 days, both were correctly applied for as month-to-month service.

As stated above, in 2009 Chinle had no local procurement policies in place; nonetheless it was customary, although not required, to submit expenditures to the board in order to get official approval for payment.

For FRN 1907530, EFG submitted a copy of a contract signed only by the vendor to the USAC Compliance Review Team. EFG sent the copy but at the time it did so, it was unaware that this contract was never signed by Chinle and was never submitted to the Board for approval. The Board minutes which were also previously provided to USAC, never mention approving a contract with Navajo Communications, only the annual amount they authorized to be paid.

It was wrong for USAC to infer the existence of a contract simply because the expenditure was presented to the Board. Since they were given a contract signed only by one party, the Compliance Review Team should have made further inquiry into the details of the contract, even if only to ascertain whether or not it was in place prior to the filing of the Form 471. The Team did not do this, instead making the erroneous presumption that a contract existed and that it wasn't submitted to the Board in a timely manner and denied funding on that basis. The truth of the matter is that it wasn't until five (5) years after the 2009 funding year window closed that Chinle entered into its first contract with Navajo Communications for local service.

As for FRN 1907530, an out-of-window contract for its Internet Access services was signed a few months after the 2009 E-rate filing window closed, so at the time Form 471 #694368 was submitted, the service was properly applied for on a month-to-month basis.

USAC clearly overstepped its authority by concluding the existence of a contract with Navajo Communications and by assuming that the contract was ratified by the Board, when in fact the Board only approved the expenditure. Since there was no contract, the fact that the Board approved the expenditure(s) after the filing is not relevant because Board approval wasn't a required step in procuring the MTM local telephone and internet access services, only for the authorization to approve payments to Navajo Communications for the procured services.

Chinle never signed the contract presented to them by Navajo Communications and it was agreed by both parties to have the service provided on a MTM basis. Since one of reasons upon which USAC based the funding denial was that no contract was in place prior to the certification of the Form 471, the denial based on contract issues should be reversed.

v. For all five FRNs subject of this Request, USAC alleged that no bidding matrices were sent to the Compliance Review team. In response to this allegation Chinle states that:

On May 6, 2010, EFG sent all evaluation matrices to Natasha Corlett of USAC's Compliance Review Team. The response contained a table that specified where they could be found in the extensive, indexed documentation that had was provided.

Since one reasons upon which USAC based the funding denials was that no bidding documents and/or matrices were sent is not true, the denials based on this reason must be reversed.

C. FY 2010 APPLICATION # 762938

i. FRN 2061752:

This FRN for cellular service with Smith Bagley was properly bid on Form 470 #283370000780203. Unfortunately, the person who entered the data into the Form 471, indicated there was a contract, when none was ever entered into. Due to this clerical/ data entry error USAC processed the FRN on the assumption that a contract was signed for the cellular services received from Smith Bagley. However since this was not the case, we ask that the denial of this FRN be reconsidered and the clerical error corrected so as to bring the application into compliance.

Additionally, despite EFG submitting the requested bid score sheet to the Compliance Review Team on May 6, 2010, the FCDL explanation issued indicating the bid documentation was never provided; the appeal decision upheld this position. As indicated in the bid evaluation document, Smith Bagley was the only bid received for the service requested under this FRN, so after assessing the cost effectiveness of the bid, Chinle awarded them the service on a MTM basis. See Exhibit C.

Although not required, submitting expenditures to the Board was part of Chinle's ordinary course of business so that payments to any and all of their vendors could be authorized. The Board minutes never mention the existence or approval of a contract with Smith Bagley, only the annual amount they were to be paid. We ask that the FRN be remanded to USAC for correction to show MTM service and that funding be awarded for this FRN.

It should be kept in mind that all expenditures of district funds must be approved by the school board and released through a P.O. – even those for MTM services - it does not change the agreement and intent of the vendor and applicant to have had MTM service for this FRN.

The P.O. only obligates the applicant to pay the vendor up to the amount approved by the
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Board. Even though P.O.s can create contracts in Arizona, in this instance the P.O. that was issued only created the obligation to pay the vendor, not to create a contract for the services provided.

ii. FRNs 2061913 and 2095101

FRN 2061913 for long distance service with Navajo Communications was properly bid on Form 470 #283370000780203 and due to a clerical error was filed for as contracted services, where in reality it was for MTM service. This correction was made during the PIA process, which is reflected in the Funding Commitment Decision explanation MR3: "The Contract Award Date was changed from 2/17/2010 to MTM to agree with the applicant documentation."

Since USAC made the change from contracted service to MTM service for FRN 2061913, the Further Explanation of The Administrator's Decision at DR2 stating "no documentation was provided to demonstrate a contract was in place when the FCC Form 471 certification was filed" is clearly in error. Since USAC changed the service to MTM the denial on this basis is incorrect and should be reversed.

Since FRN 2065101 was split by USAC from FRN 2061913 the denial reasons for FRN 2065101 are also erroneous. As reflected Funding Commitment Decision explanation MR2 for FRN 2061913, FRN 2095101 was a new split FRN with Verizon Global Business as the service provider. As such, by program rules, this FRN was not subjected to competitive bidding. Therefore, USAC's funding denial for this FRN based on lack of bidding documentation and lack of contract is inaccurate.

iii. FRNs 2061877 and 2061955

FRN 2061877 for local telephone service and FRN 2061955 for Internet Access were properly bid on Form 470 #283370000780203. Local Service was filed for as month-to-month service and Internet Access was filed for as being under contract.

For FRN 2061955, a contract for internet access services was entered into by Chinle and Navajo Communications on June 4, 2009. A copy of this contract was only recently obtained and therefore had not been submitted to the Compliance Review Team. This contract was signed out of the filing window. For FY2010, after waiting the requisite the 28 days after Form 470 #283370000780203 was posted and completing the evaluation process, Chinle memorialized the contract.

FY2010 FRN 2061877 for local service remained on a MTM basis, and continuously remained MTM service until March 2014, so it was incorrect for USAC infer the existence of a contract for this service simply because the expenditure was presented to the Board. To deny funding based on the fact the contract wasn't approved by the Board until after the filing was based on USAC's specious presumption that a contract existed. The truth of the matter is that until March 2014 Chinle never had a contract with Navajo Communications for its local services and the service continued to be provided on a MTM basis during the intervening years.

During the Compliance Review USAC overstepped its authority by concluding the existence of a contract for FRN 2061877 and by assuming that the contract was ratified by the Board when in fact the Board only approved the expenditure. Since there was no contract, the fact that the Board approved the expenditure after the filing is not relevant because Board approval wasn't a required step in procuring the MTM local telephone service, only for the authorization to approve payments for the procured services.

D. STATEMENT IN SUPPORT OF REQUEST FOR WAIVER

The Commission has repeatedly reiterated its authority under 47 C.F.R. §1.3 to waive rules for good cause shown and has routinely waived compliance for violations when the record

interest, the goals of the E-rate program and will create very significant financial hardship for this remotely located, impoverished school district.

In view of the foregoing, for the reasons stated above, Chinle Unified School District 24 requests that Commission:

1. Grant its Requests for Review and/or Waivers;
2. Order USAC to reverse its funding denials for the nine (9) FRNs contained in these Requests;
3. Remand the nine FRNs to USAC for re-processing;
4. Direct USAC issue Revised Funding Commitment Decision Letters awarding funding for the nine FRNs;
5. As necessary, waive any procedural rules necessary to effectuate the Commission's resultant Orders.

Respectfully submitted,

/s/ Courtney Cikach

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District 24