Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Declaratory Ruling or Waiver by	)	
	)	CC Docket 02-6
Riverside Unified School District	)	
	)	
Schools and Libraries Universal Service	)	FRNs: 2102832, 2165204, 2232257,
Service Support Mechanism	)	2233278 and 222717

To: Chief, Wireline Competition Bureau

REQUEST FOR DECLARATORY RULING OR WAIVER

Paul B. Hudson
Danielle Frappier
James W. Tomlinson
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006 - 3401
Tel.: (202) 973 - 4275
Fax: (202) 973 - 4499
E-Mail: paulhudson@dwt.com
E-Mail: daniellefrappier@dwt.com
E-Mail: jimtomlinson@dwt.com

Attorneys for:

RIVERSIDE UNIFIED SCHOOL DISTRICT

Dated: December 10, 2015

Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Declaratory Ruling or Waiver by	)	
	)	CC Docket 02-6
Riverside Unified School District	)	
	)	
Schools and Libraries Universal Service	)	FRNs: 2102832, 2165204, 2232257,
Service Support Mechanism	)	2233278 and 222717

REQUEST FOR DECLARATORY RULING OR WAIVER

Riverside Unified School District ("Riverside"), by its attorneys and pursuant to 47 C.F.R. § 1.2, hereby respectfully requests a declaratory ruling from the Commission that Riverside was not required by Commission rules to publish in a newspaper of general circulation its notice of certain requests for proposals ("RFPs") for E-rate services under the Commission's Schools and Libraries program. In a recent audit, the Universal Service Administrative Company ("USAC") held that in not providing notice of the RFPs in a newspaper, Riverside violated Section 54.503(b) of the Commission's rules, 47 C.F.R. § 54.503(b), which provides that the Commission's "competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements."[1] As detailed below, Riverside did in fact comply with California law by providing meaningful and adequate public notice of the RFPs at issue by publishing them on the Riverside website.[2]

Should the Commission decline to issue the requested order, pursuant to 47 C.F.R. § 54.719(c), Riverside respectfully requests a waiver from Section 54.503(b) for any newspaper

[1] 47 C.F.R. § 54.503(b).

[2] To date, USAC has not initiated a recovery action, so this submission is not an appeal of an E-rate funding commitment adjustment decision. Instead, Riverside is filing this request to moot the basis for USAC to pursue a recovery action where Riverside has complied with all requirements other than an alleged newspaper publication requirement prior to the date of this request.

publication requirement under California law for the RFPs at issue. Riverside conducted a fair and open competitive bidding process, and therefore, a waiver is consistent with Commission precedent (involving virtually identical circumstances) and is decidedly in the public interest.

I. FACTUAL BACKGROUND

Riverside serves a diverse population of more than 44,000 students.[3] During a recent audit involving funding year 2011,[4] USAC erroneously found that Riverside violated the Commission's rules because Riverside did not publish notice of the RFPs in a newspaper of general circulation, which USAC maintains is a required by California Public Contract Code § 20118.2(d)(2).[5] USAC demands full recovery of $2,535,835 disbursed to Riverside under the following Funding Request Numbers: 2102832, 2165204, 2232257, 2233278 and 222717.[6]

Riverside complied with all USAC and FCC bidding procedures. Riverside submitted a complete FCC Form 470 to USAC, which was then published on the USAC website for the requisite 28 days. Riverside's Purchasing Department supplemented this process by publishing the RFPs on its webpage specifically dedicated to providing interested parties timely notice of RFPs.[7] No prospective service provider has asserted that it did not receive notice of the RFPs, and Riverside received a number of competitive bids for its RFPs. In fact, Riverside received ***seven proposals*** in response to FRN 2232257 and ***six proposals*** in response to FRN 223278, confirming that Riverside's, the competitive bidding process was manifestly open and transparent, and highly competitive.

---

[3] Riverside's Billed Entity Number ("BEN") is 143748 and its FCC Registration Number is 0001523158.
[4] The pertinent portion of USAC's Final Audit Report is included as Attachment 1. The report was approved by the Schools & Library Committee of USAC's Board of Directors on July 28, 2015.
[5] Attachment 1, page 6.
[6] *Id*.
[7] *See* http://rusdlink.org/Page/262.

II. STANDARDS OF LAW

Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(d), provides that the Commission "in its sound discretion, may issue a declaratory order in order to terminate a controversy or remove uncertainty." Moreover, the Commission may waive any provision of its rules "on petition if good cause therefor is shown."[8] A rule may be waived where the particular facts make rigid compliance inconsistent with the public interest.[9] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[10] In sum, waiver is appropriate if special circumstances warrant deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.[11]

III. DISCUSSION

For the reasons detailed below, the Commission should issue a declaratory ruling that Riverside complied with California law during the procurement process, or in the alternative, it should issue a waiver. Waiver is appropriate under these circumstances because it is consistent with Commission precedent and is in the public interest.

A. The Commission Should Declare That Riverside Complied With California Law

USAC found that Riverside "did not demonstrate sufficient knowledge of its state and local competitive bidding requirements or the [Commission's E-Rate] Rules" because it did not publish notice of the RFPs in a newspaper of general circulation, which, USAC asserts, is

---

[8] 47 C.F.R. § 1.3.

[9] *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

[10] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972).

[11] *Northeast Cellular*, 897 F.2d at 1166.

required by California Public Contract Code 20118.2(d)(2).[12] However, USAC's finding fails to recognize the nuances of California law, which affords public entities in California, such as Riverside, considerable discretion in the procurement process. Accordingly, and in order to remove uncertainly, the Commission should declare that Riverside complied with California law.

The California Supreme Court has ruled that public agencies may lawfully ***forego public bidding altogether*** if the process would be "unavailing as affecting the final result" or "where they do not produce an advantage."[13] Certainly, if California courts have ruled on multiple occasions that public entities have the discretion to forego public bidding altogether, then a public entity has the discretion to forego one arcane element of public bidding, such as newspaper publication of such notice.

Moreover, under California law, public advertising of bids is not required where such advertising would be an "idle act."[14] It is clear that newspaper publication of Riverside's RFPs would be an idle act that would not produce an advantage, nor have any effect on the final result. Qualified, prospective bidders for E-Rate projects are well aware that the USAC website is the principal repository of E-Rate-related RFPs. This system works efficiently and effectively. Riverside understands that service providers regularly monitor the USAC website in order to be notified of RFPs on a timely basis. Riverside further supplemented this process by publishing

---

[12] Attachment 1, page 6.

[13] *See Los Angeles Dredging Co. v. Long Beach*, 210 Cal. 348, 354 (1930) ("where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce an advantage … a statute requiring competitive bidding does not apply.").

[14] *Meaking v. Steveland, Inc.*, 68 Cal. App. 3d 490, 498 (1977) ("under the circumstances, advertising for bids would not only be unnecessary, but also an idle act"); *County of Riverside v. Whitlock*, 22 Cal. App. 3d 863, 878 (1972) (contract to furnish public utility services to political subdivision not subject to competitive bidding because rates fixed or controlled by regulatory body, thereby affording adequate protection against favoritism or fraud); and *Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 636 (1980) (public contract not required if it would not result in any advantage to the public entity in efforts to contract for the greatest public benefit).

the RFP on its website. Indeed, Riverside's Purchasing Department has a webpage specifically dedicated to providing interested parties timely notice of RFPs.[15]

By contrast, it is unlikely that prospective bidders would scour the "legal notices" in a newspaper – which typically are buried its back pages – for an E-Rate related RFP. Newspaper publication of the RFPs would be entirely redundant in light of the widespread notice that was given to potential bidders on the USAC and Riverside websites, and would, in fact, be the epitome of an "idle act" that has no bearing on the final result. Despite these circumstances, and abundance of California law contradicting its position, USAC demands that Riverside return more than $2.5 Million in desperately needed funds.

In addition, USAC erred in its application of California Public Contract Code § 20118.2(d)(2) to all of the FRNs at issue here. California Public Contract Code § 20118.2(b) specifies that "this section applies only to a school district's procurement of computers, software, telecommunications equipment, microwave equipment, and other related electronic equipment and apparatus." Only two of the FRNs in question (2232257 and 2233278) address telecommunications equipment. The other three FRNs address telecommunications and maintenance ***services***, not equipment or tangible devices.

These circumstances warrant the issuance of a declaratory ruling from the Commission in order to eliminate this controversy, and prevent similar controversies in the future.

B. Waiver Is Consistent With Commission Precedent

Should the Commission decline to issue a declaratory ruling, it should, in the alternative, grant a waiver to Riverside. In 2012, the Commission granted the same waiver requested here to another California school district, San Juan Unified School District ("SJUSD"), based on

[15] *See* http://rusdlink.org/Page/262.

virtually identical circumstances as this waiver request.[16] In its waiver request,[17] SJUSD explained that during an audit, USAC ordered that funding be rescinded in full because SJUSD "did not advertise the two related Request for Proposals … in a local publication, which is required by … the California Public Contract Code."[18] SJUSD explained that it: (1) filed its FCC Form 470 on the USAC website and (2) "also posted the RFPs on its own website."[19] The Wireline Competition Bureau found that SJUSD "demonstrated good cause to waive sections 54.504 and 54.511 of the Commission's rules because … their competitive bidding processes were not compromised by their technical violation of the Commission's competitive bidding requirements."[20]

The facts here are essentially identical to those in the SJUSD proceeding. Like SJUSD, Riverside submitted a completed FCC Form 470 to USAC, which published the Form 470 on its website. Riverside also published the RFPs on its own website. These processes had the desired effect – prospective bidders were given actual and constructive notice, and that notice resulted in more than a dozen responsive bids from qualified bidders. Thus, it is apparent that the bidding process was, in fact, highly competitive.

Similarly, in 2011, the Commission granted a waiver to another California school district, Hesperia Unified School District ("Hesperia"), despite certain technical defects in its RFP process.[21] Hesperia posted its RFP beyond the deadline required by California law, but gave

---

[16] *See Requests for Waiver and Review of Decisions by Aberdeen School District, et al.*, Order, 27 FCC Rcd 1941, Appendix B (WCB 2012) ("*SJUSD Waiver Order*").

[17] *See* Attachment 2, *Request for Waiver by San Juan Unified School District*, Request for Review, CC Docket 02-06 (filed March 17, 2010) ("*SJUSD Waiver Request*").

[18] Attachment 2, *SJUSD Waiver Request* at 2.

[19] *Id*.

[20] *SJUSD Waiver Order* at ¶ 1 (footnotes omitted).

[21] *In the Matter of Requests for Review and/or Waiver of Decision of the Universal Service Administrator by Al-Ihsan Academy South Ozone Park, New York, et al.*, Order, 26 FCC Rcd 16415 at ¶ 7 (WCB 2011). ("*Hesperia Waiver Order*"),

copies of the document to all bidders who responded to the FCC Form 470.[22] In granting the waiver, the Commission found "no indication in the record that the competitive bidding process was harmed" by the minor technical defect because the "eight FCC Form 470 bidders" constituted "all potential bidders."[23] The *Hesperia Waiver Order* underscores the fact that posting one's Form 470 on the USAC website is a sufficient means of reaching all potential bidders for an E-rate contract. Riverside not only posted the Forms 470 on the USAC website, but then also posted it on its own website, providing ample notice to all potentially interested bidders such that a waiver of any newspaper publication requirement is more than appropriate.

C. Waiver Is In The Public Interest

As noted above, the Commission has discretion to waive a rule in situations where the particular facts make rigid compliance inconsistent with the public interest. The Commission also may consider hardship and equity, and whether special circumstances warrant deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. As detailed below, each of these factors has been met.

Rigid Compliance is Inconsistent with the Public Interest. Even if the Commission believes that Riverside failed to comply with Cal. Public Contract Code § 20118.2(d)(2) – which, as discussed in the previous section is not the case – consistent with the *SJUSD Waiver Order*, such a determination would constitute only a "technical violation of the Commission's competitive bidding requirements" that did not compromise the overall *competitive* bidding process. The fact that a plethora of proposals were received in response to the RFPs makes it abundantly clear that prospective bidders had notice of the RFPs. The newspaper notice provision in California law is, as a practical matter, little more than a technical formality.

---

[22] *Id.*
[23] *Id.*

Hardship. USAC recommends the imposition of the maximum possible penalty against Riverside: the recovery of 100% of the E-Rate funds, or more than $2.5 Million in critically needed funding – for what was, at most, a harmless, technical violation of the competitive bidding rules. Riverside would suffer hardship if it was forced to disperse more than $2.5 Million in unbudgeted funds in the middle of the school year. A $2.5 Million recovery will impede, postpone or suspend the expansion of Riverside's Internet infrastructure deployment necessary to handle the state-required online testing requirements. Riverside would be forced to shut down essential online activities such as email in order to try to meet such requirements to the extent possible.

Equity. Section 54.503 requires that all "entities participating in the [E-Rate] program must conduct a fair and open competitive bidding process." USAC's audit contains no finding that the competitive bidding process was not "fair and open." In fact, the bidding process was undeniably transparent, open and *highly* competitive, as demonstrated by the 6-7 proposals received from qualified bidders. There is no evidence that the lack of a newspaper publication resulted in the waste or abuse of E-Rate funds.

In 2013, the Commission recognized that the inflexible, rote application of its rules could create an inequitable outcome for service providers and applicants:

> as our rules have expanded, the risk to applicants of having USAC or the Commission seek full reimbursement of previously disbursed funds based on a rule or program violation has also grown, and ***sometimes full reimbursement is not commensurate with the violation incurred***.[24]

Finally, it should also be emphasized that School District personnel believed in good faith that publication of the RFPs on the Riverside and USAC websites was sufficient for compliance with California law. There was no effort by Riverside to circumvent the law.

---

[24] *In Re Modernizing the E-rate Program for Schools and Libraries*, Notice of Proposed Rulemaking, 28 FCC Rcd. 11304 at ¶ 253 (2013) (emphasis added).

Special Circumstances. The Commission should take into consideration the fact that Riverside has implemented additional controls and procedures to ensure enhanced procurement compliance going forward. Specifically, Riverside has:

- Streamlined all procurement through a centralized business office;
- Retrained its staff on federal, state and local procurement requirements, including those specifically related to E-Rate; and
- Reviewed and enhanced its policies and procedures related to procurement.

In particular, going forward, Riverside will ensure that notice of all E-rate related RFPs are published in a newspaper, in addition to the other, more effective means of giving notice to prospective bidders.

IV. REQUEST FOR RELIEF

Based on the foregoing, Riverside respectfully requests that the Commission issue a declaratory ruling finding the Riverside complied with California law during the bidding process for the above-referenced E-rate funding requests. Should the Commission decline to issue such a ruling, Riverside respectfully requests that the Commission waive 47 C.F.R. § 54.503(b) to the extent necessary to overturn USAC's funding clawback ruling. Riverside notes, however, that in the *SJUSD Waiver Order*, the Commission waived 47 C.F.R. § 54.504 and 47 C.F.R. § 54.511.[25] Accordingly, Riverside also requests waiver of these rules should the Commission deem it necessary to overturn USAC's funding clawback decision.

[25] *SJUSD Waiver Order* at ¶ 1.

Respectfully submitted,

Paul B. Hudson
Danielle Frappier
James W. Tomlinson
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, DC 20006 - 3401
Tel.: (202) 973 - 4275
Fax: (202) 973 - 4499
E-Mail: paulhudson@dwt.com
E-Mail: daniellefrappier@dwt.com
E-Mail: jimtomlinson@dwt.com

Attorneys for:

RIVERSIDE UNIFIED SCHOOL DISTRICT

Dated: December 10, 2015

Attachment 1

Finding #1
Failure to Comply with Competitive Bidding Requirements

Condition
IAD examined documentation to determine whether the competitive bidding process the Beneficiary used to select service providers for FRNs 2102832, 2165204, 2232257, 2233278, and 2227717 complied with state and local competitive bidding requirements, as well as FCC requirements. The Beneficiary provided IAD with a copy of Riverside Unified School District Business and Noninstructional Operations for bids, which indicated that the Beneficiary was required to conduct competitive bidding "in accordance with statutory requirements for bidding and bidding procedures."[1] IAD inquired as to whether the Beneficiary advertised its requests for proposals as required by California Public Contract Code § 20118.2(d)(2). The Beneficiary informed IAD that it did not publish notice of the request for proposals at least twice in a newspaper of general circulation at least 10 days before the date for receipt of the proposals (criteria 1 to 3).

Cause
The Beneficiary did not demonstrate sufficient knowledge of its state and local competitive bidding requirements or the Rules.

Effect
The monetary effect of this finding is $2,535,835. This amount represents the total amounts disbursed for FRNs 2102832, 2165204, 2232257, 2233278, and 2227717, as follows:

FRN	Amount
2102832	$108,653
2165204	$558,753
2232257	$424,875
2233278	$1,426,124
2227717	$17,430
Total	**$2,535,835**

Recommendation
IAD recommends USAC seek recovery of $2,535,835. The Beneficiary must implement controls and procedures to demonstrate compliance with all applicable state and local competitive bidding requirements, as required by the Rules.

Beneficiary Response
> In the DAR [Draft Audit Report], the IAD concludes that the Beneficiary "did not demonstrate sufficient knowledge of its state and local competitive bidding requirements or the Rules" because it did not publish notice of the request for proposals ("RFP") in a newspaper of general circulation, in accordance with California Public Contract Code section 20118.2(d)(2). Based on this conclusion,

[1] Beneficiary's response (Mar. 4, 2014).

the DAR recommends that USAC seek recovery in the amount of $2,535,835, which represents the amounts disbursed for the five Funding Request Numbers ("FRN") at issue[1]. For the reasons set forth below, the Beneficiary demonstrated sufficient knowledge of federal, state and local competitive bidding requirements and did engage in a competitive process for the five FRNs. Accordingly, the Beneficiary respectfully requests that the draft recommendation for forfeiture of $2,535,835 in funding be reconsidered and withdrawn.

A. The Beneficiary Engaged in a Fair and Competitive Process Consistent with Federal, State and Local Bidding Requirements.

The Beneficiary complied with all USAC bidding procedures. The Code of Federal Regulations states that "[a]ll entities participating in the schools and libraries universal service support program must conduct a fair and open competitive bidding process." (47 C.F.R. § 54.503.) Specifically, the Code of Federal Regulations requires that [school districts] submit a completed Federal Communications Commission ("FCC') Form 470 to the Administrator to initiate the competitive bidding process. The Administrator posts the FCC Form 470 on its website designated for this purpose, which is the Schools and Libraries Division ("SLD") website. The Beneficiary followed each step of this process and its [FCC] Form 470 was successfully published on the USAC website. The Beneficiary also posted the RFPs on its own website.

The Code of Federal Regulations also requires state and local competitive bid requirements must be met. (47 C.F.R. § 54.503.) As such, in addition to following USAC procedures, the Beneficiary also complied with California bidding requirements.

1. Prospective Bidders Received Notice.

The Beneficiary engaged in a lawful competitive process, even though notice inviting proposals was not published in a newspaper of general circulation. In several areas of California law, the specified form of notice may be waived when actual or constructive notice is achieved. Actual notice is when express information of fact is received. (Cal. Civ. Code § 18.) Notice is also imputed by law under the doctrine of constructive notice, whereby "[e]very person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (Cal. Civ. Code § 19; *Shapiro v. Equitable Life Assur. Soc. of U.S.* (1946) 76 Cal.App.2d 75, 86.)

Here, posting [FCC] Form 470 on the SLD website and posting the RFPs on the Beneficiary website resulted in actual and constructive notice to prospective bidders and yielded multiple bids, resulting in a fair and competitive process. For example, FRN 2232257 yielded seven proposals and FRN 2233278 yielded six

[1] The five FRNs at issue are FRN nos. 2102832, 2165204, 2232257, 2233278, and 2227717.

proposals. Moreover, given the USAC requirement for posting [FCC] Form 470 on the SLD website and the technology vendor industry reliance on those postings, all potential bidders had constructive notice of the contracts. Publication in a newspaper is duplicative notice and is highly unlikely to have drawn the attention of or solicited additional bids from other technology providers when all of the technology providers already consult the SLD website.

Furthermore, the California legislature recognized the archaic and potentially ineffective requirement of newspaper publication when it amended Senate Bill 1464 to permit posting notices online. Comments to the legislation included "Allowing posting of bids on websites, in addition to existing notice requirements in newspapers, provides school districts and bidders the opportunity to become comfortable with electronic bidding procedures using the latest technology to advertise, open and post contractor proposals." Because USAC publishes [the FCC] Form 470 on the SLD website and California law permits online posting, the newspaper publication provision in the California Public Contract Code is redundant, especially when actual and constructive notice of the bids occurred and a competitive procurement process was achieved.

2. California Public Agencies Have Discretion in the Procurement Process.

California public agencies have been granted discretion to publicly bid altogether, if such bidding would be unavailing or an idle act. Certainly, if courts have permitted public agencies the discretion to forego public bidding in its entirety, then a public agency would have the discretion to forego one arcane element of public bidding (i.e., newspaper publication of notice), which the agency deems to be an idle act and would not produce any advantage. (*See Los Angeles Dredging Company v. Long Beach* (1930) 210 Cal. 348, 354 ["where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage . . . a statute requiring competitive bidding does not apply"]; *Meaking v. Steveland, Inc.*, 68 Cal.App.32d 490 ["under the circumstances, advertising for bids would not only be unnecessary, but also an idle act"]; *County of Riverside v. Whitlock*, 22 Cal.App.3d 683 [contract to furnish public utility services to political subdivision not subject to competitive bidding because rates fixed or controlled by a regulatory body, thereby affording adequate protection against fraud or favoritism]; *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631 [public bidding is not required if it would not result in any advantage to the public entity in efforts to contract for the greatest public benefit].)

In the instant matter, newspaper publication would not have produced any advantage and is an idle act, given that such notice is duplicative of USAC's requirement of posting [FCC] Form 470s on the SLD website and the industry practice of relying on such online notice. Like the cases cited above, strict compliance with public bidding requirements should be excused where there is no

evidence of fraud or favoritism and the Beneficiary was still able to enter into contracts for the greatest public benefit.

B. Good Cause Exists for Waiver of the IAD Recommended Forfeiture of $2,535,835.

The Beneficiary respectfully requests that the IAD waive the recommendation in the DAR for forfeiture of $2,535,835 in funding due to lack of newspaper publication of notice, because good cause exists for the Beneficiary to obtain a waiver of this recommendation from the FCC. "The Commission may waive any provision of its rules on its own motion and for good cause shown." (47 C.F.R. § 1.3.)[1] Good cause for a waiver exists 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).) 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 by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).)

As discussed in more detail below, strict compliance with California's newspaper publication provision is not in the public's best interest and would result in an economic hardship on the Beneficiary. A more effective implementation of overall policy should be taken into account in this instance because two online postings of notice were more effective than a newspaper publication given that the technology-based entities bidding on the contract and online procurement mechanisms are consistent with the overall policy of promoting technology in education.

In the matter of *San Juan Unified School District*, which has nearly identical facts, a California school district requested a waiver from the FCC based on its failure to publish notice in a newspaper of general circulation and the FCC granted the waiver. In *San Juan Unified School District*, [FCC] Form 470 was published on the SLD website and the school district published notice on its own website. (Aberdeen School District, et al. Order, issued on February 22, 2012.) The FCC reasoned that good cause existed to waive the Rules because the error did not warrant complete rejection of the E-rate application and/or the competitive process was not compromised. As such, there was no evidence of waste, fraud, or abuse. The *San Juan Unified School District* Request for Waiver and the corresponding Order titled Aberdeen School District, et al. Order, issued on February 22, 2012 [provided to USAC].

[1] "The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."

Additionally, in the *Bishop Perry Order*, the FCC granted 196 appeals of USAC decisions. (*Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-487170, CC Docket No. 02-6, 21 FCC Rcd 5316, FCC 06-54 (2006) (Bishop Perry Order).) In those cases, the FCC found special circumstances justified a waiver of the FCC rules. The Beneficiary's facts are similar to the cases in the *Bishop Perry* matter and similarly warrant waiver of FCC rules.

In *Bishop Perry*, good cause existed to waive the minimum processing standards established by USAC. There, applicants inadvertently forgot to fill in a box, had computer problems, used an outdated form that requested primarily the same information as the most current one, or misread the instructions. The FCC held that such minor mistakes did not warrant the complete rejection of E-rate applications because there was no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. The *Bishop Perry Order* also found that good cause existed for a waiver due to staff mistakes or confusion. The FCC noted that "the primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers." Furthermore, the FCC found that the denial of funding requests inflicted an undue hardship on applicants and that rigid compliance with the application procedures did not serve the public interest.

In the Separate Statement to the *Bishop Perry Order*, Commissioner Michael J. Copps stated in part:

> [B]ecause access to E-rate is so important, the FCC needs to be dead serious about rooting out abuses and punishing those few bad actors who would exploit the program. The cases at issue were not about waste, fraud or abuse. When a school inadvertently provides the right information on a slightly dated but virtually identical form, flat-out funding denial is a harsh consequence. . . . In fact, it becomes hard to square denial for slight clerical errors like these with our duties under the statute to further the deployment of advanced services.

Similarly, in the instant matter, when identical information is provided on [FCC] Form 470 on the SLD website and the Beneficiary website, foregoing newspaper publication is not tantamount to waste, fraud, abuse, misuse of funds, or a failure to adhere to core program requirements. In fact, the Beneficiary followed the core program requirements by meeting all USAC procurement procedures. The proposed penalty would inflict an undue financial hardship on the Beneficiary and is not in the public's best interest. The proposed $2,535,835 forfeiture is approximately 75% of the Beneficiary's technology infrastructure budget. Loss of this funding would directly result in fewer educational opportunities for [the] Beneficiary's approximately 43,000 students.

Here, the FRNs were submitted by the Beneficiary's Technology Services Administrative Assistant to USAC on [FCC] Form 470. The Technology Services Administrative Assistant followed USAC's requirements for Form 470 to be published on the SLD website and she also posted the RFPs on the Beneficiary's website. The Technology Services Administrative Assistant believed USAC's posting requirements to be in lieu of, rather than in addition to, California's newspaper publication requirement. Nevertheless, notice was achieved, a competitive process was followed, and no fraud, abuse or misuse of funds resulted. Additionally, and as discussed in more detail below, the Beneficiary has put several controls in place to ensure compliance with federal, state, and local procurement laws, including having all Beneficiary contracts procured through one central business office, rather than the Technology Services department. Like *Bishop Perry*, a waiver should be granted given the staff misunderstanding of one element of California Public Contract Code when USAC requirements were followed and met.

Finally, flat-out denial of funding of the five FRNs, totaling $2,535,835 is a harsh consequence where a nearly identical notice was published online and such online notice is consistent with USAC's deployment of advanced services, USAC guidelines for posting [FCC] Form 470, and the California Legislature's permission of online posting in Senate Bill 1464. There is no evidence that lack of newspaper publication resulted in fraud, abuse, or exploitation of the E-rate program. For these reasons, good cause exists to waive the recommendation in the DAR to forfeit $2,535,835 and the Beneficiary respectfully requests that the IAD waive this recommendation in the final audit report.

C. The Beneficiary Has Implemented Controls And Procedures For Enhanced Procurement Compliance.

The Beneficiary has implemented enhanced controls and procedures to demonstrate compliance with all applicable federal, state, and local competitive bidding requirements. Those controls and procedures include but are not limited to streamlining all procurement through one central business office, retraining Beneficiary staff on federal, state, and local procurement requirements, including E-rate requirements, acquisition of written resource materials related to compliance with procurement requirements and procedures, and review and enhancement of Beneficiary policies and procedures for procurement. The Beneficiary is confident that these controls and procedures will result in strict compliance with all federal, state, and local requirements for procurement under E-rate.

IAD Response

The Beneficiary asserts that it "engage[d] in a competitive process for the five FRNs." However, IAD does not concur with the Beneficiary's statement that the Beneficiary "complied with all USAC bidding procedures." The Rules provide that "competitive bid requirements apply in addition to state and local competitive bid requirements and are not

intended to preempt such state or local requirements" (criterion 1). In its response, the Beneficiary acknowledges that "notice inviting proposals was not published in a newspaper of general circulation" as required by California Public Contract Code section 20118.2.

In its response, the Beneficiary cites to California Civil Code sections 18 and 19 and asserts "the specified form of notice may be waived when actual or constructive notice is achieved." The Beneficiary further asserts "posting the [FCC] Form 470 on the SLD website and posting the RFPs on the Beneficiary website resulted in actual and constructive notice to prospective bidders." However, the Beneficiary's RFPs provide "[a] contract, if awarded, will be pursuant to California Public Contract Code 20118.2, which permits the District to competitively negotiate such contracts and to consider more than simply price in awarding the contract." California Public Contract Code section 20118.2 requires the Beneficiary to post its RFPs "at least twice in a newspaper of general circulation, at least 10 days before the date for receipt of the proposals" (criterion 3). As noted above, the Beneficiary acknowledges that it did not publish its requests for proposals at least twice in a newspaper of general circulation at least ten days before receipt of the proposals in accordance with § 20118.2 (criterion 3). In addition, California Public Contract Code § 20118.2 does not include any provision that would waive the newspaper publication requirement because the Beneficiary posted an FCC Form 470 to USAC's website or posted its RFPs to its website.

The Beneficiary also cites to several cases in which California courts have held that certain public contracts were exempt from the public bidding because those contracts involved limited circumstances where public bidding would not have produced any advantage to the public entity. The Beneficiary asserts that public agencies "have the discretion to forego one arcane element of public bidding (i.e., newspaper publication of notice), which the agency deems to be an idle act and would not produce any advantage." IAD does not concur that the cited cases provide the Beneficiary discretion to forgo the newspaper publication requirement pursuant to California Public Contract Code section 20118.2. While the cited cases found in limited circumstances that certain contracts may be exempt from public bidding, the cases did not hold that public agencies can forgo the notice requirements or other requirements when public agencies conduct a public competitive bid process pursuant to California's procurement laws. Further, the facts here do not involve the type of limited circumstances where competitive bidding would not have produced any advantage to the Beneficiary. Because the Beneficiary stated in its RFPs that it was conducting competitive bidding process pursuant to California Public Contract Code section 20118.2, it was required to comply with that statute's newspaper publication requirements (criteria 1 to 3).

Further, the Beneficiary asserts "[p]ublication in a newspaper is duplicative notice and is highly unlikely to have drawn the attention of or solicited additional bids from other technology providers when all of the technology providers already consult the SLD website." However, the Beneficiary must comply with the Rules, which require the Beneficiary to comply with state and local competitive bidding requirements (criteria 1 and 2). The fact that technology providers may consult the SLD website does not relieve

the Beneficiary of the obligation to comply with all applicable state and local competitive bidding requirements as required by the Rules.

The Beneficiary further asserts that the California legislature "amended Senate Bill 1464 to permit posting notices online." The amended language provides "the governing board of a school district shall publish at least once a week for two weeks in some newspaper of general circulation published in the district, or if there is no such paper, then in some newspaper of general circulation, circulated in the county, **and** may post on the district's Web site or through an electronic portal, a notice calling for bids (emphasis added)."[1] IAD notes that the amended language states "*and* may post on the district's website or electronic portal," and, thus, indicates that electronic posting may be used *in addition to*, rather than in lieu of, the newspaper notice. Thus, IAD does not concur with the Beneficiary's assertion that the language from the amended Senate Bill 1464 permits the Beneficiary to publish its notice online in lieu of posting in a newspaper of general circulation.

In addition, the Beneficiary further "requests that the IAD waive the recommendation in the DAR for forfeiture of $2,535,835 in funding due to lack of newspaper publication of notice, because good cause exists for the Beneficiary to obtain a waiver of this recommendation from the FCC." While the FCC may waive its Rules on its own motion and for good cause shown, USAC is not authorized to waive the Rules.[2]

For these reasons, IAD's position on this finding remains unchanged.

USAC Management Response

IAD examined documentation to determine if the competitive bidding process used to select service providers complied with applicable state and local competitive bid requirements, as required by the Rules. IAD inquired as to whether the Beneficiary advertised its Requests For Proposals (RFP) as required by California Public Contract Code § 20118.2(d)(2). The Beneficiary informed IAD that it did not publish notice of the request for proposals at least twice in a newspaper of general circulation at least 10 days before the date for receipt of the proposals. However, the Beneficiary asserted that under California's Civil Code §§ 18 and 19, "the specified form of notice may be waived when actual or constructive notice is achieved." The Beneficiary further asserted that posting the FCC Form 470 on USAC's web site provided actual and constructive notice. The Beneficiary's RFPs provided that the Beneficiary was conducting the competitive bid process in accordance with California Public Contract Code section 20118.2(d)(2). Section 20118.2(d)(2) required that bids be posted at least twice in a newspaper of general circulation. Although the Beneficiary asserts that posting the FCC Form 470 on USAC's website provided notice of the bids, section 20118.2(d)(2) does not provide for this method of advertising. Thus, the Beneficiary was required to comply with the

[1] Cal. Pub. Cont. Code § 20112.

[2] *See* 47 C.F.R. § 702(c) (2011) ("[USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."), 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedures Act and the provisions of this chapter.").

newspaper publication requirements under California Public Contract Code § 20118.2(d)(2) (criterion 3).

In addition, the Beneficiary states "[p]ublication in a newspaper is duplicative notice and is highly unlikely to have drawn the attention of or solicited additional bids from other technology providers when all of the technology providers already consult the SLD website." However, as discussed in the finding, California Public Contract Code § 20118.2(d)(2) requires newspaper publication of RFPs issued pursuant to that section. The Beneficiary must comply with the Rules, which require the Beneficiary to comply with any applicable state and local competitive bidding requirements. As noted above, the Beneficiary acknowledged that it did not publish its RFP in a newspaper of general circulation as required by Section 20118.2(d)(2).

The Beneficiary also requests that USAC waive the Rule requiring applicants to comply with all applicable state and local procurement requirements. USAC acknowledges the Beneficiary's waiver request however, USAC does not have authority to waive the Rules. Going forward the Beneficiary should ensure it complies with all applicable state and/or local procurement regulations in addition to the FCC rules.

USAC agrees with the finding, effect and recommendation and will seek recovery of $2,535,835.

Criteria

1. "Except as provided in [47 C.F.R.] §54.511(c), an eligible, school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under [47 C.F.R.] § 54.502. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements." 47 CFR § 54.504(b) (2011).

2. "[T]he FCC Form 471 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:… The entities listed on the FCC Form 471 application have complied with all applicable state and local laws regarding procurement of services for which support is being sought." 47 C.F.R. § 54.504(a)(1)(vi) (2011).

3. "Notice of the request for proposals shall be published at least twice in a newspaper of general circulation, at least 10 days before the date for receipt of the proposals." Cal. Pub. Cont. Code § 20118.2(d)(2) (West 2007).

4. "The district shall purchase equipment, supplies, and services on a competitive bidding basis when required by law and in accordance with statutory requirements for bidding and bidding procedures …." Riverside

Unified School District, Business and Noninstructional Operations, Policy #3311(a), Bids (readopted 1996).