

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of

Rural Health Care Support Mechanism

Request for Review by Central Peninsula  
Hospital of a Funding Commitment Decision of  
the Universal Service Administrator

WC Docket No. 02-60

HCP No. 11902

Funding Request No. 1458110

**Request for Review and Request for Waiver**

Pursuant to Sections 54.722(a) and 1.3 of the Commission's rules, 47 C.F.R. §§ 54.722(a) and 1.3, Central Peninsula Hospital ("CPH") hereby seeks review of the decision of the Rural Health Care Division ("RHCD") of the Universal Service Administrative Company ("USAC") to deny the above-referenced funding request, more specifically described as follows, for the period July 1, 2014 through September 30, 2014:

Appellant/Health Care Provider:	Central Peninsula Hospital HCP No. 11902
Service Provider Name:	Alaska Communications Systems Holdings, Inc. SPIN 143002693
Funding Request Number:	1458110 (80 Mbps MPLS service)
Funding Year:	2014

The RHCD denied funding for this funding request, initially<sup>1</sup> and on appeal,<sup>2</sup> after finding that CPH's Funding Year 2014 Form 465 did not comply with the Commission's competitive bidding rules because it stated the fact – on a truthful and non-misleading basis – that CPH was under contract. This appeal argues that the Funding Year 2014 Form 465 complied with the competitive bidding rules. In the alternative, CPH requests a waiver to permit it to rely on an older Form 465 that did not contain the improper statements.

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<sup>1</sup> RHC Division Funding Denial Letter, Funding Request No. 1458110 (Apr. 24, 2015) ("Funding Denial Letter").

<sup>2</sup> USAC Letter to Bob Wattam, Central Peninsula Hospital (Dec. 28, 2015) ("Appeal Decision").

### **Background**

On October 1, 2010, following the completion of a competitive bidding process conducted in accord with the Commission's rules, CPH signed a contract (the "2010 Contract") with Alaska Communications for 80 Mbps MPLS broadband connectivity and 27 Mbps dedicated Internet access service. The 2010 Contract was placed in evergreen status, and CPH received funding for this service in each of Funding Years 2010, 2011, 2012, and 2013.<sup>3</sup> Following the expiration of the three-year contract term, the RHCD continued to provide funding for the 80 Mbps MPLS service on a month-to-month basis through the end of Funding Year 2013.<sup>4</sup>

On July 30, 2013, CPH issued a new Form 465, seeking to upgrade its service to reflect additional bandwidth needs.<sup>5</sup> Alaska Communications submitted the only fully responsive bid, and CPH signed a new contract with Alaska Communications on December 16, 2013 (the "2013 Contract"), providing for 200 Mbps MPLS service and 70 Mbps dedicated Internet access service. Unfortunately, due to unforeseen delays, the new 200 Mbps service was not installed and activated until October 1, 2014. During that interim period, CPH continued to receive the 80 Mbps MPLS service specified in the 2010 Contract, pursuant to the terms of that contract providing for automatic extensions following the expiration of the initial three-year term.<sup>6</sup>

Because the extension period carried over beyond the end of Funding Year 2013, CPH issued a further Form 465 for Funding Year 2014, in order to support its funding request for the

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<sup>3</sup> See, e.g., Form 465 No. 43127891 (Funding Year 2010) and Funding Request No. 11218231 (Mar. 5, 2013), granting funding for Funding Year 2012.

<sup>4</sup> Funding Request No. 13348971 (Aug. 6, 2014), granting month-to-month funding for the 80 Mbps MPLS service for the period Oct. 2, 2013 through June 30, 2014.

<sup>5</sup> Form 465 No. 43137158 (issued July 30, 2013).

<sup>6</sup> 2010 Contract at § 2.2.

80 Mbps MPLS service for the carryover period from July 1, 2014 through September 30, 2014.<sup>7</sup>

In addition to describing the services that CPH needed, that Funding Year 2014 Form 465 contained the truthful, non-misleading factual disclosure that, “[w]e are currently under Contract and filing form 465 to comply with USAC rules.”<sup>8</sup>

On the basis of that language, the RHCD concluded that CPH had violated the Commission’s competitive bidding rules, and denied funding for the 80 Mbps MPLS service for the portion of Funding Year 2014 at issue, both initially and on appeal.

### **Discussion**

The RHCD based its funding denial on the conclusion that CPH “violated the 28-day competitive bidding rule”<sup>9</sup> because CPH’s Funding Year 2014 Form 465 “indicated to prospective bidders that CPH was not requesting services or seeking bids.”<sup>10</sup>

#### **A. Request for Review**

The Funding Year 2014 Form 465 complied with the Commission’s competitive bidding rules and, therefore, the RHCD erred in denying funding for Funding Request No. 1458110. CPH agrees with the Appeal Decision that Section 54.603 of the Commission’s rules, 47 C.F.R. § 54.603, requires services supported by the Telecommunications Program of the rural health care support mechanism to be competitively bid.<sup>11</sup> And, CPH agrees with the Appeal Decision’s statement that the Commission’s *Kalamazoo* Order, as applied in the context of the rural health

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<sup>7</sup> Form 465 No. 43149098 (issued Dec. 16, 2014).

<sup>8</sup> *Id.* at Block 29.

<sup>9</sup> See RHC Division Funding Denial Letter.

<sup>10</sup> Appeal Decision at 4.

<sup>11</sup> Appeal Decision at 1-2.

care support mechanism in *Franciscan Skemp Waukon Clinic*, permits CPH to consider a preexisting, active contract, such as the 2010 Contract, as a bid in response to a Form 465, so long as it also waits the required 28 days, considers any other bids received, and selects the most cost-effective offering.<sup>12</sup>

But, the Appeal Decision cites no authority for the proposition that the CPH Funding Year 2014 Form 465 “included language that indicated that CPH was not requesting bids” and therefore “did not satisfy the competitive bidding requirements for the requested 80 Mbps MPLS service for FY 2014.”<sup>13</sup> Indeed, there can be none. Although the RHCD took exception to the truthful, non-misleading factual disclosures in the Form 465 that, “[w]e are currently under Contract” and “filing form 465 to comply with USAC rules,”<sup>14</sup> neither statement violates the competitive bidding requirements.

It is plain that the statement “[w]e are currently under Contract and filing form 465 to comply with USAC rules” does not violate Commission rules or precedent. Indeed, the *Kalamazoo Order* explicitly permitted a recipient that was already under contract to seek new bids from service providers and to elect to continue receiving service under its existing contract, so long as it complies with the formalities of the Commission’s rules, including waiting the

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<sup>12</sup> Appeal Decision at 4, n.21 (citing *Request for Review of the Decision of the Universal Service Administrator by Kalamazoo Public Schools, Kalamazoo, Michigan*, CC Docket No. 96-45, Order on Reconsideration, DA 02-2975 (Wir. Comp. Bur. 2002), at ¶ 5 (“*Kalamazoo Order*”) and *Request for Review Franciscan Skemp Waukon Clinic*, WC Docket No. 02-60, Order, DA 14-1435, 29 FCC Rcd 11714 (Wir. Comp. Bur. 2014), at ¶¶ 3, 8) (“*Franciscan Skemp Order*”).

<sup>13</sup> Appeal Decision at 4, n.21.

<sup>14</sup> Form 465 No. 43149098 at Block 29.

required 28 days, evaluating any bids received, and selecting the most cost-effective offering.<sup>15</sup>

The *Kalamazoo Order* addressed a situation in which the Kalamazoo Public Schools were in the third year of a five-year contract for service supported by the schools and libraries universal service support mechanism (“E-rate”), and issued an E-rate Form 470 seeking supported services. The procurement decisions of schools, libraries, and other public entities, including public schools and public health care providers, are often a matter of public record. Thus, the fact that Kalamazoo Public Schools was already a party to a five-year contract for the services that were the subject of its Form 470 was likely a matter of public record at the time it issued its Form 470; it is undoubtedly true that, on many occasions since, the contract status of the applicant for supported services has been a matter of public record during the 28-day bidding window. Merely inserting such already-public information into a Form 465, without more, cannot violate the Commission’s competitive bidding rules.

In this case, all of the most likely bidders had already received actual notice that CPH was under a multi-year contract *before* CPH filed its Funding Year 2014 Form 465. Specifically, CPH had recently concluded the competitive bidding process for its 2013 Contract. At the end of that process, it notified the other bidders that it had selected Alaska Communications as the winner of a multi-year service contract. Competitive markets function best when there is perfect information available to all participants. Because CPH’s contract status was already known to all of the most likely potential bidders, CPH should be permitted to make that information publicly available to all; certainly there was no competitive harm in doing so.

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<sup>15</sup> *Kalamazoo Order* at ¶¶ 6-7.

Thus, CPH's conduct differs fundamentally from a previous case, where the Wireline Competition Bureau found that an E-rate applicant's "Form 470 was tainted by [the applicant's] representation . . . that it intended to continue its existing contract."<sup>16</sup> CPH's mere factual statement that it was "currently under Contract" signals no intent and does not prejudice the outcome of the competitive bidding process. Thus, this is not a case where an applicant's statement in the Form 465 is "likely to deter other entities from making bids on eligible products or services" or "discourages prospective service providers from participating in a competitive bidding process."<sup>17</sup>

Indeed, it would raise serious First Amendment concerns under long-settled law if the Commission were to prohibit CPH from making a truthful, non-misleading factual disclosure of its contract status in its Form 465. Considering the question in 1976, the Supreme Court put it thus: "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative."<sup>18</sup>

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<sup>16</sup> *Request for Review of a Decision of the Universal Service Administrator by Last Mile, Inc., d/b/a Sting Communications and Request for Waiver of the Commission's Rules by Glendale School District*, WC Docket No. 02-6, Order, DA 14-372, 29 FCC Rcd 2909 (Wir. Comp. Bur. 2014), at ¶ 3 ("Last Mile Order").

<sup>17</sup> *Id.* at ¶ 4.

<sup>18</sup> *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 775 (1976); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996) (finding that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes").

CPH's statement that it was "filing form 465 to comply with USAC rules" similarly does not telegraph CPH's intent or otherwise violate the Commission's competitive bidding rules. The Form 465 was created pursuant to FCC rules. *Every* Form 465 is filed to comply with USAC (and FCC) rules. It is difficult to conceive of a service provider that, as a potential bidder, would not already understand that purpose of the Form 465. It is impossible to think that such a plain and obvious assertion could affect the competitive bidding process.

### **B. Request for Waiver**

In the alternative, if the Commission concludes that the Funding Year 2014 Form 465 does not comply with the competitive bidding requirements, CPH requests a waiver of the Commission's rules and Orders to permit it to associate Funding Request No. 1458110 with its original Funding Year 2010 Form 465, which supported funding for the 2010 Contract throughout its initial three year term, or the Funding Year 2013 Form 465, which supported funding for the 80 Mbps MPLS service under the 2010 Contract on a month-to-month basis for the balance for Funding Year 2013 after that term expired.

The Commission may waive its rules for "good cause shown."<sup>19</sup> More specifically, the Commission may exercise its discretion to waive a rule where special circumstances warrant a deviation from the general rule and such deviation would serve the public interest, or where the particular facts make strict compliance inconsistent with the public interest.<sup>20</sup> In making this analysis, the Commission may take into account consideration of hardship, equity, or more

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<sup>19</sup> 47 C.F.R. § 1.3.

<sup>20</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *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).

effective implementation of overall policy on an individual basis.<sup>21</sup> This request meets that standard.

### **1. Special Circumstances Warrant a Deviation from the General Rule**

Special circumstances in this case warrant a waiver of the filing deadline for this Request for Review. In this case, CPH did not expect to need support for the 80 Mbps service during Funding Year 2014, and such support became necessary only because of an unlikely convergence of unfortunate events. An unforeseen delay in the installation of our new 200 Mbps MPLS service, the intervening end of the Telecommunications Program funding year, and issues with the Funding Year 2014 Form 465 all conspired to leave CPH without support for three months of Funding Year 2014.

CPH is a 49-bed full-service hospital located in Soldotna, Alaska. It is owned by the local Kenai Peninsula Borough government, and provides critical primary health care services to residents throughout its region. Funding from the Telecommunications Program of the rural health care support mechanism is vital to CPH's ability to achieve its mission and serve its community.

### **2. A Waiver Would Serve the Public Interest**

Strict adherence to the Commission's rule requiring an annual Form 465 would serve neither the purpose of that rule or the public interest in this case. The Commission's rules requiring applicants with month-to-month service arrangements to solicit bids annually using Form 465 have a clear and valid competitive rationale. They help ensure that health care

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<sup>21</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

providers receive services that best fit their needs, and impose competitive market discipline on the rates, terms, and conditions that govern those services.

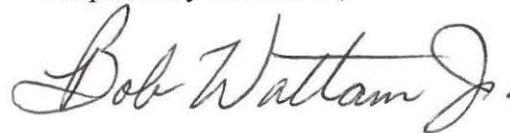
The Funding Year 2014 funding at issue here covers three months of a legacy 80 Mbps service that had been in place since Funding Year 2010. CPH conducted a competitive bidding process to replace that service, in accord with the Commission's rules. The outcome of that process was that CPH entered into a new contract in 2013 for its existing provider of 80 Mbps service to perform the upgrade to 200 Mbps service. With the replacement contract already in place, and the upgrade underway, it would have been virtually impossible, as a practical matter, for CPH to replace its legacy 80 Mbps service on an interim basis for three months. Certainly, the "competitive" opportunity presented by those three months was negligible at best.

Thus, under such circumstances, it would elevate form over substance for the Commission to deny funding for the three-month period during which the 80 Mbps legacy service carried over into Funding Year 2014. The impact on the integrity of the competitive bidding process from permitting CPH to associate its Funding Year 2014 funding request with an earlier Form 465 is negligible. Indeed, even if CPH had issued a compliant Form 465 for Funding Year 2014, it is almost impossible to imagine how it would have replaced the 80 Mbps service on such a short, interim basis, and or how such action could have represented the most cost effective solution.

**Conclusion**

For the foregoing reasons, CPH requests that the Commission grant its request for review and direct the RHCD to accept the CPH Funding Year 2014 Form 465 as valid or, in the alternative, that the Commission grant a waiver of its rules and Orders to permit CPH to associate Funding Request No. 1458110 with its Form 465 issued in Funding Year 2010 or 2013. In either case, CPH requests that the Commission direct the RHCD to issue funding for Funding Request No. 1458110, covering the period from July 1, 2014 through September 30, 2014.

Respectfully Submitted,



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