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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
)  
Federal - State Joint Board on )  
Universal Service ) CC Docket No. 02-6  
)  
Schools and Library Support Mechanism )

To: Chief, Telecommunications Access Policy Division  
Wireline Competition Bureau

**Appeal of The School Board of Miami-Dade County, Florida  
From USAC Suspension Letter, and Request for Remand**

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**APPEAL OF USAC SUSPENSION LETTER AND REQUEST FOR REMAND**

**CC DOCKET NO. 02-6**

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## Summary

1. Pursuant to Sections 54.719(c) and 1.115 of the Commissions Rules, the School Board of Miami-Dade County, Florida (“MDCPS”) requests review of the December 6, 2004 letter from George McDonald, Vice President, of The Schools and Library Division (“SLD”) of The Universal Service Administrative Company (“USAC”) to Rudolph F. Crew, E.d. D., Superintendent of Schools, Miami-Dade County Public Schools (“Suspension Letter”). Therein, USAC determined that MDCPS failed to comply with the requirements of the Schools and Libraries Support Mechanism administered by USAC and imposed sanctions suspending action on \$75 Million of pending or future FCC Forms 471 filed by MDCPS. It further required MDCPS to respond to specific inquiries regarding all of its service providers for the years 1998/1999 to the present.

2. The Suspension Letter was based, primarily, upon allegations made in an appeal filed on January 26, 2004 by Sprint-Florida, Incorporated (“Sprint”) to the effect that MDCPS had engaged in prohibitive conduct under the E-rate Program. However, contrary to the requirements of Rule 54.721(d), MDCPS was not given notice of Sprint’s allegations, nor provided any of the supporting documents until it received a redacted copy of Sprint’s prior pleading without the documents attached to the Suspension Letter, 12 months later. Further, USAC failed to provide MDCPS even the most basic due process of an opportunity to respond to the allegations before making its determination that MDCPS violated requirements of the E-rate Program and imposing the severe sanction of freezing \$75 Million of pending funding requests. The pending funding requests have nothing to do with any of the allegations made by Sprint and \$74.7 Million is for funding for other providers, not including Sprint. Further, \$27 Million of the requested funding is for Priority One Telecom Services and does not include any equipment purchases.

**Appeal of The School Board of Miami-Dade County, Florida**

**From USAC Suspension Letter, and Request for Remand**

1. Pursuant to Sections 54.719(c) and 1.115 of the Commissions Rules, The School Board of Miami-Dade County, Florida (“MDCPS”) requests review of the December 6, 2004 letter from George McDonald, Vice President, of The Schools and Library Division (“SLD”) of The Universal Service Administrative Company (“USAC”) to Rudolph F. Crew, E.d. D., Superintendent of Schools, Miami-Dade County Public Schools (“Suspension Letter”). Therein, USAC determined that MDCPS failed to comply with the requirements of the Schools and Libraries Support Mechanism administered by USAC and imposed sanctions suspending action on all pending or future FCC Forms 471 filed by MDCPS. It further required MDCPS to respond to broad inquiries regarding all of its service providers for the years 1998/1999 to the present. The Suspension Letter was based, primarily, upon allegations made in an appeal filed by Sprint-Florida, Incorporated (“Sprint”) to the effect that MDCPS had engaged in prohibitive conduct under Part 54 of the Commission’s Rules. MDCPS was not given notice of or an opportunity to respond to Sprint’s allegations prior to issuance of the Suspension Letter, even though Rule 54.721(d) requires these due process protections.

2. As demonstrated below, USAC failed to provide MDCPS even minimal due process prior to imposing a severe sanction, thereby depriving the country’s fourth largest school system of access to funding for much needed telecommunications services.<sup>1</sup> Accordingly, MDCPS requests the Commission to (a) vacate the Suspension Letter, and (b) remand this proceeding to USAC with directions to (i) comply with FCC procedural rules, (ii) resume processing MDCPS’s pending and

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<sup>1</sup>The Miami-Dade County Public Schools serve approximately 338,400 students in 340 schools employing 47,000 full and part time personnel.

future funding applications pending the outcome of their *de novo* proceeding, and (iii) conduct future informational requests in a reasonable manner, as described herein.

3. While MDCPS is mindful that the Commission has the power to conduct a *de novo* review of USAC determinations, Rule 1.115(c) limits MDCPS's ability to base its appeal upon new facts not previously presented to the designated authority in this case, USAC.<sup>2</sup> For this reason, MDCPS seeks a remand to USAC for the purposes of developing a factual record upon which to base a lawful decision in this matter.

4. As noted below, MDCPS was neither aware of the USAC proceeding below, nor was it given any opportunity to participate therein. Accordingly, the arguments presented below were not made to USAC prior to its determination. Nor did MDCPS have the opportunity to submit any evidence in opposition to Sprint's allegations of misconduct. After issuance of the Suspension Letter, MDCPS requested from USAC access to the Sprint pleadings and redacted information, and documents provided USAC by Sprint. USAC has not acted on this request. In this connection, USAC's Associate General Counsel has informed MDCPS that it must seek these documents from the FCC. For this reason, MDCPS has filed an FOIA Request and a Motion to Compel with the FCC seeking access to the evidence submitted against it.

5. Accordingly, MDCPS has limited this appeal to procedural issues in order to obtain an opportunity to review and address the evidence submitted by Sprint. MDCPS respectfully requests that it be afforded an opportunity to review this evidence and to present its factual rebuttal

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<sup>2</sup> Rule 1.115(c) provides, in pertinent part: "No application for review will be granted if it relies on question of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c). USAC has a similar prohibition of presenting new facts or law on appeal. See <http://www.sl.universalservice.org/reference/AppealsSLDGuidelines.asp>.

to USAC as part of the requested proceeding upon remand.<sup>3</sup> To the extent waiver of Rule 1.115 may be necessary for consideration of MDCPS' arguments, MDCPS submits that the unique facts and circumstances of its exclusion from the proceedings below merit such a waiver. Review of the actions of the delegated authority is appropriate at this time to correct a serious violation of FCC Rules, that precluded development of a proper factual record support USAC's actions below.

#### I. HISTORY<sup>4</sup>

6. On April 18, 1998, MDCPS filed an FCC Form 471, Application No. 54402, seeking E-Rate funding for telephone switches for 50 elementary schools for Funding Year One.<sup>5</sup> Of these 50 schools, 46 received their requested funding.

7. On February 22, 1999, MDCPS sent USAC's Schools and Libraries Division ("SLD") a letter requesting permission to change vendors from Lucent Technologies to Sprint.<sup>6</sup> The request was based on new information that Lucent was unable to provide a "per call flat rate pricing" on maintenance calls for their equipment. MDCPS indicated to SLD that in its procurement phase, it had complied with the 470 process seeking competitive bids. Of the other three vendors who had responded, the lowest bidder able to provide "per call flat rate pricing" was Sprint. Thus, Sprint was selected, as MDCPS' vendor with SLD's approval.

8. On March 25, 1999, MDCPS filed an FCC Form 471, Application No. 140214,

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<sup>3</sup> MDCPS further requests that it be allowed to provide its rebuttal after having received and reviewed all pleadings and documents from Sprint.

<sup>4</sup> The history set forth herein is not entirely in chronological order of the dates that appear on each document. Instead, the chronology is set forth as events were experienced by MDCPS. Many of the documents which will be referenced fall out of strict chronological order because they were not sent to MDCPS until December 6, 2004. *See infra* para 12.

<sup>5</sup> *See* Exhibit 1 for the complete 471 application.

<sup>6</sup> *See* Exhibit 2.

seeking funding for telephone systems for 156 elementary schools for Funding Year Two.<sup>7</sup> This application, which was approved by the SLD, included the four unfunded schools from year 1.

9. On November 21, 2002 MDCPS received notification that USAC had selected it for a random audit.<sup>8</sup> The letter announced that USAC would be onsite to conduct the fieldwork of this audit between December 3, 2002 and December 6, 2002. While the USAC auditors were onsite, they met with the MDCPS E-rate staff and made visits to 21 schools. On December 6, 2002, USAC auditors conducted their exit interview with the MDCPS E-rate staff. During these meetings, the only issue noted by the USAC E-rate audit staff was that certain parts, i.e., Analog Terminal Adapters (“ATAs”) and Analog System Modules (“ASMs”), of the ICS Key System in some schools could not be located. No written notice detailing audit findings was provided MDCPS by USAC audit staff at this point in time.

10. On June 30, 2003, USAC sent MDCPS a notification letter that USAC was seeking a recovery of erroneously disbursed funds from the service provider, Sprint.<sup>9</sup> The Recovery Letter focused on funds which were distributed from funding year 1999-2000 and related to FCC Form 471, Application No. 140214.<sup>10</sup> The Recovery Letter did not include the entire findings of the audit, but it attached 156 Funding Requests based upon the results of the on site audit.<sup>11</sup> USAC determined that MDCPS had invoiced the SLD for ATAs and ASMs that could not be located during the audit.

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<sup>7</sup> See Exhibit 3 for the complete 471 application.

<sup>8</sup> See Letter from Laurie French, USAC to Dr. Anthony Machado dated November 21, 2002. A copy of this letter is attached hereto as Exhibit 4 (*Audit Announcement Letter*).

<sup>9</sup> See Letter from Schools and Libraries Division, Universal Service Administrative Company to Dr. Anthony Machado, June 30, 2003 (*Recovery Letter*). A copy of this letter is attached hereto as Exhibit 5. However, only one school out of the 156 schools funding adjustment is attached for illustration purposes.

<sup>10</sup> See Recovery Letter at 1.

<sup>11</sup> See Recovery Letter at 5. As stated in note 9 *infra*, this page is an example of 156 commitment adjustments included in this letter.

Since, of the 21 schools actually visited, only half of ASMs and none of the ATAs could be located, SLD assumed that the same result would be found at all the other 135 schools. Therefore, SLD assessed a recovery based on their discount rate for all of the 156 schools for a total amount to be recovered of \$424,888.30.<sup>12</sup> The letter also indicated that the decision of the SLD could subsequently be appealed to either the SLD or to the FCC within 60 days of the date on the letter.<sup>13</sup>

11. On August 28, 2003, MDCPS filed a timely Letter of Appeal (“MDCPS Appeal”) to the SLD of USAC.<sup>14</sup> The MDCPS Appeal asserted that USAC’s extrapolated findings were erroneous as they were based on mere assumptions and sampling statistics. As a result of the exit interview, MDCPS initiated a comprehensive onsite review of all 202 elementary schools. A copy of the complete MDCPS inventory of ASMs and ATAs was included with the MDCPS Appeal.<sup>15</sup> Based on this subsequent MDCPS detailed onsite inventory, the MDCPS Appeal suggested that the recovery from Sprint-Florida by USAC be reduced from \$424,888.30 to \$160,994.20. To date, no action has been taken by USAC on the MDCPS Appeal.

12. On December 6, 2004, MDCPS received the Suspension Letter from USAC, indicating that USAC was withholding all pending and future funding requests until MDCPS was able to provide USAC with responses to adverse findings that “MDCPS failed to comply with one or more of the certifications that were made on program forms and/or that MDCPS has otherwise

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<sup>12</sup>There have been conflicting amounts referred to in different USAC documents. The total of each of the Funding Requests attached to the June 30, 2003 USAC letter is \$424,888.30. This amount is different from the \$398,567.80 sought to be recovered in the January 17, 2003 USAC Internal memo. *See supra* note 31.

<sup>13</sup> *See* Recovery Letter at 2-3.

<sup>14</sup> *See* Letter of Appeal from Dr. Anthony Machado to Schools and Libraries Division, August 28, 2003 (*MDCPS Appeal*). A copy of this letter is attached hereto as Exhibit 6.

<sup>15</sup> *See* Federal Audit Appeal Options. *See* Exhibit 6 at p. 2-7.

failed to comply with program requirements.”<sup>16</sup> The USAC letter expressly indicated that the withholding of funds was based on issues identified by the USAC audit and by Sprint.<sup>17</sup> A redacted copy of Sprint’s January 26, 2004 Supplemental Letter of Appeal (the “Supplement”) was attached thereto. Additionally, attached thereto was a copy of the USAC Audit Report dated January 17, 2003, from USAC’s Internal Audit Division to Mr. George McDonald. This was the first time MDCPS had received any copy of Sprint’s Supplement or a copy of the USAC audit report. As a result of Sprint’s appeal, USAC demanded that MDCPS comply with an overly burdensome and overly broad informational request.<sup>18</sup>

13. First, USAC demanded that MDCPS provide it with a full and complete inventory of all equipment that had been funded by USAC for Funding Years 1999 to the present. It requested the original location of the equipment, the date installed and whether the equipment had been moved. USAC further requested an itemization of all equipment that was funded by USAC for Funding Years 1999 through the present that had been returned to the service provider. Specifically, it wanted to know what equipment was returned and how MDCPS could account for the value of the return. USAC also requested that MDCPS describe any and all corrective actions taken to tighten internal controls to ensure that this type of breach of program rules does not happen again.<sup>19</sup>

14. Second, USAC demanded explanations for discrepancies between proposals submitted by service providers and the item 17 or 21 attachments submitted to USAC specifying the goods and services and the costs of such. Specifically, USAC requested a full and complete description of any and all discrepancies between proposals by service providers to MDCPS and the

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<sup>16</sup> See Suspension Letter at 2. A copy of this letter is attached hereto as Exhibit 7.

<sup>17</sup> See Suspension Letter at 2.

<sup>18</sup> *Id.*

<sup>19</sup> See Suspension Letter at 2-3.

FCC Form 471 item 17 or 21 attachments submitted from Funding Years 1998 to the present. USAC requested specifications of any refunds that are due to USAC because MDCPS did not pass on to USAC lower costs that were in the proposals submitted by the service providers, such as a lower cost than was sought for the relevant Funding Request Number, volume discounts and/or trade-ins. Further, USAC requested full and complete description of any service substitutions for which approval was not requested of USAC. Finally, USAC again requested that MDCPS describe any and all corrective actions taken to tighten internal controls to prevent further breaches of program rules.<sup>20</sup>

15. Third, and finally, USAC demanded that MDCPS provide it with all service provider invoices sent to USAC that included the cost of equipment that was not provided to MDCPS and included the cost of ineligible equipment. Specifically, if MDCPS determined that a service provider bill to MDCPS for a non-discount share included goods and services that had not been provided, were not in the process of being provided or were not planned to be provided, MDCPS was to inform the SLD. Here as well, USAC asked MDCPS to describe any and all corrective actions taken to prevent similar breaches of program rules.<sup>21</sup>

16. As an attachment to the Suspension Letter, USAC sent a copy of a privileged and confidential Internal Audit Division memorandum.<sup>22</sup> This was the first time that MDCPS had been informed of USAC's actual audit findings. Of the eight areas focused on during the audit, only one area yielded an exception by USAC. USAC examined the general procedures employed by MDCPS. USAC met with the Director of MDCPS' Office of Information Technology to discuss MDCPS'

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<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> See Memo from USAC, Internal Audit Division to Mr. George McDonald, Vice President, Schools and Libraries Division, dated January 17, 2003 (*IAD Memo*). A copy of this memo is included in Exhibit 7.

process used to monitor and record its participation in the Schools and Libraries Support Mechanism Program. The auditors reported that MDCPS had successfully established procedures to sufficiently address the program requirements and that no exceptions were noted.<sup>23</sup> The auditors reviewed MDCPS' financial statements covering Funding Years 1998 through 2001 to determine if any deficiencies existed that would have materially affected the E-rate program. Again, no exceptions were noted.<sup>24</sup> The auditors reviewed MDCPS' eligibility status and determined that MDCPS is an eligible school system. Again, no exceptions were noted.<sup>25</sup> USAC auditors then examined the supporting documentation used by MDCPS to determine the discount percentages reported to USAC. Here too, no exceptions were noted.<sup>26</sup> The auditors also reviewed MDCPS' approved technology plans that were in effect for Funding Years 1998 through 2001. Here again, no exceptions were noted.<sup>27</sup> Finally, the auditors reviewed MDCPS' budget for Funding Years 1998 through 2001 to determine if MDCPS had budgeted for their non-discounted portion of the technological related costs related to the E-rate program. Since the MDCPS Annual Budget Plan accounted for these costs, no exceptions were noted here as well.<sup>28</sup>

17. The audit results yielded only one adverse finding against MDCPS which stemmed from the site visit. After performing a physical inventory of the internal connections at 21 of the 156 schools part of this application, USAC determined that certain individual components of the ICS Key System that had been funded but could not be located.<sup>29</sup> According to the audit, USAC records

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<sup>23</sup> See IAD Memo at 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See IAD Memo at 4.

<sup>28</sup> *Id.*

<sup>29</sup> See IAD Memo at 3.

showed that each ICS Key System was to include 4 ASMs and 4 ATAs. However, for the schools sampled, a total of 42 out of 84 funded ASMs were unable to be located and none of the 84 ATAs were found. The audit estimated that the total amount funded by SLD for equipment that could not be located was \$33,209.10 for the sites visited. The audit then extrapolated these findings results to the remaining 135 funded schools which were not visited and estimated an additional amount to be recovered was \$260,068.70.<sup>30</sup> However, USAC then requested that MDCPS provide USAC with installation and receipt documentation to verify MDCPS' inventory. Because MDCPS was unable to provide USAC with installation and receipt documentation, USAC auditors recommended a calculated total recovery of \$398,567.80 discounted from a total equipment amount of \$540,425.00.<sup>31</sup>

18. The Suspension Letter included a redacted copy of the January 26, 2004 Supplement to Sprint's August 28, 2003 Letter of Appeal (the "Appeal"). USAC redacted significant portions of the Supplement's text and did not include any of the documents that were referenced in the footnotes.<sup>32</sup> This was the first time MDCPS received a copy of Sprint's Supplement. It referenced Sprint's August 28, 2003 Appeal but a copy of the Appeal was not included in the Suspension Letter. MDCPS has never received a copy of the Appeal.

19. Sprint, in its Supplement, made numerous allegations of prohibitive conduct against MDCPS apparently based upon an internal audit reviewing Sprint's transactions with MDCPS.<sup>33</sup> Sprint's statements included, but were not limited to, allegations of misstatements on FCC Form 471

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<sup>30</sup> *Id.*

<sup>31</sup> See IAD Memo at 4; and note 12 *infra* to see discussion of conflicting recovery amounts being sought by SLD.

<sup>32</sup> A copy of the Supplement is included in Exhibit 7. While USAC provided a redacted copy of the Supplemental Response, neither USAC nor Sprint provided MDCPS with Sprint's original Letter of Appeal dated August 28, 2003.

<sup>33</sup> See Supplement at 4.

applications made by MDCPS.<sup>34</sup> Sprint allegedly “identified a number of discrepancies between the Item 21 attachment submitted by Miami-Dade and Sprint’s documentation for these transactions.”<sup>35</sup> Sprint alleged that Miami-Dade overstated the cost amounts for certain systems, while Sprint’s bid documents showed lower prices for these items.<sup>36</sup> Sprint made allegations that MDCPS failed to include original equipment manufacturer discounts that were passed along to MDCPS by Sprint.<sup>37</sup> Sprint made allegations that MDCPS’ FCC Form 471 failed to incorporate trade-in credits in calculating total equipment prices.<sup>38</sup> Sprint claimed that MDCPS asked Sprint to apply credits from E-rate eligible purchases toward the purchase of E-rate ineligible equipment.<sup>39</sup>

20. Upon MDCPS’ receipt of USAC’s December 6, 2004 Suspension Letter with Sprint’s January 26, 2004 Supplement attached thereto, MDCPS contacted both USAC and Sprint in an attempt to obtain un-redacted copies of Sprint’s Supplement, as well as copies of the documents cited in Sprint’s footnotes and a copy of Sprint’s Appeal. On December 17, 2004, MDCPS sent a letter to Mr. George McDonald, Vice President, SLD, requesting service of all documents cited by Sprint in the Supplement, as well as, an un-redacted copy of Sprint’s Supplement and a copy of Sprint’s August 28, 2003 Appeal and any documents cited therein.<sup>40</sup> On January 13, 2005, at the suggestion of Ms. Kristy Carroll, Associate General Counsel, USAC, MDCPS filed a Freedom of

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<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 6.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.* at 8-9.

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.*

<sup>40</sup> See Letter from Matthew L. Leibowitz, Counsel to MDCPS to Mr. George McDonald, Vice President, Schools and Libraries Division, dated December 17, 2004 (*Request for Service*). A copy of this letter is attached hereto as Exhibit 8.

Information Act request with the Telecommunications Access Policy Division of the FCC.<sup>41</sup> Therein, MDCPS requested un-redacted copies of both Sprint's Appeal and the Supplement.

21. On January 21, 2005, MDCPS also filed with the Commission a Motion to Compel Service by Sprint-Florida, Inc.<sup>42</sup> Therein, MDCPS specifically requested that the Commission enforce Rule 54.721(d) and order Sprint to serve MDCPS with full and complete copies of its Appeal, its Supplement, and any documents related thereto, and order Sprint to serve MDCPS with any future documents relating thereto.<sup>43</sup>

## II. ARGUMENT

### A. USAC Failed to Comply with FCC Procedural Rules

#### Which Resulted in MDCPS Being Denied Basic Due Process of Law

22. USAC was created to facilitate the E-rate program and is an "agent" of the Federal Communications Commission. As such, USAC must comply with Commission rules of procedure and practice. As the Commission and Congress have stated, USAC's authority is limited by the Commission's rules.<sup>44</sup> Part 54 of the Commission's rules governs the operation of USAC. The Commission's Order creating the Schools and Libraries Corporation, the predecessor to the current

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<sup>41</sup> See Freedom of Information Act Request Letter from Matthew L. Leibowitz, Counsel to MDCPS to Office of the General Counsel, Federal Communications Commission, dated January 13, 2005 (*FOIA Request*). A copy of this letter is attached hereto as Exhibit 9.

<sup>42</sup> See Miami-Dade County Public Schools' Motion to Compel Service by Sprint-Florida, Inc., CC Docket No. 02-6, filed January 21, 2005. (*Motion to Compel*). A copy of the motion is attached hereto as Exhibit 10.

<sup>43</sup> *Id.* Although MDCPS already had on file with the Commission a pending FOIA request, a grant of that FOIA would only cause the release of these particular documents. Recognizing, however, that the grant of the FOIA would not result in continuing compliance with the Commission's service requirements prospectively, MDCPS filed this Motion to Compel.

<sup>44</sup> See Changes to the Board of Directors of the National Exchange Association, Inc. and Federal-State Joint Board on Universal Service, 13 FCC Rcd 25058, 25066-67, (1998) (*USAC Order*).

SLD, expressly stated that “In administering the support mechanisms for eligible schools and libraries...., the Corporations *must comply with all Commission rules.*”<sup>45</sup> Emphasis added. In 1998, when SLD’s predecessor was incorporated into USAC, the Commission again expressly asserted that USAC was bound by the Commission’s rules. Specifically, the Commission stated that “The Commission retains ultimate control over the operation of the federal universal service support mechanisms through its authority to establish the rules governing the support mechanisms...” and that “USAC’s appointment as permanent Administrator and the expansion of its responsibilities are *conditioned on its compliance with Commission rules and orders.*”<sup>46</sup>

23. However, in this proceeding, USAC failed to follow basic FCC procedural rules, thus denying MDCPS its right to due process. First, USAC denied MDCPS timely access to Sprint’s Supplement, which contained allegations of prohibitive conduct and Sprint’s supporting documentary evidence. Secondly, USAC denied MDCPS the right to participate proceedings on the Sprint Appeal and to respond to the allegations made against MDCPS, before USAC found MDCPS to be in violation of SLD rules and before USAC subjected MDCPS to sanctions.

**B. FCC Rules Require a Party Be Served With Allegations of Rule Violations**

24. The Commission’s Rule 54.721(d) specifically states that where “A request for review filed pursuant to § 54.720(a) through (c) alleges prohibitive conduct on the part of a third party, such request for review shall be served on the third party consistent with the requirement for service of documents set forth in § 1.47 of this chapter.”<sup>47</sup>

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<sup>45</sup> See Changes to the Board of Directors of the National Exchange Carrier Association, Inc., and Federal-State Joint Board on Universal Service, 12 FCC Rcd 18400, 18434 (1997) (*NECA Order*).

<sup>46</sup> See USAC Order at para. 17.

<sup>47</sup> 47 C.F.R. § 54.721(d).

25. Sprint's Appeal to USAC, and its Supplement were both filed pursuant to § 54.720(b) and neither document was served on MDCPS prior to issuance of the Suspension Letter. Indeed, MDCPS still does not know what allegations against MDCPS or documents were contained in the original Appeal, since MDCPS was never served a copy. However, in Sprint's January 26, 2004 Supplement, Sprint repeatedly accused MDCPS of prohibitive conduct.

26. Sprint's January 26, 2004 Supplement included allegations of misstatements on FCC Form 471 applications made by MDCPS.<sup>48</sup> Sprint allegedly "identified a number of discrepancies between the Item 21 attachment submitted by Miami-Dade and Sprint's documentation for these transactions."<sup>49</sup> Sprint alleged that MDCPS overstated the cost amounts for certain systems while Sprint's bid documents showed lower prices for these items.<sup>50</sup> Sprint made allegations that MDCPS failed to include original equipment manufacturer discounts that were passed along to MDCPS by Sprint.<sup>51</sup> Sprint made allegations that one of MDCPS' FCC Form 471s failed to incorporate trade-in credits in calculating total equipment prices.<sup>52</sup> Sprint alleged that MDCPS asked Sprint to apply credits from E-rate eligible purchases toward the purchase of E-rate ineligible equipment.<sup>53</sup> Sprint concluded that as a result of these actions by MDCPS, USAC is entitled to approximately \$1,245,779.00 in refunds. Clearly, these allegations of violations of USAC and SLD rules and procedures constituted allegations of prohibitive conduct by MDCPS and thus required service of documents on MDCPS. The Suspension Letter leaves no doubt that USAC views Sprint's allegations as reflecting prohibitive conduct on MDCPS' part, since USAC sanctioned MDCPS

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<sup>48</sup> See Supplement at 2.

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.* at 8-9.

<sup>52</sup> *Id.* at 9.

<sup>53</sup> *Id.*

based on these allegations.

C. FCC Rule 54.721(d) Provides for a Right to Respond  
to Allegations of Prohibitive Conduct

27. Further, according to the plain language of Rule 54.721(d), MDCPS was entitled to an opportunity to respond to the allegations made against it by Sprint. As the second sentence of the rule expressly states, “the third party may file a response to the request for review.”<sup>54</sup> By failing to afford MDCPS an opportunity to respond to Sprint’s allegations prior to imposing the sanctions in the Suspension Letter, USAC violated MDCPS’ basic due process rights of notice and an opportunity to respond.

D. USAC Violated the APA by Failing to Provide MDCPS Due Process

28. USAC has also violated the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (“APA”). Specifically, Section 9 of the APA clearly sets forth that a sanction may not be imposed...or order issued except within jurisdiction delegated to the agency and as authorized by law.<sup>55</sup> The APA includes the withholding of relief, which includes non-action on the application of a party, within the definition of “sanction.”<sup>56</sup> Nonetheless, USAC imposed upon MDCPS the sanction of withholding processing of all MDCPS’ pending and future FCC Form 471 applications, without giving prior notice of the allegations made against MDCPS in Sprint’s Supplement and without affording MDCPS a prior opportunity to respond, as required by the FCC rules. By ignoring Rule 54.721(d), USAC failed to act as authorized by law within the jurisdiction delegated to it,

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<sup>54</sup> 47 C.F.R. 54.721(d).

<sup>55</sup> 5 U.S.C. § 558(b) (2004).

<sup>56</sup> 5 U.S.C. § 551(10)(B), (11)(c) (2004).

thereby violating the APA. Thus, USAC's Suspension Letter is *ultra vires* and must be vacated by the Commission.

E. USAC Abused its Discretion by Withholding All Pending and Future Funding Requests

29. Rule 54.725 sets forth USAC's authority to limit disbursements during the pendency of a request for review of an Administrator decision. According to the plain language of Rule 54.725(a), when a party has sought review of a decision of the Administrator, "the Administrator shall not reimburse a *service provider* for the provision of discounted services until a final decision has been issued either by the Administrator or by the Federal Communications Commission; provided, however, that the Administrator may disburse funds for any amount of support *that is not the subject of an appeal.*"<sup>57</sup> Clearly, this language requires USAC to exercise reasonable discretion prior to withholding funding for matters which have not been the focus of any inquiry.

30. In this case, USAC has withheld all of MDCPS' pending and future funding requests, regardless of whether or not the requests were germane to the allegations before it. Specifically, USAC has stated that it "will take no action on pending or future FCC Forms 471 submitted by MDCPS until USAC determines that MDCPS has reasonably complied with the request explained below." Thus, USAC has improperly suspended MDCPS's potential funding of over \$75 Million based primarily on Sprint's *ex parte* allegations against MDCPS. Substantially, all of MDCPS' pending funding requests and all future funding requests are unrelated to Sprint.<sup>58</sup> None of MDCPS' pending or future funding requests relates to Sprint's Appeal or Sprint's allegations of prohibitive

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<sup>57</sup> 47 C.F.R. 54.725(a).

<sup>58</sup> Only \$245,065 of the \$75 Million requested relate to Sprint. These sums are for provision of Priority One Telecom Services, not equipment.

conduct by MDCPS with respect to Sprint provided equipment. Indeed more than \$27 Million of the pending funding requests relate strictly to the provision of Priority One Telecom Services.

31. Commission precedent supports the conclusion that USAC abused its discretion by withholding action on MDCPS's pending and future funding requests. In the Commission's recent decision addressing E-rate funding for the Puerto Rico Department of Education ("PRDOE"), the Commission directed USAC to tailor the sanctions to the "*nature of the allegations that have been raised.*"<sup>59</sup> There the Commission, directed USAC to resume processing applications for PRDOE, stating that it was "disinclined to relegate applications to an uncertain status for an indefinite period of time during the pendency of any protracted investigations."<sup>60</sup> Contrary to the FCC's mandate in the PRDOE Order, USAC has chosen the sanction of withholding all of MDCPS' pending and future funding requests even though virtually none relate to Sprint or to the allegations regarding the provision of equipment by Sprint. Given the fact that USAC has failed to act on MDCPS's August 28, 2003 appeal for over 17 months, it is impossible to predict how long it will take for action on the present appeal and subsequent USAC actions.<sup>61</sup> Thus, MDCPS's pending and future Form 471 applications are likely to be held up for an indefinite period, contrary to the Commission's direction in PRDOE.

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<sup>59</sup> See Puerto Rico Department of Education, 18 FCC Rcd 25417, 25423 (2003) (PRDOE Order).

<sup>60</sup> *Id.*

<sup>61</sup> This uncertainty is heightened by the lack of a factual record. MDCPS must first be allowed to review Sprint's evidence and submit its own evidence to refute Sprint's allegations.

F. USAC Has Imposed Sanctions on MDCPS

Without Considering Sprint's Culpability for Possible Program Violations

32. In the Commission's Fourth Report and Order, the Commission instructed USAC to revise its recovery approach for all matters on a going forward basis as well as those recovery actions which were currently under appeal to either USAC or the Commission.<sup>62</sup> The Commission concluded that recovery actions should be directed to the party or parties that committed the rule or statutory violation.<sup>63</sup> The Commission therein directed USAC "to make the determination, in the first instance, to whom recovery should be directed in individual cases" and to "consider which party was in a better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation."<sup>64</sup> In the instant case, while USAC made an implied finding of fault by assessing sanctions against MDCPS, it provided no reasoned analysis of the relative culpability of Sprint and MDCPS. In addition, since MDCPS was not afforded a prior opportunity to respond to any charges or allegations made against it by Sprint, it was simply not possible for USAC to make any lawful determination on relative fault. Thus it is imperative, pursuant to the Commission's Fourth Report and Order, that these questions of fact be remanded to USAC with instructions to make a determination of relative fault.<sup>65</sup>

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<sup>62</sup> See Federal-State Joint Board on Universal Service, 19 FCC Rcd 15252, 15255 (2004) (*Schools & Libraries Fourth Report and Order*).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at para 15.

<sup>65</sup> See Ameritech Advanced Data Services - St. Lorenz Lutheran School, Frankenmuth, Michigan, DA 05-108, (Telecommunications Access Policy Division, rel. Jan 18, 2005)

G. USAC's Request for Additional Information is Unduly Burdensome and Premature

33. In its Suspension Letter, USAC sets forth a wide-reaching demand for information and documentation from MDCPS. The information and documents sought by USAC arise directly from the *ex parte* allegations in Sprint's pleadings. USAC, based its *ultra vires* and unlawful determination that MDCPS violated program rules, goes so far as to ask MDCPS to describe corrective actions taken to ensure "that this serious breach of program rules does not occur again."<sup>66</sup> This is further evidence that USAC prejudged the merits of MDCPS' compliance with program rules. Further, USAC requests MDCPS to respond to specific questions concerning every service provider for all equipment from 1998/1999 to present, even though there are no allegations of breaches of program rules by service providers other than Sprint.<sup>67</sup>

34. The FCC has clearly stated that once it, or USAC, has determined serious violations of the program, heightened scrutiny is an appropriate agency response to avoid waste and fraud.<sup>68</sup> But in the present case, as demonstrated above, USAC's determination was made without any attempt at complying with FCC due process requirements. Contrary to the specific requirements of Rule 54.721(d), MDCPS was denied prior notice of the allegations against it and of the evidence presented. MDCPS was denied any prior opportunity to respond thereto.

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<sup>66</sup> See Suspension Letter at p. 2 and p. 3.

<sup>67</sup> See Suspension Letter at 2-4. MDCPS, after its review of the information requested, determined that it would take over two years to complete the audit at a cost of over \$2 Million. See e-mail from Matthew L. Leibowitz to Mr. George McDonald and Ms. Kristy Carroll, dated December 22, 2004 attached hereto as Exhibit 11. As a result, USAC has agreed to reduce the scope of the initial inquiry to 1998, 1999 and to include a random sample of the service providers and a random sample of their respective FRN's. USAC reserved the right to request additional information after review of the submission of the initial information. MDCPS submitted to USAC a proposal for the procedures for the initial information request and is awaiting a response from USAC.

<sup>68</sup> See PRDOE Order at p. 15.

Accordingly, until MDCPS has at least had the opportunity to review Sprint's submissions and respond, it is wholly contrary to notions of due process and a direct violation of FCC procedural rules to subject MDCPS to suspension of \$75 Million in requested funding and to require burdensome information requests based on the defective factual record created by USAC's illegal *ex parte* processes.

35. Complying with USAC's information request, even as modified, will be a burdensome task. USAC requests information on **all** equipment funded under the E-rate program, with no minimum valuation floor. This goes well beyond accepted auditing and inventory procedures. MDCPS complies with Florida Statute 274.02 which requires inventory tracking of all items valued in excess of \$1,000.00 and does not include fixtures to buildings.<sup>69</sup> Even the FCC does not track all of its equipment for inventory purposes. The FCC uses a \$1,500.00 threshold and extends the threshold to sensitive items below \$1,500.00 for specific equipment such as laptops and PDAs. Finally, there is no accounting standard known to MDCPS, that would require MDCPS to inventory individual components within an ICS Key System or a computer.

36. USAC's information requests, even as modified, seeks the present creation of an inventory for equipment that was purchased and installed over five years ago. It is certain that some of the equipment has been moved, consumed or replaced, since that time. Recently, the Commission adopted a new rule which limits a party from seeking funding for the same equipment more than two times within five years, and restricts schools from moving equipment,

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<sup>69</sup> FLA. STAT. ch. 274.02 (2004).

except in limited circumstances, for three years. However, during 1998 and 1999, there were no such rules or restrictions in place either at the FCC or at USAC.<sup>70</sup>

37. USAC's information request, even as modified, seeks an inventory of equipment from all suppliers, even through the allegations concern only Sprint and Sprint's equipment. To the best of MDCPS's knowledge, there is no allegation or information under review regarding any other vendor than Sprint. Thus, USAC's request to expand the scope of its inquiry beyond Sprint is unwarranted.

### III. REQUEST FOR REMAND

38. In view of the foregoing, MDCPS respectfully requests that the Commission remand this proceeding back to USAC with the following directions:

a. Both Sprint and MDCPS shall be parties to the appeals of the June 30, 2003 USAC Recovery Letter and the Appeal of the December 6, 2004 Suspension Letter.

b. MDCPS shall receive complete copies of all appeals, pleadings, documents, etc., from Sprint or any other third parties that relate directly, or indirectly, to the allegations of violations of program rules and procedures.

c. MDCPS shall be provided a reasonable opportunity to file an opposition to Sprint's allegations, after receipt of the above.

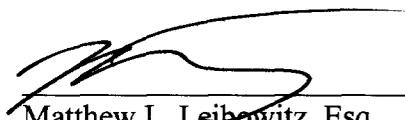
d. USAC shall reinstate processing of all MDCPS' pending and future FCC Form 471 applications, unless and until such time that USAC has made a proper determination of substantial violations of program rules.

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<sup>70</sup> It appears that during the 1998 - 1999 period there was only a USAC policy requiring equipment to be held for at least one year at the installed location.

e. USAC shall restrict its information request from MDCPS to only Sprint, and Sprint equipment that was funded, but with a minimum \$1000 valuation of equipment to be inventoried, and a recognition that the equipment holding requirements in place during 1998 and 1999 required installation for only a single year.

Respectfully submitted,



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