

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of)

Joint Request for Review of Decisions of the)
Universal Service Administrator)

CC Docket No. 02-6

Humboldt Unified School District 22)
("Humboldt"))

File No. SLD-584367 (FY2007)

JOINT REQUEST FOR REVIEW AND WAIVER

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SUMMARY

Humboldt is a school district in dire need of E-rate funding. As the facts will demonstrate, Humboldt's two employees responsible for procurement and establishing deadlines followed a procurement process in compliance with USAC's competitive bidding process and Arizona law that produced multiple bids and led to the appropriate approvals, allowing Humboldt to make a commitment to Conterra by executing a contract on February 7, 2007. Humboldt followed both the letter and the spirit of the FCC's 28-day posting requirement. If, however, the FCC finds that reviewing bids during a second 28-day posting period violates the FCC's 28-day posting requirement, the Parties respectfully request a waiver of Section 54.504(b)(4). Because of the timing of USAC's denial, should the Commission grant this appeal, Humboldt and Conterra (collectively, the "Parties") also request that the Commission allow Humboldt to file an FCC Form 471 for Funding Year ("FY") 2008 outside the filing window for these services, because this appeal relates to a multi-year contract for services.

Humboldt's Lead Information Services Specialist, who is responsible for the school's E-rate filings and the contact person listed on the FCC Forms 470 and 471, posted an FCC Form 470 on USAC's website ("First RFP") on December 20, 2006 seeking telecommunications and Internet access services. Humboldt's Purchasing Agent, whose job responsibility included preparation and posting of the publicly available Humboldt RFP, posted a more detailed RFP in support of the First RFP twelve days later on Humboldt's website on January 2, 2007 ("Second RFP"). The First RFP did not establish a deadline for bid proposals. The Second RFP required the service providers to submit their bid proposals by January 23, 2007.

The First RFP had an allowable contract date of January 17, 2007. The Second RFP had an allowable contract date of January 30, 2007. Humboldt received three bids and reviewed

those bids on January 23, 2007. Humboldt did not receive any additional bids after January 23, 2007. On February 6, 2007, Humboldt's Superintendent approved the recommendation to select Conterra Ultra Broadband, LLC ("Conterra") as the service provider, and on February 7, 2007, executed a services agreement with Conterra.

There has been no violation of the Commission's 28-day posting requirements. The rule requires that the applicant "wait at least four weeks from the date on which its description of services is posted on the Administrator's website before making commitments with the selected provider of services." Humboldt did not make a "commitment" to Conterra until it entered into a legally binding contract with Conterra on February 7, 2007, well after the 28-day posting requirement for the Second RFP. Therefore, USAC erroneously denied Humboldt's funding request. Because there was no rule violation, the Parties respectfully request that the Commission grant this appeal.

If the Commission decides, however, that Humboldt failed to meet the 28-day posting requirement, because it required bids to be submitted seven days shy of the second 28-day posting requirement and considered those bids within the 28-day period, the Parties respectfully submit that strong public policy considerations support their alternate request for a waiver. The Commission will grant a waiver of its rules when the facts make strict compliance inconsistent with the public interest. The purpose of the 28-day posting requirement is to ensure an open and fair competitive bidding process. In this case, no party was unfairly denied competition and no bids were received after January 23, 2007. Therefore, the purpose of the requirement clearly has been served. Therefore, the Parties request that the Commission grant a waiver, to the extent necessary, of the FCC's 28-day posting requirement and a waiver to allow Conterra to provide

the requested services upon release of this Order and Humboldt to file an FCC Form 471 for FY2008 out of window for these services.

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JOINT REQUEST FOR REVIEW AND WAIVER

Humboldt Unified School District 22 ("Humboldt" or "District") and Conterra Ultra Broadband, LLC ("Conterra") (collectively the "Parties"), through counsel, and pursuant to Sections 54.720(b) and 54.719(c) of the Federal Communication Commission's ("FCC" or "Commission") rules,¹ submit this Joint Request for Review and Waiver ("Joint Petition") seeking Commission reversal² of a Universal Service Administrative Company ("USAC" or "Administrator") decision to deny Humboldt's E-rate FCC Form 471 funding request ("Application")³ due to an alleged violation of the Commission's 28-day posting requirement.⁴

Humboldt complied with both the letter and the spirit of the Commission's 28-day posting

¹ 47 C.F.R. §§ 54.720(b), 54.719(c).

² 47 C.F.R. § 54.723.

³ Administrative Record ("AR") at 1 (USAC Funding Commitment Decision Letter and Reports for Humboldt dated Jan. 16, 2008 ("FCDL Report Denials")).

⁴ 47 C.F.R. § 54.504(b)(4).

requirement. Accordingly, USAC incorrectly denied Humboldt's funding request.

Alternatively, if the Commission determines Humboldt in fact violated the Commission's 28-day posting requirement, Humboldt seeks a waiver of this requirement.

I. STATEMENT OF HUMBOLDT AND CONTERRA'S INTEREST IN THIS CONSOLIDATED REQUEST FOR REVIEW

This Joint Petition is timely⁵ and the Parties have standing to file this appeal.⁶ The Parties bring this request to the Commission instead of USAC⁷ for decision because USAC has denied the Application based upon a well-established Commission rule that the applicant shall wait at least 28 days after the posting of the FCC Form 470 on the Administrator's website before entering into a contract or legally binding agreement with the service provider.⁸ Filing an appeal with USAC in this instance would be futile, because USAC's position would be that the Commission's rules require that the Parties seek a waiver from the Commission regarding the 28-day posting requirement.

⁵ Section 54.720(b) of the Commission's rules requires parties seeking review of a decision by USAC to file of an appeal "within sixty (60) days of issuance" of such USAC decision. 47 C.F.R. § 54.720(b). USAC denied Humboldt's funding request on January 16, 2008. Because March 16, 2008 falls on a Sunday, a holiday under the Commission's rules, the appeal must be filed no later than Monday, March 17, 2008. 47 C.F.R. § 1.4(j).

⁶ Section 54.719(c) of the Commission's rules provides that, "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission." 47 C.F.R. § 54.719(c). In this case, the Parties complied with the letter and the spirit of the Commission's 28-day posting requirement, complied with state procurement law, and executed a legally binding contract on a timely basis after the allowable contract date and prior to the completion and posting of the FCC Form 471 to provide telecommunications and Internet access services in connection with the Application. Still, USAC denied Humboldt's funding request. The Parties are directly aggrieved by USAC's denial of funding.

⁷ 47 C.F.R. § 54.723 ("The Wireline Competition Bureau shall conduct *de novo* review of requests for review of decisions issue[d] by the Administrator.") (emphasis in original).

⁸ 47 C.F.R. § 54.504(b)(4); see *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Order*, 18 FCC Rcd 26406, ¶39 (2003). (Commission applied 28-day posting requirement to additional publicly available RFPs filed by schools or libraries in addition to FCC Form 470 posting) ("*Ysleta Order*").

II. STATEMENT OF FACTS⁹

A. The Request For Proposals Process

Two Humboldt employees were responsible for completing the RFP process for the District. Ben Pielstick, Humboldt's Lead Information Services Specialist ("IS Specialist"), was responsible for completing and filing the First RFP, *i.e.*, the FCC Form 470, in accordance with E-rate Program requirements and was also the Humboldt contact person identified on the FCC Forms 470 and 471.¹⁰ On the other hand, Ken Johnson, Humboldt's Purchasing Agent, was responsible for posting Humboldt's RFP on the school's website and establishing the RFP deadlines pursuant to Arizona procurement laws.¹¹ Mr. Johnson was also responsible for sending the RFP to a Prescott, Arizona newspaper for publication.¹²

On December 20, 2006, Humboldt's IS Specialist posted an FCC Form 470 ("First RFP") seeking telecommunications and Internet access services.¹³ The First RFP established January

⁹ All of the facts set forth in the "Statement of Facts" section of this Joint Petition have been attested to, under penalty of perjury by Humboldt and Conterra. AR0003-4 (Declaration of Dr. Henry Schmitt, Superintendent, Humboldt Unified School District 22 ("Schmitt Declaration")); AR0005 (Declaration of Ben Pielstick, IS Specialist, Humboldt Unified School District 22 ("Pielstick Declaration")); AR0006 (Declaration of Kenneth Johnson, Purchasing Agent, Humboldt Unified School District 22 ("Johnson Declaration")); AR0007 (Declaration of John LaPenta, Senior Vice President and General Counsel, Conterra Ultra Broadband, LLC ("LaPenta Declaration")).

¹⁰ AR0003 (Schmitt Declaration); AR0005 (Pielstick Declaration).

¹¹ AR0003 (Schmitt Declaration); AR0006 (Johnson Declaration).

¹² *Id.*

¹³ AR0008-15 (Humboldt FY2007 FCC Form 470, File No. 189210000610242, dated Dec. 20, 2007 ("Humboldt FCC Form 470")); AR0005 (Pielstick Declaration); and AR0003 (Schmitt Declaration).

17, 2007 as the allowable contract date.¹⁴ On the First RFP, Humboldt's IS Specialist checked Box 9a indicating that Humboldt would be posting a more detailed RFP on its website.¹⁵

On January 2, 2007, as indicated in the First RFP, Humboldt posted a more detailed RFP ("Second RFP") to its website.¹⁶ The Second RFP established January 30, 2007 as the allowable contract date.¹⁷ The Second RFP set forth a Timetable indicating that (1) the FCC Form 470 was posted on December 20, 2006,¹⁸ (2) the Second RFP was posted on January 2, 2007,¹⁹ (3) all bid responses were due by January 23, 2007,²⁰ and (4) the RFP close date was January 30, 2007.²¹ As required by Arizona procurement law, on January 8, 2007, Humboldt requested publication of its Second RFP on the next available date for one week in a Prescott newspaper.²²

From December 20, 2006 to January 23, 2007, Humboldt received three responsive bids. On January 23, 2007, three Humboldt employees met to evaluate those bids.²³ At that meeting,

¹⁴ AR0008 (First RFP); AR0003 (Schmitt Declaration); and AR0005 (Pielstick Declaration).

¹⁵ AR0010 (First RFP); AR0005 (Pielstick Declaration).

¹⁶ AR0016-23 (Humboldt Request for Proposal #DIGITAL2006/07, dated Jan. 2, 2007 ("Second RFP")); AR0006 (Johnson Declaration).

¹⁷ AR0019 (Second RFP). By filing the Second RFP, the allowable contract date changed from January 17, 2007 to January 30, 2007. AR0006 (Johnson Declaration).

¹⁸ AR0003 (Schmitt Declaration); AR0008 (First RFP).

¹⁹ AR0003 (Schmitt Declaration); AR0006 (Johnson Declaration).

²⁰ AR0016 (Second RFP); AR0003 (Schmitt Declaration); and AR0006 (Johnson Declaration).

²¹ AR0016 (Second RFP).

²² AR0024 (Humboldt Letter to Prescott Newspapers, dated Jan. 8, 2007, requesting publication of the Legal Notice of Humboldt's Second RFP); AR0003 (Schmitt Declaration); and AR0006 (Johnson Declaration).

²³ AR0026-28 (Humboldt RFP #DIGITAL2006/07 Selection Analysis Matrix); AR0003 (Schmitt Declaration).

the Humboldt employees scored Conterra the highest in compliance with Commission competitive bidding requirements and state procurement law.²⁴ No other bids were received by Humboldt between January 23rd and January 30, 2007, the RFP close date and the allowable contract date respectively.²⁵

On January 29, 2007, Humboldt's Purchasing Agent prepared and sent a Memorandum to Humboldt's Finance Director detailing the bid review process and recommending that Humboldt award the RFP to Conterra, because its bid was the most cost-effective bid for the services requested and the most cost-effective means of meeting Humboldt's educational needs.²⁶ On February 6, 2007, this recommendation was forwarded to Humboldt's Superintendent for review and approval.²⁷

On February 6, 2007, Humboldt's Superintendent approved the recommendation to select Conterra as the school's service provider.²⁸ It was not until February 7, 2007, that Humboldt committed to Conterra by Humboldt's Superintendent executing a WAN and Internet Access

²⁴ *Id.*

²⁵ AR0003 (Schmitt Declaration).

²⁶ AR0029 (Humboldt Office Memo from Ken Johnson to Kirk Waddle, dated Jan. 29, 2007, regarding Request for Board Approval to award RFP #DIGITAL2006/07); AR0003 (Schmitt Declaration); and 47 C.F.R. § 54.504(c)(1)(xi).

²⁷ AR0030 (Humboldt Memorandum from Phil Young to Humboldt's Governing Board, dated Feb. 6, 2007, regarding Approval to Award RFP #DIGITAL2006-07 to Conterra); AR0003 (Schmitt Declaration).

²⁸ *Id.*

Telecommunications Service Agreement with Conterra.²⁹ On that same date, Humboldt filed its completed FCC Form 471 with USAC.³⁰

B. USAC’s Selective Review Process and USAC’s Denials

On April 30, 2007, USAC sent Humboldt a Selective Review Information Request (“SRIR”), to which Humboldt responded on May 30, 2007.³¹ On May 31, 2007, USAC sent Humboldt a follow-up inquiry.³² Specifically, USAC requested that Humboldt clarify the deadline for responses to the Second RFP.³³ On June 7, 2007, Humboldt responded that the deadline for RFP responses to the Second RFP was January 23, 2007.³⁴ Approximately six months later, on January 16, 2008, USAC issued a Funding Commitment Decision Letter (“FCDL”) denying Humboldt’s Application that featured Conterra as the service provider for two funding requests (“FRNs”).³⁵ In the FCDL, USAC explained that it was denying Humboldt’s Application because “[t]he referenced RFP was not available for 28 days after the filing of the Form 470.”³⁶ However, USAC’s denial reason is factually incorrect, because

²⁹ AR0031-32 (WAN and Internet Access Telecommunications Service Agreement between Conterra and Humboldt, dated Feb. 7, 2007); AR0003 (Schmitt Declaration).

³⁰ AR0033-40 (Humboldt FCC Form 471, File No. 584367, dated Feb. 8, 2007); AR0003 (Schmitt Declaration); and AR0005 (Pielstick Declaration).

³¹ AR0041-49 (Selective Review Information Request (SRIR) Funding Year 2007 from USAC to Humboldt, dated Apr. 30, 2007).

³² AR0050-57 (Fax from USAC to Humboldt, dated May 31, 2007, requesting follow-up information regarding Humboldt’s SRIR response (“Follow-up SRIR”).

³³ AR0053 (Follow-Up SRIR, Question 7 RFP).

³⁴ *Id.*

³⁵ AR0001-2 (FCDL Report Denials for FRNs 1623638, 1623670).

³⁶ *Id.*

Humboldt did meet the 28-day posting requirement for its FCC Form 470 as established by the facts of the record that USAC had before it at the time of issuance of the denial.

III. ARGUMENT

A. The Commission Should Grant This Appeal Because Humboldt Complied with the 28-Day Posting Requirement and the Commission's Competitive Bidding Requirements

USAC erroneously denied Humboldt's funding request. The Commission's 28-posting requirement requires that the entity requesting service wait at least four weeks from the date on which its description of services is posted on USAC's website before making commitments with the selected service provider(s). As noted above, USAC denied Humboldt's Application, alleging that the FCC Form 470 was not available for 28 days. This is plainly incorrect. What USAC may have intended was to deny based upon its finding that the Second RFP was not posted for 28 days, because Humboldt required bids to be filed and evaluated bids during the Second RFP 28-day time period. However, Humboldt made no commitments during the Second RFP 28-day time period and, as such, USAC's finding does not equate to a Commission competitive rule violation.

In this case, Humboldt posted its Second RFP on its website on January 2, 2007. Humboldt made its commitment with Conterra, the selected service provider on February 7, 2007 - 36 days after Humboldt posted its Second RFP. Humboldt followed both the letter and the spirit of USAC's competitive bid process, the Commission's 28-day posting requirement, and Arizona procurement law.

Specifically, the Commission should grant this appeal because: (1) both RFPs were available for 28 days before Humboldt selected its service provider and made a commitment to Conterra; (2) pursuant to Arizona law, Humboldt did not legally commit to its selected service

provider Conterra until Humboldt's Superintendent executed the contract with Conterra; and (3) there has been no harm to the competitive bidding process because no other bids were received after January 23, 2007.

1. Humboldt Posted Both Its First RFP and Second RFP for 28 Days

The Commission should grant this appeal because Humboldt complied with the letter, spirit and intent of the 28-day posting mandate, a core E-rate Program requirement. The Commission's rules require that the applicant "wait at least four weeks [28 days] from the date on which its description of services is posted on the Administrator's website before making *commitments* with the selected providers of services."³⁷ In this case, Humboldt complied with this rule by selecting the service provider on February 6, 2007 and signing the contract (*i.e.*, making the commitment) on February 7, 2007, one week after the allowable contract date for the Second RFP and almost three weeks after the allowable contract date for the First RFP.

In the *Ysleta* Order, the Commission applied the 28-day posting requirement to any other publicly available RFP submitted by applicants to ensure a fair and level playing field during the competitive bidding process. The Commission stated, "[t]o the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days."³⁸ As such, the Commission also required USAC to make changes to the FCC Form 470 so that potential bidders would know whether the applicant intends to post an RFP.³⁹

³⁷ 47 C.F.R. § 504(b)(4) (emphasis added).

³⁸ *Ysleta* Order, ¶39.

³⁹ *Id.* ("This clarification will help to fulfill the purposes of the FCC Form 470 by informing potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form.")

Although the Commission did not codify the revisions to the 28-day posting requirement made in its *Ysleta* Order, it did reiterate its holding in the *Aberdeen* Order.⁴⁰ In the *Aberdeen* Order, the Commission stated “that applicants must wait 28 days after their FCC Form 470 is posted to USAC’s website or after public availability of an applicant’s request for proposal (RFP) before *entering into an agreement* with a service provider for the requested services.”⁴¹ The *Aberdeen* Order expressly states that the purpose of the 28-day posting requirement is to provide a fair and uniform period applicable to all schools and libraries seeking discounts for eligible services to permit competitive bidding by all potential bidders.⁴² The 28-day posting requirement allows for a competitive bid process to take place *before* the applicant enters into a contract with a bidder.

USAC appears to have denied Humboldt’s request because the Second RFP required the bids to be filed by January 23, 2007, twenty-one (21) days after Humboldt posted the Second RFP on its website.⁴³ While it is true that Humboldt reviewed the three bids it received on January 23, 2007, twenty-one (21) days after it posted its Second RFP, Humboldt did not make a commitment to Conterra until the Superintendent executed a contract with Conterra on February 7, 2007.⁴⁴ Bidders had ample time between December 20, 2006 and January 30, 2007 to make inquiries regarding bids.

⁴⁰ *Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District, Order*, 22 FCC Rcd 8757 (2007) (“*Aberdeen Order*”) (emphasis supplied).

⁴¹ *Aberdeen Order*, ¶1 (emphasis added).

⁴² *Id.*, ¶5.

⁴³ AR0001-2 (FCDL Report Denials).

⁴⁴ AR0003 (Schmitt Declaration).

In this case, USAC's rigid and unpublished interpretation of the 28-day posting period forbids Humboldt from conducting a meaningful competitive bid process according to its internal procedures and state procurement rules. Where the interpretation of the Commission's rules are unclear, USAC is required to seek clarification from the Commission, not set policy and interpret the Commission's rules on its own.⁴⁵ USAC should have sought such clarification from the Commission before interpreting, defining, and restricting the applicant's competitive bid process, and denying Humboldt its much needed E-rate funding.

Furthermore, USAC did not follow the Commission's instructions set-out in the *Aberdeen* Order. The Commission directed USAC to reach out to applicants and provide applicants with an opportunity to cure ministerial and clerical errors on their FCC Forms 471 that make it appear that the applicants violated the 28-day posting rule.⁴⁶ USAC did not provide Humboldt an opportunity to remedy its perceived errors.

2. Humboldt Complied With Arizona Law and the "Selection" of a Service Provider Does Not Become a "Commitment" Until Humboldt Entered Into a Legally Binding Agreement

Under Arizona law, commitment is only binding upon the signing of a contract.⁴⁷ The Arizona Supreme Court has ruled that a school district is not contractually bound prior to the execution of a written contract.⁴⁸ In *Covington*, the Court found that a proposal and award of that proposal are preliminaries looking toward execution of a formal contract and that a contract

⁴⁵ 47 C.F.R. § 54.702(c).

⁴⁶ *Aberdeen* Order, ¶12.

⁴⁷ AR0059 (Ariz. Admin. Code § R7-2-1050).

⁴⁸ *Ry-Tan Constr., Inc. v. Wash. Elementary Sch. Dist. No. 6*, 210 Ariz. 419 (2005); *Covington v. Basich Bros. Constr. Co.*, 72 Ariz. 280 (1951).

with a public agency is not binding on the public agency until a formal contract is executed.⁴⁹ In *Ry-Tan*, the Court stated that allowing a public entity opportunity to reject a bid until the parties execute a formal contract provides additional flexibility to respond to conditions that arise before execution of the contract and provides further opportunity to consider the public interest.⁵⁰ As in *Covington* and *Ry-Tan*, Humboldt didn't make any commitment to Conterra until it executed the contract. Humboldt met on January 23, 2007 to review the three bids it received, but waited until February 6, 2007 before selecting Conterra and February 7, 2007 before committing to Conterra to provide for a fair and uniform competitive bidding process. Hence, Humboldt complied with the Commission's 28-day rule by waiting 36 days to commit to a service provider by executing a contract with Conterra on February 7, 2007.

3. There is No Harm to Fair and Open Competition

The competitive process has not been harmed because: (1) as a matter of fact and law, there was no commitment made or agreement entered before the allowable date; and (2) even if the Commission finds that Humboldt should have not conducted a bid review during the second 28-day posting period, no additional bids were received while the bid period remained open. All of the bid responses received careful consideration, and none of the responsive bidders were deprived of meaningful competition.

The Commission's intent in requiring the applicants to wait 28 days before entering into a contract for services or committing to a service provider is to provide for a fair and open

⁴⁹ *Covington*, 72 Ariz. at 285-86.

⁵⁰ *Ry-Tan*, ¶29.

competitive bid process.⁵¹ Further, the Commission's rules aim to ensure that funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available.⁵² Humboldt met these requirements.

From December 20, 2006 to January 23, 2007, Humboldt received three responsive bids. Humboldt received no other bids between January 23, 2007 and January 30, 2007. Humboldt selected Conterra as its service provider after reviewing all available bids and determining that Conterra's bid was the most cost-effective bid for the services requested and the most cost-effective means of meeting Humboldt's educational needs.⁵³ Because no other bids were received, no other service provider was harmed by Humboldt's review on January 23, 2007. Humboldt legally complied with the Commission's 28-day posting requirement. Equally important, Humboldt complied with the spirit and intent of the Commission's 28-day posting requirement by conducting an open and fair competitive bidding process. To hold otherwise would elevate form over substance and deprive Humboldt of much needed funding.

B. Current USAC Guidance Is Not Uniform and Clear and Conflicts with State Procurement Rules

Over the past several years, USAC has created inconsistent guidance regarding the competitive bidding process. Current guidance, depending on the source on USAC's website is inconsistent and often contradictory. Specifically, USAC's guidelines and presentations posted on its website are not clear about what is prohibited and what is allowed during the 28-day

⁵¹ *Schools and Libraries Universal Service Support Mechanism, Fifth Report and Order*, 19 FCC Rcd 15808, 15816 ¶21 (2004) ("the competitive bidding process is a key component of the schools and libraries program").

⁵² *Id.*

⁵³ 47 C.F.R. § 54.504(c)(1)(xi).

posting period.⁵⁴ The intent of the rule is that the applicant does not make a commitment to a service provider until after waiting 28 days.

Until recently, commitment has been interpreted to mean that the applicant may not enter into a contract with the applicant. More recently, however, USAC has added the word “select” to some of its training materials and not to others. In some instances, USAC uses the term “select” to apply only to tariffed or month-to-month services and not contracted services. As a result, some of the guidelines seem to allow service provider selection, but not contract execution until after the 28-day period. Other guidelines seem to prohibit service provider selection and contract execution until after the 28-day posting period has expired. Some guidelines state that the 28-day posting requirement is applicable only to the FCC Form 470, others make reference to both the FCC Form 470 and other applicant RFPs.

USAC’s inconsistency has led to confusion among applicants. The Commission has stated that it intends on streamlining the E-rate application process and making the application

⁵⁴ For example, Step 4 of USAC’s contract guidance procedures states that an applicant “must wait at least 28 days after the posting of the *Description of Services Requested and Certification Form* (Form 470) on USAC’s website before executing any contracts, selecting a service provider, or signing and submitting Form 471.”⁵⁴ AR0060. Under the same Step 4 on its website, USAC states that after the 28-day waiting period and, “after the *Description of Services Requested and Certification Form* is posted on the USAC website, the applicant may select a vendor for tariffed or month-to-month services or execute a contract for new contractual services.” AR0061. On the Schools and Libraries – Competitive Bidding Process page of its website, USAC states that “the applicant must then wait 28 days after the Form 470 is posted or an RFP is issued (whichever is later) before selecting a service provider, ordering services, and/or executing a contract. AR0062. In its Path to Success (and Avoiding the Road to Denial) training presentation, USAC states that an application should “wait 28 days after your Form 470 is posted and your RFP is issued before: selecting your service provider, and then sign a contract, and then file your Form 471, and then certify your Form 471.” AR0063-66. In a related training presentation, USAC highlights some commonly made mistakes including contracts being “awarded prior to 28-day posting period” and goes on to clarify that “contracts must be signed contract [sic] after your 28 days has elapsed but before you file your 471.” AR0067-74. On its “Application Do’s and Don’ts” Checklist, USAC instructs the following, “Don’t sign a contract until after the Form 470 has been posted for 28 days.” AR0075. (emphasis supplied).

process, as well as the E-rate Program as a whole, less complicated⁵⁵ in order to strike an appropriate balance between ensuring an open and fair competitive bidding process and providing schools and libraries necessary funding. More consistent and clear rules and guidelines regarding the do's and don'ts during the 28-day posting period would ensure less confusion among applicants and a more open and fair competitive bidding process.

Whatever USAC's internal views on the scope of the rules might be, in the final analysis, as noted above, the FCC rule speaks to "making commitments" and, as applied by the Commission in the *Aberdeen* Order, to "entering into agreements." As explained above, the District did neither in this case until it was permitted to do so.

C. Waiver Requests

The Commission's rules allow a waiver "for good cause shown."⁵⁶ The Commission has established the following guidance for determining whether waiver is appropriate:

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁵⁷

⁵⁵ *Aberdeen* Order, ¶11; *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Linkup, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 11308 (2005); *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism, Order*, 21 FCC Rcd 5316, ¶2 (2006) ("Bishop Perry Order").

⁵⁶ 47 C.F.R. § 1.3.

⁵⁷ *Requests for Review by Richmond County School District*, 21 FCC Rcd 6570, 6572 ¶5 (2006 (internal references omitted) (citing *Northeast Cellular Tel. Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972)).

1. In the Alternative, the Parties Seek a Waiver of the 28-Day Posting Requirement

If the Commission finds that Humboldt in fact violated the 28-day posting requirement because it established January 23, 2007 as the deadline for bids in response to its Second RFP, the Parties respectfully request a waiver of Section 54.504(b)(4). The Commission should waive the 28-day posting requirement as set forth in the *Ysleta* and *Aberdeen* Orders, because there is no evidence of waste, fraud, or abuse, or failure to comply with the core E-rate program requirements, and Humboldt complied with the competitive bidding process. The issue at the heart of this appeal is at most a misunderstanding or misinterpretation as to what Humboldt was and was not allowed to do during the 28 days before it sought authorized approval after the allowable contract date from the Superintendent to select Conterra. Thus, a waiver would be in the public interest.

In its *Bishop Perry* Order,⁵⁸ the Commission granted 196 appeals of decisions denying funding due to “clerical or ministerial errors in the application.”⁵⁹ In that case, the Commission found good cause to waive the minimum processing standards established by USAC, finding that “rigid compliance with the application procedures does not further the purposes of section 254(h) or serve the public interest.”⁶⁰ The Commission granted the waivers for good cause, noting that:

[T]he primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers, as opposed to positions

⁵⁸ See generally, *Bishop Perry* Order.

⁵⁹ *Id.*

⁶⁰ *Id.* at 5321 ¶11. The Commission departed from prior Commission precedent, noting that the departure was, “warranted and in the public interest.” *Id.* at 5319 ¶9. The Commission noted that many of the rules at issue were procedural, and that a waiver is consistent with the purposes of Section 254, which directs the Commission to “enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries.” *Id.*

dedicated to pursuing federal grants, especially in small school districts. Even when a school official has learned how to correctly navigate the application process, unexpected illnesses or other family emergencies can result in the only official who knows the process being unavailable to complete the application on time. Given that the violation at issue is procedural, not substantive, we find that the complete rejection of each of these applications is not warranted. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that denial of funding in these cases would inflict undue hardship on the applicants.⁶¹

The Commission directed USAC to allow applicants the opportunity to fix ministerial and clerical errors and concluded that such an opportunity would “improve the efficiency and effectiveness of the Fund.”⁶²

In 2007, the Commission applied this directive in its *Aberdeen* Order, and found that twenty-eight (28) Petitioners in the *Aberdeen* Order “mistakenly signed their contracts or certified their FCC Forms 471 before the allowable contract date” or “mistakenly believed they did not have to wait 28 days before submitting an FCC Form 471.”⁶³ After reviewing the facts of these individual appeals, the Commission concluded that “a waiver [of Section 54.504(b) (4) of the Commission’s rules] is warranted based on the circumstances presented and based on the facts that there is no evidence of waste, fraud or abuse.”⁶⁴ The Commission further stated that “[w]e find no indication in the record that, as a result of these errors, applicants benefited from their mistakes or that any service provider was harmed.”⁶⁵

⁶¹ *Id.* at 5323 ¶14.

⁶² *Id.* at 5327 ¶23.

⁶³ *Aberdeen* Order, ¶8.

⁶⁴ *Id.* ¶9.

⁶⁵ *Id.*

The facts of this case are similar to the types of mistakes and clerical errors that the Commission found warranted rule waivers in the *Aberdeen* Order and, for that matter, earlier Commission decisions cited therein. First, Humboldt posted its First RFP and Second RFP for 28 days and Humboldt's scoring of the bids took place 34 days after Humboldt's FCC Form 470 was posted and 21 days after its Second RFP was posted. No additional bids were received after Humboldt conducted its bid review process. Humboldt was required to comply with both the Commission's competitive bidding rules and Arizona procurement laws.⁶⁶ It did so when it entered into a contract with Conterra on February 7, 2007. Humboldt conducted a thorough bid review process, sought the necessary approvals before entering into a contract with Conterra, and timely filed its FCC Form 471. The fact that Humboldt reviewed bids before the end of the second 28-day posting period in no way hampered fair and open competition, because it received no additional bids after it completed its bid review process. Finally, as in the *Aberdeen* Order, because there is no evidence that the Humboldt or Conterra engaged in any activity that involved a misuse of funds or abuse of E-rate Program rules, the Commission should apply the reasoning and principles set forth therein with equal weight and force to the facts outlined in this Joint Petition.

Thus, in the spirit of the *Bishop Perry* and *Aberdeen* Orders, the Commission should grant this Joint Petition. Humboldt has demonstrated good cause for a waiver: (1) there is no evidence of waste, fraud, or abuse; (2) Humboldt complied with core program requirements; (3) there has been no harm to fair and open competition; and (4) the public interest would be served by providing much-needed E-rate funding to the District. Based on the above, Humboldt respectfully requests that the Commission waive 47 C.F.R. § 54.504(b)(4).

⁶⁶ AR0058 (Ariz. Admin. Code § R7-2-1042).

2. The Parties Seek a Waiver of the Commission's Recurring Services Rule

In the event that the Commission grants this Joint Petition, the Parties also respectfully request a waiver of the Commission's rule that require applicants to "use recurring services for which discounts have been committed by the Administrator within the funding year for which the services have been sought."⁶⁷ Without such a waiver, the grant of a meritorious appeal would result in a hollow, pyrrhic victory and effectively render the right of a successful appellant meaningless.

There are three key reasons that support the grant of this waiver request. First, the recurring services rule is not being interpreted and administered in a competitively neutral manner as required by federal statute and regulation. Second, applicants and service providers are deprived of their due process rights to a meaningful appeal. Third, schools and libraries are being prejudiced in a discriminatory manner by not having the same access to services as other applicants participating in the E-rate Program.

The Commission rules are clear that the applicant is required to use committed funds for recurring services in the year for which it seeks services.⁶⁸ The Commission's rules, however, are silent as to an applicant's and a service provider's requirements on uncommitted funds for recurring services, *i.e.*, funding that has been denied and then appealed to the Commission. In essence, USAC interprets this regulation to mean that regardless whether an interested party appeals the decision on denial for recurring services and despite the fact that USAC holds the appeal money in a special account pending the outcome of the appeal, USAC will not disburse

⁶⁷ 47 C.F.R. § 54.507(d).

⁶⁸ 47 C.F.R. § 54.507(d).

funds on a meritorious appeal for recurring services unless the applicant used the recurring services within the funding year for which the services were originally sought.

In 2001, the Commission issued a *Report and Order* that extended the timeframe for non-recurring services from June 30th until September 30th of the funding year.⁶⁹ The Commission also extended the time periods to install and invoice for non-recurring services through the filing of invoice deadline extension and service delivery extension requests. Finally, the Commission noted that parties could amend the time period of their original contracts and notify USAC of these extensions by filing an FCC Form 500, however, the filing of this Form and notification are not mandatory.

The *Report and Order* was silent with respect to the recurring services; in essence leaving intact the rule, discussed above, that recurring services, even those for which funding is initially denied and then obtained on appeal, must be delivered and installed within the funding year for which the E-Rate support for such services was originally sought. As evidenced below, this rule is not administered in a competitively neutral manner and as a result favors large enterprises that are able to “front” the provision of the services while they await the outcome of an appeal denying the funding.

Congress specifically directed the Commission to “establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.”⁷⁰ The Commission required USAC to administer the “distribution of universal

⁶⁹ *Federal-State Joint Board on Universal Service, Report and Order*, 16 FCC Rcd 13510 (2001) (“*Report and Order*”).

⁷⁰ 47 U.S.C. § 254(h)(2)(A).

support and benefits to eligible entities in an efficient, effective, and competitively neutral manner.”⁷¹

Further, contrary to the Regulatory Flexibility Act,⁷² as a practical matter, USAC’s application of this timing-of-service-delivery requirement, even in the case of successful appeals, prejudices small entities⁷³ and small business concerns.⁷⁴ USAC’s application of this requirement favors large companies that continue to provide the eligible E-rate recurring services through the funding year or large school districts that are able to make a hundred (“100”) percent Billed Entity Applicant Reimbursement (“BEAR”) payment. For companies such as Conterra and school districts such as Humboldt, USAC takes the position that if these services are not used in the funding year for which they are sought, despite the fact that the schools win on appeal, USAC will deny them the funding that is reinstated because it has not been provided within the funding year for which it originally was requested. Accordingly, the Parties request the Commission waive 47 C.F.R. § 54.507(d).

As is the case here, Humboldt chose Conterra as its service provider for telecommunications and Internet access (*i.e.*, recurring) services.⁷⁵ The service delivery date was July 1, 2007 for FY2007. However, USAC did not issue an FCDL until January 16, 2008,

⁷¹ *Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, Report to Congress*, 13 FCC Rcd 11810, ¶12 (1998).

⁷² 5 U.S.C. § 603.

⁷³ 13 C.F.R. § 121.201 (defining small entities to include schools and libraries having \$5 million or less in annual receipts).

⁷⁴ The Small Business Act defines a small business as one that is independently owned and operated and not dominant in its field of operation. 15 U.S.C. § 632.

⁷⁵ AR0003 (Schmitt Declaration).

almost seven months into FY2007. As a small school, Humboldt does not have the budget to pay 100% for the telecommunications and Internet access services and as a small business entity, Conterra cannot assume the risk and does not have the budget to provide and carry the discounted portion of these services until USAC issues a favorable funding decision. Because USAC issued an FCDL denying the funding, the immediate net effect of this is that Humboldt will lose all of its funding for recurring services for FY2007-FY2011, due to the fact that the originating FCC Form 470 that is the subject of this appeal resulted in a multi-year contract for five years. Unless the Commission issues a waiver to allow Conterra to begin delivery of the services immediately upon issuance of the Order and allows Humboldt to file an FCC Form 471 out of window for FY2008 that relates back to the originating Form 470 at issue in this appeal, the granting of this appeal will provide no relief to the Parties, equating, in essence to a hollow victory.

A further problem is that Humboldt cannot file an FCC Form 471 that cites to an originating Form 470 that has been denied. To require Humboldt or any school to undertake a completely new competitive bid process under this scenario is unfair and discriminatory. Under these same facts, however, if Conterra were able to carry the costs for the discounted services or Humboldt were able to afford to pay 100% of the recurring services from its budget during FY2007 and this appeal were granted in FY2008 or beyond, Humboldt would be able to receive reimbursement for these services. This result is simply unfair and demonstrates that the rules and procedures of the program as they relate to appeals of Priority One recurring services are not administered in a competitively neutral manner. Moreover, they render the right of appeal in such circumstances a procedural remedy without any opportunity for substantive relief.

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 17th day of March, 2008, a copy of the foregoing Joint Request for Review and Waiver has been served via electronic mail or first class mail, postage pre-paid, to the following:

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