

DPY

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

CC: 02-6

In the Matter of)
Request for Review of the)
Decision of the)
Universal Service Administrative Company)
By)
Cherokee County School District)

CC Docket No. 02-6
CC Docket No. 96-45
File No. 624508

FILED/ACCEPTED

MAY - 3 2010

To: Secretary, Federal Communications Commission
Attn: The Chief, Wireline Competition Bureau

Federal Communications Commission
Office of the Secretary

**MOTION FOR LEAVE TO FILE RESPONSE
TO REQUEST FOR REVIEW**

Professional Network Consultants, Inc. ("PNC"), through counsel, hereby moves for leave to file the attached response to the Request for Review ("Request for Review") submitted by Cherokee County School District ("Cherokee"). The Request for Review makes serious allegations against PNC to which PNC should be able to respond. In addition, Cherokee's Request for Review contains numerous misstatements and inaccuracies, which PNC's response is intended to correct.

Neither PNC nor its counsel was included in the Certificate of Service appended to the Request for Review as required by section 54.721(d) and 1.47(g) of the Commission's Rules. Although Cherokee provided PNC's counsel with a courtesy copy of its Request for Review, PNC's counsel has no record of when the filing was received or how it was delivered. Cherokee will not be prejudiced by permitting PNC to file the attached response.

Accordingly, the Commission should grant the Motion and permit PNC leave to file the attached response.

Respectfully submitted,



By: _____

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Dated: May 3, 2010

CERTIFICATE OF SERVICE

I, Joan Stewart, hereby declare that copies of the foregoing Motion for Leave to File Response to Request for Review were delivered via overnight express or hand delivery on this day, May 3, 2010, to the following:

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Joan Stewart

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OPPOSITION TO REQUEST FOR REVIEW

I. INTRODUCTION AND SUMMARY

Professional Network Consultants, Inc. ("PNC") respectfully opposes the request filed by the Cherokee County Schools ("CCS") seeking review of the rejection by the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") of CCS's Form 500 seeking to cancel certain FRNs for Funding Year 11 (2008-2009).¹ CCS's Request for Review contains a disturbing concoction of untruths and half-truths and demonstrates a shocking lack of candor on CCS's part.

As a threshold matter, although CCS devotes the bulk of its Request for Review to making unfounded accusations against PNC and attempting to justify its own actions, the USAC decision upon which review is sought is very narrow. Specifically, CCS is seeking review of a

¹ The FRNs at issue are FRNs 1757834, 1758563, 1758668, 1758759, 1758846, 1759708, 1759746, 1759787, 1759840, 1759871, 1759911, 1759991, 1760182, 1760217 (collectively "Funding Requests").

decision by USAC denying the Form 500 because CCS failed to provide information requested by USAC. Although not reflected in the USAC decision at issue, CCS claims that USAC rejected its Form 500 because CCS did not return E-rate funds – a claim based on an email from the SLD Problem Resolution Group that predates USAC’s decision. Even assuming CCS has correctly framed the basis of USAC’s decision, the only question before the Commission is whether USAC can properly reject a Form 500 when the applicant has not returned E-rate funds that are the subject of the funding requests that the applicant seeks to cancel. CCS’s Request for Review does not address this question. Instead, under the guise of a request for review, CCS is asking the FCC to determine whether E-rate funds should be ultimately recovered from CCS or PNC – an issue that USAC did not address and that requires the resolution of numerous factual disputes upon which USAC has never passed. Such an approach is inconsistent with the FCC’s review process, which only contemplates Commission review of decisions made and issues resolved by USAC.

Beyond this threshold procedural issue, the Request for Review is an attempt by CCS to avoid responsibility for violating some of the most fundamental rules underlying the E-Rate program. Specifically, under its own version of events, CCS violated the competitive bidding requirements, violated the obligation to calculate properly the discount rate, and violated the obligation to pay the non-discounted share. These rule violations are the three specific examples the FCC has provided of the type of violation for which a school should be held responsible.²

² *Schools and Libraries Universal Support Mechanism*, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, ¶ 15 (2004) (“*Fourth Report and Order*”).

CCS offers a host of excuses for its conduct – including the fact that it “is a very poor school district in rural North Carolina” and purportedly “never received any benefit from [the E-rate] funds.” Request at 19.³ However, none of these excuses holds water.⁴

For example, CCS asserts that it should not be held accountable for violations of the competitive bidding requirements because the former employee responsible for E-rate matters for CCS – Anthony Martin – “did not have a very extensive understanding of the E-rate program” Request at 12. Although PNC denies that the competitive bidding rules were violated, personnel at CCS in addition to Mr. Martin were fully aware at the time of the contact between PNC and CCS, which they now claim undermined the competitive bidding process. These are the same individuals who had intimate involvement with and ultimate responsibility for E-rate matters at CCS and who submitted sworn affidavits in support of the Request for Review.

Likewise, CCS admits that it filed the Form 486 in April 2009, even though it had known for months of potential problems with the discount level for which it was requesting funding from USAC. But CCS insists that it should not be held accountable for wrongly filing the Form 486 because it did so only as a result of alleged “threats” by PNC and based on an alleged “agreement” by PNC that the project would not proceed until CCS could address concerns about the discount rate. PNC disputes CCS’s version of events, which is not supported by any credible evidence and is belied by the undisputed facts. It is also noteworthy that CCS has failed to

³ CCS’s representation that it received no benefit from the E-rate funds conveniently ignores that CCS received – and still has in its possession – nearly \$1 million in equipment and was the beneficiary of more than 800 hours of professional services, including basic maintenance services, provided by PNC. CCS also overlooks that PNC was prepared to install and maintain the equipment that it had ordered on CCS’s behalf and otherwise meet its contractual and E-Rate obligations, but CCS prevented PNC from doing so. *See* Affidavit of Jeff Gaura, ¶ 20 (“Gaura Affidavit”).

⁴ CCS makes no attempt to justify its violation of E-rate rules by failing to pay the non-discounted share. Instead, CCS largely ignores the issue, apparently hoping that the FCC will do likewise.

produce a single email, letter, or other document evidencing these alleged “threats” or memorializing this alleged “agreement.” One would think that, if CCS truly filed the Form 486 under duress or was induced by PNC to do so, someone at the school system would have taken the time to document these facts. That CCS made no such effort should raise serious questions about the veracity of CCS’s claims.⁵

Admittedly, PNC fell short in complying fully with some of the requirements of the E-rate program. But these shortcomings did not affect the financial integrity of the program. And, in contrast to CCS’s E-rate violations, PNC was not the cause of USAC’s decision to grant the Funding Requests based on a discount to which CCS concedes it was not entitled.

Furthermore, CCS was in the best position to prevent or at the very least cure any E-rate violations by seeking to withdraw the Funding Requests in a timely manner. Specifically, CCS acknowledges that it received an audit report on April 29, 2009 – only nine days after it had submitted Form 486 – in which the auditors confirmed that CCS was not eligible for the discount it had claimed. Yet, for reasons CCS never adequately explains, *it waited more than eight months* – until January 11, 2010 – to file Form 500. Had CCS cancelled the funding requests in April, May, or even June 2009, the equipment that PNC had ordered could have been returned and the monies that PNC had received from USAC could have been refunded, which is not the case now.

⁵ CCS’s lack of credibility is further underscored by the significant discrepancy between the allegations made in its Request for Review and the “evidence” submitted by CCS. Many of these discrepancies are highlighted throughout PNC’s Opposition.

II. STATEMENT OF THE FACTS

A. PNC

Founded in 1998, PNC specializes in technical services and project management for the implementation of IP Telephony, wireless solutions, network security, VPN connectivity, MS Exchange migrations and Citrix configurations and installations. PNC has served as a vendor of technology equipment and services to CCS since 2004. Gaura Affidavit ¶¶ 2-3.

In Funding Year 10 (2007-2008), CCS posted a Form 470 seeking bids for services and equipment to be provided pursuant to the E-rate program. PNC submitted a bid to provide the requested Priority Two services to CCS and was selected as the winning bidder. Based on its discount rate for Funding Year 10, CCS received funding for Priority Two services for only two schools – Peachtree Elementary and Mountain Youth – and PNC provided the equipment and services at these schools. Gaura Affidavit ¶ 3; Affidavit of Phillip Colvard ¶¶ 4-5 (“Colvard Affidavit”).

B. CCS Funding Requests for Funding Year 11 (2008-2009)

On January 4, 2008, CCS filed Form 470 for Funding Year 11 requesting discounts on internal connections and basic maintenance of internal connections (among other services). PNC submitted a bid to provide internal connections and basic maintenance of internal connections to CCS in response to this Form 470. Colvard Affidavit ¶ 6. After waiting the requisite 28 days, CCS selected PNC as its vendor, utilizing a competitive bidding process conducted in accordance with USAC rules. Affidavit of Anthony Martin ¶ 7 (“Martin Affidavit”). CCS and PNC entered into a contract for internal connections and basic maintenance of internal connections on February 4, 2008. Gaura Affidavit ¶ 4, Exhibit 1. CCS subsequently filed Form

471 calculating the discount percentage that it represented it was eligible to receive. Martin Affidavit ¶¶ 8-10.

As part of its Program Integrity Assurance review in late 2008, USAC requested information from CCS about the Funding Requests. In preparing its response, CCS consulted with representatives of the North Carolina Department of Public Instruction (“DPI”), which raised questions about the survey results upon which CCS’s discount was based. In an email dated November 7, 2008, Barry Pace of DPI recommended three different options for justifying the discounts claimed by CCS. According to Mr. Pace, if none of these options “put any of the schools listed in the funding request at 90% then I would drop back and punt this request and start working on internal connections for next year.”⁶ CCS elected not to “punt,” however, opting instead to pursue the Funding Requests despite concerns about its eligibility for the discount it was claiming.

On March 19, 2009, USAC granted the Funding Requests for internal connections and basic maintenance of internal connections. On April 16, 2009, PNC and CCS held a “kick off” meeting to review the project. Present at the meeting from PNC were Dan Whitt, Sales Manager; Phillip Colvard, Account Manager; and Jeremy Meyers, a PNC engineer. Representing CCS at the meeting were Jeana Hardin, Director of Instructional Technology and Public Relations for CCS, and Terelle Beaver, Chief Financial Officer for CCS. Ms. Hardin asked for a June 1, 2009 start date for the project in order to give her time to complete an evaluation of her staff. Based on the start date of June 1, the parties discussed the need for CSS

⁶ See Gaura Affidavit, Exhibit 4 (November 7, 2008 Email from Barry W. Pace, North Carolina DPI E-Rate Specialist, to Jeana Hardin, Cherokee County Schools). This email and many of the other documents referenced in this Opposition were obtained by PNC in response to a February 3, 2010 request for documents from DPI under the North Carolina statute regarding public records. See N.C. Gen. Stat. § 132-1 et seq. This request was the result of the investigation conducted by PNC’s attorneys after receipt of a letter from CCS to USAC dated January 11, 2010, which alleged wrongdoing by PNC. Gaura Affidavit ¶ 18.

to submit the Form 486 so PNC could order the equipment to arrive in time. The parties also discussed whether there was sufficient storage at the CCS Network Operation Center (“NOC”), where the equipment was going to be housed. At no time during this April 16, 2009 meeting did either Ms. Hardin or Ms. Beaver give any indication that the project was not moving forward or that there were any problems with the discount rate claimed by CCS. Colvard Affidavit ¶¶ 10-11; Affidavit of Dan Whitt ¶¶ 3-4 (“Whitt Affidavit”).

Four days after the April 16 “kick off” meeting, CCS filed its Form 486 with USAC on April 20, 2009. PNC submitted its first Form 474s to USAC on April 23, 2009, and subsequently began ordering the equipment in order to meet the June 1, 2009 start date requested by CCS. Gaura Affidavit ¶ 11.

C. CCS’s April 2009 Internal Audit of the Funding Requests

Unbeknownst to PNC at the time, on the very day that it filed its Form 486 with USAC, CCS requested that DPI “conduct a compliance attestation examination” beginning the week of April 27, 2009, the purpose of which to determine CCS’s “compliance with FCC rules for the S&L Program.”⁷ CCS filed the Form 486, despite requesting an internal compliance examination and despite its desire for “another set of eyes on our documentation before we begin.”⁸

DPI promptly completed its compliance examination and provided CCS with a summary of its findings on April 29, 2009. DPI noted “one major issue” – namely, that the “current discount calculations based on FY 2008 survey cannot be verified” because the relevant internal

⁷ Gaura Affidavit, Exhibit 4 (April 20, 2009 Letter from Barry W. Pace, North Carolina DPI E-Rate Specialist, to Jeana Harden, Cherokee County Schools).

⁸ Gaura Affidavit, Exhibit 4 (April 16, 2009 Email from Jeana Harden, Cherokee County Schools, to Barry Pace, North Carolina DPI E-Rate Specialist).

controls were lacking. DPI recommended that CCS re-tabulate all return surveys, advising that, if the new calculations were below the 75% level, CCS should: (1) self-report “based upon the fact that you recently discovered discrepancies, allowing commitment adjustment, and offering to reconcile any resulting balances”; or (2) “file a Form 500 to reduce the committed amount by a percentage that the re-tabulated survey data supports.” Exhibit V to Request for Review, at 23.

CCS did not provide PNC with a copy of the compliance examination or share its results. However, on May 5, 2009, almost two weeks after PNC had filed Form 474, Mr. Colvard and Ms. Hardin spoke by telephone, during which Ms. Hardin told Mr. Colvard that CCS was having problems with its discount and locating the surveys upon which the discount level had been based. This was the first time that PNC learned of any issues with the discount claimed by CCS. Colvard Affidavit ¶ 13; Gaura Affidavit ¶ 17. However, CCS assured PNC that CCS was moving forward with the project. In an email to Mr. Colvard dated May 6, 2009, Ms Hardin noted that “we still have some anomalies to work through” regarding the surveys but stated “we might still come out okay.” Colvard Affidavit ¶ 14, Exhibit 2.

In light of these and other representations that CCS was continuing to review documentation to justify its discount level, PNC continued to honor its contractual obligations to CCS and satisfy the requirements of the E-rate program – namely to provide the services and equipment requested by CCS and funded by USAC. Consistent with its contract and CCS’s request for a June 1, 2009 project start date, PNC began ordering the equipment requested by CCS in May 2009, which was delivered to the school system’s NOC later that month. CCS accepted and stored the equipment, the value of which is approximately \$1 million. CCS never refused to accept delivery of the equipment or sought to return the equipment to PNC, nor did

CCS express to PNC any surprise or alarm when the equipment was delivered. Gaura Affidavit ¶¶ 14 & 20.

On May 28, 2009, representatives with PNC and CCS met to discuss implementation of the project. During this meeting, Ms. Hardin explained that the school system had been unable to verify the discount for which E-rate funding had been requested. According to Ms. Hardin, after analyzing the survey information, CCS had discovered problems with the survey forms, including missing information. Because CCS had lost confidence in the underlying data, Ms. Hardin explained that the school superintendent – Dr. Stephen Lane – had decided that CCS should file a Form 500 to withdraw the Funding Requests. However, Ms. Hardin stated that she was looking for reasons to delay doing so, and both Ms. Hardin and Ms. Beavers indicated that CCS was continuing to try to justify its discount. Whitt Affidavit ¶ 7.

On June 1, 2009, Dr. Lane sent PNC a letter directing that it “cease any activity” with respect to the Funding Requests because CCS had not “issued purchase orders” that allegedly were required under state law in order for PNC to proceed with the project. Although PNC disputes this claim, Dr. Lane’s June 1, 2009 letter did not mention any problems regarding the discount or underlying surveys, nor did it mention any filing of Form 500. Whitt Affidavit ¶ 8; Exhibit X to Request for Review.

D. CCS’s June 2009 Internal Audit of the Funding Requests

CCS did not file Form 500 in June 2009 because CCS was intent on trying to justify its discount. Sometime in June 2009, CCS requested that Funds for Learning, LLC (“FFL”) review CCS’s survey methodology and E-rate discount calculation. As a compliance firm specializing in the E-rate program, FFL was requested to determine if the survey data used to establish CCS’s discount for Funding Year 11 met USAC requirements.

In a report dated October 23, 2009, FFL was unable to validate the 90% discount rate to which CCS claimed it was entitled. According to FFL, “depending upon a variety of factors, the correct discount rate appears to be the 79%, 80% or 83%,” which “if accurate, would result in a reduction in funding of approximately \$1.8 million.”⁹ In the absence of “other sources of data” that increased the CCS discount rate to 90%, FFL noted that CCS “may be required to return E-rate funds that were improperly disbursed to [CCSS] as a result of the inflated discount percent rate.”¹⁰

After receipt of FFL’s report, CCS conferred with representatives of DPI in November 2009. DPI recommended that CCS file Form 500 withdrawing the Funding Requests – the same recommendation DPI had made some seven months earlier.¹¹ For whatever reason, CCS took another two months before following DPI’s recommendation, waiting until January 11, 2010 to file Form 500 seeking to withdraw the Funding Requests. However, when it actually filed Form 500, rather than acknowledging that it was ineligible for the discount it had claimed, CCS attempted to blame PNC. In addition, CCS’s cover letter stated that it was taking this action as a result of a “recent audit” – presumably the FFL audit -- that actually had commenced in June and that took almost four months to complete.

⁹ See Exhibit BB to Request for Review (Funds for Learning, Universal Service Funding (“E-Rate”) E-Rate Discount Calculation Survey Methodology Review for Cherokee County School District, at 1 (Oct. 23, 2009)).

¹⁰ *Id.* FFL noted that historically CCS had qualified for a 76% E-rate discount but that for Funding Year 2008 it had “used an alternative means of calculating its E-rate discount,” which allowed CCS to receive a 90% E-rate discount and qualify for approximately \$2.1 million in E-rate funding for Funding Year 2008. *Id.*

¹¹ Gaura Affidavit, Exhibit 4 (November 23, 2009 Memo from North Carolina Department of Public Instruction).

III. ARGUMENT

A. CCS Mischaracterizes the Question Presented For Review

Under the FCC's rules, a "person aggrieved by an action taken by" USAC "may seek review" from the Commission. 47 C.F.R. § 54.719(c). A request for review pursuant to Section 54.719(c) must "contain ... [t]he question presented for review, with reference, where appropriate, to the relevant Federal Communications Commission rule, Commission order, or statutory provision." 47 C.F.R. § 54.721(b)(3).

Here, CCS mischaracterizes the "question presented for review." The USAC decision of which CCS seeks review is dated February 11, 2010, and provides, in relevant part:

This letter is to notify you that your Form 500, has been rejected and is being returned to you with this letter.

We did not receive the information we requested from you, which was necessary for us to successfully process your form. Since we did not receive the requested information by the date in our communications, your form has been rejected and is being returned to you as indicated in those communications.

Exhibit A to the Request for Review. USAC's decision does not specify what information it requested that CCS failed to provide.

However, according to CCS – based on an email from the SLD Problem Resolution Group – the "information requested" by USAC was actually the return of the E-rate funds that are the subject of the Funding Requests that CCS seeks to withdraw.¹² Although that is not what

¹² Request for Review at 2; Exhibit C to Request for Review (January 26, 2010 email from Megan Allred to Jeana Hardin). Notwithstanding CCS's claims to the contrary, Ms. Allred's email is dated January 26, 2010 -- not February 1, 2010 -- and was sent before USAC's decision, not after. *See* Request for Review at 2 ("SLD claimed in the Rejection that its decision was based on the fact that Cherokee failed to provide request information. Megan Allred of SLD later claimed that, in fact, the decision was based on the fact that Cherokee 'can not cancel the FRNs because payments have already been made on the FRNs").

the USAC decision says, assuming *CCS has correctly framed the basis of USAC's decision*, the only question before the Commission is whether USAC can properly require an applicant to return E-rate funds before accepting a Form 500. CCS does not address this question. Indeed, its Request for Review is devoid of citation to any “relevant Federal Communications Commission rule, Commission order, or statutory provision” regarding the requirements for withdrawing a funding request.

Instead, CCS's Request for Review essentially asks the Commission to determine the party from which E-rate funds should be ultimately recovered – CCS or PNC. This determination would require the Commission to resolve a host of issues regarding whether CCS and PNC violated their respective obligations under the E-rate program and, if so, “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.”¹³ USAC did not address let alone resolve any of these issues. While the Wireline Competition Bureau's review of USAC decisions is *de novo*, 47 C.F.R. § 54.723, the Commission's review process contemplates that the Commission will review decisions actually made by USAC and that USAC, not the FCC, will resolve factual disputes in the first instance.¹⁴

In this case, the USAC decision of which CCS seeks review raises a narrow question – whether USAC properly rejected CCS's Form 500 because of CCS's failure to provide “requested information.” Even assuming the “requested information” is the E-rate monies that

¹³ Request for Review at 11 (citing *Fourth Report and Order*).

¹⁴ See *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies, San Antonio, TX, et al.; Schools and Libraries Universal Service Support Mechanism*, Order, 21 FCC Rcd 5348 (2006) (remanding to USAC with direction to “conduct further investigation and analysis” whether a service provider has improperly participated in an applicant's bidding process based on USAC's “pattern analysis” procedure).

are the subject of the Funding Requests that CCS seeks to withdraw, the Commission can and should resolve the Request for Review without delving into issues and factual disputes upon which USAC has never passed.

B. Any Recovery Action of E-Rate Funds Should Be Directed to CCS.

To the extent the Commission is inclined to decide the party from which E-rate funds should ultimately be recovered, the Commission should direct USAC to initiate a recovery action against CCS as the party that has violated the rules of the E-rate program. Under its own version of events, CCS violated the competitive bidding requirements, violated the obligation to calculate properly the discount rate, and violated the obligation to pay the non-discounted share. These rule violations are the three specific examples the FCC has provided of the type of violation for which a school should be held responsible.¹⁵

During its early years of operation, the E-rate program adopted the Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Order, FCC 99-291 (1999) (“*Commitment Adjustment Order*”), which first allowed USAC to recover funds that were committed in violation of the rules. In the *Commitment Adjustment Order*, USAC determined that it would seek recovery of any wrongly distributed funds from the service provider. The service provider then, in turn, could seek recovery from the school or library.

However, in 2004, the Commission adopted the *Fourth Report and Order*, which established a framework to govern what amounts should be recovered, and from whom, when funds were disbursed in violation of Commission rules. In the *Fourth Report and Order*, the Commission concluded that “recovery actions should be directed to the party or parties that

¹⁵ *Fourth Report and Order*, 19 FCC Rcd 15252, ¶ 15.

committed the rule or statutory violation in question.” The Commission recognized “that in many instances, this will likely be the school or library, rather than the service provider.” *Id.* at ¶10.

The Commission directed USAC 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.” The Commission provided specific examples of the type of violations that would be more likely to be the responsibility of a school or library, such as a violation of the competitive bidding requirements, the obligation to calculate properly the discount rate, and the obligation to pay the non-discounted share. The Commission also provided examples of the type of violations that would likely be the responsibility of the service provider, such as the failure to deliver supported services within the relevant funding year or to properly bill for services. *Id.* at ¶15.

Since the *Fourth Report and Order*, the Commission has reiterated its direction that USAC seek recovery of wrongly disbursed funds from the party that committed the rule violation. See *ATEK Construction, Inc. – Los Angeles Unified School District, Los Angeles, California, et al.*, 20 FCC Rcd 4103 (2005). For example, in at least two cases, the Commission affirmed USAC decisions that sought recovery of E-rate funds from a school for its failure to pay the non-discounted portion. *Iosco Regional Educational Services Agency, Tawas City, Michigan*, 48 CR 1045 (2009); *Hancock County School District, New Cumberland, West Virginia, et al*, DA 09-227 (2009).

There can be little doubt that CCS was in the best “position to prevent the statutory or rule violation” and “committed the act or omission that forms the basis for the statutory or rule violation.” CCS is the party that violated the competitive bidding process (to the extent any such violation occurred, which PNC denies), applied for E-rate funding based on a discount to which

it was not entitled, and failed to pay the non-discounted share. CCS also is the party that, upon learning that it could not verify the discount it had claimed, kept this information from USAC. And, most importantly, CCS is the party that failed to file Form 500 in a timely manner, despite repeatedly being advised to do so. Had CCS promptly withdrawn the Funding Requests after learning that it was ineligible for the discount, all the equipment ordered by PNC could have been returned, and the monies that PNC received from USAC could have been promptly refunded.

C. The Competitive Bidding Requirements Were Not Violated, And To The Extent Any Violation Occurred, CCS Was Responsible.

CCS alleges that PNC violated the competitive bidding requirements of the E-rate program by having “improper contact with Cherokee both prior to and after the Form 470 was filed, and prior to the award on the contract pursuant to that Form 470.” Request for Review at 2. Specifically, according to CCS, this “improper contact” consisted of Mr. Colvard of PNC allegedly: (i) “assist[ing] Cherokee with the preparation of the Form 470 and on matters relating to the appropriate discount level ...”; and (ii) participating “in meetings over the administration of the discount surveys between the issuance of the Form 470 and prior to the acceptance of its bid and prior to the filing of the Form 471.” Request for Review at 12. These allegations are unsupported by any evidence and are demonstrably false.

First, the Form 470 was prepared and submitted by Anthony Martin. As reflected in Mr. Martin’s sworn affidavit, “No one employed by or affiliated with PNC was involved in the preparation or certification of the Form 470.” According to Mr. Martin, he prepared the Form 470 on behalf of CCS “without any input, review or participation by PNC.” Affidavit of Anthony Martin ¶ 5 (“Martin Affidavit”). Mr. Martin never asked for and did not receive any

assistance from Mr. Colvard in completing the Form 470. Martin Affidavit ¶ 6; Colvard Affidavit ¶ 7.

Second, CCS's allegation that Mr. Colvard "assisted" in the preparation of the Form 470 is based solely on a relatively innocuous email exchange between Mr. Colvard and Mr. Martin on January 3, 2008. Request for Review, Exhibit J. The email exchange does not reflect that PNC provided any assistance to CCS in preparing the Form 470, notwithstanding CCS's claims otherwise.

On January 3, 2008, Mr. Colvard received a voicemail from Mr. Martin, who indicated he was trying to access the USAC website and was having problems doing so. Mr. Colvard e-mailed Mr. Martin the URL for the Schools and Libraries Division home page at USAC's website. Mr. Martin responded by email, asking for the phone number of Ms. Doris Sparks, who was the Director of Technology for the Mitchell County, North Carolina school system and who was a resource for Mr. Martin on E-rate matters. Mr. Martin could not find Ms. Sparks' telephone number and thought Mr. Colvard might have it handy, which he did. Although Mr. Martin does not recall specifically why he wanted to speak with Ms. Sparks on January 3, 2008, he believes he was trying to determine whether Ms. Sparks was having the same trouble accessing the USAC website that he was experiencing. Martin Affidavit ¶ 6; Colvard Affidavit ¶ 7. This email exchange was not improper and had no bearing on the selection of a vendor or the calculation of CCS's discount.

Third, with respect to the calculation of the discount, CCS calculated the discount in Years 11 and 12 using the survey method. CCS utilized a survey instrument provided by E-Rate Central and distributed it to the families of school students in the Cherokee County system. Martin Affidavit ¶ 9. Although CCS alleges that PNC "advised Cherokee's Mr. Martin on how

to conduct and tabulate the survey” and that Mr. Martin “relied on the advice provided by PNC” in determining CCS’s discount, Request for Review at 13, CCS does not provide a shred of evidence to support such allegations.

Furthermore, these allegations are contradicted by Mr. Martin, who prepared the Form 471 on behalf of CCS for both Year 11 and 12 “without any input, review, or participation by PNC.” According to Mr. Martin, “No one employed by or affiliated with PNC was involved in the preparation or distribution of these surveys or in the calculation of the discounts reflected on the Form 471s that [he] submitted to USAC.” Martin Affidavit ¶ 9. Mr. Martin has stated in no uncertain terms that he decided to use the survey method – a decision he made “without any advice or instruction from Mr. Colvard or anyone else at PNC.” Martin Affidavit ¶ 10.¹⁶

Fourth, CCS’s claim that Mr. Colvard participated “in meetings over the administration of the discount surveys” is a gross overstatement. Mr. Colvard admittedly was present on a single occasion when the surveys were being organized and filed and offered to help with this effort. But when advised by Ms. Hardin that he should not have access to the surveys, Mr. Colvard promptly left the room. Mr. Colvard was merely trying to be helpful in organizing and filing the surveys, and Mr. Colvard’s activities had no impact on the calculation of the discounts claimed by CCS. Martin Affidavit ¶ 11; Colvard Affidavit ¶ 9.¹⁷

¹⁶ Citing Ms. Hardin’s Affidavit, CCS asserts that “[w]hile Cherokee was formulating its Form 470, Mr. Colvard provided additional information to Cherokee employees on how to qualify for Priority II funding by using individual school surveys” Request for Review at 4, n.8. However, nothing in Ms. Hardin’s Affidavit supports this assertion, and her Affidavit is completely silent of the subject of Mr. Colvard allegedly providing information about the use of individual school surveys while CCS was formulating its Form 470.

¹⁷ Although CCS cannot agree on the date that Mr. Colvard was briefly present when the surveys were being organized and filed, both Ms. Hardin and Ms. Beaver claim it that was “[o]n or about February 6, 2008.” Hardin Affidavit ¶ 5; Beaver Affidavit ¶ 7. Assuming they are correct, Mr. Colvard’s presence obviously had no impact on the selection of a vendor as PNC was the only bidder and the contract between PNC and CCS was executed on February 4, 2008. Gaura Affidavit, Exhibit 1; Martin Affidavit ¶ 7.

In short, there is no evidence that the competitive bidding process was compromised. Nonetheless, as CCS acknowledges, “bidding violations are within the control of the Billed Entity.” Request for Review at 12. Thus, if the email exchange between Mr. Martin and Mr. Colvard and Mr. Colvard’s brief presence in a room where surveys were being sorted and organized violated the Commission’s competitive bidding requirements, CCS sought and obtained USAC approval of the Funding Requests with full knowledge of these violations.

CCS argues that it should not be held accountable for any violations of the competitive bidding requirements because “Cherokee’s E-rate program was being administered by Anthony Martin” who supposedly “did not have a very extensive understanding of the E-rate program.” Request for Review at 12. Whether or not he was an E-rate expert, CCS’s suggestion that Mr. Martin was acting as some kind of “lone wolf” on E-rate matters is without merit. In fact, Ms. Hardin was named to her current position effective January 10, 2008, which made her ultimately responsible for technology in the school system, including the E-rate program. Ms. Hardin had an office at the NOC, reviewed and signed documents prepared by Mr. Martin, and was very involved in decisions relating to the E-rate program at CCS. Martin Affidavit ¶ 25. Indeed, by her own admission, Ms. Hardin actively participated in administration of the E-rate program, including conducting meetings with PNC and soliciting guidance about E-rate matters from the State of North Carolina. Hardin Affidavit ¶¶ 13-15 & 20. CCS cannot shirk its responsibility for the E-rate violations at issue by laying blame at the feet of a former employee.¹⁸

¹⁸ In his Affidavit (¶ 7), Dr. Lane claims that Mr. Martin was terminated, “in large part” because he “was not qualified to administer the E-rate program and apparently relied upon Phillip Colvard, a regional sales representative of PNC, for assistance.” However, when Dr. Lane terminated Mr. Martin’s employment contract with CCS by letter dated June 1, 2009, the reason given was a “reduction in force.” Martin Affidavit ¶ 22, Exhibit 1. Likewise, there is no evidence to suggest that Mr. Martin “relied upon” Mr. Colvard for assistance, and Dr. Lane’s June 1, 2009 letter makes no mention of the alleged reliance on Mr. Colvard as the reason for terminating Mr. Martin’s contract.

D. CCS Violated E-Rate Rules By Applying For E-Rate Funding Based On a Discount To Which It Was Not Entitled.

No dispute exists that CCS applied for E-rate funding based on a discount to which it was not entitled and that CCS violated E-rate rules by doing so. There also is no dispute that as early as November 7, 2008, concerns were raised about the discount to which CCS claimed to be eligible when a state agency questioned the survey results upon which CCS's discount was based.¹⁹ These concerns were confirmed in a compliance examination conducted by that same state agency in April 2009, which found that the "current discount calculations based on FY 2008 survey cannot be verified."²⁰ Yet another audit commenced in June 2009 also was unable to validate CCS's discount.²¹

CCS does not deny that it applied for E-rate funds based on a discount to which it knew it was not entitled, blithely conceding that it "should not have submitted the Form 486." Request for Review at 14. But in the same breath, CCS attempts to blame PNC, constructing a fanciful story that it was: (i) forced to file Form 486 due to an alleged threat by PNC that telephone service at Mountain Youth and Peachtree schools "would be turned off if a Form 486 was not filed"; and (ii) induced to file Form 486 based on alleged assurance "that PNC would take no action on the rest of the project until Cherokee could verify its discount level." CCS's version of events surrounding the filing of the Form 486 is completely fictional.

¹⁹ See Gaura Affidavit, Exhibit 4 (November 7, 2008 Email from Barry W. Pace, North Carolina DPI E-Rate Specialist, to Jeana Hardin, Cherokee County Schools).

²⁰ Exhibit V to Request for Review, at 23.

²¹ See Exhibit BB to Request for Review (Funds for Learning, Universal Service Funding ("E-Rate") E-Rate Discount Calculation Survey Methodology Review for Cherokee County School District, at 1 (Oct. 23, 2009)).

CCS's allegations about the purported "threats" and "agreement" are based on Ms. Hardin's and Ms. Beaver's version of two meetings with PNC – one on February 24, 2009 and the other on April 16, 2009. Not surprisingly, the PNC representatives in attendance at these meetings have a very different recollection of what was said and deny CCS's allegations in no uncertain terms. *See* Gaura Affidavit ¶¶ 7-8; Colvard Affidavit ¶¶ 10-11 (denying that "PNC made any such threats or reached any such agreement at the April 16 meeting or any other time"); Whitt Affidavit ¶¶ 4-5 ("Neither Mr. Colvard nor any other PNC employee threatened to discontinue phone service, nor did we agree to delay the project").

Importantly, CCS has not produced a single document that evidences the alleged "threats" by PNC or memorializes the alleged "agreement" with PNC. There are no emails, letters, or even an internal "note to file" in the voluminous materials accompanying CCS's Request for Review that support Ms. Hardin's and Ms. Beaver's version of events. And, in the correspondence between the parties, no mention is made of any threats by PNC to discontinue service or any agreement by PNC to "hold off" implementing the project until CCS could verify its discount. For example, the June 1, 2009 letter from Dr. Lane directing PNC to "cease any activity" on the Funding Requests says nothing about the purported threats or agreement. It is simply not credible that no one at the school system took the time to document that CCS filed the Form 486 under duress or had been induced to do so by PNC if – as Ms. Hardin and Ms. Beaver now claim – that is actually what happened.

Of course, that is not what happened, and CCS's allegations that it "filed Form 486 only after PNC's [sic] insisted that it would turn off the existing, previously installed, phone service unless the Form 486 was filed" and only after PNC agreed to a "standstill" on the project ignore two critical facts. Request for Review at 14-15. First, it was Mr. Martin who filed the Form 486,

not Ms. Hardin or Ms. Beaver. Second, Mr. Martin was unaware “of any threat by PNC to discontinue telephone service or any agreement by PNC to delay the project” when he filed the Form 486. Martin Affidavit ¶ 14. Thus, CCS’s claim (Beaver Affidavit ¶ 19) that “Cherokee filed a Form 486 on April 20, 2009, based on PNC’s representations at the April 16, 2009 meeting” cannot be true, given that Mr. Martin filed the Form 486, and he “had no knowledge of the meeting on April 16, 2009 or any representations made by PNC during that meeting.” Martin Affidavit ¶ 15.²²

The credibility of CCS’s version of events is further undermined by other facts in the record. With respect to the alleged “threat” by PNC to cut off telephone service at the Mountain Youth and Peachtree schools unless CCS filed Form 486, PNC had no control over the equipment or the licenses that CCS was using to provide telephone service at those schools and was in no position to “cut off” service. CCS obtained a Call Manager system on loan from Cisco that allowed the Mountain Youth and Peachtree schools to access phone lines at the NOC, and Cisco gave CCS a three-month license to operate this system. Although Cisco extended the license for an additional three-month period based on CCS’s representation that E-rate funding was imminent, Cisco made very clear that CCS needed to find a permanent solution, whether or not it could be funded by the E-Rate program. Only Cisco, and not PNC, had the ability to grant an extension of the license for CCS to use the Call Manager system, and Cisco flatly disputes

²² Mr. Martin was not provided with a copy of and had never seen any letter, email, or other written documentation of such a threat or agreement prior to his filing the Form 486. In fact, the first time Mr. Martin became aware of PNC’s alleged threat to discontinue telephone service and PNC’s alleged agreement to delay the project was when he read CCS’s Request for Review and supporting documents in April 2010. Martin Affidavit ¶¶ 14-15. Furthermore, according to Mr. Martin, had he been aware of an agreement by PNC to “hold off” on providing services listed on the Form 486 until the discount rate had been verified, Mr. Martin would not have submitted the Form 486 because of concerns about the accuracy of the required certification. Martin Affidavit ¶ 17.

any suggestion that the temporary license “was leveraged to get CCS to proceed with their ERATE filing under duress.” Gaura Affidavit ¶ 9, Exhibit 2 (copy of February 10, 2010 email from Cisco to Jeana Hardin).

Regarding the alleged agreement by PNC to “hold off” on the project until CCS could verify its discount, based on the April 16, 2009 meeting and CCS’s desire for a June 1, 2009 start date, PNC understood that the project was going forward and made plans accordingly. On April 21, 2009, Mr. Colvard sent an email to PNC staff explaining the project and the timing of the work, noting that PNC was “approved from Cherokee County Schools to start the IP Telephony and Network Upgrade project” and that the project had a June 1, 2009 start date. It would have been nonsensical for PNC to prepare to launch the project if PNC had agreed to “hold off” doing so “until Cherokee could verify its discount rate,” as Ms. Hardin asserts in her Affidavit (¶ 16). Colvard Affidavit ¶ 12.

In May 2009 PNC began ordering the equipment for the CCS project, all of which was shipped to CCS’s NOC. Mr. Martin fully expected these deliveries and readily accepted delivery of the equipment when it arrived. Mr. Martin was never instructed by Ms. Hardin or anyone else at CCS to refuse delivery of the equipment or to return the equipment to PNC. And, when Mr. Martin told Ms. Hardin and others at CCS about the equipment deliveries in May 2009, no one acted surprised or “alarmed.” Martin Affidavit ¶ 21.

If the equipment was not “anticipated by CCS,” Request for Review at 7, or if PNC had agreed to “not move forward with the project until questions regarding the discount were answered,” Hardin Affidavit ¶ 20, CCS presumably would have refused to accept delivery of the equipment or returned the equipment to PNC – neither of which CCS did. It also is noteworthy