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IN RE: THE MATTER OF LAKE PEND
ORIELLE SCHOOL DISTRICT,

Appellant.

CC Docket No. 02-6

REQUEST FOR REVIEW

COMES NOW, Lake Pend Oreille School District, by and through its attorneys of record, Anderson, Julian & Hull, and hereby requests review of the Funding Commitment Decision letter dated September 28, 2010, regarding funding request Nos. 1990460 and 2019726, and funding commitment decision letter dated September 29, 2010, regarding funding request Nos. 1818465 and 1818472. This appeal is supported by the Declaration of Lisa Hals, filed herewith.

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I. INTRODUCTION

On June 4, 2010, the Lake Pend Oreille School District (“LPOSD”) received a letter from USAC indicating that USAC was considering denial of funding under the E-rate program for the 2009 and 2010 funding years, FRN’s 1818472, 1818465, 1990460, and 2019726, and asking for additional information. On July 14, 2010, LPOSD responded with additional information, and a request for waiver of the rules, pursuant to 47 C.F.R. § 1.3. On September 28 and September 29, 2010, LPOSD received letters from USAC indicating that funding would be denied because USAC has concluded that LPOSD “did not conduct a fair and open competitive bidding process.” USAC did not render an opinion on LPOSD’s request for a waiver of the rules under the circumstances of the case.

II. FACTUAL BACKGROUND

LPOSD is a school district that covers a large geographic area, most of which is mountainous and forested. In 2004, based on the recommendations of the LPOSD's outgoing Technology Director, Gary Carpenter, LPOSD determined that the best solution to provide internet access to its numerous and widespread school sites would be to do so wirelessly. This recommendation was made in large part due to mountainous terrain and distance between schools. The shift to wireless internet was overseen by Jim Bangle, who replaced Gary Carpenter.

Until approximately February, 2006, LPOSD had received wireless internet service from Intermax, a company out of Coeur d'Alene, Idaho. This wireless internet service was intermittent, slow, and frequently knocked out by the major snowstorms which occur in northern Idaho. These problems were so significant that by early 2006, various school employees began writing letters to LPOSD administration demanding that the internet issues be fixed. *See Hals Dec.*, Ex. A (exhibit 5). For example, on January 13, 2006, a letter was written discussing the significant problems the intermittent internet service was creating for instructional activities, and was signed by more than 40 employees from Sandpoint High School. *Id.* On January 12, 2006, the librarian at Kootenai Elementary School wrote a letter explaining how the internet problems prevented students from taking online tests. *Id.* On January 21, 2006, a Sandpoint High School science teacher wrote a letter explaining how it was difficult, if not impossible, to use the online resources he had available because of the internet service. *Id.* LPOSD had been having these troubles from the time LPOSD started receiving internet service from Intermax. These issues had been going on for a long time, and the letters show that the issues became worse in the winter due to winter storms. Thus, it became a necessity to find some other internet service provider

which would be more reliable. In 2005, due to these significant and numerous problems with Intermax, LPOSD began looking at options for other internet service providers.

One of the options LPOSD considered was Trillion. In early 2005, LPOSD began communicating with Trillion, an internet service and data provider out of Austin, Texas. It appears that school district employees became aware of and familiar with Trillion at a trade show or convention of some sort in early 2005. This introduction thereafter led to correspondence with Trillion employees. This correspondence was in the nature of figuring out what services were offered by Trillion, and whether there were options available which provided better service than Intermax.

In late April or early May, 2005, Trillion offered to fly LPOSD representatives out to Colorado to look at a school district already using Trillion's services. Trillion also paid for food and lodging expenses for this trip. In late May 2005, two LPOSD employees, Assistant Administrator Doug Olin and Jim Bangle, made the trip to Colorado at Trillion's expense. While there, they were able to see how Trillion's services worked for the Colorado Springs School District, which has similar geographic and weather conditions to LPOSD (i.e. it's mountainous and subject to heavy winter storms). Olin and Bangle were also able to talk with Colorado Springs School District employees, who gave good reviews of the services Trillion provided. Mr. Olin and Mr. Bangle did not consider this trip as a bribe or kickback by Trillion in order to convince them to switch to Trillion's service. Further, the District did not consider or believe this trip to be a violation of USAC's rules; this trip was due diligence to see if Trillion, or any service provider, could actually provide effective wireless service to a number of school sites within a large, mountainous, forested school district prone to severe winter storms. Frankly, neither Mr.

Olin nor Mr. Bangle had the authority to enter into a contract for internet services on behalf of LPOSD. See *Hals Dec.*, Ex. A (exhibit 2, ¶¶ 7 – 8).

By allowing its employees to visit another district at Trillion's expense, LPOSD in no way meant to violate USAC and FCC statutory and regulatory provisions, nor does it believe that it did so. Candidly, had LPOSD believed that USAC would consider this trip a violation of its rules, it would have sent Mr. Bangle and Mr. Olin at the school district's expense. Even though LPOSD does not believe it violated USAC's rules by allowing Olin and Bangle to travel to Colorado Springs to inspect a similar district's wireless access, LPOSD is willing to pay back to Trillion any expenses incurred as a result of this trip, and any meals or other gratuities provided by Trillion to LPOSD employees in order to cure the alleged conflicts of interest. LPOSD has informed USAC of this willingness, but no response to this offer was received as part of the USAC denial letters. *Hals Dec.*, Exs. 2 and 3.

LPOSD does not argue that Jim Bangle did not communicate with Trillion employees. The e-mails already produced by LPOSD to USAC, show that throughout the summer and fall of 2005, Jim Bangle had communications with Trillion employees, the exception being gaps of time where it appears Mr. Bangle was busy working on projects for LPOSD.

On December 16, 2005, LPOSD posted a Form 470 to USAC. *Hals Dec.*, Ex. A (exhibit 7). This form identified Jim Bangle as the contact person at the school district. (Id.). The form was fairly specific, identifying that LPOSD was seeking services related to internet access. (Id.). In searching through records, LPOSD has been able to identify that only two entities provided bids to LPOSD in response to the 2005 Form 470. *Hals Dec.*, Ex A (exhibit 1, ¶ 11). One of these entities was Trillion. The other entity was Conterra Ultra Broadband, LLC, a company out of Charlotte, NC. *Hals Dec.*, Ex. A (exhibit 1, ¶ 11; exhibit 4; exhibit 6).

Jim Bangle prepared an analysis regarding the bids submitted by Trillion and Conterra. *Hals Dec.*, Ex. A (exhibits 3 and 4). As can be seen, neither Conterra nor Trillion received a perfect rating. Neither Conterra nor Trillion had local technicians, but both indicated that they would fix any problems as quickly as possible. (Id.). However, Conterra's bid had a number of other problems. Conterra indicated in their bid that they would not be able to reach Southside Elementary School, one of the southernmost sites in LPOSD, due to its proximity to a mountain. *Hals Dec.*, Ex. A (exhibit 4). This was concerning, as intermittent internet access at Southside had already been an issue with the service provided by Intermax. There were a number of other concerns with Conterra's bid, including the fact that the service Conterra provided was going to cost \$4,000 more per month than Trillion's service. *Hals Dec.*, Ex. A (exhibit 6).

Based on 1) the fact that Trillion would be able to provide wireless internet access to all of LPOSD's sites, 2) that it was significantly cheaper, and 3) the urgency of finding an internet service provider that could provide effective service, it was determined to award the contract to Trillion, as it was the most cost effective of all the bids received. On February 3, 2006, LPOSD entered a contract with Trillion for internet services and to maintain LPOSD's wide area network ("WAN"). The contract has a term of seven years. It was signed on behalf of LPOSD by then superintendent Mark Berryhill, who had been delegated authority by the Board of Trustees to sign the contract. *Hals Dec.*, Ex. A (exhibit 2, attachment A).

Shortly thereafter, at a regularly scheduled meeting of the LPOSD Board of Trustees on April 25, 2006, the Board of Trustees approved the Contract between the School District and Trillion. *Hals Dec.*, Ex. A (exhibit 2, ¶ 4 and attachment A). Jim Bangle was not present at this Board meeting. *Hals Dec.*, Ex. A (exhibit 2, attachment A). When discussion was had regarding affirmation of the Trillion contract, only Lisa Hals and Superintendent Berryhill presented

information to the Board, and such information was mostly related to construction of towers for internet access. *Id.* Under Idaho state law, neither Jim Bangle nor Doug Olin had the power to enter into a contract with a service provider. It is the Board of Trustees that is the governing body of the school district, not the IT manager. *Idaho Code* § 33-501. It is the Board that enters into contracts, *see Idaho Code* §§ 33-512, 33-513, 33-515, 33-601, 67-2806, unless such power is delegated to a district employee. In this case, the authority was so delegated, and it was then Superintendent Mark Berryhill who entered into the contract with Trillion, not Jim Bangle or Doug Olin. *Hals Dec.*, Ex A (exhibit 2, attachment A). There is no evidence of any communication between Mark Berryhill and any Trillion employee. There is no evidence of any gifts, lodging, meals or other similar items provided to Mr. Berryhill by Trillion. After Mr. Berryhill entered the contract, it was ratified by the Board of Trustees. *Hals Dec.*, Ex. A (exhibit 2, attachment A). There is similarly no evidence of any communication or contact between any Trillion employee and any board member. *Hals Dec.*, Ex. A (exhibit 2, ¶ 11).

On June 12, 2009, LPOSD received a letter from USAC Schools and Libraries Division indicating that USAC had concerns about services provided by Trillion. According to the letter, the state of Arizona brought a complaint against Trillion for antitrust violations, bid rigging, procurement fraud, and conflict of interest. This lawsuit sparked an investigation by USAC, and as a result USAC requested that LPOSD provide information relating to communications between Trillion and LPOSD, all gifts, meals, trips, or entertainment provided by Trillion, and any E-rate seminars sponsored by Trillion which LPOSD employees attended. LPOSD responded to these requests for information by providing all information and documentation which it could find to USAC as requested.

Due to the concerns over potential funding issues because of Trillion's devolving relationship with USAC, on December 10, 2009, LPOSD filled out and filed a new Form 470 with USAC. *Hals Dec.*, Ex. A (exhibit 1, ¶ 4 and attachment A). In response to this request for bids, LPOSD received contact from only one entity, Unite Private Networks, out of Kearney, MO. *Hals Dec.*, Ex. A (exhibit 1, ¶ 6 and attachment B). However, the documentation received from Unite was not a bid; it was an advertisement. Unite did not provide any information regarding costs for services they provided, or costs related specifically to providing services to LPOSD. Instead, Unite provided two press releases and a brochure regarding the installation of fiber optic networks it had completed in other school districts. *Hals Dec.*, Ex. A (exhibit 1, attachment B). The e-mail from Unite's representative, Rob Oyler, specifically indicated that Unite was willing to install a fiber optic network for LPOSD. *Id.* However, as the district was looking for wireless internet service and maintenance of a wireless network, this offer was considered non-responsive by LPOSD.

Because no other entities submitted bids to the 2009 Form 470, LPOSD was obligated to continue receiving services from Trillion, or go without internet service due to lack of funding.

On June 4, 2010, USAC informed LPOSD that it would be denying the funding requests for funding years 2009 and 2010 on the grounds that LPOSD did not conduct a fair and open competitive bidding process related to the 2005 Form 470. *Hals Dec.*, Ex. D. As discussed above, LPOSD responded to USAC's letter by providing a letter with additional information on July 14, 2010. *Hals Dec.*, Ex. A. On September 28 and 29, 2010, USAC informed LPOSD that funding for the 2009 and 2010 funding years was going to be denied. *Hals Dec.*, Exs. B and C. This appeal follows.

III. LEGAL ISSUES AND ARGUMENTS

Through the Telecommunications Act of 1996, Congress put in place a program, called the Universal Service to assist with providing internet access to consumers in rural and high cost areas. *See 47 U.S.C.* § 254. This program also was designed to offset the costs for internet access to schools, libraries, and health care providers. *See 47 U.S.C.* § 254(b). This program was to be run by an administrator under the governance of the Federal Communications Commission. *See 42 U.S.C.* § 254; *47 C.F.R.* § 54.5. USAC has been designated as the Administrator for the Universal Service program. *47 C.F.R.* § 54.701. The program for schools and libraries is also known as the “E-rate” program.

In order to be eligible for E-rate funding, a school district must file a Form 470 with USAC indicating what E-rate eligible services¹ they are seeking. *47 U.S.C.* § 54.504(b). *See Ysleta*, 18 FCC Rcd 26406, ¶¶ 27 – 28. The Form 470 is then posted on USAC’s website for 28 days to allow for potential vendors and service providers to submit bids to the district regarding the requested services. *47 C.F.R.* § 54.504(b).² This procedure is used to ensure that any E-rate funds distributed are done under a competitive bidding process which ensures that there is a minimum of waste. *47 C.F.R.* § 54-504(a); *Ysleta*, 18 FCC Rcd 26406. When picking a service provider, the district must pick the most cost effective option of those who bid. *Ysleta*, 18 FCC Rcd 26406, ¶ 47. To determine which bidder is most cost effective, districts may look at such factors as prior experience, past performance, personnel qualifications, management capability, environmental objectives, and cost of services. *Ysleta*, 18 FCC Rcd 26406, ¶ 48. Of these factors,

¹ These services include telephone, internet access, internal connections, text messaging, and other services.

² The public bidding requirements of the Universal Service program are in addition to state bidding requirements, and do not preempt state bidding rules. *47 C.F.R.* § 54.504(a). However, the FCC tends to interpret state bidding requirements and E-rate bidding requirements so that any apparent conflicts are read out of the statutes, and the federal bidding requirements cannot be preempted by the state bidding requirements. *See Ysleta*, 18 FCC Rcd 26406, ¶¶ 40 – 46.

cost of services “must be given more weight than any other single factor.” *Ysleta*, 18 FCC Rcd 26406, ¶ 50.

LPOSD contends that there are a number of reasons why the funding requests for the 2009 and 2010 funding years should not be denied. First, USAC exceeded the scope of its audit authority when it requested additional information from LPOSD in June, 2009. Second, the evidence shows that LPOSD did engage in a fair and competitive bidding process with regard to the 2005 Form 470. Third, even if there was a violation of the competitive bidding rules, LPOSD has since attempted to cure the alleged defects, but has not been able to obtain satisfactory replacement services with any provider under the E-rate program, and therefore requests a waiver of the rules with regard to the alleged defects of the 2005 Form 470 bidding process. These issues will be discussed in detail below.

A. THE AUDIT PERFORMED BY USAC EXCEEDS THE SCOPE PERMISSIBLE UNDER REGULATIONS.

The audit power allowed under the Universal Service/E-rate program is limited by regulation. It states:

Schools, libraries, and service providers shall be subject to audits and other investigations to evaluate their compliance with the statutory and regulatory requirements for the schools and libraries universal service support mechanism, including those requirements pertaining to what services and products are purchased, what services and products are delivered, and how services and products are being used. Schools and libraries receiving discounted services must provide consent before a service provider releases confidential information to the auditor, reviewer, or other representative.

47 C.F.R. § 54.516(c). As can be seen, this language permits audits into issues relating to “compliance with the statutory and regulatory requirements”. One of the statutory regulations includes the competitive bidding requirements. *47 C.F.R.* § 54.504(a). USAC indicated in their June 12, 2009 letter to LPOSD that LPOSD was required to comply with all FCC rules and

orders governing the program. Specifically, USAC listed at least three FCC rulings which USAC believes LPOSD may have violated. *Hals Dec.*, Ex. D (June 4, 2010 letter from USAC, p. 3). However, in requesting information to determine if LPOSD has violated these rulings, USAC has exceeded its authority, as these rulings are not “statutory or regulatory requirements”. Therefore, the audit was tainted, and the results equally tainted and should be discarded.

B. LPOSD ENGAGED IN AN OPEN AND FAIR COMPETITIVE BIDDING PROCESS RELATED TO THE 2005 FORM 470.

The next legal issue is whether LPOSD engaged in a fair and open competitive bidding process when it submitted the Form 470 in December, 2005. In the June 4, 2010 letter, USAC relied on a number of FCC rulings to show that LPOSD violated the competitive bidding rules. Each of these rulings is distinguishable from the facts in this case, and LPOSD requests that the FCC conclude that LPOSD did not violate the competitive bidding requirements.

First, in *Ysleta*, 18 FCC Rcd 26406 (2003), the school district at issue filed a Form 470 requesting every product and service eligible under the E-rate program. *Ysleta*, ¶ 10. Five vendors submitted bids, and the school district selected IBM. However, the only prices listed in IBM’s response were the per hour rate for the project executive and the project administrator. *Ysleta*, ¶ 13. After the school district awarded the bid to IBM, it then began negotiating with IBM for the costs of services provided. *Ysleta*, ¶ 15.

The FCC found significant problems with this approach stating that “the Commission’s rules and orders require competitive bidding on the actual products and services supported by the program, rather than merely on the basis of a vendor’s hourly rates, reputation, and experience.” *Ysleta*, ¶ 24. Further, by submitting a request for every product and service eligible, the school district failed to submit a proper Form 470. The FCC stated “an applicant’s FCC Form 470 must be based upon its carefully thought-out technology plan and must detail specific services sought

in a manner that would allow bidders to understand the specific technologies that the applicant is seeking.” *Ysleta*, ¶ 28. The FCC also held that even if the school district did comply with local bidding laws, such does not necessarily mean compliance with the E-rate competitive bidding requirements. *Ysleta*, ¶ 42. Finally, the FCC held that price must be the primary factor in selecting a bid, and that the school district violated this principle by selecting IBM before knowing exactly what the price would be. *Ysleta*, ¶¶ 47 – 55. Despite these errors, the FCC determined that the school district would have the opportunity to rebid for the funding year. *Ysleta*, ¶ 20. The FCC found that allowing rebidding was in the public interest because the school district could reasonably have believed that its actions were appropriate based on prior approvals by the USAC of other school districts under similar circumstances.

The guidance given in *Ysleta* does not apply to this case. Clearly LPOSD did not fill out its 2005 Form 470 in the same manner as Ysleta School District. LPOSD specifically sought two services: wireless internet access and maintenance of LPOSD’s wireless WAN (wide area network). *Hals Dec.*, Ex. A (exhibit 7). Second, LPOSD did not choose a service provider based on reputation and name. Both Conterra and Trillion provided bids which outlined the services provided and the costs for those services, unlike IBM in *Ysleta*. Further, LPOSD did choose the most cost effective service provider. Conterra’s services would have cost almost \$50,000 more per year than Trillion’s services, and this would have included school sites which would not have received internet services due to Conterra’s limitations. Therefore, LPOSD did not violate the guidance given in *Ysleta*.

Next, the June 4, 2010 USAC letter relied on *MasterMind Internet Services*, 16 FCC Rcd 4028 (2000). In that case, a number of school districts attempted to use MasterMind as their service provider. However, funding requests were denied because Mastermind had either filled

out the forms on behalf of the school districts, signed the forms for the districts, submitted RFPs to other potential bidders, or had a MasterMind employee listed as the contract person for the school districts, all of which were violations of the competitive bidding requirements. *MasterMind*, ¶¶ 5 – 6, 10. The FCC stated that “a prospective bidder may choose not to participate in a competitive bidding process if it believes that the bidding will not be conducted in an open and fair manner, given that another bidder is serving as the contact person.” *MasterMind*, ¶ 11. Even though MasterMind was not always the successful bidder for each of the Form 470s in which it was involved, the FCC determined that open and fair bidding required that potential vendors stay out of the Form 470 preparation process.

This ruling is also distinguishable from what occurred with the LPOSD 2005 bidding process. *Mastermind* mostly deals with the appearance of conflicts of interest. Unlike the school districts in *MasterMind*, the 2005 Form 470 was prepared by Jim Bangle, who was listed as the contact person on the form. *Hals Dec.*, Ex. A (exhibit 7). Thus, there is no concern that any potential service providers would not submit a bid based on the fact that LPOSD already had decided to award the contract to Trillion or any other entity.

LPOSD admits that there are communications between Jim Bangle and Trillion which appear to indicate that he was partial to Trillion prior to the award of the contract. Indeed, as pointed out by USAC representative, Pina Portanova in the June 4, 2010 letter, there are e-mails indicating that Mr. Bangle was in contact with Trillion’s legal department, and had stated that he would be contacting them regarding filling out the Form 470. *See Hals Dec.*, Ex. D (p. 2). Because Jim Bangle is no longer with LPOSD, it is impossible to verify to what extent he communicated with Trillion. However, in responding to USAC’s various requests for information, LPOSD gathered every document and e-mail it could find which in any way

mentioned the E-Rate program and Trillion, and was unable to find anything documenting that Mr. Bangle actually did contact Trillion for assistance in filling out the 2005 Form 470. As far as LPOSD is aware, Jim Bangle filled out the Form 470, not Trillion or its employees. There is nothing in the 2005 Form 470 which would lead any potential bidders to conclude that LPOSD had already made up its mind to choose a service provider. *Hals Dec.*, Ex. A (exhibit 7). Therefore, there has been no conflict of interest under the *MasterMind* decision.

Finally, USAC relies on *Caldwell Parish School District*, 23 FCC Rcd 2784 (2008). In *Caldwell Parish*, eight school districts appealed a decision by USAC to deny funding to the FCC. *Caldwell Parish*, ¶ 9. For seven of the school districts, the service provider had sent in the Form 470 on behalf of the school districts. *Caldwell Parish*, ¶¶ 10, 12. Based on this, USAC concluded that the service provider had been involved in the preparation of the 470 forms. The school districts clarified the issue, indicating that they only used the service provider's FedEx account to track delivery of the forms, and that the service provider had no other involvement in preparing the bid forms. *Caldwell Parish*, ¶¶ 12 - 13. The FCC stated, regarding this issue, "Although we do not condone such actions, we cannot conclude under these circumstances that such assistance alone interfered with the competitive bidding process" for the seven school districts. *Caldwell Parish*, ¶ 12.

For the eighth school district, though, the FCC declined funding. The district admitted that the service provider had employees who advised the district as to what types of services were necessary, assisted the district in filling out the Form 470, and submitted the Form 470 from the service provider's office. *Caldwell Parish*, ¶ 15. The FCC stated that "the applicant [the school district] could not reveal information to the service provider that the applicant did not

share with all prospective bidders”, and that “FCC Form 470 must be completed by the entity that will negotiate with prospective bidders.” *Caldwell Parish*, ¶¶ 16 – 17.

Caldwell Parish is distinguishable from the facts in this case. First, it is unfair and inequitable for USAC to rely on a ruling from 2008 and use it as a reason for denying related to actions that were done in 2005. There is no basis for concluding that LPOSD could have known about or could have predicted any FCC ruling decided after 2005. As discussed above, LPOSD was in conformance with the FCC rules and decisions which had been issued as of the time the 2005 Form 470 was filled out by Jim Bangle.

Second, Trillion did not prepare the 2005 Form 470. As discussed above, this form was prepared and submitted by Jim Bangle. There is no evidence that Jim Bangle utilized any assistance from Trillion in filling out the 2005 Form 470. Though there are communications between Jim Bangle and Trillion employees, these only show that Jim Bangle was whining about having to figure out the Form 470. All evidence points to the fact that Jim Bangle filled out the form, not Trillion.

Third, as mentioned above, LPOSD is not aware that Trillion was provided any more information than any other potential bidder. The communications prior to December, 2005 between Jim Bangle and Trillion employees are benign, discussing such things as deadlines and timelines. Trillion and Conterra both received the RFP that LPOSD prepared in conjunction with the 2005 Form 470 (though apparently when Conterra printed the RFP, it cut off various information, *see Hals Dec.*, Ex. A (exhibit 6)). The district provided the same information to every bidder. LPOSD cannot assume that USAC and the FCC would interpret the guidance in *Caldwell Parish* to mean that no school district can receive funding under the Universal Service/E-rate program if it communicates with any potential service provider prior to filing the

Form 470. This is particularly true where the FCC concluded that there was no violation of FCC rules where seven of the eight school districts involved in the *Caldwell Parish* decision utilized a potential service provider's FedEx account to submit the Form 470 to USAC, *Caldwell Parish*, ¶ 15, and were still determined not to have violated the bidding procedures.

Simply stated, there is too much at risk for school districts not to communicate with potential service providers prior to submitting a form 470. The window between when a district must file the Form 470 and then submit the Form 471 related to the selection of a service provider is simply too short to effectively allow districts to consider alternative options. A district must be allowed time to do its due diligence, such as finding out what service providers exist, what services can be provided, and what services will best suit the district. In this case, that is all that LPOSD did. It communicated with Trillion exploring potential options. Then, when the Form 470 was submitted, and only two bids were prepared, LPOSD picked the cheapest, most cost effective option. LPOSD should not be penalized for taking the time prior to filing the Form 470 to figure out what was available and what it needed. There would have been no conflict if LPOSD had picked Conterra. However, the potential existed that USAC would deny funding to LPOSD on the ground that Conterra was not the cheapest, most cost effective bidder. Thus, LPOSD chose the option it thought would be approved by USAC, which was to utilize a service provider that could service all of LPOSD's school sites, and which was the cheapest option. In this way, LPOSD complied with the competitive bidding requirements of *47 C.F.R.* § 54.504.

LPOSD admits that its employees communicated with Trillion prior to filing the 2005 Form 470. However, this communication did not create a conflict of interest or violation of the competitive bidding rules. There is nothing in the communications between LPOSD and Trillion (all of which were provided to USAC in response to the June, 2009 USAC audit letter) which

allowed Trillion to provide a better bid than Conterra, or any other entity. The communications from Trillion are little more than encouragement to LPOSD to fill out the Form 470 so that Trillion could submit a bid. Further, there was no violation of Idaho bidding and procurement laws. School districts procure services pursuant to *Idaho Code* § 67-2806, which does not forbid any pre-bid communications or due diligence by a district. The District fully believed it was in compliance with all state and federal rules regarding procuring communication services.

Further, Jim Bangle and Doug Olin could not enter the contract on behalf of LPOSD; that power was reserved to the Board and Superintendent Mark Berryhill. There is no evidence of any communication between former LPOSD Superintendent Berryhill or the Board members and Trillion employees. See *Hals Dec.*, Ex. A (exhibit 2, ¶¶ 11 – 12). The FCC rules and decisions are designed to prevent “waste, fraud, and abuse, and [ensure] that funds disbursed through the E-rate program are used for appropriate purposes.” *Caldwell Parish*, ¶ 20. There is no such waste, fraud, or abuse in this case. In 2005 and 2006 LPOSD needed better wireless internet service than it currently had, and researched possible solutions. Then, when bids came in, the best, most cost effective option was selected. This complies with FCC rules, and therefore funding for the 2009 and 2010 funding years should not be denied.

C. IF A VIOLATION OF FCC RULES IS FOUND, LPOSD REQUESTS THAT A WAIVER OF THE RULES BE GRANTED RELATED TO THE 2005 FORM 470 BIDDING PROCESS.

FCC rulings make it clear that under certain circumstances, a waiver of the rules will be allowed. See *Ysleta*, ¶¶ 1, 66 – 74; *MasterMind*, ¶ 15. Waiver is allowed where “the particular facts make strict compliance inconsistent with the public interest.” *Ysleta*, ¶ 67; *47 C.F.R.* § 1.3. LPOSD believes that there are several reasons why waiver would be appropriate in this case, and requests that funding be reinstated for the 2009 and 2010 funding years.

There are a number of factors that weigh in favor of waiver under these circumstances.³ First, LPOSD has made a recent attempt to comply with the public bidding requirements. *Hals Dec.*, Ex. A (exhibit 1, ¶¶ 3 – 8 and attachments A and B). When LPOSD found that there was some concern regarding Trillion’s actions and the communication between LPOSD and Trillion, LPOSD filed a new Form 470 in 2009. *Hals Dec.*, Ex. A (exhibit 1, ¶ 3). This was done because LPOSD was concerned that USAC had indicated its intent to revoke Trillion’s status as a service provider, and to ensure that LPOSD complied with FCC rules. As discussed in the Factual Background, above, LPOSD only received one response to the 2009 Form 470, which was not a bid at all. Additionally, LPOSD could not accept the offer to install a fiber optic network; LPOSD had previously determined that a wireless internet service and WAN was necessary due to the large size of the district, as well as the mountainous terrain. Therefore, because LPOSD received no bids or acceptable offers, it had to continue receiving service from Trillion.

Second, LPOSD relied on the law as it understood it. The only one of the rulings discussed above that implies that applicants should not have pre-filing communications with service providers is *Caldwell Parish*, which was decided in 2008 (after LPOSD entered into the contract with Trillion). Granted, *Caldwell Parish* does rely on FCC training materials from 2001 when establishing this rule. See *Caldwell Parish*, ¶ 16 (fns. 50 – 51). However, these training materials are not regulations or rulings, see *47 C.F.R.* § 54.516(c), and are no longer available on the internet.⁴ It makes little sense to say that a district should lose funding based on training materials that are neither statutory or regulatory rules, and frankly are not accessible on the internet.

³ Many of these arguments also weigh in favor of finding that there was no violation of the competitive bidding rules.

⁴ LPOSD’s legal counsel has attempted to obtain these materials a number of times via internet, but was not able to access them. It is presumed they are no longer posted on the internet.

Third, in 2005 and 2006, LPOSD desperately needed a new internet service provider. Whereas Intermax provided wireless internet service that was intermittent and did not work during winter storms, Trillion's wireless internet service has been fantastic. The problems with intermittent service and down service during heavy snow have essentially disappeared. There are no more teacher complaints about internet service. Teachers and other staff members who had previously shied away from using technology because of the problems with dial-up (before Intermax) and wireless service (during Intermax) are now embracing the wireless technology.

The goal of the E-rate program is to help provide internet access to rural and poverty stricken districts. *See 47 U.S.C. § 254.* This goal certainly applies to LPOSD. LPOSD is in a rural, mountainous area, in which it is difficult to get good wireless internet connections. LPOSD receives approximately a 76% discount for services under the E-rate program, meaning that more than 50% of the students attending the district meet the FCC poverty level requirements and definition of disadvantaged. *47 C.F.R. § 54.505.* Trillion's service, which was the most cost effective service of the options presented, has allowed these students internet access in a way that was not previously available. Surely public interest is served by continuing to provide funding which would allow students to get internet services under these circumstances.

Fourth, due to the numerous financial emergencies that have plagued the state of Idaho, school funding has been cut so significantly that if LPOSD were to lose E-rate funding, the likely result would be that LPOSD would have to revert to dial-up internet access, or some other cut-rate service provider. This would result in intermittent internet access at most school sites, and potentially non-existent at other sites. Should access to wireless technology be lost, the curriculum and teaching at the schools will suffer; students will have less education options available to them, and it is likely that educators will again retreat from using technology in the

classroom. This has already happened once, *see Hals Dec.*, Ex A (ex. 5), and LPOSD desperately wants to avoid this situation happening again. LPOSD students need access to effective and reliable technology in order to have a chance at succeeding. Considering the purposes of the E-rate program, denying funding is not in the public interest.

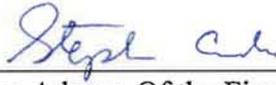
Therefore, to the extent that the FCC agrees with USAC's determination that LPOSD violated the competitive bidding requirements, LPOSD requests that the competitive bidding rules be waived and funding reinstated for the 2009 and 2010 funding years.

IV. CONCLUSION

Based on the foregoing, LPOSD requests that the FCC overturn USAC's decision regarding the 2009 and 2010 funding years, and reinstate funding under the E-rate program. Alternately, LPOSD requests that the FCC grant a waiver under *47 C.F.R.* § 1.3, and allow funding to continue pursuant to the 2005 Form 470 and 471 filled out by LPOSD. If any further information is requested, LPOSD will gladly provide such information.

DATED this 12 day of November, 2010.

ANDERSON, JULIAN & HULL LLP

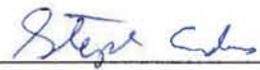
By 
Stephen Adams, Of the Firm
Attorneys for Lake Pend Oreille School
District

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12 day of November, 2010, I served a true and correct copy of the foregoing **REQUEST FOR REVIEW** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Marelene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile
 Electronic Filing


Stephen Adams