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

In the Matter of	)	
	)	CC Docket No. 02-6
Request for Review of Decisions of the Universal Service Administrator	)	
	)	
Duplin County School District Duplin County, North Carolina	)	File No. SLD524056 (FY2006)

To: Chief, Wireline Competition Bureau

REQUEST FOR REVIEW

Paul C. Besozzi
Carly T. Didden
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5292

John W. Hughes
New Hope Foundation
One Valentine Lane
Chapel Hill, NC 27516
(919)968-4332

Contracted Consultant & Contact For Duplin County School District

Dated: December 1, 2010

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SUMMARY

The Duplin County School District ("Duplin County" or "District") appeals the Universal Service Administrator's ("USAC") decision to recover previously-disbursed funds under the Schools and Libraries Support Mechanism ("E-Rate Program" or "Program") for two Funding Requests for Funding Year 2006 ("COMADS"). USAC claims the recovery is justified because the District "failed to comply with local and state procurement laws." Duplin County respectfully submits that USAC's conclusion is factually in error and not legally supportable. Indeed, the Commission has specifically previously addressed the factual scenario presented here and declined to find any violation of E-Rate Program rules.

USAC does not specify what "local and state procurement laws" the District allegedly violated. This factor in and of itself renders USAC's conclusions defective and deprives the District of its due process rights to file a meaningful and substantive appeal.

USAC appears to assert that Duplin County misled potential bidders by indicating that it would not use a Request for Proposals ("RFP"), but then doing so by providing such bidders the opportunity to obtain a document entitled "E-Rate Internal Connections Requested Needs Duplin County Schools 2006-2007" ("Additional Information"). This document did not ask for any bids, set any time frame or procedures for submitting any bids, list any bidder qualifications or in any way constitute an RFP. Further USAC neither contends nor demonstrates that an RFP was required as a matter of local or state procurement law.

Indeed, the FCC Form 470 itself contained sufficient detail to satisfy the competitive bid process required under the Program rules. All prospective bidders had an opportunity to obtain the Additional Information if they wanted it. So these prospective bidders were on a "level playing field" and not at a competitive disadvantage. As a result, there was no violation of the competitive bidding process as a result of the availability of the Additional Information.

In fact the Commission has previously addressed a nearly identical factual scenario in the 2008 *Approach Learning and Assessment Centers* decision. In that case, a number of the petitioners contended that the documents issued or available to prospective service providers were entitled, for example, "Scope of Work and Guidelines," and "Description of Services," were not RFP's but merely a restatement of information on their FCC Forms 470 with some additional information about the desired services. Others argued that prospective service providers did not need to read any documents other than the applicant's FCC Form 470 in order to prepare bids, explaining that each service provider expressing an interest in bidding received additional information regarding the desired services. Under such circumstances the Commission concluded that there was no violation of the competitive bidding process. For all the foregoing reasons, it must do the same in this case and direct USAC to rescind the COMADs.

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REQUEST FOR REVIEW

Duplin County School District (the "Duplin County" or "District"), acting pursuant to and in accordance with Sections 54.719-54.721 of the Federal Communication Commission's ("Commission") rules, hereby files this Request for Review ("Request") of decisions of the Universal Service Administrator ("USAC") to recover certain Schools and Libraries Support Mechanism ("E-Rate Program" or "Program") funding provided to the District for Funding Year ("FY") 2006.[1]

USAC claims the recovery is justified because the District violated the E-Rate Program competitive bidding rules because it "failed to comply with local and state procurement laws." Apparently USAC believes such violation occurred because the District on its FCC Form 470 indicated that it would not use "an RFP" for Internal Connections services that it was seeking and then allegedly did so. Duplin County respectfully submits that USAC's conclusion is factually in error and not legally supportable. Indeed, the Commission has specifically previously addressed the

[1] FCC Administrative Record ("FCCAR") at FCCAR00001-8 (USAC Notification of Commitment Adjustment Letters, dated October 6, 2010 and dated October 15, 2010, seeking to recover previously-provided E-Rate Program support for Funding Request Numbers ("FRN") 1476643 and 1476684 (collectively, the "COMADs")).

factual scenario presented and declined to find any violation. Therefore, the District's Request must be granted and USAC's efforts to recover the Program funds terminated.

I. STATEMENT OF THE DISTRICT'S INTEREST IN THE REQUEST

The District has standing to file its appeal because 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."[2] In this case, Duplin County is directly aggrieved by USAC's effort to recover previously-approved Program funds expended in accordance with that approval.

II. KEY BACKGROUND FACTS

A. The District

Duplin County is a District of 16 public schools located in the rural Southeastern part of North Carolina. The District has participated in the E-Rate Program since approximately 1998. Such participation has enabled the District to bring advanced telecommunications and Internet access services to its student population.

B. FCC Form 470 – Internal Connections

On January 16, 2006, USAC posted the School's FCC Form 470, Application No. 504030000577017, indicating its intent to seek telecommunications, Internet access, and internal connections services ("Form 470").[3] Specifically at issue here, on its FCC Form 470, the School sought the following internal connections services:

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[2] 47 C.F.R. §54.719(c).

[3] FCCAR00009-19 (FCC Form 470 Application Number 504030000577017, January 16, 2006).

Internal Connections	
Email Server with Groupwise software	1
Data Cabling	Increase Ethernet drops per classroom from 4 to 7 in 15 schools
Data cabling	Connect each IDF to its associated MDF via 1GHB fiber in 15 schools
Dedicated Internet Service	60 computers
Switches	17 to replace outdated switches
UPS	43 inter. power supplies
DHCP and DNS Servers	Replace old servers in 16 locations
Novell Netware SLA	9,000 students
Firewall	17 Cisco PIX firewalls
Telephone Systems	Upgrade of existing systems at 18 locations

The Form 470 indicated in Block 10 that no RFP had been released for the specified Internal Connections and that the District did not intend to release such an RFP. However, the Form 470, in Block 13a, stated that "The exact specification of the eligible equipment contained in Block 10 [relating to Internal Connections] may be obtained by contacting the Contact detailed in Block 6 via email at jhughes@newhopetech.org."

Those interested bidders who availed themselves of this option were provided a document entitled "E-Rate Internal Connections Requested Needs Duplin County Schools 2006-2007" (the "Additional Information").[4] The document did not ask for any bids, set any time frame or procedures for submitting any bids, list any bidder qualifications or in any way constitute a Request

[4] FCCAR00020-42 (E-Rate Internal Connections Requested Needs Duplin County Schools 2006-2007, undated).

for Proposals ("RFP"). It basically elaborated on the information already contained in the FCC Form 470 for Internal Connections recited above.

C. FCC Form 471

On February 16, 2006, the District filed its FCC Form 471, Application No. 524056, with USAC, certifying its selection of CDW-G and CNIC, Inc. as internal connection service and telecommunications service providers, respectively.[5] Specifically, the FCC Form 471 included the following funding requests: FRN 1476643 for Internal Connections (CDW-G) and FRN 1476684 (CNIC, Inc.), for telecommunications services.

USAC subsequently approved the FY 2006 funding requests in the discounted amounts of $820,838.53 (FRN 1476643) and $530,674.41 (FRN 1476684).[6] To date USAC has disbursed $684,753.25 for FRN 1476643 and $530,007.12 for FRN 1476684, respectively.[7]

D. The COMADs

On October 6, 2010 and October 16, 2010, respectively USAC sent the District the COMADs for the FRNs listed above, adjusting USAC's funding commitment in each case to $0.00 and seeking return of all disbursed funds[8] Therein USAC provided following Funding Commitment Adjustment Explanation:

> "After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. On your FY 2006 FCC Form 470 you certified that you reviewed and complied with all FCC, state and local procurement/competitive bidding requirements. During the course of an audit it was determined that you failed to

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[5] FCCAR00043-50 (FCC Form 471 Application No. 524056).

[6] The FRN related to CNIC, Inc. was originally mistakenly classified on the FCC Form 471 as "telecommunications", but was corrected during subsequent application review to "internal connections." FCCAR00051-57 (Funding Commitment Decision Letter, dated December 5, 2006).

[7] FCCAR00001-8 (COMADs).

[8] *See* note 1, *supra*.

> comply with all FCC, state and local procurement/competitive bidding requirements. It was indicated that an RFP would not be used for your internal connections on FCC Form 470 # 504030000577017 when in fact an RFP was used. The FCC rules require that the applicant submits a bona fide request for services by conducting internal assessments of the components necessary to use effectively the discounted services they order, submitting a compete description of services they seek so that it may be posted for competing providers to evaluate and certify to certain criteria under penalty of perjury. Since you failed to comply with local and state procurement laws you violated the competitive bidding process. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant."[9]

III. STANDARD OF REVIEW

USAC's authority to administer the E-Rate Program is limited to implementing and applying the Commission's rules and the Commission's interpretations of those rules as found in Commission decisions and orders.[10] USAC is not empowered to make policy, interpret any unclear provisions of the governing statute or the rules promulgated by the Commission,[11] or create the equivalent of new guidelines.[12] USAC is responsible for "administering the universal support mechanisms in an efficient, effective, and competitively neutral manner."[13] The Commission's review of the COMADs is *de novo*, without being bound by any findings or conclusions of USAC.[14]

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[9] FCCAR00001-8 (COMADs).

[10] 47 C.F.R. §54.702(c).

[11] *Id.*

[12] *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, Third Report and Order, 13 FCC Rcd 25058, 25066-67 (1998).

[13] 47 C.F.R. §54.701(a).

[14] 47 C.F.R. §54.723.

First, the District fully complied with the Commission's rules on seeking competitive bids by signing and certifying the FCC Form 470,[15] carefully considering all bids submitted,[16] and waiting the required four weeks before making commitments with the selected providers of the services.[17]

Second, each and every bidder had the opportunity to obtain the additional information that the District decided to make available to interested parties. A specific person was listed for interested bidders to contact. There was no separate RFP required under state and local procurement law as part of the competitive bidding process and no such RFP process was initiated or conducted.

IV. ARGUMENT

A. USAC Fails What Was the Violation of Local and State Procurement

The crux of USAC's COMAD justification is that "[s]ince you failed to comply with local and state procurement laws you violated the competitive bidding process." Yet, USAC fails to cite a single local and state procurement law that Duplin County ostensibly violated. The District is literally left to guess and surmise what those laws might be.

USAC's failure to substantiate its finding denies the District its due process rights to file a meaningful and substantive appeal to the FCC.[18] The Commission has clearly concluded that without specific information to determine the basis for a denial, applicants cannot provide

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[15] 47 C.F.R. §54.504(b)(2).

[16] 47 C.F.R. §54.504(b)(2)(vii).

[17] 47 C.F.R. §54.504(b)(4).

[18] Moreover, the Commission has also noted that with the passage of time the ability of applicants to effectively respond to allegations of rule violations years before can be substantially affected. *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technology*, Order, 21 FCC Rcd 5348, 5351 ¶8, n. 20 (2006) ("*Academy of Careers Order*"). The COMAD "finding" comes almost 5 years after the Form 470 was posted in January of 2006.

comprehensive responses to USAC's arguments.[19] Yet the Commission has expressly instructed USAC that applicants must be "afforded the opportunity to demonstrate that they did not violate the Commission's competitive bidding rules."[20] Duplin County cannot file an informed appeal without specific information from USAC about what local and state procurement laws" the District violated. Because USAC failed to comply with these FCC directives, the COMADs should be rescinded.

B. <u>There Was No RFP Issued or Required to Be Issued in Connection with Seeking the Internal Connections Services at Issue</u>

The Commission's rules regarding the competitive bid process do not define the term "RFP" or "Request for Proposals." So USAC bases its COMADs on the conclusion that the Form 470 reference to the Additional Information constituted an RFP, contrary to the representation in Block 10b that the District did not intend to use and had not issued an RFP.

A conventional definition of an "RFP" or "Request for Proposal" involves more than just the provision of information about the services being sought, but for instance a specific request for a price, bidder qualifications, a deadline for submitting the proposal.[21] There were no such "requests" as part of the Additional Information. By no reasonable definition could the Additional Information be classified as an RFP. There was no other document issued in connection with obtaining the Internal Connections services that are the subject of the COMADs that could reasonably be defined or categorized as an RFP.

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[19] *Academy of Careers Order*, 23 FCC Rcd at 5350 ¶6.

[20] *Id.*

[21] A Request for Proposals "Announces the intent to award a contract and specifies the service or product to be delivered, the criteria to be used, applicant qualifications, person-years anticipated, and deadline." *See* http://www.nova.edu/ogc/preaward_training/page_05.htm.

Moreover, USAC neither contends nor demonstrates that as a matter of local and state procurement law an RFP was required. Therefore, there is also no basis for concluding that failure of Duplin County to use an RFP was a violation of the Commission's competitive bidding process.

For the foregoing reasons, there are no grounds for sustaining the COMADs. They should be promptly rescinded.[22]

C. The FCC Form 470 Itself Provided Potential Bidders With Sufficient Information

Again, USAC's COMAD justification is unclear but it seems to be suggesting that there was an incomplete "description of the services" that Duplin was seeking and that somehow violated the competitive bidding process.[23] But the Commission has said that "an applicant is required to provide only general information about the services for which it seeks discounts."[24] The service descriptions set forth in Block 10, as listed above, are beyond "general information." And each and very bidder had an opportunity to obtain the Additional Information if they felt that they needed it.

Moreover, USAC cites no FCC rule or decision which prescribes as part of the competitive bidding process the reference on the FCC Form 470 to a source for additional details. That in and of itself is not a violation of the competitive bidding process.

So all bidders were on a "level playing field" and therefore there could have been no actual harm to the competitive bidding process from one bidder choosing to obtain the Additional

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[22] The Commission has in the past traditionally refrained from acting or deferred action in matters of alleged violations of local or state laws where the matters have not been presented to or acted upon by the authority charged with responsibility of interpreting and enforcing those laws. *Request for Review of the Decision of the Universal Service Administrator by Bienville Parish School Board, Arcadia, Louisiana*, Order, 21 FCC Rcd 1234, 1238 ¶6 (Wireline Compet. Bur. 2006).

[23] Is this an oblique argument that the descriptions violated the principals set forth in the Commission's *Ysleta* decision? *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District*, Order, 18 FCC Rcd 26406 (2003).

[24] *See Request for review of the Decision of the Universal Service Administrator by Brooklyn Public Library, Brooklyn, New York*, Order, 17 FCC Rcd 18598, ¶2 n. 4 (2000).

Information and another not doing so.[25] There is no evidence that other any other bidders were not considered.[26] Absent any demonstration of any such competitive advantage, the competitive bidding process should not be deemed to have been tainted.[27] USAC has presented no genuine evidence in its COMAD that the competitive bidding process failed to be fair and open in compliance with the Commission's rules.

D. The Commission Has Previously Held Under Such Circumstances

In fact, the Commission has already addressed a nearly identical factual scenario and held that the USAC finding of a competitive bid violation was in error.

In the *Approach Learning Order*, the Commission addressed a similar assertion by USAC that reference to additional information did not constitute a violation of the competitive bidding process.[28] In that case, a number of the petitioners contended that the documents issued or available to prospective service providers were entitled, for example, "Scope of Work and Guidelines," and "Description of Services," were not RFP's but merely a restatement of information on their FCC Forms 470 with some additional information about the desired services.[29] Others argued that prospective service providers did not need to read any documents other than the applicant's FCC

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[25] *See Request for Review of Decisions of the Universal Service Administrator by Approach Learning and Assessment Centers, et al.*, Order, 23 FCC Rcd 15510, 15513-14 ¶8 (Telecom Access Pol. Div. 2008) ("*Approach Learning Order*").

[26] *See Request for Review of a Decision of the Universal Service Administrator by Aberdeen School District*, Order, 22 FCC Rcd 8757, 8763 ¶9 (2007)("*Aberdeen Order*").

[27] *Id.*, ¶8; *see Requests for Review of Decisions of the Universal Service Administrator by Delano Joint High School District et al.*, Order, 23 FCC Rcd 15399,15403-04 ¶8 (Telecom. Access Pol. Div. 2008); *Request for Review of a Decision of the Universal Service Administrator by Hillsboro Independent School District*, Order, 23 FCC Rcd 15424, 15429 ¶10 (Telecom. Access Pol. Div. 2008).

[28] *See Request for Review of Decisions of the Universal Service Administrator by Approach Learning and Assessment Centers, et al.*, Order, 23 FCC Rcd 15510, 15513-14 ¶8 (Telecom Access Pol. Div. 2008) ("*Approach Learning Order*").

[29] *Id.*, ¶7.

Form 470 in order to prepare bids, explaining that each service provider expressing an interest in bidding received additional information regarding the desired services.[30]

The Commission rejected the USAC conclusion that under such circumstances there was a violation of the competitive bidding process. The Commission concluded that all bidders were on a "level playing field" and it would be "inequitable not to provide the requested relief," noting:

> The petitioners' FCC Forms 470 contained enough detail for service providers to identify the desired services and to formulate bids, and it appears that all interested bidders also had access to whatever additional information petitioners provided in the auxiliary documents. Thus, we conclude that rejecting the identified applications on the ground that the petitioners failed to advise bidders that an RFP existed is not warranted in these instances. In addition, we find that there was no actual harm to the competitive bidding process.[31]

That is exactly the case with Duplin County here. Moreover, there is no evidence that other any other bidders were not considered.[32] Absent any demonstration of any such competitive advantage, the competitive bidding process should not be deemed to have been tainted.[33] USAC has presented no genuine evidence in its COMAD that the competitive bidding process failed to be fair and open in compliance with the Commission's rules.

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[30] *Id.*

[31] *Id.*, ¶8.

[32] *Aberdeen Order*, ¶9.

[33] *Id.*, ¶8; *see Requests for Review of Decisions of the Universal Service Administrator by Delano Joint High School District et al.*, Order, 23 FCC Rcd 15399, 15403-04 ¶ 8 (Telecom. Access Pol. Div. 2008); *Request for Review of a Decision of the Universal Service Administrator by Hillsboro Independent School District*, Order, 23 FCC Rcd 15424, 15429 ¶10 (Telecom. Access Pol. Div. 2008).

E. There Are No Other Grounds Supporting The COMADs

There is absolutely no evidence here of any activity by Duplin County intended to defraud or abuse the E-Rate Program.[34] Nor is there any evidence of any waste, fraud or abuse or misuse of funds.[35] Moreover, the imposition of a requirement to reimburse the requested funds under these circumstances some five (5) years after they were originally approved and expended would impose an undue hardship on the School.[36] The District acted in good faith in an attempt to ensure that those who needed additional information about these Internal Connection services could obtain it.[37] Doing do would not further the purpose of preserving and advancing access to universal service support for schools and libraries.[38] Under such circumstances, it would be inequitable to uphold the COMADs.[39] The Commission should not do so.[40]

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[34] *See Request for Review of the Decision of the Universal Service Administrator by New Haven Free Public Library*, Order, 23 FCC Rcd 15446, 15449 ¶7 (Telecom. Access Pol. Div. 2008); *Request for Review of the Decision of the Universal Service Administrator by the District of Columbia Public Schools*, Order, 23 FCC Rcd 15585, 15588 ¶5 (Telecom. Access Pol. Div. 2008); *Request for Review of the Decision of the Universal Service Administrator by Tekoa Academy of Accelerated Studies*, Order, 23 FCC Rcd 15456,15458-59 ¶6 (Telecom Access Pol. Div. 2008).

[35] *See Requests for Review of Decisions of the Universal Service Administrator by Broaddus Independent School District et al.*, Order, 23FCC Rcd 15547, 15551-52 ¶12 (Telecom. Access Pol. Div. 2008).

[36] *See Request for Review of a Decision by the Universal Service Administrator by Radford City Schools*, Order, 23 FCC Rcd 15451, 15453 ¶4 (Telecom. Access Pol. Div. 2008); *Request for Review of a Decision of the Universal Service Administrator by Grand Rapids Public Schools*, Order, 23 FCC Rcd 15413, 15416 ¶6 (Telecom. Access Pol. Div. 2008).

[37] *See Request for Waiver of the Decision by the Universal Service Administrator by Great Rivers Education Cooperative, Forrest City, Arkansas*, Order, 21 FCC Rcd 14115, 14119 ¶9 (Wireline Compet. Bur. 2006).

[38] *See Request for Review of a Decision by the Universal Service Administrator by Adams County School District 14*, Order, 22 FCC Rcd 6019, 6022 ¶8 (2007).

[39] *See Approach Learning Order*, ¶4.

[40] For all these same reasons, if the Commission is not inclined to come to the same conclusion as in the *Approach Learning Order*, there is ample justification to waive any rule violation that might have occurred by reference to the Additional Information in the Form 470. *See Requests for Review of Decision of the Universal Service Administrator by Richmond County School District, Schools and Libraries Universal Service Support Mechanism*, Order, 21 FCC Rcd 6570, 6572 ¶5 (2006) (internal references omitted) (citing *Northeast Cellular Tel. Co. v FCC*, 897 F.2d

V. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, Duplin County respectfully requests that the Commission grant this Request and direct USAC to overturn its prior decision and cancel the COMADs relating to the FY2006 funding requests for FRNs 147663 and 1476684 for internal connections.

There is just no evidence, as opposed to surmise by USAC, of the District's failure to comply with the core program requirements, and Duplin County complied with the Commission's competitive bidding rules. Therefore, the District respectfully submits that the Commission must find that there has been no violation of the competitive bidding process and grant its Request to rescind the COMADs.

Respectfully submitted,

DUPLIN COUNTY SCHOOL DISTRICT

By: John W. Hughes

John W. Hughes
New Hope Foundation
One Valentine Lane
Chapel Hill, NC 27516
(919)968-4332

Contracted Consultant & Contact For Duplin County School District

Paul C. Besozzi
Carly T. Didden
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5292

Dated: December 1, 2010

1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972)).

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 1st day of December, 2010, a copy of the foregoing Request for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

Priya Aiyar
Legal Advisor to Chairman Genachowski
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Priya.Aiyar@fcc.gov

Sharon Gillette
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Sharon.Gillette@fcc.gov

Randy Clarke
Legal Counsel to the Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Randy.Clarke@fcc.gov

Trent Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Trent.Harkrader@fcc.gov

Gina Spade
Assistant Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Gina.Spade@fcc.gov

Letter of Appeal
Schools and Libraries Division-
Correspondence Unit
100 S. Jefferson Road
P.O. Box 902
Whippany, NJ 07981

Carly T. Didden

5131135.04