

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

In the Matter of	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	
	)	
Modernizing the E-rate	)	WC Docket No. 13-184
Program for Schools and Libraries	)	
	)	
Sioux Falls School District 49-5	)	471 Application No. 161034649
Application for Review	)	
	)	
	)	

**SIoux FALLS SCHOOL DISTRICT 49-5  
APPLICATION FOR REVIEW**

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April 26, 2019

**TABLE OF CONTENTS**

<b>SUMMARY.....</b>	<b>ii</b>
<b>FACTS AND PROCEDURAL BACKGROUND .....</b>	<b>2</b>
A. THE ERRONEOUS FUNDING COMMITMENT.....	3
B. THE DISTRICT’S USAC APPEAL.....	4
C. THE MISSED INVOICE DEADLINE.....	5
D. THE BUREAU’S STREAMLINED DENIAL OF THE REQUEST FOR REVIEW.....	6
<b>DISCUSSION .....</b>	<b>7</b>
A. THE COMMISSION SHOULD WAIVE THE SECTION 54.720(A) FILING DEADLINE FOR THE REQUEST FOR REVIEW .....	8
1. The Waiver Standard Inherently Limits Blind Reliance on Precedent.....	8
2. The Commission Should Waive the Section 54.720(a) Filing Deadline .....	9
B. THE MERITS OF THE DISTRICT’S APPEAL ARE CLEAR AND UNDENIABLE .....	17
1. USAC Should Have Permitted Sioux Falls to Correct Its Ministerial or Clerical Error .....	17
2. Adherence to Bishop Perry Was Particularly Important in FY 2016 .....	20
C. THE COMMISSION SHOULD WAIVE ADDITIONAL RULES TO UPHOLD THE INTEGRITY AND POLICY GOALS OF THE E-RATE PROGRAM.....	21
1. The Commission Should Waive the Form 471 Filing Rule for Corrections to the Extent Needed to Effect Relief.....	22
2. The Commission Should Waive the E-rate Invoice Filing Deadline .....	23
<b>CONCLUSION .....</b>	<b>25</b>

## SUMMARY

This Application for Review seeks Commission relief from the denial by the Wireline Competition Bureau (the “Bureau”), by streamlined Public Notice, of an untimely Request for Review filed by Sioux Falls School District 49-5 (the “District”), as well as relief from the underlying denial of Category Two funding from the Schools and Libraries Universal Service Support Mechanism (“E-rate”).

*First*, the District requests that the Commission waive the filing deadline contained in Section 54.720(a) of its rules, as it has done in past cases where the applicant filed its appeal within a reasonable time after receiving actual notice of an adverse decision by the Universal Service Administrative Company (“USAC”) or the appeal should not have been necessary at all, but for manifest USAC error in denying the underlying funding request.

The Bureau’s denial of a waiver of the Section 54.720(a) filing deadline by streamlined Public Notice is procedurally flawed. The waiver standard itself makes clear that “good cause” under Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, requires a showing of “particular facts” or “special circumstances”<sup>1</sup> that warrant deviation from a rule on an individual basis.<sup>2</sup> Indeed, the Commission in this very proceeding has made clear that waivers of the Commission’s E-rate rules are highly fact specific, and that each must be judged individually.<sup>3</sup> The Bureau’s streamlined denial of the District’s waiver request as merely “consistent with precedent,” with no articulated reasoning or discussion of the individual facts the Bureau found dispositive, fails to meet the Commission’s required standard.

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<sup>1</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>2</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

<sup>3</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, FCC 04-190, 19 FCC Rcd 15808 (2004), at ¶ 75, n.134.

Rather, the Commission should waive the procedural filing deadline where, as here, a waiver is necessary to avoid the loss of E-rate support resulting from manifest errors by the USAC staff or where the applicant lacked actual notice of USAC action triggering the filing deadline, including as a result of issues associated with the debut of the “E-rate Productivity Center” (“EPC”), and filed its appeal within a reasonable period of time after receiving notice of USAC’s decision. Here, although the District filed a timely appeal with USAC of its erroneous funding commitment, it did not receive a Letter of an Administrator’s Decision on Appeal through the EPC or otherwise of USAC’s decision on that appeal, despite its efforts to reach out proactively to USAC staff. To the extent that precedent may be instructive when considering such waiver requests, the Bureau’s denial failed to acknowledge or distinguish a substantial body of precedent granting even lengthy waivers of the Section 54.720(a) filing deadline under such circumstances. Conversely, past denials of such waivers have, in part, turned on the need for repose in the face of E-rate funding demand that exceeded the applicable funding cap, a circumstance that was not present in Funding Year (“FY”) 2016.

*Second*, regarding the merits of the request for relief from USAC’s denial of Category Two funding, the Commission should direct USAC to adhere to its *Bishop Perry* duty to provide timely assistance to applicants, including the District, in correcting ministerial or clerical errors with their applications. Here, in the confusing, tumultuous rollout in FY 2016 of USAC’s then-new EPC, the District made a simple ministerial and clerical error in completing its FCC Form 471. Faced with ambiguous instructions for completing the newly-revised Form 471 entry for “One-time Unit Cost” of eligible Category Two equipment, the District entered the post-discount amount, *i.e.*, the full amount of its support request, instead of the pre-discount amount that was evidently intended.

Despite diligent and sustained efforts, both during Program Integrity Assurance (“PIA”) Review and in an appeal to USAC of the erroneous funding commitment that resulted, USAC consistently failed to acknowledge or implement the correction. USAC thus violated the Commission’s directive in *Bishop Perry* to eliminate administrative, ministerial, or clerical errors without the need for intervention by the full Commission or the Wireline Competition Bureau. As a result, instead of the correct support amount of about \$2.25 million permitted under the District’s Category Two budget, USAC committed only \$1.3 million, having erroneously applied the 60 percent discount factor a second time to the pre-discount equipment costs.

The Commission should also, to the extent necessary, waive additional rules that are now implicated in this Application for Review as a result of the passage of time, including without limitation the Form 471 filing deadline of Section 54.504 and the invoice filing deadline of Section 54.514(a), 47 C.F.R. §§ 54.504, 54.514(a). Now that the Form 471 filing window for corrections has passed and the FCDL has been issued, the District requests that the Commission waive Section 54.504 here, to the extent necessary to allow corrections to the District’s FY 2016 Form 471 and the associated FCDL, so that the District may realize the intended benefit of the E-rate program for its students.

In addition, even if the Commission does not grant any other relief, the Commission should waive the BEAR invoice submission deadline in Section 54.514(a), so that the District may submit the invoices necessary to receive payment of Category Two support, whether in the full amount of its approximately \$2.25 million Category Two budget, or at least the erroneous, twice-discounted \$1.3 million originally committed by USAC. In light of the confusing circumstances presented here, that waiver, at a minimum, would serve the public interest.

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Sioux Falls School District 49-5 Request for	)	471 Application No. 161034649
Review of a Funding Decision by the	)	
Universal Service Administrative Company	)	
and Petition for Waiver	)	

**SIoux FALLS SCHOOL DISTRICT 49-5  
APPLICATION FOR REVIEW**

Pursuant to section 1.115(a) of the Commission’s rules,<sup>4</sup> the Sioux Falls School District 49-5 (“Sioux Falls” or the “District”) respectfully submits this Application for Review of the recent Wireline Competition Bureau (“Bureau”) denial, by “streamlined” Public Notice,<sup>5</sup> of the District’s recent Request for Review<sup>6</sup> of the decision by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) to deny the District’s above-referenced request for Category Two funding for FY 2016.<sup>7</sup>

Sioux Falls seeks review because the Bureau’s streamlined decision in the Public Notice is inconsistent with the weight of precedent and works manifest injustice on an applicant for support under the Schools and Libraries Universal Service Support Mechanism (“E-rate”). As shown herein, the District’s minor misunderstanding in FY 2016 of the instructions for one

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<sup>4</sup> 47 C.F.R. § 1.115(a).

<sup>5</sup> *Schools and Libraries Universal Service Support Mechanism*, WC Docket No. 02-6, Public Notice, “Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company,” DA 19-213 (Wir. Comp. Bur., rel. Mar. 29, 2019) (“Public Notice”).

<sup>6</sup> *Schools and Libraries Universal Service Support Mechanism*, WC Docket No. 02-6, Request for Review of the Request of the Sioux Falls School District 49-5 for Review of a Decision of the Universal Service Administrative Company and Petition For Waiver (filed Feb. 1, 2019) (“Request for Review”), Attachment 1.

<sup>7</sup> Request for Review, Exhibit A (USAC Revised Funding Commitment Decision Letter, dated Aug. 9, 2017).

application field in USAC's FCC Form 471 in the then-new "E-rate Productivity Center" ("EPC") has snowballed over time, and USAC has failed to provide the assistance necessary to meet its obligations under the Commission's directives in *Bishop Perry*.<sup>8</sup> Rather, the District's concerted and sustained efforts to correct what was initially an unremarkable, easily-remedied error, have been met with apparent indifference and ignored by USAC and, now, the Bureau.

### **Facts and Procedural Background**

This Application for Review has its roots in an initial, seemingly trivial misstep by Sioux Falls that has cast a long shadow of unforeseeable and increasingly grave consequences over the ensuing years. Against the backdrop of the fraught 2016 debut of the new "E-rate Productivity Center" ("EPC"), the District faced an initial minor misunderstanding of the intent of the instructions for the "One-time Unit Cost" of eligible Category Two equipment in the EPC's newly redesigned electronic FCC Form 471. Despite diligent and sustained efforts to correct the erroneous entry during Program Integrity Assurance ("PIA") review and a subsequent appeal of USAC's erroneous funding commitment, Sioux Falls ultimately suffered the unjustified loss of over \$2 million in Category Two E-rate support.

For the benefit of the students of Sioux Falls, and the Commission's E-rate policy goals, the Commission should, at long last, direct USAC to adhere to its responsibilities under *Bishop Perry* to assist applicants in correcting ministerial and clerical errors and, in doing so, restore the Category Two funding that the District otherwise would have, and should have, received.

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<sup>8</sup> *Schools and Libraries Universal Service Support Mechanism, Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA, et al.*, CC Docket No. 02-6, FCC 06-54, 21 FCC Rcd 5316 (2006), at ¶ 23 ("*Bishop Perry*") (finding that USAC's must proactively assist applicants in filing correct and complete applications because, among other reasons, doing so should lower the number of appeals involving ministerial and clerical errors, thereby reducing the overall cost and burden of appeals and improving the efficiency of fund administration).

### **A. The Erroneous Funding Commitment**

At the conclusion of a successful competitive bidding process for Category Two equipment, Sioux Falls awarded the contract to Riverside Technologies<sup>9</sup> and filed FCC Form 471# 161034649, seeking funding under FRN 1699072622 for Category Two equipment.<sup>10</sup> On the Form 471, freshly incorporated into the new EPC, the District entered the post-discount amount of \$2,252,900 in the box for “One-time Unit Cost,” instead of the total pre-discount Category Two costs of \$3,754,650, computed based on the allowable budget of \$150 per student.<sup>11</sup> In prior Form 471s, costs were always identified using the terms pre-discount and discount. With the change of the 2016 Form 471, these terms changed. As a result, the District mistakenly entered the discounted amount in the box where it should have put the pre-discount amount.

The District promptly began working to correct the error. In its timely response to USAC’s PIA requests for substantiation of the “One-time Unit Cost” figure,<sup>12</sup> well in advance of any funding commitment decision, the District provided a spreadsheet<sup>13</sup> and supporting invoices identifying, among other key data, the following:

- Total student enrollment = 25,031
- The pre-discount amount based on \$150.00 per student = \$3,754,650
- The 60% discount level funding commitment request = \$2,252,790

In addition, the District clarified in its response that “[t]he top spread sheet is my . . . prediscou[n]t budget and 60% discount budget.”<sup>14</sup>

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<sup>9</sup> Request for Review, Exhibit B (Riverside Technologies Contract, dated Feb. 22, 2016).

<sup>10</sup> Request for Review, Exhibit C (FY 2016 FCC Form 471# 161034649); *see also* Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, Purchasing Secretary, Sioux Falls School district 49-5, at ¶ 4).

<sup>11</sup> Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 5).

<sup>12</sup> Request for Review, Exhibit D (PIA Pre-Commitment Inquiry, dated July 26, 2016).

<sup>13</sup> Request for Review, Exhibit E (District Spreadsheet on Total Pre-discount and Discount Amounts).

<sup>14</sup> *Id.*; *see* Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 6).



USAC made no change to the District's Funding Request based on the PIA response.<sup>15</sup> Rather, on January 9, 2017, USAC issued a Funding Commitment Decision Letter ("FCDL") based on the original, incorrect budget amount.<sup>16</sup> As a result, USAC committed only \$1,335,798 to the District in Category Two funding.

### **B. The District's USAC Appeal**

On February 10, 2017, the District timely filed an appeal of the FCDL in the EPC, reiterating that its pre-discount budget at \$150 per enrolled student should be \$3,754,650<sup>17</sup> and again providing a spreadsheet to support this amount.<sup>18</sup> The District pointed out that, in essence, the 60 percent factor had been applied *twice*, resulting in E-rate support equal to 36 percent of the pre-discount amount, not 60 percent, as it should have been. Had the correct pre-discount amount been entered, then the EPC would have calculated the correct funding commitment request at 60 percent of that number to reach the correct amount of \$2,252,790.

On August 9, 2017, following two status follow-up requests from the District on February 28, 2017 and March 1, 2017, respectively, USAC issued a Revised Funding Commitment Decision Letter denying the District's appeal, inexplicably finding, despite manifest evidence to the contrary, that the Appeal lacked sufficient information and "did not show that USAC's determination was incorrect."<sup>19</sup> Despite the District's outreach efforts, however, USAC failed to provide effective notice of its decision to the District.<sup>20</sup> The District

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<sup>15</sup> Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 7).

<sup>16</sup> Request for Review, Exhibit F (FY 2016 FCDL for Category Two Funding). As shown in the FCDL, USAC further reduced the original figure from \$2,252,790 to \$2,226,330. The reduction was erroneously based on the closure of one of the District's schools. Because the students from that school were reassigned to another school in the District, the District's overall enrollment level did not change. Because funding is based on a pre-discount budget of \$150 per student, that adjustment was also in error and should also be reversed.

<sup>17</sup> Request for Review, Exhibit G (District USAC Appeal of the FCDL, Appeal # 35987).

<sup>18</sup> Request for Review, Exhibit H (District Spreadsheet Supporting USAC Appeal); *see* Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 7).

<sup>19</sup> Request for Review, Exhibit K (Third USAC RFCDL).

<sup>20</sup> Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 8).

never received an Administrator’s Decision Letter on Appeal that it understood would be forthcoming to further explain the basis for the denial. Furthermore, USAC made no effort to contact or follow-up with the District on either the pre-commitment information provided or its Appeal, both of which clearly presented the corrected pre-discount amount.

### **C. The Missed Invoice Deadline**

Lacking notice that its Appeal had been decided in August 2017, the District reached out to the Client Services Bureau (“CSB”) on January 31, 2018 to remind USAC that its appeal was still pending.<sup>21</sup> In response, the CSB did not provide correct information on the status of the appeal, but rather advised the District to file a BEAR Form 472 Invoice for the amount that had been approved. The CSB made no mention either of the fact that, unbeknownst to the District, the appeal had already been denied, or of the fact that the invoicing deadline had passed two days prior, on January 29, 2018.<sup>22</sup> On February 2, 2018, the District filed its FCC Form 472 BEAR Form along with Invoice # 2766401 seeking reimbursement of the incorrect \$1,335,798 amount.<sup>23</sup>

On February 9, 2018, USAC sent a Form 472 (BEAR) Notification Letter, (“472 BEAR Letter”) Notice to the Service Provider, reducing the total amount for reimbursement of funding from \$1,335,798 to \$0 without stating a reason for the denial or sending a copy to the District.<sup>24</sup> Instead, the District received notice from the Service Provider that the District’s BEAR had been rejected.<sup>25</sup> Upon receipt of that notice, on March 20, 2018, the District made another inquiry by email into why the invoice had been rejected and USAC replied by email that it had been denied because it was filed on February 2, 2018 instead of January 29, 2018 – four days late – and

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<sup>21</sup> *Id.*, ¶ 9.

<sup>22</sup> Request for Review, Exhibit L (District Inquiry to CSB on Filing of Form 472 (BEAR)); *see* Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 10).

<sup>23</sup> Request for Review, Exhibit M (District 472 BEAR Invoice).

<sup>24</sup> Request for Review, Exhibit N (USAC Form 472 (BEAR) Notification Letter).

<sup>25</sup> Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 11).

because no invoice deadline extension had been requested.<sup>26</sup>

Critically, USAC never explained that the appeal had previously been denied. Therefore, the District continued to believe that its USAC appeal was still pending, and that the invoices could only be submitted after USAC issued a formal Letter of Administrator's Decision on Appeal.<sup>27</sup> Further outreach by telephone to USAC and FCC staff produced no helpful information or clarity on the posture of the District's funding request.<sup>28</sup> The District staff employee responsible for this matter then reached out internally and was granted approval to seek a consultant to assist with this matter. Thus, it was not until Autumn 2018 that the consultant informed the District that there would be no further formal notice of appeal from USAC and that the District would need to file an FCC appeal on multiple issues.<sup>29</sup> In order to move forward, Board approval was granted in December 2018, and a Request for Review filed as quickly as practicable thereafter, on February 1, 2019.

#### **D. The Bureau's Streamlined Denial of the Request for Review**

The Bureau denied the District's Request for Review in the streamlined Public Notice less than two months later, on March 29, 2019, solely based on the fact that its appeal was untimely filed.<sup>30</sup>

#### **Questions Presented**

The Bureau's streamlined denial in the Public Notice of the District's Request for Review conflicts with case precedent and established Commission policy, involves an application of

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<sup>26</sup> Request for Review, Exhibit O (District CSB Inquiry on Rejection of Invoice).

<sup>27</sup> Request for Review, Exhibit P (Affidavit of LuQuita Buckenberg, ¶ 12).

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

<sup>29</sup> *Id.*, ¶ 13.

<sup>30</sup> Public Notice, at 11. The Public Notice offers no evidence that the Bureau considered the merits of the District's Request for Review.

precedent that should be overturned or revised, and compounds USAC's prejudicial procedural error.<sup>31</sup> Thus, this Application for Review presents the following questions:<sup>32</sup>

1. Whether the Bureau erred in denying the District's Petition for Waiver of the filing deadline contained in 47 C.F.R. § 54.720(a), where the District never received written a Letter of Administrator's Decision on Appeal from USAC on its initial appeal of USAC's denial of funding, and where a waiver is necessary to correct manifest error by USAC staff and rectify the unjustified loss of over \$2 million in E-rate support for which the District was otherwise eligible;
2. Whether the Commission should direct USAC to meet its responsibilities under *Bishop Perry* and its progeny by assisting the District in correcting the "One-time Unit Cost" figure in its original Form 471; update its Funding Commitment Decision Letter to reflect the full \$2,252,790.00 in Category Two support for which it was eligible; and waive the Form 471 filing rule contained in Section 54.504, invoice deadline contained in 47 C.F.R. § 54.514(a), and any other procedural rules necessary to effectuate this relief.

### **Discussion**

This is not case of waste, fraud, or abuse, or a flagrant violation of the Commission's rules. Rather, this is a case of a school district that has participated in the E-rate Program since its inception, takes seriously its responsibilities as an applicant, and has never before needed to file an FCC appeal, or even use the services of an E-rate consultant. The appeal arises from a series of unfortunate events that took place in the midst of a funding year that confronted applicants with the greatest array of new and unfamiliar changes in USAC's E-rate administrative processes and forms since the inception of E-rate, which were themselves riddled with errors and changes or inconsistent language from prior years. It is nothing more or less than an unfortunate but fixable case, where the District entered the discount amount in the wrong box instead of the pre-discount amount, and USAC persisted in treating that erroneous information as correct, in derogation of its

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<sup>31</sup> 47 C.F.R. § 1.115(b)(2)(i, iii, v).

<sup>32</sup> 47 C.F.R. § 1.115(b)(1).

*Bishop Perry* obligation and despite the District’s own diligent and repeated efforts to correct it in a timely manner.<sup>33</sup>

**A. The Commission Should Waive the Section 54.720(a) Filing Deadline for the Request for Review**

While the streamlined Public Notice asserts that the Bureau’s decision to deny the Petition for Waiver of the filing deadline that accompanied the Sioux Falls Request for Review was “consistent with precedent,” the Public Notice in fact ignores a weighty body of precedent to the contrary. There is ample precedent showing that the Commission has granted even lengthy waivers of the deadline for filing a request for review where, among other circumstances, where doing so is necessary to avoid a loss of E-rate support resulting from manifest errors by the USAC staff or where the applicant lacked actual notice of USAC action triggering the filing deadline (including as a result of issues associated with the debut of the EPC), and filed its appeal within a reasonable period of time.

**1. The Waiver Standard Inherently Limits Blind Reliance on Precedent**

The Commission may waive its rules for “good cause.”<sup>34</sup> A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.<sup>35</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>36</sup> In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.<sup>37</sup>

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<sup>33</sup> *Bishop Perry* at ¶ 23.

<sup>34</sup> 47 C.F.R. §1.3.

<sup>35</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

<sup>36</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

<sup>37</sup> *Northeast Cellular*, 897 F.2d at 1166.

These formulations make clear the high degree to which the Commission’s evaluation of a petition for waiver turns on the particular facts and circumstances of the petitioner’s situation. Indeed, the Commission has long held that, while “there may be mitigating circumstances which warrant waiver of a rule . . . , [s]uch determinations necessarily are fact specific, and each must be judged individually.”<sup>38</sup> Precedent has but limited utility in the context of a process that requires such fact-specific judgments.

The Bureau’s denial of the District’s request for waiver of Section 54.720(a) by streamlined Public Notice, purportedly because the denial is “consistent with precedent,” is inherently at odds with the fact-specific inquiry and individualized analysis that the waiver standard requires. That is even more the case where, as discussed herein, there is *also* a substantial body of more directly applicable precedent in favor of granting the waiver.

## **2. The Commission Should Waive the Section 54.720(a) Filing Deadline**

The Commission’s rules permit any affected party to request Bureau review or waiver of USAC decisions within 60 days from the date the Administrator issues its decision.<sup>39</sup> In this case, owing to “well documented”<sup>40</sup> problems in the EPC, the District did not receive timely notice of USAC’s decision on its appeal and, thus, did not become aware that the 60-day appeal period had begun until after it had long-since expired.

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<sup>38</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, FCC 04-190, 19 FCC Rcd 15808 (2004), at ¶ 75, n.134; *see also Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, FCC 12-9, 27 FCC Rcd 787 (2012), at ¶ 106 (stating the Commission’s expectation that “waiver requests will be highly fact specific and unique to each device presented”).

<sup>39</sup> 47 C.F.R. § 54.720(a).

<sup>40</sup> *Schools and Libraries Universal Service Support Mechanism, Application for Review of a Decision of the Wireline Competition Bureau by Pribilof School District, St. Paul Island, Alaska*, CC Docket No. 02-6, Order, FCC 18-118 (rel. Aug. 8, 2018), Statement of Commissioner Michael O’Rielly (“*Pribilof School District*”).

The Bureau’s Public Notice denied the Sioux Falls’ request for waiver of this rule without discussion of any of the associated special circumstances, including the lack of notice. In doing so, the Bureau asserted that denial of the Sioux Falls Petition for Waiver was “consistent” with the Bureau’s prior decisions in *Agra Public Schools* and *Bound Brook School District*.<sup>41</sup> Purporting to explain the alleged consistency, the Bureau included a parenthetical noting that, in *Bound Brook School District*, the petitioners “failed to 1) submit their appeals either to the Commission or to USAC within 60 days; or failed to submit their waiver requests to the Commission within 60 days as required by the Commission’s rules; and 2) did not show special circumstances necessary for the Commission to waive the deadline.”

Neither decision is on point here, or provides useful guidance concerning the Sioux Falls Petition for Waiver of the Section 54.720(a) filing deadline. It is particularly difficult to see how *Bound Brook School District* provides any dispositive precedent; there, the Bureau denied 28 untimely requests for review because the petitioners had “failed to demonstrate that special circumstances exist to justify a waiver of the deadline,”<sup>42</sup> but the Bureau’s Order did not discuss any of the particular reasons the petitioners cited for delay. Without such a discussion, it is impossible to tell whether any subsequent petition involves sufficiently similar circumstances that a denial would in fact be consistent with that precedent or not.

In *Agra Public Schools*, the Bureau denied requests for waiver of the filing deadline by petitioners facing very different circumstances from those of Sioux Falls. Specifically, the

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<sup>41</sup> Public Notice at 10, n.22 (*citing Requests for Review of Decisions of the Universal Service Administrator by Agra Public Schools I-134 et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 25 FCC Rcd 5684 (Wir. Comp. Bur. 2010) (“*Agra Public Schools*”) and *Requests for Waiver or Review of Decisions of the Universal Service Administrator by Bound Brook School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 29 FCC Rcd 5823 (Wir. Comp. Bur. 2014) (“*Bound Brook School District*”)).

<sup>42</sup> *Bound Brook School District* at ¶ 1.

Bureau found that the *Agra Public Schools* applicants were “provided with specific information regarding the appeal deadline when their requests are reduced or denied by USAC,”<sup>43</sup> and that special circumstances were not present where the petitioners alleged “employee inattention,” “lack of awareness of the Commission’s rules,” or “lack of knowledge of any defect in their original funding application.”<sup>44</sup> Here, there is no such lack of employee attention, awareness, or knowledge. Rather, Sioux Falls missed the Section 54.720(a) filing deadline owing to the problem-riddled rollout of the EPC in 2016 and a lack of effective communication from USAC staff, *despite significant outreach and repeated inquiries from the District staff*.

Thus, although USAC decided the District’s appeal in August 2017, the District received no actual notice of that action from USAC, and it continued to expect that it would receive a formal Letter of Administrator’s Decision on Appeal, as USAC had customarily issued in previous years. The denial of the District’s appeal came to light only after the District learned through its outreach efforts in Autumn 2018 that the RFCDL was, in fact, the appeal decision. The District then went to work to gain appropriate approvals to move forward with filing an appeal with the FCC, understanding for the first time that the appeal deadline had passed.

Furthermore, the Bureau’s denial of the filing deadline waivers in *Agra Public Schools* occurred within an E-rate environment where demand for funding exceeded the applicable cap, raising very different policy considerations from those prevailing in FY 2016. Thus, in *Agra Public Schools*, the Bureau discussed at some length the heightened need for repose concerning USAC’s funding decisions within the context of fairness to applicants and USAC’s administration of the E-rate mechanism within the constraints of the \$2.25 billion cap.<sup>45</sup> In FY

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<sup>43</sup> *Agra Public Schools* at ¶ 1.

<sup>44</sup> *Id.* at ¶ 4.

<sup>45</sup> *Agra Public Schools* at ¶ 6 (“Filing deadlines for appeals are needed to provide finality in the decision-making process. Because the E-rate program has a cap of \$2.25 billion each year, USAC



2016 and funding years since, demand has not exceeded the cap, and therefore the cap has no longer created these concerns. Rather, USAC estimated that the total demand for funding year 2016 was \$3.609 billion, comprised of \$2.330 billion for Category One services and \$1.279 billion for Category Two services.<sup>46</sup> The Bureau announced that the E-Rate funding cap for funding year 2016 was \$3.939 billion, leaving an estimated \$330 million available. In addition, there was \$1.9 billion in unused funds from previous years also available for FY 2016.<sup>47</sup>

Under these circumstances, the Bureau should have been guided by different, more applicable precedents. *First*, in *Pribilof School District*, binding Commission precedent held that difficulties with the implementation of the EPC during the FY 2016 application process warranted relief from the Section 54.720(a) filing deadline where the applicant failed to receive notice of critical information about its application as a result of changes to USAC's communications processes under EPC.<sup>48</sup> Specifically, the Commission has recognized that the combination of factors including the launch in FY 2016 of the EPC, the "significant unforeseen technical difficulties" surrounding the launch of that platform, and USAC's decision to provide notices of the status of individual applicants' filings (including appeals) via an EPC news feed

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and the Commission must accurately determine the number of funding requests that will be able to be granted in any given year. While USAC maintains a reserve fund for appeals, the amount of money reserved in that fund is generally based on the appeals that can be filed within the 60-day deadline. If the Commission allowed applicants to appeal decisions significantly after the deadline, it would be difficult to estimate the amount of money that should be held in the reserve fund. The reserve fund could be increased; however, that funding would have to come from the same \$2.25 billion allocated for the program and would therefore effectively take money away from applicants that had followed the rules or timely filed appeals.").

<sup>46</sup> Public Notice, "Wireline Competition Bureau Directs USAC to Fully Fund Eligible Category One and Category Two E-rate Requests," CC Docket No. 02-6, 31 FCC Rcd 6751 (Wir. Comp. Bur. 2016), at 1.

<sup>47</sup> *Id.*

<sup>48</sup> *Pribilof School District* at ¶ 11 (finding that, "difficulties with the implementation of EPC during the Funding Year 2016 application process were not within the control of Pribilof, and granting waiver relief [from the Section 54.720(a) filing deadline] here prevents an outcome whereby Pribilof is foreclosed from seeking to obtain much-needed E-Rate funding").

“constitutes special circumstances unique to the funding year 2016 application process” that support a waiver of the appeal filing deadline.<sup>49</sup>

As in the case of Pribilof, Sioux Falls did not receive critical news concerning the status of its funding request (in this case, the denial of its appeal filed at USAC) through the EPC; if news of the denial was, speculatively, provided in the EPC “news feed,” Sioux Falls did not see it. As Commissioner O’Rielly has eloquently explained:

Notice by news feed is lazy, inadequate, and wrongly shifts responsibility for some of the failings of the EPC system on to the shoulders of unsuspecting applicants. Given the number of users and actions within the program, the content posted on EPC has been described as voluminous, cluttered, and almost always irrelevant to specific schools or libraries. It is unreasonable to expect applicants – often school and library staff with a primary educational mission to accomplish – to devote resources to continuously monitor a general-purpose news feed in lieu of receiving an FCDL directly from USAC, especially when they were never told they needed to check it.<sup>50</sup>

The streamlined denial in the Public Notice does not reflect any consideration of the impact of the EPC, which dramatically changed USAC’s E-rate application process and its notification practices and procedures, and which itself was beset by technical difficulties upon launch for FY 2016. To the extent that the Bureau treats action on previous waiver requests as precedent under its streamlined procedures, the Commission’s decision in *Pribilof School District* is controlling.

Second, a waiver of the Section 54.720(a) filing deadline is warranted where USAC erred, or should have worked proactively with the applicant to correct errors before they rose to the level of a Request for Review filed at the FCC. Waivers of the Section 54.720(a) filing deadline in such cases are grounded in the Commission’s landmark *Bishop Perry* decision. There, the Commission explicitly directed USAC to proactively inform applicants in writing of ministerial or clerical errors, offer clear and specific directions for remedying those errors, and

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<sup>49</sup> *Id.*, ¶¶ 10-11.

<sup>50</sup> *Id.*, Statement of Commissioner Michael O’Rielly.

provide an opportunity for applicants to amend their filings to cure such minor errors, all in an effort to improve the efficiency of the E-rate program and reduce the number of appeals involving such errors.<sup>51</sup> The error made by Sioux Falls – misstatement of the non-discounted cost line item in the Form 471 – is precisely the type of error that *Bishop Perry* requires USAC to work in concert with the District to correct.<sup>52</sup>

The Bureau’s application of *Bishop Perry* in *Alton* confirms that the Bureau should have granted a similar waiver here. In *Alton*, the Bureau found that, consistent with *Bishop Perry*, waiver of the appeal filing deadline is warranted where, as here, applicants had missed a USAC procedural deadline and did not violate a Commission rule, and the petitioners demonstrated that they made good faith efforts to comply with programmatic rules.<sup>53</sup> Similarly, the Bureau recently granted a waiver of the appeal-filing deadline for York County School District on the

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<sup>51</sup> *Bishop Perry* at ¶ 23 (“USAC shall inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications, along with a clear and specific explanation of how the applicant can remedy those errors . . . . The opportunity for applicants to amend their filings to cure minor errors will also improve the efficiency and effectiveness of the Fund . . . . If USAC helps applicants file correct and complete applications initially, USAC should be able to reduce the money it spends on administering the fund because fewer appeals will be filed protesting the denial of funding for these types of issues. Therefore, we believe this additional opportunity to cure inadvertent administrative, ministerial, and clerical errors on applications will improve the administration of fund.”).

<sup>52</sup> See, e.g., *Schools and Libraries Universal Service Support Mechanism, Requests for Waiver and Review of Decisions of the Universal Service Administrator by Ann Arbor Public Schools et al.*, CC Docket No. 02-6, Order, DA 10-2354, 25 FCC Rcd 17319 (Wir. Comp. Bur. 2010) (“*Ann Arbor*”), at ¶ 2 (identifying a wide variety of typographical, transcription, rate, and discount calculation errors as “ministerial or clerical”); *Schools and Libraries Universal Service Support Mechanism, Requests for Review of Decisions of the Universal Service Administrator by Archer Public Library, Archer City, TX, et al.*, CC Docket No. 02-6, Order, DA 08-2381, 23 FCC Rcd 15518 (Wir. Comp. Bur. 2008), at ¶ 6 (waiving Section 54.504(c) of the Commission’s rules to allow applicants to amend their original FCC Form 471 applications or the Item 21 attachments submitted to USAC to conform the filing to the price on the source document).

<sup>53</sup> *Schools and Libraries Universal Service Support Mechanism, Requests for Review of Decisions of the Universal Service Administrator by Alton Community Unit School District 11, Alton, Illinois, et al.*, CC Docket No. 02-6, Order, DA 10-999, 25 FCC Rcd 7089 (Wir. Comp. Bur. 2010), at ¶¶ 6-7 (finding that, “denying the petitioners’ requests would create undue hardship and prevent these otherwise eligible schools and libraries from receiving funding that they need to bring advanced telecommunications and information services to their students and patrons”).

grounds that, “USAC Error Resulted in Late-Filed Appeal,”<sup>54</sup> apparently accepting the school district’s argument that, “[t]he fact that ‘several supervisors’ [at USAC] overlooked the error, as did the [USAC] reviewer, should be enough of a point to remand the application back to USAC/PIA for further review. The fact that ‘several supervisors’ made the mistake of not catching the reviewer’s error also should be grounds for the FCC to consider the applicant’s error in overlooking the 60 day appeal deadline.”<sup>55</sup>

In such cases, the Bureau has consistently and repeatedly waived the Section 54.720(a) filing deadline, in some cases where the appeal was filed more than a year late.<sup>56</sup> For example, in *Savannah R-III*, the Bureau found good cause to waive the deadline where USAC had unreasonably denied the applicant’s appeals, finding that, “even though Savannah’s appeal was filed more than 60 days after it received the Notification of Commitment Adjustment Letters and FY 2005 Administrator’s Decision on Appeal, there is good cause to waive section 54.720 of the Commission’s rules [because] the issue before the Commission should have been resolved with USAC before Savannah resorted to filing another appeal.”<sup>57</sup>

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<sup>54</sup> Public Notice, “Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 02-6, DA 17-1217, 32 FCC Rcd 10368 (Wir. Comp. Bur. 2017) (waiving appeal filing deadline where appeal would not have been necessary absent USAC error during PIA review).

<sup>55</sup> York County School District 1 Request for Waiver and Remand, CC Docket No. 02-6 (filed Oct. 23, 2017), at 2.

<sup>56</sup> *Schools and Libraries Universal Service Support Mechanism, Requests for Review and/or Requests for Waiver of Decisions of the Universal Service Administrator by Animas School District 6, et al.*, CC Docket No. 02-6, Order, DA 11-2040, 26 FCC Rcd 16903 (Wir. Comp. Bur. 2011), at ¶ 4 (granting waivers of the appeal filing deadline to eleven petitioners where their late-filed appeals would never have been necessary absent an error on the part of USAC) (“*Animas School District*”); Public Notice, “Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 02-6, DA 18-299, 33 FCC Rcd 2908 (Wir. Comp. Bur. 2018) (waiving appeal filing deadline for Bienville Parish, LA, Application No. 161045894, because the appeals involved errors by USAC); *Ann Arbor* at ¶ 1 (same).

<sup>57</sup> *Schools and Libraries Universal Service Support Mechanism, Request for Review of Decisions of the Universal Service Administrator by Savannah R-III School District, Savannah, Missouri*, CC Docket No. 02-6, Order, DA 08-1890, 23 FCC Rcd 12053 (Wir. Comp. Bur. 2008) (“*Savannah R-III*”), at ¶ 6, n.30.

Similarly, in *Assabet Valley Regional Vocational District*, the Bureau waived Section 54.720(a) where applicants “submitted their appeals to the Commission . . . within a reasonable period of time of actual notice of a clerical error or a decision by USAC not to correct the error.”<sup>58</sup> *Assabet Valley Regional Vocational District* is particularly instructive in this case because it resolved in the applicants favor cases where, just as here, “USAC refused to permit petitioners to make changes to their applications after they had submitted them,” in derogation of USAC’s *Bishop Perry* obligations to assist applicants in correcting such errors.<sup>59</sup>

Finally, in *Animas School District*, the Bureau waived Section 54.720(a) because, “[i]f USAC had not erred, the petitioners would not have had to file an appeal.”<sup>60</sup> As shown herein, had USAC staff provided the District with the assistance required under *Bishop Perry*, or even timely action on the District’s prompt requests for its error in entering the “One-time Unit Cost” in the new online Form 471, none of the District’s subsequent – and far more burdensome and costly – efforts to remedy the problem would have become necessary.

Based on this large body of precedent, the Bureau should have granted the District a waiver of Section 54.720(a) here. As was the case in these previous Commission and Bureau decisions, the District here worked assiduously to correct a simple, manifest error that was well within USAC’s authority and obligation to address. Had USAC efficiently discharged its responsibility under *Bishop Perry* to investigate the affected Form 471 line item and assist in correcting the District’s error, this appeal would never have become necessary.

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<sup>58</sup> *Schools and Libraries Universal Service Support Mechanism, Requests for Waiver and Review of Decisions of the Universal Service Administrator by Assabet Valley Regional Vocational District, Marlborough, MA, et al.*, CC Docket No. 02-6, Order, DA 11-2040, 26 FCC Rcd 16903 (Wir. Comp. Bur. 2011), at ¶ 1.

<sup>59</sup> *Id.* (citing *Bishop Perry*).

<sup>60</sup> *Animas School District* at ¶ 4, n.13.

## **B. The Merits of the District's Appeal Are Clear and Undeniable**

The facts of this appeal are straightforward, as are the merits of the relief the District seeks. Indeed, this appeal is well within the realm of those the Commission intended to avert when it directed USAC to assist applicants like those in *Bishop Perry* that make simple, ministerial or clerical errors during the application process. USAC simply failed to heed the Commission's directive and did not properly discharge its *Bishop Perry* obligations.

### **1. USAC Should Have Permitted Sioux Falls to Correct Its Ministerial or Clerical Error**

The District made a simple data entry error at the heart of this matter that is easy to comprehend, as are the surrounding circumstances that created an environment ripe for such errors. The District recognized its error promptly, well before any funding commitment was made, repeatedly called USAC's attention to the specific line item to be changed, and provided backup documentation supporting the correct figure. It did so during PIA review, a process specifically created to assure the accuracy – even “integrity” – of precisely these figures. It did so in direct response to the PIA reviewer's explicit questions concerning the affected line item on the Form 471. It did so again on appeal, after its initial corrective submissions were inexplicably ignored. It did so yet again in subsequent telephone calls, trying to get someone (anyone!) to understand the clear evidence it had presented. After all, it required nothing more than basic arithmetic to confirm that a correction needed to be made. It did so most recently in a Request for Review that, although untimely, was well within the mainstream of circumstances for which the Commission has waived the filing deadline in the past.

The futility of these sustained efforts to rectify this matter belie the apparently straightforward merits of this matter. Instead, distracting attempts to correct the initial error have derailed the District's entire funding request for nearly three years. Confronted with the mismatch of USAC's funding commitment the District's properly documented Category Two

budget and cost figures, confusion has arisen among the District and USAC staff alike, producing additional errors that have compounded the difficulties. The District was forced to submit a BEAR Invoice that it knew to be incorrect, only to face rejection of even that 60-cents-on-the-dollar payment request. Ultimately, the District, despite reasonable expectations, has been left with no funding at all, instead of more than \$2.25 million for which it was eligible.

That result is all the more distressing because it is squarely within the category of problems that the Commission has explicitly directed USAC to avoid in *Bishop Perry*. The Commission's rules charge USAC with the responsibility to "administer[] the universal service support mechanisms in an efficient, effective, and competitively neutral manner."<sup>61</sup> To implement that responsibility, *Bishop Perry* directed USAC to "improve the efficiency and effectiveness of the Fund" specifically by proactively providing an opportunity for applicants to "amend their filings to cure minor errors" in order to reduce the burden of appeals on applicants, USAC, and the Commission alike.<sup>62</sup> It is plainly inconsistent with this foundational Commission directive for USAC to ignore, willfully disregard, or otherwise fail to acknowledge an applicant's good faith efforts to correct ministerial or clerical errors in accordance with the strictures of *Bishop Perry* and its progeny. That is particularly so in light of the Commission's explicit directive in *Bishop Perry* that "Applicants shall have 15 calendar days from the date of receipt of notice in writing by USAC to amend or refile their FCC Form 470, FCC Form 471 or associated certifications."<sup>63</sup> Yet, when the District provided clear spreadsheets and invoice

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<sup>61</sup> 47 C.F.R. § 54.701(a).

<sup>62</sup> *Bishop Perry* at ¶ 23.

<sup>63</sup> *Bishop Perry* at ¶ 23. While Sioux Falls responded to the PIA reviewer's July 26, 2016 inquiry within 16 calendar days, "special handling procedures" permitting such a response are in place for the summer months, when applicants may be unavailable. See USAC Schools and Libraries Program, Administrative Procedures (Oct. 31, 2016), at 20, available at: [https://ecfsapi.fcc.gov/file/103167885907/USAC%20Annual%20SLD%20Administrative%20Procedures%20Filing%20\(2016\).pdf](https://ecfsapi.fcc.gov/file/103167885907/USAC%20Annual%20SLD%20Administrative%20Procedures%20Filing%20(2016).pdf).

substantiation for its pre-discount Category Two costs and highlighted the need for the correction to its Form 471, USAC did not raise any question as to its accuracy, sufficiency, reliability, or provenance. It did not explicitly reject the information. It simply failed to process the correction, with no explanation of why it persisted instead with the original, erroneous figure.

This result is directly contrary to the strictures of *Bishop Perry*. As discussed above, beginning in 2006 with *Bishop Perry*, the Commission has consistently sought to avoid the “harsh consequence”<sup>64</sup> of funding denial resulting from “minor . . . inadvertent administrative, ministerial, and clerical errors,” by directing USAC to “inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications, along with a clear and specific explanation of how the applicant can remedy those errors.”<sup>65</sup> In doing so, it granted limited waiver flexibility of the E-rate competitive bidding and application filing rules in order to “ensure eligible schools and libraries will be able to realize the intended benefits of the E-rate program.”<sup>66</sup>

The Commission thus recognized and accepted the inevitability of application errors made in good faith by “school administrators, technology coordinators and teachers” who do not have expertise or primary responsibility for pursuing grants of federal financial support,<sup>67</sup> and sought to soften the potentially catastrophic results of an ensuing funding denial or COMAD. Indeed, this case falls squarely within the realm of the inequitable results that *Bishop Perry* and its progeny sought to avoid. For example, in *Ann Arbor*, the Bureau explicitly found that “entering the discounted annual price rather than the pre-discount annual price” in a request for E-rate support constituted a ministerial or clerical error that the applicant was entitled to correct.<sup>68</sup>

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<sup>64</sup> *Bishop Perry*, Statement of Comm’r Copps.

<sup>65</sup> *Id.* at ¶ 23.

<sup>66</sup> *Id.* at ¶ 2.

<sup>67</sup> *Bishop Perry* at ¶ 14.

<sup>68</sup> *Ann Arbor* at ¶ 2; see also Public Notice, “Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 02-6, DA 18-72, 33 FCC Rcd 895



## **2. Adherence to *Bishop Perry* Was Particularly Important in FY 2016**

FY 2016 was a tumultuous and complicated year in the E-rate Program, creating an environment ripe for administrative, ministerial, and clerical errors as USAC worked to “debug” the EPC and applicants struggled to learn the new system. The combination of the roll out of the EPC and the advent of sweeping E-rate rule and FCC Form changes created an unsurpassed nationwide burden. Applicants, while trying to meet deadlines and learn new rules along with a new portal system for the centralization of E-rate requests, communications, and records, found themselves in extremely unfamiliar territory, especially those who did not rely on consultants for E-rate and budget purposes.

Even now, it remains easy to see how the new EPC portal system, new forms, additional responsibilities, and recently-changed Category Two rules converged to create a “perfect storm” ripe for error, such as the District’s misunderstanding of what was required in response to the Form 471 request for “One-time Unit Cost.” Indeed, in these situations, the Commission’s *Bishop Perry* charge to USAC to assist applicants in correcting ministerial and clerical errors takes on heightened importance. But for the new FY 2016 FCC Form 471 and newly drafted instructions for providing amounts for one-time eligible Category Two funding, this error would not have happened. But for the PIA reviewer who failed to properly recognize the error based on fulsome information submitted by the District, the District’s error could have been easily corrected and the pre-discount amount correctly applied before a funding commitment was made. But for the failure of USAC to understand the issue on appeal and accept clear documentation of the pre-discount amount, the FCDL would have been corrected and the District would have filed its BEAR Invoice on time. Had the Bureau looked past the missed Section

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(Wir. Comp. Bur. 2018), at 3 (granting appeal of Houston Area Library Automated Network (HALAN), TX, Application No. 161059030).

54.720(a) filing deadline, it might have seen the merits of the District’s substantive arguments. In any of those cases, the District’s correct support amount would have been properly computed, and the correct eligible discount amount of \$2,252,790 would have been reflected in the funding commitment. And, had USAC correctly and timely taken that step, as required under *Bishop Perry*, no appeal to the Bureau or Application for Review would have been necessary.<sup>69</sup>

Indeed, having held that an applicant’s “mistake in answering the PIA questions incorrectly should not result in the denial of funding,”<sup>70</sup> it would be strange indeed for the Bureau to consign accurate PIA answers to that fate. Instead, USAC was obligated under *Bishop Perry* and related precedent to use the District’s PIA response to effect the necessary correction to the Form 471, in order to avert an unjustified reduction or denial of funding for this minor error.

It is manifestly unjust, and fundamentally at odds with the Commission’s vision for the operation of the E-rate mechanism, for Sioux Falls to lose its entire funding request, in excess of \$2.25 million, based on this simple misunderstanding. The Commission should now, at long last, take this opportunity to correct that outcome.

### **C. The Commission Should Waive Additional Rules to Uphold the Integrity and Policy Goals of the E-rate Program**

Confusion and delay arising from USAC’s failures to permit the District to correct its initial error have now necessitated technical waivers of additional Commission rules, in order to permit the District to realize the benefit of any relief the Commission may grant. In connection with this relief, to the extent required, the District also requests that the Commission direct

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<sup>69</sup> See *Amimas School District*, *supra*, n.56.

<sup>70</sup> *Savannah R-III* at ¶ 6; see also, e.g., Public Notice, “Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 02-6, DA 17-1048, 32 FCC Rcd 9121 (Wir. Comp. Bur. 2017) (granting appeal of Kamiah Joint School District No. 304, ID, Application No. 171048024 to permit correction of school’s error in omitting non-recurring cost from the Form 471 altogether).

USAC to waive any other procedural deadlines, to the extent necessary to effectuate the relief granted by the Bureau and permit the District to submit the invoices associated with this funding request for payment, including specifically those discussed below.<sup>71</sup>

**1. The Commission Should Waive the Form 471 Filing Rule for Corrections to the Extent Needed to Effect Relief**

While the *Bishop Perry* directives would appear designed to give USAC the necessary discretion to address ministerial and clerical errors on its own behalf, it has not done so here. Thus, to the extent necessary, now that the Form 471 filing window for corrections has passed and the FCDL has been issued, the District requests that the Commission waive the Form 471 rule here,<sup>72</sup> in order to allow the District and USAC to correct the FY 2016 Form 471 and the associated FCDL. Only by doing so can the Commission ensure that the District is able to realize the intended benefit of the E-rate program for its students.

Special circumstances clearly support the grant of a waiver in this case. As discussed above, FY 2016 unfolded as a uniquely complicated regulatory and procedural environment that was unprecedented, perhaps since the very first year of the E-rate program. Ambiguous wording on the FY 2016 Form 471 compounded this already-difficult environment leading to the District's original error. And, USAC's unjustified failure to meet its responsibility to work with the applicant to correct this administrative, ministerial, or clerical error left the District with no other avenue for relief.

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<sup>71</sup> See, e.g., *Schools and Libraries Universal Service Support Mechanism, Request for Waiver and Review of Decisions of the Universal Service Administrator by Erie I BOCES et al.*, CC Docket No. 02-6, Order, DA 13-1923, 28 FCC Rcd 13381 (Wir. Comp. Bur. 2013) (directing USAC to waive any procedural deadline, including the invoice filing deadline, that might be necessary to effectuate the relief granted by the Bureau).

<sup>72</sup> 47 C.F.R. § 54.504.

The public interest also supports a waiver. As the Commission found in *Aberdeen* and the *Bishop Perry Order*, rigid adherence to certain E-rate rules and requirements that are “procedural” in nature may not promote the goals of section 254 of the Act – ensuring access to discounted telecommunications and information services to schools and libraries – and therefore does not serve the public interest.<sup>73</sup> These factors, along with compliance with core requirements; zero evidence of waste, fraud, and abuse; and alignment with the Commission’s goals to “promote the statutory requirements of section 254(h) of the Communications Act of 1934, as amended (the Act), by helping to ensure that eligible schools and libraries actually obtain access to discounted telecommunications and information services,”<sup>74</sup> are in alignment with the progeny of Commission Orders following the *Bishop Perry Order* allowing for the correction of ministerial, clerical, and procedural errors<sup>75</sup> and speak in favor of granting a waiver for these funding requests and direct USAC to allow Sioux Falls to resubmit its invoice to USAC at the corrected discount amount for reimbursement.

## **2. The Commission Should Waive the E-rate Invoice Filing Deadline**

The Commission should also grant a waiver of the invoice filing deadline contained in Section 54.514(a) of the Commission’s rules, even if, for some reason, it finds that it cannot otherwise grant the Form 471 or other relief requested above.<sup>76</sup> Under Section 54.514(a), invoices eligible for E-rate support must be submitted no later than 120 days after the last day to receive service or 120 days after the FCC Form 486 Notification Letter date, whichever is later. In light of the prolonged confusion surrounding this funding request, the District submits that

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<sup>73</sup> *Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District, Aberdeen, WA*, et al., CC Docket No. 02-6, Order, FCC 07-63, 22 FCC Red 8757 ¶ 7 (2007) (“*Aberdeen*”); *Bishop Perry* at ¶ 23.

<sup>74</sup> 47 U.S.C. § 254(h).

<sup>75</sup> *Bishop Perry* at ¶ 9.

<sup>76</sup> 47 C.F.R. § 54.514(a).

this appeal presents the type of “extraordinary circumstances” and “substantial circumstances” that justifies a waiver of the invoice filing deadline established in the *E-rate Modernization Order*.<sup>77</sup> Thus, even if the Commission does not grant any other relief necessary to correct the erroneous “One-time Unit Cost” entry to reflect the non-discount amount, the District requests a waiver of Section 54.514(a) so that it may, at the very least, submit invoices to receive partial payment in the amount of USAC’s original \$1,335,798.00 funding commitment.

The well-documented fog of confusion surrounding the FY 2016 application process, compounded by the extraordinary amount of administrative process surrounding USAC’s persistent refusal to correct a trivial error in the District’s Form 471, create special circumstances justifying this waiver. Here, believing that its USAC appeal was still unresolved, the District was not aware that the invoice filing deadline was approaching. Had it been given proper notice of USAC’s August 2017 denial of its appeal, the District of course would never have let that January 29, 2018 invoice filing deadline pass, putting at risk the entire (albeit partial and incorrect) \$1.3 million funding commitment that it had received.

Furthermore, the invoices themselves *had* previously been provided to USAC, both with the District’s initial response to the PIA reviewer in August 2016, and again with its USAC appeal of the incorrect funding commitment in February 2017. When the District was advised to file its partial invoice on January 31, 2018, despite awaiting the Administrator’s Decision in Appeal, it promptly filed the Form 472 BEAR as quickly as possible, only two days later, on February 2, 2018. Had the District so requested only days earlier, before the initial deadline had passed, USAC itself would have automatically granted a one-time 120-day extension of the deadline.

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<sup>77</sup> *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-99, 29 FCC Rcd 8870 (2014) at ¶ 240.

The public interest also supports a waiver. Absent such a waiver, the District will lose, not only the \$900,000 reduction in support caused by USAC's erroneous application of a double discount to the District's pre-discount Category Two budget, but also the original \$1.3 million in support that USAC did commit. That result would undermine the goals of the E-rate program to enrich the educational experience of the nation's primary and secondary students, and make the benefits of broadband more accessible to all, as well as severely impact the District's budget.

### **Conclusion**

For the foregoing reasons, the District respectfully requests that the Commission (1) waive the appeal filing deadline contained in 47 C.F.R. § 54.720(a); (2) waive the Form 471 filing deadline contained in 47 C.F.R. § 54.504 to allow for the correction and the associated invoice filing deadline contained in 47 C.F.R. § 54.514(a); (3) direct USAC to restore and commit additional FY 2016 Category Two funding to the District based on the entire amount of the District's Category Two budget and eligible Category Two costs; and (4) direct USAC to waive any other procedural deadline that might be necessary to effectuate the aforementioned relief.

Respectfully submitted,



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