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August 13, 2018

Appeals Unit  
Federal Communications Commission  
Washington D.C. 20554

RE: In the matter of Schools and Libraries Universal Service Support Mechanism  
Consolidated Request for Review and/or Waiver by and for Pleasantville School District  
Of a Funding Decision by the Universal Service Administrative Company  
Dkt. No. 02-6  
Form 471 Application No. 484579  
Billed Entity No. 123365

Dear Sir/Madam:

We are counsel for the Pleasantville School District. Attached please find our appeal of USAC's request for rescission of funding for FY2005. If the Court is in need of any further documentation, please contact us and we will immediately provide.

Thank you for your attention to this matter.

Very truly yours,

s/James J. Carroll, III, Esq.  
JAMES J. CARROLL, III, ESQ.

BBB/kw

cc: Benjamin B. Brenner, Esq.  
Appeals - USAC (via email)

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Schools and Libraries	)	CC Docket No. 02-6
Universal Service Support Mechanism	)	
	)	
Consolidated Request for Review	)	Form 471 Application No. 484579
and/or Waiver by	)	Billed Entity No. 123365
and Pleasantville School District (NJ)	)	
of a Funding Decision by the	)	
Universal Service Administrative Company	)	

**CONSOLIDATED REQUEST FOR REVIEW AND/OR WAIVER  
BY PLEASANTVILLE SCHOOL DISTRICT (NJ)  
OF FUNDING DECISIONS BY THE  
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY**

Pursuant to sections 54.719 and 54.722 of the Commission's rules,<sup>1</sup> Pleasantville School District hereby respectfully requests a review of Universal Service Administrative Company (USAC) decisions to seek recovery for Funding Years 2005.<sup>2</sup> USAC alleged that Pleasantville School District did not provide "sufficient" responses to its request for information made during a 2010 review. Contrary to USAC's assertion, Pleasantville School District did provide sufficient information to USAC during its 2010 review and it satisfied all of the Commission's competitive bidding rules and selected the most cost-effective solution for its Internet access services. Pleasantville School District therefore respectfully requests that the Commission grant this appeal,

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<sup>1</sup> 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

<sup>2</sup> See Exhibit A for the relevant applications, which involve approximately \$403,517.54 in funding requests.

restore the funding commitments for these funding years, and direct USAC to cease its efforts to recover the funding disbursed.<sup>3</sup>

### **EXECUTIVE SUMMARY**

USAC is seeking to recover approximately nearly \$403,517.5 in E-rate funding. In 2010, USAC allegedly conducted a competitive bidding review of Pleasantville's FY 2005 funding. During this review, USAC allegedly requested additional information from Pleasantville and its consultant Martin Friedman about Mr. Friedman's role during the competitive bidding process. It was not until 2017, or approximately seven (7) years later, or over twelve years after Pleasantville received the funding, that USAC notified Pleasantville that it did not receive "enough information" to find that Pleasantville's competitive bidding process was open and fair. Contrary to USAC's finding, Pleasantville did respond to USAC's inquiry and provided the information requested. As demonstrated below, there is simply no evidence that Pleasantville's competitive bidding process was not fair and open. Moreover, it selected the most cost-effective solution for its broadband needs.

Further, seeking recovery of these funds more than twelve (12) years after the funding was disbursed, and nearly seven (7) years after the alleged "review" by USAC was completed violates federal law and Commission policy. The recovery is also unjust. Due to the passage of time and significant number of different administrators, superintendents and legal representation for the District, Pleasantville School District had tremendous difficulty obtaining the documentation from that time period. If, however, alternatively, the Commission decides that recovery is warranted, it is appropriate for USAC to seek reimbursement from the service providers as well as the District.

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<sup>3</sup> Should the FCC grant Pleasantville's appeal of the denial of USAC regarding the 2005 debt, Pleasantville reserves its right to appeal USAC's denial of SY 2017 and 2018 which denial was based solely upon Pleasantville's failure to pay the 2005 debt. See attached **Exhibit D** (attachments/exhibits pages 129-131), a copy of Pleasantville's appeal of the denial of funding for FY 2017.

Finally, although Pleasantville School District conducted a fair and open competitive bidding process, in the alternative, Pleasantville School District requests that the Commission waive any rules it believes were violated as such a waiver would serve the public interest. USAC's decision to seek recovery of over \$400,000 in these circumstances is wildly disproportionate to the alleged violation and therefore not in the public interest, especially given that there was zero harm to either the integrity or finances of the E-rate program.

For these reasons, we respectfully request that the Commission grant the appeal and direct USAC to cease its recovery efforts against the District.

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## BACKGROUND

USAC has asserted that Pleasantville has not repaid \$403,517.54 in previously disbursed E-rate funds. USAC determined that these funding commitments must be rescinded, and the disbursed funding recovered due to a violation of E-rate program rules. USAC asserted that it sent Demand Payment Notice on this debt to Pleasantville by letters dated June 16, 2017; August 17, 2017 and September 18, 2017. In its appeal to USAC, Pleasantville asserted by signed certification under penalty of law that it never received the first two Demand Payment Notices dated June 16, 2017 and August 17, 2017. The first notice Pleasantville received regarding this alleged debt was by letter dated September 18, 2017. See attached **EXHIBIT A** to the Affidavit of James J. Carroll, Esq., a copy of the appeal filed by the Pleasantville School District with attachments (attachments/exhibits pages marked 1-120).

In said Demand Payment Notices, which contained a copy of the Funding Adjustment Reports (“COMAD”) for the above references debts, USAC stated that its investigation had resulted in the following assertion:

During the course of a review, you [the District] was asked to provide information regarding Martin Friedman and Alemar Consulting and the roles he played at your school, including his role in the competitive bidding process. You did not provide specifics regarding the role played by Mr. Friedman in your competitive bidding and vendor selection process. Therefore, USAC is unable to make a determination if your school engaged in a fair and open competitive bidding process free from conflicts of interest. {Emphasis added.}

See Pages 7-33 of **Exhibit A** of Affidavit of James J. Carroll, III, Esq., attached hereto.

This “explanation” by USAC simply did not contain information sufficient to inform the District why the funding was being rescinded, or if it had any basis for appeal. Specifically, the COMADs did not state when the “review” was done by USAC; on what date the District was asked

to provide information; or to whom said request was sent. It did not indicate whether the District responded to the inquiry, but the response was not “specific” enough; or, if the District did respond, what about their response was missing? Rather, the only information the District had was that sometime in the last twelve (12) years, USAC allegedly requested information from the District about Martin Friedman and allegedly the District failed to provide “the specific” information USAC was seeking. Because the COMADs were so vague and because this all allegedly happened twelve (12) years ago, the District had no choice but to request additional documentation from USAC regarding the matter to determine whether it could appeal.

Under the FCC’s debt collection regulations, debtors have fifteen (15) days from the date of the demand letter to request a retrieval of invoices and documentation related to a debt to the FCC or USAC. As stated, the first correspondence Pleasantville School District received from USAC regarding the debt it was seeking to rescind was September 18, 2017. By letter dated October 2, 2017, (or twelve (12) days after receipt of the initial correspondence), Pleasantville provided USAC with the signed certification from the Business Administrator indicating that that the District had not received the initial two notices from USAC. See Pages 36-40 of **Exhibit A**. The letter dated October 2, 2017, also requested a copy of USAC’s file relating to its investigation. The letter also placed USAC on notice that the District intended to dispute the propriety of the debt; and/or seek a waiver; and /or appeal the notification. This letter was timely, as it was sent within twelve (12) days of receipt of the first notice the District received from USAC.

However, USAC did not provide any response to the District’s October 2, 2017 letter. Thereafter, by letter dated October 9, 2017, the District again reiterated its request for documentation indicating what investigation was conducted and what was the basis for the USAC’s COMADs. See Page 41 of **Exhibit A**. USAC did not respond to the letter. Thereafter,

by letter dated October 13, 2017, the District again reiterated its request for documentation. See Page 42 of **Exhibit A**. Finally, on November 15, 2017, USAC responded and provided the District with documentation. See Page 43 of **Exhibit A**. This documentation was provided to the District over forty (40) days after USAC first notified the District of its demand for repayment of \$403,517.54 from funding years 2005, or over eleven (11) years ago.

Upon receipt of the documentation, which was quite voluminous, the District immediately began its own investigation.

By letter dated November 28, 2017 (or within 31 days of receipt of the voluminous documentation), the District notified USAC that the USAC documentation, as well as the District's own records, indicated that in 2010, the District did respond to an inquiry from Linda Grieger, relating to information about Martin Friedman. See Pages 44-46 of **Exhibit A**. However, in several of the responses the District provided to Ms. Geiger's inquiries, the District had indicated that the matter was currently in litigation and that the Board's solicitor would be providing additional information as requested. Based upon the same, the District then attempted to contact the Board's solicitor at the time, namely, Ray Hamlin, Esq., to determine what information was provided on the District's behalf. In a letter dated November 28, 2017 to USAC, the District requested additional time to secure this information from the Board's prior solicitor and requested a reasonable amount of time to obtain the necessary information relating to USAC's allegation that it "did not provide specifics regarding the role played by Mr. Friedman" in the competitive bidding process and thereby allow the District to investigate, refute, appeal or seek a waiver of the claim by USAC that it is owed \$403,517.54. See Pages 44-46 of **Exhibit A**. USAC did not provide any response to the District's November 28, 2017 letter.



By letter dated January 16, 2018, the District notified USAC that it had been able to contact Ray Hamlin, Esq., the District's counsel in 2010. See Pages 47-49 of **Exhibit A**. Mr. Hamlin indicated that he had no documentation that reflected that his firm was ever placed on notice of this issue, who the notification was sent to, whether there is proof of its receipt, and who specifically provided a response to it. Based upon Mr. Hamlin's response, the District in the January 16, 2018 letter to USAC, asserted that there was simply no proof one way or the other to USAC's assertion that twelve (12) years ago it made an inquiry of the District and no one responded.

Separate and distinct from the District's efforts to confirm with Mr. Hamlin one way or the other what actions he took approximately seven (7) years ago in response to an alleged inquiry by USAC, the District was able to provide USAC with the following documentation to specifically dispute USAC's allegation that it did not get "sufficient information" from the District during its alleged 2010 inquiry. This information included:

1. Pleasantville Board of Education – January 2010 legal bill for services rendered by Ray Hamlin, Esq., counsel for Pleasantville at the time which indicate that on 12/8/10 and 12/17/10, he spoke with Michael Shea and Elisha Thompkins regarding documents requested by USAC; on 12/21/10, he spoke with Linda Geiger at USAC regarding documents requested by USAC from PBOE regarding e-rate funding.

2. A copy of emails dated September 22, 2010 from Linda Geiger at USAC to Elisha Thompkins wherein Mr. Thompkins provided a written response to Ms. Geiger's questions which specifically related to Mr. Friedman.

3. A copy of a letter to Linda Geiger at USAC from Martin Friedman written in response to a November 10, 2010 request for information for Special Compliance Review Team. Mr.

Friedman provided detailed answers to a number of questions all relating to the bidding and selection of providers process.

See Page 50-120 of **Exhibit A**.

By email dated January 31, 2018 (or approximately 133 days after the District first received the Demand Payment Notice in September 2017, and after failure to respond to the District letter dated November 28, 2017), Ms. Sheila Murray of USAC wrote:

We reviewed your January 16, 2018 letter in response to USAC's November 15, 2017 Notice of Dismissal to Pleasantville School District. As indicated in the November 15th notice, Pleasantville has not repaid \$403,517.54 in previously disbursed E-rate funds. USAC determined that these funding commitments must be rescinded, and the disbursed funding recovered due to a violation of E-rate program rules. Because of Pleasantville's failure to repay the outstanding amounts, its Funding Year (FY) 2017 funding applications were denied and the funding commitment decision letter (FCDL) was issued on January 19, 2018. (A copy of the FCDL is attached and the FCDL is also available in the E-rate Productivity Center and noted in Pleasantville's News Feed.)

To appeal this denial decision, you must submit your appeal to USAC within sixty (60) days of the denial decisions (by March 20, 2018). If you have any questions regarding the appeal process, please refer to the appeals section of USAC's website.

By electronic filing on March 2, 2018, the Pleasantville School District filed an appeal with USAC. See **Exhibit A**. By electronic notice dated June 25, 2018, the undersigned as counsel for the Pleasantville School District received notice from USAC of the denial of its appeal.<sup>4</sup> See attached **Exhibit B** to Affidavit of James J. Carroll, III (attachments/exhibits Page 121). In its denial, USAC reiterated its allegation that Pleasantville did not provide USAC with sufficient information regarding the role Mr. Friedman played in the open and competitive bidding process. See attached **Exhibit C**, a copy of USAC's denial (attachments/exhibits Page 122-128).

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<sup>4</sup> Notice was electronically received on June 25, 2018 – this despite the date that was on the denial opinion of May 25, 2018. See Affidavit of James J. Carroll, III, Esq.

Appeals to the Commissioner of USAC decisions are due within 60 days of receipt of the decision. Counsel for the District received USAC's decision from USAC by email dated June 25, 2018.<sup>5</sup> This appeal is timely.

## **II. USAC ERRED IN FINDING THAT PLEASANTVILLE'S BIDDING PROCESS WAS NOT OPEN AND FAIR.**

USAC stated that in 2010 during a review, it had requested Pleasantville provide "additional information" relating to Martin Friedman's role during the bidding process. It was not until 2017 that USAC gave Pleasantville any notice whatsoever that the District had allegedly failed to comply with USAC's request. However, despite the approximately seven (7) years that had passed since USAC first allegedly began its "review", Pleasantville was able, in 2017, to respond to said inquiry and provided USAC with a documents which clearly indicated that back in 2010, USAC had direct access to Mr. Friedman, as evidenced by his correspondence to Ms. Geiger of USAC which clearly answered questions posed by her to Mr. Friedman. See Pages 108-120 of **Exhibit A**. Pleasantville also provided USAC with emails to/from Ms. Geiger to then assistant business administrator Elisha Thompkins which indicated that Mr. Thompkins did respond to Ms. Geiger's inquires. See Pages 102-107 of **Exhibit A**. Pleasantville also provided time sheets from its legal bills indicated that it had discussed the matter with its attorney and its attorney had discussed the matter with Ms. Geiger. See Pages 50-101 of **Exhibit A**. Nothing in the documentation provided by Pleasantville to USAC indicates that it failed to respond to USAC's inquiry back in 2010. Thus, there was no basis for USAC's COMAD to state that:

During the course of a review, you [the District] was asked to provide information regarding Martin Friedman and Alemar Consulting and the roles he played at your school, including his role in the competitive bidding process. You did not provide

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<sup>5</sup> Id.

specifics regarding the role played by Mr. Friedman in your competitive bidding and vendor selection process. Therefore, USAC is unable to make a determination if your school engaged in a fair and open competitive bidding process free from conflicts of interest. {Emphasis added.}

The evidence therefore demonstrates that Pleasantville did respond to all inquiries from Ms. Geiger and USAC and it was never told that its answers or responses were insufficient until over seven (7) years after USAC allegedly completed its investigation.

The evidence therefore demonstrates that USAC has no legitimate or reasonable basis to rescind the money or to assert that the bidding process was not open or fair.

## **II. RECOVERY OF FUNDING MORE THAN FIVE YEARS AFTER DISBURSEMENT IS PROHIBITED BY FEDERAL LAW AND COMMISSION POLICY**

Pleasantville School District recognizes that recently, the Commission has declined to recognize any formal temporal limitation on recovery actions by USAC. In the Net56 Order, the Commission determined that the five-year investigation period it had previously established in the Fifth Report and Order is a “policy preference” and “not an absolute bar to recovery.”<sup>6</sup> More recently, in its Blanca Order, the Commission rejected an argument that the Supreme Court’s decision in Kokesh v. SEC imposed the general federal five-year statute of limitations in 28 U.S.C. § 2462 on USAC recovery actions.<sup>7</sup> First, the Commission’s decision in Blanca can be distinguished here. But even taking these Commission orders into account, USAC must still respect the Commission’s unequivocal preference for concluding investigations within five years.

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<sup>6</sup> Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc., Palatine, Illinois, CC Docket No. 02-6, Memorandum Opinion and Order, 32 FCC Rcd 963, 966 ¶ 9 (2017).

<sup>7</sup> Blanca Telephone Company Seeking Relief from the June 22, 2016 Letter Issued by the Office of the Managing Director Demanding Repayment of a Universal Service Fund Debt Pursuant to the Debt Collection Improvement Act, CC Docket No. 96-45, Memorandum Opinion and Order and Order on Reconsideration, 32 FCC Rcd 10594, 10611-12, ¶¶ 44-45 (2017) (Blanca).

First, notwithstanding the Commission's decision in Blanca, the five-year statute of limitations provision should apply here. The five-year statute of limitations applies to the "enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."<sup>8</sup> In Kokesh v. SEC, the Court found that the SEC's disgorgement action constituted a "penalty" under the statute because a penalty addresses a wrong against the public, not an individual, and is sought for the purpose of punishment and deterrence, not just compensation of a victim.<sup>9</sup> In Blanca, the Commission determined that the federal five-year statute of limitations provision was not applicable to Blanca because the recovery at issue was not a penalty but "merely recovers for the USF a windfall to which Blanca was not entitled."<sup>10</sup> Contrary to the Commission's decision in Blanca, recovering over \$400,000 in funding because of vague, unspecific allegations of "insufficient information" can only be characterized as a penalty, especially when there was no effect on the competitive bidding process and therefore no harm to the fund. Here, USAC has not shown any harm to the universal service fund, and, as demonstrated above, there is no evidence that Pleasantville did not engage in an open and fair process. Unlike Blanca, Pleasantville School District did not receive any "windfall"; USAC disbursed funds that paid for E-rate eligible services that Pleasantville used to provide educational opportunities for its students—in furtherance of the E-rate program's statutory goals. As a result, the only purpose for recovery here would be to punish the school district and deter future violations by E-rate applicants and service providers, which would mean the statutory limitation should apply.

Further, the Commission has recognized that there are important policy reasons to limit its review period. In its Fifth Report and Order, the Commission established a policy that "USAC

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<sup>8</sup> 28 U.S.C. § 2462

<sup>9</sup> Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017).

<sup>10</sup> Blanca at 10612, ¶ 45.

and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or a rule within five years of the final delivery of service for a specific funding year.”<sup>11</sup> In adopting that policy, the Commission recognized that “conducting inquiries within five years strikes an appropriate balance between preserving the Commission’s fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries’ needs for certainty and closure in their E-rate application processes.”<sup>12</sup> The Net56 Order clarified that the five-year period in the Fifth Report and Order was a policy preference rather than a hard deadline, but at the same time it reiterated the policy considerations described in the Fifth Report and Order, stressing that the Commission “continue[s] to believe that the best course is for USAC to aim to complete its investigations and seek recovery of funds within five years, whenever possible” and directing USAC “to incorporate that as an objective in its annual performance metrics plan.”<sup>13</sup>

The Supreme Court has also explained on numerous occasions why statutes of limitations are so important as a matter of policy. In Kokesh, the Court explained that statutes of limitations “are ‘vital to the welfare of society’ and rest on the principle that ‘even wrongdoers are entitled to assume that their sins may be forgotten.’”<sup>14</sup> The Court has gone so far as to point out that “[i]n a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.”<sup>15</sup>

Even if no formal statute of limitations applies to E-rate recovery actions, the policy concerns that the Commission recognized in the Fifth Report and Order and the Net56 Order, and

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<sup>11</sup> 47 U.S.C. § 254(b)(6).

<sup>12</sup> Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808 (2004) ¶ 33 (emphasis added) (Fifth Report and Order).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 3M v. Browner, 17 F.3d at 1457 (quoting Adams v. Woods, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.) (emphasis added)).

that the Supreme Court described in Kokesh and elsewhere, are no less applicable. As a matter of good policy and essential fairness, USAC should be far more hesitant than it is to rescind funding committed twelve years ago. USAC has chosen to ignore the Commission's policy preference over an alleged "insufficient" response by Pleasantville, despite a complete lack of evidence that any deficiency in the responses affected the competitive bidding process in any way. It is difficult to imagine a less significant reason for rescinding funding, or a more arbitrary and inexplicable change of course. If the Commission affirms decisions such as this one, E-rate applicants will never experience the "certainty and closure" that the Commission has directed USAC to prioritize. The Commission must reverse USAC's decision, because if this decision is permitted to stand, then the Commission's longstanding policy preference for concluding universal service funding investigations within five years is rendered meaningless.

Finally, Pleasantville also submits that there is a significant difference in the COMADS issued by USAC in 2017 – the year Pleasantville received its COMADS, which show a present pattern of conduct on the part of USAC which flagrantly violates the FCC's clearly stated policy preference that inquiries related to wrongful E-rate program disbursements should be completed within five years of the final delivery of service for a specific funding year.

Specifically, between 2013-2016, the commitment adjustments occurred on average 2.8 years after the start of the funding year. This is consistent with the timeframe of audits that result from the disbursement of funds. Funds are disbursed in Year 1; payments are audited in Year 2; and the audit findings are approved and the recovery of funds initiated sometime soon thereafter; i.e., 2.8 years after the funds are disbursed. However, in 2017 the COMADS were different; not only were the applicant numbers significantly increased, and more money was at risk, the COMADS themselves were nearly twice as old. In fact the oldest COMAD was from funding year

2001 – or 17 years ago. The total amount in money sought to be reimbursed to USAC went from \$4.3million during 2013-16 to over \$60 million in 2017.

Pleasantville respectfully asserts that this recent pattern of conduct exhibited by USAC in 2017 directly and significantly violates the FCC’s “policy preference” that inquiries related to wrongful E-rate program disbursements should be completed within five years of the final delivery of service for a specific funding year. In 2017, Pleasantville was clearly not the only District who was handed a COMAD that was eleven (11) years old. This change in procedures by USAC should not be tolerated and is a flagrant violation of the expressed and clear *preference* of the FCC in handling these matters.

#### **IV. PLEASANTVILLE’S CARRIERS ARE EQUALLY RESPONSIBLE FOR ANY VIOLATIONS OF THE RULES.**

If the Commission determines that there was a competitive bidding violation (which we have demonstrated above is not the case), then each of Pleasantville’s carriers were equally responsible for any violation of the Commission’s competitive bidding rules. First, every carrier must certify annually on the FCC Form 473 that it is compliance with the Commission’s rules.<sup>54</sup> Second, in the Fourth Report and Order, the Commission directed USAC to seek recovery of funds based on the assignment of fault.<sup>16</sup> Here, if Pleasantville School District is found to have violated the Commission requirement that the competitive bidding process be fair and open, then surely its carriers contributed to that violation by failing to provide the alleged, vague and unspecified

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<sup>16</sup> Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Schools and Libraries Universal Service Support Mechanism, CC Docket Nos. 96-45, 97-21 and 02-6, Order on Reconsideration and Fourth Report and Order, FCC 04181, ¶¶ 10, 15 (2004) (Fourth Report and Order).



information requested by USAC in the first place. Finally, it is simply unfair to place the entire penalty on the District. That being said, Pleasantville School District does not believe any parties has violated the Commission's rules.

#### **V. IN THE ALTERNATIVE, A WAIVER OF THE COMMISSION'S RULES IS IN THE PUBLIC INTEREST**

As demonstrated above, USAC has presented no evidence that Pleasantville did not conduct a fair and open competitive bidding process. To the extent that the Commission concludes that a violation of USAC's request for "sufficient information" occurred, however, the District respectfully argues that a waiver of that rule would be in the public interest and would constitute a more effective implementation of overall E-rate policy.

Any of the Commission's rules may be waived if good cause is shown.<sup>17</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>18</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>19</sup> The Commission has waived competitive bidding rules when applicants' "competitive bidding processes were not compromised by their technical violation of the Commission's competitive bidding requirements."<sup>20</sup> Even if Pleasantville did not provide

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<sup>17</sup> 47 C.F.R. § 1.3.

<sup>18</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>19</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. 59

<sup>20</sup> See Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company, CC Docket No. 96-45, Public Notice (WCB February 29, 2016) (granting Request for Review by Riverside Unified School District, CA, CC Docket No. 02-6 (filed Dec. 10, 2015) citing to Requests for Waiver and Review of Decisions of the Universal Service Administrator by Aberdeen School District et al.; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 27 FCC Rcd 1941 at ¶ 1 (WCB 2012) (granting waiver to San Jose Unified School District of competitive bidding rule

“sufficient responses” and even if such a de minimus action may have technically violated the Commission’s rules, there is simply no evidence that the competitive bidding process was compromised. As detailed above, Pleasantville had Mr. Friedman respond directly to any questions posed by Ms. Geiger on behalf of USAC. If Ms. Geiger needed or wanted additional information, she could have easily asked Mr. Friedman additional questions. There is no evidence such action was ever taken by USAC. Rather, they waited over seven (7) years to inform Pleasantville that it had not responded sufficient. These actions are simply not evidence that there was any influence—good, bad or otherwise—on the competitive bidding process. Like in Aberdeen, then, the Commission should find a waiver would be appropriate in these circumstances.

Furthermore, the Commission has routinely waived competitive bidding rules when the applicant has selected the lowest-cost bidder.<sup>21</sup> There was simply no evidence or allegation by USAC that Pleasantville did not select the lowest-cost bidders when it selected its carriers for Internet and telecommunications services. The Commission should waive the rule here where, as in the other appeals, the universal service fund was not harmed because the applicant selected the lowest-cost vendor.

A finding by the Commission that Pleasantville’s alleged “insufficient” response constituted some alleged improper action would require the District to repay close to a half of a

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requiring compliance with state and local procurement law when the applicant violated a state rule requiring the RFP to be published in a newspaper of general circulation but the applicant published the RFP on its website and received sufficient bid responses, and there was no evidence of waste, fraud, and abuse).

<sup>21</sup> See, e.g., Request for Review of Decisions of the Universal Service Administrator by Allendale County School District et al.; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 26 FCC Rcd 6109 (Wireline Comp. Bur. 2011) (Allendale Order) (finding that a waiver of the Commission’s competitive bidding rules was in the public interest where the petitioners selected the least expensive responsive service offering).

million dollars in funding and has cost the District requested funding for FY 2017 and 2018. This disproportionately punitive outcome would cause substantial harm to students in Pleasantville School District and would not serve the purposes of the E-rate program in general. Accordingly, the District urges the Commission to waive its competitive bidding rules to the extent necessary to avoid such an egregious outcome.

## **VI. CONCLUSION**

For the foregoing reasons, the Pleasantville School District respectfully requests that the Commission grant this appeal. If the Commission believes that the responses provided were “insufficient” under the Commission’s rules, then the District respectfully requests that the Commission waive its rules, consistent with its precedent, especially given that the error had no effect on the competitive bidding process and repayment of the over \$400,000 would be a tremendous hardship to the District.

Respectfully submitted,

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	)	
Consolidated Request for Review	)	Form 471 Application No. 484579
and/or Waiver by	)	Billed Entity No. 123365
and Pleasantville School District (NJ)	)	
of a Funding Decision by the	)	
Universal Service Administrative Company	)	

**CERTIFICATE OF SERVICE**

This is to certify that on this 13<sup>th</sup> day of August, 2018, a true and correct copy of the foregoing Request for Review was sent to the following parties in the manner indicated below:

Schools and Libraries Division Universal Service Administrative Company  
Appeals@sl.universalservice.org (via email)