

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

In the Matter of)	
)	
School and Libraries)	CC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Request for Review and/or Waiver)	Billed Entity No. 143338
By Portales (New Mexico))	Application No. 432673
Municipal Schools)	

**REQUEST FOR REVIEW AND/OR WAIVER BY PORTALES (NEW MEXICO)
MUNICIPAL SCHOOLS OF A FUNDING DECISION BY THE UNIVERSAL SERVICE
ADMINISTRATIVE COMPANY**

Pursuant to Sections 54.719 and 54.722 of the Commission’s Rules,¹ Portales Municipal Schools (“Portales”) requests a review of a Universal Service Administrative Company (USAC) decision to adjust Portales’s funding request and seek recovery of funding disbursed in 2004 and 2005. USAC’s attempt to recover these funds is time-barred by the general federal statute of limitations in 28 U.S.C. § 2462. Accordingly, the Wireline Competition Bureau (“Bureau”) should grant this appeal, and or any waivers necessary or warranted, and remand the above-captioned application to USAC with instruction to reinstate the funding commitment and cancel this recovery request.

I. Background

Portales Municipal Schools is located in Portales, New Mexico, in the east-central portion of the state and near Cannon Air Force Base. The district serves approximately 2,700 students in four elementary schools, one middle school, and one high school. Approximately 29.1 percent of Portales households fall below the poverty rate, which is more than double the national poverty rate of 13.5 percent.

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

On December 2, 2003, Portales's Technology Coordinator at the time, Bill Jones, posted an FCC Form 470 seeking bids for tariffed and month-to-month services.² On June 22, 2004, USAC issued a Funding Commitment Decision Letter covering this application.³ On June 16, 2017, Portales received several Notification of Commitment Adjustment Letters covering seven Funding Request Numbers.⁴ Each of the Commitment Adjustment Letters stated that Portales "did not provide a copy of the RFP at the request of the Administrator."⁵

Portales timely filed an appeal by email on July 12, 2017.⁶ The appeal noted that "documentation retention mandates" in 2004 "were only 5 years" and the last date of service for the disputed Funding Request Numbers (FRNs) would have been June 30, 2005. Because the Commitment Adjustment Letters were sent more than 12 years after that date, Portales was unable to locate the requested RFPs. Portales requested "that the decision to rescind the funding in full be reconsidered due to the negative impact it would have on our rural school district and its' [sic] kids because of our limited budget for school technology needs."⁷

USAC denied the appeal in a letter dated October 13, 2017.⁸ The decision recognized that Portales no "longer [has] the documentation on file." As a result, USAC "could not determine if an RFP was issued" and denied the appeal. USAC did not address Portales's discussion of the document retention requirements in effect in 2004.⁹

Portales herein timely files its request for review and/or waiver with the Commission.¹⁰

² Exhibit 1, FCC Form 470, Application Number 935690000475494.

³ Exhibit 2, USAC Funding Commitment Decision Letter, Form 471 Application Number 432673.

⁴ Exhibit 3, Notification of Commitment Adjustment Letters for Funding Request Numbers 1204781, 1204850, 1204455, 1204609, 1204572, 1204646, and 1204716.

⁵ *Id.*

⁶ Exhibit 4, Email from igriffith@portaleschools.com to appeals@sl.universalservice.org.

⁷ *Id.*

⁸ Exhibit 5, Administrator's Decision on Appeal – Funding Year 2004-2005.

⁹ *Id.*

¹⁰ 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

II. USAC's recovery action is time-barred by the general federal statute of limitations.

Federal law prohibits USAC from seeking recovery of E-rate funding more than five years after the funding was disbursed. Federal law setting statutes of limitations states:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.¹¹

This limitations period applies to agency administrative proceedings, because it is unfair to pursue stale claims, whether they are brought before a court or before an agency.¹² Section 2462 also “provides the statute of limitations for the Communications Act.”¹³

The funding adjustment sought by USAC is a penalty under the statute of limitations. 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.¹⁴ Rescission of E-rate funding meets this definition, because there is no individual that is a victim. USAC seeks the return of funding to address a “wrong” against the E-rate program and to recoup money for the Universal Service Fund on behalf of the federal government. The commitment adjustment thus constitutes a penalty for purposes of the Section 2462 statute of limitations.

Alternatively, the funding adjustment sought by USAC could also be considered a forfeiture under the statute of limitations. The common meaning of “forfeiture” is the requirement that a person turn over money or property because of a breach of a legal duty.¹⁵ Rescission of E-rate funding meets this definition, because USAC would require Portales to turn over its money because it purportedly did not

¹¹ 28 U.S.C. § 2462.

¹² *3M Co. v. Browner*, 17 F.3d 1453, 1456-57 (D.C. Cir. 1994).

¹³ See *United States v. Worldwide Indus. Enters.*, 220 F. Supp. 3d 335, 338 (E.D.N.Y. 2016).

¹⁴ *Kokesh v. SEC*, 581 U.S. ___, 137 S. Ct. 1635, 1642 (2017).

¹⁵ *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).

comply with the competitive bidding process established by federal and state laws.¹⁶ The commitment adjustment thus constitutes a forfeiture for purposes of the Section 2462 statute of limitations.

The Commission's *Net56 Order* suggests that USAC recovery actions are subject to no time limitations whatsoever because the Commission's *Fifth Report and Order* five-year "time frame constitutes a mere policy preference and not an absolute bar to recovery."¹⁷ The *Net56 Order* does recognize that "a statutory limitations period that Congress may establish" is "an absolute bar to recovery."¹⁸ The *Net56 Order*, however, did not consider the Section 2462 statute of limitations established by Congress.

Statutes of limitations serve an important policy role. Limitation periods 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."¹⁹ In *Browner*, an administrative law judge argued that no limitations period should apply to a penalty action brought in an administrative agency. The D.C. Circuit rejected this argument, observing 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 for ever liable to a pecuniary forfeiture."²⁰

Limitations periods are established because no school district can be expected to mount a robust defense more than a decade after the alleged violations of the E-rate rules occurred. The passage of time and the departures of key staff involved in the 2004 bidding process have made it extremely and unfairly challenging for Portales to respond to USAC's inquiries.

USAC sent its Commitment Adjustment letters to Portales in 2017. Bill Jones, the Portales employee who had handled the applications back in 2004, had long since left the district. Portales could locate only limited documentation from 2004. It could not find any requests from the Administrator,

¹⁶ The Communications Act actually treats the terms "penalty" and "forfeiture" synonymously. *See Worldwide Indus. Enters.*, 220 F. Supp. 3d at 337-38 (referring to a "forfeiture penalty").

¹⁷ *Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc.*, CC Docket No. 02-6, Memo. Op. & Order, 32 FCC Rcd 963, ¶ 9 (2017) [*Net56 Order*].

¹⁸ *Id.*

¹⁹ *Kokesh*, 137 S. Ct. at 1641 (quoted authority omitted).

²⁰ *Browner*, 17 F.3d at 1457 (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) (Marshall, C.J.)).

prior to 2017, to provide copies of the RFPs. This loss of evidence is why Congress establishes statutes of limitations. As the Supreme Court has explained, “[s]tatutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”²¹ That is exactly what has happened here: certain witnesses have disappeared, others do not have clear memories of events that occurred well over a decade ago, and Portales cannot even verify that it has all documents that once existed. In particular, Portales cannot verify whether it issued an RFP or whether it determined that this was a sole source procurement that did not require an RFP, as allowed by the New Mexico Procurement Code, N.M. Stat. Ann. § 13-1-126.

Congress established a five-year statute of limitations for recovery actions such as this one. AA Chairman Pai said in his *First Modernization Order* dissent, “[s]tripping schools and libraries of their procedural rights doesn’t do them any service.”²² USAC’s decade-long delay in pursuing this recovery action has made it impossible for Portales to respond to USAC’s requests, much less to mount any kind of a defense. The Bureau should therefore reverse USAC’s decision.

III. In the alternative, a waiver of the Commission’s rules is in the public interest.

As shown, USAC’s COMAD is time-barred by 28 U.S.C. § 2462. Should the Bureau disagree, however, Portales respectfully requests in the alternative that the Bureau waive the Commission’s rules to the extent necessary to grant the requested relief.

Any of the Commission’s rules may be waived if good cause is shown.²³ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with

²¹ *Gabelli v. SEC*, 568 U.S. 442, 449 (2013) (quoted authority omitted).

²² *First Modernization Order*, 299 FCC Rcd at 9040 (dissenting statement of Commissioner Ajit Pai). In his dissent, Chairman Pai also objected to the possibility of “a school or library [being] stuck with a multi-million dollar bill from the government a decade after the fact.” *Id.*

²³ 47 C.F.R. § 1.3.

the public interest.²⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁵

Portales is a poor school district that does not have money on hand to repay this funding. New Mexico has cut general school funding by nearly 14 percent between 2008 and 2014, and inflation-adjusted per-pupil spending was 7 percent lower in 2017 than in 2008.²⁶ New Mexico is also waiting on a decision in a lawsuit that says the state must spend more on education in order to avoid violating the state constitution.²⁷ Attempting to recover funds from 2004-2005, based on missing documents that the District was not required to retain, harms the District and its individual students. Waiving the rules in this situation will better serve the purpose of the E-rate program to insure that “[e]lementary and secondary schools and classrooms . . . and libraries should have access to advanced telecommunications services.”²⁸ There is no question that Portales received the equipment and services paid for under the E-rate program. The only question is whether Portales can prove that it paid the best prices that it could for that equipment and those services. Penalizing Portales by the entire amount paid exceeds the harm that could have occurred. Therefore, if the Commission decides not to apply the federal statute of limitations, Portales asks that the Commission’s rules be waived in this situation.

Respectfully submitted,

WALSH GALLEGOS TREVIÑO RUSSO & KYLE,
P.C.

By: /s/ Barry J. Berenberg

²⁴ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁵ *Id.*; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

²⁶ https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/17/new-mexico-gov-martinez-vetoes-higher-education-funding-all-of-it/?utm_term=.b65e7c60bdb1

²⁷ <https://www.usnews.com/news/best-states/articles/2017-07-21/state-leaders-clash-on-new-mexicos-public-education-funding>

²⁸ 47 U.S.C. § 254(h).

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CERTIFICATE OF SERVICE

This is to certify that on this 12th day of December, 2017, a true and correct copy of the foregoing Request for Review and/or Waiver was electronically filed through the FCC's ECFS.

By: /s/ Barry J Berenberg
Barry J. Berenberg