

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Request for Review of Decisions of the)
Universal Service Administrator by)

St. Jude School)

CC Docket No. 02-6

File No. SLD Form 471 No. 828179
FRNs 2262629, 2262626

To: Chief, Wireline Competition Bureau

SUPPLEMENT TO REQUEST FOR REVIEW OR WAIVER

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Dated: October 21 , 2014

TABLE OF CONTENTS

I. INTRODUCTION 2

II. STATEMENT OF THE SCHOOL'S INTERESTS IN THE APPEAL..... 2

III. KEY BACKGROUND FACTS..... 3

 A. The School..... 3

 B. FCC Form 470 3

 C. The Competitive Bidding Process and FCC Form 471..... 3

 D. USAC's 2014 Commitment Adjustment Letters 4

IV. STANDARD OF REVIEW 5

V. ARGUMENT..... 5

 A. FRN 2262629 Will Be Cancelled 5

 B. The School Is Closed And Therefore The COMAD Cannot Be
 Recovered 5

 C. A Waiver Is Justified..... 6

VI. CONCLUSION AND REQUEST FOR RELIEF 10

SUMMARY

St. Jude School (“Jude” or “School”) hereby supplements its timely filed July 11, 2014 Request For Review or Waiver (“Appeal”) of the Universal Service Administrative Company’s Schools and Libraries Division Notification Of Commitment Adjustment Letter, dated May 14, 2014 (“COMAD”). The COMADs seek recovery of \$1,248.07 in disbursed funds and rescission of \$13,778.68 of previously-approved E-Rate Program support.

St. Jude School, located in the Washington Heights area of New York City, was closed at the end of June 2013 for financial and other reasons. This affected the School’s ability to provide all documentation regarding the FRNs that are the subject of the Appeal, which involve a total of \$1,248.07 in disbursed E-Rate Program support. The School is planning to cancel FRN 2262629 for which support was approved, but not disbursed. Assuming such cancellation, the School respectfully submits that under the circumstances and in view of the *de minimis* amount involved, it does not serve the public interest to continue to seek recovery of the support provided under FRN 2262626.

Even assuming the Commission finds a violation of the E-Rate Program requirements under these circumstances—where the School made good faith efforts to comply with what the Commission itself concedes can be a complicated set of rules—the School respectfully submits that a waiver of the requirements is wholly justified. Simply put, equitable considerations, hardship, and the lack of any evidence of waste, fraud, or abuse warrant that the COMADs be rescinded.

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To: Chief, Wireline Competition Bureau

SUPPLEMENT TO REQUEST FOR REVIEW OR WAIVER

This is a Supplement (“Supplement”) filed on behalf of St. Jude School, which was part of the Catholic Archdiocese of New York school system (“Jude” or “School”). On July 11, 2014, the School timely filed, in accordance with Sections 54.719-54.721 of the Federal Communication Commission’s (“FCC” or “Commission”) rules, a separate Request For Review Or Waiver (“Appeal”) relating to a decision of the Universal Service Administrator (“Administrator”) to rescind and/or recover certain Schools and Libraries Support Mechanism (“E-Rate Program” or “Program”) funding provided to the School for Funding Year (“FY”) 2012.¹

Therein the School reserved the right to supplement its Appeal and herein does so, further reserving the right to address any further questions that might be raised by the Commission as a result of this Supplement, including by way of further supplementation on at its own discretion or at the request of the Commission.

¹ A copy of the Appeal is attached as Exhibit 1.

I. INTRODUCTION

St. Jude School, located in the Washington Heights area of New York City, was closed at the end of June 2013 for financial and other reasons. This affected the School's ability to provide all documentation regarding the FRNs that are the subject of the Appeal, which involve a total of \$1,248.07 in disbursed E-Rate Program support. The School is planning on cancelling FRN 2262629, for which \$1,728.00 in support was approved, but not disbursed. The School respectfully submits that under the circumstances and in view of the *de minimis* amount involved it does not serve the public interest to continue to seek recovery of the support provided under FRN 2262626.

Even assuming the Commission finds a violation of the E-Rate Program requirements under these circumstances—where the School made good faith efforts to comply with what the Commission itself concedes can be a complicated set of rules—the School respectfully submits that a waiver of the requirements is wholly justified. Simply put, equitable considerations, hardship, and the lack of any evidence of waste, fraud, or abuse warrant that the COMADs be rescinded.

II. STATEMENT OF THE SCHOOL'S INTERESTS IN THE APPEAL

The School had standing to file the Appeal and this Supplement because Section 54.719(c) of the Commission's rules provides that "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission."² In this case, the School is directly aggrieved by the Universal Service Administrative Company's ("USAC") COMADs and its continued effort to recover previously approved Program funds expended in accordance with that approval.

² 47 C.F.R. § 54.719(c).

III. KEY BACKGROUND FACTS

A. The School

St. Jude was a private, coed, inner-city Catholic elementary school located in the Washington Heights area of New York City. It was among a number of such schools in the Archdiocese of New York that participated in the E-Rate Program. For FY 2012, the School qualified for discounts at the 90% rate, with over 77% of its students eligible for free or reduced price lunches under the National School Lunch Program. For FY 2012, the School served 225 students in pre-kindergarten through 8th grade, many of whom were from families of needy residents.

St. Jude was among a number of Archdiocesan schools that were required to be closed for financial and other reasons as of the end of the 2012-2013 school year (i.e., in June of 2013).³ The School is not operational and therefore not able to reimburse any E-Rate program support funds previously disbursed.

B. FCC Form 470

The School timely posted an FCC Form 470 for FY 2012 on July 15, 2011, indicating the School's intent to seek E-Rate Program support for Telecommunications Service and Internet Access. The Form 470 followed the instructions and posted using generic, vendor-neutral language to describe the eligible services being sought.⁴

C. The Competitive Bidding Process and FCC Form 471

After posting Form 470, Jude was forwarded some proposal information from AT&T concerning AT&T Long Distance and Web Hosting Services.⁵ However, after waiting the necessary 28 days and it submitted the relevant FCC Form 471 on February 8, 2012, indicating that it had selected Verizon New York, Inc. for eligible Telecommunications Service and Time Warner

³ See Exhibit 2.

⁴ The relevant Form 470 is attached as Exhibit 3.

⁵ See Exhibit 4.

ResCom of New York LLC for eligible Internet Access.⁶ The services selected were non-contracted tariffed or month-to-month services. USAC approved the support and issued a Funding Commitment Decision Letter on July 10, 2012.⁷

D. USAC's 2014 Commitment Adjustment Letters

On May 14, 2014, after a series of USAC inquiries starting in April 2013, USAC issued the COMADs.⁸ The substance of the Funding Commitment Adjustment Explanation for each FRN was the same:

“After multiple requests for documentation, it has been determined that this funding commitment must be rescinded in full. The applicant failed to produce at the request of the Administrator the following documentation pertaining to its competitive bidding process: copies of bids received and documentation to support the vendor evaluation and selection process. FCC rules require schools and libraries to retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least five years after the last day of service delivered in a particular Funding Year and to produce such records upon a request of an auditor or other authorized representative. FCC rules further provide that a non-compliance with the FCCs record keeping and auditing rules by failure to retain records or to make available required documentation is a rule violation that warrants recovery of any disbursed funds for the time period for which the information/documentation is being sought. Since you failed to produce the above specified documentation upon request of an authorized representative, your compliance with the competitive bidding requirements could not be determined. As a result your funding commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.”

Again, the COMADs seek recovery of \$1,248.07 in disbursed funds and rescission of \$13,778.68 of previously-approved E-Rate Program support.

⁶ Because of the complexity of the E-Rate Program application process and in a good faith effort to ensure compliance with the Commission's rules, the School was assisted by a duly-authorized E-Rate consultant ERateProgram, LLC.

⁷ The relevant Form 471 and FCDL are attached as Exhibit 5.

⁸ Copies of the COMADs are included in Exhibit 1. The language regarding recovery of funds was not included in the COMAD relating to FRN 2262629.

IV. STANDARD OF REVIEW

USAC's authority to administer the E-Rate Program is limited to implementing and applying the *Commission's rules and the Commission's interpretations of those rules* as found in Commission decisions and orders.⁹

USAC is not empowered to make policy, interpret any unclear provisions of the governing statute or the rules promulgated by the Commission,¹⁰ or create the equivalent of new guidelines.¹¹ USAC is responsible for "administering the universal support mechanisms in an efficient, effective, and competitively neutral manner."¹² In connection with efforts to recover previously approved E-Rate support, USAC has the burden of acting in a timely manner to recover and demonstrating that there has been a statutory or substantive rule violation.¹³ Finally, the Commission's review of the COMAD is *de novo*, and the agency is not bound by any findings or conclusions of USAC.¹⁴

V. ARGUMENT

A. FRN 2262629 Will Be Cancelled

Because FRN 2262629 will be cancelled, the COMAD relating to this FRN is moot and should be rescinded. Further, the Appeal, as it originally related to this FRN would no longer be applicable. This FRN involves a total of \$1,728.00 in E-Rate Program support.

B. The School Is Closed And Therefore The COMAD Cannot Be Recovered

St. Jude was one of a number schools forced to close by the Archdiocese of New York for

⁹ 47 C.F.R. § 54.702(c).

¹⁰ *Id.*

¹¹ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, Third Report and Order, 13 FCC Rcd 25058, 25066-67, ¶¶15-16 (1998).

¹² 47 C.F.R. § 54.701(a).

¹³ *See In the Matter of Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15813 and 15819, ¶¶15, 32(2004) ("*Fifth Report and Order*").

¹⁴ 47 C.F.R. § 54.723.

financial and other reasons at the end of the 2012-2013 school year (i.e., in June 2013).¹⁵ Therefore, there is no applicant or billed entity from which to make any recovery. Again, with respect to FRN 2262629, which seeks the rescission of approved, but undisbursed funds, the Archdiocese will cancel the FRN on behalf of the former school. With respect to FRN 2262626 the total amount disbursed was \$1,248.07, which was used for the purpose for which it had been approved.

The Commission established the process and procedures for recovery of funds from the responsible party, either the applicant or the service provider.¹⁶ The Commission also stated that “it does not serve the public interest to seek to recover funds associated with statutory or rule violations when the administrative costs of seeking recovery outweigh the dollars subject to recovery.”¹⁷

Because the School is planning to cancel FRN 2262629, Jude respectfully submits that under the circumstances it is not in the public interest to pursue the recovery of \$1,248.07, and therefore the COMADs should be rescinded.

C. A Waiver Is Justified

Nevertheless, the School respectfully submits that if the Commission concludes that there has been a violation of the E-Rate Program document retention rules for the remaining FRN, a waiver of the rules is wholly justified under the special circumstances here.

¹⁵ The announcement related to the closings is at Exhibit 2.

¹⁶ See *In the Matter of Federal-State Joint Board on Universal Service*, Order On Reconsideration And Fourth Report And Order, 19 FCC Rcd 15252 (2004).

¹⁷ *Fifth Report and Order*, ¶35. It is noteworthy that the Commission has decided to exempt from the competitive bidding requirements certain internet access services where the annual pre-discount cost is \$3600 per year or less. *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-99, p. 79, ¶200 (released July 23, 2014).

The Commission's rules allow waiver of a Commission rule "for good cause shown."¹⁸ The Commission has extended this authority to waivers of USAC rules. For example, in the *Bishop Perry Order*, the Commission noted that it "has vested in USAC the responsibility of administering the application process for the schools and libraries universal service support mechanism."¹⁹ Pursuant to that authority, USAC developed procedures relating to the application and appeals process.²⁰ Thus, in *Bishop Perry*, the Commission applied the 47 C.F.R. § 1.3 waiver rule to allow a limited waiver of USAC procedures.²¹

The Commission has established the following guidance for determining whether waiver is appropriate:

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. 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.²²

¹⁸ 47 C.F.R. § 1.3.

¹⁹ *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al.*, Order, 21 FCC Rcd 5316, ¶4 (2006) ("*Bishop Perry Order*").

²⁰ *Id.* The *Bishop Perry Order* dealt with USAC application procedures known as "minimum processing standards."

²¹ *Id.*

²² *Requests for Review of A Decision of the Universal Service Administrator by Richmond County School District*, 21 FCC Rcd 6570, 6572, ¶5 (Wireline Compet. Bur. 2006) (internal references omitted) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972)).

Jude respectfully submits that the outcome of the vendor selection process here was “consistent with the policy goals underlying the Commission’s competitive bidding rules” and therefore a waiver is appropriate.²³

Strict compliance with the Commission’s rules in the special circumstances involving the School would not be in the public interest. In *Bishop Perry*, the FCC granted 196 appeals of decisions denying funding due to “clerical or ministerial errors in the application.”²⁴ In that case, the FCC found good cause to waive the minimum processing standards established by USAC, finding that “rigid compliance with the application procedures does not further the purposes of section 254(h) or serve the public interest.”²⁵ Many of the appeals in *Bishop Perry* involved staff mistakes or mistakes made as a result of staff not being available.²⁶ The Commission granted the waivers for good cause, noting that:

[T]he primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers, as opposed to positions dedicated to pursuing federal grants, especially in small school districts. Even when a school official has learned how to correctly navigate the application process, unexpected illnesses or other family emergencies can result in the only official who knows the process being unavailable to complete the application on time. Given that the violation at issue is procedural, not substantive, we find that the complete rejection of each of these applications is not warranted. Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that

²³ *Requests for Review of Decision of the Universal Service Administrator by Euclid City School District, Euclid, OH, et al.*, Order, 27 FCC Rcd 14169, 14170, ¶2 (Telecom. Access Pol. Div. 2012).

²⁴ *Bishop Perry Order*, ¶1.

²⁵ *Id.*, ¶11. The Commission departed from prior Commission precedent, noting that the departure was, “warranted and in the public interest.” *Id.*, ¶9. The Commission noted that many of the rules at issue were procedural, and that a waiver is consistent with the purposes of Section 254, which directs the Commission to “enhance ... access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries.” *Id.*

²⁶ *Id.*, ¶13.

denial of funding in these cases would inflict undue hardship on the applicants.²⁷

The Commission has recently formally recognized that the existing E-rate system is complex and burdensome, requiring applicants to spend many hours focusing on compliance with its various requirements.²⁸ Indeed, it is so complicated as to be a deterrent to particularly smaller schools even applying.²⁹

Where the outcome of the competitive bidding process provided the applicant with the services that met their needs in a way that was ultimately likely to impose the least burden on the federal universal service fund, a waiver is appropriate.³⁰

There is absolutely no evidence here of any activity by the School intended to defraud or abuse the E-Rate Program.³¹ Nor is there any evidence of any waste, fraud, or abuse, or misuse of funds.³²

Furthermore, the imposition of a requirement to reimburse the requested funds under these circumstances many months after they were originally approved and expended would impose an

²⁷ *Id.*, ¶14.

²⁸ *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11319 ¶45 (2013).

²⁹ *Id.*, 11474 (Statement of Commissioner Jessica Rosenworcel) and 11475 (Statement of Commissioner Ajit Pai).

³⁰ *Requests for Review of Decisions of the Universal Service Administrator by Central Islip Union Free School District*, Order, 29 FCC Rcd 2715, 2716, ¶1 n.7 (Telecom. Access Pol. Div. 2014).

³¹ See *Request for Review of the Decision of the Universal Service Administrator by New Haven Free Public Library*, Order, 23 FCC Rcd 15446, 15449, ¶7 (Telecom. Access Pol. Div. 2008); *Request for Review of the Decision of the Universal Service Administrator by the District of Columbia Public Schools*, Order, 23 FCC Rcd 15585, 15588, ¶5 (Telecom. Access Pol. Div. 2008); *Request for Review of the Decision of the Universal Service Administrator by Tekoa Academy of Accelerated Studies*, Order, 23 FCC Rcd 15456, 15458-59, ¶6 (Telecom Access Pol. Div. 2008).

³² See *Requests for Review of Decisions of the Universal Service Administrator by Broaddus Independent School District et al.*, Order, 23 FCC Rcd 15547, 15551-52, ¶12 (Telecom. Access Pol. Div. 2008).

undue hardship because the School is closed.³³ There is no evidence that the School acted in bad faith.³⁴ Requiring repayment would not further the purpose of preserving and advancing access to universal service support for schools and libraries.³⁵ Consequently, it would be inequitable to uphold the COMADs.³⁶ Thus, a waiver is appropriate under these special circumstances.

VI. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, Jude respectfully requests that the Commission grant the Appeal and direct USAC to overturn its prior decisions and cancel the COMADs relating to the School's FY 2012 funding request for Telecommunications and Internet Access services.

³³ See *Request for Review of a Decision by the Universal Service Administrator by Radford City Schools*, Order, 23 FCC Rcd 15451, 15453, ¶4 (Telecom. Access Pol. Div. 2008); *Request for Review of a Decision of the Universal Service Administrator by Grand Rapids Public Schools*, Order, 23 FCC Rcd 15413, 15416, ¶6 (Telecom. Access Pol. Div. 2008).

³⁴ See *Request for Waiver of the Decision by the Universal Service Administrator by Great Rivers Education Cooperative, Forrest City, Arkansas*, Order, 21 FCC Rcd 14115, 14119, ¶9 (Wireline Compet. Bur. 2006).

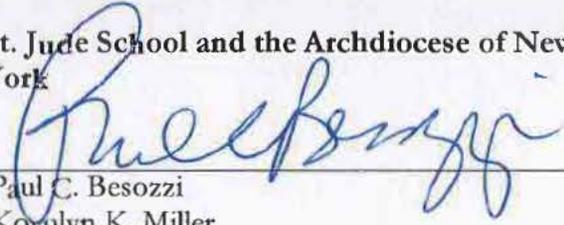
³⁵ See *Request for Review of a Decision by the Universal Service Administrator by Adams County School District 14*, Order, 22 FCC Rcd 6019, 6022, ¶8 (2007).

³⁶ See *Request for Waiver and Review of a Decision of the Universal Service Administrator by Approach Learning and Assessment Center, Santa Ana, CA, Schools and Libraries Universal Service Support Mechanism*, Order, 23 FCC Rcd 15510, 15513, ¶8 (Telecom. Access Pol. Div. 2008).

Finally, even if the Commission finds a violation of the E-Rate Program requirements under these circumstances—where the School made good faith efforts to comply with what the Commission itself concedes can be a complicated set of rules—a waiver of the requirements is wholly justified. Simply put, equitable considerations, hardship, and the lack of any evidence of waste, fraud, or abuse warrant that the COMADs be rescinded.

Respectfully submitted,

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Dated: October 21, 2014

DECLARATION

I, Dr. Timothy J. McNiff, am the Superintendent of Schools for the Archdiocese of New York, a position that I have occupied since 2008. As Superintendent I am generally familiar with the E-Rate Program and the participation of the schools of the Archdiocese in that Program. I am further aware that on May 14, 2014, the Administrator of the Universal Service Administrative Company ("USAC") issued Notification of Commitment Adjustment Letters to 6 current and 3 former schools of the Archdiocese in connection with certain E-Rate Program support for Funding Year 2012. I am also aware that on July 11, 2014 each of those schools appealed, as a matter of right, the USAC decisions to the Federal Communications Commission ("FCC").

The foregoing Supplement To Request For Review or Waiver was prepared pursuant to my ultimate direction, supervision and control. I declare under penalty of perjury that the factual statements therein relating to the participation of the particular Archdiocesan School that is the subject of the Supplement in the E-Rate Program for Funding Year 2012 are true and correct to the best of my knowledge, information and belief.



Dr. Timothy J. McNiff

Dated: 10/17/14

CERTIFICATE OF SERVICE

I, Paul C. Besozzi, certify on this 21st day of October, 2014, a copy of the foregoing "Supplement To Request For Review Or Waiver" has been served via electronic mail or first class mail, postage pre-paid, to the following:

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