Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	CC Docket No. 02-6
Request for Review of Decisions of the Universal Service Administrator by	)	
St. Ann School	)	File No. SLD Form 471 Nos. 858098, 860715 FRNs 2334842 (Form 471# 858098); 2343175 (Form 471# 860715)

To: Chief, Wireline Competition Bureau

SUPPLEMENT TO REQUEST FOR REVIEW OR WAIVER

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Dated: October 22 , 2014

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SUMMARY

St. Ann School ("Ann" 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 Letters, dated May 14, 2014 ("COMADs"). The COMADs seek recovery of $69,167.70 in disbursed funds and rescission of $11,970.07 in previously-approved E-Rate Program Support.

The School conducted a competitive bidding process in the spirit of compliance with the E-Rate Program rules regarding the solicitation and consideration of competing bids. It timely posted its FCC Form 470 and waited the requisite time period under the Rules. The School responded to a number of inquirers, indicating that it was to hold an E-Rate Open House. Thereafter, there were two proposals submitted. Available records indicate that the School chose the lower cost proposal for both Internal Connections and Basic Maintenance of Internal Connections. Ann respectfully submits that these efforts demonstrate good faith efforts by the School to fully comply with the competitive bidding rules and Ann's conduct does not warrant imposition of the COMADs.

USAC contends that the Form 470 description of the requested Basic Maintenance of Internal Connections was insufficiently detailed, but does not explain how, other than to point to the fact that the School received an email seeking some additional information. Ann respectfully submits that one such inquiry does not equate with an inadequate description under the E-Rate Program rules. Nor does the failure of the School to respond render the competitive bidding process defective. There is no indication that inquirer ever followed up and records indicate it has never filed a Service Provider Annual Certification ("SPAC") form or been selected to receive E-Rate Program support.

Finally, 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 requirement 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. Ann School, which is part of the Catholic Archdiocese of New York school system ("Ann" 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 decisions 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 at its own discretion or at the request of the Commission.

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

I. INTRODUCTION

The School conducted a competitive bidding process in the spirit of compliance with the E-Rate Program rules regarding the solicitation and consideration of competing bids. It timely posted its FCC Form 470 and waited the requisite time period under the Rules. The School responded to a number of inquirers, indicating that it was to hold an E-Rate Open House. Thereafter, there were two proposals submitted. Available records indicate that the School chose the lower cost proposal for both Internal Connections and Basic Maintenance of Internal Connections. Ann respectfully submits that these efforts demonstrate good faith efforts by the School to fully comply with the competitive bidding rules and Ann's conduct does not warrant imposition of the COMADs.

USAC contends that the Form 470 description of the requested Basic Maintenance of Internal Connections was insufficiently detailed, but does not explain how, other than to point to the fact that the School received an email seeking some additional information. Ann respectfully submits that one such inquiry does not equate with an inadequate description under the E-Rate Program rules. Nor does the failure of the School to respond render the competitive bidding process defective. There is no indication that inquirer ever followed up and records indicate it has never filed a Service Provider Annual Certification ("SPAC") form or been selected to receive E-Rate Program support.

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.

III. KEY BACKGROUND FACTS

A. The School

Ann is private, coed, inner-city Catholic elementary school located in the upper East Side of New York City. It is 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 100% of its students eligible for free or reduced price lunches under the National School Lunch Program. For FY 2012, the School served 293 students in pre-kindergarten through 8th grade, many of whom were from families of needy residents.

B. FCC Form 470s

The School timely posted an FCC Form 470 for FY 2012 on January 16, 2012 for Internal Connections and Basic Maintenance of Internal Connections. The Form 470 indicated that it was seeking "hourly pricing" for maintenance services for wireless access points and a controller, as well as other eligible equipment.[3]

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[2] 47 C.F.R. § 54.719(c).

[3] The Form 470 is attached as Exhibit 2.

C. The Competitive Bidding Process and FCC Form 471s

After the posting of the Form 470, the School had email exchanges with seven (7) inquiring parties: Eler Technology, VoiceData, AmerNetworks, Knight Nets, Avaya, Meru Networks, and Network Outsource, indicating that the School would be having an E-Rate Open House on February 7, 2012.[4] Previously, the School had spoken by phone with MetComm and Cogent, prior to the posting of the Form 470.[5]

The School received proposals from Knight Nets and Network Outsource. Based on an evaluation of the proposals it was determined that the Network Outsource proposals were less costly.[6]

The School waited the requisite 28 days before making its selection and filed two Form 471s on March 13, 2012 (Internal Connections) and March 15, 2012 (Basic Maintenance of Internal Connections, respectively.[7]

USAC issued Funding Commitment Decision Letters approving the requested support on December 4, 2012.[8]

D. USAC's 2014 Commitment Adjustment Letter

On May 14, 2014, after a series of USAC inquiries starting in April 2013, USAC issued the COMADs.[9] The Funding Commitment Adjustment Explanation in each case included the following:

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[4] *See* Exhibit 3.

[5] *See* Exhibit 4.

[6] *See* Exhibit 5.

[7] The Form 471s are at Exhibit 6.

[8] *See* Exhibit 7.

"After multiple requests for documentation, it has been determined that this funding commitment must be rescinded in full. USAC received information showing that a potential bidder contacted you within the 28 day bidding window seeking information about your Internal Connections (IC) and Basic Maintenance of Internal Connections (BMIC) requirements. During review, you provided correspondence with potential bidders which shows that the school responded to service providers who had contacted them with an invitation to an open house which was to occur at the school on February 7, 2012. However, documentation provided indicates the school did not respond to the particular bidder USAC was informed about either in the form of the information the service provider had sought or with an invitation to the open house, as was provided to other prospective bidders. Since you did not treat all prospective bidders equally, you violated open and fair CB requirements. Since you posted FCC Form 470 #330250000999575, which included a request for IC and BMIC, you are obligated to receive and assess all bids and to treat all potential bidders fairly and equally. Circumstances should not be present that would give unfair competitive advantage to any service provider. You failed to meet these requirements. Therefore, the applicant has violated the competitive bidding program rules and your funding commitment will be rescinded in full."

"Additionally 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."

Again, the COMADs seek recovery of $69,167.70 in disbursed funds and rescission of $11,970.07 of previously-approved E-Rate Program support.

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[9] Copies of the COMADs are included in Exhibit 1.

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.[10]

USAC is not empowered to make policy, interpret any unclear provisions of the governing statute or the rules promulgated by the Commission,[11] or create the equivalent of new guidelines.[12] USAC is responsible for "administering the universal support mechanisms in an efficient, effective, and competitively neutral manner."[13] 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.[14] Finally, the Commission's review of the COMAD is *de novo,* and the agency is not bound by any findings or conclusions of USAC.[15]

V. ARGUMENT

A. The Bidding Process, Form 470 Description and Failure To Respond To A Single Email Do Not Justify Imposition Of The COMADs

The School conducted a competitive bidding process in the spirit of compliance with the E-Rate Program rules regarding the solicitation and consideration of competing bids. It timely posted its FCC Form 470 and waited the requisite time period under the Rules. The School responded to a number of inquirers, indicating that it was to hold an E-Rate Open House. Thereafter, there were

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[10] 47 C.F.R. § 54.702(c).

[11] *Id.*

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

[13] 47 C.F.R. § 54.701(a).

[14] *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*").

[15] 47 C.F.R. § 54.723.

two proposals submitted. Available records indicate that the School chose the lower cost proposal for both Internal Connections and Basic Maintenance of Internal Connections. Ann respectfully submits that these efforts demonstrate good faith efforts by the School to fully comply with the competitive bidding rules and Ann's conduct does not warrant imposition of the COMADs.

USAC asserts that the COMAD for FRN 2335462 is further justified because the descriptions of the Basic Maintenance of Internal Connections being sought by the School are "insufficiently detailed to allow prospective bidders to provide a [responsive] bid." The COMAD does not explain the insufficiency or against what specific standard approved by the Commission it must be measured. The Form 470 reflected that there would be wireless access points and sought basic maintenance for all access points and controllers. Moreover, the Form 470 sought an "hourly pricing rate" not an overall contract price. In any case, the School respectfully submits that the description was sufficiently complete to allow bidders to specify their hourly rate for the categories of maintenance services specified.

USAC's conclusion that the description was insufficient was apparently tied to an email message from Mr. Assad Gilani on behalf of SaaS Networks, Inc. who did ask for more information in connection with the Form 470 for Basic Maintenance of Internal Connections. But one inquiry cannot equate to a general conclusion that the Form 470 description is wanting. At least one other bidder was able to submit a bid based on the Form 470 and the support was approved and disbursed by USAC. Further Mr. Gilani apparently gathered some additional information himself from a prior year FCC Form 471 and was aware of the number of classrooms and computers involved.[16] Further, the School submits that Mr. Gilani's inquiry related solely to Basic Maintenance of Internal

[16] *See* Exhibit 8.

Connections. So the failure to respond to him cannot be grounds for rescinding E-Rate Program Support for Internal Connections Other Than Basic Maintenance.

The School concedes that it was unable to produce an email response to Mr. Gilani. There is no indication that Mr. Giliani made any further inquiry. And his company ultimately did not submit a bid.[17] However, there is no evidence here of any intentional or wilfull effort to favor one or more bidders or to ignore or exclude Mr. Gilani and SaaS, and therefore truncate competition. The apparent inadvertent failure of a busy elementary school Principal to respond to Mr. Gilani via email, if that is in fact what occurred here, should not be turned into a "gotcha" violation that requires a 90% school to return needed E-Rate support money. This is especially the case when the funds have been spent properly for Priority 2 Internal Connections (and Basic Maintenance Support thereof) that the Commission has now concluded are "crucial to improving educational experiences and expanding opportunities for all our nation's students, teachers, parents and communities."[18] This is the kind of "strict liability" under the competitive bidding rules that the Commission appropriately recently questioned.[19]

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[17] Recent consultation of the USAC database indicates that SaaS has a SPIN, but there is no indication that it has ever filed a SPAC form. Annual submission of a SPAC is necessary for the service provider to be able to be paid on invoices submitted to USAC. *See* http://www.e-ratecentral.com/formsRack/sp/Form473.asp Further, based on consultation using SaaS's SPIN with a database maintained by E-Rate Central, SaaS has never been selected to receive any E-Rate Program support, before or since FY 2012. *See* Exhibit 9.

[18] *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8872, ¶1 ("*E-Rate Modernization Order*").

[19] "At the same time, as our rules have expanded, the risk to applicants of having USAC or the Commission seek full reimbursement of previously disbursed funds based on a rule or program violation has also grown, and sometimes full reimbursement is not commensurate with the violation incurred." *In the Matter of Modernizing the E-Rate Program for Schools and Libraries,* Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11372, ¶253 (2013) ("*Modernization NPRM*").

Mr. Gilani sent one email (which may or may not have been answered) and then apparently failed to make any further inquiry or showing of interest.[20] Ann respectfully submits that under those circumstances a finding of a violation based on this scenario is not warranted and the COMADs are not justified on this basis.

B. A Waiver Is Justified

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

The Commission's rules allow waiver of a Commission rule "for good cause shown."[21] 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."[22] Pursuant to that authority, USAC developed procedures relating to the application and appeals process.[23] Thus, in *Bishop Perry*, the Commission applied the 47 C.F.R. § 1.3 waiver rule to allow a limited waiver of USAC procedures.[24] 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

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[20] Mr. Gilani sent similar email messages to a number of other schools that are the subject of similar COMADs because of an inability to demonstrate a response to his inquiries. Again, in no case did he submit a bid. Moreover, see footnote 17, *supra*.

[21] 47 C.F.R. § 1.3.

[22] *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*").

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

[24] *Id.*

> 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.[25]

The School 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.[26]

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."[27] 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."[28] Many of the appeals in *Bishop Perry* involved staff mistakes or mistakes made as a result of staff not being available.[29] The Commission granted the waivers for good cause, noting that:

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[25] *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)).

[26] *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).

[27] *Bishop Perry Order*, ¶1.

[28] *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.*

[29] *Id.*, ¶13.

> [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 denial of funding in these cases would inflict undue hardship on the applicants.[30]

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.[31] Indeed, it is so complicated as to be a deterrent to particularly smaller schools even applying.[32]

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.[33]

There is absolutely no evidence here of any activity by the School intended to defraud or abuse the E-Rate Program.[34] Nor is there any evidence of any waste, fraud, or abuse, or misuse of

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[30] *Id.*, ¶14.

[31] *Modernization NPRM*, ¶45.

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

[33] *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).

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

funds.[35] The inability of the School to produce evidence of a response to Mr. Gilani does not reflect an effort to affirmatively discourage bidders.[36]

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 undue hardship on the School.[37] There is no evidence that the School acted in bad faith.[38] Requiring repayment would not further the purpose of preserving and advancing access to universal service support for schools and libraries.[39] Consequently, it would be inequitable to uphold the COMADs.[40] Thus, a waiver is appropriate under these special circumstances.

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[35] *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).

[36] *Compare Requests for review of Decisions of the Universal Service Administrator by Conestoga Valley School District,* Order, 27 FCC Rcd 13167 (Telecom. Access Pol. Div. 2012).

[37] *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).

[38] *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).

[39] *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).

[40] *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).

VI. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, Ann respectfully requests that the Commission grant the Appeal and direct USAC to overturn its prior decision and direct that USAC rescind the COMADs for the reasons set forth herein and because a waiver of the rules is fully justified.

There is no evidence that the School made other than good faith efforts to comply with what the Commission itself concedes can be a complicated set of rules. Therefore, a waiver of the rules 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.

St. Ann School and the Archdiocese of New York

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Dated: October 22, 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.

Timothy J. McNiff

Dr. Timothy J. McNiff

Dated 10/16/14

CERTIFICATE OF SERVICE

I, Paul C. Besozzi, certify on this 22nd 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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