

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )

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

Mount Carmel-Holy Rosary School )

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CC Docket No. 02-6

File No. SLD Form 471 No. 858216  
FRNs 2335266, 2335314

To: Chief, Wireline Competition Bureau

PETITION FOR RECONSIDERATION

Paul C. Besozzi  
Benjamin Tarbell  
Squire Patton Boggs (US) LLP  
2550 M Street, NW  
Washington, DC 20037  
(202) 457-6000

Counsel for Mount Carmel-Holy Rosary School  
and the Archdiocese of New York

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## SUMMARY

Mount Carmel-Holy Rosary School (“Mt. Carmel” or “School”) hereby seeks reconsideration of the Wireline Competition Bureau’s summary denial of its 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.

Mt. Carmel respectfully submits that reconsideration is warranted for the following reasons:

- The Commission erred in concluding that a failure to respond to a single email from a company that had not submitted a Service Provider Annual Certification tainted what was otherwise a fair and open competitive bidding process. The nature of the Commission’s summary disposition does not indicate whether the Commission considered this factor.
- The Commission’s adoption of a streamlined process for disposing of E-Rate appeals and waiver requests was procedurally improper and therefore summary disposition by Public Notice of a previously-pending appeal was improper. This was a significant procedural change which deprives the School from fully understanding the Commission’s reasoning in denying its Appeal.
- There is no indication in the Notice that the Commission ever considered the request for waiver that was included in the Mt. Carmel Appeal, which was therefore procedurally improper. Mt. Carmel, as a matter of procedural fairness, is entitled to understand how its request failed to meet the Commission’s waiver standard.

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**PETITION FOR RECONSIDERATION**

This Petition For Reconsideration (“Petition”) is filed on behalf of Mt. Carmel The Evangelist School, which is part of the Catholic Archdiocese of New York school system (“Mt. Carmel” 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 Request For Review Or Waiver relating to decisions of the Universal Service Administrator (“Administrator” or “USAC”) 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.<sup>1</sup> On March 27, 2015, the Commission summarily denied the Appeal.<sup>2</sup> In accordance with the Notice and Section 1.106 of the Commission’s rules, the School seeks reconsideration of that denial by this Petition.

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<sup>1</sup> Mt. Carmel supplemented the Appeal on October 22, 2014 (“Supplement”). Hereinafter, the two filings are collectively referred to as the “Appeal.”

<sup>2</sup> FCC Public Notice, “Streamlined Resolution Of Requests Related To Actions By The Universal Service Company,” DA 15-387, released March 27, 2015 (“Notice”).

## I. INTRODUCTION

Mt. Carmel respectfully submits that reconsideration is warranted for the following reasons:

- The Commission erred in concluding that a failure to respond to a single email from a company that had not submitted a Service Provider Annual Certification tainted what was otherwise a fair and open competitive bidding process. The nature of the Commission's summary disposition does not indicate whether the Commission considered this factor.
- The Commission's adoption of a streamlined process for disposing of E-Rate appeals and waiver requests was procedurally improper and therefore summary disposition by Public Notice ("PN") of a previously-pending appeal was improper. This was a significant procedural change which deprives the School from fully understanding the Commission's reasoning in denying its Appeal.
- There is no indication in the Notice that the Commission ever considered the request for waiver that was included in the Mt. Carmel Appeal, which was therefore procedurally improper. Mt. Carmel, as a matter of procedural fairness, is entitled to understand how its request failed to meet the Commission's waiver standard.

## II. KEY BACKGROUND FACTS

### A. The School

Mt. Carmel is a private, coed, inner-city Catholic elementary school located in the East Harlem area of New York City. It is among a number of such schools in the Archdiocese of New York that participate 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 and reduced price lunches under the National

School Lunch Program. For FY 2012, the School served 235 students in pre-kindergarten through 8<sup>th</sup> grade, many of whom are from families of needy residents.

**B. FCC Form 470**

The School timely posted an FCC Form 470 for FY 2012 on January 16, 2012, indicating the School's intent to seek E-Rate Program support for Internal Connections Other Than Basic Maintenance and Basic Maintenance of Internal Connections. The Form 470 indicated that the School was seeking a server and wireless local area network ("LAN") and controller, as well as other equipment serving up to 40 rooms. For Basic Maintenance, the School sought hourly pricing for each piece of equipment and network and all eligible equipment and networks.<sup>3</sup>

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

After the posting of the Form 470, between January 17 and January 30, Mt. Carmel's Principal, Susan Kaszynski, the person at Mt. Carmel ultimately responsible for E-Rate Program matters, received directly or indirectly eight (8) email inquiries about the Form 470.<sup>4</sup> They were from SaaS (January 17), Meru Networks (January 17), Eler Technologies (January 24), KnightNets (January 24), All County Business (January 25), VoiceData (January 25), Amer Networks (January 25), and Computec Digital (January 30). The School scheduled an E-Rate Open House for February 1, 2012. The School produced email records to USAC, reflecting that messages were sent to all of the foregoing, including some discussion regarding the Open House, with the exception of—despite a thorough search by the School—an email message responding to Mr. Gilani and SaaS.<sup>5</sup>

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<sup>3</sup> The relevant Form 470 is Exhibit 2 to the Supplement.

<sup>4</sup> 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.

<sup>5</sup> The inquiries and responses are Exhibit 3 to the Supplement.

At the Open House, which was open to all potentially interested vendors—a personal invitation from the School was not required—the following interested parties attended: All County Business, Knight Nets, Net Procomm and Carousel Industries.<sup>6</sup> There is no indication that the School received any further expression of interest from Mr. Gilani or SaaS, i.e., neither Mr. Gilani nor SaaS submitted any communication after the January 17 message, nor did he submit a bid of any kind.<sup>7</sup> Further, the School submits that Mr. Gilani’s inquiry related to potential provision of Basic Maintenance of Internal Connections, not Internal Connections Other Than Basic Maintenance.<sup>8</sup>

The School waited the required time period under the FCC’s rules after posting of the Form 470 before awarding a contract for the services sought to the only bidder, All County Business Machines Corporation. USAC approved the requested support through a Funding Commitment decision letter dated October 16, 2012.<sup>9</sup>

**D. USAC’s 2014 Commitment Adjustment Letters**

On May 14, 2014, after a series of inquiries starting in April of 2013, USAC issued the COMADs.<sup>10</sup> The substance of the Funding Commitment Adjustment Explanation for each FRN was the same:

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<sup>6</sup> The School is unaware as to how the last two entities found out about the Open House as there is no indication that they sent emails or received email invites like the other attendees. The agenda and sign-in list is Exhibit 4 to the Supplement.

<sup>7</sup> Recent consultation of the USAC database indicates that SaaS has a SPIN, but there is no indication that it has ever filed a Service Provider Annual Certification (“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 5 to Supplement.

<sup>8</sup> This is based on similar inquiries made by SaaS to other Archdiocesan schools that are the subject of similar COMADs.

<sup>9</sup> The relevant Form 471 and FCDL are Exhibit 6 to Supplement.

<sup>10</sup> Copies of the COMADs are in the Appeal.

“After an application review 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 that was to occur at the school on February 1, 2012. However, the documentation provided indicated that the school did not respond to the particular bidder that USAC was informed about either in the form of the information that the bidder 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 #624090000999563, 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 an unfair 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. USAC will seek recovery of any disbursed funds from the applicant.”<sup>11</sup>

Again, the COMADs seek recovery of \$14,856.00 in disbursed funds and rescission of \$50,536.66 of previously-approved E-Rate Program support.

#### **E. The Appeal**

In the Appeal the School asserted that despite the fact that it was unable to produce a responsive email message to Mr. Gilani, there was no evidence or assertion that Mt. Carmel failed to respond via phone or in some other acceptable manner, or that Mt. Carmel intended to exclude SaaS from the bidding process. There was no indication of any follow-up inquiries from Mr. Gilani or from anyone at SaaS about the School’s apparent failure to respond. Nothing prevented SaaS from submitting a bid for the Priority 2 services being sought by the School, which, despite the School holding an E-Rate Open House attended by four (4) potentially interested parties, received only one bid for the services.

The School submitted that it conducted the bidding process in a fair and equitable manner, even conducting an open house event where potential bidders could obtain more information.

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<sup>11</sup> The language seeking recovery of funds was not included in FRN 2335314 Explanation because the funds had not been disbursed.

Thus, the School's inability to locate a copy of a response to a single request for more information unsupported by any follow up inquiries from SaaS's should not invalidate Mt. Carmel's entire competitive bidding process for the Priority 2 services and should not be found to have destroyed the required "fair and open" characterization of that process.

Even assuming the Commission found a violation of 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 submitted that a waiver of the requirements was wholly justified. Simply put, equitable considerations, hardship, and the lack of any evidence of waste, fraud, or abuse warranted that the COMAD be rescinded.

**F. The Commission's Streamline Processing Public Notice**

On September 15, 2014, after the School's Appeal had been submitted, the Wireline Competition Bureau ("WCB") unilaterally announced, via Public Notice, that it would now resolve by Public Notice any requests for review, requests for waiver, and petitions for reconsideration (collectively, Requests) related to actions of USAC that are consistent with precedent.<sup>12</sup> The WCB stated that previously it had resolved Requests in a stand-alone order, and issues that are readily determined under Commission or WCB precedent had typically been resolved in a shorter order to "accelerate their disposition."<sup>13</sup> But, because the WCB received numerous Requests on a monthly basis, as of September 15, 2014 the WCB stated that it would issue a PN "periodically, as necessary, disposing of pending matters that do not involve complicated and/or controversial issues, in a

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<sup>12</sup> See Federal Communications Commission, *Streamlined Process for Resolving Requests for Review of Decisions by the Universal Service Administrative Company*, WC Docket No. 02-6 et al., Public Notice, 29 FCC Rcd 11094 (Wireline Comp. Bur. 2014) ("Streamlining PN").

<sup>13</sup> Streamlining PN at 1.

manner consistent with Commission and/or [WCB] precedent.”<sup>14</sup> The Commission provided no opportunity for notice and comment on this change in procedure and applied same to all pending appeals, including the Mt. Carmel Appeal. This substantive procedural change was not mandated by Commission.<sup>15</sup>

### **G. The FCC’s Denial Of The Appeal**

The Notice listed the Appeal as “Denied” as a result of “Differential Treatment of Potential Vendors,” citing the case of *Petitions for Reconsideration by Callisburg Independent School District* for the proposition that “all potential bidders and service providers must have access to the same information and be treated in the same manner throughout the procurement process.”<sup>16</sup> No other reasons for the denial were listed or explained. The request for waiver of these violations that was requested in the Appeal was neither mentioned nor addressed by the Notice.

### **III. PETITION FOR RECONSIDERATION STANDARDS**

Mt. Carmel respectfully submits that the School has satisfied the requirements of Section 1.106(b)(2) of the Commission’s rules regarding Petitions For Reconsideration. It is adversely affected by the denial of its Appeal by the Notice. Mt. Carmel could not have raised the procedural reasons for which it seeks reconsideration herein because it was not impacted until March 27, 2015.

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

<sup>15</sup> In its July 2014 *Modernization Order* the Commission did address the matter of where appeals should be filed first, but did not require abandonment of the traditional method for handling appeals. *Modernizing the E-Rate Program for Schools and Libraries*, Order and Further Notice of Proposed Rulemaking, 29 FCC 8870, 8971, ¶¶250-52 (2014) (“*E-Rate Modernization Order*”).

<sup>16</sup> Notice, p. 5, n.17. Note that the *Callisburg Case* did not involve consideration of a request for waiver of the Commission’s rules. See *Petitions for Reconsideration by Callisburg Independent School District; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order and Order on Reconsideration, 28 FCC Rcd 9459 (July 5, 2013) (“*Callisburg Case*”).

In any case, it is in the public interest for the Commission to consider those arguments.<sup>17</sup> The Petition is timely filed in accordance with the Notice and Section 1.4 of the Commission's Rules.

#### IV. ARGUMENT

##### A. The Commission Should Reconsider The Conclusion Re Unequal Treatment Of Potential Vendors

The Commission should reconsider its apparent finding that the School's failure to respond to a single email sent by a Mr. Assad Gilani on behalf of SaaS Networks, Inc. tainted the competitive bidding process.<sup>18</sup> From the Notice it is not apparent that the Commission considered the factors reflecting on the realities of Mr. Gilani as a potential bidder. The School respectfully submits that it should do so.

The School conceded that it was unable to produce an email response to Mr. Gilani. However, there is no indication in the record that Mr. Gilani made any further inquiry. And his company ultimately did not submit a bid. Further consultation of the USAC database indicated that while SaaS had a Service Provider Identification Number, there was no indication that it had ever filed a Service Provider Annual Certification Form, an annual submission necessary for the service provider to be able to be paid on invoices submitted to USAC.<sup>19</sup> Moreover, based on consultation using SaaS's SPIN with a database maintained by E-Rate Central, it was determined that, as of the

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<sup>17</sup> See 47 C.F.R. §1.106(b)(2).

<sup>18</sup> The COMAD actually relied on the allegation that 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 did 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 a 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. Nevertheless, USAC's conclusion was apparently tied to Mr. Gilani's request for information.

<sup>19</sup> See FCC Form 473, *Service Provider Annual Certification ("SPAC")*, Federal Communications Commission (2015), available at <http://www.e-ratecentral.com/formsRack/sp/Form473.asp>.

time of the Appeal, SaaS had never been selected to receive any E-Rate Program support, before or since FY 2012.<sup>20</sup>

There is no indication, based on the summary nature of the Notice, that the Commission ever considered these factors in determining whether this was an inquiry from a “real” potential bidder. The *Callisburg Case* involved the reconsideration of whether there had been improper communications favoring the service provider that was selected in the process.<sup>21</sup> That is not the factual situation here. A busy school principal inadvertently neglected to answer an email and the sender never followed up. Moreover, the sender had not complied with USAC certification requirements. How much of a real bidder was SaaS? Reconsideration of the finding that this was a violation of the competitive bidding rules because a series of bidders somehow had inside information is warranted.<sup>22</sup>

#### **B. The Commission’s Streamlining Notice Is Procedurally Defective**

The Commission adopted the Streamlining Notice without any opportunity for notice and comment, despite the fact that it was a fundamental change in the process for handling appeals under the Commission’s rules.<sup>23</sup> The change was applied retroactively to appeals that already had been filed, despite the fact that other changes relating to appeals were made pursuant to a

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<sup>20</sup> See Exhibit 6 to Supplement.

<sup>21</sup> The Commission on reconsideration concluded that the selective communications had actually been made before the competitive bidding process started and after it had been completed. See *Callisburg Case* ¶5.

<sup>22</sup> Furthermore, the *Callisburg Case* did not involve consideration of a request for waiver. See Section IV. C., *supra*.

<sup>23</sup> The APA defines a “rule” as an agency statement of “general applicability and future effect” that “prescribe[s] law or policy or [that] describe[s] the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). A “rule making” is defined as an “agency process for formulating, amending or repealing a rule.” 5 U.S.C. § 551(5). The Commission’s decision to “streamline” its well-established appeals process explicitly amended procedure and practice of the agency and is a “rule” under the APA; thus, a “rule making” is required by statute.

rulemaking proceeding and were made prospectively. Nothing in the Commission's Modernization Order required such a change.<sup>24</sup> It should have been subject to notice and comment rulemaking.<sup>25</sup> In any case, it should only have been applied prospectively to newly filed appeals.<sup>26</sup>

### C. The Commission Never Addressed Mt. Carmel's Waiver Request

There is no evidence that in using its streamlined process that the Commission even considered or assessed Mt. Carmel's waiver request. Failure to do so renders the denial procedurally

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<sup>24</sup> See *E-Rate Modernization Order* ¶¶250-52.

<sup>25</sup> The Supreme Court has found that because agencies "have the ability to make new law prospectively," an agency has less reason to rely on *ad hoc* processes to formulate new standards, and the quasi-legislative process of notice and comment rulemaking is preferable "as much as possible." *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). Specifically, although the choice of whether to conduct a rulemaking or proceed otherwise is within the broad discretion of the agency, rulemakings are preferable unless the agency is addressing problems that it "could not reasonably foresee" or that are "so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule." *Id.* at 202-03. But the Bureau is – and has been – quite aware of the frequency of requests for review of USAC decisions; since 2005, the FCC has received 1733 appeals, 85 petitions for reconsideration, 165 petitions for waiver, and 716 other "requests" in the *Schools and Libraries Universal Service Support Mechanism* docket alone. No unforeseen or changed circumstances prompted this abrupt departure from prior policy. And while the Bureau may consider "streamlining" its processes to be prudent, it seems premature in light of the nascent agency-wide process reform effort that has involved, to date, only a "first-step" report from staff "recommending ways" to improve agency efficiency. See Staff Working Group, Federal Communications Commission, *Report on FCC Process Reform*, at 3 (Feb. 14, 2014). Moreover, that the agency has taken "first step[s]" toward a comprehensive reform effort is a clear indication that "streamlining" agency procedures is not a "specialized" or "varying" problem necessitated by issues unique to E-rate; rather, it demonstrates the Commission's interest in conducting an agency-wide reform of its processes. The Bureau should reconsider the advisability of its decision to take this step in advance of full Commission action informed by public comment.

<sup>26</sup> The Supreme Court has held that federal agencies cannot adopt retroactive rules without explicit congressional authorization to do so. See *Bowen v. Georgetown Hospital*, 488 U.S. 204, 215 (1988). This is also clear from the statutory definition of "rule" as an agency statement that has "future effect." 5 U.S.C. § 551(4). And, very recently, in the *Open Internet Order*, the Commission acknowledged that changes to its rules and procedures "appropriately apply only on a prospective basis." See *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, n. 792 (Mar. 12, 2015) (citing *Verizon v. FCC*, 269 F.3d 109 (D.C. Cir. 2001)).

infirm – an arbitrary and capricious action which warrants reconsideration.<sup>27</sup> As set forth in its Appeal, Mt. Carmel respectfully submits that 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.”<sup>28</sup> 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.”<sup>29</sup> Pursuant to that authority, USAC developed procedures relating to the application and appeals process.<sup>30</sup>

Thus, in *Bishop Perry*, the Commission applied the 47 C.F.R. § 1.3 waiver rule to allow a limited waiver of USAC procedures.<sup>31</sup>

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

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<sup>27</sup> Agency action is arbitrary and capricious if it has “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). As previously stated, the *Callisburg Case*, which the Bureau cites to deny Mt. Carmel’s appeal, “entirely failed to consider” Mt. Carmel’s reasons for appeal of USAC’s decision – specifically, that the failure to respond to a single email from a company that had not submitted a Service Provider Annual Certification did not taint what was otherwise a fair and open competitive bidding process. Note that the case cited by the Commission to deny Mt. Carmel’s appeal did not involve consideration of a request for waiver of the Commission’s rules. *See Callisburg Case*.

<sup>28</sup> 47 C.F.R. § 1.3.

<sup>29</sup> *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*”).

<sup>30</sup> The *Bishop Perry Order* dealt with USAC application procedures known as “minimum processing standards.” *Id.*

<sup>31</sup> *Id.*

better serve the public interest than strict adherence to the general rule.<sup>32</sup>

Under such circumstances where the competitive bidding process was much less robust than the one at hand, the Commission has seen fit to grant a waiver that is in the public interest and supports a more effective implementation of Commission policy on competitive bidding.<sup>33</sup> Mt. Carmel 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.<sup>34</sup> The mere inadvertent failure to respond to one inquiry cannot be deemed to have been an effort to deter any bidders.<sup>35</sup>

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.”<sup>36</sup> In that case, the FCC found good cause to waive the minimum processing standards established by USAC, finding that

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<sup>32</sup> *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)).

<sup>33</sup> *Requests for Review of a Decision of the Universal Service Administrator by Ramirez Common School District*, Order, 26 FCC Rcd 8430, 8432-33, ¶7 (Telecom. Access Pol. Div. 2011); *see also Requests for Review of a Decision of the Universal Service Administrator by Riverdale Unified School District*, Order, 26 FCC Rcd 11207, 11210, ¶9 (Telecom. Access Pol. Div. 2011). The Commission has stated that a waiver is appropriate where the record shows that for each of the funding requests at issue, the applicant selected the least expensive and most cost effective service offering. *See Requests for Review and Waiver of Decisions of the Universal Service Administrator by Colorado Springs School District*, Order, 27 FCC Rcd 7022, 7023, ¶1 (Telecom. Access Pol. Div. 2012).

<sup>34</sup> *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).

<sup>35</sup> *See generally Request for Review of Decisions of the Universal Service Administrator by Consorcio de Escuelas y Bibliotecas de Puerto Rico*, Order, 28 FCC Rcd 64, 69, ¶13 (Telecom. Access Pol. Div. 2013) (no general deterrence of bidders from use of right of first refusal). *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).

<sup>36</sup> *Bishop Perry Order*, ¶1.

“rigid compliance with the application procedures does not further the purposes of section 254(h) or serve the public interest.”<sup>37</sup> Many of the appeals in *Bishop Perry* involved staff mistakes or mistakes made as a result of staff not being available.<sup>38</sup> 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 denial of funding in these cases would inflict undue hardship on the applicants.<sup>39</sup>

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.<sup>40</sup> Indeed, it is so complicated as to be a deterrent to particularly smaller schools even applying.<sup>41</sup>

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<sup>37</sup> *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.*

<sup>38</sup> *Id.*, ¶13.

<sup>39</sup> *Id.*, ¶14.

<sup>40</sup> *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11319 ¶45 (2013).

<sup>41</sup> *Id.* 11474 (Statement of Commissioner Jessica Rosenworcel) and 11475 (Statement of Commissioner Ajit Pai).

The competitive bidding process here was not compromised by any perceived technical violation of the Commission's rules. Further, the outcome of the vendor selection process was otherwise consistent with the policy goals underlying those rules.<sup>42</sup> 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.<sup>43</sup>

Also, there is absolutely no evidence here of any activity by the Schools intended to defraud or abuse the E-Rate Program.<sup>44</sup> Nor is there any evidence of any waste, fraud, or abuse, or misuse of funds.<sup>45</sup>

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.<sup>46</sup> There is no evidence that the School failed to act in good faith,

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<sup>42</sup> The Commission has granted waivers of violations of the competitive bidding rules in such circumstances. *Requests for Review of Decisions of the Universal Service Administrator by Central Islip Union Free School District*, Order, 29 FCC Rcd 2715, 2716, ¶1 (Telecom. Access Pol. Div. 2014).

<sup>43</sup> *Id.*, n.7.

<sup>44</sup> 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).

<sup>45</sup> 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).

<sup>46</sup> 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).

and,<sup>47</sup> requiring repayment would not further the purpose of preserving and advancing access to universal service support for schools and libraries.<sup>48</sup> Consequently, it would be inequitable to uphold the COMAD.<sup>49</sup> Thus, a waiver is appropriate under these special circumstances.

## V. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the Commission should reconsider the summary denial contained in the Notice. The process and application in this context are procedurally defective. There is no indication that the request for a waiver of the Commission's rules was ever considered. Yet, 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 COMAD be rescinded.

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<sup>47</sup> 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).

<sup>48</sup> 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).

<sup>49</sup> 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).

Respectfully submitted,

**Mount Carmel-Holy Rosary School and the  
Archdiocese of New York**

A handwritten signature in blue ink, appearing to read "Paul C. Besozzi", written over a horizontal line.

Paul C. Besozzi  
Benjamin Tarbell  
Squire Patton Boggs (US) LLP  
2550 M Street N.W.  
Washington, DC 20037  
(202) 457-6000

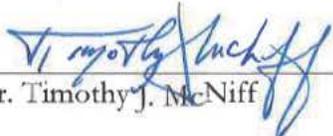
Counsel for the Archdiocese of New York and  
Mount Carmel-Holy Rosary School

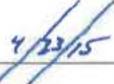
Dated: April 24, 2014

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"), supplemented those appeals in October 2014 and that on March 27, 2015 the FCC summarily denied those appeals.

The foregoing Petition For Reconsideration ("Petition") 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 Petition 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

CERTIFICATE OF SERVICE

I, Paul C. Besozzi, certify on this 24th day of April, 2014, a copy of the foregoing "Petition For Reconsideration" has been served via electronic mail or first class mail, postage pre-paid, to the following:

Julie Veach  
Bureau Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Julie.Veach@fcc.gov](mailto:Julie.Veach@fcc.gov)

Ryan Palmer  
Division Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Ryan.Palmer@fcc.gov](mailto:Ryan.Palmer@fcc.gov)

Michael Jacobs  
Legal Advisor  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Michael.Jacobs@fcc.gov](mailto:Michael.Jacobs@fcc.gov)

Letter of Appeal  
Schools and Libraries Division-  
Correspondence Unit  
100 S. Jefferson Road  
P.O. Box 902  
Whippany, NJ 07981  
[appeals@sl.universalservice.org](mailto:appeals@sl.universalservice.org)

Lisa Hone  
Deputy Division Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Lisa.Hone@fcc.gov](mailto:Lisa.Hone@fcc.gov)

  
Paul C. Besozzi