

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 )

St. Aloysius School )

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CC Docket No. 02-6

File No. SLD Form 471 Nos. 837162, 858274 )  
FRNs 2271652, 2271656, 2271658 (Form 471# )  
837162); 2335462 (Form 471# 858274) )

To: Chief, Wireline Competition Bureau

**PETITION FOR RECONSIDERATION**

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## SUMMARY

St. Aloysius ("St. Aloysius" 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.

St. Aloysius 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 St. Aloysius Appeal, which was therefore procedurally improper. St. Aloysius, 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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To: Chief, Wireline Competition Bureau

**PETITION FOR RECONSIDERATION**

This Petition For Reconsideration (“Petition”) is filed on behalf of St. Aloysius The Evangelist School, which is part of the Catholic Archdiocese of New York school system (“St. Aloysius” 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> St. Aloysius 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

St. Aloysius 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 St. Aloysius Appeal, which was therefore procedurally improper. St. Aloysius, as a matter of procedural fairness, is entitled to understand how its request failed to meet the Commission's waiver standard.

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 470s and waited the requisite time period under the rules, during which time the School's Director of Finance reported that the School received and responded to a number of inquiries. Phone calls were returned to prospective bidders who called or inquired. The School adopted a written policy regarding conduct of the competitive bidding process and recorded its

decision to select for Internet Access and Basic Maintenance of Internal Connections, what available records indicate was the single bidder for those services—Network Outsource. Available records indicate that proposals for wireless services were submitted by Verizon, AT&T, and Sprint. Aloysius respectfully submits that these efforts demonstrate good faith efforts by the School to fully comply with the competitive bidding rules and Aloysius’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. Aloysius 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. KEY BACKGROUND FACTS**

### **A. The School**

Aloysius is private, coed, inner-city Catholic elementary school located in the Harlem area 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 179 students in pre-kindergarten through 8<sup>th</sup> 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 July 13, 2011 for Telecommunication Services and Internet Access. The Form 470 posted used generic, vendor-neutral language to describe the categories of eligible services being sought. It posted a separate Form 470 on January 15, 2012 for Basic Maintenance of Internal Connections services, indicating that it was seeking hourly pricing for maintenance services for wireless access points and other eligible equipment.<sup>3</sup> In August 2011, the School adopted a written policy regarding conduct of the competitive bidding process.<sup>4</sup>

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

After the posting of the Form 470s, the School waited the requisite 28 days before making its selections. During that time the School's Director of Finance reported that the School received and responded to a number of inquiries. Phone calls were returned to prospective bidders who called or inquired. Available records indicate that proposals for wireless services were submitted by Verizon, AT&T and Sprint.<sup>5</sup>

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

<sup>4</sup> See Exhibit 3 to the Supplement.

<sup>5</sup> See Exhibit 4 to the Supplement.

On February 11 and 18, 2012 the School held meetings to discuss bids that were received from Network Outsource, Inc. for Internet Access and Basic Maintenance of Internal Connections.<sup>6</sup> Available records indicate that Network Outsource was the sole bidder for these services.

Aloysius filed Form 471 No. 858274 for Basic Maintenance of Internal Connections on March 13, 2012, selecting Network Outsource. The School filed its Form 471 No. 837162 Telecommunications Service and Internet Access on March 19, 2012, selecting Verizon New York and Verizon Wireless for Telecommunications Service and Network Outsource for Internet Access. The Telecommunications Service selections were for non-contracted tariffed or month-to-month services.<sup>7</sup>

USAC issued Funding Commitment Decision Letters approving the requested support on September 18, 2012 (Telecommunications Service and Internet Access) and December 4, 2012 (Basic Maintenance of Internal Connections).<sup>8</sup>

**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.<sup>9</sup> The Funding Commitment Adjustment Explanation in each case included the following:

“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

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<sup>6</sup> See Exhibit 5 to the Supplement.

<sup>7</sup> The Form 471s are Exhibit 6 to the Supplement.

<sup>8</sup> See Exhibit 7 to the Supplement.

<sup>9</sup> Copies of the COMADs are included in the Appeal.

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.”<sup>10</sup>

The Explanation for FRN 2335462 also included the following:

“Additionally USAC received information showing that a potential bidder contacted you within the 28 day bidding window seeking information about your Basic Maintenance of Internal Connections (BMIC) requirements. Documentation provided during review, indicates you did not respond to the potential bidder with the information sought. It has been determined that the maintenance services as requested on FCC Form 470 #54260000999487 contains maintenance service descriptions which are insufficiently detailed to allow prospective bidders to provide a bid responsive to the maintenance services that were subsequently requested by the school in FRN 2335462. Since you did not respond with the information sought by the service provider and since the service provider would not have been able to provide a responsive bid without the additional information, a fair and open competition bidding process was inhibited. Since you posted FCC Form 470 #54260000999487, which included a request for BMIC, you are obligated to receive and assess all bids and provide to potential service providers with requested information so that they may provide responsive bids. The competitive bidding process is not fair and open, as required by FCC Rules, when you discourage potential bidders from submitting a response to the services requested on the FCC Form 470. Therefore, the applicant has violated the competitive bidding program rules and your funding commitment will be rescinded in full.”

Again, the COMADs seek recovery of \$12,711.63 in disbursed funds and rescission of \$33,195.50 in previously-approved E-Rate Program Support.

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

In the Appeal the School submitted that it had 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 470s and waited the requisite time period under the rules, during which time the School’s Director of Finance reported that the School received and

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<sup>10</sup> The language re “improperly disbursed funds” was not included in the Explanations for FRNs 2271652 and 2335462 because none of the approved E-Rate support had been yet disbursed.

responded to a number of inquiries. Phone calls were returned to prospective bidders who called or inquired. The School adopted a written policy regarding conduct of the competitive bidding process and recorded its decision to select for Internet Access and Basic Maintenance of Internal Connections, what available records indicate was the single bidder for those services—Network Outsource. Available records indicate that proposals for wireless services were submitted by Verizon, AT&T and Sprint. St. Aloysius respectfully submitted that these efforts demonstrate good faith efforts by the School to fully comply with the competitive bidding rules and the School’s conduct did not warrant imposition of the COMADs.

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

Even assuming the Commission found 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 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 warrant that the COMADs 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 the Universal Service Administrative Company (USAC) that are consistent with precedent.<sup>11</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>12</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 Public Notice "periodically, as necessary, disposing of pending matters that do not involve complicated and/or controversial issues, in a manner consistent with Commission and/or [WCB] precedent."<sup>13</sup> The Commission provided no opportunity for notice and comment on this change in procedure and applied same to all pending appeals, including the St. Aloysius Appeal. This substantive procedural change was not mandated by Commission.<sup>14</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

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<sup>11</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>12</sup> Streamlining PN at 1.

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

<sup>14</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").

information and be treated in the same manner throughout the procurement process.”<sup>15</sup> 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

St. Aloysius 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. St. Aloysius could not have raised the procedural reasons for which it seeks reconsideration herein because it was not impacted until March 27, 2015. In any case, it is in the public interest for the Commission to consider those arguments.<sup>16</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>17</sup> From the Notice it is not apparent that the Commission considered

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<sup>15</sup> Notice, p. 5, n.17. The Notice also denied the Appeal on the grounds of failure to produce documentation regarding the vendor selection process. *Id.* Note, neither of the cited cases involved consideration of requests 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*”); *Requests for Review of Decisions of the Universal Service Administrator by Central Islip Free Union School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, order, 26 FCC Rcd 8630 (Wireline Comp. Bur. 2011) (“*Central Islip Case*”).

<sup>16</sup> *See* 47 C.F.R. §1.106(b)(2).

<sup>17</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

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>18</sup> Moreover, based on consultation using SaaS's SPIN with a database maintained by E-Rate Central, it was determined that, as of the time of the Appeal, SaaS had never been selected to receive any E-Rate Program support, before or since FY 2012.<sup>19</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>20</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

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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>18</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>.

<sup>19</sup> See Exhibit 6 to Supplement.

<sup>20</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.

violation of the competitive bidding rules because a series of bidders somehow had inside information is warranted.<sup>21</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>22</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 rulemaking proceeding and were made prospectively. Nothing in the Commission’s Modernization Order required such a change.<sup>23</sup> It should have been subject to notice and comment rulemaking.<sup>24</sup> In

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<sup>21</sup> Furthermore, the *Callisburg Case* did not involve consideration of a request for waiver. *See* Section IV. C., *supra*.

<sup>22</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.

<sup>23</sup> *See E-Rate Modernization Order* ¶¶250-52.

<sup>24</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

any case, it should only have been applied prospectively to newly filed appeals.<sup>25</sup>

### C. The Commission Never Addressed St. Aloysius's Waiver Request

There is no evidence that in using its streamlined process that the Commission even considered or assessed St. Aloysius's waiver request. Failure to do so renders the denial procedurally infirm – an arbitrary and capricious action which warrants reconsideration.<sup>26</sup> As set forth in its Appeal, St. Aloysius 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>27</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>28</sup> Pursuant to

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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>25</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)).

<sup>26</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 St. Aloysius's appeal, "entirely failed to consider" St. Aloysius' reasons for appeal of USAC's decision – specifically, that failures to respond to a single email from a company that had not submitted a Service Provider Annual Certification and to produce documentation of the bidding process did not taint what was otherwise a fair and open competitive bidding process. Furthermore, neither of the cases cited by the Commission to deny St. Aloysius' appeal involved consideration of requests for waiver of the Commission's rules. See *Callisburg Case*, *Central Islip Case*.

<sup>27</sup> 47 C.F.R. § 1.3.

<sup>28</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").

that authority, USAC developed procedures relating to the application and appeals process.<sup>29</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>30</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 better serve the public interest than strict adherence to the general rule.<sup>31</sup>

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.<sup>32</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>33</sup> 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

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<sup>29</sup> The *Bishop Perry Order* dealt with USAC application procedures known as “minimum processing standards.” *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Requests for Review of A Decision of the Universal Service Administrator by Richmond County School District*, 21 FCC Rcd 6570, 6572, ¶15 (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>32</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>33</sup> *Bishop Perry Order*, ¶1.

serve the public interest.”<sup>34</sup> Many of the appeals in *Bishop Perry* involved staff mistakes or mistakes made as a result of staff not being available.<sup>35</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>36</sup>

The Commission has recently formally recognized that the existing E-rate system is complex and burdensome, requiring applicants so spend many hours focusing on compliance with its various requirements.<sup>37</sup> Indeed, it is so complicated as to be a deterrent to particularly smaller schools even applying.<sup>38</sup>

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<sup>34</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>35</sup> *Id.*, ¶13.

<sup>36</sup> *Id.*, ¶14.

<sup>37</sup> *Modernization NPRM*, ¶45.

<sup>38</sup> *Id.*, 11474 (Statement of Commissioner Jessica Rosenworcel) and 11475 (Statement of Commissioner Ajit Pai).

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>39</sup>

There is absolutely no evidence here of any activity by the School intended to defraud or abuse the E-Rate Program.<sup>40</sup> Nor is there any evidence of any waste, fraud, or abuse, or misuse of funds.<sup>41</sup> The inability of the School to produce evidence of a response to Mr. Gilani does not reflect an effort to affirmatively discourage bidders.<sup>42</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>43</sup> There is no evidence that the School acted in bad faith.<sup>44</sup> Requiring repayment would not further the purpose of preserving and advancing access to universal service

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<sup>39</sup> *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).

<sup>40</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>41</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>42</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>43</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).

<sup>44</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).

support for schools and libraries.<sup>45</sup> Consequently, it would be inequitable to uphold the COMADs.<sup>46</sup> Thus, a waiver is appropriate under these special circumstances.

**VI. 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.

Respectfully submitted,

**St. Aloysius School and the Archdiocese of New York**



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Dated: April 24, 2015

<sup>45</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).

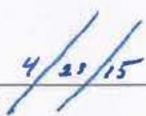
<sup>46</sup> See *Request for Waiver and Review of a Decision of the Universal Service Administrator by Approach Learning and Assessment Center, Santa Ana, CA, Schools and Libraries Universal Service Support Mechanism*, Order, 23 FCC Rcd 15510, 15513, ¶8 (Telecom. Access Pol. Div. 2008).

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:

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

Paul C. Besozzi