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Federal Communications Commission
Office of the Secretary

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02-9

December 22, 2006

Via Federal Express
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capital Heights, MD 20743

Dear Sir/Madam:

Re: Letter of Appeal from USAC Regarding
Commitment Adjustment Letters

PRELIMINARY STATEMENT

This is an appeal and/or waiver request to the Federal Communications Commission from a series of interrelated decisions concerning Commitment Adjustment Letters by the Schools and Libraries Division of the Universal Service Administrative Company (USAC), issued on and after November 16, 2006. The Commitment Adjustment Letters demand reimbursement of USAC of an amount exceeding \$600,000 paid for goods and services delivered in 2003 to 2004.

The appeal is taken on behalf of the following schools and their service provider:

Our Lady Help of Christians School

Assumption-All Saints School (c/o St Patrick School)

No. of Copies rec'd 041
List ABCDE

St. Patrick School

Blessed Sacrament School

Holy Trinity Elementary School

St. Mary High School

Mother Seton Parochial School

Our Lady of Good Counsel High School

Our Lady of Good Counsel Elementary School

St. Lucy's School

Future Generation, Inc.

The grounds for the appeal and/or waiver are:

- a. Special circumstances exist here warranting a waiver of the FCC competitive bidding requirements.
- b. USAC's denial of the appeal was arbitrary, capricious, and unreasonable because the Agency failed to make adequate findings of fact based upon the record that was before it.
- c. USAC failed to apply the law correctly under the specific facts of this appeal.
- d. *Request for Review by MasterMind Internet Services, Inc., Federal-State Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Red 4028, FCC 00-167, ¶ 9 (rel. may 23, 2000) is inapposite and the rule does not apply to the facts of this case.

- c. No conflict of interest in the competitive bidding process occurred here because the appellant schools' contact persons determined their own product needs and they were in no way related to the appellant service provider.

Based on these reasons, the appeal and/or waiver request from USAC's demands for reimbursement for monies paid out in 2003 and 2004 must be granted.

SCOPE OF THE APPEAL

The following tables identify the scope of appeal. Demand has been made on the service provider, Future Generation, Inc. ("Future Gen"), for repayment of all of the funds.

Our Lady Help of Christians School -2003			
Notice of Commitment Adjustment Letter:	August 4, 2006		
Funding Request Numbers:	965603	965670	965732
	965611	965685	965747
	965626	965699	965774
	965656	965713	965791
			965814
Billed Entity Name:	Our Lady Help of Christians School		
FCC Registration Number from Letter:	12005054		
Billed entity number:	6575		
Form 471 Application Number:	357752		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

Assumption-All Saints School - 2003			
Notice of Commitment Adjustment Letter:	August 4, 2006		
Funding Request Numbers:	964519	964560	964603
	964526	964570	964615
	964534	964580	964623
	964553	964593	964633
			964662
Billed Entity Name:	Assumption-All Saints School		
FCC Registration Number from Letter:	12004859		
Billed entity number:	7348		
Form 471 Application Number:	357472		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

Blessed Sacrament School - 2003			
Notice of Commitment Adjustment Letter:	August 4, 2006		
Funding Request Numbers:	967162	967194	967238
	967168	967201	967264
	967175	967208	967278
	967181	967228	967295
			967306
Billed Entity Name:	Blessed Sacrament School		
FCC Registration Number from Letter:	12004883		
Billed entity number:	7167		
Form 471 Application Number:	358234		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

Holy Trinity Elementary School - 2003			
Notice of Commitment Adjustment Letter:	July 18, 2006		
Funding Request Numbers:	964893	965099	965138
	964905	965110	965150
	964916	965114	965160
	964926	965128	965174
Billed Entity Name:	Holy Trinity Elementary School		
FCC Registration Number from Letter:	12004941		
Billed entity number:	7167		
Form 471 Application Number:	357557		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

St. Mary's High School - 2003			
Notice of Commitment Adjustment Letter:	July 20, 2006		
Funding Request Numbers:	970477	970486	970468
	970480	970487	970471
	970481	970490	970474
	970483	970491	
Billed Entity Name:	St. Mary High School		
FCC Registration Number from Letter:	12005294		
Billed entity number:	7317		
Form 471 Application Number:	359171		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

Our Lady of Good Counsel Schools - 2003			
Notice of Commitment Adjustment Letter:	July 20, 2006 (to Ania Jarmulowicz)		
Funding Request Numbers:	967480	967510	967555
	967488	967520	967568
	967500	967532	967585
Billed Entity Name:	Our Lady of Good Counsel Schools		
FCC Registration Number from Letter:	12005096		
Billed entity number:	7119		
Form 471 Application Number:	358346		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

Our Lady of Good Counsel Elementary School - 2003			
Notice of Commitment Adjustment Letter:	July 20, 2006 (to Pat McGrath)		
Funding Request Numbers:	970667	970674	970678
	970670	970676	970680
	970672		
Billed Entity Name:	Our Lady of Good Counsel Elementary Schools		
FCC Registration Number from Letter:	None on letter		
Billed entity number:	7118		
Form 471 Application Number:	359187		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

Mother Seton Parochial School - 2003			
Notice of Commitment Adjustment Letter:	July 18, 2006		
Funding Request Numbers:	965254	965302	965372
	965264	965316	965387
	965279	965330	965407
	965283	965358	965426
			965459
Billed Entity Name:	Mother Seton Parochial School		
FCC Registration Number from Letter:	12004875		
Billed entity number:	7011		
Form 471 Application Number:	357662		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

St. Patrick School - 2003			
Notice of Commitment Adjustment Letter:	July 19, 2006		
Funding Request Numbers:	966985	967026	967053
	966986	967030	967057
	966990	967039	967062
	967000	967045	966978
	96701	967049	966980
			966983
Billed Entity Name:	St. Patrick School		
FCC Registration Number from Letter:	12005310		
Billed entity number:	7341		
Form 471 Application Number:	358142		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

Saint Lucy's School - 2003			
Notice of Commitment Adjustment Letter:	August 4, 2006		
Funding Request Numbers:	970547	970561	970575
	970549	970566	970576
	970553	970569	
	970556	970572	
Billed Entity Name:	Saint Lucy's School		
FCC Registration Number from Letter:	12005260		
Billed entity number:	7111		
Form 471 Application Number:	359178		
SPIN Name / Number:	Future Generation, Inc. / 143007891		

With respect to each institution named above, this appeal specifically embraces any and all Funding Requests which may not have been included in the above listings either due to mistake, inadvertence or a lack of adequate notice that a Funding Request Number is being challenged by USAC.

Future Gen, SPIN 143007891, likewise appeals each and every one of the above Notifications of Commitment Adjustment Letters, the substance of which is reiterated in "tandem" versions of the letters sent directly to Future Gen and addressed to one of its principals, Mr. Howard Gerber. Future Gen's appeal should be construed as representing each and every one of the Funding Request Numbers tracked above for each of the institutions as well as any and all other relevant Funding Request Numbers which may not appear above through inadvertence, mistake or want of good and adequate notice.

PROCEDURAL HISTORY

On or about June 21, 2006, each appellant school received a fax from the compliance department of USAC with a question regarding the Form 470 Funding Year 2003 application:

“Please explain why an email address associated with service provider Future Generation appears in Block 6 of the cited Form 470...” Attached hereto as Exhibit A is a fax from USAC to Holy Trinity Elementary School representative of the same fax each appellant school received.

Each school timely responded with its reasons for the erroneous inclusion of the provider’s email address.

Thereafter, between July 18, 2006 and August 4, 2006, as outlined in the preceding tables, the schools and Future Gen received a USAC “Notification of Commitment Adjustment Letter” for the 2003 funding year, essentially seeking reimbursement of several hundred thousand dollars committed and spent two to three years prior for services and goods already rendered and received. *Attached hereto as Exhibit B is a commitment adjustment letter from USAC to Holy Trinity Elementary School representative of the same commitment adjustment letter each appellant school received.*

On or about September 7, 2006, the schools and Future Gen submitted a joint appeal to USAC from its myriad Commitment Adjustment Letters. *Attached hereto as Exhibit C (sans exhibits) is the joint appeal filed with USAC.* Despite appealing USAC’s initial decision, on or about September 18, 2006, eleven days *after* submitting their appeal, each school and Future Gen began to receive a series of USAC Demand Payment Letters directing full payment of the adjustment

amount within 30 days. *Attached hereto as Exhibit D is a demand payment letter to Holy Trinity Elementary School representative of the same demand payment letter each appellant school received.*

On or about September 20, 2006, and on several dates thereafter, the appellants' counsel wrote to USAC, alerting it to the appeal and requesting withdrawal of the demands during its pendency. USAC not only ignored counsel's letter but commencing with November 20, 2006, each school began to receive a Second Notice Demand Payment Letter. *Attached hereto as Exhibit E is a second demand payment letter to Holy Trinity Elementary School representative of the same second demand payment letter each appellant school received.* Subsequent correspondence by appellants' counsel to USAC about the demands was similarly ignored by the agency.

Beginning on November 16, 2006, USAC commenced sending the schools its "Administrator's Decision on Appeal," which denied their appeals. More USAC Demand Letters followed. The schools and Future Gen are herein appealing the entirety of the matter to the Federal Communications Commission. *Attached hereto as Exhibit F is a copy of each denial letter of each appellant schools' appeal to USAC.*

STATEMENT OF FACTS ON APPEAL

A. The Appellants

The facts of each school's appeal and of Future Gen's appeal are largely identical. Future Gen is a service provider engaged in the business of providing computer, telecommunications and networking services to various schools and libraries throughout the State of New Jersey. Its services

include system and software sales, technical and network administration services, complete networking services (copper, fiber optic, and wireless), comprehensive maintenance and support, as well as training. Future Gen has been engaged as a service provider to K - 12 educational organizations in the E-rate program since 1998.

Each of the schools involved in this appeal are faith-based, inner-city institutions which received and paid for the services purchased through the Forms 471's in 2003-2004. These schools are located in New Jersey's most urban and economically challenged communities, including Newark, East Orange, Union City and Jersey City. These institutions already maintain a delicately balanced, hand-to-mouth financial existence which will be thrown off-kilter if forced to rebate monies already spent — let alone, nearly three years ago. *See Exhibit G, affidavit of Howard Gerber filed with USAC as part of the appeal below.* As will be shown below, this is far more financial hardship than the schools could ever deserve for having committed a naively innocent mistake.

B. The Financial Hardship:
Amounts Encompassed by USAC's Demands for Reimbursement

i. USAC Commitments Actually Disbursed for Funding Year 2003 - 2004

To give perspective to this matter, the Commission needs to appreciate the scope of USAC's demands for reimbursement of the funds committed and then actually spent in 2003-2004:

Funding Year 2003-2004	
Total Original Funding Commitment to Appellants from USAC	\$1,040,772.85
Amount of Adjustment Demanded	\$1,040,772.85

Funds Actually Disbursed to Date to Appellants	\$731,026.83
Funds Which USAC Seeks to Recover	\$731,026.83

In the case of the schools, even setting aside USAC commitments which were never funded, the amounts sought to be recovered are as follows:

Appellant School	Funds Actually Disbursed and For Which Recovery is Sought
Assumption - All Saints	\$63,627.82
Blessed Sacrament	\$76,948.59
Holy Trinity	\$114,848.86
Mother Seton Interparochial	\$49,810.95
Our Lady of Good Counsel Elem.	\$84,834.79
Our Lady of Good Counsel H.S.	\$46,747.02
Our Lady Help of Christians	\$71,385.55
St. Lucy's	\$42,992.40
St. Mary's H.S.	\$95,256.68
St. Patrick	\$84,574.17
TOTAL:	\$731,026.83

As the chart shows, each of the amounts at issue are not small by urban-center, parochial school standards where teacher salaries often start in the low to mid-\$20,000 range. If full recovery is awarded, the schools, at minimum, will suffer great financial hardship and Future Gen is likely to close its doors for good. *See Gerber Affidavit attached hereto as Exhibit G; see also appended hereto, Affidavit of Raymond Barto filed with USAC as part of the appeal below attached hereto as Exhibit H.*

*ii. USAC Commitments Which Were Never Disbursed
for Funding Year 2003-2004*

Adjustment (and loss) of the undisbursed commitments, another \$309,746.02, will not affect the schools or Future Gen. As set forth in the Gerber Affidavit, there is often a time gap between the posting of approved funding work by the schools' Forms 471, and the time for deployment of the goods and services ordered thereby. In the case of the undisbursed commitments, totaling \$309,746.02, work related to these Forms 471 was determined by Future Gen, in conjunction and consultation with the schools, to be excessive, unnecessary or redundant when the time arrived for performance.

Thus, the Commission must take into consideration that the appellants, in the relevant year, actually turned away \$309,746.02 in approved funding, an action which would surely be at odds with any intent, plan or conspiracy aimed at achieving fraud or abuse of USAC funding or at tainting the bidding process for personal benefit.

iii. *Confirmed Receipt of the Goods and Services Under the Forms 471*

Significantly, as set forth in the Gerber affidavit, USAC audited the schools to determine whether the goods and services outlined in the posted Forms 470 and 471 had been delivered and were received. Its auditor reported nothing out of order and presumably confirmed that Future Gen sold the goods to the schools and the schools received and paid for them. *See also the Gerber Affidavit which confirms this as the case.*

C. **USAC's Basis for Demanding Reimbursement of \$731,000**

In each instance, the USAC Commitment Adjustment Letters outlined above relate that each institution's 2003, FCC Form 470, at Block 6, not only employs an incorrect email address for the applicant but, in fact, erroneously (but innocently) references Future Gen's school services help line address, sld@futuregeninc.com. Based on this, USAC has sought to rescind the myriad Funding Requests cited in the tables above, reasoning that any applicant's Form 470 reference to a service provider's email address would taint the competitive bidding process mandated by the Commission.

In denying the appeals below, and in concentrating on the email address *faux pas* to the point of donning blinders, USAC failed and refused to give any weight to the counterbalancing effect of the other, correct information at Block 6 on the Forms 470. Each and every school's Forms 470 contact name, address, telephone number, and fax number is accurate, correct, above reproach and without any taint or question. *Attached hereto as Exhibit I is the Form 470 for Holy Trinity Elementary School representative of the same manner in which each appellant school filled out Block 6.*

i. Mother Seton Interparochial's Forms 470

Specifically, Block 6 of Mother Seton Interparochial School's Forms 470 read as follows:

6a. Contact Person's Name: Mary McErlaine
6b. Street Address 1501 NEW YORK AVE
UNION CITY NJ 07087 4323
6c. Telephone Number (201) 863-8433
6d. Fax Number -()-
6e. E-mail Address sld@futuregeninc.com

When asked by USAC to explain the email reference, the schools' replies varied but their recurring theme was that an inadvertent mistake had been made. On July 3, 2006, by fax memorandum, Ms. McErlaine of Mother Seton Interparochial School advised Kelly Miller of USAC:

The e-mail address in question . . . was actually entered as a technical contract [sic] address we use to communicate with Future Generation. This address was set up as an additional means of contacting our support company with any questions we need answered during the application process with regard to our exciting network environment. Since the entire e-rate process relates to technology and equipment, I thought it best to include a technical contact in this block. I did not fully understand that this needed to be an address associated with the school itself, and not one of the service provider. *See Exhibit J appended hereto, fax memorandum, July 3, 2006, McErlaine to Miller.*

ii. Our Lady of Good Counsel's Forms 470

Specifically, Block 6 of Our Lady of Good Counsel Schools' Forms 470 read as follows:

6a. Contact Person's Name: Ania Jarmulowicz
6b. Street Address 243 WOODSIDE AVE NEWARK NJ 07104 3113
6c. Telephone Number (973) 482-1209
6d. Fax Number -()-
6e. E-mail Address sld@futuregeninc.com

Ania Jarmulowicz, the Vice Principal of Our Lady of Good Counsel Schools, discussed the error in her June 27, 2006 communication to Ms. Miller:

The reason why the email address belonging to Future Generation was entered on our application is simply due to a misunderstanding of its purpose, and miscommunication between Future Generation and us. Future Generation offers technical support and maintenance for Our Lady of Good Counsel Schools. Assuming the technical questions would arise regarding our present network configuration, and that Future Generation would be equipped to answer such questions, we requested that Future Generation provide us with a contact email address for this purpose. They created a separate address for this technical purpose, and provided it to us. Once again, they and we thought it was for technical questions regarding our existing network, not for questions relating to future bids. We placed this address in Block 6 for this purpose.

We failed to understand that this e-mail address could be used in relation to the bidding process, which was not our intention. We truly misunderstood the purpose of this e-mail address, and its use in this block. *See Exhibit K appended hereto, June 27, 2006 fax memorandum, Jarmulowicz to Miller.*

iii. *St. Patrick's School's Forms 470*

Specifically, Block 6 of St. Patrick's School's Forms 470 read as follows:

6a. Contact Person's Name: Pat West/ Sr. Maeve McDermott			
6b. Street Address 509 BRAMHALL AVE			
JERSEY CITY	NJ	07304	2730
6c. Telephone Number (201) 433-4664			
6d. Fax Number (201) 433-0935			
6e. E-mail Address sld@futuregeninc.com			

St. Patrick's School in Jersey City provided a similar explanation:

Please be advised that the following email address, sld@futuregeninc.com was used in error. In checking back through my files, I see that the application process for the 2003 funding year was started around the same time that Future Generation had created a "technical support" email address for their clients use. This was meant as a means of communication to answer any questions during the application process regarding our existing infrastructure, which they maintain. Having not given it much thought, I simply put a technical contact email address in the application instead of my St. Patrick email address. *See Exhibit L appended hereto, fax from Pat West of St. Patrick School to Kelly Miller.*

iv. *St. Mary High School's Forms 470*

Block 6 of St. Mary High School's Forms 470 provide:

6a. Contact Person's Name: Beatriz Esteban-Messina			
6b. Street Address 209 3RD ST			
JERSEY CITY	NJ	07302	2801
6c. Telephone Number (201) 656-8008			

6d. Fax Number	(201) 653-4518
6e. E-mail Address	sld@futuregeninc.com

The same was true of St. Mary High School. On July 7, 2006, Ms. Beatriz Esteban wrote to Ms. Miller:

I inadvertently used an e-mail address that is assigned to us for technical support. Knowing most of the application process pertains to hardware/software and technology in general, Future Generation set up an e-mail address for their clients to ask any technical questions in relation to their existing network which may arise during the e-rate filing process. I thought it best to have any correspondence between the SLD and us go to this specific e-mail account. Understanding the importance of timely response to the SLD, I chose to use this e-mail address so as not to overlook any important requests made during the application process. Unfortunately, I did not realize at the time that this-email address was designed for use between us and our technical support company to explain questions we may have about our network so that we could better understand and answer any questions the SLD may ask. . . . *See Exhibit M appended hereto, letter, July 7, 2006, Beatriz Esteban to Kelly Miller.*

v. *Blessed Sacrament School's Forms 470*

Block 6 of Blessed Sacrament School's Forms 470 state:

6a. Contact Person's Name:	Nathan Potts		
6b. Street Address	610 CLINTON AVE		
	NEWARK	NJ	07108 1421
6c. Telephone Number	(973) 824-5859		
6d. Fax Number	(201) 624-6030		
6e. E-mail Address	sld@futuregeninc.com		

A new principal, Alice M. Terrell of Blessed Sacrament School, had no personal knowledge of any employment of the Future Gen tech support email address on the Form 470 for 2003, but learned from her staff

. . . that this was an e-mail address set up by Future Generation (our support company at the time) to communicate questions back and forth pertaining to our network environment at that time and to better understand any questions asked of us from the SLD communicating directly with Future Generation. *See Exhibit N appended hereto, July 19, 2006 letter, Terrell to Miller.*

This, of course, corroborates exactly what the other school officials have said, namely, that the email address was a technical services help and support portal for Future Gen.

vi. *Holy Trinity School's Forms 470*

Block 6 of Holy Trinity School's Forms 470 provide the following information:

6a. Contact Person's Name:	Sr. Janet Roddy		
6b. Street Address	43 MAPLE AVE HACKENSACK	NJ	07601 4501
6c. Telephone Number	(201) 489-6870		
6d. Fax Number	(201) 489-2981		
6e. E-mail Address	sld@futuregeninc.com		

Sister Janet Roddy, the principal of Holy Trinity School, also corroborates:

Please accept my apologies in the confusion of entering an e-mail address belonging to Future Generation as a means of contact. I seem to recall having many issues with my personal e-mail address at the time the 470 application process started, and was hesitant to provide that e-mail as a means of contact. Therefore, I supplied an e-mail address set up by Future Generation for technical support between us

and them to answer questions regarding our existing infrastructure which they have maintained for us on an as-needed basis.

Please note that the e-mail address on my application, sld@futuregeninc.com is no longer in existence. See *Exhibit O appended hereto, June 30, 2006 letter, Sister Janet to Miller*.

Without beleaguering the issue, the remainder of the appellant schools' Form 470s Block 6 provide the same information.

D. Counterbalancing Information at Block 6 for Any Interested Provider

Significantly, then, each of the schools' Forms 470 bore the correct addresses, phone numbers, fax numbers, and the identities of the contact persons for the institution. Given all of this information to counterbalance the erroneous inclusion of Future Gen's customer service email address, it cannot be fairly said that these special circumstances constituted a "taint." Indeed, as Gerber pointed out to USAC in his affidavit,

Finally, and of equal significance, as the e-mail address was terminated immediately upon Future's awareness of its use, *no correspondence was ever received* through this address. No bidding queries were made, no questions were asked for bidding purposes, and, ironically, no product support questions were ever sent to us by the schools, their staff, or the Schools Libraries Division of USAC. Throughout its short existence, the Future Generation support email address was silent, dormant and served no useful purpose, let alone "tainting" the bidding process This is not surprising. Although the Future email address was inadvertently listed on the Form 470s as the preferred method of contact, most service providers engaged in our business would have immediately recognized that the email address was that of another provider and would have chosen to utilize another means of contact with the institution.

E. Future Generation's Email Address for Support

On July 19, 2006, Future Gen's operational director, Howard Gerber, wrote to Ms. Miller to confirm that the email address was essentially a customer support portal:

. . . Several less technical clients inquired with us about the technicalities and limitations of their present environment at that time, and stated they required timely responses due to the nature of the E-Rate process, and needed to determine their additional requirements prior to filing their 470 forms. As their questions were numerous and consistent for a period, we created a separate email address (sld@futuregeninc.com). The purpose of this address was for schools to ask technical questions relating to their present environment. Also, this "specific" e-mail box would be treated as time sensitive by our staff, so as to comply with our clients' requests for a quick response . . . The segregated mailbox allowed for the prioritization that the schools requested. This was meant to be a means of communication between our clients and us for questions about their present environment, such as the capacity of their network, servers, bandwidth, hard drive space, speed / usage limitations, etc. It was NOT meant to be a means for the SLD, or potential vendors, to communicate with Future Generation, or the applicants. *See Exhibit P appended hereto, July 19, 2006 fax memorandum, Gerber to Miller.*

Gerber also explained what his investigation disclosed concerning the use of the email address by the schools in their Forms 470:

Unfortunately, when asked for an e-mail address in their Form 470 application, they innocently thought they should put the e-mail address set up at Future Generation for technical support. Since a majority of the funding requests pertain to hardware and software, they assumed that any technical questions the SLD had in relation to these items would best be answered by us. They misunderstood our purpose of setting up this additional means of communication, and the purpose of the Block 6 request. They also overlooked the fact that service providers are not allowed to be involved on the applicant's

behalf. *See Exhibit P appended hereto, July 19, 2006 fax memorandum, Gerber to Miller.*

Significantly, though, once Future Gen learned of the school's Block 6 gaffe, it instantly understood the import for the bidding process and immediately shut down the email support address.

Gerber told Miller that

When it came to our attention through some of these schools that they had listed this e-mail address on the application, we immediately terminated the mailbox to eliminate any involvement with their application. We are aware of the rules and regulations the FCC sets forth and would not jeopardize our client's funding by personally getting involved or influencing them in any way. *See Exhibit P appended hereto, July 19, 2006 fax memorandum, Gerber to Miller.*

Finally, and of equal significance, Gerber advised Miller, "As the e-mail address was terminated immediately upon our awareness of its use, no correspondence was received through this address." (Emphasis added to original.) *See Exhibit G appended hereto, July 19, 2006 fax memorandum, Gerber to Miller.* Ms. Jarmulowicz, the Vice Principal of Our Lady of Good Counsel Schools, likewise told Ms. Miller:

... after Future Generation learned that this e-mail address was sited in our application, they shut the address down to avoid any conflict of interest between a service provider and applicant. This was early in our E-Rate experiences. With the submission of each application, we gain a better understanding of what is actually being requested and hope to avoid supplying any incorrect information on future application [sic]. We apologize for this error, but caught it very early and prevented any conflict whatsoever, as Future Generation had no communication on our behalf. *See Exhibit K appended hereto, June 27, 2006 fax memorandum, Jarmulowicz to Miller.*

As set forth in the Gerber Affidavit, Future Gen's best estimation of the creation of the email address in question is November 28, 2003, which is three or so days before the filing dates of the first relevant Form 470 submitted to USAC. The schools' email designation error was discovered by Future Gen on or about December 18, 2003, the date when the email box was immediately terminated by the company. This means that the email address was only "in play" as part of the Forms 470 error from December 1st through December 18th.

Significantly, when considered with the fact that no email was ever received at the email server for this address, it is clear that each Form 470 posted on and after December 18th would have been wholly effective and without any bidding "taint."

Based on Future Gen's review of the records provided by USAC and some of the schools, the last submissions made before the termination of the address were by Our Lady of Good Counsel High School and Elementary School. Although the SLD has characterized the ensuing competitive bidding as tainted, the fact that the email box was closed by Future Gen within 18 days of the first posted Form 470, and that no service provider queries were received in it, underscore that this email identification error proved not only innocuous but entirely moot.

F. Independent, Alternative Bidding Avenues Used by the Schools

A final factor which negates the import of the schools' unintentional address error is that several of the schools joining in this appeal prepared their own equipment and service lists as informal Request for Proposals (RFPs) for the services sought through the Forms 470. These

included Our Lady of Good Counsel High School and elementary school, St. Patrick School, Blessed Sacrament, Mother Seton InterParochial, and St. Lucy's School. Accordingly, for these schools there were independent avenues for third party bidding, mitigating any "taint" that might be attributable to the email box gaffe.

Indeed, this argument is not merely academic: as set forth in the Gerber Affidavit, each of these six schools received verbal inquiries from third party vendors concerning the goods and services being sought. Given these inquiries, it simply cannot be said that their bidding processes were "tainted." To the contrary, insofar as inquiries were fielded, they can only be termed successful.

G. Goods and Services Purchased by the Schools Forms 470 and 471 were Delivered

Finally, in each instance, the services ordered by the Forms 470 were delivered, installed and maintained as required by the agreements between the appellant schools and the appellant service provider, Future Gen.¹ There has been no allegation, nor can there be, of fraud, abuse, or waste, and each school applicant continues to maintain its relationship with Future Gen. In turn, Future Gen continues to support and maintain each school's computer networks, etc.²

¹ Four schools. Our Lady of Good Counsel High School and elementary school, and Holy Trinity School, and Mother Seton InterParochial have been subject to USAC's BearingPoint technology audits. In no instance has BearingPoint alleged that any Future Gen contract for goods or services has been breached or that the service provider has otherwise failed to deliver as promised.

² With the qualified exception of Assumption - All Saints school, which merged into another Future Gen client and appellant herein, St. Patrick's School.

*Legal Argument***Point I****GIVEN THE POTENTIAL HARDSHIP AND THE
BALANCING OF THE EQUITIES, GOOD CAUSE EXISTS FOR
THE COMMISSION TO GRANT A WAIVER TO THE APPELLANTS**

The USAC is the not-for-profit corporation responsible for administering the Universal Service Fund and the four federal universal service programs, one of which is Schools and Libraries. The schools and libraries support mechanism, also known as the E-rate program, is administered under FCC oversight. *See generally, Fifth Report and Order, CC Docket No. 02-6 (FCC 2004).* Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections. *See, 47 C.F.R. §§ 54.501-54.503; see also, Request for Review and/or Waiver, Glendale Unified School District, DA 06-244, CC Docket No. 02-6 (2006).* Telecommunications and related technological discounts are to be provided in response to a bona fide request for services by an eligible entity. *Request for Review, MasterMind Internet Services, CC Docket No. 96-45 (2000).*

The Commission concluded in the Universal Service Order that Congress intended, by providing support only for those schools and libraries making bona fide requests for service, to require accountability on the part of the schools and libraries. To ensure such accountability, the Commission concluded that eligible schools and libraries should submit a description of the services they seek so that such description may be posted to the Administrator's website to be evaluated by competing service providers. In addition to the need to comply with the requirement that schools and libraries make bona

vide requests for services, the Commission concluded that fiscal responsibility required that schools and libraries award contracts for eligible services pursuant to competitive bidding. Accordingly, the Commission adopted competitive bidding requirements, noting that “[c]ompetitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them.” The Commission found that without competitive bidding, the applicant may not receive the most cost-effective services available, with the result that demand for support would be greater than necessary and less support would be available to support other participants in the program. To promote a fair and open competitive bidding process, the Commission adopted several requirements aimed at ensuring that all prospective bidders could identify the services that schools and libraries seek to receive and that all such bidders would have sufficient time to prepare and submit bids. *Id.*

In order to receive discounts on eligible services, the Commission’s rules require that the applicant submit to the USAC’s Administrator a completed FCC Form 470, in which the applicant sets forth its technological needs and the services for which it seeks discounts. See, 47 C.F.R. § 54.504(b)(1), (b)(3); see also, *Request for Guidance, Sandhill Regional Library System*, DA 02-1463, CC Docket No. 96-45 and 97-21 (2002). Once the applicant has complied with the Commission’s competitive bidding requirements and entered into agreements for eligible services, the applicant must submit a completed FCC Form 471 application to the Administrator. *Id.*; See, 47 C.F.R. § 54.504(b)(4). The applicant must wait 28 days before entering into an agreement with a service provider for the requested services and only then may it submit the Form 471 requesting support for the services it ordered. See, 47 C.F.R. § 54.504(c); see also, *Request for Review, Brunswick County Schools*, DA 05-1122, CC Docket No. 02-6 (2005).

In the *Sandhill Regional Library* matter cited above, the applicant submitted two completed FCC Forms 470 for posting in Funding Year 2. One of the forms was posted in April 1999, but through no fault of the applicants the other was not posted until June 3rd of that year. The library system received a Receipt Notification Letter for the first, posted Form 470 and, assuming that the second one had already been posted, submitted two Forms 471, both of which relied in part on the yet to be posted Form 470. The USAC Administrator denied the funding requests on the grounds that they failed to meet the 28 day bidding requirement time period. *Id.*

The library system then appealed to USAC requesting that the 28 day competitive bidding requirement be waived. Generally, the Commission may waive any provision of its rules, but a request for waiver must be supported by a showing of good cause. *Id.* The Commission, relying on prior precedents, concluded that a waiver of its rules was warranted. *Id.*

In the case at hand, strict compliance with our rules is inconsistent with the public interest. We find that the substantial delay in posting the second FCC Form 470 was solely attributable to the Administrator. It would be unfair for Sandhill to be denied discounts because of so substantial a posting delay, particularly when this error may have resulted in Sandhill being denied substantial support it otherwise would have received. *Id.*

The public interest test is thus applied in determining the viability of any waiver request. Waiver is only appropriate if special circumstances, that is, good cause, warrants a deviation from the general rule and such deviation will serve the public interest. *See, Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C.Cir. 1990).* Significantly, the Commission has concluded that the public interest is served by the effective operation of the schools and libraries universal

support service mechanism, which generally requires competitive bidding for all services eligible for support. *Request for Guidance, Sandhill Regional Library System, supra*. The Commission has also concluded that additional factors may be considered when determining whether to grant a waiver:

The Commission may waive any provision of its rules on its own motion and for good cause shown. 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. *Request for Review and/or Waiver, Glendale Unified School District, supra*.

The case of the within appellants cries out for application of a waiver. First, the discounted goods and services were delivered and installed during Funding Year 2003 - 2004. They were bought and paid for and the program goal of providing universal access was met.

Second, forcing repayment by the schools and the service provider of the monies already spent will not only create a hardship but will impact adversely on the program goal since a forced reimbursement is likely to drive one or more of the schools, each of which maintains a hand-to-mouth existence, onto the brink of bankruptcy — a possibility which surely cuts against any notion of affording universal access to all. Indeed, the reimbursement of USAC based on a clerical error in the Form 470 is actually a case of first impression; one in which the Commission must carefully balance the public interest in providing discounts for universal service to faith based institutions of learning in inner city environments against substantially penalizing them financially for mere clerical

errors. This is exactly the type of “equity” which, in the balance, mandates grant of a one time waiver to the appellants.

Third, there is no hint of any fraud, abuse, or waste related to the 2003 -2004 discounts accorded to the appellants. Indeed, while USAC has indicted them for a “tainted bidding process,” nothing in the record supports such a finding. Rather, the Administrator has chosen to simply adopt six year old language from the *Mastermind* case, cited above, as grounds for this conclusion, even though the facts of the case do not support such a finding.

Fourth, the mistake at issue, filling in the contact information on the Forms 470 with an incorrect email address, was not only short lived to begin with, but would have been caught and excused in a timely fashion under recent case rulings by the Commission which has shown itself to be more willing to abide clerical and other ministerial errors in the Forms 470.

As the *Fifth Report and Order*, *supra*, makes plain, the Commission is vitally interested in ensuring against fraud, waste or abuse infecting the program, while simultaneously assuring the equitable distribution of the universal fund proceeds. Indeed, following issue of the *Fifth Report and Order* in 2004, USAC vigorously applied its established procedures, including “minimum processing standards,” to facilitate its efficient review of funding applications. *See, In the Matter of Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School New Orleans, LA, CC Docket No. 02-06, Order, FCC 06-54 (2006)*(Bishop Perry Order), a matter in which the Commission heard numerous appeals and requests for waivers from, *inter alia*, USAC decisions related to failures to comply with minimum processing standards.

Consequently, prior to the *Bishop Perry Order*, when an applicant submitted an FCC Form 470 that omitted information required by the minimum processing standards, USAC automatically returned the application to the applicant without considering it for discounts under the program, without inquiring into the cause of omission and without providing the applicant with the opportunity to cure the error. See, *Bishop Perry Order*. Indeed, reimbursement of previously funded applications are sought in situations where USAC would normally deny a funding request outright upon discovering a particular infirmity in the application review process, because the applicant failed to meet one or more necessary requirements for receipt of support. *Fifth Report and Order*.

In its *Bishop Perry Order*, however, the Commission recognized that a slavish insistence upon perfection in the face of USAC's "minimum processing standards" was affecting the efficiency of the fund and hampering its policy goal of ensuring universal access to telecommunication and related technology. It found that immaterial clerical, ministerial or procedural errors resulted in rejection of requests which were otherwise infused with *bona fide* need. The creation of artificial barriers was seen by the FCC as contrary to its statutory policy goal to "enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms . . . and libraries." 47 U.S.C. § 254.

The FCC also came to grips with the fact that the community with which USAC was dealing was forgivably amateurish when contending with the bureaucratic requirements of the 470 and 471 Forms:

We note that the 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 family emergencies can result in the only official who knows the process being unavailable to complete the application on time. *Bishop Perry Order.*

With this in mind, the Commission concluded that certain filing and form-filing errors should not create barriers to the benefits of the universal fund:

Importantly, applicants' errors could not have resulted in an advantage for them in the processing of their application. That is, the applicants' mistakes, if not caught by USAC, could not have resulted in the applicant receiving more funding than it was entitled to. In addition, 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 the denial of funding requests inflicts undue hardship on the applicants. In these cases, we find that the applicants have demonstrated that rigid compliance with the application procedures does not further the purposes of section 254(h) or serve the public interest. *Bishop Perry Order.*

Thus, in the May 2006 *Bishop Perry* matter, for the first time the FCC required "USAC to provide all E-rate applicants with an opportunity to cure ministerial and clerical errors on their FCC Form 470."

Specifically, USAC shall inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications, along with a clear and specific explanation of how the applicant can remedy these errors. . . . Applicants shall have 15 calendar days from the date of receipt of notice in writing by USAC to amend or refile their FCC Form 470.

USAC shall apply this directive to all pending applications and appeals even if such applications or appeals are no longer within the filing window. Bishop Perry Order.

In response, USAC has issued a notice to applicants advising them of their right to make corrections on their Forms 470. The relevant parts are extracted below:

USAC's Important Notice Regarding Correctable Errors on FCC Forms 470 and 471

A. Corrective Action Allowed:

Form 470, Block 1 Items 1 and 3, the Applicant Name and Contact Information:

“As long as there is sufficient contact information on the form to be able to make contact with someone, applicants can provide the missing contact information within 15 days of notification from USAC. This information is required before the form can be posted which starts the 28-day posting requirement.”

B. Errors that can be corrected by amending the Form 470:

Form 470, Block 1 Items 1 and 3, the Applicant Name and Contact Information:

“Applicants will be able to submit corrections to the contact information within 15 days of notification from USAC. Before making the change, the correction will be reviewed to ensure that the change does not circumvent the FCC's competitive bidding requirements.”

Accordingly, the “rules of the game” have changed in the last several months and more leniency has recently been afforded to school and library applicants. As USAC itself noted, if there is sufficient contact information on the Form 470, missing or erroneous information due to unintentional ministerial and clerical mistakes can be corrected. In the present case, where the error was caught and the email address terminated during the 28 day period, it is clear that the appellants could have corrected the mistake had it occurred post-Bishop Perry Order. Under this

circumstance, it is fundamentally unfair to impose on the schools and the provider the substantial financial liability sought by USAC for reimbursement of the discounts.

Although the events in the present case arose in Funding Year 2003 - 2004, the same policy guidelines should be applied. Each of the appellant school applicants provided sufficient contact information on their Form 470, including school employee names, addresses, phone numbers and fax numbers, where appropriate; the reference to the Future Gen email support address was terminated by the service provider immediately upon learning of the appellants' gaffes; moreover, for the bulk of the Forms 470 at issue here, this termination was effected within the 15 day period ultimately contemplated by the Commission as a reasonable period of time to correct an unintentional ministerial or clerical mistake.

Given all of the above circumstances, it is respectfully submitted that the Commission must grant a waiver to each of the appellants.

POINT II

USAC'S DENIAL OF THE APPEAL BELOW WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE

The USAC denial of appeal must be reversed because the it failed to make adequate findings of fact based upon the record that was before it and failed to satisfy both requirements of Section 557 of the Administrative Procedure Act. See, 5 U.S.C.A. § 557. Section 557 of the Administrative Procedure Act provides: "The record shall show the ruling on each finding, conclusion, or exception presented. All decision....shall include a statement of- (1) findings and conclusions, and the reasons

or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.” See, 5 U.S.C.A. § 557.

Interestingly, USAC’s only “finding” is that, “If the applicant has posted a Form 470 that contains contact information for a service provider that participates in the competitive bidding process, the applicant has violated this requirement, and the FCC rules consider this to be tainted.” In other words, the steps taken by the provider back in 2003 to terminate the email address, the inquiries received by the schools in response to the posted Forms 470, and the bulk of the contact information which otherwise pointed an interested bidder to the eligible institution, were not considered at all. In lieu of any analysis of the facts of the case, the Administrator incorrectly opted to simply apply the general rule of law without making any findings. This is plain error under the Federal APA and, at minimum, should lead the Commission to remand the matter to the Administrator for further consideration of the actual facts of the case.

Furthermore, although the appellants requested that the Administrator consider granting a waiver, no ruling is made on this request. This, too, is error mandating remand for further proceedings.

Perhaps because of its shortcomings in weighing the facts and evidence before it, USAC also erred in its application of the law. Reliance upon Request for Review, MasterMind Internet Services, Inc., supra., is inapposite. In *MasterMind*, the FCC denied funding (in advance, not three years after the fact) because the named service provider participated in the bidding process: indeed, one of MasterMind’s own employees was named as the *contact person* on the relevant, disallowed Forms 470 — a stark contrast to the Forms 470 at issue in this matter.

In fact, MasterMind admitted that its workforce was also involved in the preparation of the Forms 470, the Applicants having effectively surrendered control of the entire bidding process to the service provider. Nothing in the within case comes within a mile of this level of egregiousness.

To the contrary, the appellants in this matter fall squarely within the portion of the *MasterMind* appeal which the Commission *granted*, stating:

To the extent that the applications at issue here were denied by SLD in instances that the Applicant did not name a MasterMind employee as the contact person and a MasterMind employee did not sign the associated Forms 470 or 471, we do not believe that there has been a violation of the competitive bidding process. Granting these requests for review, therefore, is not inconsistent with the Commission's rules. Accordingly, we grant the requests for review and remand those applications to SLD for further processing.

Significantly, in no instance, did Future Gen sign any Forms 470 or 471, nor was any Future Gen employee identified as a contact person on the schools' Forms 470. Squarely, then, under this aspect of the *MasterMind* holding, USAC erred as a matter of law by failing to grant the appellants' appeals from the Commitment Adjustment Letters.

Additionally, USAC in its denial of the appeal below erroneously extended the holding in *MasterMind*, to encompass email addresses — treating them as being co-equal with contact names and telephone and fax numbers. But nothing in the 2000 ruling by the Commission even hints at this. Nor, as pointed out above, did the Administrator give any consideration to the prompt termination of the email address during the bidding period. In each instance, this constitutes error below.

Several of the schools joining in this appeal prepared their own equipment and service lists

as informal Request for Proposals (RFPs) for the services sought through the Forms 470. These included Our Lady of Good Counsel High School and elementary school, St. Patrick School, Blessed Sacrament, Mother Seton InterParochial, and St. Lucy's School. Accordingly, for these schools, there were independent avenues for third party bidding. Furthermore, in conjunction with the direct vocal inquiries to the Contact Person listed in Block 6, these schools were able to distribute their RFP's to potential 3rd party vendors.

In accord with the purpose of the contact information contained in Block 6, and inapposite to the facts of *MasterMind*, each of these six schools received verbal inquiries from third party vendors concerning the goods and services being sought. These verbal inquiries were directed to the Contact Person in Block 6 and made by telephone inquiry. Given these inquiries, it simply cannot be said as a matter of mere rote recitation that the bidding processes were "tainted" --- the facts suggest a clerical mistake, an effort to timely fix it, and more than enough counterbalancing contact information to vouchsafe the bona fides of the bidding process. "The Form 470 required that the applicant name a person whom prospective service providers may contact for additional information (contact person). The contact person should be able to answer questions regarding the information included on the Form 470 and the services requested by the applicant, including how to obtain a copy of the applicant's request for proposal (RFP), if the applicant has prepared one." *Id.* These requirements were met and the Administrator erred in failing to consider them. Unlike *MasterMind*, the purpose of the contact person was satisfied here.

Similarly, no email inquiry of any sort was ever received in the Future Gen customer support email box, a fact which should have been found below as serving to mitigate any concern about a

compromised bidding process. Like soda ash, these two facts — written, albeit informal RFPs followed by verbal bidding inquiries to six of the schools from third party vendors, and the lack of emails — neutralize any hint of acidity in the bidding processes at issue here.

Finally, it cannot be overlooked that as a matter of law, MasterMind contemplates a two-pronged test to which the Administrator failed to adhere. Without addressing a reimbursement claim such as here, MasterMind holds that “denial is appropriate in any instance in which the service provider is [1] listed as the contact person *and* [2] participates in the bidding process.” *Id. at* ¶13. (emphasis and enumeration added). This is a two prong, conjunctive test which cannot be applied to the present case since the service provider, Future Gen, was neither identified as the contact person nor did it participate in the bidding process— let alone to the extent by which the MasterMind usurped and controlled the competition. Accordingly, it is error to rely, as the Administrator did, solely upon MasterMind to ascribe a “taint” to the bidding involving the within appellants. The MasterMind holding must be found inapplicable to this appeal and this appeal must be granted.

Further, if findings of fact were actually made, they would have to take into consideration a myriad of facts supporting the appeal. For example, although BearingPoint has performed technological audits of some of the schools, there has been no finding of financial fraud, abuse or mistake; rather, USAC’s denial of the appeal below is premised solely upon an unintentional error that has been explained and pans out as merely the product of a certain technological naivete — just what one might expect from the school administrators discussed by the FCC in the *Bishop Perry* matter as being less likely to be comfortable dealing with technological issues and with unforgiving bureaucratic forms.

What should be found, however, is that since the 2003 school year, the students of each of the schools appealing in this matter, have benefitted from the implementation of the Forms 470 and 471. The schools involved are entirely based in New Jersey's urban areas, including Newark, East Orange and Jersey City. These schools needed and required the aid made available to them under the Universal Fund, received the aid, implemented its intent and are now being pressed to the wall to make a reimbursement. The equities of the circumstances here present weigh against this.

Similarly, Future Gen, too, acted in good faith. It provided the goods and services contracted for under the Forms 470 and 471, delivering value for money back in 2003. It is utterly inequitable to expect it to now regurgitate the full contract price (as is the plain intent of the numbers set forth in the Notifications of Commitment Adjustment Letters) based on others' naive but otherwise harmless mistakes ---- and particularly so given that Future Gen sought to immediately ameliorate the problem by terminating the e-mailbox. The end result of such a process is likely to be Future Gen's dissolution, something which will ultimately undercut the USAC's goal of competition by removing a provider in a geographic area where it has gained expertise, experience and a glowing reputation.

Moreover, there is no better example of the appellants' innocence, naivete, and good faith, than that they literally left nearly \$310,000 "on the table," declining to implement and seek disbursement for projects to which USAC had already committed. This fact alone belies any intimation that the Block 6 identification error on the Form 470's was in any sense a product of fraud or waste.

CONCLUSION

Based on the foregoing analysis of the facts and discussion of pertinent law, the parties' appeals must be granted in all respects or a rules waiver must be put into place for their benefit.

Respectfully submitted,

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