

**Before The
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Request for Review by)	CC Docket No. 02-6
Net56, Inc. of Decisions of the)	
Universal Service Administrator)	
)	CC Docket No. 96-45
)	
Schools and Libraries Universal Service)	Country Club Hills School District
Service Support Mechanism)	2009 Funding Year
)	FRNs 1853415, 1853424, 1853437

**REQUEST FOR REVIEW BY NET56, INC. OF DECISIONS OF THE UNIVERSAL
SERVICE ADMINISTRATOR**

Net56, Inc. (“Net56”) respectfully requests, pursuant to Sections 54.719 through 54.723 of the Commission’s rules,¹ that the Commission review and reverse the Universal Service Administrative Company (“USAC”) Decision on Appeal for funding year 2009 (“Administrator’s Decision”) and the associated USAC funding commitment decision for the above-referenced FRNs.² The Administrator’s Decision was issued on June 29, 2010 in response to a Letter of Appeal filed by Net56 on April 23, 2010.³ For the reasons set forth herein, the Commission should grant Net56’s appeal of the Administrator’s Decision and remand the underlying funding application to USAC for immediate approval.⁴

¹ 47 C.F.R. §§ 54.719-54.723.

² See Administrator’s Decision on Appeal for Funding Year 2009-2010, dated June 29, 2010, attached hereto as Exhibit A (“Administrator’s Decision”); see also the Funding Commitment Decision Letter, dated February 23 (“FCDL”) and the Further Explanation of Administrator’s Funding Decision Letter, dated March 26, 2010 (Further Explanation Letter), jointly attached hereto as Exhibit B.

³ See Letter of Appeal, dated April 23, 2010, attached hereto as Exhibit C (“Letter of Appeal to USAC”).

⁴ The FCC Form 471 Application Number on which the above-referenced FRNs were submitted to USAC was Funding Year 2009 Form 471 Application Number 678753, attached hereto as Exhibit D (the “District’s Form 471”). Country Club Hills School District 160 is the Billed Entity for the application, and its Billed Entity Number (“BEN”) is 135654.

Background

Net56 is a small, privately-owned technology solutions provider. Net56 began participating in the E-rate program in 2003 in response to local school districts interest in more personalized, responsive services that are tailored to their rapidly changing needs. Currently, Net56 provides e-rate and non e-rate services to eight school districts in northern Illinois, including the Country Club Hills School District, the recipient of the services which are the subject of this appeal (the “District”). Comprised of two elementary schools and one middle school, the District serves a population of more than 1500 students and employs more than 150 teachers and staff. More than 50% of the students in the District are eligible for the National School Lunch Program. As a result, the District is eligible to receive services under the E-rate program at the 80% discount level.

Net 56 began providing e-rate services to the District in funding year 2006. USAC reviewed and approved Form 471 funding requests from the District for Net56 services for funding years 2006, 2007 and 2008 that are substantially similar to the services at issue in this appeal.⁵ Several months into the 2008 funding year, however, USAC advised Net56 and the District that it was conducting a special compliance review of the funding applications filed by school districts served by Net56 and that all funding for these districts would be placed on hold, including funding that had already been reviewed and approved by USAC. USAC did not supply Net56 or the District with any information on the reason for the compliance review.

On December 15, 2008, the District posted a Form 470 for the 2009 funding year on the USAC website, initiating a 28-day competitive bidding period and seeking bids for Internet

⁵ See Form 471 Application Numbers 519131 (2006), 579088 (2007), and 632757(2008).

access, web and email hosting, firewall, and wide area network services.⁶ In response to the Form 470, Net56 proposed a written offer with specific proposed rates for each of these services to the District for e-rate services for the 2009 funding year. The District accepted Net56's bid and signed the quotation on January 20, 2009, thereby entering into a contract ("2009-10 E-Rate Contract"). On February 11, 2009, the District filed a Form 471 with USAC, requesting funding for the e-rate services to be provided by Net56 pursuant to this contract.⁷

On February 23, 2010 – more than a year after the funding request was submitted – USAC finally issued a FCDL for the FRNs included in the District's Form 471. The FCDL denied funding for each of the FRNs and stated, "[t]his funding request is denied as a result of the program violations explained in the Further Explanation of Administrator's Funding Decision letter sent this date under separate cover."⁸ In fact, the District and Net56 had to wait another month, until March 26, 2010, to receive the letter from USAC describing the reasons for the funding denial. Shortly thereafter, on April 23, 2010, Net56 filed the Letter of Appeal to USAC, appealing the February 23, 2010 funding decision. On June 29, 2010, USAC issued the Administrator's Decision, denying Net56's appeal and upholding its decision to deny all funding for the FRNs covered by the District's Form 471.⁹

I. The Administrator's Decision Erroneously Ignores the Right Contract.

USAC's stated basis for denying all funding for the FRNs is its determination that the District and Net56 "failed to provide a breakdown of the eligible versus ineligible services being received from Net56 and their respective dollar amounts..."¹⁰ As Net56 explained in the Letter

⁶ See FCC Form 470 Application Number 83240000711069, attached hereto as Exhibit E (the "District's Form 470").

⁷ See Exhibit D.

⁸ FCDL at 3-5.

⁹ Administrator's Decision at 1.

¹⁰ Further Explanation Letter at 4.

of Appeal to USAC, this conclusion was based upon review of the wrong contract.¹¹ In the course of USAC's special compliance review of Net56, the District provided USAC with a copy of a 60-month term Master Services Agreement, dated May 10, 2006, between Net56 and the District ("MSA"). The MSA provided a foundation for a relationship between Net56 and the District upon which the District could later choose to contract for specific services. USAC instead incorrectly understood this agreement to be "the contract" for the provision of e-rate services for the 2009 funding year. Since this MSA does not provide any breakdown of e-rate eligible and ineligible services and their respective costs, USAC denied the District's funding request on the basis that this breakdown was missing.

But that breakdown is plainly included in the parties' 2009-10 E-Rate Contract, which is the document that the parties agreed to and executed during the bid period. This contract clearly describes and states the separate monthly price of each eligible e-rate service, distinct from all ineligible services. As such, the 2009-10 E-Rate Contract satisfied the requirement that USAC erroneously found to have been violated, by allocating eligible and ineligible services and their respective costs.

USAC nonetheless decided that the MSA was the only contract because the District had in one instance referenced the MSA in responding to a USAC question regarding the applicable contract. Nothing in the Commission's rules directs USAC to deny funding on the basis of a minor error in responding to USAC inquiries when in reality the parties complied with program rules. Here, the 2009-10 E-Rate Contract obviously applies. Even USAC itself acknowledged that the District had provided the contract in its Item 21 attachment.¹² Also, if the District and Net56 had believed the MSA was a contract for e-rate services for funding year 2009-10, the

¹¹ Letter of Appeal to USAC at 2-3.

¹² Administrator's Decision at 2.

District would have had no need to seek bids at the end of 2008 through a new Form 470, and Net56 would have had no need to provide a new quotation.¹³ Moreover, even if the MSA included e-rate services for 2009, which it does not, it would have been superseded by the subsequent agreement executed after the District posted its Form 470 for 2009. Therefore, the 2009-10 E-Rate Contract signed on January 20, 2009 is the relevant contract between Net56 and this contract clearly allocates and states the price for each e-rate service covered by the District's Form 471.

In any event, USAC's conclusion proves too much. USAC states that the [2009-10 E-Rate Contract] "is not a separate contract but rather part of the [MSA]." But if the 2009-10 E-Rate Contract is part of the MSA that USAC believes is the contract, then that contract *includes* the allocation between eligible and ineligible services that USAC stated was missing. Whether the quotation is a separate contract, as Net56 and the District believed, or whether it was incorporated into the MSA prior to the Form 471 filing, as USAC apparently believes, either way it was contractually agreed to by Net56 and the District during the bid period, and either way it thereby set a clear allocation between eligible and ineligible services. Nothing in the Administrator's Decision alleges any flaw in the 2009-10 E-Rate Contract; instead, its decision is based entirely on the supposition that that agreement simply does not apply, when in fact it does.

Finally, even if the Commission finds that the District and/or Net56 failed to comply with some technical element of program rules, the Commission should give substantial consideration to the inequities that have been imposed on Net56 in this case as a result of USAC's extremely slow decision-making process. The delay in issuance of the FCDL unreasonably prejudiced Net56 and the District. Net56 initially contacted USAC in February 2006 to try to determine if its proposed contract structure was acceptable, and it walked away from those discussions

¹³ The term of the MSA is 60 months, into 2011.

believing that it had been given a go-ahead. USAC then later confirmed Net56's impression by providing funding for the District and other districts using the same approach with Net56 for subsequent funding years. USAC apparently decided sometime in 2008 that it had concerns with Net56's approach, but until the FCDLs in 2010 it would never clearly articulate to Net56 what those concerns were. Once USAC notified Net56 that it was conducting a special review of the applications of the school districts served by Net56, both Net56 and its counsel repeatedly called and wrote to USAC, begging to be told the details of any concerns so that Net56 could address them before contracts were submitted for the following school years, to no avail. In writing and in person, Net56 made clear that it was available at any time to work with USAC to provide any information or clarification that USAC needed to complete its review and issue a decision.¹⁴ During this time, Net56 and the District could have incorporated guidance from USAC into their approach to funding year 2009-10, and later funding year 2010-11, so that there would have been no problems with those applications. But USAC politely shunned these requests and kept the District and Net56 in the dark until it was too late.

As the Commission has noted, “the timing of the Commission’s and USAC’s processes may be critical to schools and libraries. Lengthy intervals for processing or reviewing applications could have a disruptive effect on the budget or procurement schedule for schools or libraries.”¹⁵ In *Request for Review of Totowa Borough Public Schools*, the Wireline Competition Bureau found that USAC “erred by unreasonably delaying its notification to

¹⁴ See, e.g., letter from Paul Hudson to Mel Blackwell, dated October 16, 2009, attached hereto as Exhibit F.

¹⁵ *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket No. 05-195, 20 FCC Rcd 11308, 11321, ¶ 29 (2005). In the same NPRM/FNPRM, the Commission reiterated that such delays and the resultant impact on mandated budget or procurement schedules “can have a significant negative impact on schools’ and libraries’ ability to achieve connectivity goals.” See *id.* at 11325, ¶ 38.

Totowa of the problems with its Form 470,” for eight months.¹⁶ More recently, the Bureau addressed a scenario in which an applicant’s numerous communications with USAC were ignored, ruling in favor of the applicant and pointing to the applicant’s “several attempts to follow-up with USAC, and USAC’s delay in responding.”¹⁷ A common theme in these cases is that dispensation should be provided to applicants when unreasonable delays by USAC inflicted prejudicial harm.

That certainly is the case here. There is no dispute that Net56 in fact provided valuable, eligible services to the District. There is no dispute that during the competitive bidding period, Net56 quoted specific rates to the District for each eligible service, and that the District signed that proposed contract. There is also no dispute as to the amounts billed and paid for each eligible service – indeed, USAC’s Further Explanation Letter even references the rate for each separate service in discussing their cost-effectiveness. (Thus, USAC on the one hand cites the exact rates from the 2009-10 E-Rate Contract while on the other hand perplexingly claiming that these rates have not been identified by being separately allocated.) There is no dispute that the Internet Access services were provided at cost-effective rates. There is no dispute that the District properly sought competitive bids, or that Net56 was the best offer available to the District. USAC’s only basis for denying all funding is that the District and Net56 supposedly

¹⁶ *Request for Review by Totowa Borough Public Schools, Schools and Libraries Universal Service Support Mechanism*, Order, File No. SLD-265823, CC Docket No. 02-6, DA 04-3898, ¶ 4 and n.14 (Wireline Comp. Bur. 2004) (citing previous instances of unreasonable or excessive delay). *See also Request for Waiver by Lettie W. Jensen Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Order, File No. SLD-267950, CC Docket Nos. 96-45 and 97-21, DA 01-2401, ¶¶ 5-7 (Com. Car. Bur. 2001) (holding that a two-month delay in notification regarding an omitted signature was unreasonable); *Request for Waiver by Council Bluffs Community Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Order, File No. SLD-E007282, CC Docket Nos. 96-45 and 97-21, DA 00-1909, ¶ 4 (Com. Car. Bur. 2000) (determining that a failure to post applicant’s Form 470 for approximately six weeks was excessive).

¹⁷ *Request for Review by Bradford Regional Medical Center; Rural Health Care Universal Service Support Mechanism*, Order, File No. RHCP 14491, WC Docket No. 02-60, 25 FCC Rcd 7221, 7223, ¶ 4 (Wireline Comp. Bur. 2010).

failed to clearly allocate prices between eligible and ineligible services – even though they timely executed contract terms that did exactly that.

Under all of these circumstances, USAC’s denial of every cent of requested funding elevates form over substance and unfairly penalizes the District and Net56 for USAC’s extremely slow process. The Commission should therefore grant Net56’s appeal of the Administrator’s Decision and the underlying funding decision and remand the District’s 2009 funding application to USAC for approval.

II. USAC’s All-or-Nothing Implementation of the Cost-Effectiveness Rule is Inequitable.

If the Commission agrees with the position set forth above, then it should direct USAC to provide full funding for the Internet Access services provided under FRNs 1853415 and 1853424. However, in the case of the email and web hosting services covered under FRN 1853437 USAC indicated a belief that these services were not cost-effective and denied funding for that FRN.¹⁸ In the Letter of Appeal to USAC, Net56 asked USAC to reconsider that decision to the limited extent necessary to modify the FCDL to grant funding in the amount that USAC did conclude would have been cost-effective. The Commission previously instructed USAC that even when an applicant violates the cost-effectiveness rule, it is still entitled to funding in the amount associated with the least expensive cost-effective service.¹⁹ In the *Macomb Order*, the school district received identical services from multiple service providers, including the lowest-cost bidder and two providers who offered the service at a higher price. USAC determined that the district violated the Commission’s cost-effectiveness rule by not selecting the lowest-cost bidder to provide all of the services and denied the entire funding request on the basis that more

¹⁸ Further Explanation Letter at 3.

¹⁹ See Letter of Appeal to USAC at 4, citing *Request for Review by Macomb Intermediate School District Technology Consortium*, File no. SLD-44190, Order, FCC 07-64 (rel. May 8, 2007) (the “Macomb Order”).

than 30 percent of the request was ineligible. In its decision on appeal, the Commission agreed with USAC's determination that the school district violated program rules by not selecting the most cost-effective service offering but ruled that USAC's decision to deny the entire funding request was wrong.²⁰ The Commission recognized that it would be unnecessarily unfair to deprive an applicant or service provider of all funding for an eligible service based upon an all-or-nothing approach.

In the Administrator's Decision, USAC denied the appeal regarding cost-effectiveness because Net56 was the only bidder and its bid was found to not be cost-effective. "USAC cannot honor your request to approve funding up to the amount that is found to be cost effective because doing so would constitute a change in price and after the close of the bidding process as such price changes and renegotiation of the contract would constitute a violation of the FCC competitive bidding rules."²¹ This is nonsense. Net56 is simply asking to be able to invoice for at least a fraction of the contract price for a service that no one denies has already been provided in full. This is not a "renegotiation" that Net56 has requested *from the District*; it is a request for a shred of equity *from USAC*. As such, it is not a renegotiation with the District any more so than it would have been in the *Macomb* case. For these reasons, the Commission should remand the cost-effectiveness decision to USAC and direct it to grant funding for FRN 1853437 in the amount that USAC determined would have been cost-effective.

²⁰ Macomb Order at paras. 6-9.

²¹ Administrator's Decision at 3-4.

Conclusion

For the foregoing reasons, the Commission should grant Net56's appeal of the Administrator's Decision and the underlying funding decision and remand the District's 2009 funding application to USAC for approval.

Respectfully submitted,



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August 30, 2010

CERTIFICATE OF SERVICE

I, Debra Sloan, hereby certify that a true and correct copy of the foregoing *Request For Review By Net56, Inc. of Decisions of the Universal Service Administrator* was mailed postage prepaid this 30th day of August to the following:

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/s/ Debra Sloan

Debra Sloan