

**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	)	Round Lake Area School District 116
Service Support Mechanism	)	2009 Funding Year
	)	FRNs 1901504, 1901546, 1901579,
	)	1901630, 1901654

**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,<sup>1</sup> that the Commission review and reverse the Universal Service Administrative Company (“USAC”) Decision on Appeal for the 2009 funding year (“Administrator’s Decision”) and the associated USAC funding commitment decision for the above-referenced FRNs.<sup>2</sup> The Administrator’s Decision was issued on March 8, 2011 in response to a Letter of Appeal filed by Net56 on June 4, 2010.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> 47 C.F.R. §§ 54.719-54.723.

<sup>2</sup> See Administrator’s Decision on Appeal for Funding Year 2009-2010, dated March 8, 2011, attached hereto as Exhibit A (“Administrator’s Decision”); see also the Funding Commitment Decision Letter, dated April 6, 2010 (“FCDL”) and the Further Explanation of Administrator’s Funding Decision Letter, dated April 6, 2010 (“Further Explanation Letter”), jointly attached hereto as Exhibit B.

<sup>3</sup> See Letter of Appeal, dated June 4, 2010, attached hereto as Exhibit C (“Letter of Appeal to USAC”).

<sup>4</sup> The FCC Form 471 Application Number on which the above-referenced FRNs were submitted to USAC is Funding Year 2009 Form 471 Application Number 692375, attached hereto as Exhibit D (the “District’s Form 471”). Round Lake Area School District 116 is the Billed Entity for the application, and its Billed Entity Number (“BEN”) is 135319.

## **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 Round Lake Area School District, the recipient of the services which are the subject of this appeal (the "District"). The District is comprised of 9 schools serving 7,000 students in pre-kindergarten through 12<sup>th</sup> grade. The District is eligible to receive services under the E-rate program at the 85% discount level since the majority of its students are eligible for the National School Lunch Program.

Net56 began providing e-rate services to the District in funding year 2007. USAC reviewed and approved Form 471 funding requests from the District for Net56 services for funding year 2008 that are substantially similar to the services at issue in this appeal.<sup>5</sup> 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. USAC did not supply Net56 or the District with any information on the reason for the compliance review, despite Net56's numerous attempts to seek out such information before it prepared to place bids for the 2009 funding year.

On January 12, 2009, 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

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<sup>5</sup> See Form 471 Application Number 635038.

access, web and email hosting, firewall, and wide area network services.<sup>6</sup> In response to the Form 470, Net56 proposed a written offer with specific proposed rates for each of these eligible services to the District for the 2009 funding year. The District accepted Net56's bid and signed the quotation on February 10, 2009, thereby entering into a contract ("2009-10 E-Rate Contract"). On February 12, 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, and it identified the February 10, 2009 date of the E-Rate Contract as the applicable contract date in its Form 471.<sup>7</sup>

On April 6, 2010 – more than a year after the Form 471 was submitted – USAC issued a FCDL denying all funding. On June 4, 2010, Net56 filed a Letter of Appeal to USAC, which USAC denied on March 8, 2011.<sup>8</sup> Net56 addresses the three bases for USAC's denial below.

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

USAC's first basis for denial was its assertion 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."<sup>9</sup> This incorrect conclusion was based upon USAC's review of the wrong contract. In the course of USAC's special compliance review of Net56, the District provided USAC with a copy of a Master Services Agreement dated May 1, 2007, between Net56 and the District ("MSA"). However, the District did not contract for any e-rate services in the MSA, for the 2009 funding year or otherwise. USAC instead incorrectly understood this agreement to be "the contract" for the provision of e-rate services for the 2009 funding year. Since the 2007 MSA document does not provide any breakdown of e-rate eligible and ineligible

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<sup>6</sup> See FCC Form 470 Application Number 381670000723245, attached hereto as Exhibit E (the "District's Form 470").

<sup>7</sup> See Exhibit D.

<sup>8</sup> Administrator's Decision at 1.

<sup>9</sup> Further Explanation Letter at 6.

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 and the document that is referenced in the District's Form 471. 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, 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 the District had previously provided the correct contract information and when in reality the parties complied with program rules. Here, it is obvious from the record that the Parties intended the allocation and rates from the 2009-10 E-Rate Contract to apply, and that these rates were executed after the end of the 28-day competitive bidding period. If the District and Net56 had believed the 2007 MSA was a contract for e-rate services for funding year 2009-10 (its term runs into 2012), the District would have had no need to seek bids at the beginning of 2009 through a new Form 470, and Net56 would have had no need to provide a new quotation. 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 February 10, 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.

Nothing in the Administrator's Decision alleges any flaw in the 2009-10 E-Rate Contract; instead its decision is based on the supposition that it effectively does not exist. But the record clearly shows that that agreement was the contract executed by the parties at the close of the bidding period and that it reflects the intentions of the parties at that time. It was signed and dated at the end of the bidding period, is the contract referenced on the Form 471, and it is the only document that has a description and 2009-10 rates for the services for which funding has been sought. USAC should not be permitted to ignore this contract simply because the District referenced the incorrect agreement in responding to a USAC question. Instead, the Commission should direct USAC to base its determination on the 2009-10 E-Rate Contract rather than the MSA.

## **II. The District Paid for E-Rate Services**

USAC also asserts that funding should be denied because it thought that the District did not pay for eligible services. USAC made that finding because the District's payments for 2009 were delivered to a leasing company in the amount that was originally established by the lease agreement attached to the 2007 MSA. USAC apparently concluded that this payment must be solely attributed to the ineligible equipment described in the lease agreement between the District and the leasing company, and not to the eligible services provided under the parties subsequent E-Rate Contract.

It is true that the lease agreement originally described a payment of \$49,535 without reference to allocation of any part of that payment for Net56 services (eligible or ineligible). However, the District and the leasing company subsequently agreed in writing (to reflect their original intent) that the equipment was not worth this amount and that a portion of the lease payment would be provided by the leasing company to Net56 for services. The District and

Net56 also agreed in writing to a service-by-service allocation of these funds to eligible and ineligible services.<sup>10</sup>

USAC's position should be reversed because it does not comport with reality. *USAC has not disputed that the leasing company did in fact transfer a portion of these funds that it received from the District to Net56.* USAC also did not dispute that that the amount of the District's funds transferred to Net56 were sufficient to pay the District's non-discounted share of eligible services. If the payments were made solely for equipment owned by the leasing company, then it would not have delivered the funds to Net56. Instead, the leasing company did pay Net56 on behalf of the District both for eligible and ineligible services, in accordance with the exact allocations specified by Net56 and the District in Exhibit F attached hereto and in their 2009-10 E-Rate Contract. It is incorrect and exceedingly unfair for USAC to ignore these payments, which were actually made, on the sole basis that USAC reads the lease agreement to mean something other than what the parties expressly clarified it to mean. USAC's basis is especially inappropriate given that the lease agreement is not the applicable contract for e-rate services. Ultimately, in assessing whether the District paid for services, it should not really matter what the MSA says or which middlemen may have touched the payments; what matters is that the District did pay, by remitting funds that were ultimately received by the Net56 in the amounts required by the parties' actual E-Rate Contract.

Net56 now recognizes that the District's payment for e-rate services through the leasing company was confusing to USAC, and it has therefore moved away from that model. But the fact is that the District did make payments that cover its non-discounted share, and these payments were received and retained by Net56 as the e-rate services provider, and not by the

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<sup>10</sup> See Exhibit F. As stated in the Letter of Appeal, these documents were provided to USAC prior to issuance of the FCDL.

leasing company for equipment that it owned. The Administrator's Decision was therefore incorrect in concluding that the District had not paid for eligible services.

### **III. 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 FRN 1901504. However, in the case of WAN, firewall, email and web hosting services covered under FRNs 1901546, 1901579, 1901654, 1901630, USAC also denied funding on the basis that these services were not cost-effective.<sup>11</sup> 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.<sup>12</sup> 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 Macomb 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 than 30 percent of the request was ineligible. In its decision on appeal, the Commission found that USAC should not have denied all funding even though it agreed with USAC's determination that the school district violated program rules by not selecting the most cost-effective service offering.<sup>13</sup> The Commission recognized that it would be

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<sup>11</sup> Further Explanation Letter at 1-5.

<sup>12</sup> 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").

<sup>13</sup> *Macomb Order* at ¶¶ 6-9.

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."<sup>14</sup> This is nonsense. Net56 is simply asking to be able to receive 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.

Net56 understands from USAC staff that its all-or-nothing approach reflects its belief that the Commission does not want to put USAC into the position of having to determine a cost-effective rate to award. However, USAC necessarily must determine at least an estimate of cost-effectiveness in order to apply the Ysleta test to find that a service is not cost-effective. The Further Explanation Letter in fact specifically quotes rates it believes that it would have found to be cost-effective. No greater effort would have been required to provide funding in these amounts. It may well not always be a fair amount, but it would always be fairer than denying funding altogether.

For these reasons, the Commission should remand the cost-effectiveness decision to USAC and direct it to grant funding for FRNs 1901546, 1901579, 1901654, and 1901630 in the amounts that USAC determined would have been cost-effective.

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<sup>14</sup> Administrator's Decision at 3.

#### **IV. It Would be Inequitable to Deny All Funding**

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 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, Net56 repeatedly asked USAC during the fall of 2008 for the details of any concerns so that Net56 could address them before it placed bids and entered into contracts for the 2009 funding year, to no avail. During this time, Net56 and the District could have incorporated guidance from USAC into their approach to funding year 2009-10 so that there would have been no problems with that application. But USAC 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."<sup>15</sup> In *Request for Review of Totowa Borough Public Schools*, the Wireline Competition

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<sup>15</sup> *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,

Bureau found that USAC “erred by unreasonably delaying its notification to Totowa of the problems with its Form 470” for eight months.<sup>16</sup> 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.”<sup>17</sup> A common theme in these cases is that dispensation should be provided to applicants when unreasonable delays by USAC inflicted prejudicial harm.

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

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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.

<sup>16</sup> *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).

<sup>17</sup> *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).

funding is that the District and Net56 supposedly 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.

### **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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March 23, 2011

## 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 23<sup>rd</sup> day of March to the following:

Universal Service Administrative Company  
Schools and Libraries Division  
100 South Jefferson Road  
P.O. Box 902  
Whippany, New Jersey 07981

/s/ Debra Sloan

Debra Sloan