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SUMMARY

This request relates to two (2) Notification of Commitment Adjustment Letters (“COMADs”) served on St. Barnabas High School (“St. Barnabas” or “School”), a Catholic girls’ high school in the Bronx, New York relating to Priority 1 services for Funding Year (“FY”) 2010.

The School, which had no E-Rate Program consultant or expert and three different principals since FY 2005, conducted surveys and made a good faith effort to comply with the survey guidelines. USAC, in violation of the Commission’s *Academia Claret* instructions, apparently threw out a number of surveys for missing an item of information. In addition, it provided only general, conclusory explanations for disqualifying others. In these fundamental respects, St. Barnabas respectfully submits that USAC violated the Commission’s instructions and for that reason alone the COMADs should be rescinded.

In addition, however, the totality of the circumstances in this case justifies a waiver of any shortfalls in the surveys and rescission of the COMADs. There is no evidence of any intent to defraud or abuse the E-Rate Program. The requirement for recovery of these funds, which were properly expended in accordance with USAC’s approval, would only work a hardship on the school and under the circumstances would not serve the fundamental purposes of the E-Rate Program.

applicable discount rate should not be adjusted to sixty-percent (60%). In the alternative, there is good cause to waive shortcomings in the surveys. In any case, the COMADs should be rescinded.

More specifically, the COMADs relate to the following two (2) Funding Request Numbers (“FRNs”) approved by USAC for FY 2010 under FCC Form 471 Nos. 752898 and 753954 respectively, (commitment adjustment amounts as a result of discount reduction after the = sign) for Telecommunications and Internet Access as indicated:

1. FRN 2034655 (Telecomm Services) = \$702.48
2. FRN 203579 (Internet Access) = \$227.76.²

I. STATEMENT OF THE SCHOOL’S INTEREST IN THE REQUEST

St. Barnabas has standing to file this Request because Section 54.719(c) of the Commission’s rules provides that, “[a]ny person aggrieved by an action taken by a division of the Administrator . . . may seek review from the Federal Communications Commission.”³ In this case, the School is directly aggrieved by USAC’s COMADs.

² In addition, USAC has indicated it will deny in their entirety, on the same grounds, the following FRNs under FCC Form 471 No. 749823 for Basic Maintenance of Internal Connections (BMIC) for FY 2010 (amounts subject to denial after = sign): (a) FRN 2025980 = \$23,511.17 (b) FRN 2026026 = \$2,157.69 (c) FRN 2029337 = \$1,399.97. The School recognizes that inclusion of these FRNs as part of this Request could be premature in that no final denial by USAC has taken place as of the date of this Request. However, in light of USAC’s stated position, at a minimum, St. Barnabas respectfully believes that the Commission should at a minimum be informed of USAC’s and the School’s position.

³ 47 C.F.R. § 54.719(c).

II. KEY BACKGROUND FACTS

A. St. Barnabas High School

St. Barnabas High School is a college preparatory Catholic High School for young women, founded in 1924, and under the aegis of St. Barnabas Parish and the Archdiocese of New York. The School is situated in the Woodlawn section of the Bronx, and services a multicultural population of students from low- and lower-middle income families from the adjacent communities.⁴

St. Barnabas is a tuition-based school, and the School's operating income and expenses are directly contingent upon student enrollment. The School's current student population is 229 students. The population has fluctuated over the years since FY 2005 and the School's student capacity is approximately 400 students. The decline in the student population has caused a significant financial strain on the School. Moreover, many students at St. Barnabas receive scholarships and financial aid in order to be able to complete their education. These support funds are only available as a result of generous gifts from alumnae and private donors.

The School offers a lunch program for its students. Participation in the lunch program is optional, and at low cost to students. The School offers a similar program for breakfast. The School uses the National School Lunch Program eligibility guidelines in calculating E-Rate Program discount rates.

⁴ St. Barnabas is accredited by The University of the State of New York and The Middle States Association of Colleges and Secondary Schools and offers students a broad array of academic courses and extracurricular activities.

B. St. Barnabas and E-Rate Program

Although St. Barnabas started participating in the E-Rate Program in 1998, throughout that participation E-Rate Program matters have been handled on a part-time basis by the principal or a designated teacher.

The School has had no external E-Rate Program consultant or internal full-time E-Rate Program staff and did not for FY 2010. As in the case of many smaller or individual schools E-Rate Program duties have traditionally been an additional assignment along with teaching or other administrative responsibilities. During St. Barnabas' participation there also have been turnovers in key personnel as well. Since 2001 there have been three different principals at the School dealing with E-Rate matters. The principal of the School during the FY 2010 application process and leading up to the beginning of the FY was Sister Joan Faraone, RJM , who had only assumed that position in the summer of 2008. She remains the principal. At the same time she is also principal of an affiliated elementary school with 400 students. The contact person on the FCC Form 471, Ms. Rita Ferrari, is primarily a science teacher, for whom E-Rate matters have been a part-time, additional assignment.

It has been the consistent practice of St. Barnabas to conduct surveys of the School families each year as a basis for its applications for E-Rate Program support. The support received from the E-Rate Program has been and remains critical to the School's ability to provide the students with in-school Internet Access and the enhanced learning opportunities that such access affords.

C. The FY 2010 Form 471s and Funding Commitments

St. Barnabas submitted the FCC Form 471s related to the COMADs to USAC on February 9, 2009. The Form 471s included data that supported a discount eligibility calculation

of eighty percent (80%).⁵ These calculations were based on surveys of the School's students conducted under Sister Joan's supervision in the fall of 2009.⁶

USAC issued its Funding Commitment Decision Letters on May 26, 2010 (Form 471 No. 753054) and June 2, 2010 (FCC Form 471 No. Form 687454), approving the funding for the FRNs in question with an eighty percent (80%) approved discount rate. The authorized E-Rate Program support was as requested under the FRNs.

D. The Post-Commitment USAC Review and The COMADs

In October of 2010, USAC now requested information concerning the mechanism that was used to determine the School's discount percentage for FY 2010. The current principal of the School, Sister Joan Faraone, reported to USAC on October 14, 2010, that for FY 2010 surveys were distributed to families using Federal Poverty levels and thereafter provided USAC with a complete set of the surveys.⁷

However, USAC, after reviewing the surveys, claimed that of "185" surveys provided only "178" were "valid" (i.e., contained the name of the family and students, size of the family and income level of the family). USAC further claimed only 86 of 178 "valid" surveys "met program requirements in order to qualify for free or reduced meals."⁸ Since USAC did not specify which survey forms were deficient and why each such individual form was deficient or

⁵ See Exhibit 3. There is no indication in the School's files that in the normal post-application pre-commitment review that USAC questioned the School's calculations. FCC Form 471 No. 749823 relating to the BMIC support was submitted on February 8, 2010. A copy also included at Exhibit 3 for information purposes.

⁶ A complete set of the surveys is being provided at Exhibit 4. There are some 185 survey forms that were returned out of a total of 223 forms distributed, one for each enrolled student.

⁷ Again, see Exhibit 4.

⁸ See Exhibit 5 (at discussion of "Fund Year 2010").

how it calculated that only 86 qualified for free or reduced price meals, the School disagreed and refused to accept USAC's determination.⁹

As a result, on October 19, 2011, USAC issued the COMADs covering the two (2) FRNs for FY 2010. The COMADs seek to reduce the FY 2010 commitments as outlined above.

USAC's Funding Commitment Adjustment Explanations ("Explanations") for the FRNs were as follows:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$647.35 [FRN 1881485] \$227.76 [FRN 1882128]. On the original Form 471, the applicant was approved at an 80 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of a review, it was determined that the applicant is only eligible to receive a 60 percent discount. The determination was based on a review of the surveys for compliance with program rules. Accordingly, the commitment has been reduced by \$702.48 [FRN 2034655] \$227.76 [FRN 2035079] (pre-discount commitment amount*(discount percentage approved on the Form 471 less the discount rate the applicant is actually eligible to receive) and if recovery is required, USAC will seek recovery from the applicant.

⁹ See Exhibit 6.

III. STANDARD OF REVIEW

USAC's authority to administer the E-Rate Program is limited to implementing and applying the Commission's rules and the Commission's interpretations of those rules as found in agency adjudications.¹⁰ USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission,¹¹ or to create the equivalent of new guidelines.¹² USAC is responsible for "administering the universal support mechanisms in an efficient, effective, and competitively neutral manner."¹³ The Commission's review of the COMADs is *de novo*, without being bound by any findings or conclusions of USAC.¹⁴

IV. ARGUMENT

A. USAC Failed To Follow The Commission's Instructions Regarding Adjusting Discounts Based On Survey Analysis

The Commission has provided USAC with explicit instructions regarding adjustment of discount rates based on analyses of surveys. St. Barnabas respectfully submits that USAC has not followed those directives in this instance and, therefore, the COMADs should be rescinded.

First, the Commission has explicitly instructed that "USAC should not deny those funding requests where the applicant made a good faith effort to comply with the survey

¹⁰ 47 C.F.R. § 54.702(c).

¹¹ *Id.*

¹² *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, Third Report and Order, 13 FCC Rcd 25058, 25066-67 (1998).

¹³ 47 C.F.R. § 54.701(a).

¹⁴ 47 C.F.R. § 54.723.

guidelines but did not include some information on the student survey regarding the student's grade, address or number of persons in the household."¹⁵ Yet here, USAC stated that it rejected a number of surveys (five) because they did not include "Household Size."¹⁶ USAC provided the School with no information on which surveys were supposedly missing that information. In any case, the Commission has stated that the fact that it might be missing cannot be a basis for denying funding. However, in effect the COMADs constitute just such a denial.

Second, the Commission has explicitly instructed that USAC "must inform applicants of any errors regarding the discount rate calculation that it identifies, along with a specific explanation of how the applicant can remedy such errors."¹⁷ The COMAD Explanations state only that "during a review, it was determined that the applicant was only eligible to receive a 60 percent discount. The determination was based on a review of the surveys for compliance with program rules." There is no explanation of the specific compliance issues in the COMADs themselves. Furthermore, USAC's pre-COMAD review analysis makes general statements about alleged missing information and failure to meet NSLP guidelines. However, there is no specification of which surveys were allegedly defective or how the NSLP guidelines were applied to determine that of surveys submitted only 86 met "the program requirements in order to qualify for free or reduced meals." The School respectfully submits that these USAC "explanations" on review are inadequate to comply with the Commission's requirements set

¹⁵ *Requests for review of the Decision of the Universal Service Administrator, Academia Claret, Order*, 21 FCC Rcd 10703, 10708, ¶ 14 (Wireline Compet. Bur. 2006) ("*Academia Claret Order*").

¹⁶ See Exhibit 10.

¹⁷ *Id.*

forth in the *Academia Claret Order*.¹⁸ Without pointing out which alleged surveys were defective and how they were so, St. Barnabas had no opportunity to respond and address any USAC's errors.¹⁹ For these reasons alone, the COMADs should be rescinded.

B. The Circumstances Justify A Waiver of the Commission's Rules

In the event that the Commission believes that USAC fulfilled its *Academia Claret Order* obligations, St. Barnabas respectfully submits that the totality of the circumstances justify a waiver of the rigid application of the survey rules. In this case, requiring recovery would impose a decided hardship on the School and there is no evidence of any waste, abuse or intent to defraud the E-Rate Program. USAC does not allege any.

The Commission's rules allow for the waiver of a Commission rule "for good cause shown."²⁰ The FCC has articulated the following guidance for determining whether a waiver is appropriate:

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such

¹⁸ The Commission has subsequently affirmed these requirements on several occasions. See *Request for Review of a Decision of the Universal Service Administrator by Oddessey Charter School*, Order, 26 FCC Rcd 6875, 6875-76, ¶2 (Telecom. Access Pol. Div. 2011) (missing students' grade level); see *Request for Review of a Decision of the Universal Service Administrator by Explore Knowledge Academy Charter School*, 25 FCC Rcd 17022, 17023, ¶2 (Telecom Access Pol. Div. 2010) (missing one item of information) ; see generally *Request for Review of a Decision of the Universal Service Administrator by Little Flower School*, Order, 26 FCC Rcd 4991, ¶1 (Telecom. Access Pol. Div. 2011).

¹⁹ USAC errors in recalculating the discount rate would also justify rescission of the COMADs. See *Request for Review of a Decision of the Universal Service Administrator by The Bronx Charter School for Better Learning*, Order, 25 FCC Rcd 7190, 7193, ¶ 6 (Wireline Compet. Bur. 2010).

²⁰ 47 C.F.R. § 1.3.

deviation would better serve the public interest than strict adherence to the general rule.²¹

In granting such waivers, the Commission has noted that, like the situation with St. Barnabas, those responsible for understanding and complying with the E-Rate Program rules at individual schools or small school districts are not federal grants program experts. On more than one occasion the Commission has granted waivers for good cause, noting that:

[T]he primary jobs of most of the people filling out these forms include school administrators, technology coordinators and teachers, as opposed to positions dedicated to pursuing federal grants, especially in small school districts. Even when a school official has learned how to correctly navigate the application process, unexpected illnesses or other family emergencies can result in the only official who knows the process being unavailable to complete the application on time.... Notably, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that denial of funding in these cases would inflict undue hardship on the applicants.²²

St. Barnabas is a single school where among the duties of the principal was service as the E-Rate Program contact person. There were no resources for a dedicated full-time E-Rate staff person. Such limited staffing and resources have also been noted as grounds for waiver of the

²¹ *Requests for Review of Decisions of the Universal Service Administrator by Richmond County School District*, Order, 21 FCC Rcd 6570, 6572, ¶5 (2006) (internal references omitted) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972)).

²² *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al.*, Order, 21 FCC Rcd 5316,5323, ¶14 (2006); *see also Request for Waiver and Review of Decisions of the Universal Service Administrator by Academy of Math and Science*, Order, 25 FCC Rcd 9256, 9260, ¶9 (2010); *Request for Waiver of Decisions of the Universal Service Administrator by Children of Peace School*, Order, 25 FCC Rcd 5492, 5495-96, ¶7 (Wireline Compet. Bur. 2010); *Request for Review of Decision of the Universal Service Administrator by Hazelwood School District*, Order, 24 FCC Rcd 12698, 12700, ¶5 (Telecom. Access Policy Div. 2009).

Commission's rules in certain circumstances.²³ So has staff turnover and as noted above there have been three principals at St. Barnabas since FY 2005.²⁴

Under such circumstances the formal and detailed requirements that were the basis for the COMADs were logically were less familiar to St. Barnabas, particularly when there had been a relatively recent change in principals.²⁵ The Commission also has taken into consideration such circumstances in granting waivers of its rules.²⁶

Prior to approving the funding, USAC presumably assessed the justification for the School seeking an eighty percent (80%) discount rate. USAC went ahead and found the information provided by the School to be sufficiently credible to justify grant of the application at the eighty percent (80%) discount level. Now, USAC is reversing field and seeking years later to recover all of the previously-approved and expended funds.

Rigid adherence to the survey requirements in this case will not serve the public interest or the purpose of the E-Rate Program. There is no evidence that any alleged defects in St. Barnabas' collected surveys relating to FY 2010 were based on any effort or intent to defraud or abuse the E-Rate program. There is no evidence of any waste or misuse of the E-Rate Program

²³ See *Request For Waiver of Form 470 Requirements re: Voluntary Contract Extension Designation by California State E-Rate Coordinator*, Order, 25 FCC Rcd 16119, 11621, ¶5 (Telecom. Access Pol. Div. 2010).

²⁴ See *Requests for Review of Decisions of the Universal Service Administrator by Alton Community Unit School District 11*, Order, 25 FCC Rcd 7089,7091-92, ¶5 (Wireline Compet. Bur. 2010).

²⁵ See *Request for Review of Decision of the Universal Service Administrator by Keyport School District*, Order, 24 FCC Rcd 12702, 12705, ¶8 (Telecom. Access Pol. Div. 2009) (“[P]rior to funding year 2005, the Commission had not adopted rules describing the types of documents E-rate program participants were required to keep....”).

²⁶ *Requests for Review of the Universal Service Administrator by West Virginia Dept. of Education*, Order, 26 FCC Rcd 14306, 14307, ¶2 (Telecom. Access Pol. Div. 2011).

support funds that were provided. They were used in accordance with the approval granted. Such circumstances further support the grant of a waiver.²⁷

Finally, the Commission may also take into consideration “hardship, equity, or more effective implementation of overall policy on an individual basis.”²⁸ Reducing (or denying funding outright) here, in light of the School’s clearly constrained resources would impose a distinct hardship on the School and very likely lead to the deprivation of current students of access to services previously supported by the E-Rate Program.²⁹

V. CONCLUSION AND REQUEST FOR RELIEF

St. Barnabas made a good faith effort to comply with the survey guidelines. USAC did not comply with the Commission’s *Academia Claret* requirements. Further, there is good cause to waive any shortcomings in the St. Barnabas surveys. There no evidence of waste, fraud, or

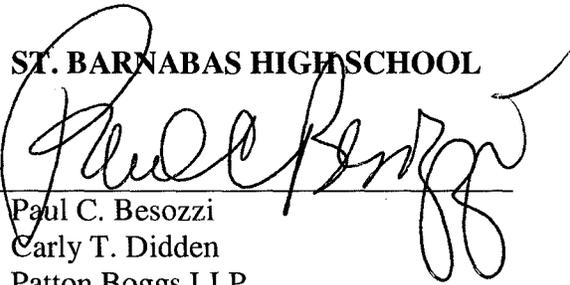
²⁷ Where there is no evidence of any intent to defraud or misuse the funds of the E-Rate program and in such circumstances, when combined with the other factual circumstances, there is not grounds to justify the harsh penalty of a denial of these funds. *See generally Request for Waiver of the Decision of the Universal Services Administrator by Barberton City School, Barberton, Ohio et al., Schools and Libraries Universal Service Support Mechanism, Order, 23 FCC Rcd 15526, 15530, ¶7 (Telecom. Access Pol. Div. 2008).*

²⁸ *Request for Waiver of the Decision of the Universal Service Administrator by Owensboro Public Schools, Owensboro, Kentucky, Order, 21 FCC Rcd 10047, ¶5 (2006) See generally Requests for Review of Decisions of the Universal Service Administrator by Approach Learning and Assessment Centers et al, Schools and Libraries Universal Service Support Mechanism, Order, 23 FCC Rcd 15510, 15513-14, ¶8 (Telecom. Access Pol. Div. 2008). See Request for Review of Decision of the Universal Service Administrator by Radford City Schools, Radford, Virginia, Schools and Libraries Universal Service Support Mechanism, Order, 23 FCC Rcd 15451, 15453, ¶4 (Telecom. Access Pol. Div. 2008).*

²⁹ *See generally Request for Review of Decision of the Universal Service Administrator by Approach Learning and Assessment Centers, Order, 23 FCC Rcd 15510, 15513-14, ¶8 (Telecom Access Pol. Div. 2008) (Inequitable not to provide relief).* With respect to Priority 2 funding and the BMIC support requested under FCC Form 471 No. 749823, St. Barnabas notes that the Commission directed that Priority 2 requests be funded “*at all discount levels*” for FY 2010. So there is no basis for USAC to deny St. Barnabas FY 2010 BMIC requests even if they were to be at the 60 percent (60%) discount level. *Schools and Libraries Universal Service Support Mechanism, Order, 26 FCC Rcd 11145 (2011) (emphasis supplied).*

abuse, or failure to comply with the core program requirements. Unintended record-keeping mistakes should be considered procedural in nature and, where the School has made a good faith effort to comply with the Commission's rules, not a justification for funding denial. Imposing a penalty of reducing (or denying funding outright) would work a distinct hardship and the equities here do not support USAC's action. For all of the foregoing reasons, St. Barnabas respectfully submits that the Commission should direct that the COMADs be rescinded.

Respectfully submitted,

ST. BARNABAS HIGH SCHOOL


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Dated: December 15, 2011

DECLARATION

1. I, Sister Joan Faraone, RJM, am the current principal of St. Barnabas High School ("St. Barnabas") at 425 East 240th Street in the Bronx, New York 10470-1791. I have occupied that position since July of 2008.

2. The foregoing Consolidated Request For Review ("Request") of certain actions by the Universal Service Administrative Company with respect to St. Barnabas was prepared and my direction and with my approval.

3. I have reviewed the Request and hereby declare under penalty of perjury that the factual statements and representations therein relating to St. Barnabas, its participation in the E-Rate Program and the recent COMADs are true and correct to the best of my knowledge and belief.



Sister Joan Faraone, RJM

Dated: December 15, 2011

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 15th day of December, 2011, a copy of the foregoing Consolidated Supplement to Requests for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

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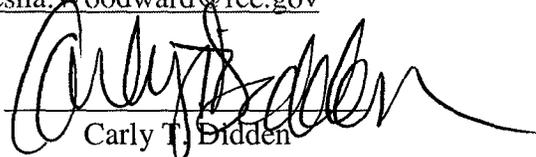
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