

June 20, 2013

BY ELECTRONIC FILING

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

**Re: Request for Review by Net56, Inc. of Decision of the Universal Service
Administrator, CC Docket No. 02-6**

Dear Ms. Dortch:

Net56, Inc. respectfully submits this supplement to its pending request for review filed in this proceeding on October 31, 2011 regarding the Universal Service Administrative Company (“USAC”) Decision on Appeal for the 2009 funding year for its service to the Wheeling School District 21.

We emphasize at the outset that, while we have cited to cases in which the Commission has granted waivers or otherwise excused violations of the Commission’s rules, the District did *not* violate the codified rules in renewing a prior-year competitively-bid contract without clear authorizing language in the original contract. While Net56’s appeal acknowledged, in retrospect, that it would have been preferable if the parties had included more clear language in the original contract, nothing in Part 54 of the Commission’s rules expressly requires such language. Instead, the Commission has held that an “applicant can enter into multi-year contracts or contracts with voluntary extensions without reposting an FCC Form 470 application and complying with the 28-day rule each year as long as the applicant indicated such intent in the

original posting in Item 13 on its FCC Form 470 or in its RFP.”¹ The District did exactly that, unambiguously, by marking the box on its 2008 Form 470 to indicate that it was seeking a new multi-year contract and/or a contract featuring voluntary extensions. The rules also require that the voluntary extension be exercised as a binding new agreement prior to the submission of the Form 471 for a successive year, and the District did that as well. The renewal extension agreement was signed prior to the Form 471 and its rates precisely incorporated into the Form 471 filing. Thus, the District complied with the applicable requirements for an exemption from the requirements of Section 54.504 of the Commission’s rules to post a new Form 470 for the 2009 funding year.

What the parties did not do is write an express extension option term into the original agreement. Net56 does not believe such a prerequisite is clearly incorporated into the Commission’s rules. Indeed, the Commission has previously approved funding for an applicant whose initial contract only included a provision for voluntary extension for one year but whose parties mutually extended the agreement again thereafter. *See Request for Review of Decisions of the Universal Service Administrator by Paterson School District*, CC Docket No. 02-6, Order, DA 06-2269, ¶ 4 (Nov. 2, 2006) (approving funding for the 2004 funding year without a new Form 470 , on the basis that the parties utilized a voluntary extension of a contract initially signed in 2000 with a one-year term and provision for a single additional one-year extension, but that was thereafter extended again by the parties through the 2004 funding period via “several more contract extensions of varying lengths after the initial contract extension ended”). The Commission’s order approving funding did not even reflect concern that the initial contract

¹ *See Request for Review of Decisions of the Universal Service Administrator by Albert Lea Area Schools*, CC Docket No. 02-6, Order, DA 09-285, ¶ 2 (Apr. 14, 2009).

lacked such a provision; what mattered in granting the appeal was that the original contract was competitively bid and that the extension agreement was signed and in place prior to the Form 471 filing for that funding year. *Id.* at ¶ 7. The same is true here, and Net56's appeal should likewise be granted.

In addition to *Paterson*, the Commission has taken other permissive approaches to facilitate the use of voluntary extensions even when parties did not clearly evidence their intent at the time of the initial competitive bidding process. In 2010, the Commission reversed USAC's denial of funding to the Illinois State Board of Education (BOE). BOE's Form 471 had sought funding under a contract that expired during the middle of the funding year, but allowed for service to continue for up to a year on a tariffed, month- to-month basis. USAC denied funding, finding that the second-half services were provided under the tariff for which no timely Form 470 had been filed. The Commission reversed, interpreting instead that these services had effectively been provided under the BOE's election of a voluntary extension of the original contract. *Request for Review of a Decision of the Universal Service Administrator by Illinois State Board of Education*, CC Docket No. 02-6, DA 10-1019 (June 4, 2010), ¶¶ 4-6.

Also in 2010, the Commission granted a waiver to the California State Department of Technology Services (DTS) from its then-requirement that, in order to later seek funding under a voluntary extension, the applicant must have checked a box on its Form 470 for the initial contract that indicates that it was interested in that option. *Request for Waiver of Form 470 requirements re: Voluntary Contract Extension Designation by California State E-Rate Coordinator*, CC Docket No. 02-6, DA 10-2217 (Nov. 23, 2010). The Commission determined that this omission was only a "technical" error that did not "negatively affect[] the competitive bidding process." *Id.* at ¶ 6. The Commission then eliminated that requirement altogether in

2010 in its revised Form 470, reflecting recognition that these requirements had not been necessary to protect the public interest or the competitive bidding process. *See Sixth Report and Order* at ¶ 70, n.205. Even if the Commission believes that there is a requirement that the voluntary extension option be explicitly referenced in the original contract, such a rule would be no more important than the former Form 470 notification requirement on which the Commission has previously granted forgiveness and ultimately eliminated as unnecessary.²

In addition to this precedent regarding voluntary extensions specifically, there is additional spiritual precedent for relief in the Commission's overall approach to e-rate appeals. Even if the Commission's rules did require renewal language in the initial contract, Commission precedent illustrates that a violation of such requirement, in the manner of this case, is the type that warrants forgiveness on appeal. The Commission's apparent guiding first principle in deciding whether to grant appeals and waivers related to facial violations of e-rate program rules has been to evaluate the gravity of the *consequence*, not the gravity of the violation. For example, applicants are required to list a contact person in their Form 470. When an applicant listed a person from a service provider, the Commission denied funding because, even though the entry of a name on a Form 470 is only a clerical task, it raised doubt as to the validity of the competitive bidding process. *See Request for Review of the Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.*, CC Docket No. 96-45, Order, ¶ 11 (rel. May 23, 2000). By contrast, even a clear violation of the fundamental rule that price be the most

² Indeed, the Form 470 notification that the Commission found to be unnecessary was arguably more important than any requirement related to the initial contract language because it enabled other potential service providers to realize that if they do not bid that they run the risk that the school may enter a multi-year arrangement and not solicit further bids for several years. By contrast, there is no clear, compelling benefit from strict enforcement of a requirement that the initial contract include a voluntary extension provision.

important factor is routinely excused when the applicant nonetheless harmlessly chose the lowest bid. *See, e.g., Request for Review of the Decision of the Universal Service Administrator by Allendale County School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 6109 (2011). The rule was not unimportant – far from it – but the Commission has granted such appeals so long as “applicants’ errors could not have resulted in an advantage,” and that “the applicants’ mistakes, if not caught by USAC, could not have resulted in the applicant receiving more funding than it was entitled to.” *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5316-17, 5319-20, ¶ 11 (2006) (“*Bishop Perry*”). The Commission’s subsequent *Albert Lea* decision characterizes this distinction as the “important[.]” holding of *Bishop Perry*. *See Request for Review of Decisions of the Universal Service Administrator by Albert Lea Area Schools*, CC Docket No. 02-6, Order, DA 09-285, ¶ 6 (Apr. 14, 2009). In other words, the Commission’s primary motivation is not forgiveness of violations if they are “minor” or “procedural,” but because they are relatively inconsequential to the ultimate objectives of Section 254 in their specific case.

Such is the case here. In the first place, it is important that the Commission recognize that this case does not implicate the rule that a Form 470 and competitive bidding process precede execution of a contract. While of course that is a fundamental requirement of e-rate, those rules do not require re-bidding every year. The 2009 renewal terms were competitively bid in 2008 every bit as much as if the parties had entered into a valid multi-year agreement or if they had made the voluntary extension option more clearly in their agreement. That is all the Commission’s rules require, in letter and spirit, when the parties utilize a multi-year contract or extend a contract that was competitively bid. As the Commission has explained, “permitting a

school or library to commit to a long-term contract after participating in the competitive bidding process does not compromise the benefits derived from competition. As long as all providers have had the opportunity to compete for the same contract, schools or libraries can enter into renewable contracts of any length or form, as permitted by state law.” *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, DA 99-1773, ¶ 10 (1999). The alleged rule violation before the Commission is therefore not whether the District must have filed a Form 470, but whether the parties violated the requirements applicable to voluntary extensions.

Even if the parties did violate those rules, neither Net56 nor the District did receive, or could have received, any advantage to which they could not have been entitled. If USAC had not noticed the omission of such renewal language in the 2008 agreement, the parties would not have received any funding for which they should not have been eligible. *See Bishop Perry*, ¶ 11. Instead, the District’s exercise of the voluntary extension served exactly the purpose for which the Commission presumably intended in allowing extensions: to enable a school to avoid disruption and a potentially costly re-evaluation by choosing to maintain an eligible service at rates that have already been competitively bid and deemed cost-effective. As the Commission has explained in granting a waiver, voluntary extensions of competitively-bid contracts serve the public interest to spare schools from “expend[ing] unnecessarily their limited staffing and financial resources.” *California DTS*, ¶ 5. There would not have been any further material benefit from the inclusion of more clear language in the 2008 contract when, in any event, USAC clearly received notice of the district’s election of that option when it submitted its 2009 Form 471.

Of course, the Commission has an important interest in assuring that USAC be able to know when a voluntary extension has actually been invoked, to define the scope of requested

funding and enable clear evaluation as to whether the services thereunder are eligible and provided at cost-effective rates. The parties did so by executing the renewal prior to the Form 471, and they made that contract available to USAC during review.

In sum, because the parties could have received funding had they better documented their desire to provide for a voluntary extension option, and because the parties' alleged failure to do so did not actually result in any request for funding that would not have been available to them had the paperwork been completed correctly, "denying their requests for funding would create undue hardship and prevent these *otherwise* eligible schools and libraries from receiving E-rate funding." *See Request for Review of Decisions of the Universal Service Administrator by Adams County School District 14*, CC Docket No. 02-6, Order, DA 07-35, ¶ 12 (Mar. 28, 2007) (emphasis added). Instead, the Commission has held that such "mistakes do not warrant the complete rejection of these Petitioners' applications for E-rate funding." *See Request for Review of Decisions of the Universal Service Administrator by Adams County School District 14*, CC Docket No. 02-6, Order, DA 07-35, ¶ 10 (Mar. 28, 2007), citing *Bishop Perry*, ¶¶ 2, 9.

It would be a grave injustice to deny two entire years of funding on the basis of a harmless omission not clearly required by the Commission's codified rules. Therefore, Net56's appeal should be granted.

Sincerely,



Paul B. Hudson
Counsel to Net56, Inc.