

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

In the Matter of	)	
	)	
Request for Review by	)	CC Docket No. 02-6
Net56, Inc. of the Administrator’s Decisions	)	
On Appeal – Funding Years 2006-2008	)	CC Docket No. 96-45
	)	
Schools and Libraries Universal Service	)	Country Club Hills School District
Support Mechanism	)	2006 FRNs 1465813, 1466017
	)	2007 FRNs 1602460, 1602745, 1602809
	)	2008 FRNs 1749190

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

Net56, Inc. (“Net56”) respectfully requests, pursuant to Sections 54.719 through 54.7123 of the Commission’s rules,<sup>1</sup> that the Commission review the Universal Service Administrative Company (“USAC”) Decisions on Appeal for Funding Years 2006, 2007 and 2008 with respect to the above-referenced FRNs (“Administrator’s Decisions”). The Administrator’s Decisions were issued on July 2, 2013 in response to a Letter of Appeal filed by Net56 on June 25, 2013.<sup>2</sup> For the reasons set forth herein, the Commission should grant Net56’s appeal of the Administrator’s Decisions and remand the underlying applications to USAC for funding.<sup>3</sup>

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

<sup>2</sup> See Administrator’s Decisions on Appeal for Funding Years 2006, 2007 and 2008, dated July 2, 2013, attached hereto as Exhibit A (“Administrator’s Decisions”). See Letter of Appeal, dated June 25, 2013, attached hereto as Exhibit B (“Letter of Appeal to USAC”).

<sup>3</sup> The FCC Form 471 Application Numbers on which the above-referenced FRNs were submitted to USAC were 530870 (2006), 579088 (2007), and 632815 (2008). Country Club Hills School District 160 is the Billed Entity for the application, and its Billed Entity Number (“BEN”) is 135654.

## **I. Net56 Should Not be Deprived of Consideration of its Appeal on its Merits**

Over the course of the past three years, USAC has issued a multitude of decisions that have denied funding or sought recovery for funding for every single district served by Net56 during the period of 2006-2009. Ultimately, Net56 has secured funding through many successful appeals. Net56 is a small company with only a small number of employees and limited funds for legal counsel, and the onslaught of adverse decisions has severely strained its resources. As a result, Net56 missed the above USAC notice of recovery action, and the date for appealing such action, by a few days. Net56 nonetheless appealed to USAC seeking leave to have an appeal considered. However, on July 2, 2013, USAC summarily denied the appeal on the sole basis that it was untimely.

President Obama's new ConnectED initiative directs the Commission to "modernize and leverage its existing E-Rate program" to connect 99 percent of America's students to the broadband within five years. The Administration announced that, "In addition to connecting America's students, ConnectED harnesses the ingenuity of the American private sector get new technologies into students' hands and support digital learning content."<sup>4</sup> For the Commission to carry out the President's call to engage the private sector, especially small businesses, in this program, one critical step is to revisit the procedures and precedents that have made the existing e-rate program a trap for the unwary, a bureaucratic minefield of peril in which funding can be delayed for years, and lost altogether, for failure to precisely navigate the program's overly complex guidelines and strictures.

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<sup>4</sup> <http://www.whitehouse.gov/the-press-office/2013/06/06/president-obama-unveils-connected-initiative-bring-america-s-students-di>

Net56, and this case in particular, present a case study in the perils of e-rate participation for a small business. Net56 is a small, privately-owned technology solutions provider. In the mid-2000s, Net56 began to market its commercial services to school systems in the Chicago metropolitan area. These local school districts were eager to receive more personalized, responsive services tailored to their rapidly changing needs than the standard commercial services offered to schools by many large providers. As a result of initial success, Net56 shifted most of its focus, and its new business, to the e-rate market.

Then, in 2008, USAC funding to Net56 abruptly stopped. USAC cut off all funding to Net56 for every district that it served. For nearly two years, until early 2010, Net56 received no explanation other than that its cases were being reviewed. Finally, USAC issued decisions that denied all of the funding for the 2008 and 2009 program years. Net56 appealed, first to USAC and then the Commission, and in 2012 largely prevailed. While the Commission restored most of the funding, Net56 certainly had not “won” – it had lost hundreds of thousands of dollars in interest charges, tax penalties, and legal fees, as well as its relationships with two school districts that in the interim had departed as a result of Net56’s troubles with USAC, and untold number of potential new customer relationships with schools that stayed away from a company that USAC had seemingly blacklisted.

In addition, Net56 had elected to forgo appealing USAC’s denial of a smaller fraction of the services for the 2008 and 2009 funding years. At that time, Net56 did not challenge these determinations because it chose to focus its appeal on the other unrelated adverse findings that had resulted in a complete denial of funding. Net56 could not afford to lose its appeal on those larger issues, and feared that objecting to the above findings would hurt its chances of prevailing,

and/or would delay the Commission's disposition of the appeals and thus receipt of urgently-needed funding, by further complicating already-complicated appeals.<sup>5</sup>

Net56 had been willing to forgo this never-received funding for 2009 to improve the outlook for its appeals, on which it eventually prevailed. But it did not realize that USAC would then seek to go back, years later without prior warning, and seek recovery of these amounts for prior funding years. It is one thing not to receive funding in the first place, but even more difficult to have taken back funding that Net56 long ago spent and deemed closed. Because USAC has now demanded return of such funds, without any new evidentiary findings that the facts in these older funding years were the same as the years subject to the later appeals, Net56 decided to return to USAC to show that the vast majority of the denied funding was in fact requested for eligible, cost-effective services. But because Net56 took only a few extra days to act, USAC summarily denied Net56 the chance to have this case considered on its merits.

Net56 appreciates that the Commission has a valid interest in enforcing appeal deadlines to bring predictable closure, especially in rendering decisions for a current funding year. But COMADs present a special case. A COMAD is a heavy burden, and its target receives only a single notice of the proposed recovery action, followed by a 60 day period for appeal. Unlike Funding Commitment Decision Letters, which are tracked by recipients and expected, a COMAD can come unexpectedly, years later, and thus can more easily be missed. The second notice of the action, the Demand Payment Letter itself, is received by the target shortly after that appeal period has run, such that if the first notice is missed then the target realizes, only a few days too late, that its chance to have its defense heard on its merits has been lost. To avoid such

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<sup>5</sup> See CC Docket 02-6, Letter from Paul Hudson, Counsel for Net56, to Marlene H. Dortch, Secretary, FCC (July 27, 2012) (“Net56 does not concede ineligibility of that any part of the services for which funding was sought, but forgoes such argument in this proceeding to expedite the Commission’s consideration of the appeals.”).

injustices and afford due process to e-rate participants, the Commission should either allow parties to also appeal a Demand Payment Letter, and/or allow parties sixty days to appeal from the second notice of a COMAD, rather than the first. The addition of a few extra days to appeal would not have any material adverse effect on the program, given that COMADs typically apply to funding years that are already well passed in any event.

To the extent that the Commission finds that it would need to adopt a new rule to effect the policy described above that would not apply to Net56 retroactively, Net56 seeks a waiver of the existing appeal deadline. The Commission may exercise its discretion to waive a rule 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.<sup>6</sup> That would be the case here, where it would be manifestly unjust to demand back funding from up to seven years ago for services that were both eligible and cost-effective.

## **II. The Merits of Net56's Appeal**

USAC seeks recovery of the following amounts:

- For 2007 and 2008, \$205/month from the WAN Internet Access service for each IBM server (used to provide DNS and DHCP functionality for Net56's Internet Access service) on the grounds that these servers should have been classified as providing internal connection instead of Internet access;
- For 2006 and 2007, \$1350/month from the Firewall service for the firewall equipment at the Net56 data center, which USAC found to be an "ineligible location" and "redundant"; and

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<sup>6</sup> See *Requests for Review of Decisions of the Universal Service Administrator by La Joya Independent School District*, Order, CC Docket No. 02-6, DA 13-1173, (Wireline Comp. Bur. 2013).

- For 2006 and 2007, \$1000/month from the Web Hosting services for archiving and journaling, which USAC found to be ineligible services.
- For 2006 and 2007, \$1000/month from the Email services for archiving and journaling, which USAC found to be ineligible services.

While USAC’s Recovery Letters did not clearly explain the basis of its decision, Net56 assumes that it is based on the same USAC findings for 2009.<sup>7</sup>

This recovery action for 2006 is time-barred by the five-year limitations period. *See* CC Docket 02-6, *Fifth Report and Order*, FCC 04-190, ¶ 32. USAC cannot initiate this recovery proceeding in 2013 for the 2006 funding year. To the extent that USAC nonetheless proceeds with further consideration of this appeal, Net56 responds to each of the proposed recoveries below.

**A. The DNS/DHCP Server Was an Integral Part of Internet Access Service, Not an Internal Connection**

The relevant Eligible Service Lists (ESL) expressly provide that Priority 1 Internet Access service can include “Domain Name Service, to assist use of the standard Internet naming convention” and “Dynamic Host Configuration Protocol, to assist with providing devices with a unique address.”<sup>8</sup> The ESL also provides eligibility for funding as a part of Internet Access for a “Wide Area Network” (WAN) that “provides connections from within an eligible school or library to other locations beyond the school or library” “if that offering is the most cost effective means of accessing the Internet and the service is limited to basic conduit access to the

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<sup>7</sup> *See* Further Explanation of Administrator’s Funding Decision Letter to Country Club Hills School District for Funding Year 2009 (March 26, 2010) (hereinafter “2009 Further Explanation Letter”).

<sup>8</sup> *See, e.g.*, Schools and Libraries’ Eligible Services List for Funding Year 2006, pp. 20-21.

Internet.”<sup>9</sup> Net56 deployed IBM servers at each premises to provide DNS and DHCP functionality for its Internet Access service, which was delivered via a WAN.

DNS is essential to Internet Access, as maps domain names to IP addresses so that users can access third party websites. DHCP is used to provide dynamic IP addresses to devices so that they may interact with the Internet. Net56’s Internet Access service could not have performed properly without these functions, and the use of the Internet Access service was the purpose for which this server was deployed. This is why these functions were included in the ESL, and USAC cannot dispute that Net56 is permitted to incorporate the cost of DNS and DHCP into its integrated Internet Access service.

But USAC instead decided, at least in the 2009 case, that the servers were internal connections under the Commission’s *Tennessee Order*.<sup>10</sup> USAC claimed that the servers “failed” the guidelines for rebutting an internal connection classification for two reasons. First, in the *Tennessee* case, the Commission found that the on-premises equipment should be included in Priority 1 funding because “the schools’ internal networks would continue to function without connection to the equipment.”<sup>11</sup> For Net56’s typical service configuration in 2009, USAC found that Net56 “failed” to meet this criterion “because the DHCP/DNS service would not be able to function if the servers were removed.”<sup>12</sup> But that is not the question. Of course DNS and DHCP would have been affected by removal of the equipment that was performing those Internet Access functions. The question is whether the District’s internal networks would have continued to function in 2006 without Net56’s DNS/DHCP service, and the answer is yes, because the

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<sup>9</sup> *Id.* at p. 23.

<sup>10</sup> In Re Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Order, 14 FCC Rcd 13734 (1999) (hereinafter “*Tennessee Order*”).

<sup>11</sup> *Tennessee Order*, ¶ 38.

<sup>12</sup> See 2009 Further Explanation Letter.

DNS/DHCP functions were part of the Internet Access service. This indicates that the server was *not* actually part of the schools' internal connections.

Second, USAC points to the *Tennessee* test factor that on-premises equipment would appear to warrant Priority 1 classification where “There is no contractual, technical, or other limitation that would prevent the service provider from using its network equipment, in part, for other customers.” USAC found that the servers “failed” this part of the test “because the servers are located at an applicant site; as such, it would not be possible for the vendor to utilize the same servers to provide DNS/DHCP service to another customer.” This is not the FCC’s test. By definition, the *Tennessee* test is applied to equipment on the premises of the school, so it cannot be that equipment would fail it if located on school premises. USAC’s circular reasoning would obliterate the meaning of the FCC’s *Tennessee Order*, which in fact did that certain on-premises equipment should have been classified as Priority 1. While of course the location of the equipment at the time made it less likely that it would be used for other customers, Net56 could re-locate the equipment because it retained ownership. The relevant test is only that “There is no contractual, technical, or other limitation that would prevent the service provider from using its network equipment, in part, for other customers.” There was no such limitation.

The reality is that the servers were an integrated part of Net56’s basic Internet access service. The server was the beginning and end point of the Internet Access service so that devices at the schools could utilize the service. By contrast, Internal Connections are “components located at the applicant site that are necessary to transport information to classrooms, publicly accessible rooms of a library, and to eligible administrative areas or buildings. Internal Connections include connections within, between or among instructional

buildings that comprise a school campus or library branch, but do not include services that extend beyond the school campus or library branch.”<sup>13</sup>

In this case, the servers were provided by Net56, the same service provider that provides the eligible Internet access service. Net56 had responsibility for maintaining the equipment, not the District. Net56 retained ownership of the equipment, even today, and it will not transfer to the District. The agreements between the parties do not contain any option for the District to purchase the equipment. Net56 did not charge any upfront, capital charges for the equipment, but instead bore such costs itself to be defrayed through the ongoing price of the services. All of these are factors that USAC has considered to weigh in favor of a Priority 1 classification.

For all of these reasons, the servers are an integral part of the basic Internet Access service and not internal connections. Therefore, the Commission should not permit USAC to demand recovery funding for the portion of the Internet Access WAN that Net56 previously allocated to the DNS/DHCP servers.

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<sup>13</sup> Schools and Libraries’ Eligible Services List for Funding Year 2006, p. 24.

**B. The Firewall Service Should Not be Partially Defunded for Locating Equipment in the Net56 Data Center**

USAC requests recovery of \$1350/month from the firewall service, presumably upon the same grounds as USAC denied funding for subsequent years: that (1) the “Net56 data center is an ineligible location” and (2) “since the funding request includes the firewall capability of the software running on the switch, which is located at the point of entry of each building, it has been determined that the equipment located at the Net56 data center is redundant and therefore ineligible for that reason as well.”<sup>14</sup>

It is puzzling that USAC would argue that funding would not be appropriate for services powered in any part by equipment located in the service provider’s data center. Such a rule would render ineligible every Internet Access service, and it is particularly strange when USAC has at the same time faulted Net56 for locating its DNS/DHCP servers on school premises rather than in its data center. The presence of some firewall functionality at more than one location is not “redundant.” Net56’s best-practice standard firewall service, which it provides to its commercial customers as well, permits customers to tailor its firewall needs for each location, rather than requiring all customers to have the same service, and this required the presence of firewall functionality at the premises and the data center. In addition, the service could not be as robust if all firewall functions were only in one location. It is true of many services that portions of functionalities are performed by multiple pieces of equipment that may be at multiple locations: just as Internet Access service may be powered by a modem and router at the customer premises and by network equipment at the provider’s data center. Therefore, USAC has not identified any valid reason why funding for the firewall service should be partially recovered. Finally, we note that it would be particularly unjust to recover funding based upon an unclear

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<sup>14</sup> See 2009 Further Explanation Letter.

basis when the Commission acknowledged at the time that the “eligibility of firewall service is now ambiguous and confusing.”<sup>15</sup>

**C. The Recovery Amount Requested for Archiving and Journaling is Excessive**

Net56 acknowledges that it provided retention (archiving) and journaling functionality in connection with its Web Hosting and Email Services, and that these functions are ineligible for e-rate support. However, the incremental cost to Net56 for these functions was much, much smaller than the \$1,000 per month per service sought by USAC in the Recovery Letters. A Net56 representative provided that figure to USAC in 2009 when asked about these services. That person is no longer with the company, and we have been unable to determine the source of his information. It may be that he estimated the cost of purchasing these services separately using different, stand-alone equipment. If so, that is not a reasonable method for determining the portion of the funding request to allocate to the ineligible function in this case, because a stand-alone solution would be much more expensive. The equipment that Net56 needed and used in any case to deliver the *eligible* services was able to perform the retention and journaling functions with only one additional incremental cost for storage. Net56 purchased two 500 GB IBM-39M4554 hard drives for the District to provide storage for both of these two services, combined. Such hard drives are very inexpensive today, but in 2006 cost Net56 \$526 each<sup>16</sup> – far less than the \$24,000 per year proposed to be recovered.

In the attached Exhibit D, Net56 has used the same formula employed in other successful appeals to USAC to generate a monthly service price allocable to these hard drives. This

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<sup>15</sup> See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking, 23 FCC Rcd 11703, ¶ 20 (2008).

<sup>16</sup> The attached invoice shows Net56’s purchase price in 2006 (Exhibit C). Net56 has so far not been able to locate the invoice for the same equipment ordered slightly earlier for use in the District, but this contemporaneous invoice provides a reasonably reliable estimate of the cost.

formula adds 50% for installation cost and 50% annually for maintenance, and 11.25% for Net56's overhead, spread over 36 months. Using this formula, the hard drives represent \$60.30 per month per service. The Commission should direct USAC to limit any recovery request to this amount per month, for a total recovery of \$723.60 ( $\$60.30 * 12$  months) for each of the two FRNs.

### **Conclusion**

For the foregoing reasons, the Commission should grant Net56's appeal.

Respectfully submitted,



Paul B. Hudson  
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1919 Pennsylvania Ave., NW, Suite 800  
Washington, DC 20006-3401  
(202) 973-4275  
Counsel for Net56, Inc.

July 11, 2013

# Exhibit A



**Universal Service Administrative Company**  
Schools & Libraries Division

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**Administrator's Decision on Appeal – Funding Year 2006-2007**

July 02, 2013

Paul B. Hudson  
Davis Wright and Tremaine LLP  
1919 Pennsylvania Avenue, Ste. 800  
Washington, DC 20006

Re: Applicant Name: COUNTRY CLUB HLS SCH DIST 160  
Billed Entity Number: 135654  
Form 471 Application Number: 530870  
Funding Request Number(s): 1465813, 1466017  
Decision Letter Date: April 10, 2013  
Date Appeal Postmarked: June 25, 2013  
Your Correspondence Dated: June 25, 2013

Our records show that your appeal was postmarked more than 60 days after the date your Notification of Improperly Disbursed Funds Letter was issued, as shown above. Federal Communications Commission (FCC) rules require applicants to postmark appeals within 60 days of the date on the decision letter being appealed. FCC rules do not permit the Universal Service Administrative Company (USAC) to consider your appeal.

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either USAC or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC website or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

Schools and Libraries Division  
Universal Service Administrative Company



**Universal Service Administrative Company**  
Schools & Libraries Division

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**Administrator's Decision on Appeal – Funding Year 2007-2008**

July 02, 2013

Paul B. Hudson  
Davis Wright and Tremaine, LLP  
1919 Pennsylvania Avenue, NW, Ste. 800  
Washington, DC 20006

Re: Applicant Name: COUNTRY CLUB HLS SCH DIST 160  
Billed Entity Number: 135654  
Form 471 Application Number: 579088  
Funding Request Number(s): 1602460, 1602745, 1602809  
Decision Letter Date: April 10, 2013  
Date Appeal Postmarked: June 25, 2013  
Your Correspondence Dated: June 25, 2013

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Schools and Libraries Division  
Universal Service Administrative Company



**Universal Service Administrative Company**  
Schools & Libraries Division

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**Administrator's Decision on Appeal – Funding Year 2008-2009**

July 02, 2013

Paul B. Hudson  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, NW, Ste. 800  
Washington, DC 20006-3401

Re: Applicant Name: COUNTRY CLUB HLS SCH DIST 160  
Billed Entity Number: 135654  
Form 471 Application Number: 632815  
Funding Request Number(s): 1749190  
Decision Letter Date: April 10, 2013  
Date Appeal Postmarked: June 25, 2013  
Your Correspondence Dated: June 25, 2013

Our records show that your appeal was postmarked more than 60 days after the date your Notification of Improperly Disbursed Funds Letter was issued, as shown above. Federal Communications Commission (FCC) rules require applicants to postmark appeals within 60 days of the date on the decision letter being appealed. FCC rules do not permit the Universal Service Administrative Company (USAC) to consider your appeal.

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Schools and Libraries Division  
Universal Service Administrative Company

# Exhibit B



Davis Wright  
Tremain LLP

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1919 Pennsylvania Avenue, NW  
Washington, DC 20006-3401

**Paul Hudson**  
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June 25, 2013

Letter of Appeal  
Schools and Libraries Division – Correspondence Unit  
100 S. Jefferson Rd.  
P.O. Box 902  
Whippany, NJ 07981  
**VIA EMAIL: [appeals@sl.universalservice.org](mailto:appeals@sl.universalservice.org)**

To Whom It May Concern:

The purpose of this letter is to appeal the decisions set forth in the USAC Notification of Commitment Adjustment Letters, dated April 10, 2013, regarding Funding Years 2006, 2007 and 2008 for Country Club Hills School District 160 (the “District”).

**Identifying Information:**

Appellant Name: Net56, Inc.  
Applicant Name: Country Club Hills School District 160  
Applicant BEN: 135654  
Service Provider SPIN: 143025679  
Funding Years: 2006, 2007, 2008

2006 Form 471 No.: 530870  
2007 Form 471 No.: 579088  
2008 Form 471 No.: 632815

2006 FRNs: 1466017, 1465813  
2007 FRNs: 1602460, 1602809, 1602745  
2008 FRNs: 1749190

USAC Action: April 10, 2013 Notification of Commitment Adjustment Letters

**Appeal Contact:**

Paul B. Hudson  
Davis Wright Tremain LLP  
1919 Pennsylvania Ave. NW, Suite 800  
Washington, DC 20006  
202-973-4275  
[paulhudson@dwt.com](mailto:paulhudson@dwt.com)

## **Background**

Over the course of the past three years, USAC has issued a multitude of decisions that have denied funding or sought recovery for funding for every single district served by Net56 during the period of 2006-2009. Ultimately, Net56 has secured funding through many successful appeals. Net56 is a small company with only a small number of employees and limited funds for legal counsel, and the onslaught of adverse decisions has severely strained its resources. As a result, Net56 missed the above USAC notice of recovery action, and the date for appealing such action, by a few days. Net56 seeks leave to have this appeal considered. It would be unfair that USAC can reach back to seek recovery of funding that began nearly seven years ago but deny Net56 due process to contest such recovery under these circumstances.

## **Appeal**

USAC seeks recovery of the following amounts:

- For 2007 and 2008, \$205/month from the WAN Internet Access service for each IBM server (used to provide DNS and DHCP functionality for Net56's Internet Access service) on the grounds that these servers should have been classified as providing internal connection instead of Internet access;
- For 2006 and 2007, \$1350/month from the Firewall service for the firewall equipment at the Net56 data center, which USAC found to be an "ineligible location" and "redundant"; and
- For 2006 and 2007, \$1000/month from the Web Hosting services for archiving and journaling, which USAC found to be ineligible services.
- For 2006 and 2007, \$1000/month from the Email services for archiving and journaling, which USAC found to be ineligible services.

While USAC's Recovery Letters did not clearly explain the basis of its decision, Net56 assumes that it is based on the same USAC findings for 2009.<sup>1</sup> At that time, Net56 did not challenge these determinations because it chose to focus its appeal on the other unrelated adverse findings that had resulted in a complete denial of funding. Net56 could not afford to lose its appeal on those larger issues, and feared that objecting to the above findings would hurt its chances of

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<sup>1</sup> See Further Explanation of Administrator's Funding Decision Letter regarding to Country Club Hills School District for Funding Year 2009 (March 26, 2010) (hereinafter "2009 Further Explanation Letter").

prevailing, and/or would delay disposition of the appeal and thus receipt of urgently-needed funding, by further complicating already-complicated appeals.<sup>2</sup>

Net56 had been willing to forgo this never-received funding for 2009 to improve the outlook for its appeals, on which it eventually prevailed. But it did not realize that USAC would then seek to go back, years later without prior warning, and seek recovery of these amounts.

This recovery action is time-barred by the five-year limitations period. *See* CC Docket 02-6, *Fifth Report and Order*, FCC 04-190, ¶ 32. USAC cannot initiate this recovery proceeding in 2013 for the 2006 funding year. To the extent that USAC nonetheless proceeds with further consideration of this appeal, Net56 responds to each of the proposed recoveries below.

### **I. The DNS/DHCP Server Was an Integral Part of Internet Access Service, Not an Internal Connection**

The relevant Eligible Service Lists (ESL) expressly provide that Priority 1 Internet Access service can include “Domain Name Service, to assist use of the standard Internet naming convention” and “Dynamic Host Configuration Protocol, to assist with providing devices with a unique address.”<sup>3</sup> The ESL also provides eligibility for funding as a part of Internet Access for a “Wide Area Network” (WAN) that “provides connections from within an eligible school or library to other locations beyond the school or library” “if that offering is the most cost effective means of accessing the Internet and the service is limited to basic conduit access to the Internet.”<sup>4</sup> Net56 deployed IBM servers at each premises to provide DNS and DHCP functionality for its Internet Access service, which was delivered via a WAN.

DNS is essential to Internet Access, as maps domain names to IP addresses so that users can access third party websites. DHCP is used to provide dynamic IP addresses to devices so that they may interact with the Internet. Net56’s Internet Access service could not have performed properly without these functions, and the use of the Internet Access service was the purpose for which this server was deployed. This is why these functions were included in the ESL, and USAC cannot dispute that Net56 is permitted to incorporate the cost of DNS and DHCP into its integrated Internet Access service.

But USAC instead decided, at least in the 2009 case, that the servers were internal connections under the Commission’s *Tennessee Order*.<sup>5</sup> USAC claimed that the servers “failed”

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<sup>2</sup> *See* CC Docket 02-6, Letter from Paul Hudson, Counsel for Net56, to Marlene H. Dortch, Secretary, FCC (July 27, 2012) (“Net56 does not concede ineligibility of that any part of the services for which funding was sought, but forgoes such argument in this proceeding to expedite the Commission’s consideration of the appeals.”).

<sup>3</sup> *See, e.g.*, Schools and Libraries’ Eligible Services List for Funding Year 2006, pp. 20-21.

<sup>4</sup> *Id.* at p. 23.

<sup>5</sup> *In Re Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, Order, 14 FCC Rcd 13734 (FCC rel. Aug. 11, 1999) (hereinafter “*Tennessee Order*”).

the guidelines for rebutting an internal connection classification for two reasons. First, in the Tennessee case, the Commission found that the on-premises equipment should be included in Priority 1 funding because “the schools’ internal networks would continue to function without connection to the equipment.”<sup>6</sup> For Net56’s typical service configuration in 2009, USAC found that Net56 “failed” to meet this criterion “because the DHCP/DNS service would not be able to function if the servers were removed.”<sup>7</sup> But that is not the question. Of course DNS and DHCP would have been affected by removal of the equipment that was performing those Internet Access functions. The question is whether the District’s internal networks would have continued to function in 2006 without Net56’s DNS/DHCP service, and the answer is yes, because the DNS/DHCP functions were part of the Internet Access service. This indicates that the server was *not* actually part of the schools’ internal connections.

Second, USAC points to the Tennessee test factor that on-premises equipment would appear to warrant Priority 1 classification where “There is no contractual, technical, or other limitation that would prevent the service provider from using its network equipment, in part, for other customers.” USAC found that the servers “failed” this part of the test “because the servers are located at an applicant site; as such, it would not be possible for the vendor to utilize the same servers to provide DNS/DHCP service to another customer.” This is not the FCC’s test. By definition, the *Tennessee* test is applied to equipment on the premises of the school, so it cannot be that equipment would fail it if located on school premises. USAC’s circular reasoning would obliterate the meaning of the FCC’s *Tennessee Order*, which in fact did that certain on-premises equipment should have been classified as Priority 1. While of course the location of the equipment at the time made it less likely that it would be used for other customers, Net56 could re-locate the equipment because it retained ownership. The relevant test is only that “There is no contractual, technical, or other limitation that would prevent the service provider from using its network equipment, in part, for other customers.” There was no such limitation.

The reality is that the servers were an integrated part of Net56’s basic Internet access service. The server was the beginning and end point of the Internet Access service so that devices at the schools could utilize the service. By contrast, Internal Connections are “components located at the applicant site that are necessary to transport information to classrooms, publicly accessible rooms of a library, and to eligible administrative areas or buildings. Internal Connections include connections within, between or among instructional buildings that comprise a school campus or library branch, but do **not** include services that **extend beyond** the school campus or library branch.”<sup>8</sup>

In this case, the servers were provided by Net56, the same service provider that provides the eligible Internet access service. Net56 had responsibility for maintaining the equipment, not the District. Net56 retained ownership of the equipment, even today, and it will not transfer to

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<sup>6</sup> *Tennessee Order*, ¶ 38.

<sup>7</sup> See 2009 Further Explanation Letter.

<sup>8</sup> Schools and Libraries’ Eligible Services List for Funding Year 2006, p. 24.

the District. The agreements between the parties do not contain any option for the District to purchase the equipment. Net56 did not charge any upfront, capital charges for the equipment, but instead bore such costs itself to be defrayed through the ongoing price of the services. All of these are factors that USAC has considered to weigh in favor of a Priority 1 classification.

For all of these reasons, the servers are an integral part of the basic Internet Access service and not internal connections. Therefore, USAC should not request back funding for the portion of the Internet Access WAN that Net56 previously allocated to the DNS/DHCP servers.

## **II. The Firewall Service Should Not be Partially Defunded for Locating Equipment in the Net56 Data Center**

USAC requests recovery of \$1350/month from the firewall service, presumably upon the same grounds as USAC denied funding for subsequent years: that (1) the “Net56 data center is an ineligible location” and (2) “since the funding request includes the firewall capability of the software running on the switch, which is located at the point of entry of each building, it has been determined that the equipment located at the Net56 data center is redundant and therefore ineligible for that reason as well.”<sup>9</sup>

It is puzzling that USAC would argue that funding would not be appropriate for services powered in any part by equipment located in the service provider’s data center. Such a rule would render ineligible every Internet Access service, and it is particularly strange when USAC has at the same time faulted Net56 for locating its DNS/DHCP servers on school premises rather than in its data center. The presence of some firewall functionality at more than one location is not “redundant.” Net56’s best-practice standard firewall service, which it provides to its commercial customers as well, permits customers to tailor its firewall needs for each location, rather than requiring all customers to have the same service, and this required the presence of firewall functionality at the premises and the data center. In addition, the service could not be as robust if all firewall functions were only in one location. It is true of many services that portions of functionalities are performed by multiple pieces of equipment that may be at multiple locations: just as Internet Access service may be powered by a modem and router at the customer premises and by network equipment at the provider’s data center. Therefore, USAC has not identified any valid reason why funding for the firewall service should be partially recovered. Finally, we note that it would be particularly unjust to recover funding based upon an unclear basis when the FCC acknowledged at the time that the “eligibility of firewall service is now ambiguous and confusing.”<sup>10</sup>

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<sup>9</sup> See 2009 Further Explanation Letter.

<sup>10</sup> See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking, 23 FCC Rcd 11703, ¶ 20 (2008).

### III. The Recovery Amount Requested for Archiving and Journaling is Excessive

Net56 acknowledges that it provided retention (archiving) and journaling functionality in connection with its Web Hosting and Email Services, and that these functions are ineligible for e-rate support. However, the incremental cost to Net56 for these functions was much, much smaller than the \$1,000 per month per service sought by USAC in the Recovery Letters. A Net56 representative provided that figure to USAC in 2009 when asked about these services. That person is no longer with the company, and we have been unable to determine the source of his information. It may be that he estimated the cost of purchasing these services separately using different, stand-alone equipment. If so, that is not a reasonable method for determining the portion of the funding request to allocate to the ineligible function in this case, because a stand-alone solution would be much more expensive. The equipment that Net56 needed and used in any case to deliver the *eligible* services was able to perform the retention and journaling functions with only one additional incremental cost for storage. Net56 purchased two 500 GB IBM-39M4554 hard drives for the District to provide storage for both of these two services, combined. Such hard drives are very inexpensive today, but in 2006 cost Net56 \$526 each<sup>11</sup> – far less than the \$24,000 per year proposed to be recovered.

In the attached Exhibit, Net56 has used the same formula employed in other successful appeals to USAC to generate a monthly service price allocable to these hard drives. This formula adds 50% for installation cost and 50% annually for maintenance, and 11.25% for Net56's overhead, spread over 36 months. Using this formula, the hard drives represent \$60.30 per month per service. USAC should limit its recovery request to this amount per month, for a total recovery of \$723.60 ( $\$60.30 * 12$  months) for each of the two FRNs.

For the foregoing reasons, USAC should grant Net56's appeal and rescind the Notification of Improperly Disbursed Funds Letters for FRNs 1466017, 1465813, 1602460, 1602809, 1602745, and 1749190.

Respectfully submitted,



Paul B. Hudson  
Counsel for Net56, Inc.

cc: Country Club Hills School District 160

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<sup>11</sup> The attached invoice shows Net56's purchase price in 2006. Net56 has so far not been able to locate the invoice for the same equipment ordered slightly earlier for use in the District, but this contemporaneous invoice provides a reasonably reliable estimate of the cost.



This invoice was created for your records only,  
please do not remit payment to SYNNEX

PURCHASE ORDER 6524765MP-1	CUSTOMER # 332439	SHIPPED VIA Local Delivery	Invoice# 19221961	DATE 11/30/06
TERMS: WT WIRE TRANSFER	Ship Date 11/30/06	F.O.B SYNNEX -GLENDALE CM6	Invoice Total \$43,854.00	Due Date 12/05/06
Approval #	Taxable N	Source Sales Order	Contact Phone # (864) 349-4713	PAGE 1 / 2

Bill To:  
Net56, Inc  
1266 West Northwest Hwy  
Suite 740  
Palatine IL 60067  
US

Ship To:  
Bruce Koch  
NET56, INC  
1266 WEST NORTHWEST HWY,  
SUITE 740  
PALATINE IL 60067  
US

Sold To:  
Net56, Inc  
1266 West Northwest Hwy  
Suite 740  
Palatine IL 60067  
US

QTY	PART NUMBER/DESCRIPTION	SKU #	VENDOR PART #/UPC CODE	UNIT PRICE	EXT NET PRICE
2	IBM-32R1812 Brocade 20-port 4Gb SAN Switch SN: 1S32R181223A5756	1083541 SN: 1S32R181223A5828	32R1812 000435819130	\$5,637.00	\$11,274.00
4	IBM-39M4675 BladeCenter 2000W Power Supply Modules SN: 1S39M4675KQVW544 SN: 1S39M4675KQXL603	1108324 SN: 1S39M4675KQVW549	39M4675 000435820785 SN: 1S39M4675KQXL602	\$474.00	\$1,896.00
9	IBM-39M4594 2GbPS FC, 300.0 GB, 10K E- DDM SN: 0631254785 SN: 0639031323 SN: 0639031670	1096663 SN: 0632326587 SN: 0639031337 SN: 0639031743	39M4594 000435882189 SN: 0639031312 SN: 0639031660 SN: 0639031751	\$545.00	\$4,905.00
1	IBM-181281H IBM DS4000 EXP810 Expansion Unit SN: 1S181281H130362D	1096656	181281H 000435882974	\$3,773.00	\$3,773.00
1	IBM-41Y5222 DS4700 Mod 70 EXPs Att 1-3	1134142	41Y5222 000435913470	\$3,590.00	\$3,590.00
32	IBM-39M4554 500GB 7200 RPM SATA E-DDM SN: 0639029032 SN: 0639029047 SN: 0639029052	1171577 SN: 0639029036 SN: 0639029050 SN: 0639029056	39M4554 000435929860 SN: 0639029046 SN: 0639029051 SN: 0639029059	\$526.00	\$16,832.00

1) Claim for any discrepancy or defective material must be made within 1 week from the date of shipment from SYNNEX. No return will be accepted without prior authorization.

2) Statements or description of products, if any, by SYNNEX or agents of SYNNEX are informational only, and not made or given as a warranty of any kind. SYNNEX SELLS THE PRODUCTS WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES OF ANY TYPE AND PARTICULARLY WITHOUT ANY IMPLIED WARRANTY OF MERCHANTABILITY OR NON-INFRINGEMENT. In the event of any product defect or nonconformity, purchaser's sole remedy shall be the repair or replacement of nonconforming goods or, at SYNNEX's option, a refund of the purchase price and purchaser shall not be entitled to any incidental, consequential, or special damages of any kind.

3) Customer also agrees to pay such attorney's fees and costs as are actually incurred for the collection of this amount whether or not suit is instituted.

A service charge of 1 1/2% per month, 18% per annum will be assessed on past due amounts

Net 56, Inc.

Email and Web Hosting Retention and Journaling Allocation

	Cost per	Install	Total of	Monthly Cost	Monthly	Monthly	Total Monthly	Number	Monthly
Equipment	Hard Drive	Cost	Equipment	Spread over	Maintenance	Overhead	Allocation	of	Allocation
			and Install	36 months	for 12 months	Costs	Per Hard Drive	Hard Drives	(Both Services)
IBM-39M4554 500 GB Hard Drive	\$ 526.00	\$ 263.00	\$ 789.00	\$ 21.92	\$ 21.92	\$ 16.47	\$ 60.30	2	\$ 120.61
Equipment Cost and Install spread over a 36 month period.									
Maintenance Cost per month									
Equipment must be replaced on average after 36 months.									
Overhead of 11.25% added for operations, cost of money and other overhead expenses									

# Exhibit C



This invoice was created for your records only,  
please do not remit payment to SYNNEX

PURCHASE ORDER 6524765MP-1	CUSTOMER # 332439	SHIPPED VIA Local Delivery	Invoice# 19221961	DATE 11/30/06
TERMS: WT WIRE TRANSFER	Ship Date 11/30/06	F.O.B SYNNEX -GLENDALE CM6	Invoice Total \$43,854.00	Due Date 12/05/06
Approval #	Taxable N	Source Sales Order	Contact Phone # (864) 349-4713	PAGE 1 / 2

Bill To:  
Net56, Inc  
1266 West Northwest Hwy  
Suite 740  
Palatine IL 60067  
US

Ship To:  
Bruce Koch  
NET56, INC  
1266 WEST NORTHWEST HWY,  
SUITE 740  
PALATINE IL 60067  
US

Sold To:  
Net56, Inc  
1266 West Northwest Hwy  
Suite 740  
Palatine IL 60067  
US

QTY	PART NUMBER/DESCRIPTION	SKU #	VENDOR PART #/UPC CODE	UNIT PRICE	EXT NET PRICE
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1	IBM-181281H IBM DS4000 EXP810 Expansion Unit SN: 1S181281H130362D	1096656	181281H 000435882974	\$3,773.00	\$3,773.00
1	IBM-41Y5222 DS4700 Mod 70 EXPs Att 1-3	1134142	41Y5222 000435913470	\$3,590.00	\$3,590.00
32	IBM-39M4554 500GB 7200 RPM SATA E-DDM SN: 0639029032 SN: 0639029047 SN: 0639029052	1171577 SN: 0639029036 SN: 0639029050 SN: 0639029056	39M4554 000435929860 SN: 0639029046 SN: 0639029051 SN: 0639029059	\$526.00	\$16,832.00

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  - 3) Customer also agrees to pay such attorney's fees and costs as are actually incurred for the collection of this amount whether or not suit is instituted.
- A service charge of 1 1/2% per month, 18% per annum will be assessed on past due amounts**

# Exhibit D

Net 56, Inc.

Email and Web Hosting Retention and Journaling Allocation

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Equipment Cost and Install spread over a 36 month period.									
Maintenance Cost per month									
Equipment must be replaced on average after 36 months.									
Overhead of 11.25% added for operations, cost of money and other overhead expenses									