

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Application for Review of a
Decision of the Wireline
Competition Bureau by
Net56, Inc.
Palatine, Illinois
Schools and Libraries Universal
Service Support Mechanism
File Nos. SLD-530870, 579088, 632815
CC Docket No. 02-6

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 2017

Released: January 17, 2017

By the Commission:

1. In this Memorandum Opinion and Order (Order), we deny an application for review (AFR) filed by Net56, Inc. (Net56). Net 56 seeks review of the portion of the Wireline Competition Bureau's (Bureau) Academia Avance Order affirming a decision of the Universal Service Administrative Company (USAC) seeking to recover funds disbursed from the schools and libraries universal service support program (more commonly known as the E-rate program) to Country Club Hills School District 160 (Country Club Hills) for funding years 2006, 2007, and 2008. For the reasons discussed below, we deny the AFR. We also take this opportunity to address Net56's argument regarding the Commission's policy on the administrative limitations period for pursuing recovery of wrongful disbursements from the Universal Service Fund.

2. Background. At the time the underlying appeal was filed, a party seeking review of a USAC decision was required to file an appeal with USAC or the Commission within 60 days of the issuance of the decision sought to be reviewed. The time period for filing an appeal commences on the issuance date of the decision being appealed, and appeals are treated as filed with USAC or with the Commission on the date the appeal is postmarked.

1 See Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc., CC Docket No. 02-6 (filed Sept. 17, 2013) (Net56 AFR).

2 See Requests for Review or Waiver of Decisions of the Universal Service Administrator by Academia Avance, et al.; Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 28 FCC Rcd 12859 (Wireline Comp. Bur. 2013) (Academia Avance Order).

3 47 C.F.R. § 54.720(a), (b) (2012). The Commission recently revised section 54.719 of its rules to require parties aggrieved by an action taken by a division of USAC to first seek review by USAC before filing an appeal with the Commission. Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184, Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8970, para. 252 (2014); 47 C.F.R. §54.719(a), (b) (2015).

4 47 C.F.R. § 54.720(a), (b).

5 47 C.F.R. § 54.720(c).

3. On April 10, 2013, USAC issued commitment adjustment decision letters (COMADs) to Net56 seeking recovery of funds disbursed for funding years 2006, 2007, and 2008.⁶ Net56 filed an appeal with USAC on June 25, 2013, 76 days after the COMADs were issued.⁷ USAC denied the appeal on the grounds that it was untimely filed.⁸ Net56 then filed a request with the Commission for review of USAC's denial of the late-filed appeal.⁹ The Bureau, acting under delegated authority, denied Net56's request on the basis that Net56 failed to file its appeal with USAC within 60 days and failed to demonstrate that special circumstances existed to justify a waiver of the deadline.¹⁰ Net56 subsequently filed the AFR.

4. *Denial.* Net56 does not contest that its appeal to USAC was filed more than 60 days after the issuance of the COMADs. Instead, Net56 argues that the Commission should either allow parties to file appeals within 60 days of the issuance of a Demand Payment Letter or the second notice of a COMAD.¹¹ Net56 contends that deadlines associated with COMADs are distinct from annual E-rate filing deadlines because COMADs may arrive unexpectedly, sometimes years after the funding year at issue.¹² We find this argument unpersuasive. Clear filing deadlines for appeals are needed to provide finality in the decision making process, and a 60-day period is adequate for applicants and providers to respond to USAC decisions, including COMADs. Finality in the decision making process is important so that the Commission can determine the amount of unused E-rate funding available to carry forward for subsequent years. The E-rate program has historically received funding requests that exceed the program's annual cap, and USAC has therefore denied funding to otherwise eligible applicants in past years.¹³ Extending the deadline for filing COMAD appeals would delay USAC's efforts to recover erroneously committed funds and carry them forward. Even in years where there is sufficient funding available under the E-rate cap to meet all requests, delays in recovering erroneous funds harm USAC's ability to properly administer the program. Finally, Net56's suggestion would result in a confusing situation in which parties appealing COMADs would have multiple deadlines for filing appeals in the event that the party received multiple Demand Payment Letters. Such a situation would frustrate our goal of streamlining the administration of the program. Therefore, we deny Net56's request that we allow parties to appeal Demand Payment Letters and/or the second notice of a COMAD.

5. The Net56 appeal to USAC was untimely under our rules because it was not filed within 60 days of the issuance of the COMADs. The Commission's rules clearly state that appeals must be filed within 60 days of the "issuance of the decision" being appealed.¹⁴ Here, the April 10, 2013 COMADs

⁶ See Letter from USAC, Schools and Libraries Division, to Mary Piazza, Net56, Inc., RE: Funding Year 2006 (dated Apr. 10, 2013) (2006 COMAD); Letter from USAC, Schools and Libraries Division, to Mary Piazza, Net56, Inc., RE: Funding Year 2007 (dated Apr. 10, 2013) (2007 COMAD); Letter from USAC, Schools and Libraries Division, to Mary Piazza, Net56, Inc., RE: Funding Year 2008 (dated Apr. 10, 2013) (2008 COMAD).

⁷ See Letter from Paul B. Hudson, counsel to Net56, to Schools and Libraries Division, USAC (dated June 25, 2013).

⁸ See Letter from USAC, Schools and Libraries Division, to Paul B. Hudson, counsel to Net56 (dated July 2, 2013).

⁹ See Request for Review by Net56, Inc. of the Decisions of the Universal Service Administrator, CC Docket No. 02-6 (filed July 11, 2013) (Request for Review).

¹⁰ See *Academia Avance Order* at 12859, ¶ 1.

¹¹ Net56 AFR at 3. USAC's procedure for recovering incorrectly disbursed funds is to issue a COMAD followed by a Demand Payment Letter. See 2006 COMAD at 1.

¹² Net56 AFR at 2.

¹³ The *Second E-rate Modernization Order* adjusted the annual E-rate program cap to \$3.9 billion beginning in funding year 2015, with adjustments for inflation thereafter. See *Modernizing the E-rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184 and 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15586, para. 114 (2014) (*Second E-rate Modernization Order*).

¹⁴ 47 C.F.R. § 54.720(b).

rendered the USAC decisions that Net56 subsequently appealed. It was through the COMADs that USAC notified Net56 that funds had been committed in error. Moreover, the COMADs provided notice to Net56 that it had 60 days from April 10, 2013 to file an appeal with USAC or the Commission.¹⁵ A Demand Payment Letter is not the decision being appealed; it is issued for the purpose of recovering funds that USAC or the Commission have previously determined were erroneously disbursed.¹⁶

6. *Waiver.* Net56 also requests, in the alternative, a waiver of the Commission's 60-day filing deadline.¹⁷ The Commission may waive any provision of its rules on its own motion and for good cause shown.¹⁸ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.¹⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁰ In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.²¹

7. In general, the Commission has enforced its appeal filing deadlines for the E-rate program, allowing waivers of deadlines only in limited, compelling situations.²² For example, in the *Mescalero Order*, the Commission denied a request for review where the applicant asserted that its appeal was untimely filed because of disruption caused by the transfer of the school to a new location and a non-responsive vendor.²³ The Commission upheld the Bureau decision denying the applicant's request for review as untimely filed, stating that, in cases of missed deadlines, the Bureau rarely grants waivers for untimely filing of appeals to USAC.²⁴

8. We find that Net56 has not demonstrated the existence of special circumstances that would warrant a waiver of our rules. Net56 offers little justification for a waiver. It states that it "missed the implication of [the COMADs] and did not become aware of its desire to appeal until USAC mailed

¹⁵ See 2006 COMAD at 2; 2007 COMAD at 2; 2008 COMAD at 2.

¹⁶ See USAC Glossary of Terms: Schools and Libraries (E-rate) Program, http://www.usac.org/_res/documents/sl/pdf/handouts/SL-Glossary-of-Terms.pdf (last visited Sept. 30, 2015) ("1st Demand Letter: The initial letter sent by USAC to recover funds from applicants or service providers who have committed program rule violations.").

¹⁷ See Net56 AFR at 5.

¹⁸ 47 C.F.R. § 1.3.

¹⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972).

²¹ *Northeast Cellular*, 897 F.2d at 1166.

²² See, e.g., *Application for Review of a Decision of the Wireline Competition Bureau by Mescalero Apache School, Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 20 FCC Rcd 5848 (2005) (*Mescalero Order*) (upholding a Bureau-level decision denying a request for review as untimely filed); *Request for Review by Donna Public Library, Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 19 FCC Rcd 6358 (Wireline Comp. Bur. 2004) (Bureau-level decision declining to waive the 47 C.F.R. § 54.720 filing deadline and denying a request for review as untimely filed); *Request for Review of the Decision of the Universal Service Administrator by Albuquerque Public Schools, Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 19 FCC Rcd 3985 (Wireline Comp. Bur. 2004) (same); *but see Request for Waiver by Greenfield Public School District, Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 2122 (Wireline Comp. Bur. 2006) (granting a waiver request where the district's technology coordinator was unexpectedly called to active military duty in a time of war).

²³ *Mescalero Order*, 20 FCC Rcd at 5850, para. 5.

²⁴ *Id.*

Demand Payment Letters directing the return of the funds.”²⁵ This assertion falls far short of special circumstances that would warrant a waiver of our rules.

9. *Administrative Limitations on Debt Recovery.* We also reject Net56’s argument that USAC’s recovery action for funding year 2006 is time-barred by the Commission’s policy directive that USAC finish its investigations and seek recovery within five years of the final delivery of service for a specific funding year.²⁶ In the *Fifth Report and Order*, the Commission “for administrative efficiency” announced a policy that inquiries related to wrongful E-rate program disbursements should be completed within five years of the final delivery of service for a specific funding year.²⁷ The Commission found that this policy struck “an appropriate balance between preserving the Commission’s fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries’ need for certainty and closure in their E-rate application processes.”²⁸ We continue to believe that the best course is for USAC to aim to complete its investigations and seek recovery of funds within five years, whenever possible. We therefore direct USAC to incorporate that as an objective in its annual performance metrics plan. In this instance, we find that USAC finished its inquiries within five years of the funding year 2006 disbursements.²⁹ But even assuming *arguendo* that the recovery action fell outside the five year period within which the Commission recommended that investigations be completed, that time frame constitutes merely a policy preference³⁰ and not an absolute bar to recovery, unlike a statutory limitations period that Congress may establish.³¹

10. The Commission has a duty to make sure that the E-rate program is operated efficiently and effectively for the benefit of our nation’s schools and libraries. The Commission also has a duty to safeguard against waste, fraud, and abuse of the federal funds that go to support all of the universal service support mechanisms. The Debt Collection Improvement Act (DCIA) directs agencies to “try to collect a claim of the [U.S.] Government for money or property arising out of the activity of or referred to, the agency.”³² The Commission noted this requirement when adopting the five year policy,

²⁵ Net56 AFR at 1.

²⁶ *Id.* at 2-3.

²⁷ *Schools and Libraries Universal Service Support Mechanism*, C C Docket 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15819 (2004) (Fifth Report and Order).

²⁸ *Id.* at 15819, para. 33.

²⁹ Net56 argues that USAC issued the April 10, 2013 COMAD more than five years after funding year 2006. However, disbursements for the FRNs at issue occurred from February 2007 to July 2007 and USAC issued the initial COMAD underlying this AFR on February 7, 2012. Net56 appealed that COMAD to USAC, the appeal was approved in part with funding reductions for certain FRNs, and those reductions were the subject of the April 10, 2013 COMAD.

³⁰ See *Fifth Report and Order* at 15809, para. 1 (“[w]e announce our policy regarding the timeframe in which USAC and the Commission will conduct audits or other investigations relating to use of E-rate funds.”); see also *id.* at 15818, para. 31 (where the Commission finds that “announcing a general policy in this area is in the public interest...”); and *id.* at 15818-19, para. 32 (again describing the limitations period as a policy.); see also *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight et al.*, CC Docket Nos. 96-45 et al., Report and Order, 22 FCC Rcd 16372, 16387, para. 28 (2007).

³¹ Only Congress may create a limitations period barring recovery of debt. *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294, 61 S. Ct. 995, 997 (1941) (“Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, [section] 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress . . .”) See also *United States v. Wurts*, 303 U.S. 414, 416, 58 S.Ct. 637, 638 (1938) (“The Government’s right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has ‘clearly manifested its intention’ to raise a statutory barrier [to recovery].”) (citations omitted)

³² 31 U.S.C. § 3711(a)(1); see also 31 C.F.R. § 901.1 (requiring aggressive collection actions). Depending on the amount of the debt, such a rule could also violate the statutory limitation on an agency’s authority to compromise

(continued....)

emphasizing that “our policy...does not affect the statutes of limitations applicable under the DCIA for collection of debts established by the Commission.”³³ We will not construe the Commission’s administrative policy for completing inquiries expeditiously in a way that would impair the Commission’s ability to fulfill its statutory obligation to establish and collect its debts consistent with applicable statutes that do not impose similar time constraints on initiation of debt recovery actions. As the Commission explained late last year, in an Order seeking recovery of funds from a recipient high cost universal service support program funds, “Congress has not imposed a statutory limitations period on the collection of debt under section 254 or the DCIA, and construing any Commission order as an attempt to do so would be impermissible because...only Congress may impose such absolute limitations on debt recovery.”³⁴

11. Moreover, the Commission has in the past proceeded with recovery when more than five years has lapsed between final delivery of services for a specific funding year and the conclusion of an investigation. For example, in the *Lakehills Order*, the Commission upheld USAC’s rescission of funding requests even though the five-year document retention period had lapsed because “USAC’s recovery of government funds paid to an applicant or service provider who has no just right to keep the funds is not barred by the passage of time.”³⁵ In this case, upon determining that it had provided E-rate support for funding for both ineligible services and services that were awarded in violation of the Commission’s competitive bidding rules, USAC promptly took action, which was both appropriate and consistent with Commission precedent.

12. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, that the Application for Review filed by Net56, Inc., Palatine, IL, on September 17, 2013, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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debt exceeding \$100,000 under the DCIA, 31 U.S.C. § 3711(a)(2), and the Commission’s own mirror rule that limits FCC compromise authority to claims up to \$100,000. 47 C.F.R. § 1.1915.

³³ *Fifth Report and Order*, 19 FCC Rcd at 15819, para. 34.

³⁴ *Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order, 31 FCC Rcd 12999, 13026-27, para. 92 (2016).

³⁵ *Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP*, CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16601, para. 28 (2011). See *United States v. Wurts*, 303 U.S. 414, 416, 58 S.Ct. 637, 638 (1938); see also *Request for Waiver or Review of a Decision of the Universal Service Administrator by Premio Computer, Inc.*, CC Docket No. 02-6, Order, FCC 29 Rcd 8185, 1886-87, para. 6 (2014) (“In some instances, consistent with its general obligation to recover funds improperly disbursed, the Commission has elected to proceed with recovery even when more than five years has elapsed.”) (citations omitted); see also *Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order, 31 FCC Rcd 12999.