

**Before the
Federal Communications Commission**

In the Matter of

Montcalm Area Intermediate School District

Appeal of USAC Administrator's Decisions on Appeal
Regarding E-Rate Funding for FY 2003 and FY 2004

Form 471 Application Numbers 396545 and 354876
CC Docket No. 02-6

We submit this appeal to the Federal Communications Commission ("Commission") on behalf of Montcalm Area Intermediate School District (Billed Entity No. 131263; SPIN 143004346; FCC Registration No. 0011799582) ("the District"). The District appeals from two (2) Administrator's Decisions on Appeal of Universal Services Administrative Company ("USAC"), rescinding a total of \$776,318.64 in funds awarded to the District by the Schools & Library Program ("E-Rate") for funding years 2003 and 2004. These decisions are attached as **Exhibit A**.

FACTUAL BACKGROUND

I. USAC'S Original Decisions

The District first received notice that USAC was even reviewing FY 2003 and 2004 when the District received the June 16, 2017 Commitment Adjustment Decisions at issue in this appeal. Copies of the Commitment Adjustment Decisions at issue are attached as **Exhibit B**. For both FY 2003 and FY 2004, the basis provided by USAC for the Commitment Adjustment Decision is as follows:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. USAC has evidence of a stock purchase agreement between Steven R Meinhardt of Casair, Inc., and Roger Hoezee, which was effective July 1, 2006. In this agreement, Meinhardt sold Elite Fund to Hoezee. This purchase demonstrates that the two companies, Casair and Elite Fund, were a single entity prior to July 1, 2006. During the time when Elite Fund, Inc. was a part of Casair, Inc., Elite is considered a service provider and therefore cannot act as an independent consultant on behalf of applicant or assist them with those tasks that service providers are prohibited from undertaking. The FCC Form 470 must be completed by the entity that will negotiate for eligible products and services with potential service providers and cannot be a service provider. Furthermore, service providers that participate in the competitive bidding process as a bidder cannot be involved in the preparation or certification of the entity's

[sic] FCC Form 470. Because Elite Fund executed these tasks while it was part of Casair, the applicant was not in compliance with FCC rules which require applicants to conduct a fair and open competitive bidding process free from conflicts of interest. Accordingly, the applicant should not have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with "inside" information or allow it to unfairly compete in any way. By having the service provider engaged in the preparation and submission of its Form 470, the applicant surrendered control of the competitive bidding process to the service provider who participated in the competitive bidding process as a bidder. Accordingly, the commitment will been [sic] rescinded in full and USAC will seek recovery of any funds disbursed in violation of the programs [sic] competitive bidding rules from the applicant and service provider.

II. The District's Appeal

On August 15, 2017, the District submitted timely appeals to USAC relating to the funding years at issue. In its appeals, the District submitted un rebutted evidence that USAC's position with respect to both FYs is purely speculative and based on erroneous assumptions. Indeed, as to FY 2003, USAC's findings are directly contradicted by the State of Michigan Department of Licensing and Regulatory Affairs, which shows that the alleged violation could not have existed since Elite was not even in existence until after the District received and accepted the FY 2003 bid.

Despite the many factual and legal inaccuracies in its position, USAC denied the appeals for the following reasons:

- USAC determined that the service provider was improperly involved in the competitive bidding process. During the review process, USAC gave you an opportunity to demonstrate that the competitive bidding process was not compromised and you failed to do so. Since you violated the FCC competitive bidding rules, USAC rescinded your funding request and sought recovery of any fund disbursed. On appeal, you have not demonstrated that USAC's determination was incorrect. Consequently, your appeal is denied.

FCC rules require that, except under limited circumstances, an eligible school, library or consortium that includes an eligible school or library shall seek competitive bids for all services eligible for support and must conduct a fair and open competitive bidding process. See 47 C.F.R. sec. 54.503(a) and (b). An applicant violates the FCC's competitive bidding requirements when it surrenders control of the bidding process to a service provider who participated in the competitive bidding process as a bidder. See Request for Review of the Decisions of the Universal Service Administrator by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors the

National Exchange Carrier Association, Inc., CC Docket Nos. 96-45, Order, 16 FCC Rcd 4028, FCC 00-167 para. 9-10 (rel. May 23, 2000). In cases where the Administrator finds "carbon copy" FCC Forms 470 across and series of applications, especially where the services and products requested are complex or substantial, and when the same service provider is involved, it is appropriate for the Administrator to subject such applications to more searching scrutiny to ensure there has been no improper service provider involvement in the competitive bidding process. See Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., SLD Nos. 321479, et al., CC Docket Nos. 96-45, 97-21, Order, FCC 03-313 para 30 (rel. Dec. 8, 2003). The FCC's Fifth Report and Order requires recovery of all funds disbursed for any funding request for which the competitive bidding rules have been violated. See Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Fifth Report and Order and Order [sic], 19 FCC Rcd 15815-15816, FCC 04-190 para. 21 (rel. Aug. 13, 2004).

As explained further below, USAC's initial decision to rescind the funding and its subsequent denial of the District's appeals are factually and legally inaccurate. During the bid process for FY 2003, Elite did not even exist and, therefore, could not have been improperly involved in the bid process. For FY 2004, USAC has no factual support for its position that the District "surrendered control" of the bid process to Elite. Indeed, in its appeal, the District provided unrefuted evidence proving that its actions in FY 2004 (and FY 2003) were consistent with USAC/FCC guidelines. USAC's claim that the District has "not demonstrated that USAC's determination was incorrect" ignores all of the evidence provided by the District as well as the actual status of the FCC's rules and regulations during the funding years at issue. Due to its failure to consider the undisputed evidence, USAC denied the appeals.

Moreover, USAC's ultimate determination is inequitable given the District's good faith compliance with rules and regulations governing the application and bidding process. The District acted consistent with the guidance in place 13 and 14 years ago and should not be punished for a subsequent determination by USAC that it wishes the rules had been different. USAC cannot retroactively enforce rules. Equity also mandates consideration of the devastating impact to the District if USAC rescinds over three-quarters of a million dollars 14 and 13 years respectively after the alleged improper acts. The District does not have these funds since the money was spent over a decade ago on appropriate services for the District and the local entities that it serves.

For these reasons, the District asks that its appeal be granted and USAC's decisions reversed.

Alternatively, the District asks that the Commission hold the service provider, Crystal Automation Systems, Inc. ("Casair"), and/or Elite Fund, Inc. ("Elite") responsible for any

recovery since they were the only entities aware of any purportedly improper relationship and, therefore, the only entities that could have prevented any alleged rule violations. The District was not involved in Casair's/Elite's corporate structure and internal activities and was unaware of the "fact" that forms the basis for USAC's determination. In fact, the District maintained separate points of contact with Elite and Casair at all times.

III. The District's Critical Role in the Community

The District is an educational service organization providing a wide variety of quality educational support services and programs to local school districts, public school academies, and private schools within Montcalm County, Michigan. The District, along with the other intermediate school districts in the state of Michigan, provides critical services to the most vulnerable student populations, i.e., special education students. The District also assists the local districts by providing shared operational services, training teachers and support staff in the latest research based methods and best practices, and providing pilot innovative programs that the local districts could not afford using their own funding and resources. The services provided by the District are critical to the success of the regional educational system and children in the community.

Montcalm County is a largely rural community with related budgetary constraints. Affirming USAC's unsupported denial of the District's appeals and requiring the return of over three quarters of a million dollars from the District 14 and 13 years after it was provided would strike a devastating blow to the District's ability to continue to provide the many necessary and critical services to its students and local communities.

ARGUMENT

I. The District Did Not Use Elite's Services for FY 2003

The District submitted its Form 470 for FY 2003 on or about October 25, 2002. See **Exhibit C**. Contrary to USAC's Commitment Adjustment Decision and denial of the District's appeal, the District did not utilize the services of Elite with respect to any service for FY 2003. See **Exhibit D**, Affidavit of Tom Staten. The District *could not* have done so.

According to publicly available documents created by the State of Michigan Department of Licensing and Regulatory Affairs, Elite was incorporated on September 19, 2003. Put another way, Elite was not even in existence as of October 2002 when the District's FY 2003 Form 470 was submitted or during any of the other stages of the bidding and selection process for FY 2003. See, **Exhibit E**. Since this incorrect assumption forms the sole basis for USAC's determination to rescind funds for FY 2003, the District's appeal should be granted and USAC's decision reversed.

**II. Regardless, It is Undisputed That the District Complied
with Then Current Rules for FY 2003**

Although the District did not utilize Elite's services for FY 2003, it did utilize services provided by Casair. The only services that Casair provided to the District, however, were vendor neutral services to track timelines, provide guidance and answer questions relating to the application process, and ensure program compliance. This assistance was provided at a standard hourly flat rate and was not dependent on whether Casair competed for or was awarded the underlying E-Rate contracts. *Id.*

At all times, including FY 2003 and FY 2004, the District controlled the application and bidding process. The District staff always filled out, signed and mailed applications. The District staff always received bids, analyzed bids and selected vendors. *Id.* As explained below, this was not improper under FCC rules and cannot form the basis for rescission of funding.

In support of its adjustment, USAC suggests that the FCC Form 470 was not completed by the District. This is not accurate. The information on Form 470 submitted by the District shows that the District provided the information for and certified the application, bidding, and selection process for its internet service provider. Among other things, the form shows:

- A district employee, Mr. Tom Staten, as the contact person.¹
- The District provided a Request for Proposal ("RFP") to solicit and evaluate potential bidders.
- The certification and all other forms were signed and filed by the District itself.

See, Exhibits C and D.

By denying the appeal, USAC continues to assume in the face of clear evidence to the contrary that the District "surrendered control of the competitive bidding process" to a service provider. This also is untrue. As stated above, the District retained full control over the process, received and reviewed all bids, and selected the vendor. For FY 2003 and FY 2004, the District set the scope of necessary services in the RFP, directly received bids from prospective vendors, evaluated the bids independent of any input from Casair, and received approval from its Board of Education to purchase the services. *Id.* Casair only provided technical assistance in completing the required forms, which was not prohibited by the FCC's rules and regulations at the time. All other activities, including the receipt of bids and selection of a vendor, were implemented by the District's Staff. *See Exhibit D. Again, these practices fully complied with FCC rules and regulations for the time periods at issue.*

When the District's documentation relating to FY 2003 was prepared, the Federal Communication Commission ("FCC") did not proscribe the type of assistance Casair provided.

¹ The FCC has held that the contact person is critical to the determination of influence over the bidding process and controlling dissemination of information regarding requested services. *Request for Review by MasterMind Internet Services, Inc. et al*, 16 FCC Rcd 4028 at 4033 (2000).

In fact, in *Request for Review of Mastermind Internet Services, Inc.*, the FCC held that where a vendor neither signs the Form 470 nor is listed as the contact, there is no violation of the E-Rate competitive bidding rules. The District is not aware of anything occurring at the FCC level for FY 2003 (or FY 2004) that alters the *Mastermind* decision. In fact, the FCC relied on *Mastermind* in a 2007 decision (*SEND*, 23 FCC Rcd at 2791).

USAC simply ignored the facts and the precedent established by the FCC. A review of the evidence provided and the existing rules and regulations leads to only one conclusion: the District did not violate any E-Rate rules.

Moreover, as noted above, the District covers a largely rural population. In 2002, there were significant limits on technology available in the applicable geographical area. Due to the location of the District, there were only a handful of bidders who were qualified to and interested in providing services in that area. This is not a situation where a district should naturally have received many bids, yet only received a select few. Rather, given the District's location, it was fortunate to receive the bids it did from several different potential providers. Upon receipt, *the District* – not Elite or Casair – evaluated the bids, decided to utilize the most appropriate and cost effective provider and obtained approval of the provider from its Board of Education to award the contract to Casair. *See, Exhibit D*. USAC's supposition that the bids were awarded due to any relationship between the District and Casair that "unfairly influenced the outcome of the competition" or furnished the service provider with "inside information" is false. *Id.* USAC's continued failure to acknowledge this falsehood and change its erroneous presumptions based on this falsehood is the sole basis for its denial of the District's appeals.

In short, Casair's very limited involvement was compliant with the FCC's rules and regulations in place at the time. There is no factual support for USAC's decision to the contrary and upholding the adjustment and USAC's denial of the appeals would violate the rules and regulations imposed by the FCC (and followed by the District) for FY 2003.

III. It is Also Undisputed That the District Complied with Then Current Rules in FY 2004

The District submitted its Form 470 for FY 2004 on or about December 8, 2003. *See Exhibit F*. Elite provided very limited assistance to the District with respect to FY 2004, i.e., application guidance and posting of the RFP since the District did not have the capability to quickly update its website and post an RFP on its own site. *See, Exhibit D*. *This type of assistance was not prohibited by FCC rules or regulations*. In or about spring of 2004, the District terminated all assistance services and has not utilized any third parties to provide assistance with E-Rate since that time. *Id.*

Moreover, the same process was followed for FY 2004 as for FY 2003. *Id.* The District fully controlled the required components of the process, was in charge of setting the scope of the services and was in charge of receiving and reviewing the bids and selecting and approving the service provider. Elite did not control these actions or decisions. *Id.* The District fully complied with the FCC's rules.

USAC's Commitment Adjustment Decision and appeal denial for FY 2004 ignores the process that actually occurred and again makes inaccurate assumptions that the District "surrendered control" of the competitive bidding process. This simply did not occur. Rather – as a matter of law based on the FCC's prior rules decisions – the District retained full control and the very minor assistance provided by Elite was *expressly permitted* by the FCC's regulations. *See, Mastermind, supra.*

IV. Casair and Elite are Separate Legal Entities

USAC's determination and denial of the District's appeal should be reversed based on the fact that the District did not violate any E-Rate rule. As an alternative basis for relief, USAC's decision must be reversed due to another legal error, i.e., assuming that Elite was "a part of" Casair.

As indicated in Casair's August 1, 2017 appeal of the two (2) Commitment Adjustment Decisions at issue in this appeal, Casair and Elite were separate legal entities and were operated as two distinct legal entities. USAC makes the incorrect assumption that because Elite and Casair were both owned by Mr. Steven Meinhardt until 2006, that Elite "was a part of" Casair. This simply is not so. Rather, the corporate documents clearly show that Elite and Casair are two distinct entities and must be treated as such as a matter of law. *See, Exhibit E.*

Moreover, the District interacted with these two entities separately. It maintained separate contacts with each entity and was not aware of any issue of purported common ownership.

V. USAC's Newly Raised "Carbon Copy" Issue

In its denial of the District's appeals, USAC states, for the first time, that "where the Administrator finds 'carbon copy' FCC Forms 470 across a series of applications.....it is appropriate for the Administrator to subject such applications to a more searching scrutiny to ensure there has been no improper service provider involvement in the competitive bidding process." First, if USAC is attempting to raise a new basis for its underlying finding, it is too late. It cannot raise a new issue and assert a new basis for its denial on appeal. This is a clear deprivation of the District's Constitutional due process rights. Second, it is clear that USAC has not subjected the applications at issue to *any* scrutiny, let alone a "more searching scrutiny," or it would have determined that Elite did not even exist in FY 2003 and that the District's limited interactions with Elite for FY 2004 fully complied with the requirements as detailed by the FCC in *MasterMind*.

Regardless of USAC's apparent due process violations, this allegation is also incorrect. The decision USAC relies on to substantiate this statement is *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al.*, Federal State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., SLD Nos. 321479, et al., CC Docket Nos. 96-45, 97-21, Order, FCC 03-313 para 30 (rel. Dec. 8, 2003). This decision is not applicable to the current situation.

In *Ysleta*, the FCC found a violation because:

- The schools at issue did not seek pricing information and never compared prices between bids
- The schools filed "encyclopedic" Forms 470, which were not based on actual technology plans
- The schools did not indicate that they had an RFP
- The schools did not negotiate the scope of work and costs until after it awarded the bid to IBM
- The bid provided by IBM did not include specific pricing for eligible items and services and included many ineligible items

Not one of these circumstances exists in this matter. Indeed, the uncontested sworn declaration provided to USAC by the District establishes this fact. *See, Exhibit D.* Even if USAC could supplement its wholly unsupported decision via its appeal denial, this attempt also lacks any legal or factual support.

**VI. USAC'S Denial is Inequitable and Would Have a Devastating Impact
On the District's Ability to Provide Critical Services
To the Vulnerable Population That it Serves**

The District provides a wide range of critical services to the local districts and to the special education students located in Montcalm County. The students it serves are among the most vulnerable students with the most serious, difficult and expensive educational needs. The District simply does not have over \$776,000 to take out of its budget to comply with USAC's decision that it must rescind the funding for FYs 2003 and 2004. If the appeals are not granted, and USAC's factually and legally inaccurate determinations are instead upheld, the District will be placed in a financially untenable position that will likely force it to limit services to the detriment of Michigan school children within its service area. Allowing USAC to do this well over a decade after it disbursed the money at issue would be unconscionable.

Moreover, the issues USAC raises do not originate with the District. While the District staunchly maintains that it acted appropriately and followed all applicable rules and regulations with respect to its FY 2003 and FY 2004 application and processes, if USAC's decision is not reversed the District should not be responsible for repayment of the monies. Rather, this burden should be borne by the entity or entities whose actions purportedly violated the rules, i.e., Casair and/or Elite. Again, the District does not believe that any entity violated the FCC's rules and regulations with respect to E-Rate. The District itself certainly acted in good faith and with the understanding that it was complying with all requirements. However, it would be neither just nor reasonable to punish the students and community served by the Montcalm Area Intermediate School District for the actions of unrelated private entities.

**VII. The District is Not the Proper Entity for Recovery
Based on the FCC's Directives**

If the FCC finds a violation Casair and/or Elite should be responsible for any recovery since they were the only entities aware of any purportedly improper relationship and, therefore, the only entities that could have prevented any alleged rule violations. The District was not involved in Casair's/Elite's corporate structure and internal activities and was unaware of the "fact" that formed the basis for USAC's determination, i.e., that Elite and Casair were effectively one entity. As noted above, the District maintained separate points of contact with Elite and Casair at all times.

Consistent with prior decisions, this recovery action against the educational institutions, including the District, should cease and, if appropriate, any recovery actions should be directed solely against Casair and/or Elite. *See, Achieve Telecom Network of MA*, 30 FCC Rcd 3653, 3655, 3672 (WCB 2015); *Request for Review of Decision by USAC by Bell South Telecommunications, Inc., et al*, Order, 27 FCC Rcd 11208 (WCB 2012). As dictated by the FCC's 2004 rule modifications, liability should be determined based on which entities were in a "better position" to prevent the alleged violations. *See Federal-State Joint Board on Universal Services Order on Reconsideration and Fourth Report and Order*, 19 FCC Rcd 15252, 15257 (2004).

USAC's determination is based on its assumption that the District knew about the internal workings and corporate structure of Casair and Elite, which the District has refuted. Therefore, USAC should be directed to immediately cease all recovery efforts against the District and instead focus solely on Casair and/or Elite for return of any funds.

VIII. The Commitment Adjustment Decisions Were Untimely

During FYs 2003 and 2004, the FCC imposed a five-year administrative limitations period relating to USAC audit and investigations of E-Rate funding. This is consistent with the FCC's five-year record retention policy.²

In the FCC's Fifth Report And Order, it imposed clear direction that USAC and the FCC should carry out any audit or investigation that may lead to discovery of a violation of the statute or rule within five years of the final delivery of services for a specific funding year. Despite this clear directive, the District did not receive any notice that USAC was investigating alleged problem with FYs 2003 and 2004 until it received USAC's June 16, 2017 Commitment Adjustment Decision. Allowing USAC to initiate an investigation at least eight years after the records retention period expired for the funding years at issue violates the FCC's rules.

The timing of this determination also violates expressed public policy considerations favoring a district's ability to use funds and achieve a degree of certainty that USAC will not try

² This record retention policy was lengthened to ten years in the late fall of 2014, well after the time period that the records for the FYs at issue would have had to be maintained under the then existing regulations.

to call such funds back after a specific point in time. As the FCC noted in *In the matter of Comprehensive Review of the Universal Service Fund Management Administration and Oversight*, 22 FCC Rcd 16372 (FCC 2007), the five-year time period for record retention in place for FYs 2003 and 2004 "appropriately balances the beneficiary's need for finality and our need to safeguard the USF programs from waste, fraud, and abuse." *Id.* at 16386.

Additionally, in this case, the District received and responded to routine USAC PIA audits and more extensive USAC Selective Review requests for FY 2003 and FY 2004 relating to the application numbers at issue.³ *These audits occurred during the respective program years and prior to both applications being fully funded after USAC completed its review. See, Exhibit D.* To allow USAC to come in 14 and 13 years after the respective FYs at issue, 14 and 13 years after it initially audited the applications at issue and approved funding, and 9 and 8 years after the expiration of the records retention requirements for such FYs respectively, would be an unprecedented abuse of the FCC's own rules and regulations. For this reason also, the appeals should be granted and USAC's decisions reversed.

REQUESTED RELIEF

For the reasons set forth in this appeal and the attached documents, the District asks FCC to reverse USAC's erroneous decision to rescind E-Rate funding to the District for FYs 2003 and 2004.

The sole basis for USAC's decision is its factually and legally inaccurate conclusion that Casair and Elite were a single entity. As noted above, these corporations are separate legal entities and were operated as such. Regardless, it is clear from the facts presented that irrespective of the ownership of Casair and Elite, all services provided were vendor neutral and the District properly maintained control over all necessary aspects of the application and bid process in conformity with FCC rules and regulations in place at the time. Moreover, to allow USAC to rescind well over three-quarters of a million dollars in funding from an intermediate school district 14 years after it approved the applications and disbursed the funds, is not supported by the FCC's own rules imposing a five-year investigation and record retention limitation or by the principles of justice and equity. If the FCC does determine that these monies should be refunded, the only appropriate entities from which to collect are the only entities that had any control over and knowledge of the alleged violation, i.e., Casair and/or Elite.

Accordingly, the District requests that its appeals of the attached Commitment Adjustment Decisions and USAC appeal denials be granted and USAC's erroneous determination that any adjustment should be made against the District for FY 2003 and FY 2004 be reversed.

³ In its denial of the appeals, USAC claims that "[d]uring the review process, USAC gave [the District] than opportunity to demonstrate that the competitive bidding process was not compromised and [the District] failed to do so." *See, Exhibit B.* The District does not know what USAC is referring to in this sentence. If it is referring to the original audits, the District *did* show compliance and was approved by USAC. If it is referring to the appeal, the District again showed compliance, but USAC chose to ignore the evidence presented.

If you have questions about this appeal or wish to have further communication on the issues raised herein, please contact the undersigned.

Respectfully Submitted,



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c: Superintendent Ron Simon

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