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March 28, 2003

MAR 28 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Secretary Marlene H. Dortch
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

**RE: Electronic Classroom of Tomorrow (ECOT)
Petition for Reconsideration
File No. SLD-226510**

Dear Secretary Dortch:

On behalf of Electronic Classroom of Tomorrow, we are filing an original and four copies of the above-referenced petition.

Transmitted herewith is an extra copy of this letter and filing, which we request be date-stamped and returned to our courier.

Very truly yours,



Alan Y. Naftalin

WAS1 #1170619 v1

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

MAR 28 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
Request for Review of the)	
Universal Service Administrator by)	
)	
Electronic Classroom of)	File No. SLD-226510
Tomorrow)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors)	CC Docket No. 97-21
of the National Exchange Carriers)	
Association, Inc.)	

To: The Wireline Competition Bureau

Petition for Reconsideration

Electronic Classroom of Tomorrow ("ECOT") files herewith, by its attorneys, its petition under Section 1.106 of the Commission's rules, for reconsideration of the Bureau's Order released in the above matter on February 27, 2003 (DA 03-601).

In that Order, the Bureau dismissed ECOT's request that the Bureau overrule a USAC determination that ECOT is not an "eligible" school within the meaning of the Education Act. ECOT had pointed out that the Ohio Department of Education had determined that ECOT may provide both elementary and secondary education

In its Order, the Bureau stated that:

"We take notice of the fact that that the validity of ECOT as a charter school under the Ohio statutes and Constitution is at issue in litigation currently pending in Ohio state court. . . Based on our review

of the pleadings . . . we find that the best course of action is to dismiss the pending Request for Review without prejudice to the rights of ECOT to refile if, at the conclusion of the Ohio State Court litigation, ECOT determines that the relief requested here is consistent with the rulings in that action."

ECOT seeks reconsideration on two grounds:

A. The Bureau Ruling Leaves ECOT With No Later Right to Refile.

First, as matters now stand, at the "conclusion of the Ohio State Court litigation" ECOT will have no "rights to refile." Section 54.720(a) of the Commission's rules specifies that an "affected party requesting review of an Administrator decision . . . *shall* file such request within thirty (30) days of the issuance of the decision . . ." (emphasis supplied). That "decision" consists of a letter ruling dated December 4, 2001. Clearly, under the terms of that rule, the time will have long since expired for ECOT to have the "right" to refile when the Ohio State Court litigation is completed. Hence, the Bureau Order is clearly unlawful, since it dismisses ECOT's request for review, which amounts to a denial, without giving any substantive, or even procedural, grounds for such final action. The Bureau Order has given a reason for the Bureau to defer action pending the outcome of the State Court proceeding, but no reason to deny the request for review

Nor, so far as we can tell, has the Bureau granted a waiver of Section 54.720(a) of the Rules, so as to grant ECOT the absolute right to seek review of the USAC ruling. The Bureau did not say that it was waiving the rule. It said only that its dismissal order was "without prejudice to the rights of ECOT to refile" if the

¹ *Order* at 5

outcome of the Ohio litigation is favorable. But in the absence of an explicit waiver, ECOT will have no "right" to refile.

B. The Bureau Erred In Declining to Rule Now.

ECOT's second ground for reconsideration, is that the Bureau erred in determining to withhold making payments to which ECOT is entitled until the conclusion of the "Ohio State Court litigation,"² which will not be for several years.³

The Bureau held that:

"We find it likely that that the Ohio State Court litigation will significantly narrow the issues before us, specifically resolving the status of ECOT under Ohio state law. Permitting the state court to resolve this issue will therefore conserve Commission resources and avoid the possibility of inconsistent legal conclusions and a resulting federal-state conflict. Further, because the matter is purely one of state law, we conclude that the Ohio state court is the more appropriate forum for its resolution."⁴

Unfortunately, the Bureau has misunderstood the status of ECOT under Ohio state law. First the "Ohio statutes" issues have been resolved by recent statutory amendments that "computer schools" such as ECOT are fully qualified. See Attachment A. The only remaining material issue is whether the Ohio constitution bars licensing of the 130 Charter schools in Ohio, including ECOT. *Ibid.* As noted above, final resolution of this question is some years away.

In the meantime, the Charter schools, including ECOT, are providing public school services for students and their parents, and are being paid to do

² *Ibid.*

³ See Attachment A.

⁴ *Order* at ¶ 5.

so by the State of Ohio. This process is in not being impeded by the Ohio court. The court has granted no interim or interlocutory relief in the Ohio Federation of Teachers case, so that there would be no basis for undoing any of those payments. Attachment A.

Since, as the Bureau has said, "the Ohio state court is the more appropriate forum for . . . resolution" of ECOT's status, the Commission should follow the state court and permit ECOT to **be** paid for costs related to the provision of past services during Funding Year 2001, which have been fully performed, regardless of the final outcome of the Ohio Federation of Teachers case. The Commission should certainly not take the opposite position, given the Administration's strong support for Charter schools. As President Bush stated, for example, on April 12, 2001:

"First, I'm an enthusiastic supporter of charter schools. Charter schools are beginning to change our understanding of public education, no question about it. These schools are public, because they're publicly funded, and publicly accountable for results. The vision of parents and teachers and principals determines the rest.

"And the competition charter schools oftentimes provide can serve as an agent to strengthen other schools. You see, you hear a lot of talk about, well, we can't have charter schools or choice because some school is going to be left behind. That's got it backwards. Excellence in neighborhoods means excellence in mother neighborhood. It means raising the bar.

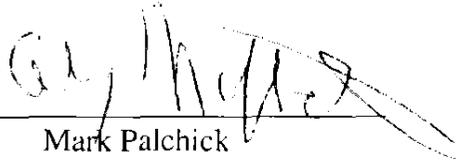
"Ours is an administration that wants the Congress to provide funding to assist charter schools with start-up costs, facility costs, and other -- (applause) -- and other needs associated with high quality schools. My budget offers \$150 million in additional funding next year, for the priority of encouraging the growth of charter schools all around the country."⁵

⁵ Source: whitehouse.gov.

For the foregoing reasons, the Bureau should reconsider its February 27, 2003 **Order**, and promptly process and grant ECOT's request for funding for Funding Year 2001

Respectfully submitted,

Electronic Classroom of Tomorrow

By 

Mark Palchick
Alan Y. Naftalin

Holland & Knight LLP
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Suite 100
Washington, D.C. 20006-6801
Its Attorneys

March 28, 2003

ATTACHMENT A

Before **the**
Federal Communications Commission
Washington, DC **20554**

In the Matter of)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Electronic Classroom of Tomorrow)	File No. SLD-226510
Columbus, Ohio	I	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service	I	
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

Declaration of Chad A. Readler

1. I am an attorney at the law firm of Jones Day, 41 South High St., Suite 1900, Columbus, Ohio. I represent the Electronic Classroom of Tomorrow, or ECOT, in Ohio Federation of Teachers v. Ohio State Board of Education, Case No. 01 CVH 05 04457, currently pending in the Franklin County (Ohio) Court of Common Pleas.

2. I understand that the Federal Communications Commission is currently considering whether ECOT qualifies as an "elementary or secondary school" under Ohio and Federal law. (See FCC Feb. 27, 2003 Order at 2.) Based upon my understanding of federal and state law, my familiarity with ECOT and its operations, and my involvement in the Ohio Federation of Teachers litigation, I believe ECOT qualifies as an elementary or secondary school under applicable law

3 Like all Ohio charter schools, ECOT is **an** Ohio public non-profit. See R.C. § 3314.03(A)(1). It is a "public school," R.C. § 3314.01(B), "part of the state's program of public education." Id.

4. In the Ohio Federation of Teachers litigation, the plaintiffs are challenging the constitutionality of the State's charter school law. The constitutional challenges are based upon provisions in the Ohio Constitution that plaintiffs allege prohibit the formation of charter schools in Ohio. Those claims are aimed at all of Ohio's 130+ charter schools, not just ECOT.

5. There is no question that charter schools are elementary or secondary schools under Ohio law. Even if the plaintiffs are successful with their claims, that would prove only that the Ohio Constitution does not allow for the creation of charter schools as they are currently constituted under Ohio law. It would not prove that the schools are not operating as elementary or secondary schools. Indeed, the opposite is true. The schools currently enroll over 30,000 Ohio schoolchildren. The schools are publicly funded by the State. See R.C. § 3314.08. The schools are regulated by the Ohio Department of Education. The schools hire state-certified public school teachers. See R.C. §§ 3314.03(A)(10) and 33 14.10. The students take state-sponsored proficiency exams. See R.C. § 3314.03(A)(3) and (A)(11). And the schools educate students. In the case of secondary students, charter schools, including ECOT, have produced hundreds of high school graduates, all of whom have earned diplomas in accordance with Ohio law. (See, e.g., Online School Helping Students Chart Course, Columbus Dispatch, (June 16,2002) (56 students graduated from ECOT in 2002).)

6. The Ohio Federation of Teachers plaintiffs have also made specific claims against ECOT. Their primary claim is that Ohio's charter school law, even if constitutional, does not allow for the creation of computer-based schools. Recent amendments to Ohio's charter school law put this argument to rest. The law plainly defines "internet- or computer-based" charter schools as those where "the students enrolled work primarily from their residences on assignments provided via an internet- or other computer-based instructional method that does not rely on regular classroom instruction." R.C. § 3314.02(A)(7); see also R.C. § 3314.041 (requiring school to notify parents and general public that school "is a public school and students enrolled in and attending the school are required to take proficiency tests and other examinations prescribed by law"). The plaintiffs agree. In their latest pleading, they state that: "Plaintiffs may no longer seek a ruling based upon the prior statute that cyber schools are not authorized." (Supplemental Memorandum of Plaintiffs Addressing Impact of Amendments to O.R.C. Chapter 3314 on Pending Motions, at 9.)

7. Plaintiffs also argued that Ohio law required computer-based schools *to* have physical "classrooms" and brick-and-mortar buildings. This claim too was answered by the recent amendments to Ohio law. The revised law makes plain that the "facility" requirements for traditional "brick-and-mortar" school buildings "shall not apply to internet- or computer-based community schools." R.C. § 3314.05. This is so, of course, because students enrolled in these schools "work primarily from their residences on assignments provided via internet- or other computer-based instructional method that does not rely on regular classroom instruction." R.C. § 3314.02 (A)(7).

8. Plaintiffs continue to argue that ECOT must be located in Lucas County, Ohio, the home of ECOT's sponsor. Recent amendments, however, provide that the sponsor simply must have representatives located "within fifty miles of the school's base of operations." R.C. 3314.023. For ECOT, its sponsor has representatives within fifty miles of ECOT's operation base. Further, even if plaintiffs are successful with this claim, at most ECOT would need to shift its base of operation, not shut down. None of this questions whether ECOT is a valid elementary or secondary school.
9. Finally, plaintiffs assert that ECOT is not a *bona fide* non-profit corporation. Even if true, and ECOT firmly denies the claim, the remedy would be to require ECOT to comply with state non-profit laws. Once again, this claim does not question whether ECOT is an elementary or secondary school.
10. The Ohio Federation of Teachers case has been pending for nearly two years. The case is before the trial court for consideration of dispositive motions. It is exceedingly likely the case will be appealed to the court of appeals and the Ohio Supreme Court. That process could last three years or more. In short, a "final judgment" in this case is likely years away.
11. In any case, however, even if the Ohio Federation of Teachers case were to be decided adversely to ECOT, the decision would have prospective effect, not retroactive effect. For example, for the preceding period, ECOT will have provided services to the State of Ohio, for which it will have been paid. No interim or interlocutory relief has been granted in the Ohio Federation of Teachers case, and there would be no justification for attempting to undo that payment. And of course all of ECOT's students will have

earned their school credits, and some of them their diplomas, from the educational services ECOT has provided to them and the State of Ohio.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March ~~24~~²⁷, 2003.



Chad **A.** Readler

WAS1 #1168415 v1

Federal Communications Commission
Commission Registration System (CORES)
CORES Certification Form

I, Marianne Trana, certify that the FCC Registration Number (FRN) listed below is true and correct to the best of my knowledge, information and belief

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