

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In re Appeal of the	)	
	)	
Children's Studio School	)	Application No. 250771
– Public Charter School	)	Funding Request No. 618040
Request for E-Rate Funding	)	
for Fiscal Years 2001-02	)	
	)	
Schools and Libraries Universal	)	CC Docket No. 02-6
Support Mechanism	)	
_____	)	

To: The Wireline Competition Bureau

**APPEAL OF THE CHILDREN'S STUDIO SCHOOL  
(Request for Review)**

Theodore D. Frank  
Arnold & Porter LLP  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
202 942-5790  
Counsel for Children's Studio School  
- Public Charter School

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To: The Wireline Competition Bureau

**APPEAL OF THE CHILDREN’S STUDIO SCHOOL**

The Children’s Studio School – Public Charter School (“the Studio School”) hereby appeals the denial by the Administrator of the Schools and Libraries Division (“SLD”), Universal Service Administrative Company (“USAC”), of the Studio School’s appeal of the SLD’s decision holding that the Studio School is required to refund monies provided under the Commission’s E-rate program for Fiscal Years 2001-02.<sup>1</sup> The SLD found that the Studio School was ineligible to receive the funding because the Studio School’s Form 470 listed, in response to Item 11, the name of a school volunteer, Ms.

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<sup>1</sup> The USAC decision was adopted on January 20, 2004. On March 19, 2004, the Studio School filed a letter requesting a thirty day extension of time to file this appeal. That request has not been acted on and, under Section 1.46 of the Commission’s rules, this appeal is timely. To the extent the Bureau disagrees with this conclusion, the Studio School hereby requests a waiver of the 60-day appeal period for the reasons set forth in the March 19<sup>th</sup> letter.

Gail Hawkins-Shirar, who was also associated with the service provider chosen by the school. On appeal, the USAC affirmed that decision.

### **Summary of Argument**

The USAC decision below rests on instructions for completing Form 470 that were adopted after the Studio School submitted its Form 470. To the best of the Studio School's knowledge, the instructions at the time its Form 470 was filed did not indicate that applicants could not name individuals associated with a service provider in response to Item 11. Moreover, contrary to the USAC's position in its decision, the current instructions, even if applicable in 2000, do not preclude applicants from naming the service provider in Item 11. Thus, whichever instructions applied, the Studio School application complied with them at the time it was filed.

Further, to the extent that the USAC decision correctly reflects the operative instructions, those instructions did not give the Studio School adequate notice of the requirements. Thus, they cannot serve as the basis for holding that the school was ineligible to receive an E-rate grant. Since the Studio School complied with a reasonable interpretation of the USAC instructions, the Bureau should reverse the determination below.

### **I. Background**

The Studio School is a public charter school under the laws of the District of Columbia. It was awarded a public charter school charter in 1996 by the District of Columbia Board of Education. It receives the majority of its funds from the District of Columbia through a per-pupil formula. As its name implies, the Studio School's Arts As Education<sup>®</sup> process is the principal vehicle through which it educates its students -- most

of whom come from impoverished backgrounds. Many come from broken homes with little support for their education. The Studio School employs respected artists from diverse cultures as teachers. Architects, visual and performing artists, and writers engage children in the artist's processes of inquiry, experimentation and critiquing as a rigorous, all-encompassing means of education.

The Studio School operates under extremely tight financial constraints and relies heavily on volunteers to supplement those limited financial resources. The school's principals have only limited technical expertise with respect to Internet access and the equipment and facilities needed to provide students with the benefits of the Internet – benefits the E-rate program was designed to provide. They have no familiarity with the Commission's rules or procedures or with the complex rules and procedures adopted by the USAC for filing and prosecuting applications for E-rate funding. As such, it relied on its volunteers to assist in preparing the application and identified the volunteer as the person to be contacted for technical information. Officials of the Studio School, however, evaluated the applications submitted and made the decision as to the grantee.

## **II. The Studio School's Form 470 Complied With the Applicable Rules**

In its appeal of the SLD decision, the Studio School argued that it had complied with the applicable requirements when it filed its Form 470. It argued that the USAC had modified its requirements with respect to Item 11 since the Studio School filed its application and that the requirements applicable when it filed its Form 470 did not preclude the Studio School from listing a representative of its service provider in response to Item 11.

The Studio School also noted that (a) the USAC’s instructions for the form indicated that service providers could assist applicants as long as “the service provider’s assistance is neutral,” and did not purport to preclude naming an individual associated with the service provider in Item 11, (b) while the individual listed in Item 11 of Form 470 was associated with the ultimately selected service provider, she was listed purely to provide information concerning the technical aspects of the proposal, and (c) the ultimate decision concerning the service provider was made by the Studio School, and not by the individual listed in Item 11. The USAC denied the appeal solely on the ground that the Studio School’s service provider was listed in Item 11 and did not address any of the Studio School’s other arguments. In support of that holding, the USAC cited to the discussion on the SLD web site that:

In order to be sure that a fair and open competition is achieved, any marketing discussions you hold with service providers must be neutral, so as not to taint the competitive bidding process. That is, you 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 them to unfairly compete in any way. A conflict of interest exists, for example, when an applicant's consultant, who is involved in determining the services sought by the applicant and who is involved in the selection of the applicant's service providers, is associated with a service provider that was selected.<sup>2</sup>

In addition, the USAC cited the Bureau’s decision in *Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-

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<sup>2</sup> See Letter dated January 20, 2004 to Gail Shirar from the SLD, USAC, at p. 2. (“USAC Decision”)

45 and 97-21, Order, 16 FCC Rcd 4028 (2000) (“*MasterMind*”). Neither supports the USAC Decision that the Studio School was ineligible to receive the E-rate funds.

**A. The USAC Requirements Did Not and Do Not Preclude Listing a Representative of a Service Provider in Response to Item 11 of Form 470**

While the Studio School cannot now find the instructions applicable to Form 470s filed in November 2000, when it filed its application, it believes, as Studio School argued in its appeal to the USAC, that the directions changed between the time it submitted its Form 470 and the time the SLD held that it was not qualified to receive a grant.<sup>3</sup> Specifically, the instructions for Form 470 applicable in 2000 did not indicate that a representative of a service provider could not be listed in response to Item 11 of FCC Form 470.<sup>4</sup> As the materials in Appendix A show, the Introduction to the instructions did not contain any warning about limits on assistance to be provided by a service provider, as is the case with the current instructions and the instructions in place in 2002.

Thus, the only guidance that the Studio School had concerning limits on service provider assistance was the Commission’s rule requiring that the bidding process must be fair, reasonable and untainted. This general obligation did not provide sufficient notice that the Studio School could not rely on Ms. Hawkins-Shirar, a school volunteer and its technical expert, as the person to contact for *technical* information. She was not going to

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<sup>3</sup> In its appeal, the Studio School submitted copies of the first two pages of the Instructions as of September 1999 and page 2 of the April 2002 instructions. Those submissions clearly indicated that the Introduction had changed and become more specific. *See* Appendix A to this Appeal.

<sup>4</sup> *See* Letter of Appeal, dated July 9, 2003, from Gail L. Hawkins-Shirar, Connectivity+ Inc., to Schools and Libraries Division, at p. 2. We have been unable to locate the full Instruction for Form 470 filed in connection with the Fiscal Year 2001-02 grant cycle.

be involved with the evaluation process; the proposals were going to be, and were, evaluated by Mr. Franklin Wassmer, Associate Director of the Studio School not Ms. Hawkins-Shirar. Her assistance was limited to providing potential bidders with help on technical matters. Since the teachers and administrators at the School had little or no expertise in those matters, it made little sense for the School to identify one of them; they were basically unqualified to assist prospective bidders who might have questions – unless of course they took the question to Ms. Hawkins-Shirar for an answer. Surely, the Commission did not intend to require such a cumbersome and ineffective process – and one that would not differ in a substantive way from identifying Ms. Hawkins-Shirar directly.

Accordingly, as of the time when the Studio School filed its Form 470, neither the Commission nor the USAC gave the Studio School any indication that a representative of a service provider could not be identified in Item 11. At best, the Studio School was on notice that the evaluation process had to be conducted fairly and in an unbiased manner. That was done here; the Studio School held two vendor workshops at which the proposal was discussed;<sup>5</sup> it received four bids,<sup>6</sup> and the bids were evaluated by Mr. Wassmer, an official of the School. The contract was awarded on the basis of considerations of price and service quality. Ms. Hawkins-Shirar played no part in that process. Absent more

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<sup>5</sup> The Studio School held vendor workshops on January 5 and January 11, 2001 at which the request for proposals was discussed and vendors were given the option to answer questions. Ms. Marcia McDonell and Mr. Franklin Wassmer, officials of the Studio School, participated in those workshops.

<sup>6</sup> Four companies submitted bids, Connectivity+Inc (Ms. Hawkins-Shirar's firm), Quality Telecommunications Services, Inc., Sofex/Cablelan, and Pegasus Solutions (a Cencor Company).

detailed directions and clarification that these procedures were inadequate, the Studio School's process complied with Commission requirements and its funding should not be subject to any refund requirement.

**B. The Commission's Current Requirements Do Not Preclude Naming a Representative of a Service Provider in Item 11**

As indicated above and in its initial appeal to the USAC, the Studio School believes that the instructions applicable to Form 470 changed between 2000, when it filed its Form 470, and the time the SLD ruled that its application did not comply with the applicable rules. However, even assuming *arguendo* that there was no change in the instructions and that the current instructions applied in 2000, those instructions do not preclude applicants from identifying a representative of a service provider in Item 11. The material in the Introduction provides that "The Form 470 cannot be *completed* by a service provider who will participate in the competitive process as a bidder."<sup>7</sup> That does not indicate that the service provider cannot be listed in response to Item 11, which asks for the name of the person to contact for *technical* questions concerning the funding request.

While the next sentence of the 1999 instructions indicates that an application will be tainted if a service provider is "involved" in preparing the Form 470, that sentence must be read together with the preceding sentence, which only precludes the service provider from "completing" the Form. Moreover, the discussion in the Introduction relates to concerns over whether the bidding process is somehow "tainted" by the service

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<sup>7</sup> See FCC Form 470 Instructions – April 2002, p. 2, a copy of which is attached to this appeal.

provider's identification in the Form 470. It is not intuitively obvious that listing a service provider as the source for technical information somehow "taints" the process when the evaluation is performed by the school. That is particularly true when the USAC instructions allow service providers to assist in preparing request for proposals, as long as the assistance is neutral. Thus, the USAC directions provide:

The FCC understands that applicants sometimes need to seek assistance from service providers in developing RFPs. Such assistance is permissible even if the service provider plans to submit a bid in response to that RFP as long as the service provider's assistance is neutral.<sup>8</sup>

The directions go on to state:

Service Providers may offer technical assistance on the development of a technology plan, so long as that assistance can be interpreted as neutral and in no way as having an undue influence on the applicant's ability to conduct a fair and open competition for the necessary technology services and products.<sup>9</sup>

While admittedly these instructions do not say that an employee of a service provider may be named in Item 11, they also do not preclude naming such an individual. To the contrary, the impression they leave is to the contrary: that service providers may be identified for assistance on technical matters. Indeed, if service providers can assist in the preparation of an RFP -- which can easily be tailored to favor the assisting service provider without being obvious about that -- it is far from obvious that a representative or employee may not be named in Item 11 when the Form 470 only starts the application process and cannot be used to favor any applicant.

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<sup>8</sup> Chapter 5 – Service Provider Role in Assisting Customers, at <http://www.sl.universalservice.org/vendor/manual/chapter5.asp>.

<sup>9</sup> *Id.*

While the current USAC directions now expressly state that applicants should not list individuals associated with service providers as the “contact person” on Form 470, the individual identified in Item 11 is not the “contact person.” The “contact person” is identified in Item 6. Item 11 only asks for the name of the individual to contact concerning *technical* issues. That reading is reinforced by the instructions for Form 470, which indicate that the individual listed in item 11 is not the contact person but the individual to be contacted solely on technical matters. Thus, they provide:

You may (but are not required to) provide the name and contact information of the person on your staff *or project* who can provide *additional technical details* or answer specific questions from service providers about the services you are seeking. This *need not* be the contact person listed on Item 6 nor the authorized person identified in Item 27.<sup>10</sup>

Given this distinction between the individuals named in items 6 and 27 as compared to the individual named in Item 11, the Studio School had no reason to believe that it could not name Ms. Hawkins-Shirar in Item 11. As noted earlier, any other response made little sense since the officials at the Studio School were largely unable to respond to requests for technical information.

Finally, interpreting the instructions to allow a representative of a service provider to be named in Item 11 is consistent with the discussion in those instructions of why a service provider may not be named as the Contact Person. That discussion makes it clear that the Commission’s concern is in preserving the integrity of the bidding process.

Thus, it states:

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<sup>10</sup> *FCC Form 470 Instructions – May 2003*, at p. 11 (emphasis added).

It is unlikely that the applicant can have a fair and open competitive process if the bids are submitted to and the evaluation is carried out by a representative or employee of a Service Provider who participated in the bidding process.

Similarly, the language quoted by the USAC in its decision denying the Studio School's appeal also focuses on the importance of assuring the integrity of the bidding process:

In order to be sure that a *fair and open competition* is achieved, any marketing discussions you hold with service providers must be neutral, so *as not to taint the competitive bidding process*. That is, you 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 them to unfairly compete in any way.<sup>11</sup>

However, identifying Ms. Hawkins-Shirar does not pose any such risks to the bidding process since Mr. Wassmer, an official of the school, evaluated the bids and decided which bidder would be awarded the contract. Thus, identifying her in response to that Item could not and did not chill the filing of competing bids nor did it influence the outcome of the bidding process. Consequently, the Studio School's application complied with the Commission's rules and the USAC instructions; the USAC Decision must be reversed.

**C. The Commission's Decision Does Not Preclude a Grant of the Studio School's Application**

The Commission's decision in *MasterMind Internet Services, supra*, also does not support the USAC Decision. In that case, the Commission concluded that the applicant had "surrender[ed] control of the bidding process to a service provider that participate[d]" in the bidding process. There

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<sup>11</sup> USAC Decision (*emphasis added*).

(1) an employee of MasterMind had been named as the contact person on the associated Form 470; (2) an employee of MasterMind had signed the Form 470; or (3) an employee of MasterMind had signed a Form 471 associated with the funding request.<sup>12</sup>

There is nothing comparable here; the Studio School listed Ms. Hawkins-Shirar solely in response to a question seeking a contact person for technical information. The contact person was Mr. Wassmer and the evaluation of the bids was done by him. Ms. Hawkins-Shirar, a volunteer at the school and the only individual with the technical expertise to answer questions properly, was the only reasonable person to identify in response to Item 11. She performed that function in a neutral manner and her performance did not taint or otherwise color the fairness and the reasonableness of the bidding process.<sup>13</sup> Accordingly, the Bureau's decision in MasterMind does not support the USAC's decision that the Studio School should refund the funds received through the E-rate program.

**D. The USAC Requirements Did Not Provide Adequate Notice that Ms. Hawkins-Shirar Could Not Be Identified in Item 11**

It is well established that the Commission must give adequate notice of its requirements and may not penalize applicants where that notice is not provided. *Salzar v. FCC*, 778 F.2d 869 (D.C. 1985); *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.) (“elementary fairness requires clarity of standards sufficient to apprise an applicant of

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<sup>12</sup> *MasterMind*, *supra* at ¶ 4 (footnotes omitted).

<sup>13</sup> As the Studio School indicated in its appeal, Connectivity+Inc. came in with the second lowest bid. The lower bid was made by a company the School had experienced some difficulties with. See Note to File January 18, 2001, attached as Appendix B. The material was submitted as part of the Studio School's June 25, 2003 appeal.

what is expected”), *cert. denied*, 429 U.S. 895, 97 S.Ct. 255, 50 L.Ed.2d 178 (1976); *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398 (D.C. 1968).

Here, it is clear that the USAC directors did not provide notice that individuals associated with a service provider could not be named in Item 11. At best, the instructions indicated that Ms. Hawkins-Shirar could not be named as the contact person and that she could not be involved in the evaluation process. But there is nothing that reasonably put the Studio School on notice that they could not continue to rely on Ms. Hawkins-Shirar for the technical expertise the others at the school lacked. As such, the Studio School lacked the notice of the standard to which it would be held and the USAC Decision must be reversed.

### **III. Conclusion**

For the reasons set forth above, the Studio School requests that the Bureau reverse the decision of the USAC denying the Studio School’s appeal of the SLD determination that the Studio School was not eligible to receive the E-rate funds for the 2001-02 fiscal year. The Studio School believes the USAC Decision below relies on instructions adopted after its application was filed and its application conformed with the rules in place at the time. In all events, however, the procedures used by the Studio School to select its service provider complied with both the spirit and the letter of the Commission’s regulations and the USAC requirements both then and as currently drafted. Those rules did not indicate that a representative of a service provider could not be identified in response to Item 11.

The Studio School is precisely the kind of school Congress intended to benefit from the E-rate program. It is trying to educate children from poorer economic

environments, with less financial and frequently less emotional support than children whose parents can afford computers and Internet access. Given its economic constraints, it is essential that it rely on volunteers, particularly in areas in which its teachers and support staff lack expertise. The preparation of an E-rate application is one of those areas in which such assistance is welcome and useful, if not essential. The Studio School relied on just such a volunteer here – one who had been working with the school on technology issues. It was natural for it to rely on that individual for technical expertise in connection with this application. However, the ultimate decision making process was reserved to the school, and thus preserved the integrity of the bidding process. The USAC Decision should be reversed.

Respectfully submitted,

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Theodore D. Frank  
Arnold & Porter LLP  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
202 942-5790  
Counsel for Children's Studio School  
- Public Charter School

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## **Appendix A**

Comparison of Instructions for Form 470

September 1999-April 2002

## **Appendix B**

Copy of Note to File  
dated January 18, 2001