



## SUMMARY

This Request deals with an FCC Form 470 application for E-Rate Program Funding Year (“FY”) 2002 that was certified by the school district, Yonkers Public Schools (“Yonkers”) over 8 years ago, in January of 2002.

In October 2008, over 5 years after the initial July 2003 grant of the E-Rate Program support to Yonkers USAC issued a Notification of Commitment Adjustment Letter (“COMAD”) to A+ Technology Solutions, Inc. (“A+”) alleging violations of the Commission’s competitive bidding rules. USAC did so without *any* prior direct contact with A+ about the allegations raised in the COMAD. Moreover, the action followed a comprehensive, 7-month external KPMG LLP (“KPMG”) audit report commissioned by USAC that made no adverse findings regarding the “performance of the service provider selection and contracting process....”

Nevertheless, USAC claimed that because A+ and an affiliated company, Integra Consulting and Computer Services, Inc. (“Integra”), offered clerical and administrative E-Rate consulting services to Yonkers (through Ms. Rosanne Sweeney) in connection with their application process that A+ effectively and improperly “selected itself” as Yonkers service provider for FY 2002. USAC supported the COMAD by citing the Wireline Competition Bureau’s 2007 decision regarding *Send Technologies, LLC* (“*Send*”).

In denying A+ appeal of the COMAD, USAC abandoned *Send* and shifted the foundation of its decision to the Commission’s 2000 decision in *MasterMind Internet Services* (“*MasterMind*”) and the Federal Acquisition Regulation (“FAR”) to support a conclusion that A+ “has *not* provided sufficient information to demonstrate that the competitive bidding process was *not* tainted by the relationship between A+ and Integra” and therefore “A+ has *not* shown

that a conflict of interest and competitive bidding violation did *not* exist.” This Request seeks review of that USAC denial.

A+ respectfully submits that USAC has misapplied the applicable law and created policy to carve out justification for its Denial, thereby exceeding its authority under Commission rules. USAC has failed to demonstrate, as is its burden, that A+, Integra, Ms. Sweeney or Yonkers has violated any federal statutes or applicable Commission rules or orders.

There was no violation of *MasterMind*, the standard applicable to service provider involvement in the competitive bidding process, *because* neither A+ nor Integra (or anyone affiliated with those entities) was listed or otherwise reflected on the Yonkers FY 2002 FCC Form 470 as the contact person for Yonkers. That Form 470 was signed and certified by Yonkers, as was the relevant FCC Form 471.

USAC’s reference to unidentified “FCC guidance” extending the principal finding of *MasterMind* to “any service provider contact information on an FCC Form 470, including address, telephone numbers, fax numbers and email address” is wholly unsupported. If such “guidance” existed as applicable to FY 2002, USAC had an obligation to identify, as opposed to just asserting, it to A+. Even assuming such “guidance” existed and applied to FY 2002 applications, USAC has not indicated what or where “any such service provider contact information” relating to A+ or Integra is found on the FCC Form 470. There is none.

USAC cites no Commission rule or precedent that prevents a service provider from organizing different internal operating components to provide different services. Rather, the issue in this case is whether a competitive bid violation has occurred as a result of some improper relationship that undermined and prevented a fair and open Yonkers competitive

bidding process for FY 2002. As the facts will demonstrate, there was no improper relationship and there was no competitive bid violation.

There was no improper relationship because the facts will show that Ms. Sweeney, as an E-Rate consultant, provided no more than basic, clerical and administrative E-Rate consulting services. Neither Ms. Sweeney nor A+ nor Integra usurped or otherwise intruded into Yonkers role in the selection of products for which to seek E-Rate Program support and services or Yonkers selection of vendors for those services. At no time did Yonkers relinquish control of its competitive bidding process or abdicate its competitive bid process responsibilities to any third party.

Nor was any service provider excluded from the vendor selection process by Yonkers or any action of A+, Ms. Sweeney or Integra. The services were generically described on the relevant FCC Form 470. Moreover, Yonkers relied on vendors listed on various state master contracts that already had been competitively bid by the State of New York.

Yonkers and A+ abided by the rules and procedures in place for FY 2002 and Yonkers conducted a fair and open competitive bid process in compliance with the requirements of the Commission's rules. USAC has failed to meet its burden of demonstrating that A+ or Yonkers have acted improperly or compromised the integrity of the competitive bidding process. Even if the Commission now, all these years later, determines that it should apply retroactively some current policy, there are ample grounds for waiving any technical rule violation.

For all of the foregoing reasons, as further elaborated and outlined in the Request, the USAC Denial must be reversed, the COMAD rescinded and the previously-approved E-Rate Program funding support for Yonkers for FY 2002 fully restored.

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

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<b>In the Matter of</b>	)	
	)	<b>CC Docket No. 02-6</b>
	)	
<b>Request for Review of Decision of the Universal Service Administrator by</b>	)	
	)	
<b>A+ Technology Solutions, Inc.</b>	)	<b>File No. SLD-294946 (FY2002)</b>
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**REQUEST FOR REVIEW AND WAIVER**

A+ Technology Solutions, Inc. (“A+” or “Company”) timely submits this Request for Review and Waiver (“Appeal” or “Request”) pursuant to Section 54.719(c) of the Federal Communication Commission’s (“Commission” or “FCC”) rules. The Request seeks reversal of the Decision on Appeal of the Administrator of the Universal Service Administrative Company (“USAC” or “Administrator”) reconfirming the prior decision to recover and rescind certain E-Rate Program funding approved by USAC for Funding Year (“FY”) 2002 (i.e., July 1, 2002 – June 30, 2003) for the Yonkers, New York Public Schools (“Yonkers”).<sup>1</sup> The COMAD and USAC Denial are based on alleged improper service provider involvement in Yonkers’

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<sup>1</sup>Administrator’s Decision on Appeal - Funding Year 2002-2003, dated December 7, 2009, to A+ Technology Solutions, Inc., denying A+’s appeal relating to the FRNs listed in Exhibit 1 at page 1. (“USAC Denial” or “Denial”). The USAC Denial is Exhibit 2. USAC’s original Notification of Commitment Adjustment Letter and Further Explanation of Commitment Adjustment (“FECA”) Letter to A+, which were the subject of that A+ appeal, were issued October 7, 2008 (collectively, “COMAD”). The FECA Letter is Exhibit 3, along with a list of the relevant FRNs and related amounts.

competitive bidding process. A+ respectfully submits that there was no such involvement and the USAC Denial must be reversed and the COMAD rescinded.

**I. STATEMENT OF A+ INTEREST AND TIMELINESS OF APPEAL**

A+ has clear standing to file this Request because Section 54.719(c) of the Commission's rules provides that, "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission."<sup>2</sup> In this case, A+ is directly aggrieved by USAC's decision seeking to continue to enforce the COMAD against A+ for FY 2002 E-Rate Program support for services long-since rendered to Yonkers in accordance with USAC's original funding approval.

This Request is timely submitted. Section 54.720(a) of the Commission's rules requires the filing of such a request "within sixty (60) days of issuance" of the decision by USAC that is the subject of the request.<sup>3</sup> The USAC Denial was dated December 7, 2009, and 60 days thereafter is February 5, 2010. The Request is filed as of February 4, 2010.

**II. INTRODUCTION**

This Request deals with an FCC Form 470 application for FY 2002 that was certified by Yonkers over 8 years ago, in January of 2002.

USAC's COMAD came over 5 years after the initial July 2003 grant of the E-Rate Program support to Yonkers and without *any* prior direct contact by USAC with A+ or Integra Consulting and Computer Services, Inc. ("Integra") about the allegations raised in the COMAD . Moreover, the action followed a comprehensive, 7-month external KPMG LLP ("KPMG") audit

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<sup>2</sup> 47 C.F.R. § 54.719(c).

<sup>3</sup> 47 C.F.R. § 54.720(c).

report commissioned by USAC that made no adverse findings regarding the “performance of the service provider selection and contracting process...”<sup>4</sup>

The Request is supported by Declarations from Yonkers, A+, and Rosanne Sweeney, who worked with A+ and Integra, a separate-but-affiliated company, solely in providing E-Rate consulting services.<sup>5</sup> Each Declaration states that Yonkers retained full control over the competitive bidding process, both with respect to the selection of services to be sought and vendors to be used.

Nonetheless, USAC now contends that its Denial is dictated by this Commission’s *MasterMind Order*, which A+ concedes was the FCC rule regarding service provider participation in the competitive bidding process for FY 2002.<sup>6</sup> In essence USAC bases its Denial on three facts which it claims establish a violation of *MasterMind* : (a) Yonkers, Integra and A+ failed to provide a “clear explanation” of the partnership or relationship between Integra and A+; (b) Ms. Sweeney provided E-Rate consulting services from her home but also out of A+ and Integra’s home office; and (c) A+ provided no explanation regarding the fact that the New York State Division of Corporations records indicated that A+ and Integra had the same address.<sup>7</sup>

As a result, USAC concludes A+ “has *not* provided sufficient information to demonstrate that the competitive bidding process was *not* tainted by the relationship between A+ and Integra” and therefore “A+ has *not* shown that a conflict of interest and competitive bidding violation did

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<sup>4</sup> Letter, dated February 7, 2006, from KPMG LLP to Mr. D. Scott Barash, Acting CEO, USAC, and Mr. William A. Hill, Jr., Acting Asst. IG for USF Oversight, FCC, p. 10 (“*KPMG Report*”). See Exhibit 4.

<sup>5</sup> See Exhibits 5 (“Yonkers Declaration”), 6 (“A+ Declaration”) and 7 (“Sweeney Declaration”).

<sup>6</sup> *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services*, Order, 16 FCC Rcd 4028 (2000) (“*MasterMind Order*” or “*MasterMind*”).

<sup>7</sup> USAC Denial, p. 3.

not exist.”<sup>8</sup> USAC argues that in addition to the *MasterMind Order*, A+ has violated the provisions of the Federal Acquisition Regulation (48 C.F.R. §§9.505(a), (b)) and therefore the Denial is warranted.

A+ respectfully submits that USAC has misapplied the applicable law and created policy to carve out justification for its Denial, thereby exceeding its authority under Commission rules. USAC has failed to demonstrate, as is its burden, that A+, Integra, Ms. Sweeney or Yonkers has violated any federal statutes or applicable Commission rules or orders.

There was no violation of the *MasterMind Order* because neither A+ nor Integra (or anyone affiliated with those entities) was listed or otherwise reflected on the Yonkers FY 2002 FCC Form 470 as the contact person for Yonkers. That Form 470 was signed and certified by Yonkers, as was the relevant FCC Form 471.<sup>9</sup>

USAC’s reference to unidentified “FCC guidance” extending the principal finding of *MasterMind* to “any service provider contact information on an FCC Form 470, including address, telephone numbers, fax numbers and email address” is wholly unsupported. If such “guidance” existed as applicable to FY 2002, USAC had an obligation to identify, as opposed to just asserting, it to A+. Even assuming such “guidance” existed and applied to FY 2002 applications, USAC has not indicated what or where “any such service provider contact information” relating to A+ or Integra is found on the FCC Form 470. There is none.

USAC cites no Commission rule or precedent that prevents a service provider from organizing different internal operating components to provide different services. Rather, the issue in this case is whether a competitive bid violation has occurred as a result of some

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<sup>8</sup> *Id.*, at p. 2 (emphasis supplied).

<sup>9</sup> In the interest of ensuring compliance with applicable statutes and FCC Rules, A+ consulted with, and obtained an opinion from legal counsel confirming that the *MasterMind* requirements were what governed for FY 2002.

improper relationship that undermined and prevented a fair and open Yonkers competitive bidding process for FY 2002. As the facts will demonstrate, there was no improper relationship and there was no competitive bid violation.

There was no improper relationship because the facts will show that Ms. Sweeney, as an E-Rate consultant, provided no more than basic, clerical and administrative E-Rate consulting services. Neither Ms. Sweeney nor A+ nor Integra usurped or otherwise intruded into Yonkers role in the selection of products for which to seek E-Rate Program support and services or Yonkers selection of vendors for those services. At no time did Yonkers relinquish control of its competitive bidding process or abdicate its competitive bid process responsibilities to any third party.

Nor was any service provider excluded from the vendor selection process by Yonkers or any action of A+, Ms. Sweeney or Integra. The services were generically described on the relevant FCC Form 470. Moreover, Yonkers relied on vendors listed on various state master contracts that already had been competitively bid by the State of New York.

Yonkers and A+ abided by the rules and procedures in place for FY 2002 and Yonkers conducted a fair and open competitive bid process in compliance with the requirements of the Commission's rules. USAC has failed to meet its burden of demonstrating that A+ or Yonkers have acted improperly or compromised the integrity of the competitive bidding process.

Furthermore, USAC's ongoing investigation is fundamentally unfair and prejudicial because USAC waited until late 2008, more than six and one half years after the FCC Form 470 was in place, to take action against A+. This protracted delay makes it unduly burdensome and unfair to Yonkers and A+, which has been forced to recreate a timeline for a period when A+ and Integra were in transition and now provide documentation for FY 2002—a time period that even

exceeds the FCC's five-year record keeping requirement.<sup>10</sup> A+ respectfully submits that, USAC's extended, repetitive inquiry represents an abuse of discretion and is not in accordance with Congress's intent in establishing the E-Rate Program. Rather, Congress intended that funds be awarded to schools and libraries in a competitively neutral manner.<sup>11</sup> Yet USAC's heightened scrutiny of Yonkers and A+ is anything but competitively neutral.

For all of the foregoing reasons, as further elaborated and outlined below, the USAC Denial must be reversed, the COMAD rescinded and the previously-approved E-Rate Program funding support for Yonkers for FY 2002 fully restored.

### **III. STATEMENT OF FACTS**

USAC rests its Denial on the conclusion that an improper relationship among A+ and Integra and the E-Rate consulting services provided by Ms. Sweeney constituted a conflict of interest that tainted Yonkers FY 2002 competitive bidding process. A+ respectfully submits that the key facts just do not support that conclusion.<sup>12</sup>

#### **A. The Companies In 2001 – 2002: A+, Integra and Their Services**

##### **1. Background Information: A+**

In 2001-2002 A+, which was formed in 1997, was primarily a provider of eligible internal connections for schools under the E-Rate Program. A+ appeared as a provider of such

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<sup>10</sup> The Commission has expressly recognized that with the passage of time the ability of applicants to effectively respond to allegations of rule violations can be substantially affected. *See Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies, San Antonio, Texas et al.*, Order, 21 FCC Rcd 5348, 5350, ¶8 n.20 (2007) (“Academy Of Careers Order”).

<sup>11</sup> *See* 47 U.S.C. § 254(h)(2) (stating that the “Commission shall establish competitively neutral rules to enhance ... access to advanced telecommunications and information services for all public and non-profit secondary school classrooms, health care providers and libraries ...”).

<sup>12</sup> These key facts are supported by the Exhibits attached hereto, including the Yonkers, A+ and Sweeney Declarations. *See* Exhibits 5, 6, and 7.

products and services (and others) on various state master contracts that had already been competitively bid by the New York State Office of General Services (“OGS”) and were maintained by OGS. In some cases, A+ was the lead company on the OGS master contracts. In others, A+ was a reseller of a lead company on the master contract. During 2001-2002, A+’s home office was located at 4177 Merrick Road, Massapequa, New York. However, the Company’s sales team and technical staff, who were involved in marketing services to schools and preparing proposals for E-Rate supported services, were physically separated in a different office some 20 miles away in a different county at 3500 Sunrise Highway, Great River, New York.<sup>13</sup>

## 2. **Background Information: Integra**

Integra is a separate corporation formed in 1989. Integra and A+ originally had different ownership structures, although since 2000 David Antar has been the owner in both companies. In 2001-2002, Integra provided custom programming and support solutions to *non-school* entities in New York, as Integra had been doing so since 1989.

During the same period, Integra’s home office also was located at 4177 Merrick Road, Massapequa, New York. Again, however, those individuals responsible for the sales and technical aspects of Integra’s services also were located in the separate office at 3500 Sunrise Highway, Great River, New York.

Integra did not provide any E-Rate Program supported services to Yonkers in FY 2002. A+ and Integra had no partnership or other arrangements between them relating to A+’s provision of E-Rate-Program-supported services to Yonkers or any other school districts.

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<sup>13</sup> A copy of a lease for this office, rent checks paid by A+ and the request for listings in the directory at that office are included as Exhibit 8. The lease was in Integra’s name at the request of the landlord because A+ had been in business only a few years.

**3. A+, Integra and E-Rate Consulting Services**

For FY 2002, A+ and Integra did offer E-Rate consulting services to schools through Rosanne Sweeney, who performed all of the day-to-day E-Rate consulting services. Revenues from E-Rate consulting services were separately accounted for and tracked by A+ and Integra.

The services consisted solely of administrative and clerical support in assisting schools in processing forms, adhering to deadlines, and, upon request, assisting with responses to PIA and USAC questions. Ms. Sweeney continues to serve in this role today. She is not, and never has been, responsible for any marketing or promotion of, or bids or proposals for, E-Rate eligible services to Yonkers or any other schools for A+ or Integra.

In connection with FY 2002 applications, Ms Sweeney provided these consulting services largely from her home, but also had a desk at the A+/Integra home office in Massapequa. Ms. Sweeney has never been an owner of A+ or Integra and, for 2001-2002 was not an officer of either Company.

**4. Yonkers FY 2002 FCC Form 470**

Yonkers' FY 2002 Form 470 was posted with USAC on November 1, 2001. The Form was certified by Ahunna Margaux Akoma, under the title Assistant Superintendent for Technology. Ms. Akoma was listed as the contact person on the Form 470, at Yonkers' address and phone number. Ms Akoma also signed and dated the written Form 470 certification provided to USAC.<sup>14</sup>

The Form 470 specifically indicated that “[p]ublic works and purchase contracts for public schools in New York State are governed by the provisions of Sections 103-109 of the State’s Municipal Law.” Further, “[p]ublic schools may also purchase equipment and services

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<sup>14</sup> FCC Form 470, Application 164470000372688, attached as Exhibit 9.

under publicly bid centralized procurement contracts administered by the State's Office of General Services or under cooperative bidding contracts administered by local boards of cooperative education services (BOCES)."<sup>15</sup>

#### **5. Yonkers FY 2002 FCC Form 471**

Yonkers FY 2002 Form 471 was submitted and certified on January 13, 2002. Again, the contact person and information related to Ms. Akoma. She again signed the requisite certification submitted to USAC. On the FCC Form 471, Yonkers selected a series of service providers including, Arch Paging, Inc.; AT&T Corp.; AT&T Wireless; Verizon-New York, Inc.; Cellco Partnership d/b/a Verizon Wireless; eChalk, L.L.C.; Edmin Open Systems, Inc.; and, for internal connections, Verizon Network Integration, Inc.; Compaq Computer Corporation; and A+.<sup>16</sup>

#### **6. USAC Post-FCC Form 471 Reviews**

Before acting on Yonkers' application, USAC conducted a thorough review, seeking information on the competitive bidding process and vendor selection. That review included inquiry about selection of certain contractors from the state master contracts. Yonkers responded at least twice to such inquiries, explaining that "these vendors have been chosen by the State as acceptable and authorized vendors to participating agencies, based on competitive bidding."<sup>17</sup>

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<sup>15</sup> *Id.*, Block 12.

<sup>16</sup> FCC Form 471, Application No. 294946 attached as Exhibit 10. In 2001-2002 Integra had transitioned to A+ the handling of all services related to serving as a reseller of wireless equipment for Symbol Technology, Inc. ("Symbol"), while awaiting Symbol and OGS acknowledgment of A+ being formally authorized as the new reseller under the state master contract. Although Integra sought to have the change take effect as early as 2001, Symbol failed to submit a contract addendum immediately to OGS substituting A+ on the list. As a result, Integra remained on the OGS state master contract list as a Symbol reseller. That list was not revised to reflect the substitution of A+ addition until February 10, 2004. In light of these facts, as noted below Yonkers subsequently submitted a SPIN change request to USAC to change the service provider to A+ which was granted by USAC. *See* Section III.A.7, *infra*.

<sup>17</sup> Letter, dated October 18, 2002, from Ahunna Margaux Akoma, Assistant to the Superintendent, Technology and Information Systems, Yonkers Public Schools, to Guarangi Shah, Schools and Libraries Division, attached as Exhibit 11; *see also* Letter, dated May 30, 2002 from Ahunna Margaux Akoma,

Upon further inquiry, Yonkers specifically indicated that A+ had been chosen under the New York State Contract based on “cost effectiveness, past experience, qualified personnel and management capabilities.”<sup>18</sup>

#### **7. USAC Funding Commitment Decision Letters**

After completing its review, USAC issued Funding Commitment Decision Letters (“FCDL”) on July 22, 2003 to both A+ and Integra. However, pursuant to a SPIN change requested by Yonkers and approved by USAC, the service provider for all USAC-approved FRNs related to Integra was changed to A+.<sup>19</sup> The change was reflected in a further FCDL issued to A+ on January 22, 2004. Integra provided no E-Rate-Program-supported services to Yonkers for FY 2002.<sup>20</sup>

#### **8. The KPMG Audit**

By letter dated July 13, 2005, USAC advised Yonkers that it had retained KPMG to conduct a performance audit of Yonkers focusing on FY 2002. The notification letter requested,

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Assistant to the Superintendent for Technology, Yonkers Public Schools, to Guarangi Shah, Schools and Libraries Division, attached as Exhibit 12.

<sup>18</sup> Letter, dated December 24, 2002, from Ahunna Margaux Akoma, Assistant to the Superintendent, Technology and Information Systems, Yonkers Public Schools, to Guarangi Shah, Schools and Libraries Division, at p. 2, attached as Exhibit 13.

<sup>19</sup> Letter, dated December 10, 2003, from Christopher M. Carvalho, Director, Technology and Information Systems, Yonkers Public Schools, to Schools and Libraries Division, attached as Exhibit 14, and Electronic Message, dated January 8, 2004, from SLD Client Operations, to Ahunna Margaux Akoma, also attached as part of Exhibit 14.

<sup>20</sup> Again, this SPIN change was consistent with the decision of A+ and Integra to transition Integra’s services and operations to A+. As previously noted, however, Symbol failed to timely submit the addendum that was required for A+ to be added as a reseller and Integra to be removed. *See* note 16, *supra*.

among other things, information regarding persons involved in preparation of E-Rate documentation and an overview of the Service Provider selection process.<sup>21</sup>

Some 7 months later, on February 7, 2006, KPMG sent the *KPMG Report* to USAC, indicating that KPMG concluded that “the Beneficiary was generally compliant with the [applicable E-Rate Program] Rules for FY 2002.”<sup>22</sup> The *KPMG Report* separately discussed and examined the Service Provider Selection and Contracting Process, “including the related competitive bidding activities.” A+ FRNs were among those selected for examination by KPMG. Specifically, for the service providers whose FRNs were selected, KPMG

determined whether the Beneficiary followed its service provider selection procedures, including those for competitive bidding (as applicable, and properly completed and utilized FCC Forms 470 (Services Requested and Certification Form) and 471 (Services Ordered and Certification Form). We also inquired as to what, if any, assistance the Beneficiary received relative to completion of the FCC forms and selection of the winning bidders.<sup>23</sup>

At the conclusion of this 7 month analysis KPMG “*identified no audit findings or other matters in performance of the service provider selection and contracting process audit procedures to be reported....*”<sup>24</sup>

## **9. Additional USAC Reviews**

Apparently lending little or no credibility to the findings of its own independent auditor, USAC continued to request information from Yonkers relating to the competitive bidding process and asking about Integra. When asked by Yonkers, Integra supplied information, in both

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<sup>21</sup> Letter, dated July 13, 2005, from Wayne M. Scott, Vice President, Internal Audit Divisions, USAC, to Christopher M. Carvalho, Director, Technology and Information Systems, Yonkers Public Schools, pp. 4, 5, attached as Exhibit 15.

<sup>22</sup> *KPMG Report*, at p. 2.

<sup>23</sup> *Id.*, at p.10

<sup>24</sup> *Id.* (emphasis supplied). KPMG had previewed this conclusion in an exit conference held on October 12, 2005. The relevant Power Point slides from that conference are attached as Exhibit 16.

January and December of 2006, relating to the continuing questions posed by USAC. In each case, Integra restated that it had no involvement or control over the Yonkers procurement process.<sup>25</sup>

#### **10. The COMAD, A+ Appeal and USAC Denial**

Yet 20 months later, on October 7, 2008, USAC sent A+ the COMAD rescinding funding commitments to Yonkers and A+ for the FRNS listed on Exhibit 1 hereto. The COMAD was the first direct contact by USAC with A+ or Integra regarding these issues. USAC had never made any such an inquiry to A+ or Integra prior to issuing the COMAD.

Therein, USAC asserted that because (a) Integra had served as a consultant and service provider to Yonkers, (b) A+ did not provide an adequate explanation of the relationship between itself and Integra, and (c) both companies had the same address, that “*Integra has not demonstrated that a conflict of interest and competitive bidding violations did not exist.*”<sup>26</sup> USAC supported its decision by citing a decision of the Commission’s Wireline Competition Bureau which had been released in March of 2007<sup>27</sup>, over 5 years after the Yonkers FY 2002 Form 470. The COMAD did not rely upon or even mention the Commission’s *MasterMind Order*.

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<sup>25</sup> See Letter, dated January 25, 2006, from Integra, to Christopher M. Carvalho, Director, Technology and Information Systems, Yonkers Public Schools and Letter, dated December 28, 2006, from Integra to Christopher M. Carvalho, Director, Technology and Information Systems, Yonkers Public Schools, both attached as Exhibits 17 and 18.

<sup>26</sup> FECA Letter (Exhibit 3), at p. 5 (emphasis supplied).

<sup>27</sup> *Request for Review of Decision of the Universal Service Administrator by Send Technologies, L.L.C.*, Order, 22 FCC Rcd 4950 (Wireline Compet. Bur. 2007) (“*Send Order*”). Note, the *Send* case involved a situation where the contact person specifically listed on the applicant’s FCC Form 470 owned a 15% interest in the service provider with the winning bid.

A+ appealed the COMAD to USAC.<sup>28</sup> As noted above, using essentially the same reasoning, but this time citing the *MasterMind Order* and the FAR, the USAC rejected the A+ appeal, concluding this time that “A+ has *not* provided sufficient information to demonstrate that the competitive bidding process was *not* tainted by the relationship between A+ and Integra” and therefore “A+ has *not* shown that a conflict of interest and competitive bidding violation did *not* exist.”<sup>29</sup>

#### IV. ARGUMENT

##### A. Standard of Review and Burden of Proof

USAC is responsible for “administering the universal support mechanisms in an efficient, effective, and competitively neutral manner” consistent with the limitations on its authority.<sup>30</sup> The Commission’s review of the COMAD and USAC Denial is *de novo*, without being bound by any findings or conclusions of USAC.<sup>31</sup> More importantly, the Commission must review *de novo* as well the underlying actions of USAC that led to the attempt to recover funds.

Furthermore, the *burden* of demonstrating that recovery of funds is justified under the Commission’s rules lies *with USAC*. It is USAC’s responsibility to establish that there has been a violation of those rules of the relevant statute that supports the recovery and denial of E-Rate Program support. Contrary to the USAC Denial, it is not A+’s responsibility to avoid recovery by demonstrating the opposite. Thus, USAC places the shoe on the wrong foot when it bases its Denial on the conclusion that “A+ has not provided sufficient information to demonstrate that the

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<sup>28</sup> Letter of Appeal from A+ Technology Solutions, Inc. to USAC, dated December 3, 2008 (“A+ Letter of Appeal”) attached as Exhibit 19.

<sup>29</sup> USAC Denial, at p. 3 (emphasis supplied).

<sup>30</sup> 47 C.F.R. § 54.701(a).

<sup>31</sup> 47 C.F.R. § 54.723.

competitive bidding process was not tainted....”<sup>32</sup> A+ respectfully submits that USAC has woefully failed to meet that burden of proof.

**B. USAC’s Interpretation of the 5 Year Rule Is Without Foundation**

The Commission has determined that USAC’s audits and investigations are subject to a five-year administrative time limitation. In its *Fifth Report and Order*,<sup>33</sup> the Commission stated: “Accordingly, we announce our policy that we will initiate and complete any inquiries to determine whether or not statutory or rule violations exist within a five-year period after final delivery of service for a specific funding year.”<sup>34</sup> The Commission added that “[t]he limitation period we establish here relates to the time period within which we must *bring action* to establish a debt due to a violation of E-rate program rules or the statutory provisions.”<sup>35</sup>

USAC contends that it satisfied the Commission standard because it ostensibly “concluded its investigation and determined that the CAL should be issued on July 24, 2008” and

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<sup>32</sup> USAC Denial, at p. 3, ¶2. The FCC has confirmed that the burden of proving improper involvement in the competitive bidding process is on USAC, not the applicant. In its *Caldwell Parish* decision, the FCC found that USAC improperly denied the requests for funding based on mere allegations of possible impermissible service provider involvement in the competitive bidding process instead of “sufficiently examining whether the Commission’s rules actually were violated due to improper service provider involvement in the applicants’ competitive bidding processes.” See *Requests for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al. Columbia, Louisiana*, Order, 23 FCC Rcd 2784, ¶2 n.5 (2008) (“*Caldwell Parish*”); see also *Request for Review of a Decision of the Universal Service Administrator by Albert Lea Area Schools, Albert Lea, Minnesota, et al.*, Order, 24 FCC Rcd 4533,4540, ¶11 n.51 (2009); *Requests for Review of the Decision of the Universal Service Administrator by District of Columbia Public Schools*, Order, 23 FCC Rcd 15585,15590, ¶7 n.39 (2008); *Review of Decisions of the Universal Service Administrator by Collegio Nuestra Senora del Carmen, Hatillo, Puerto Rico, et al.*, Order, 23 FCC Rcd 15568, 15575, ¶18 n.62; *Requests for Review and Waiver of Decisions of the Universal Service Administrator by State of Arkansas, Department of Information Systems, Little Rock, Arkansas, et al.*, Order, 23 FCC Rcd 9373, ¶1 n.5 (2008).

<sup>33</sup> *Schools and Libraries Universal Service Support Mechanism, Fifth Report and Order*, 19 FCC Rcd 15808 (2004) (“*Fifth Report and Order*”).

<sup>34</sup> *Id.*, ¶32.

<sup>35</sup> *Id.*, n.55 (emphasis supplied).

merely “memorialized” its decision with the October 8, 2008 FECA Letter<sup>36</sup>, without making any announcement to A+ or any other party. USAC provides absolutely no support for this interpretation of the Commission’s rules, which A+ respectfully submits is a contrived artifice to avoid the clear deadline set by the *Fifth Report and Order*. USAC’s position flies in the face of the Commission’s clear statement that “[t]he limitation period we establish here relates to the time period within which we must *bring action* to establish a debt due to a violation of E-rate program rules or the statutory provisions.”<sup>37</sup> No action was brought by USAC or anyone until the original COMAD was issued on October 7, 2008, after the close of what even USAC admits is the 5 year period. Moreover, USAC’s attempt to interpret the Commission’s *Fifth Report and Order* to its advantage exceeds the scope of its authority pursuant Section 54.702(c)<sup>38</sup> of the Commission’s rules. If USAC had desired to have the FCC adopt this “internal completion” interpretation, it could have sought Commission guidance under Section 54.702(c).<sup>39</sup>

**C. USAC Has No Authority To Fill A Rule Or Policy Void Or Retroactively Apply FCC Guidance: Rules In Effect At Time Of Application Apply**

Again, the FCC’s E-Rate Program rules are explicit that USAC’s authority to administer the Program is limited to implementing and applying the Commission’s rules and the Commission’s interpretations of those rules as found in agency adjudications.<sup>40</sup> USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission,<sup>41</sup> or to

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<sup>36</sup> The date of the FECA Letter is actually October 7, 2008.

<sup>37</sup> *Id.*, n.55.

<sup>38</sup> 47 C.F.R. § 54.702(c)(2008) (stating that, “Where the Act or the Commission’s rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

create the equivalent of new guidelines.<sup>42</sup> Thus, in this matter USAC was charged with analyzing the conduct that it contends violated the Commission's competitive bidding rules in accordance with the FCC's rules and precedent applicable to FY 2002 applications.

The Commission has generally held that in determining compliance with E-Rate and other Universal Service related rules, it is those *in effect at the time of the application or the alleged improper conduct* that govern the assessment of whether a violation has occurred.<sup>43</sup> As such this principle is consistent with USAC's own guidelines for audit policies – i.e., that they “reflect compliance with the rules that existed during the funding year to which the funding was associated...”.<sup>44</sup> That is because an applicant or service provider cannot be expected to comply with a rule requirement for which it has no notice.<sup>45</sup> “Unless and until the Commission adopts a

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<sup>42</sup> *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, Third Report and Order, 13 FCC Rcd 25058, 25066-67, ¶¶15-16 (1998).

<sup>43</sup> For example, the Commission has required compliance with competitive bidding standards “as they existed at [the] time” of the alleged violation. *See Requests for Review of Decisions of the Universal Service Administrator by Colegio Nuestra Senora del Carmen et al.*, Order, 23 FCC Rcd 15568, 15573 ¶12 (Telecom. Access Pol. Div. 2008); *see also Request for Review of a Decision by the Universal Service Administrator by Lazo Technologies, Inc. et al.*, Order, 24 FCC Rcd 10675, ¶5 n.15 (Wireline Compet. Bur. 2009); *Requests for Review of the Decisions of the Universal Service Administrator by Long Beach Unified School District, Long Beach, California*, Order, 22 FCC Rcd 11143, 11145, ¶7 (Wireline Compet. Bur. 2007); *Federal Joint Board on Universal Service, Request for Review by Cook Telecom, Inc. of a Decision of the Universal Service Administrator*, 24 FCC Rcd 7611, ¶¶1, 5 (Telecom. Access Pol. Div. 2009); *Request for Review of the Decision of the Universal Service Administrator by Academia Discipulos de Cristo et al.*, Order, 21 FCC Rcd 9210, 9213-9214, ¶¶9-10 (2006).

<sup>44</sup> *Report, USAC Task Force on the Prevention of Waste, Fraud and Abuse*, CC Docket No. 02-6, p. 10 (November 26, 2003).

<sup>45</sup> *See, e.g., Request for Review of a Decision of the Universal Service Administrator by Keyport School District, Keyport, New Jersey*, Order, 24 FCC Rcd 12702 (Wireline Compet. Bur. 2009); *Requests for Review of Decisions of the Universal Service Administrator by Advanced Education Services, et al.*, Order, 22 FCC Rcd 21513, 21516, ¶7 (2007) (“*Advanced Education Services Order*”); *Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, Federal Communications Commission, to Mel Blackwell, Vice President, Schools and Libraries Division, USAC*, 23 FCC Rcd 15444 (2008); *Request for Waiver of the Decision of the Universal Service Administrator by South Carolina Division of Chief Information Officer*, Order, 21 FCC Rcd 5987, 5990-91, ¶8 (Wireline Compet. Bur. 2006); *Request for Review of the Decision of the Universal Service Administrator by Williamsburg-James City Public Schools*, Order, 14 FCC Rcd 20152, 20154-55, ¶¶4-6 (1999); *Request for Review of the Decision of the Universal Service*

requirement,” applicants cannot be effectively denied funding for failing to comply with that requirement.<sup>46</sup>

Moreover, even assuming that the Commission subsequently provided USAC with guidance or authority to apply such a policy, USAC has no discretion or authority to apply it retroactively to applications submitted and approved years before. Certainly there is no evidence that the Commission authorized any such retroactive application as USAC engaged in here.<sup>47</sup>

**D. USAC Failed to Demonstrate a Violation Of The Applicable Competitive Bidding Rules Regarding Service Provider Involvement: The *MasterMind* Order**

Under the Commission’s *Fifth Report and Order*, the COMAD and USAC Denial must be based upon a violation of the Communications Act or the Commission’s competitive bid rules and decisions that applied to FY 2002 conduct.<sup>48</sup>

Neither the COMAD nor the COMAD Denial contend that A+ or Integra has violated the Communications Act or any other relevant Federal statute. Rather, USAC asserts that the USAC Denial is justified by A+ violation of the Commission’s competitive bidding rules, citing the Commission’s decision in the *MasterMind* case.<sup>49</sup>

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*Administrator by Prairie City School District*, Order, 15 FCC Rcd 21826, 21827, ¶5 (Com. Carrier Bur. 1999).

<sup>46</sup> See *Requests for Review of the Decisions of the Universal Service Administrator by Aiken County Public Schools, Aiken, SC et al.*, Order, 23 FCC Rcd 8735, 8737, ¶6 (2007).

<sup>47</sup> In the past the Commission has generally recognized that clarifications of E-Rate Program rules and policies are normally to be applied prospectively by USAC. See *Request for Review of the Decision of the Universal Service Administrator by Ysleta, Independent School District, El Paso, Texas*, Order, 18 FCC Rcd 26406, 26419-23, ¶¶26-38 (2003); *Request for Review of the Decision of the Universal Service Administrator by Winston Salem/Forsyth County School District, Winston-Salem North Carolina*, Order, 18 FCC Rcd 26457, 26462, ¶13 (2003).

<sup>48</sup>“It is clear that funds disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered.” *Fifth Report and Order*, ¶18.

<sup>49</sup> USAC Denial, p. 4. It is instructive that USAC, in the COMAD, relied upon the Wireline Competition Bureau’s 2007 *Send Order* to justify its actions. There is no reference to the *Send Order* in the Denial. Thus, USAC acknowledges that the FCC decisions in the *Send Order*, issued years after FY2002, cannot

In the *MasterMind Order*, the Commission focused on responsibilities relating to the FCC Form 470, the official FCC request for E-Rate services that initiates the competitive bidding process for the E-rate Program.<sup>50</sup> As such, the Commission requires the applicant to follow certain steps to ensure that the competitive bid process is fair and open. For one, the FCC Form 470 must be signed by a person authorized to request the services on behalf of the applicant.<sup>51</sup> In addition, the FCC Form 470 requires the applicant to name a contact person, who is responsible to speak with prospective service providers.<sup>52</sup>

The Commission reaffirmed these requirements in *MasterMind*. In that case, MasterMind sought the Commission's review of USAC's denial of funding requests where it admitted that it was involved in the preparation of Forms 470 and a MasterMind employee was listed as the contact person on the Forms 470 relating to the denials.<sup>53</sup> However, certain funding requests were denied even though a MasterMind employee was not listed as the contact person and a MasterMind employee had not signed the school district's Form 470 or Form 471.<sup>54</sup> The Commission found that USAC had erred in denying requests for support that did not name a service provider as the contact person on the Forms 470 or 471.<sup>55</sup> Importantly, the Commission found that no competitive bid violation occurred where the applications did not name a MasterMind employee as the contact person and a MasterMind employee did not sign the FCC

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now be applied to A+ and the *MasterMind Order* is the relevant FCC decision. Even if the *Send Order* were somehow applicable here, as noted above in that case the contact person listed on the Form 470 had a 15% ownership interest in the winning bidder. No such factual situation exists here.

<sup>50</sup> Description of Services Requested and Certification Form, OMB 3060-0806 (FCC Form 470).

<sup>51</sup> FCC Form 470 Instructions at 19-20.

<sup>52</sup> *Id.*

<sup>53</sup> *MasterMind Order*, ¶6.

<sup>54</sup> *Id.*, ¶5.

<sup>55</sup> *Id.*, ¶14.

Forms 470 and 471. The Commission concluded, however, that an applicant surrenders control of the bidding process and violates the Commission's competitive bidding process when a service provider serves as a contact person on the Forms 470 or 471 or signs those forms.<sup>56</sup>

The *MasterMind Order* was the controlling law in connection with the FY 2002 E-Rate process. However, USAC has failed to adhere to the Commission's conclusions in the *MasterMind Order* and has failed to apply the Commission's *MasterMind* holdings to the facts in this case.

No representative of A+ or for that matter Integra was identified in any way as a contact person for Yonkers on the relevant FCC Forms 470 or 471. Rather, Ahunna Margaux Akoma, then Yonkers Assistant Superintendent for Technology, was listed as a point of contact on Yonkers FCC Forms 470 and 471 and her contact information was included. In addition, she signed and certified the Yonkers FCC Form 470 and Form 471. Finally, Mr. Christopher Carualo (sic Carvalho) was listed as Yonkers' Network Engineer on the Form 470.

The USAC Denial claims that “[p]ursuant to FCC guidance, this principal [of the *MasterMind Order*] applies to any service provider contact information on an FCC Form 470 including address, telephone, fax numbers and email address.” USAC fails to indicate where this “FCC guidance” is provided in the *MasterMind Order* or in any other FCC pronouncement available to A+ and applicable to FY 2002 applications. Further, even if such “guidance” had been identified and applicable to FY 2002 applications, USAC fails to indicate what “service provider contact information” of A+ is on the relevant FCC Form 470 ostensibly in violation of this “FCC guidance.”<sup>57</sup> There is none.

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<sup>56</sup> *Id.*, ¶10.

<sup>57</sup> The Commission has clearly concluded that without specific information to determine the basis for a denial, applicants cannot provide comprehensive responses to USAC's arguments. *Academy of Careers*

The USAC Denial goes on to cite “48 C.F.R. §9.505(a), (b)” as further justifying USAC’s finding that there has been a violation of the Commission’s E-Rate Program competitive bidding rules in 47 C.F.R. Part 54. Title 48 of the Code of Federal Regulations deals with the Federal Acquisition Regulation (“FAR”) System, which sets out the rules and regulations relating to contracting with the Federal government.

A+ respectfully submits that the terms and conditions of the FAR do not govern the administration and oversight of the E-Rate Program.<sup>58</sup> A+ is aware of no FCC decision applying the same to the E-Rate Program, much less doing so with respect to FY 2002. Indeed, the FCC has expressly said that the FAR does not apply and has asked for public comments about whether it should adopt rules requiring USAC to apply the FAR.<sup>59</sup> In any case, USAC has no authority unilaterally to apply the FAR to A+, Integra or any other service provider for any year, much less FY 2002.<sup>60</sup>

USAC’s attempts to expand, extrapolate and interpolate the clear holding of the *MasterMind Order* are unsuccessful. There has been no showing that A+ or anyone affiliated with A+ violated the holding of that decision and USAC cannot rely upon that decision as a basis

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*Order*, ¶6. Further the Commission has expressly instructed USAC that applicants must be afforded the “opportunity to demonstrate that they did not violate the Commission’s competitive bidding rules.” *Id.*, ¶1. See generally *Request for Review of the Decision of the Universal Service Administrator by Picher-Cardin Independent School District 15*, Order, 17 FCC Rcd 17392, 17394, ¶5 (Telecom Access Pol. Div. 2002) (an appeal is impeded when the record developed by USAC does not reveal facts and reasoning on which the SLD’s determination is based with clarity).

<sup>58</sup> USAC has never been held to be a Federal government agency or any part thereof to which the FAR might be deemed applicable. See *Report of the United States Government Accountability Office, GAO-05-151, “Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program,” February 9, 2005, at pp. 8, 11, 12.*

<sup>59</sup> *Comprehensive Review of Universal Service Fund, Management, Administration, and Oversight*, Notice of Proposed Ruling and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308, 11314, ¶12 (2005).

<sup>60</sup> Presumably, USAC attempted to rely on the FAR regarding “conflict of interest” because the *MasterMind Order* does not address that issue, other than as it relates to the service provider contact person being listed on and signing the FCC Form 470.

for the COMAD or USAC Denial. Therefore, the USAC Denial must be reversed and the COMAD rescinded.

**E. USAC Failed to Demonstrate Any Other Justification for Its Conclusion Of a Violation of The FCC's Competitive Bidding Rules**

Even assuming that USAC were permitted to “go beyond” the *MasterMind Order* in determining FY 2002 compliance, USAC has failed to meet its burden of establishing any violation of the FCC’s rules requiring an “open and fair competitive bidding process.”<sup>61</sup> That is because Yonkers, A+ and Rosanne Sweeney deny that Yonkers improperly delegated its power and responsibility over the competitive bidding process to any entity that participated as a vendor in that process.<sup>62</sup>

USAC offers no persuasive counter evidence on this point. Rather, USAC relies on what can best be described as circumstantial facts, that USAC claims have not been sufficiently rebutted by information provided by A+ for USAC to conclude that the competitive bidding process was not tainted. USAC’s evidence such as it is cannot counter the declarations of all the parties involved as to who controlled Yonkers FY 2002 competitive bidding process.

The foundation of USAC’s conclusions in the COMAD Denial is restated in several different ways, but a common element in each one of them is that A+ or Ms. Sweeney had a role in selecting the services to be sought by Yonkers and/or in selecting A+ or Integra as a service provider for Yonkers in FY 2002. Specifically USAC claims:

A competitive bidding violation and conflict of interest occur when an applicant’s consultant provides consulting services, which include determining the services for which the applicant will seek funding and/or in selecting the service provider(s), the consultant

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<sup>61</sup> USAC Denial, p. 2. (“The FCC’s competitive bidding rules require an open and fair competitive bidding process.”).

<sup>62</sup> See Exhibits 5, 6, and 7.

and/or one of its partners provide those services and is a bidder, and the consultant and/or one of its partners is selected to provide the services.<sup>63</sup>

USAC cites no other FCC precedent for this interpretation of the Commission's rules besides the *MasterMind Order*, which of course does not include such a standard. Moreover, USAC simply ignores its gross failure to demonstrate that Ms. Sweeney, or anyone other than Yonkers, engaged in "determining the services for which the applicant [sought] funding and/or...selecting the service providers." Even if the other "circumstances" that are reflected in USAC's expanded reading of *MasterMind* were present, this fundamental and pivotal fact is not. Without it, there can be no showing of a violation of the competitive bidding rules.

Failing that the USAC Denial on its face focuses on three factors as justification for concluding that "because A+ ...has *not* provided sufficient information to demonstrate that the competitive bidding process was *not* tainted by the relationship between A+ and Integra, A+ has *not* shown that a conflict of interest and competitive bidding violation did *not* exist."<sup>64</sup>

The *first* is the alleged failure of "Yonkers, Integra and A+" to provide a "clear explanation of the partnership or relationship between Integra and A+."<sup>65</sup> To the extent that this issue was not explained in A+'s appeal of the COMAD, it has been above and in the Declarations of Rosanne Sweeney and David Antar. A+ and Integra are separate corporations. Integra does not provide, and did not provide in FY 2002, E-Rate supported services to Yonkers.

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<sup>63</sup> In a variance on this theme, the USAC Denial states also that such a violation occurs when (a) "a service provider provides both eligible services and ineligible consulting services, serves as an applicant's consultant, and selects itself to provide services without an appropriate separation between the service provider and consulting functions" and (b) "an applicant's consultant, who is involved in determining the products and/or services sought by the applicant and who is involved in the selection of the applicant's service providers, is associated with the service provider that was selected." *Id.*, at pp. 2, 3.

<sup>64</sup> Again, as noted previously, USAC's quadruple negative places the burden of proof on the wrong party. See Section IV.A., *supra*. Nevertheless, A+ has established that there has been no violation.

<sup>65</sup> *Id.*, at p. 3.

There neither are, nor have been, any partnership, stockholders or other agreements of any shape or form between Integra and A+ whereby the former agreed or is obligated to recommend the latter to schools for which Integra might provide E-Rate consulting services or vice versa. Rosanne Sweeney, the provider of consulting services, never had any such partnership or other agreement with any service provider.<sup>66</sup> Integra received no financial benefit (e.g., commission, bonus, success fee or similar payment) as a result of the selection of A+, under a previously competed state contract, as service provider by Yonkers, for FY 2002. Nor did Ms. Sweeney.

The second is the fact that Ms. Sweeney “worked out of her home *and out of the Massapequa New York offices of A+ and Integra.*” A+ concedes that A+ and Integra were headquartered at the Massapequa address. But the USAC Denial wholly ignores the fact that to the extent that Ms. Sweeney was in the Massapequa offices she “was located at a different location than the technical and sales staff of A+”, who were then located in Great River, New York and were the sales team and technical staff who were involved in marketing services to schools and preparing proposals for such services in seeking to provide E-Rate supported eligible services to Yonkers and other schools.<sup>67</sup> Moreover, the mere fact that at some times Ms. Sweeney provided E-Rate consulting services using the Massapequa office facilities does not translate into a finding that she was working to select, for Yonkers or any other school, the services that they would seek and the service providers that they would use. Again, Ms. Sweeney was never an owner or director, and for 2001-2002 was not an officer of A+ or Integra. Nor was she involved in, or an agent or representative for, A+ or Integra with respect to the marketing and preparation of proposals of E-Rate-supported services to eligible schools. Again, Ms. Sweeney

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<sup>66</sup> The only vendor partnerships that existed were service provider-to-service provider partnerships, which are a common, every day industry practice for these types of services.

<sup>67</sup> See A+ Appeal, at p. 3.

received no bonus, commission, success fee or similar financial incentive tied to the selection by Yonkers of A+ or any other service provider.

The *third* is the failure of A+ to explain “the same addresses for the companies as indicated in the records held by the New York State Division of Corporations.”<sup>68</sup> A+ respectfully submits that it is not of course the keeper of these State records, but agrees that Integra and A+ were headquartered at the same address in Massapequa during FY 2002. There was and is no prohibition for such an arrangement under E-Rate Program rules. Again, all of A+ and Integra sales and technical staff were located at 3500 Sunrise Highway, Great River, New York during this period. Ms. Sweeney did not use that office and actually did not have a security card to gain access to that office.<sup>69</sup> Moreover, the Commission has clearly stated in other contexts that similarities, absent more, cannot be equated with a violation of the competitive bidding rules.<sup>70</sup>

A+ respectfully submits that by any reasonable assessment USAC’s conclusions cannot support a finding of a violation of the standard that it seeks to apply to FY 2002 conduct at issue. These factoids standing alone do not refute the statements of the parties involved and cannot be grounds for concluding that A+ has violated the FCC’s competitive bidding rules.

As stated earlier, Yonkers relied on a New York State-approved contract list available through OGS for prospective service providers. In addition, Yonkers also awarded contracts for similar and other eligible services to other service providers. For example, Yonkers FCC Form 471 for FY 2002 indicates that Arch Paging, Inc.; AT&T Corp.; AT&T Wireless; Verizon-New York, Inc.; Cellco Partnership d/b/a Verizon Wireless; eChalk, L.L.C.; Edmin Open Systems,

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<sup>68</sup> COMAD Denial, at p.3.

<sup>69</sup> Exhibit 20 is the Access Card Request Form for access to the Sunrise Highway Office. Ms. Sweeney’s name is not on it.

<sup>70</sup> See *Academy of Careers Order*, ¶6 (“...Mere presence of similar language in Form 470s by different program participants ultimately selecting the same service provider is not sufficient evidence of a rule violation.”).

Inc.; and, for internal connections, Verizon Network Integration, Inc.; Compaq Computer Corporation; and A+. <sup>71</sup> Those awards serve as further evidence that Yonkers maintained control of the selection process and chose an array of service providers rather than granting exclusive provision of eligible services to a single provider.

Because USAC failed to meet its burden in proving a violation of the competitive bidding process and because the facts in this case fully comply with the Commission's *MasterMind* decision, the Commission must reverse the USAC Denial and rescind the COMAD.

**F. USAC Is Not Legally Authorized to Issue a COMAD For Procedural Reasons**

As outlined above, USAC has failed to prove or cite any violation of federal statute or Commission competitive bidding rules in its USAC Denial. In its 2001 *Universal Service Order*, the Commission stated that USAC can only recover funding for a violation of federal statute. <sup>72</sup> The Commission further held in its *Fifth Report and Order* that actions that fail to rise to the level of a statutory violation or Commission regulation do not require recovery. <sup>73</sup>

In this case, there is no evidence that A+ violated a federal statute or the then-applicable competitive bidding rule of the Commission. Even assuming, for argument's sake, that A+ failed to follow USAC procedures, that would not be grounds for recovery of disbursed funds. The Commission has held that if the "procedural violation is inadvertently overlooked during the application phase and funds are disbursed, the Commission will not require that they be recovered, except to the extent that such rules are essential to the financial integrity of the program, as designated by the agency, or that circumstances suggest the possibility of waste,

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<sup>71</sup> See Exhibit 10.

<sup>72</sup> *Universal Service*, Report and Order, 14 FCC Rcd 2769, ¶11 (1999).

<sup>73</sup> *Fifth Report and Order*, ¶19.

fraud, or abuse, which will be evaluated on a case-by-case basis.”<sup>74</sup> There is no such basis for doing so in this case.

**G. Mailing Forms to Track Delivery is Clerical in Nature**

Although not raised in the USAC Denial, USAC also based the COMAD in part on the fact that the certification for Yonkers FY 2002 Form 470 was mailed by Ms. Sweeney from the Massapequa, New York office. The Commission has determined that the mere act of mailing FCC Form 470 certifications does not constitute a violation of its competitive bidding process. In its *Caldwell Parish* Order,<sup>75</sup> the Commission reviewed USAC’s funding denials of applicants who gave their FCC Forms 470 certifications to an employee of a service provider to mail to USAC using the service provider’s Federal Express account. In reaching its conclusion, the Commission found that the service provider’s “provision of Federal Express mailing service for the certifications does not, by itself, rise to the level of a violation of the competitive bidding process.”<sup>76</sup> While A+ notes that the Commission was not clear as to whether it granted retroactive status to this issue, the facts in *Caldwell Parish* are similar to those here. Ms. Sweeney mailed the certification for Yonkers FCC Form 470 after it was signed by Yonkers’ Assistant Superintendent for Technology.

As in *Caldwell Parish*, in this case, Rosanne Sweeney, as the E-Rate consultant, not service provider, mailed the certification as a means to track and deliver the certification. Because Yonkers’ consultant never engaged in any competitive bid processes for Yonkers, and a consultant mailed Yonkers’ certification merely to provide for the tracking and timely filing of

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<sup>74</sup> *Id.*

<sup>75</sup> *Requests for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al.*, Order, 23 FCC Rcd 2784 (Wireline Compet. Bur. 2008).

<sup>76</sup> *Id.*, ¶12.

the document, the Commission should conclude that Integra's assistance did not interfere with the competitive bidding process.

**H. In The Alternative The Commission Should Waive The Rule Requirements**

If the Commission is compelled, even under these circumstances, to conclude that USAC was correct to apply a policy regarding competitive bidding other than what was articulated in the *MasterMind Order*, it should waive that requirement in this circumstance and A+ should not be deemed responsible. A+ should not, 6 years or more after the application was filed in good faith, be required to make the payments suddenly sought by USAC.

The Commission's rules allow such waiver "for good cause shown."<sup>77</sup> The Commission has extended this waiver authority to limited waivers of USAC rules. The FCC has established the following guidance for determining whether waiver is appropriate:

A rule may be waived 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. 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.<sup>78</sup>

The circumstances here meet this standard and therefore a waiver is clearly justified. Strict compliance with a retroactively applied rule here will not serve the public interest. Certainly A+ acted in good faith to comply with what it perceived to be the applicable

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<sup>77</sup> 47 C.F.R. § 1.3.

<sup>78</sup> *Requests for Review of Decision of the Universal Service Administrator by Richmond County School District*, Order, 21 FCC Rcd 6570, 6572 ¶5 (2006) (internal references omitted) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972)).

Commission rules.<sup>79</sup> Indeed, as noted above A+ consulted with counsel about the applicable rules and was told that the *MasterMind Order* was the governing law, as was the case. And there was no violation of *MasterMind*.

In relying in good faith upon the published E-Rate Program and FCC rules and policies, USAC could not have known that over 5 years later, USAC would contend that more than the *MasterMind Order* applied to these issues in FY 2002. Considerations of equity and fairness, already outlined above as relates to retroactive application of policies, surely support and justify a waiver. The Commission has cited such factors in granting relief on appeal.<sup>80</sup>

So do considerations of hardship.<sup>81</sup> Again, it has now been 7 years since this application was filed and over 6 years since the funds were approved. Grant of a waiver would not in any way be suborning or endorsing conduct that allegedly involved waste, fraud or abuse of the benefits afforded under the Program. There is no evidence of any misuse of funds.<sup>82</sup> There is no evidence of any intent to defraud or misuse the E-Rate Program or the funds in question.<sup>83</sup>

A variety of competing vendors could meet these specifications. Due to the specifications' generality, the Yonkers could not have staged an unfair and effectively closed

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<sup>79</sup> The Commission has found such good faith actions to justify waivers in the past. See *Request for Waiver of the Decision by the Universal Service Administrator by Great Rivers Education Cooperative, Forrest City, Arkansas*, Order, 21 FCC Rcd 14115, 14119, ¶9 (Wireline Compete. Bur. 2006).

<sup>80</sup> See *Requests for Review of Decisions of the Universal Service Administrator by Approach Learning and Assessment Centers et al*, Order, 23 FCC Rcd 15510, 15513-14, ¶8 (Telecom. Access Policy Div. 2008), ("Approach Order").

<sup>81</sup> See *Request for Review of Decision of the Universal Service Administrator by Radford City Schools, Radford, Virginia*, Order, 23 FCC Rcd 15451, 15453, ¶4 (Telecom. Access Policy Div. 2008).

<sup>82</sup> See *Request for Waiver of the Decision of the Universal Services Administrator by Barberton City School District, Barberton, Ohio et al*, Order, 23 FCC Rcd 15526, 15530, ¶7 (Telecom. Access Policy Div. 2008).

<sup>83</sup> *Request for Review of the Decision of the Universal Service Administrator by New Haven Free Public Library, New Haven, Connecticut*, Order, 23 FCC Rcd 15446, 15449, ¶7 (Telecom. Access Policy Div. 2008).

bidding process. All bidders were on a “level playing field” and therefore there could have been no actual harm to the competitive bidding process.<sup>84</sup> There is no evidence that any other bidders were not considered.<sup>85</sup> Absent any demonstration of any such competitive advantage, the competitive bidding process should not be deemed to have been tainted.<sup>86</sup>

If the Commission finds that A+ erred, it could also conclude that theirs was a minor, clerical error. The Commission has held that procedural violations do not warrant recovery of funds.<sup>87</sup> Finally, the Commission has ruled that administrative errors do not constitute competitive bid violations.<sup>88</sup>

## V. CONCLUSION

USAC, after many years and many reviews and audits, bases its Denial on an unauthorized and unsupportable extension of the applicable law (i.e., *MasterMind Order*). Whatever E-Rate consulting services Ms. Sweeney provided in connection with the Yonkers FY 2002 application, USAC has failed to establish any violation of the fundamental tenet of that decision because no one associated with A+ or Integra was listed on Yonkers FY 2002 Form 470 or 471 or signed those forms.

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<sup>84</sup> See *Approach Order*, ¶8. Contrast with *Request for Waiver or Review of a Decision of the Universal Service Administrator by Exigent Technologies*, Order, 24 FCC Rcd 12720 (Telecom. Access Pol. Div. 2009).

<sup>85</sup> See *Request for Review of a Decision of the Universal Service Administrator by Aberdeen School District*, Order, 22 FCC Rcd 8757, 8763, ¶9 (2007) (“*Aberdeen Order*”).

<sup>86</sup> *Id.*, ¶8; See *Requests for Review of Decisions of the Universal Service Administrator by Delano Joint High School District et al.*, Order, 23 FCC Rcd 15399, 15403-04, ¶8 (Telecom. Access Pol. Div. 2008); *Request for Review of a Decision of the Universal Service Administrator by Hillsboro Independent School District*, Order, 23 FCC Rcd 15424, 15429, ¶10 (Telecom. Access Pol. Div. 2008).

<sup>87</sup> *Fifth Report and Order*, ¶19.

<sup>88</sup> See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School et al.*, Order, 21 FCC Rcd 5316, 5319-5320, ¶8 (2006).

Nevertheless, USAC's Denial asserts that A+ violated some unidentified "FCC guidance" interpreting *MasterMind* and the Federal Acquisition Regulation and therefore the COMAD remains justified. USAC has no authority to fill or expand a regulatory void by citing regulations that have no application to the E-Rate Program. Moreover, USAC has failed to even establish how its unidentified "FCC guidance" on *MasterMind* has been violated.

The fundamental and determinative fact – not countered by USAC – is that Yonkers made the decisions about what services it should seek support for and who should provide those services. Yonkers says so. Ms Sweeney, A+ and Integra do as well. The services were generically described. Various vendors were selected by Yonkers. The majority, including A+, were from state master contracts that had previously been competed. Moreover, A+ responds again to the "circumstances" that USAC claims support its Denial conclusions and establishes that they do not.

A+ respectfully submits that USAC cannot establish a violation of the competitive bidding rules by mere repetition that the circumstances create a conflict of interest and resultant control of Yonkers decision-making by A+. And that is essentially what USAC has done here. Nothing more.

For all these reasons and those set forth in the Request above, the Commission must reverse the USAC Denial and order that the COMAD be rescinded.

Respectfully submitted,



David Antar  
President  
A+ Technology Solutions, Inc.  
1490 North Clinton Avenue  
Bayshore, New York 11706

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Paul C. Besozzi  
Carly T. Didden  
Patton Boggs LLP  
2550 M Street NW  
Washington, DC 20037  
(202) 457-5666

*Counsel to A+ Technology  
Solutions, Inc.*

February 4, 2010

## CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 4th day of February, 2010, a copy of the foregoing Request for Review and Waiver Request has been served via electronic mail or first class mail, postage pre-paid, to the following:

Priya Aiyar  
Legal Advisor to Chairman Julius Genachowski  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Priya.Aiyar@fcc.gov](mailto:Priya.Aiyar@fcc.gov)

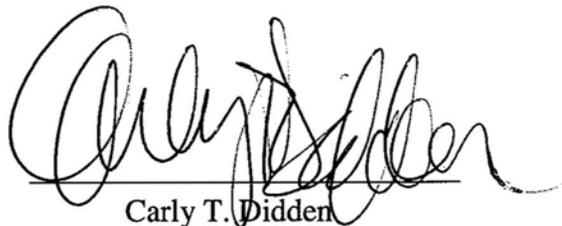
Randy Clarke  
Legal Counsel to the Bureau Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Randy.Clarke@fcc.gov](mailto:Randy.Clarke@fcc.gov)

Gina Spade  
Assistant Division Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Gina.Spade@fcc.gov](mailto:Gina.Spade@fcc.gov)

Sharon Gillett  
Bureau Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Sharon.Gillett@fcc.gov](mailto:Sharon.Gillett@fcc.gov)

Jennifer McKee  
Acting Division Chief  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Jennifer.McKee@fcc.gov](mailto:Jennifer.McKee@fcc.gov)

Letter of Appeal  
Schools and Libraries Division-  
Correspondence Unit  
Universal Service Administrative Company  
100 S. Jefferson Road  
P.O. Box 902  
Whippany, NJ 07981



Carly T. Didden