

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

In the Matter of: )  
 )  
Schools and Libraries Universal Service ) CC Docket No. 02-6  
Support Mechanism )

**PETITION FOR CLARIFICATION  
OF CONFIDENTIALITY OF CONSULTANT INFORMATION  
INCLUDED ON NEW FCC FORMS 470 AND 471  
AND DEFINITION OF “CONSULTANT”**

The Commission has submitted revised FCC Forms 470 and 471 to the Office of Management and Budget for approval. The Commission decided to revise those forms because it wanted “to streamline the application process for the federal universal service schools and libraries support mechanism and to remove outdated and unneeded questions.”<sup>1</sup> At the same time, the Commission decided that it wanted to use those forms to begin collecting certain new information, such as information about “consultants” who assist with the E-rate application process.<sup>2</sup> It is significant to note, however, that nowhere in the draft instructions for the forms or on the forms themselves does the Commission define the term, “consultant.” It is unclear, therefore, whether the Commission intended the definition to include every kind of entity and anyone who provides that kind of assistance, like state government employees for example.

**Part 1: The Confidentiality Issue**

Funds For Learning, LLC (“FFL”) does not object to the Commission beginning to collect information about E-rate consultants.<sup>3</sup> In fact, we think it might be useful for

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<sup>1</sup> Federal Register Articles (August 2, 2010), <http://www.federalregister.gov/articles/2010/08/02/2010-18864/notice-of-public-information-collections-review-and-approval-to-the-office-of#p-20>

<sup>2</sup> *Id.* See also *Draft FCC Forms 470 and 471*.

<sup>3</sup> *But see* Part 2 at p.9: “Definition of ‘Consultant’ and Other Unanswered Questions.”

the Commission to have it. What greatly concerns us, though, is that the Commission might decide to make this information publicly available. Therefore, we respectfully request that the Commission clarify for public comment whether it intends to make all or some of the information it collects about consultants in Forms 470 and 471 publicly available and, if it does, which information it intends to make publicly available and how it intends to do so. For the reasons set forth and discussed below, we urge the Commission not to make this information publicly available.

### **I. A Public Database Would Be Free Advertising for Consultants**

We believe strongly that if the Commission makes information about consultants public, especially *information that allows the public to tie consultants to specific applicants*, what will happen is that it will wind up creating a marvelous advertising opportunity for “consultants” who are inexperienced, unethical or worse. It will anoint them with instant credibility, allowing them to trade on a reputation that they decidedly do not deserve. Note too that the more applicants those consultants “assist,” the more times their names will appear in the Commission’s public database, and the more applicants this database associates them with, the more credibility they will appear to have. We have similar concerns when it comes to drop-down lists filled with the names of registered consultants. (*See* discussion in section VI below).

A public database will become, in effect, the great equalizer among companies and individuals who compete for applicants’ business in this still very new and wide-open marketplace. Team parity may be good for professional sports, and parity among E-rate consultants may be good too, but certainly not if it occurs overnight. As the Commission knows all too well, there is nothing to stop anyone with any amount of experience or training from setting up shop as an E-rate consultant. A restaurant industry sales representative today may decide to sell himself on the street as an E-rate expert tomorrow. Every so-called E-rate consultant, no matter how seriously that company or individual takes the responsibility that goes along with that label, will automatically become a “FCC-Registered Consultant” simply by filling out a form. The newly minted FCC-Registered Consultant who set up shop yesterday will use that seemingly impressive

registration tomorrow to help persuade an applicant to sign up as a client. One client will lead to two, and two to three and so on. And once that consultant's name starts appearing in the Commission's public database attached to all of those applicants, business will grow even faster. We do not believe that this is the kind of marketplace for E-rate assistance that the Commission wants to have a hand in helping to create.

## **II. A Public Database Would Create Unexpected Procurement Process Problems**

A public database tying E-rate applicants to consultants will make it increasingly difficult if not impossible for E-rate consultants, who do not provide procurement-related services, to continue isolating themselves from their clients' procurement-related activities. What always seems to get lost or pushed aside in policy discussions about E-rate consulting is that "E-rate consulting" and "procurement consulting" are NOT one and the same. Advising organizations about E-rate regulations and helping them to complete E-rate paperwork, which is what E-rate consultants do, is completely different from and has nothing whatsoever to do with specifying equipment and evaluating proposals, which is what procurement consultants do. What happens is that some consultants, who advertise themselves as E-rate consultants, also provide procurement and/or network design services. Funds For Learning is NOT one of them. By design, FFL has divorced itself completely from those kinds of *additional* services, and our contracts with every single one of our clients make that perfectly clear.

FFL's objective has always been to stay as far away as possible from the E-rate procurement process. Unfortunately, though, rather than helping FFL and companies like us to maintain our safe distance from this minefield, the Commission is going to push all of us closer to it -- if it publicly ties applicants to the organizations and people who help them. That is because if the Commission's database links our company's name publicly with all of our clients, which include many of the country's largest school districts, we guarantee that service providers will use that information first to identify our clients and then to try to reach or even market to them through us. We trust that the Commission will agree that it is unfair and unreasonable, not to mention poor public policy, to place

any company in that kind of awkward and difficult position, especially where, as here, the need to do so is, at best, not entirely clear.

When it comes to the competitive bidding process, the Commission has announced new rules recently and USAC has embarked on new activities that seem to be evidencing a rather dramatic shift in policy. Rather than simply trying to clean up the competitive bidding process, it looks to us like the Commission has decided to do its best to sanitize it completely. If that is the case or even if the Commission's interest in competitive bidding issues remains unchanged, we urge the Commission to consider very seriously the potential dilemma that we have outlined here, as public disclosure of this kind of information is far more likely to hurt than help the E-rate procurement process.

### **III. A Public Database Would Reveal Highly Confidential Business Information**

A public database that generates or make it easy to create a list of clients attached to every consultant in that database will result in the disclosure of highly confidential, proprietary business information. For-profit companies account for a very large number of the organizations that provide E-rate consulting and E-rate management assistance to schools and libraries, and the E-rate community holds many of them in very high regard. At the end of the day, though, even though they do "good" work, they still are businesses. Therefore, to stay in business and earn a profit, they have no choice but to compete against each other for new business. To do that successfully, they must closely guard their most sensitive business assets, and one of the most valuable assets that any business owns is its *client list*.

While it was deliberating over whether to make consultant-client information public, we suspect that this was not an issue that the Commission even considered. It is not that obvious, we admit. The reality, though, is that this kind of unwarranted disclosure is very much an issue and a serious one. Unintended or not, the disclosure of highly confidential, proprietary business information will result if the Commission gives the public an electronic tool to link consultants and applicants together. That is why we urge the Commission to consider this issue very carefully and to clarify it now.

We want to emphasize that this is by no means a matter of little or no real consequence – just the opposite. FFL has always worked hard to keep its client information confidential, and not just from competitors. Over the years, it has steadfastly refused to divulge this information to vendors. Just like any other for-profit company and many non-profit ones too, we consider it a very poor business practice indeed to share publicly the names of our clients or the scope of services we provide to them. It is important to note too that this kind of confidentiality does not concern only us. Indeed, in many instances, our school district clients contractually require us not to publicize their names without their express, written permission, and we are sure that many of our competitors are bound by similar requirements. We take our obligation in this regard very seriously. We are equally serious about protecting the substantial investment of time and money that FFL has made over the last eleven years to establish its reputation and the client base we have built as a result of it. That is why, as a condition of employment, everyone who works for our company is required to keep FFL’s clients’ names confidential.

Helping to ensure that highly confidential information submitted to the Commission on documents and forms remains that way is something that that the Commission does routinely. Thus the notion of doing what it can to protect the confidentiality of sensitive business information, like client lists, is nothing new. That is exactly why the Commission issues protective orders pursuant to its authority under Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.331 of the Commission’s rules, 47 C.F.R. § 0.331. In the past, the Commission has granted special protection for materials, including client lists, which, if released to competitors, would allow those competitors to gain an unfair advantage in the marketplace.<sup>4</sup> The Commission repeatedly has found that such enhanced protection

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<sup>4</sup> See, e.g., *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, Second Protective Order, WC Docket No. 06-74, ¶ 3 (July 7, 2006); *SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control*, Second Protective Order, WC Docket No. 05-65, ¶ 3 (May 9, 2005); *Applications of AT&T Inc. and Cellco Partnership d/b/a/ Verizon Wireless For Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, Second Protective Order, 24 FCC Rcd 14569 (WTB 2009); *Applications of AT&T Inc. and*

for highly sensitive categories of information appropriately balances the Commission’s and the public’s needs on the one hand and the parties’ interests in safeguarding highly sensitive data on the other.<sup>5</sup>

#### **IV. A Public Database Would Make It More Difficult For Certain Applicants To Receive E-rate Assistance**

We urge the Commission to consider very carefully what impact publicly disclosing the names of applicants and their consultants may have on the ability of “troubled applicants” to get the good, sound, reliable E-rate assistance they so badly need – after they get in trouble. We believe that public disclosure of this kind of information could very well have a chilling effect on the willingness of experienced consultants to take on those kinds of applicants as new clients. Here is the reason why. What will happen when applicants use the Commission’s database to identify Consultant X as the consultant responsible for assisting Troubled Applicant Y? Since the Commission’s database is unlikely to reveal the date on which the parties’ engagement actually began and, equally if not more important, whether the applicant had engaged a different consultant during the “bad” years, will that applicant’s troubled past wind up tarring the new consultant too?

In the marketplace for E-rate support services, applicants look for consultants with good, solid, successful, unblemished reputations, and for good reason. Therefore, we have to wonder how quick experienced consultants will be to risk having their reputations tarnished by having their names associated with one or more “troubled

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*Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, Second Protective Order, 24 FCC Rcd 7182 (WTB 2009); *Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB Docket 07-18, Protective Order, 22 FCC Rcd 12797 (MB 2007) (adopting a second protective order); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, MB Docket No. 05-192, Order, 20 FCC Rcd 20073 (MB 2005) (adopting a second protective order).

<sup>5</sup> See, e.g., *AT&T/BellSouth Second Protective Order* ¶ 3.

applicants” in a public database. This is a factor that every consultant will have to weigh very carefully before deciding to bid on business from any “troubled applicant.”

#### **V. USAC Collects The Same Consulting Information Now on Letters of Agency**

We wholeheartedly agree that the Commission and USAC should be able to access easily the contact information for anyone involved in helping to prepare an applicant’s forms, but only the Commission and USAC should have access to that kind of confidential, proprietary business information. For that, the existing Letter of Agency (“LOA”) process, which USAC has had experience for years administering, is a much more appropriate method. It is timely, it specifies the scope of engagement, and it is private between USAC, the consultant and the applicant. To enable the Commission and USAC to access and use the data on these forms more easily, USAC, if it has not already done so already, can create a database where all of that information can be entered as these forms arrive from applicants.

#### **VI. A Drop-Down List of FCC-Registered Consultants Could Create the Misleading Impression That the Commission Has Endorsed Those Consultants**

To collect the information about consultants that the Commission says it needs, realistically, we see three options: (1) use the existing LOA process to get this information into USAC’s database; (2) collect and transfer this information into USAC’s database after applicants or consultants type it into the “fill-in-the-blank” fields on the new forms; or (3) on the new forms, display a drop-down list of FCC-Registered Applicants, have the user select its consultant from that list, populate the blank fields with the information associated with consultant selected, and then transfer that information into USAC’s database.

Again, we believe that the LOA process continues to be the best solution for gathering this kind of data, as it addresses the legitimate interests, needs and concerns of everyone who has a stake in the collection of this particular kind of information. The next best solution, in our opinion, is the second option -- transferring the information *typed into* the “fill-in-the-blank” fields on the electronic forms into USAC’s database.

Choosing the drop-down list option, we believe firmly, would be a mistake, but that is the direction the Commission seems to be headed. But before that ship sails, we ask the Commission to please consider the following not so obvious, but nevertheless very serious problem, that is very likely to result from that approach.

At its recent applicant training program in Washington, DC, USAC mentioned that it was planning on installing a drop-down list of FCC-Registered Consultants on its website for the public to use to make it easier to complete the new versions of the E-rate application forms. There is a cost, however, for convenience. As we discussed at the outset in Section I, *any* list of FCC-Registered Consultants that USAC offers up to applicants, *regardless of where or how it is generated*, becomes, in effect, a free advertising and promotional platform for consultants. For the “not-so-good” ones, this is a marketing dream come true, and every profession, unfortunately, has its share of underperforming members. Naturally, that class of consultants will be delighted to be included in a drop-down list of FCC-Registered Consultants. That is because they know full well that when applicants see their names listed there, it will leave a large enough percentage of potential clients with the impression that the Commission has given those consultants an official endorsement, and that the registration actually carries some indefinable weight. Rest assured, those companies and individuals will promote themselves as “FCC-Registered Consultants,” and they will direct potential clients to the USAC website, not only to prove it, but to trade on whatever perceived value they can manage to assign to the Commission’s mythical endorsement.

As discussed before, there will be manual, “fill-in-the-blank” fields on each of the new forms where the person completing it will be able to type in, if applicable, the name and contact information of the consulting firm or individual(s) that assisted with and/or signed the form. Since those “fill-in-the-blank” fields on the new, electronic E-rate application forms, like the fields on the electronic applications now, are tailor made for gathering and transferring information to USAC’s database and, moreover, since the forms do not come with any potentially serious side effects when they are stripped of drop-down consultant lists, it certainly would appear that of the two options, this one

makes far more sense for the Commission to implement.

## **VII. Signatory Information on E-rate Forms is Already Kept Confidential**

We are not suggesting anything unusual or unprecedented in connection with the E-rate program, as the Commission has decided already not to make all of the information it collects on Form 470 and 471 public. For example, USAC already keeps the contact information for the authorized signors of the Form 471 confidential by stripping from its public database all contact information for the authorized signors of the Form 471. Therefore, we ask the Commission to instruct USAC, in a similar fashion, to keep the names of anyone listed as assisting applicants in the preparation of their E-rate applications confidential. The public should not be able to tie applicants to consultants by using USAC's data retrieval tool or any other software to generate that kind of information.

### **Part 2: Definition of "Consultant" and Other Unanswered Questions**

Next funding year, when applicants begin using the new E-rate application forms, they will have to provide for the first time the names of and contact information for any "consultants" who have provided them with E-rate application help. The draft Form 470 requires this information "if a consultant is assisting you with your application process." On the draft Form 471, this requirement is stated slightly differently. There this information is required "if a consultant is assisting you with your application."

The instructions to neither form defines the term, "consultant." Nor do they define the terms, "assisting you with your application process" or "assisting you with your application." By leaving the meaning of all of these terms to chance, applicants will have no choice but to define them themselves. This is likely to lead to differing interpretations among applicants on the one hand and between applicants and the Commission/USAC on the other. Multiple other questions of interpretation and application abound too, the most obvious of which we have included in the list below. One thing we have learned from the

short history of the E-rate program is that leaving important issues like this unaddressed for too long will lead inevitably to disagreements, frustration, anger, most likely the denial of funding commitments and funding, and possibly even litigation. No one wants anything like that to happen. Therefore, we respectfully request that the Commission clarify these words and terms and the issues related to them before applicants have to begin completing these forms:

1. In this context, what is the definition of the term, “consultant”?
2. Is a state E-rate Coordinator a “consultant”? A regional service agency employee? Someone who works for a non-profit organization? A local volunteer?
3. To be a “consultant,” must the company or individual receive a fee for “assisting” with the application process or the application or is the receipt of payment for this kind of “assistance” irrelevant? (It would seem logical that the Commission would be particularly interested in consultants who provide so-called free support to applicants.)
4. To constitute “assistance” must the assistance be part of a dedicated, ongoing effort to “assist”? What if, for example, the “assistance” consists only of answering an applicant’s questions by email or phone on an irregular, ad hoc basis?
5. Is there an amount of “assistance” that the Commission will consider *de minimis* and thus unnecessary to report?
6. What recourse will a company or an individual have if an applicant lists that company or individual incorrectly or by mistake on its form as a “consultant,” or if the so-called “consultant” disputes that it actually is a “consultant” and/or that it assisted with the application process or application?

7. What if an applicant receives consulting assistance from multiple sources simultaneously and in relatively equal amounts – e.g., from a company that advertises itself as an E-rate consulting company and a representative from the state library system? Must the applicant list every “consultant” who helps? If not why not? If so, how will applicants report multiple consultants on their forms?

Respectfully submitted,

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