

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

In the Matter of)	
)	
Requests for Waiver and Review of)	
Decisions of the Universal Service)	
Administrator by)	
)	
Networks & More! Inc.)	SLD File Nos. 229937, <i>et al.</i>
Island Heights, NJ)	
)	
Long Branch Public Library)	SLD File No. 329836
Long Branch, NJ)	
)	
Freehold Township School District)	SLD File No. 429735
Freehold, NJ)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

APPLICATION FOR REVIEW

Pursuant to section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, Networks & More! Inc., (Networks & More) hereby requests Commission review of the Wireline Competition Bureau’s March 14, 2012 decision in the above-captioned matter.¹ As shown herein, the Bureau’s decision has no factual basis, is contrary to Commission precedent, and reflects fundamental procedural errors. It should accordingly be reversed in its entirety or, at a minimum, remanded to the Bureau for further review.

¹ Requests for Waiver and Review of Decisions of the Universal Service Administrator by Networks & More! Inc., *et al.*, *Order*, DA-12-403 (rel. March 14, 2012) (*Order*). Networks & More is a service provider registered with USAC under Service Provider Identification Number 143004355. Networks & More provides schools and libraries with various Internet services, including E-Rate-eligible Internet e-mail service.

I. BACKGROUND

In these proceedings the Bureau denied 15 appeals filed by Networks & More, and an appeal filed by the Long Branch Public Library, seeking review of decisions by the Universal Service Administrative Company (USAC) under the Commission's E-rate program.² The decisions involved applications submitted for Funding Year 2003, applications which USAC rescinded in 2006 based on a finding that "service provider contact information appeared on the cited Form[s] 470."³

Networks & More promptly sought review of these determinations, pointing out that USAC's determination was in error. In fact, the contact information supplied on the Form 470 applications did not reference Networks & More but instead was for the relevant school districts. Networks & More made clear, moreover, that any involvement it had in preparing the applications at issue was ministerial or clerical in nature and did not in any way "taint" or otherwise affect the competitive bidding process. Networks & More explained that it scrupulously complies with both the letter and spirit of all published rules, policies and interpretations of both USAC's Schools and Libraries Division (SLD) and the FCC.⁴

Notwithstanding the above, and without conducting further inquiry, the Bureau found that Networks & More had improperly assisted applicants with the preparation of their

² Id.

³ See, e.g., Notification of Commitment Adjustment Letter, Funding Year 2001. Funding Commitment Adjustment Report Form 471 Application Number: 22937. ¶ 1. (dated November 2, 2006)

⁴ See, e.g., CC Docket No. 02-7, Networks & More! Inc. Request for Review of Decision by Administrator, Application No. 375144 (filed Jan. 2, 2007).

FCC Forms 471.⁵ No factual basis is cited for this finding, however – the Bureau did not, for example, state what type of assistance Network and More may have provided to school districts during Funding Year 2003, nor did it discuss whether or how the competitive bidding process was in fact “tainted” by Networks & More’s actions. The Bureau decision instead merely asserts that “any direct involvement by the service provider in the preparation and submission of the FCC Form 470, even clerical or data entry assistance, is a violation of the Commission’s competitive bidding rules” and that “Networks & More’s actions are a clear violation of the prohibition against service providers filling out forms that require an applicant’s certification, as well as a violation of the mandate that the FCC Form 470 be completed by the entity that will negotiate with prospective bidders.”⁶

II. DISCUSSION

Section 1.115 of the Commission’s rules provides for Commission review of Bureau decisions where it can be shown that the action taken pursuant to delegated authority “is in conflict with statute, regulation, case precedent, or established Commission policy;” “involves application of a precedent or policy which should be overturned or revised;” where an “erroneous finding as to an important or material question of fact” has occurred; or if there is “prejudicial procedural error.”⁷ As shown below, the Bureau’s determination in this proceeding reflects errors in each of these areas and should accordingly be set aside by the Commission on review.

A. The Bureau’s Decision Lacks Factual Foundation and Runs Contrary to

⁵ Id., ¶ 2. By erratum issued March 19, 2012, the Bureau replaced the reference to “Form 471” in the sentence quoted above with a corrected reference to “Form 470.”

⁶ Order, ¶ 2.

⁷ 47 C.F.R. § 1.115(b)(2).

Applicable Commission Precedent.

As noted above, the Bureau's decision simply ignores the fact that USAC's original determination was based on an egregious error. The Form 470's submitted in this case did not list Networks & More information in the contact fields, as USAC originally found, but instead listed the applicants' information in the contact field as required by USAC procedures and Commission precedent.

In its rush to uphold USAC's decision, however, the Bureau substituted a different basis for USAC's erroneous decision, without, however, *making any factual determinations whatsoever* as to the nature or extent of the assistance supposedly provided by Networks & More to school districts. Nor did the Bureau attempt to ascertain whether Networks & More's actions in fact had any actual improper influence on the applicants' competitive bidding processes.

In failing to conduct any such inquiry, the Bureau's actions are in direct conflict with basic principles of administrative law and applicable Commission precedent, and must be accordingly be set aside by the Commission on review. In its *Academy of Careers* Order, for example, the Commission specifically found that USAC had improperly denied requests for funding without sufficiently examining whether the Commission's rules were violated due to improper third-party participation in the applicants' competitive bidding processes, and remanded the underlying applications to USAC with instructions "to conduct further investigation and analysis prior to denying funding for suspected competitive bidding violations of the type addressed herein"⁸ The Commission

⁸ See *Request for Review of the Decision the Universal Service Administrator by Academy of Careers and Technologies San Antonio, TX, et al.* CC Docket No. 02-6, Order, FCC 06-55 (May 19, 2006), paras. 6-8.

further directed USAC to provide applicants “an opportunity to demonstrate that they did not violate the Commission’s competitive bidding rules.”⁹

In its subsequent *Caldwell Parish* decision, the Bureau granted reviews of a number of decisions denying E-rate funding to applicants finding that USAC had failed to conduct a sufficient examination of whether a service provider’s actions on behalf of the applicants – which, like the applications at issue here, included “ministerial and clerical” work – amounted to an actual violation of the Commission’s competitive bidding rules.¹⁰

In the present case, USAC did in fact seek additional information from Networks & More regarding preparation of the subject Form 470’s, which Networks & More readily provided. That information indicated that Networks & More’s involvement in the Form 470 process was minimal and caused no competitive harm.¹¹ But the Bureau’s *Order* contains no information regarding the results of any such inquiry. It simply *asserts* Networks & More assisted applicants with the preparation of their FCC Forms 470, and applies a *per se* rule which apparently holds that no such assistance is permitted.

As a result of the Bureau’s failure to conduct any factual inquiry or include the results of such inquiry in its decision, the Commission has no basis whatsoever for upholding the

⁹ Id.

¹⁰ See *Request for Review of the Decisions for the Universal Service Administrators of the Universal Service Administrator by Caldwell Parish Schools District, et al.* CC Docket No. 02-6, Order, ¶ One. The Bureau denied review, however, in the case of one applicant where it was shown that an employee of the service provider (1) advised the applicant in determining what types of services it needed and for which it would seek bids; (2) assisted the application in filling out the FCC Form 470; and (3) submitted the FCC Form 470 from its own offices.¹⁰ In the Bureau’s view, these actions apparently amounted to a *per se* violation of the Commission’s competitive bidding rules. As discussed below, however, it is highly questionable whether a Bureau decision on these grounds would withstand scrutiny by a court under the Administrative Procedure Act.

¹¹ Networks & More did not offer or get involved in any of the following services: Technology Plan development, Form 470 certifications, request for proposal development, vendor evaluations, and/or vendor selections.

Bureau's decision – it simply cannot tell to what extent any assistance actually occurred or what the nature of that assistance was. There is certainly no basis for the Commission to determine whether that assistance was of any significance to the competitive process.

Because the Bureau failed to present or consider any facts and circumstances regarding the ministerial and clerical assistance provided by Networks & More to applications, or whether that assistance in fact amounted to improper interference with the Commission's competitive bidding rules, its actions are by definition arbitrary and capricious, in contravention of the federal Administrative Procedure Act, and contrary to the specific factual inquiry requirements of the Commission's *Academy of Careers Order*. The *Order* should be set aside on this basis alone.

B. The Bureau's Application of a *Per Se* Rule to Determine Competitive Bidding Violations Is Procedurally Improper.

Even if the Bureau had provided a factual basis for upholding USAC's determinations (or if one might be inferred from the conclusory assertions contained in the Bureau's *Order*), the Bureau's practice of applying a *per se* "no assistance" rule for Form 470 is improper and should not be permitted by the Commission.

Provision of ministerial and/or clerical assistance to applicants in completing Form 470's was a common practice in the early days of the E-rate program. As the service provider in the *Caldwell Parish* explained to the Bureau in 2007, USAC's rules and procedures at the time did not specifically prohibit such actions.¹² Indeed, USAC's rules and procedures *still do not prohibit such actions*.

¹² See *Request for Review of the Decisions for the Universal Service Administrators of the Universal Service Administrator by Caldwell Parish Schools District, et al.* CC Docket No. 02-6, Order.

For example, in a web page entitled “Proper Service Provider Assistance to Applicants,” USAC’s instructions state that in certain limited circumstances service providers *can provide assistance* to applicants during the application process, so long as they act in a “neutral, advisory role.”¹³ Applicants can also request assistance from service providers with writing Requests for Proposals (RFPs), again so long as the RFP is not written in such a way as to exclude other bidders.¹⁴

USAC’s website does make clear that some roles are “inappropriate” for service providers. For example, the website states that a service provider cannot approve an applicant’s technology plans, nor can a service provider serve as the Form 470 contact person.¹⁵ Similarly, USAC’s website makes clear that service providers may not provide completed or duplicate RFPs, cannot sign the Form 470 or 471, or make final determinations about eligibility. With regard to competitive interference, USAC’s website indicates that an applicant is required “to conduct a fair and open competition to seek the most cost-effective solution to its technology needs”¹⁶ but the instructions do not even hint, let alone state clearly, that *any* ministerial or clerical assistance provided to applicants in the process of completing Form 470 will automatically disqualify the application, no questions asked.

Yet this *per se* approach is routinely taken by the Bureau with respect to applications where it appears a service provider has provided ministerial assistance in

¹³ <http://www.usac.org/sl/providers/step01/proper-service-provider-assistance.aspx>. Service providers “may offer technical assistance on the development of a technology plan, so long as that assistance can be interpreted as neutral and in no way as having an undue influence on the applicant's ability to conduct a fair and open competition for the necessary technology, services, and products.” *Id.*

¹⁴ *Id.*

¹⁵ <http://www.usac.org/sl/providers/step01/inappropriate-roles-providers.aspx>.

¹⁶ *Id.*

completing Form 470. In support of its *per se* “no assistance” rule, the Bureau relies on its 2008 *Caldwell Parish* decision, which in turns cites a document referenced on USAC’s website consisting of a PowerPoint presentation given by USAC representatives in a 2001 “Train the Trainer” presentation. But even if the referenced presentation clearly stated the “no clerical assistance” rule – which it does not – that fact that USAC may have published a document on an obscure page of its website hardly provides service providers with reasonable notice such activity is prohibited. In any event, publication of such a document – which is after all, merely a training slide deck, cannot overrule the specific factual inquiry requirements established in the Commission’s *Academy of Careers* order.

To the extent, therefore, that the Bureau’s decision in this case involves application of the *per se* “no assistance” rule announced in the *Caldwell Parish* order, it clearly constitutes an example of the “application of a precedent or policy which should be overturned or revised” under section 1.1115 of the Commission’s rules. In remanding this case, the Commission should accordingly instruct the Bureau in no uncertain terms that it is required to conduct a meaningful factual inquiry into the nature of any assistance provided by Networks & More to applicants in this case, and must also make a reasoned determination as to whether any competitive harm in fact occurred as a result of such actions.

III. CONCLUSION

The Bureau’s decision in the above-referenced case should be reversed by the Commission on review. As shown above, the Bureau’s actions in this case have no factual basis, are contrary to Commission precedent, and reflect fundamental procedural

error. At a minimum, the matter should be remanded to the Bureau for further consideration, with specific instructions to establish a factual basis for any finding of competitive interference, including careful examination of the facts and circumstances surrounding actions taken and an evaluation of any actual adverse impacts on the competitive bidding process.

Respectfully submitted,



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Enclosure (Federal Communications Commission DA 12-403 APPENDIX)

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Via Fax: 973-599-6582

APPENDIX

Petitioners	Application Number(s)	Funding Year	Date Appeal Filed
Networks and More! Inc.	229937	2001	January 3, 2007
	251684	2001	
	319633	2002	
	297874	2002	
	298093	2002	
	296534	2002	
	296304	2002	
	298010	2002	
	329836	2002	
	379196	2003	
	355642	2003	
	363306	2003	
	375144	2003	
	370474	2003	
429735	2004		
Freehold Township School District	429735	2004	April 5, 2006
Long Branch Public Library	329836	2002	June 29, 2009