



Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 27 2004
FCC-15-1-ROOM

In the Matter of

Consolidated Request for Review by)
Union Parish School Board of)
Decisions of Universal Service Administrator)
Regarding Union Parish School Board)
)
)
TO: The Commission)

CC Docket No. 02-6

CONSOLIDATED REQUEST FOR REVIEW

Union Parish School Board
P.O. Box 308
Farmerville, LA 71261

Stephen J Katz
Rankin, Yeldell & Katz
(A Professional Law Corporation)
411 South Washington Street
Bastrop, LA 71220
Telephone: (318) 281-4913
Telecopier: (318) 281-9819
Email: sztak@aol.com
*Counsel to Union Parish School
Board*

February 24, 2004

No. of Copies rec'd 0
List A B C D E

TABLE OF CONTENTS

	Page
SUMMARY	i
I. UNION PARISH SCHOOL BOARD'S INTEREST IN THE MATTER PRESENTED FOR REVIEW	5
II. STATEMENT OF FACTS	5
A. Union Parish School Board	5
B. Tom Snell	6
C. FCC Competitive Bidding Rules in 1999	7
1. Union Parish Sought Competitive Bids	9
2. Union Parish Also Complied with Local and State Competitive Bidding and Procurement Laws	11
III. QUESTIONS PRESENTED FOR REVIEW	
A. Was There a Prohibited Conflict of Interest Under Applicable Law That Compromised Union Parish's Competitive Bidding Process?	14
B. Beyond Complying With the Competitive Bidding Rules, Did Union Parish Comply With the Underlying Intent of the Competitive Bidding Process?	17
1. Union Parish's Competitive Bidding Process Fulfilled the Underlying Intent of the Competitive Bidding Process	17
2. Telcomm Services and Internal Connections Services Were Identical Whether Or Not Send Was A Service Provider.	18
3. Later-Adopted Commission Precedent Regarding Competitive Bidding is Inappropriate to the Union Parish Case.	19
C. Did the Administrator Exceed Its Authority When It Interpreted Current FCC Precedent Regarding Competitive Bidding and Then Retroactively Applied Such Interpretation to Union Parish's Granted Applications?	25

1.	The Administrator Exceeded its Authority in Interpreting Commission Precedent	25
2.	The Administrator Exceeded its Authority in Retroactively Applying its Interpretation of Later-Adopted Commission Precedent to Union Parish’s Granted Applications	27
3.	The Administrator Has Advocated Applying Only Program Rules Relevant to a Particular Funding Year to Its Own Audits	34
D.	Did the Administrator Exceed its Authority by Interpreting the FCC’s Competitive Bidding Rules As Including Part 48 Federal Acquisition Planning Rules?	34
E.	Do the Facts in Union Parish’s Case Warrant Waiver of the Commission’s Competitive Bidding Rules?	36
F.	Did the Administrator Exceed its Authority In its Post-Commitment Review?	41
IV.	RELIEF SOUGHT	44
V.	CONCLUSION	45

SUMMARY

In 1999, Union Parish School Board ("Union Parish"), a school system in Farmerville, Louisiana, filed applications for funding for a variety of services offered through the universal service support mechanism for schools and libraries ("E-rate Program"). The Technology Systems Administrator for Union Parish, Tom Snell, was listed as the contact person on Union Parish's Form 470 applications.

Snell holds a fifteen percent minority, non-controlling unitholder interest in a technology services company, Send Technologies ("Send"). Snell is not now, nor has he ever been, an employee of Send, and Snell has never undertaken any operational responsibility for Send. Snell is a passive investor. As described herein, immediately upon learning that Send had responded to Union Parish's Form 470 applications with competitive bids, Snell informed the Superintendent of Union Parish, who sought and received a specific determination that Snell's unitholder interest would not pose a conflict of interest under Louisiana state law if Send were awarded E-rate contracts. Notwithstanding the specific finding that Snell did not have a conflict of interest, out of an abundance of caution Union Parish walled Snell off and insulated him from the Union Parish competitive bidding process for E-rate services and subsequent decision making involving Send in order to ensure a full and fair competitive bidding process, both in reality and perception.

In 1999 and even today, the FCC's rules on competitive bidding do not address such alleged conflicts of interest, but they do require compliance with local and state competitive bidding and procurement laws - which Union Parish observed. Union Parish received a determination from the State of Louisiana that Snell's unitholder interest in Send did not pose a

conflict of interest. This is significant, since the FCC's rules specifically provide that the federal law is not intended to preempt the state law on such matters. The Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") also did not have any Support Mechanism rules in place in 1999 that would have provided further direction to Union Parish on conflict of interest issues. Union Parish complied with all known federal, state and local competitive bidding rules with respect to the E-rate Program.

Through the competitive bidding process, Send was found to be the low-cost provider for Internet access services and internal connections, and it was awarded contracts to provide those services in 1999, 2000 and 2001. Union Parish's Form 470 applications, which are the subject of this Request For Review, were granted in 1999, 2000 and 2001. In reliance on such grants, valuable Internet access services, telcomm service, and internal connections were provided by many service providers including Send, and paid for by Union Parish.

On January 31, 2003, three years after the applications were granted and funded, the SLD issued Commitment Adjustment Letters seeking to void the granted applications and rescind the funding already allocated pursuant to the applications. The stated basis for the "adjustments" emanated from Commission precedent regarding competitive bidding that was adopted years after the Union Parish applications were granted. Based on this precedent, which can be easily distinguished from the facts in the Union Parish case, the SLD asserted that Union Parish's Form 470s contained "service provider contract information" which violated the intent of the competitive bidding process. Union Parish's Form 470 applications do not contain "service provider contact information," but they were nevertheless declared invalid and all funding related thereto was rescinded.

Union Parish filed with USAC a consolidated letter appeal on May 17, 2003, which was denied on January 20, 2004. The Administrator stated in its denial, among other things, that "the authorized contact person listed on the Form 470 cannot be associated in any way with a service provider as this violates the intent of the bidding process." Again, the precedent that forms the basis of the Administrator's assertion is based upon FCC cases that are factually inapplicable to the Union Parish case, and were decided years after the Union Parish applications were granted and funded.

The primary issues for the Commission's consideration in this Request for Review are: (1) whether unitholder interests held by an employee of Union Parish in a service provider amounted to a prohibited conflict of interest under applicable law and compromised Union Parish's competitive bidding process under the E-rate Program; (2) whether the competitive bidding process undertaken by Union Parish complied with the letter, spirit and intent of the Commission's competitive bidding rules; (3) whether Commission precedent regarding competitive bidding from 2001 (and thereafter) can be properly applied to Union Parish's applications, granted in 1999 and 2000; (4) whether USAC exceeded its authority when it interpreted such later-adopted FCC precedent and retroactively applied it to Union Parish's granted applications; (5) whether the Administrator exceeded its authority in applying Part 48 federal procurement rules to Union Parish's case, which the Commission has acknowledged are wholly inapplicable to the E-rate Program; (6) whether the facts of Union Parish's case warrant waiver of the Commission's competitive bidding rules; and (7) whether the Administrator exceeded its authority in the post-commitment review.

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

In the Matter of

Consolidated Request for Review by)	
Union Parish School Board of)	
Decisions of Universal Service Administrator)	CC Docket No. 02-6
Regarding Union Parish School Board)	
)	
TO: The Commission)	

CONSOLIDATED REQUEST FOR REVIEW

Union Parish School Board ("Union Parish"), through counsel, and pursuant to Section 54.719(c) of the Commission's rules,¹ hereby submits this Consolidated Request for Review ("Request for Review") seeking reversal of six decisions of the Administrator of the Universal Service Administrative Company ("Administrator" or "USAC" respectively), issued on January 20, 2004,² denying Union Parish's Consolidated Letter of Appeal ("Appeal").³ Send's Appeal, filed on April 1, 2003, sought the reversal of five Commitment Adjustment Letters ("CALs") issued by USAC's Schools & Libraries Division ("SLD") on April 24, 2003 to Union Parish.⁴ The CALS see to rescind over \$275,000.00 in federal funding awarded to Union Parish in 1999,

¹ 47 C.F.R. § 54.719(c).

² Letters (six) from the Universal Service Administrative Company to Stephen J Katz, counsel for Union Parish School Board regarding Union Parish School Board ("*Administrator's Decision on Appeal*"), attached hereto as Exhibit 1.

³ Letter from Stephen J Katz, counsel for Union Parish School Board to the Universal Service Administrative Company, Schools and Libraries Division, regarding appeal of commitment adjustment letters (May 17, 2003) ("*Appeal*"), attached hereto as Exhibit 2.

⁴ Letters from the Universal Service Administrative Company to Union Parish regarding commitment adjustments (April 24, 2003) ("*CALs*"), attached to Appeal as Exhibits 1-5.

2000 and 2001 for internal connections and telcomm services. The telcomm services were provided by BellSouth Telecommunications, Inc., CenturyTel of Central, Louisiana, Inc., AT&T Corp. as the long distance provider, Metrocall, Inc. for pager services and CenturyTel Wireless, Inc. for cellular services and Internal connections were provided by Global Data Systems, Inc., Dell Marketing, L.P., FRN and Anixter, Inc., all through the universal service support mechanism for schools and libraries ("E-rate Program"). In addition over \$300,000.00 of federal funding was sought to be rescinded to Send for internet access services and some internal connections service and is subject to another appeal, filed by Send, dated December 16, 2003. Hence over \$575,000.00 in funding is sought to be rescinded. Union Parish appealed all five CALs; the Administrator denied Union Parish's Appeal.⁵ This Request for Review seeks consolidation because the Administrator's stated reason for denying Union Parish's Appeal with respect to each CAL is the same:

After a thorough review of the appeal, the documentation
(audit report from the State of Louisiana Legislative Auditor)

⁵ Filing information regarding the five CALs at issue in the Request for Review is as follows: (1) Funding year: 1999-2000, Form 471, Application Number: 209497, FRN: 483189, service provider -BellSouth Telecommunications, Inc.; (2) Funding year: 1999-2000, Form 471, Application Number: 121741, FRN: 176108, service provider - Global Data Systems, Inc., rescission of \$13,194.90; FRN: 176115, service provider - Global Data Systems, Inc., rescission of \$4,149.00; FRN: 176121, service provider - Global Data Systems, Inc., rescission of \$4,149.00; FRN: 176128, service provider - Global Data Systems, Inc., rescission of \$3,456.00; FRN: 176132, service provider - Global Data Systems, Inc., rescission of \$3,456.00; FRN: 176141, service provider - Global Data Systems, Inc., rescission of \$ not stated; FRN: 176227, service provider - Anixter, Inc., rescission of \$ not stated; FRN: 176237, service provider - Diversi FIRE, Inc., rescission of \$ not stated; (3) Funding year 2000-2001, Form 471, Application Number: 160965, FRN: 385749, service provider - BellSouth Telecommunications, Inc., rescission of \$89,739.38; FRN: 385761, service provider - AT&T Corp., rescission of \$4,451.66; FRN: 405626, service provider - CenturyTel Wireless, Inc., rescission of \$368.05; FRN: 405655, service provider - Key Tech Communication Services, L.L.C., rescission of \$ not stated; (4) Funding year: 2000 - 2001, Application Number: 163210, FRN: 405275, service provider - Dell Marketing, LP, rescission of \$7,024.08; FRN: 405449, service provider - Anixter, Inc., rescission of \$39,388.22; (5) Funding year: 2001-2002, Form 471, Application Number: 229706, FRN: 594001, service provider - BellSouth Telecommunications, Inc., rescission of \$89,685.89; FRN: 594023, service provider - AT&T Corp., rescission of \$5,996.31; FRN: 594092, service provider - CenturyTel Wireless, Inc., rescission of \$3,428.45; FRN: 594323, service provider - Metrocall Inc., rescission of \$169.31; FRN: 618168, service provider - CenturyTel of Central Louisiana, Inc., rescission of \$7,637.26.

which was obtained by the SLD, it was determined that Mr. Tom Snell who is the authorized contact person listed on the cited Form 470 ..., also has a 15% ownership interest in the selected service provider (Send Technologies, LLC) as listed on the Form 471 application. *According to the rules of the Support Mechanism this is considered to be a conflict of interest and is in violation of the competitive bidding guidelines, as the authorized contact person listed on the Form 470 cannot be associated in any way with a service provider because this violates the intent of the bidding process regarding fair and open competition.* ⁶

Rules of the Support Mechanism require the applicant to provide a fair and open competitive bidding process. Per the SLD website, "... *A conflict of interest exists, for example, when an applicant's contact person, who is involved in determining the services sought by the applicant and who is involved in the selection of the applicant's service providers, is associated with a service provider that was selected.*" Since the applicant's consultant/contact person in this case has been determined to have a 15% ownership interest in the selected service provider from whom the applicant is requesting services, all funding requests that are associated with the cited Form 470 must be denied. Consequently, the appeal is denied. ⁷

Conflict of interest principals that apply in competitive bidding situations include preventing the existence of conflicting rules that could bias a contractor's judgment, and preventing unfair competitive advantage ... (*See, e.g., 48 C.F.R., §9.505(a),(b).*) ⁸

⁶ Appeal at 3 (emphasis added). Among the documents the Administrator reviewed in making its decision in Union Parish's Appeal was an audit report of the E-rate Program produced by Louisiana's former legislative auditor, Daniel Kyle. *E-Rate Program, Investigative Audit, State of Louisiana Legislature Auditor Daniel G. Kyle, Ph.D.* (Jan. 15, 2003). The audit solely addresses E-rate billing discrepancies that, as Kyle acknowledges in the report, Send promptly resolved. The billing discrepancies were not material and amounted to 2% of Send's overall revenue. Most importantly, the audit report does not address any of the SLD's concerns that are at issue in this Report for Review. Kyle later referred the audit to local law enforcement officials, but such audit referrals are required under state law. As the SLD is aware, however, state and local law enforcement officials in Louisiana reviewed the audit and declined to pursue any action against Send.

⁷ *Administrator's Decision on Appeal* at 2-3 (emphasis added). The "Support Mechanism" referred to above is the E-rate Program, which provides universal support to schools and libraries. The "rules of the Support Mechanism" refer to those guidelines and procedures adopted by the SLD and posted on its website as part of its administration of the E-rate Program.

⁸ *Id.* at 3.

FCC rules require applicants to seek competitive bids and in selecting a service provider to carefully consider all bids. FCC rules further require applicants to comply with all applicable state and local competitive bidding requirements. In the May 23, 2000 *MasterMind Internet Services, Inc.* (MasterMind) appeals decision, the FCC upheld SLD's decision to deny funding where a MasterMind employee was listed as the contact person on the FCC Form 470 and MasterMind participated in the competitive bidding process initiated by the FCC Form 470. The FCC reasoned that under those circumstances, the Forms 470 were defective and violated the Commission's competitive bidding requirements, and that in the absence of valid Forms 470, the funding requests were properly denied. Pursuant to FCC guidance, this principle applies to any service provider contact information on an FCC Form 470 including address, telephone and fax numbers, and e-mail address.⁹

The Commission should overturn the Administrator's decision, and direct the SLD to withdraw the CALs because: (1) There was no prohibited conflict of interest under applicable law that compromised Union Parish's competitive bidding process; (2) Union Parish complied with the letter and spirit of all applicable competitive bidding rules and the intent underlying such rules; (3) Later-adopted Commission precedent regarding the competitive bidding rules, including the MasterMind cases, is inapplicable to Union Parish's granted applications and involves easily distinguishable facts; (4) The SLD and the Administrator exceeded their authority when they interpreted current Commission precedent regarding the competitive bidding rules and retroactively applied such interpretations to Union Parish's E-rate applications granted in 1999 and 2000; (5) The Administrator exceeded its authority when it justified its actions in the Union Parish case by relying on Part 48 regulations that are wholly inapplicable to the E-rate program; and (6) The Administrator exceeded its authority in the post-commitment review of Union Parish.

⁹ *Id.*

I. UNION PARISH'S INTEREST IN THE MATTER PRESENTED FOR REVIEW.

Pursuant to Section 54.719 of the Commission's rules,¹⁰ any party aggrieved by an action taken by the SLD or the Administrator may appeal that decision, including applicants.

II STATEMENT OF FACTS.¹¹

A. Union Parish School Board.

Union Parish, a school system in Farmerville, Louisiana, participates in the E-rate Program to obtain funding for basic telecommunications, Internet services and internal connections. Pursuant to FCC, USAC and state competitive bidding rules, Union Parish sought bids for E-rate services beginning in 1998 and submitted the appropriate Form 470 applications to the SLD.¹² This Request for Review relates to applications for E-rate support filed by and granted to Union Parish for funding year 1999-2000 (Applications Nos. 1209497 and 121741), funding year 2000-2001 (Application Nos. 160965 and 163210) and funding year 2001-2002 (Application No. 229706).

¹⁰ 47 C.F.R. § 54.719

¹¹ Attached hereto are declarations of Tom Snell and Donna Cranford, all of whom have personal knowledge of the facts set forth herein.

¹² Schools and libraries seeking discounts under the E-Rate Program must file with the SLD a Form 470 application to start the competitive bidding process. A Form 470 describes the telecommunications services, Internet access and internal connections for which an applicant is seeking discounts. The SLD posts the Form 470s on its website where service providers may review them and then submit bids to the applicants for services they seek to provide to the applicants.

B. Tom Snell.

At the time the applications were filed, Tom Snell was the Technology Systems Administrator for Union Parish. Thus, Union Parish listed him as the contact person for the school system on its Form 470s. Snell did not sign any Form 470 or Form 471 for the funding years in question.

Snell holds a fifteen percent minority, non-controlling unitholder interest in a technology services company, Send Technologies. Snell is not now, nor has he ever been, an employee of Send, and Snell has never undertaken any operational responsibility for Send. Snell is a passive investor. Snell's ownership interest in Send is not attributable under applicable Louisiana state and local law. As described below, immediately upon learning that Send had responded to Union Parish's Form 470 applications with competitive bids, Snell informed the Superintendent of Union Parish who sought and received a specific determination that Snell's unitholder interest would not pose a conflict of interest under Louisiana state law if Send were awarded E-rate contracts. Notwithstanding the specific finding that Snell did not have a conflict of interest, he was nevertheless insulated from the Union Parish competitive bidding process for E-rate services, and subsequent decision making involving Send, in order to ensure a full and fair competitive bidding process, both in reality and perception.

It was impossible for Union Parish to know when it filed its initial Form 470 that in listing Tom Snell, its own Technology Systems Administrator as the contact person, it would, in retrospect, raise a theoretical question about the fairness of its competitive bidding process because Send would later bid for Union Parish's services.

C. FCC Competitive Bidding Rules in 1999.

At the time Union Parish filed its Form 470s, very little guidance was available to participants in the E-rate Program regarding the FCC's competitive bidding requirements. The competitive bidding rules at that time provided, and still provide:

§54.504 Requests for Services.

(a) *Competitive bid requirements.* Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

The FCC's rules regarding the E-rate Program have never defined prohibited associations, attributable interests, or other conduct that may represent a conflict of interest and a violation of the E-rate competitive bidding rules. To Union Parish's knowledge, the Support Mechanism rules of the SLD from 1999 also did not contain any guidance. The only other direction regarding competitive bidding procedures available to applicants like Union Parish in 1999 was outlined in broad language in the Commission's *Universal Service Order*.¹³ The *Universal Service Order* spoke in generalities about the competitive bidding process:

Competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them. Absent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand on universal service

¹³ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) ("*Universal Service Order*").

support mechanisms would be needlessly great. ¹⁴

...

[A]lthough we do not impose bidding requirements, neither do we exempt eligible schools or libraries from compliance with any state or local procurement rules, such as competitive bidding specifications, with which they must otherwise comply. ¹⁵

The FCC Form 470 used by E-rate applicants in 1999 asked for the name and contact information for the person to be contacted for questions regarding the form. ¹⁶ It did not seek information regarding the applicant's relationships with possible vendors and did not provide any information that would put applicants on notice that certain relationships between applicants and service providers could render the applications invalid. The FCC modified the Form 470 in September 1999, but it again failed to address any restrictions that may apply to the person listed as an applicant's contact. ¹⁷ The FCC, in fact, did not amend the Form 470 to instruct applicants regarding the contact information provided on the form until April 2002, well after Union Parish's Form 470s were filed and granted. ¹⁸

In compliance with FCC, USAC and Louisiana state rules in effect in 1999, Union Parish undertook, in good faith, a competitive process in which it sought competitive proposals for a variety of services.

¹⁴ *Id.* At 9029.

¹⁵ *Id.* at 9030.

¹⁶ FCC Form 470 (Dec. 1998).

¹⁷ FCC Form 470 (Sept. 1999).

¹⁸ FCC Form 470 (Apr. 2002)

1. Union Parish Sought Competitive Bids.

For each program year, Union Parish sought competitive bids as required under FCC rules by posting its Form 470 application on the SLD website. In its first program year, Union Parish exceeded the Commission's requirements by also actively soliciting quotes from local and national service providers for the school system's services. Union Parish issued additional bid solicitations in order to increase its opportunities to find service providers that would bid on services to rural schools like Union Parish's. Attracting the attention of service providers in rural areas was a difficult task in 1998, 1999, 2000 and 2001, but is less so today. Quotes were specifically solicited from LDS, BellSouth, and UUNet Technologies, Inc. Donna Cranford, business manager for the school board, solicited the service quotes.¹⁹ Send provided quotations for Internet services in 1999, 2000 and 2001 and for internal connections services in 2000. In response to its Form 470, Union Parish also received inquiries from other vendors. Mastermind Internet Services submitted an inquiry regarding Internet services in 1999 and Icon Technologies submitted inquiries in 1999 and 2000 for Internet services and internal connections. The costs of services to be offered by the other vendors were judged by Union Parish to be several times greater than the proposal of Send for Internet access services and certain internal connections. Union Parish also observed three surrounding parishes who contracted for internal connections services with Icon Technologies, CompStar Plus, and FirstCo, all at significantly higher cost for less service. Union Parish decided to purchase internal connections equipment from a variety of vendors.

¹⁹ Memorandum from Donna Cranford, Business Manager of Union Parish, to Finance Committee Members (May 11, 1998) ("Cranford Memo"). Attached to Appeal as Exhibit 10.

Upon receiving inquiries and contract bids for various services in each funding year, Union Parish's superintendent evaluated the inquiries and bids (the evaluation and decision making process is described in more detail, *infra* pp. 8-11). Because Send's service proposals would cost Union Parish one-fifth to one-half of what the other service providers offered for comparable services, Union Parish chose Send to provide it with Internet services in 1999 and 2000 and 2001 and certain internal connections in 2000. Various other vendors were selected by the district to provide telecommunications and internal connections for each year. ²⁰ In funding years 1999, 2000 and 2001, Union Parish selected the following service providers for the following services: Diversifire Inc. (wire plan installation); Global Data Systems Inc. (routers and switches), Anixter Corporation (wire and terminations), Dell Marketing Inc. (servers), BellSouth (T-1 circuits and phone lines), CenturyTel (T-1 Circuits and phone lines), AT&T (long distance services), McKee Electronics (phone system), Motorcall Inc. (pager services) and CenturyTel Wireless, Inc. (cellular).

Although bids may be accepted based upon factors independent of the cost of services, the Commission recommends that cost should be the most relevant factor when an applicant is reviewing bids for services. The theory, presumably, is that if an applicant chooses the lowest cost provider, there is a presumption that their decision was not coerced for other illegitimate reasons but, rather, driven by the bottom line. ²¹

²⁰ See Appeal at Exhibit 13.

²¹ See generally Universal Service Order, 12 FCC Rcd at 9029-30; see also, Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, CC Docket No. 96-45, FCC No. 03-313 at 50 (Dec. 8 2003) ("Ysleta").

With respect to the competitive bidding process undertaken by Union Parish in each program year, Send participated only as a bidding vendor.

2. Union Parish Also Complied with Local and State Competitive Bidding and Procurement Laws.²²

After initial bids for E-rate services were received by Union Parish, Snell learned that Send had responded to Union Parish's Form 470 by submitting a bid for certain services. Snell immediately disclosed his minority interest in Send to the appropriate local government officials who sought a determination about whether Snell's ownership interest presented a conflict of interest or violated any local procurement regulations for competitive bidding. Snell contacted Mr. Mike Lazenby, Superintendent of Union Parish from 1998 - 2001, who in turn contacted Mr. Stephen J Katz, attorney for Union Parish, and requested legal clarification of Snell's status with respect to any potential conflict of interest under the circumstances. Mr. Katz researched the appropriate state laws and provided the Superintendent with a written opinion that Snell's ownership interest in Send did not pose a conflict of interest under state law and complied with

²² In Request for Review by the Dept. of Education of the State of Tennessee of the Universal Service Administrator, 14 FCC Rcd 13734 (1999), an applicant for the E-rate Program chose a vendor that was not the low cost provider, and a company that did not win the bid appealed to the SLD. The SLD concluded that it would "defer to the state and local competitive bid procurement review procedures and findings." Id. at 13737 (citation omitted). The FCC upheld this portion of the SLD's decision, noting:

We expect that we can generally rely on local and/or state procurement processes that include a competitive bid requirement as a means to ensure compliance with our competitive bid requirements. That is, we believe it is sensible, as the Administrator did, to rely on state and/or local procurement rules and practices for determining compliance with our competitive bid requirements because such rules and practices will generally consider price to be a "primary factor," and select the most cost-effective bid. Id. at 13739.

state ethics regulations.²³ Mr. Katz also requested and eventually received a written ruling from the State Ethics Board that under Louisiana law no conflict of interest existed.²⁴

Although neither local nor state authorities found that Snell's ownership interest created a prohibited conflict of interest, out of good faith concern for the competitive bidding process, Mr. Lazenby instructed Snell that any proposal or contract negotiations or decisions involving Send would be conducted by the school board or the Superintendent. After Lazenby concluded that Send offered the most cost-effective service proposal for Union Parish, the Business Manager for Union Parish provided a disclosure declaration to the school board regarding Snell's investment.²⁵ Snell did not negotiate or execute any contract between Union Parish and Send.

Superintendent Lazenby continued to personally evaluate proposals and conduct negotiations in each successive funding year, and he initiated and approved all contracts with Send. Even though Snell had no conflict of interest under applicable Louisiana law, Union Parish, out of an abundance of caution and in an effort to avoid even the appearance of impropriety, went to great lengths to assure that a full and fair competitive process was undertaken, and that its business with Send was conducted at arm's length, and without any involvement by Snell, either in reality or in perception.

²³ See Appeal at Exhibit 7.

²⁴ Disclosure of all information was made to the district independent auditors in 1998 and each year thereafter. The independent auditors examined all transactions during the years in question and found no evidence of undue influence or a conflict of interest that would warrant exception. After the State audit report, the district independent auditors re-examined events regarding the State audit report and re-affirmed concurrence with their previous opinions of no exception. See *id.* at Exhibit 9.

²⁵ See *id.* at Exhibit 8.

When Snell was appointed Superintendent of Union Parish in 2001 (long after the 2001-2002 application was sent in), a challenge regarding Snell's relationship with Send prompted an audit at the state level. The audit addressed whether Snell's unitholder interest in Send violated local or state procurement requirements. The standard in Louisiana is contained in the Code of Governmental Ethics at LSA R.S. 42:1101 et seq. at R.S. 42:1111C(2):

No public servant and no legal entity in which the public servant exercises control or owns an interest in excess of twenty-five percent, shall receive any thing of economic value for or in consideration of services rendered, or to be rendered, to or for any person during his public service....

Following an investigation, the Louisiana Board of Ethics confirmed that Snell's investment in Send, and the contract between Send and Union Parish, complied with state laws. In a letter to Snell dated January 24, 2002, the Louisiana Board of Ethics found the following:

The Board of Ethics, at its January 16, 2002 meeting, considered an investigation report generated as a result of allegations that you worked for and owned in excess of 25% of a company, Send Technologies, which did business with the Union Parish School Board while you served as an employee of the Union Parish School Board. The investigation report revealed that you owned only 15% of Send Technologies and that you were not an employee of Send Technologies. Further, you did not participate in the initial contract between Send Technologies and the Union Parish School Board.... Based upon the information obtained, the Board concluded and instructed me to inform you that no violation of the Code of Governmental Ethics was presented by your ownership interest in Send Technologies²⁶

Since the E -rate Program relies on state and local procurement processes to ensure competition, and since the federal requirements are not intended to preempt state and local

²⁶ Letter from Jennifer G. Magness, Louisiana Board of Ethics, to Tom Snell (Jan. 24, 2002) ("Board of Ethics Letter"), attached to Appeal as Exhibit 11.

requirements, the finding of no conflict of interest by the Louisiana Board is significant. Union Parish complied with all relevant state and federal requirements for competitive bidding.

On April 14, 2003, the SID issued five commitment adjustment letters to Union Parish and Union Parish rescinding funds totaling over \$275,000 that were allocated to it for Internet Services, internal connections, telecom services, in Funding Years 1999, 2000 and 2001.²⁷ The SLD concluded that the Union Parish Form 470s contained service provider contact information, which violated the intent of the competitive bidding process for services under the E-rate Program. The SLD found that, "a competitive bidding violation occurs when a [service provider] associated with the Form 470 participates in the competitive bidding process as a bidder."²⁸ Union Parish appealed the SLD's commitment adjustments on May 17, 2003. The Administrator denied Union Parish's Appeal on January 20, 2004 for the reasons stated on pages 2-3 hereof.

III. QUESTIONS PRESENTED FOR REVIEW.

A. Was There a Prohibited Conflict of Interest Under Applicable Law That Compromised Union Parish's Competitive Bidding Process?

As previously discussed, the Administrator's denial of the Appeal states that Snell's minority interest in Send is a conflict of interest according to the rules of the Support Mechanism. However, no prohibited conflict of interest under applicable law was created by the identification of Snell as the Union Parish contact in the Form 470s at issue here. The

²⁷ See CALs.

²⁸ See CALs at 3.