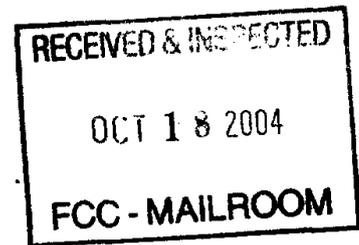


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**DOCKET FILE COPY ORIGINAL**

Of Counsel  
LEONARD E. SCHWARTZ  
(NJ & NY BAR)

October 14, 2004

Federal Communications Commission  
OFFICE OF THE SECRETARY  
445 - 12<sup>TH</sup> Street, SW  
Washington, DC 20554  
**VIA FEDERAL EXPRESS OVERNIGHT DELIVERY**

**Re: In the matter of Request for Review by RelComm, Inc. of Decision of  
Universal Service Administrator  
CC Docket No. 02-6, SLD Decision 1022916 and 1023492  
Year Six E-Rate, Billed Entity #123420: Atlantic City Board of Education  
Our file 13,586-1**

To Whom It May Concern:

Please be advised this firm represents the interests of the Atlantic City Board of Education [ACBOE] with regard to the above referenced matter. Enclosed herewith please find the following:

- (X) **Petition of ACBOE and ALEMAR CONSULTING for Waiver of 47 C.F.R. §§54.721(d) and 54.725 (O & 4)**
- (X) **Response of ACBOE and ALEMAR CONSULTING to Request for Review by RelComm, Inc. of Decision of Universal Service Administrator (O & 4)**
- (X) **Affidavit of Martin Friedman (O & 4)**
- (X) **Appendices (O & 4)**
- (X) **Proof of Service (O & 4)**

Respectfully submitted,

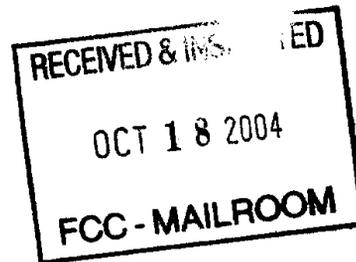
  
Michael J. Blee, for  
Rovillard & Blee, L.L.C.

MJB:kw  
enclosures

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Page 2  
October 14, 2004  
Federal Communications Commission

cc: J. Philip Kirchner, Esquire (via facsimile and Federal Express Overnight Delivery)  
Schools and Library Division (Via Federal Express Overnight Delivery)  
Ralph Kelly, Esquire (via First Class Mail)  
Gino F. Santori, Esquire (via First Class Mail)  
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**Before the  
Federal Communications Commission**

**Schools and Libraries Universal Service  
Mechanism**

**CC Docket No. 02-6**

**SLD Decision 1022916 and 1023492**

**In the Matter of Request for Review by  
RelComm, Inc. of the Decision of the  
Universal Administrator**

**Billed Entry No. 123420  
Atlantic City Board of Education**

**PETITION OF ATLANTIC CITY BOARD OF EDUCATION  
FOR WAIVER OF 47 C.F.R. §§54.721(d) and 54.725**

The Atlantic City Board of Education ("ACBOE") petitions for waiver<sup>1</sup> of the rules governing the review and consideration of the Request for Review filed by RelComm, Inc. against the ACBOE's funding commitment decisions letter ("FCDL") on the above-listed two funding requests.

RelComm filed its Request for Review on the basis that the applicant, the ACBOE failed to comply with the E-rate competitive procurement rules. RelComm is a disgruntled bidder, which had sought, unsuccessfully, to disqualify the ACBOE's award of an internal connections

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<sup>1</sup> This Petition is filed pursuant to 47 C.F.R. §1.3, which states that the FCC's rules may be waived upon a showing good cause.

contract to MTG before the New Jersey Department of Education. After the Funding Administrator issued the FCDL on these two FRNs, RelComm then filed a request for review of the Administrator's decisions, on or about August 6, 2004. RelComm accuses the ACBOE of engaging in prohibited conduct.

**Request for Waiver of 47 C.F.R. §54.721(d)**

Pursuant to 47 C.F.R. §54.721(d), if a Request for Review alleges prohibited conduct on the part of a third party, the third party may file a response to the Request for Review. A response is due within 15 days of the submission of the Request for Review.<sup>2</sup> Accordingly, the ACBOE's response was due on or about August 23, 2004. This time frame, however, was insufficient to review and respond to all of the various attachments and materials attached to the Request for Review. The Request is replete with accusations and alleged statements of fact that are not supported by the materials that RelComm attached. A RelComm principal, Michael Shea, submitted an extensive affidavit littered with misstatements. In all, RelComm's Request amounts to 161 pages. RelComm accuses not indicts the ACBOE, but also implicates the District's E-rate consultant, Martin Friedman. The District's preparation of a comprehensive response to this Request for Review necessitated that an extension of time for submitting this Response be obtained.

Complicating matters further, during the same time frame in which RelComm filed its Request for Review, the ACBOE has been in the midst of pretrial litigation and discovery in the

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<sup>2</sup> Section 54.721(d) indicates that a response must be due within the time period applicable for the filing of a reply in 47 C.F.R. §1.45. Section 1.45 indicates that a reply must be filed within five days of the filing of an opposition, and an opposition must be filed within ten (10) of the filing of a petition. Accordingly, a response is due within 15 days of the filing date.

civil lawsuit that RelComm initiated against the District in 2002, and in which the District has filed numerous counterclaims. Many of the same persons involved in the civil litigation were required to be consulted in order to prepare this Response.

For these reasons, the ACBOE submits that it has shown good cause in support of this petition for waiver and requests that 47 C.F.R. §54.721(d) be waived so that this Response is accepted as timely filed.

**Request for Waiver of 47 C.F.R. §54.725**

Pursuant to 47 C.F.R. §54.725, whenever a Request for Review is filed to seek review of the Administrator's decision, the Administrator may not disburse discounts on any contested support to a service provider until a final decision has been issued by either the Administrator or the FCC. In this situation, this means that by virtue of filing its Request for Review, RelComm as a third party bidder, has effectuated a stay of the Administrator's payment of discounts to the current service provider, MTG.

The ACBOE requests that this effect of this rule severely and unjustifiably prejudices the District by further delaying its receipt of discounts for E-rate funding year 2003. The present appeal is not the typical appeal that is filed by an applicant that is seeking the receipt of **additional** funding. This appeal seeks to rescind the Administrator's funding authorization already provided to the District.

Unfortunately, the very act of filing this appeal further thwarts the District's efforts to make effective use of its existing technology as well as undertake its new procurements, regardless of the fact that this appeal lacks merit. The Commission's rules prescribe that when

an appeal is filed, the Administrator shall not make reimbursements to a service provider for any amounts that are subject to the appeal. 47 C.F.R. §54.725(a). While an appeal before the Wireline Competition Bureau may be decided within 90 days, the Bureau may take an additional 90 days, or the Commission may further extend the time period for review. 47 C.F.R. §54.724(a). Consequently, the potential delay ensuing from the very act of RelComm's filing of this appeal is open-ended. The District patiently awaited its receipt of the FCDL for the Year 6 period until July 2004 – or about a month *after* the funding year *ended*. Rather than be able to benefit finally from the discounts awarded, the District's students face yet this latest obstacle in being able to benefit from the technology that the E-rate program is supposed to impart, by virtue of the operation of the FCC's rules regarding appeals.

This situation is particularly aggravating in view of the fact that the New Jersey State Department of Education already investigated the competitive procurement that led to ACBOE's selection of MTG as the successful bidder and concluded that the bidding was conducted properly. Moreover, the SLD already examined in depth all facets of this competitive procurement as part of the SLD's Item 22 Selective Review of ACBOE for E-rate funding years 2002, 2003 and 2004, and in issuing this FCDL, concluded that ACBOE satisfied E-rate bidding requirements. In short, there is no new "smoking gun" in RelComm's request for review that has not already been examined and dismissed by SLD and the State Department of Education. Under these unique circumstances, the risk of SLD improperly disbursing funds to MTG is virtually non-existent. Even so, ACBOE is willing to serve as a guarantor, and to certify in advance that in the event that the RelComm Request for Review is granted, and the FCC determines that discounts should not be paid to MTG on behalf of the District, the District will

voluntarily pay back any funds that may have been disbursed to MTG on FRNs 1022916 and 1023492.

For all of these reasons, the ACBOE requests that the FCC waive the provisions of 47 C.F.R. §54.725 and direct USAC to disburse discounts to MTG upon receipt of a properly completed invoice form.

**ROVILLARD & BLEE, L.L.C.**

Dated: 10/13/04

By:   
Michael J. Blee, Esquire

**Before the  
Federal Communications Commission**

**Schools and Libraries Universal Service  
Mechanism**

**CC Docket No. 02-6**

**SLD Decision 1022916 and 1023492**

**In the Matter of Request for Review by  
RelComm, Inc. of the Decision of the  
Universal Administrator**

**Billed Entry No. 123420  
Atlantic City Board of Education**

**APPENDICES TO RESPONSE OF ATLANTIC CITY BOARD OF EDUCATION AND ALEMAR  
CONSULTING TO RELCOMM'S REQUEST FOR REVIEW OF  
UNIVERSAL SERVICE ADMINISTRATOR'S DECISION**

- Appendix 1,** *RelComm, Inc. v. Atlantic City Board of Education*, New Jersey Superior Court, Atlantic County, Docket No. L-000477-04, Complaint and Counterclaim
- Appendix 2,** Affidavit of Martin Friedman;  
Exhibit 1 – 01-21-03 Email message from Zammit to Friedman  
Exhibit 2 – 01-23-03 Email message from Friedman to Zammit
- Appendix 3,** Atlantic City Board of Education Form 470  
Application Number 755640000448116
- Appendix 4,** Letters of Agency between Atlantic City Board of Education and  
Mr. Friedman of Alemar Consulting
- Appendix 5,** Inventory of Atlantic City District's installed technology provided to interested  
vendors
- Appendix 6,** Photographs of RelComm's technology installation in the  
Atlantic City School District
- Appendix 7,** New Jersey Department of Education Report of Audit
- Appendix 8,** N.J. Stat. § 18A:18A-5 (2004)

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**Before the  
Federal Communications Commission**

**Schools and Libraries Universal Service  
Mechanism**

**CC Docket No. 02-6**

**SLD Decision 1022916 and 1023492**

**In the Matter of Request for Review by  
RelComm, Inc. of the Decision of the  
Universal Administrator**

**Billed Entry No. 123420  
Atlantic City Board of Education**

**RESPONSE OF ATLANTIC CITY BOARD OF EDUCATION  
AND ALEMAR CONSULTING  
TO RELCOMM INC.'S REQUEST FOR REVIEW  
OF UNIVERSAL SERVICE ADMINISTRATOR'S DECISION**

**I. INTRODUCTION**

Faced with the inadequate and unacceptable quality of services provided during E-rate funding years 2000 through 2002 by its former vendor, RelComm, Inc., ("RelComm"), the Atlantic City Board of Education ("ACBOE" or "Board" or "District") posted a Form 470, conducted a fair and open competitive bidding process, and selected the most cost effective bidder to provide priority 2 internal connections services and equipment to the District. After closely scrutinizing the District's Form 471 applications, including conducting an exhaustive

Selective Review, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") agreed and approved funding of discounts.

RelComm, however, is a disgruntled unsuccessful bidder because the Board found that RelComm was not the most cost-effective bidder. Since the Board decided to sever its relationship with RelComm, RelComm has relentlessly sought retaliation against the Board. The filing of the instant Request for Review is just the latest of its legal maneuvers. Previously, RelComm filed a civil action against the Board, which is ongoing in New Jersey state court.<sup>1</sup> This latest tactic, although completely baseless as evidenced by the numerous misstatements and misapplications of the applicable program rules, is particularly vindictive as it seeks to further delay and thwart the District's receipt of discount funding for E-rate Year 2003, for the period July 1, 2003 through June 30, 2004. This Joint Response, submitted on behalf of ACBOE and ALEMAR Consulting ("ALEMAR"), provides documentary evidence, which unequivocally refutes each and every factual and legal allegation of impropriety that the District and ALEMAR are accused of. Indeed, the crux of RelComm's claim, that the District's competitive bid process was tainted, is an issue that the SLD necessarily addressed and dismissed as part of its Selective Review and examination of the District's Form 471 application. Further, RelComm's rendition of events, and its claims of impropriety, reflects fundamental misunderstandings and misapplications of the E-rate Program rules. When all of these

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<sup>1</sup> The District counterclaimed, alleging that RelComm had breached the contract in various ways due to its poor quality of workmanship and commercially unreasonable practices. The federal lawsuit was removed to state court. *RelComm, Inc. v. Atlantic City Board of Education*, New Jersey Superior Court, Atlantic County, Docket No. L-000477-04. The deadline for the discovery phase of this proceeding is June 30, 2005, and a resolution of the case is expected sometime thereafter. [See Appendix 1 for a copy of the Complaint and Answer with Counterclaims concerning this lawsuit]

anomalies are exposed and corrected, it is clear that the request for review lacks any substantive merit, and should be dismissed.

The crux of this appeal is that an unsuccessful bidder is displeased that it lost the bid to another vendor. RelComm now tries to mask the deficiencies in its bid by casting a wide array of accusations against the bid process conducted by ACBOE. Importantly, RelComm failed to cite to even one specific FCC regulation, statute in the Telecommunications Act of 1996 and state law as the basis of its complaint that the ACBOE violated competitive bidding regulations.

The present appeal is not the typical appeal that is filed by an applicant that is seeking the receipt of **additional** funding. This appeal seeks to rescind the Administrator's funding authorization already provided to the District. Unfortunately, the very act of filing this appeal further thwarts the District's efforts to make effective use of its existing technology as well as undertake its new procurements, regardless of the fact that this appeal lacks merit. The Commission's rules prescribe that when an appeal is filed, the Administrator shall not make reimbursements to a service provider for any amounts that are subject to the appeal. 47 C.F.R. §54.725(a). While an appeal before the Wireline Competition Bureau may be decided within 90 days, the Bureau may take an additional 90 days, or the Commission may further extend the time period for review. 47 C.F.R. §54.724(a). Consequently, the potential delay ensuing from the very act of RelComm's filing of this appeal is open-ended. The District patiently awaited its receipt of the FCDL for the Year 6 period until July 2004 – or about a month *after* the funding year *ended*. Rather than be able to benefit finally from the discounts awarded, the District's students face yet this latest obstacle in being able to benefit from the technology that the E-rate program is supposed to impart, by virtue of the operation of the FCC's rules regarding appeals.

For these reasons, the Board has filed a companion Petition for Waiver to request the FCC to authorize the Administrator to pay invoices associated with these FRNs on appeal, pending its review and final decision of this appeal. The District appreciates the FCC's need to take sufficient time to process this appeal, but implores the FCC to recognize and mitigate the unfairness of its automatic stay rule that allows any party to injure an applicant by virtue of filing an appeal. The SLD already carefully reviewed the ACBOE's E-rate Year 6 application including the District's competitive procurement. This applicant was subject to an Item 25 Selective Review and the SLD already reviewed the District's competitive procurement to assure that it was conducted properly. As part of the Selective Review process, the District was required to submit every conceivable document related to the District's E-rate applications including, but not limited to:

- All documents provided to potential vendors
- All correspondence with potential vendors
- All consulting agreements between the District and E-rate consultants
- Copies of all winning and losing proposals
- Copies of the bid evaluation criteria and the individuals participating in the scoring of the proposals
- Attendance sheets at any and all pre-bid meetings
- Copy of the District's technology plan

Consequently, the SLD conducted an exhaustive review of the competitive bidding process, which lasted more than 17 months and found that the District complied with all applicable E-rate requirements. None of the claims made by RelComm present legitimate issues or concerns that impugn in any way the decision of the Administrator to approve discounts for the District.

## **II. OVERVIEW OF THE DISTRICT'S E-RATE YEAR 2003 INTERNAL CONNECTIONS PROCUREMENT**

FRN 1022916 approved discounts in the amount of \$3,198,322.80, which represents a 90% discount of the pre-discount amount of \$3,553,691.11. The original pre-discount amount was modified to reflect a reduction of the original amount of \$3,594,699. The Board voluntarily reduced the FRN to remove 12 servers, and the SLD also reduced funding to remove ineligible server agents and open file agents. Complete Convergence Inc. d/b/a Micro Technology Groupe, Inc. ("MTG") is the vendor that provided the equipment/services to the District.

FRN 1023492 approved discounts in the amount of \$160,912.80, which represents an 80% discount of the base amount of \$201,141. No reductions or adjustments were made to the original amount of the FRN. MTG is also the vendor for this FRN.

Both of the FRNs at issue are for Priority 2 internal connections equipment and services. Both FRNs were subject to the posting of a Form 470 and the receipt of competitive bids, the selection of the most cost-effective proposals, and the submission of a complete Form 471 within the Year 6 window deadline.

In Funding Year 2000, pursuant to a properly posted Form 470 for at least 28 days, RelComm was selected as the most cost-effective vendor and began providing internal connections equipment and services to the District, continuing into Funding Year 2002. District personnel, however, complained about the technical problems they experienced trying to access and effectively use the Internet, e-mail and various applications that were supposed to be available from the District's network. These complaints increased in frequency and fervor during Funding Year 2, and consequently, the District Superintendent and Assistant Superintendent made repeated requests to the District's data processing manager to address

these issues. This manager was the liaison with RelComm. Despite these requests to the District's data processing manager to address these problems, the technical issues persisted. The Superintendent and Assistant Superintendent began taking a more active role in the administration of the District's technology and asked many questions of the District's data processing manager. Despite their requests, little information was forthcoming. The data processing manager was responsible for communicating with and coordinating the provision of technology with the District's vendors, and was the District's interface with RelComm.

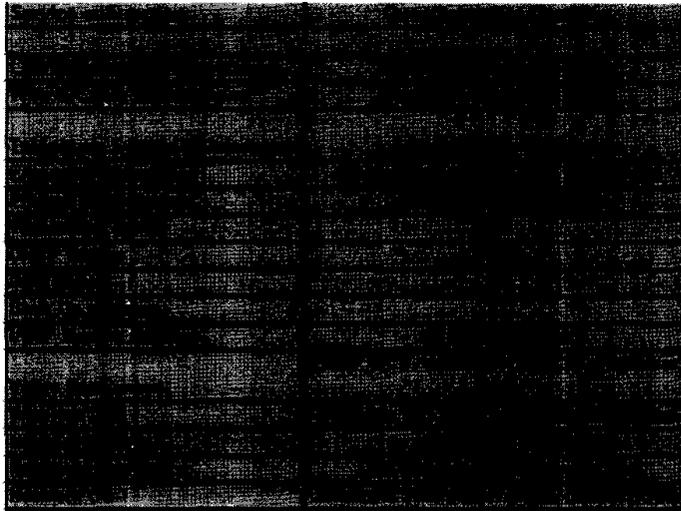
Concerns about the technology situation in the District grew so high that in December of 2002, the District decided to retain the services of an E-rate consultant, ALEMAR Consulting, to be responsible for the E-rate Year 6 competitive procurements, preparation and filing of all applications.<sup>2</sup> The District decided to seek competitive bids to receive ongoing maintenance of the eligible internal connections that it already had procured, and to acquire additional eligible components to complete its network.

As the District's representative who was responsible for the Year 6 applications, including the competitive bid procurement, Martin Friedman of ALEMAR Consulting has prepared the attached affidavit at Appendix 2 in order to describe, comprehensively, the process, time line, and all salient details of the Year 6 competitive procurement leading up to the District's decision to contract with MTG as the successful bidder. As Mr. Friedman explains, on

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<sup>2</sup> None of the costs of the District's agreement with ALEMAR Consulting was included in the District's request for funding. Nonetheless, RelComm improperly argues that the District's decision not to conduct a competitive procurement before retaining ALEMAR constitutes a violation of state and federal competitive bid requirements applicable to the E-rate program. *See* RelComm Request for Review at 10-11. RelComm tried to claim that the State Department of Education's finding, which is on appeal at the present time, that the District should have conducted a competitive procurement before retaining ALEMAR, constitutes an E-rate bidding violation. The fallacy of this reasoning, however, is that the consulting agreement was never subject to E-rate bidding requirements because it was not part of the District's Form 471 application because the District knows that E-rate consulting services are not eligible for discounts. Any claims concerning the District's contract with ALEMAR are completely irrelevant.

January 5, 2003, the District posted Form 470 application number 755640000448116, with an allowable contract date of February 2, 2003. *[See Appendix 3 for a copy of the Form 470]* The Form 470 indicated in question no. 5 that the applicant was a school district containing multiple schools. The specific services requested were itemized on the Form, and the quantity of services requested indicated that there were 10 different buildings:



The District's Form 470 further advised that interested persons may contact Martin Friedman, the District's consultant, for more information. Mr. Friedman signed the Form 470 as the person authorized to post this Form 470, consistent with his agreement with the District to act as the District's representative and consultant in connection with the District's Year 6 E-rate applications. *[See Appendix 4 for the Letters of Agency between the District and Mr. Friedman of ALEMAR Consulting]*

Each prospective vendor that contacted Mr. Friedman in response to the posting of the Form 470 was provided an inventory of the District's current technology. *[See Appendix 5]* Mr. Friedman also advised that all potential bidders were required to participate in the walkthrough of the premises in order to provide a "best solution" for the District of all internal connections

excluding the noted servers. This requirement was also specified on the internal connections inventory list. Importantly, all interested vendors who contacted Mr. Friedman were provided with the same exact information and bidding requirements.

As the inventory list explains, the District solicited "best solution" proposals based on its embedded technology and its new technology that it sought to acquire in E-rate Year 2003 (Year 6). This approach was the only viable option for the District in view of the situation in which it found itself. Neither the District's then current technology director, Jonathon Jones, or its current internal connections vendor, RelComm, made documentation available to other District personnel and to the District's E-rate consultant concerning the present network configuration and design. In addition, even a cursory review of various technology installations previously performed by RelComm revealed a complete state of disarray. Photographs depicting the status of the District's technology installations performed by RelComm are set forth in Appendix 6. The various problems that were evident included but were not limited to: unsecured and unmarked cables that are tangled together, inadequate ventilation, placement of servers in insufficiently protected areas, direct exposure of technology equipment to light and other heat sources; servers not operating properly; and inability to access the Internet on various desktop computers. Indeed, these problems form in part the basis for the Board's efforts to pursue legal recourse against RelComm before the courts.

Against this backdrop, RelComm contacted Mr. Friedman concerning the E-Rate Year 2003 competitive procurement and posed a detailed series of questions prior to the deadline for the submission of bids. Mr. Friedman replied promptly, and in place of responding to specific questions, each interested vendor including RelComm was invited to participate in the walkthrough of the facilities in order to observe firsthand the status of the District's technology

deployment. Mr. Friedman also advised RelComm of the date and time of the walkthrough, and emphasized that the vendor's attendance at the walkthrough was a requirement in order for the vendor to be qualified to submit a proposal.

Two walkthrough visits were conducted, on January 14, 2003 and on January 24, 2003 respectively. Vendors who contacted the District prior to the first date attended the first walkthrough and vendors who contacted the District after January 14 attended the second walkthrough. On February 3, 2003, Mr. Friedman presented to the District the various internal connections proposals that had been submitted. After a committee evaluated the proposals, the District determined that MTG's proposal was the most cost-effective, as the proposal provided the best solution at the best price. This proposal addressed the District's clearly articulated need to address the inadequacies of the existing technology infrastructure – initially installed by RelComm – and was submitted by a reputable, qualified vendor with recommendations that confirmed the vendor's credentials.

RelComm's proposal was not accepted because it did not address all of the technology procurements that the District had identified on its Form 470. The District also was concerned about the existing disarray of its technology, which in large measure was the product of RelComm's prior work for the District. Moreover, RelComm's price, experience and qualifications were not scored as highly as MTG's.

Following the award of the bid to MTG, RelComm initiated a lawsuit in the United States District Court for the District of New Jersey against the District, MTG, the District's Superintendent, Assistant Superintendent and ALEMAR Consulting to challenge the District's contract award to MTG. That suit has since been removed to state court, where the matter is still pending. In addition, the New Jersey Department of Education, Office of Compliance

Investigation already examined issues raised by two unnamed parties concerning the Year 6 bidding process and the award of the bid to MTG. Importantly, the State Department of Education's Report exonerated the District from any wrongdoing regarding the contract award to MTG:

**The Atlantic City School District (district) was accused of approving MTG without benefit of proper bid procedures. According to documentation received, however, eight vendors bid on the internal connections project and the bidding was conducted appropriately.**

*[See Appendix 7 for a copy of this Report]*

Notably, RelComm failed to present its objections regarding the MTG contract award to the SLD while the District's E-rate application was pending. Rather, it instead decided to wait and see, and raise these objections only after the SLD completed its exhaustive review and issued a favorable funding commitment decisions letter. RelComm should not be allowed to further delay the District's receipt of funding for the E-Rate 2003 Funding Year by raising this frivolous appeal. RelComm has no legitimate dispute with the District, and has no basis for accusing the District of violating E-rate program rules.

RelComm's appeal displays the vendor's failure to understand and apply accurately the applicable E-rate rules. In numerous instances, RelComm's representations of what the rules require are patently inaccurate or untrue. It is this same misapprehension of the rules that has led RelComm to file this misguided and groundless appeal.

### III. SPECIFIC REPLIES TO RELCOMM'S ACCUSATIONS

#### A. No Preferential Treatment Was Given to the Successful Bidder.

RelComm tried to attack the MTG bid award on the nebulous basis that ALEMAR Consulting somehow favored MTG over the other bidders. [See *RelComm's Request for Review at 2-3*] The only support offered for this vague allegation is a list of the various E-rate applications on which MTG was listed as a proposed service vendor, and where ALEMAR served as a consultant to the E-rate applicant. RelComm also inaccurately contended that ALEMAR was responsible for recommending a specific vendor to the District for its internal connections contract, based on the bids received in response to the District's Form 470. *Id.* at 3. This is not true. As Mr. Friedman explains in his affidavit, he was retained to coordinate and manage the competitive procurement, but was not responsible for evaluating the bids or selecting the winning bid. The District retained these responsibilities. Further, neither Mr. Friedman nor ALEMAR Consulting has any business relationship with MTG, and MTG has no business relationship with Mr. Friedman or ALEMAR Consulting. As Mr. Friedman explains, after he posted the District's Form 470, he contacted various vendors including MTG to inform them of this bid opportunity. He did so as part of his coordination responsibilities and merely to try to assure that the Form 470 would yield a vibrant competitive procurement. It is no surprise that he contacted vendors such as MTG with whom he had some prior familiarity. The District never solicited and Mr. Friedman never volunteered his opinion of MTG's qualifications or credentials. Mr. Friedman simply delivered the bids that he received to the District personnel who evaluated the bids and selected MTG as the winning service provider.

MTG did not receive any preferential treatment regarding the site visit in which it participated and the District did not provide certain information only to MTG, which was not

shared with other prospective bidders. Cf. RelComm Request for Review at 8, 9 and 10. There was no second unannounced walkthrough of the high school that RelComm and other bidders were not invited to attend, and the District did not only inform MTG to include the high school facilities in its bid. Cf. RelComm Request for Review at 7. RelComm likewise mischaracterizes certain documents that MTG provided in response to its RelComm's discovery question in connection with the civil lawsuit, and insinuates that the District provided certain information only to MTG and not to other prospective bidders. [See Request for Review at 9] The various documents, attached as Exhibit K to RelComm's Request for Review are in fact documents that MTG and all other bidders obtained during the first site walkthrough visit on January 14, 2003. RelComm received all of these same documents from the District during its January 24, 2003 site visit. There was one additional document that was provided to the vendors in attendance at the January 14, 2003 site walkthrough. This document was an excerpt of a few pages from the District's technology plan. A complete copy of the District's published, publicly available technology plan was available to RelComm long before the District issued its Funding Year 2003 Form 470,<sup>3</sup> however, and therefore, RelComm cannot accuse the District of providing information only to MTG and not circulating the same information to other prospective bidders.

MTG was subject to the same treatment and information that was provided to each bidder: no more and no less. There was no preferential treatment, and RelComm's claims to the contrary should be dismissed.

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<sup>3</sup> The District's technology plan is publicly available on its website.

B. The Form 470 Provided Sufficient Detail Concerning the Identification and Quantity of Services and Equipment that the District Sought to Procure.

RelComm also complained that the Form 470 failed to provide sufficient detail concerning the scope of services subject to the competitive procurement. *Id.* at 2. Specifically, RelComm contends that the District's request for a "best solution" "is a violation of [the] FCC's Third Order and Report [*sic-Third Report and Order*] because it eliminated the competitive bidding process because no adequate comparisons could be done." RelComm Request for Review at 3. RelComm's claims are baseless.

First, notwithstanding its claim to the contrary, the District's Form 470 in fact itemized the various internal connections services and equipment, both existing and new, for which it requested bids. In addition, each vendor that contacted the District in response to the Form 470 was provided with the additional inventory list that was given to RelComm. The phrase "best solution" was used in connection with informing vendors that it was up to them and not the District to specify the technology and manufacturer of the internal connections components that the District sought to acquire. The "best solution" request in no way undermined the competitive bidding process and in fact enlarged the pool of prospective bidders by not imposing technology type or manufacturer restrictions on the bids.

Second, the competitive bid approach did not violate the Third Report and Order, or any other E-rate program rules or requirements. Notably, The Third Report and Order that RelComm accuses the District of being in violation of (without providing any specific citation to an order that is 61 pages in length) was released by the FCC on December 23, 2003, or more than nine months *after* the District posted the Form 470 and conducted the competitive bid procurement at issue. Notice of the Third Report and Order was published in the Federal

Register on February 12, 2004 at 69 Fed. Reg. 6181, and the rules promulgated pursuant to that Order went into effect on March 11, 2004. Clearly, therefore, the District cannot be in violation of any rules or pronouncements that were issued *after* the conclusion of its competitive bid procurement. This is yet another example to demonstrate RelComm's confusion and misunderstanding of the E-rate process.

Third, the Third Report and Order did not adjust or clarify any of the competitive bidding requirements or rules. Schools and Libraries Universal Service Mechanism, CC Docket No. 02-6, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 02-323 (released December 23, 2003) at ¶¶ 63-66. Rather, the Second Further Notice of Proposed Rulemaking (which was contained within the same document as the Third Report and Order) solicited comments concerning any modifications that should be made to the competitive bidding requirements.

Fourth, the District's manner of conducting the procurement did not eliminate the competitive bid procurement, notwithstanding RelComm's claim to the contrary. The District received timely bids on internal connections from CompuWorld, MTG, Net2, Omicron, in addition to receiving bids from MTG and RelComm. Obviously these bidders found the process to provide them with sufficient background information to enable them to prepare bids.

Fifth, absolutely no substantiation is provided to support RelComm's bald assertion that the competitive bid was not consistent with the District's technology plan, and it is impossible to evaluate or address this allegation. RelComm provides no facts to support the averment that the Form 470 bears no relation to the District's technology plan. The District provided its technology plan to the SLD during the Selective Review process. The SLD carefully confirmed that the items requested on the Form 471, Item 21 attachments were supported by

documentation included in the District's approved technology plan. This claim, therefore, should be dismissed.

Sixth and last, RelComm's stated premise, that state competitive bid procurement laws and regulations govern the District's purchases of services and equipment pursuant to the E-rate program is completely wrong. E-rate procurements are exempt from state law advertising and procurement requirements. N.J. Stat. § 18A:18A-5 (2004). [*See Appendix 8 for a copy of this statute*] There are no bidding requirements other than the E-rate requirements that apply to these competitive procurements. 47 C.F.R. §54.504. Further, for all of the reasons stated above, the procurement complies with the requirements of section 54.504 of the Commission's regulations.

C. The District's Information Package and Vendor Site Visits Met Applicable Legal Requirements and Provided a Fair Basis for Conducting this Competitive Procurement.

RelComm also claims that the District failed to respond to its inquiries regarding the exact location of the equipment to be installed. RelComm Request for Review at 4. RelComm does not explicitly state how this so-called oversight constitutes a violation of program rules or state competitive bid requirements. Nonetheless, the factual averment is inaccurate.

RelComm initially contacted the District's representative on January 21, 2003 with questions that appeared as garbled text and were not intelligible. On January 22, 2003, Mr. Friedman received an intelligible version of the questions. He responded to this message on the same day, and instructed RelComm to attend a walkthrough site visit later that week and prior to the bid submission deadline in order to observe firsthand the District's technology implementation, and to determine how best to prepare its response to the Form 470. During

the site visit, RelComm was permitted to record the site visit and the District's equipment, and was then able to review the information to assist in the development of its proposal.

All of the information requested in its January 22, 2003 correspondence should have been in RelComm's possession already since RelComm was the District's internal connections vendor for E-rate Years 2001 and 2002. In fact, because RelComm was the District's incumbent service provider, RelComm clearly was at a distinct advantage over other bidders in terms of its knowledge and familiarity with the District's current technology status. As the incumbent vendor, RelComm should have known or had access to all of the information it requested.

A review of RelComm's information request quickly reveals that the kind of information that RelComm requested was far more detailed than the District was required to provide in its Form 470, and this information already should have been in RelComm's possession. For example, RelComm was the service provider that installed the District's current servers and desktops, and therefore should have had a master design of the network; the kind of network already in place; the type of workstations in each location; the type of network servers in each location; the manner in which the various buildings were interconnected on the network; the kind of maintenance required to be performed on the network; and the eligible items applicable to the network. Similarly, RelComm should have known what kind of cabling the District currently uses; how many cable runs would be needed to complete the installation of the network; the building maps with marked socket locations and location of the network hub and which of the eligible items were applicable to this part of the request.

In short, RelComm was THE most knowledgeable entity about the District's current network configuration. Indeed, during E-rate years 2001 and 2002 when the District filed its

Form 470 and requested various internal connections services and equipment, none of this kind of information was made available to RelComm. Yet, RelComm managed to prepare a bid during Funding Years 2001 and 2002, as well as Funding Year 2003, without insisting that the District provide the information that RelComm requested as part of Funding Year 2003 procurement.

Further, RelComm's implicit assumption, that the District was required to respond to every question it posed, is incorrect. There is absolutely no requirement in the E-rate bidding rules that every question asked by a vendor must be answered. Rather, the hallmark of the E-rate competitive bidding requirements is that the bid process must be conducted in a "fair and open" manner. As the SLD's website states:

**"Fair" means that all bidders are treated the same, and that no bidder has advance knowledge of the information contained in your RFP. "Open" means there are no secrets in the process – such as information shared with one bidder but not with others – and that all bidders know what is required of them. Your RFP (or your Form 470 description of services requested, if you don't have an RFP) should be clear about the products or services and quantities you are seeking.**

[See <http://www.sl.universalservice.org/whatsnew/reminders-F470.asp>.] The District adhered to this cardinal principle throughout the bid process. The same information package was given to all bidders. Each bidder was required to participate in a site visit to personally observe the District's installed technology and to obtain specific information concerning the various components that the District had in place. The deadline for submission of proposals was the same deadline publicized to all prospective bidders. There was no prejudice or adverse result that arose as a result of the District's inability to provide RelComm or any other bidder with the information that RelComm requested.

Likewise, RelComm's various claims that the District's representative did not provide accurate information during the site visit, are equally specious. [See *RelComm Request for Review at 5-6*] The fact is, the District provided accurate information to the best of its ability and it provided the *same* information to all bidders who participated in the walkthrough. The District's Form 470 stated that services and equipment were sought for the entire district, which includes the high school. There was no contradictory information provided by the District to suggest that the high school facilities should have been omitted from any vendor's bid.<sup>4</sup>

D. The Posting Of Various Forms 470 Was Not Authorized By The District But Nonetheless Did Not Impede The Competitive Bidding Process.

RelComm's next complaint is that it was confused because the District posted multiple Form 470 applications, and it could not figure out which Form 470 served as the basis of the District's internal connections competitive procurement. RelComm Request for Review at 4-5. Like its earlier factual accusations, RelComm does not explain how its claim somehow translates into a competitive bid violation – because no such linkage exists.

RelComm is correct that there were multiple Form 470 applications posted which purportedly solicited bids on the District's behalf. Notably, however, not all of those Forms were authorized by the District. The District's data processing manager filed several Form 470 applications after the Superintendent engaged ALEMAR Consulting to handle the Year 6 E-rate process for the District. These 470 Form numbers are: 192460000450897, 280180000450905 and 685210000450907. While each form was completed, none was certified. The first two of

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<sup>4</sup> Since the District did not exclude the high school from the bid specification on the Form 470, RelComm's claims regarding the manner in which the District computed its discount amount are irrelevant. Cf. RelComm Request for Review at 7-8. In point of fact, the District was free to submit a site specific FRN with all of its schools with the same discount level, and to submit a separate FRN for site specific services for a school with a different discount level. See Form 471 Instructions regarding calculation of discounts.