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January 25, 2005

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Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Ex Parte Notice**

Joint Consolidated Request for Review of Decisions of the Universal Service Administrator, El Monte Unified, Hemet Unified, Inglewood Unified, Lucerne Valley Unified, Romoland Elementary, and Rosemead Elementary School Districts and Spectrum Communications Cabling Services, Inc.
CC Docket No. 02-6

Dear Ms. Dortch:

On January 24, 2005, Robert Rivera, President of Spectrum Communications Cabling Services, Inc. ("Spectrum"), Pierre Pendergrass, General Counsel of Spectrum, and Jennifer L. Kostyu and the undersigned of Morrison & Foerster LLP, on behalf of Spectrum, met with Narda Jones, Vickie Robinson, Jennifer Schneider and Greg Lipscomb of the Telecommunications Access Policy Division, Wireline Competition Bureau, regarding the above-referenced Request for Review.

The parties discussed the need for the Commission to quickly resolve the pending Request for Review that was filed by the six schools referenced above (the "Schools") and Spectrum. The Request for Review questions whether the presence of certain perceived "similarities" in the Form 470 applications and selective review responses submitted by the Schools for the 2002 E-rate funding year, which the Universal Service Administrative Company ("USAC") interpreted as "suggesting" impermissible service provider involvement in the competitive bidding process, with no proof of actual rule violations (after the selective review process), justifies denial of the funding requests. While Spectrum appreciates that Commission and E-rate rules and guidelines cannot anticipate every potential circumstance, the fact remains that neither

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the Schools nor Spectrum violated any rules or guidelines at any point in the process. There was, therefore, no valid justification for denying the Schools' funding requests. The Schools and Spectrum have the right to expect more due process than USAC has accorded them given that applications for federal funds are at stake.

Although the pending appeal concerns only the Schools' Year 2002 funding requests, USAC has multiple cases pending before it for other funding years that have been or likely will be denied due to perceived similarities and the mere suggestion of improper service provider involvement. Accordingly, Spectrum urges the Commission to act promptly in this case to forestall the needless expenditure of time and resources on the part of the Commission, USAC, and E-rate participants in litigating the same issue multiple times.

During the meeting, Spectrum stated that a review of the salient facts demonstrates that it was not impermissibly involved in the Schools' bidding processes. The "similarities" in the Form 470s submitted by the Schools related to the descriptions of the internal connections requested by the Schools. The descriptions, and the order of the internal connections requested, emanate from the Program eligible services lists, not from Spectrum. Each School tailored its request to its technology plan, and requested different services and quantities according to its needs. There were no duplicate applications like the type found in the *IBM* case.¹

USAC also denied the School's funding requests because of perceived similarities in the School's selective review responses which, again, "indicated" to USAC improper service provider involvement in the "competitive bidding process." As a temporal matter, this conclusion is illogical. The important point, however, is that while Spectrum did not provide answers in response to USAC's selective review request, it did respond to questions posed by certain Schools who requested information as they prepared their selective review answers. This assistance was fully in keeping with E-rate Program rules that were in place at the time. USAC improperly denied the Schools' funding requests based upon new Program guidelines, which changed the role of service providers in the selective review process. USAC made the new Program guidelines public three weeks *after* it denied the Schools' funding requests. Retroactive application of new Program rules or guidelines is patently unfair, a violation of due process, and conflicts Commission precedent.² Nevertheless, it is unclear whether

¹ See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, International Business Machines, Inc.*, 18 FCC Rcd 26406 (2003) ("*IBM*").

² See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Prairie City School District*, 15 FCC Rcd 21826, 21827 (CCB 1999), citing *Request for Review of the*

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USAC could find, even based upon the new guidelines, that Spectrum's informational assistance to the Schools violated any rule.

Spectrum also stated that denying funding requests generally based upon perceived similarities is unjustified given that the similarities could have been the result of any number of factors, none of which equate to improper service provider involvement (*e.g.*, applicants coordinating with each other or applicants following the format of Form 470s that had been previously filed and granted by USAC or that have been provided in state and federal E-rate training sessions). A prompt decision on this issue by the Commission would prevent USAC from continuing to unjustifiably deny funding requests based upon alleged similarities and only a "suggestion" of improper service provider involvement. Spectrum discussed with the Commission the arguments set forth in the attached Taking Points.

Spectrum also would like to respond to a concern raised by the staff that Mr. Rivera's prior position on USAC's board of directors and as a member of the Schools and Libraries Committee ("SLD Committee") might provide Spectrum with an unfair competitive advantage in the E-rate Program. The Commission's rules mandate that USAC's board of directors include representatives of the industries, applicants, and consumers that participate in or are affected by USAC's universal service programs.³ The rules also specifically require that the SLD Committee be comprised of at least one service provider representative, along with three school representatives and one library representative (all board members).⁴ The current SLD Committee includes two service providers (one as the service provider member, another as an at-large member). Mr. Rivera served USAC, and was not compensated for this service, because he believed he could help improve the E-rate Program to the benefit of schools and libraries. Given that the Commission requires that service provider representatives serve on these boards and committees, it would be a grave injustice for those who give of their time and

Decision of the Universal Service Administrator by Williamsburg-James City Public Schools, 14 FCC Rcd 20152, 20154-55 (1999) (directing USAC to fund an applicant where its application was submitted before the establishment of a particular rule); *Request for Review of the Decision of the Universal Service Administrator by Mariposa County Unified School District*, DA No. 05-162 (TAPD/WCB, Jan. 25, 2005) (applying then-existing Program rules when granting a Request for Review).

³ 47 C.F.R. § 54.703.

⁴ *Id.* § 54.705(a)(2).

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resources to participate, to then be viewed unfavorably, as having an unfair competitive advantage. Such a result would disincite service providers from serving on the board.⁵

Pursuant to Section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed with the office of the Secretary. If you have any questions regarding this notification, please contact the undersigned.

Very truly yours,

/s/ Jennifer L. Richter

Jennifer L. Richter
*Counsel to Spectrum Communications
Cabling Services, Inc.*

Attachment

cc: Narda Jones
Vickie Robinson
Jennifer Schneider
Greg Lipscomb

⁵ Concerns regarding unfair advantages gained by board members could similarly apply to school and library representatives that may be associated with pending funding applications. If service provider, school or library representatives are thought to have a competitive advantage, they would have to choose between participating in the Program and suspending their participation while they served on the board. This was not the intent of the Commission when it promulgated its universal service rules.

Spectrum Communications Cabling Services, Inc.

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Talking Points

- On June 19, 2003 six California schools (the “Schools”) and Spectrum Communications Cabling Services, Inc. (“Spectrum”) filed a Request for Review regarding the Universal Service Administrative Company’s (“USAC”) denials of the Schools’ 2002-2003 funding requests under the E-rate Program.¹ The applications were denied after being subject to Selective Review for more than one year.
- The denials were based upon perceived “similarities” in the Schools’ Form 470 applications (the description of internal connection services sought by the Schools) and answers to a Selective Review question that were submitted by the Schools (how and why each School selected Spectrum as its service provider for internal connections).
- USAC erroneously assumes that these perceived similarities *per se* equate to impermissible service provider involvement by Spectrum in the Schools’ competitive bidding process. USAC, however, proffers no evidence of any actual impermissible service provider involvement or violation of the E-rate Program’s or FCC’s competitive bidding rules for the 2002-2003 funding year. A review of the salient facts in this case demonstrates that Spectrum was not impermissibly involved in the Schools’ competitive bidding process.
 - **Form 470 Service Descriptions.** The Schools’ Form 470 service descriptions varied to reflect the individual needs of each applicant. Although USAC fails to provide any clarifying information, it appears that the perceived “similarities” may be because each item listed on the Schools’ Form 470 is listed in the same, or virtually the same, manner as what is listed on USAC’s eligible services list. Spectrum’s involvement fully comported with Program rules at the time the applications were filed, and was in fact encouraged by USAC. Any communications with the Schools prior to the filing of the Form 470 applications was neutral and proper. Spectrum provided the Schools with basic information regarding the E-rate Program and eligible services. Spectrum notes that in its role as an E-rate trainer for the California Department of Education, it also was required to provide only neutral, advisory information to E-rate applicants.
 - **Selective Review Responses.** The responses were submitted after the Schools’ Form 470 bidding and selection of Spectrum, thus any similarity in responses cannot be considered proof of Spectrum’s involvement in the competitive bidding process. In any event, Spectrum’s assistance with the Schools’ responses does not violate Program or FCC rules. Spectrum assisted the Schools by providing information requested by the Schools which the Schools used to prepare their Response, but such assistance had no connection to the competitive bidding process. Existing rules at the time the Schools filed their applications stated that applicants and service providers were to assist in the selective review process. Three weeks *after* USAC denied the Schools’ applications, USAC changed its policy by posting on its website an alert that service providers cannot

¹ Joint Consolidated Request for Review of Decisions of the Universal Service Administrator, El Monte Unified School District, Hemet Unified School District, Inglewood Unified School District, Lucerne Valley Unified School District, Romoland Elementary School District, Rosemead Elementary School District, Spectrum Communications Cabling Services, Inc., CC Docket No. 02-6, SLD File Nos. 311437, 295589, 313520, 314228, 305956, 303357 (filed June 19, 2003).

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answer selective review questions for applicants. Neither the Schools nor Spectrum had any notice that USAC was changing its policy or that USAC would retroactively apply the new policy to applications previously filed.

- The mere existence of similarities across Form 470 applications does not *per se* equate to improper service provider involvement and a competitive bidding violation. The *Ysleta* case explicitly recognized that there are valid reasons why similarities may exist across Form 470 applications.
- Furthermore, it is inappropriate for USAC to deny applicants' funding requests because "similarities" it may perceive *suggests* to USAC that there may be impermissible service provider involvement. USAC should not deny applications based on similarities without proof of a competitive bidding violation. Suggestions of impermissible conduct should prompt further investigation, which USAC undertook with the selective review process, not an outright denial of applications. USAC's due diligence in determining *actual*, rather than *suggested*, competitive bidding violations would ultimately reduce the amount of litigated funding denials, thus saving applicants, service providers, USAC and the Commission from needlessly expending valuable resources.