

APPEALS PENDING WITH THE FCC

“Similarities” Appeal

- Consolidated Request for Review of Decisions of the Universal Service Administrator, Morehouse Parish School District and Jackson Parish School District, CC Docket No. 02-6 (filed January 10, 2005).
- Request for Review of Decisions of the Universal Service Administrator, Webster Parish School District, CC Docket No. 02-6 (to be filed April 25, 2005).

“Similarities”/Title 38 Consolidated Appeal

- Consolidated Request for Review of Decisions of the Universal Service Administrator, Morehouse Parish School District and Richland Parish School District, CC Docket No. 02-6 (filed August 23, 2004).

Title 38 Appeals

(All Title 38 appeals were supplemented by Louisiana counsel with an opinion from the Louisiana Attorney General on December 21, 2004.)

- Consolidated Request for Review of the Decisions of the Universal Service Administrator, DeSoto Parish School Board and Tensas Parish School Board, CC Docket No. 02-6 (filed July 27, 2004).
- Consolidated Request for Review of the Decisions of the Universal Service Administrator Regarding the Denials of Bienville Parish School District’s Funding Requests and Madison Parish School District’s Funding Requests, CC Docket No. 02-6 (filed August 17, 2004).
- Consolidated Request for Review of the Decisions of the Universal Service Administrator, Caldwell Parish School District, Catahoula Parish School District, Claiborne Parish School District, Concordia Parish School District, Franklin Parish School District, Lincoln Parish School District, Webster Parish School District, and Winn Parish School District, CC Docket No. 02-6 (filed August 23, 2004).

DISCUSSION POINTS ON PENDING "TITLE 38" APPEAL

- The SLD and USAC denied the 2002 funding requests of 13 Louisiana schools (the "Schools") because the Schools allegedly failed to comply with the competitive bidding requirements set forth in Title 38 of the Louisiana Revised Statutes (the state procurement law). The funding requests were for the purchase of Internet access service and/or internal connections from SEND.
- The SLD and USAC applied their own interpretations of Louisiana state procurement law to the Schools' funding requests.
- Because compliance with state procurement requirements is a matter of state law, local Louisiana counsel for the Schools (who also represents the Louisiana School Boards Association) sought and obtained an opinion from the Louisiana Attorney General ("AG") regarding the applicability of Title 38 to the purchase of Internet access services and internal connections. USAC representatives indicated agreement that the Louisiana AG is the final arbiter of how Louisiana state procurement law is to be applied to the competitive bidding processes and should control the substantive disposition of this matter.
- The AG's opinion indicates that Internet access services are service contracts which are not subject to Title 38. Internal connections contracts could be subject to Title 38 if the contracts exceed certain threshold dollar amounts, but the E-rate Program's competitive bidding process would meet the state's procurement requirements in any event.
- On December 21, 2004, the Schools' local counsel supplemented the pending Title 38 appeals with detailed analyses of the AG opinion and the competitive bidding processes undertaken by the Schools under the framework supplied by the AG. The analyses demonstrate that the Louisiana state procurement law was not violated by any of the Schools. A prompt decision by the Commission with regard to USAC's Title 38 allegations would bring to a close multiple pending Title 38 appeals and provide needed guidance to USAC and E-rate applicants regarding the applicability of Louisiana procurement requirements going forward.

DISCUSSION POINTS ON PENDING “SIMILARITIES” APPEAL

The FCC Must Act Quickly To Prevent Further Erroneous Funding Denials Based Upon Perceived “Similarities” That “Suggest” Impermissible Service Provider Involvement Without Proof Of Actual Rule Violations.

- The funding requests of various Louisiana schools for the Funding Year (“FY”) 2002 were scrutinized by USAC due to perceived “similarities” in the Form 470 applications that “suggested” to USAC that there might have been impermissible service provider involvement that corrupted the competitive bidding process. Based upon these similarities, USAC subjected the schools to a two-year selective review process, but no actual rule violations were found, including no finding of *actual* impermissible service provider involvement. Nevertheless, the funding requests were denied because of the “suggestion” of service provider involvement, with nothing more.
- Despite rational explanations for perceived “similarities,” which are unrelated to any service provider, the pattern of denials for Louisiana schools for the same similarities from FY2002 seems to be continuing in FY2003 and FY2004, perhaps because of continuation contracts from FY2002 (although USAC’s decisions have been unclear on this). If the “similarities” from FY2002 are easily explained and are not indicative of rule violations, impermissible service provider involvement, or a corrupt bidding process, then the FY2002 denials were in error and any related denials for FY2003 and FY2004 also are in error. (Applications for FY2004 are now under selective review and risk being denied based on the same perceived similarities.)
- The alleged “similarities” in the FY2002 applications that apparently continue to be an issue for the Louisiana schools in FY2003 due to continuation contracts, are: (1) the school identifiers, (2) some of the service descriptions contained in the Form 470 applications, and (3) the mailing method used by some of the schools to submit their Form 470 certifications.
 - During recent meetings with USAC staff, SEND explained and provided proof that the school identifiers are assigned by the state board of education and have nothing to do with any service provider.
 - Likewise, SEND demonstrated that although the descriptions of requested services may be similar in some instances, the services requested for each school are tailored to individual technology plans and needs and each funding request is completely different. The similarities in the service descriptions are not indicative of a rule violation or impermissible service provider involvement. In training sessions held many years ago by USAC and service providers for Program applicants, application templates were developed in order to assist the schools with the application process. Schools may have subsequently used these templates and/or similar service descriptions year after year, but these are not rule violations or evidence of impermissible service provider involvement.
 - The “similar” mailing method used by the schools to deliver their Form 470 certifications also does not equate to improper service provider involvement or a competitive bidding violation. Each school prepared its own Form 470 for FY2002 online and signed and submitted its own certification page to the SLD. Because timely delivery of regular mail is not guaranteed, and loss of a Form 470 certification precludes E-rate support, overnight delivery is preferred. The schools, however, often do not use

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overnight delivery services to avoid burdensome internal approval processes for the *de minimis* expenditure. Because SEND is located near an overnight delivery location, it offered to overnight the certifications that had already been completed by the schools to the SLD for prompt processing or allowed the schools to simply use SEND’s FedEx account number. This minimal mailing assistance did not corrupt the competitive bidding processes. Each school sought competitive bids under the Program requirements, and based upon the bids submitted by various vendors, some schools chose SEND, some chose a combination of SEND and other vendors, and some chose other vendors altogether.

- All communications between SEND and the schools were of the type approved by Program rules, were vendor-neutral, and for the purpose of providing general, basic assistance to the schools. There was no improper service provider involvement in the schools’ competitive bidding process and no such involvement was found by USAC during selective review.
- The mere existence of similarities across Form 470 applications does not *per se* equate to improper service provider involvement and a corrupted competitive bidding process. As explained above, the similarities were the result of any number of justifiable factors that do not run afoul of program rules in any way. The *IBM/Ysleta* case explicitly recognized that there are valid reasons why similarities may exist across Form 470 applications, which is the case for the Louisiana schools. Suggestions of impermissible conduct should prompt further investigation through the selective review process, not an outright denial of applications, even when there is no proof of rule violations. USAC’s due diligence in determining *actual*, rather than *suggested*, competitive bidding violations would ultimately reduce the amount of litigated funding denials.
- Quick action by the FCC to resolve the “similarities” issue will prevent USAC and the SLD from wrongly acting on numerous funding requests that are currently pending. Without prompt resolution of this issue, the SLD’s and USAC’s continued reliance on “similarities” as a basis to deny funding requests without evidence of actual rule violations will prompt the needless expenditure of time and resources on the part of the FCC, USAC, the schools and service providers like SEND in litigating the same issue multiple times.
- Neither the schools nor SEND were aware that the perceived similarities from FY2002 could be perceived as tainting the competitive bidding process for FY2003 and FY2004. The schools filed their funding requests for FY2003 and FY2004 before USAC provided information in January 2004 about problems related to perceived similarities in FY2002. Accordingly, the schools were denied the opportunity to explain that the similarities had nothing to do with their service provider or to take other corrective action to address any perceived problems for subsequent funding years.

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Timeline

- **Fourth Quarter 2001:** After seeking competitive bids for services for the 2002 Funding Year, multiple Louisiana schools filed Form 470 applications naming SEND as their service provider for Internet access service and internal connections.
- **Fourth Quarter 2002/ First Quarter 2003:** Pursuant to Program guidelines, three schools (Morehouse, Jackson, and Webster Parish School Districts) continued their contracts with SEND and filed Form 471s for the 2003 Funding Year referencing the prior year’s filings.
- **Fourth Quarter 2003/ First Quarter 2004:** Pursuant to Program guidelines, three schools (Morehouse, Jackson, and Webster Parish School Districts) again continued their contracts with SEND and filed Form 471s for the 2004 Funding Year.
- **January 22, 2004:** After two years in selective review, the SLD denied ten schools’ applications for the 2002 Funding Year based upon alleged or perceived “similarities” between their Form 470 applications and the applications of other E-rate Program applicants that “suggest” that SEND was improperly involved in the Schools’ competitive bidding process.
- **February 10, 2004:** Counsel for SEND requested that the SLD clarify the nature of the alleged or perceived similarities so that the issue could be properly addressed on appeal.
- **March 2004:** Without the benefit of any clarifying information from the SLD, eight of the schools and SEND appealed the SLD “similarities” decisions regarding the 2002 Funding Year to USAC.
- **May 28, 2004:** The SLD denied funding requests of three schools (those with continuation contracts from the prior funding year) for the 2003 Funding Year based upon the same “similarities.”
- **June 24, 2004:** USAC denied two of the schools’ appeals for the 2002 Funding Year, at which time USAC provided slightly more information regarding the three perceived similarities which, according to USAC, “suggest” improper service provider involvement in the competitive bidding process: (1) the schools’ Form 470 identifier; (2) the description of services on the schools’ Form 470; and (3) the delivery method used to send the schools’ Form 470 certification page to USAC.
- **July 29, 2004:** The SLD’s denials for the 2003 Funding Year are appealed to USAC.
- **August 23, 2004:** The schools (Morehouse and Richland Parish School Districts) and SEND appealed USAC’s denials regarding the 2002 Funding Year to the FCC.
- **November 9, 2004:** USAC denied two schools’ (Morehouse and Jackson Parish School Districts) funding requests for the 2003 Funding Year based upon the same alleged “similarities.”
- **November 24, 2004:** SEND submits letter to USAC asking that it rescind the Morehouse and Jackson 2003 Funding Year denials and not deny any other pending applications based upon the same alleged “similarities” until the FCC provides further guidance on this issue, which is pending on appeal.
- **January 10, 2005:** SEND and Morehouse and Jackson Parish School Districts appealed USAC’s denials for the 2003 Funding Year to the FCC.
- **February 24, 2005:** USAC denied Webster Parish School District’s funding request for the 2003 Funding Year based upon the same alleged “similarities.” (To be appealed to the FCC on April 25.)