

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

In the Matter of)	
)	
Request for Review of Decisions of the Universal Service Administrator)	CC Docket No. 02-6
)	
Webster Parish School District)	File Nos. SLD-363968
)	
)	

REQUEST FOR REVIEW

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April 25, 2005

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SUMMARY

Webster Parish School District (“Webster”) and SEND Technologies, LLC (“SEND”) seek review of a decision of the Universal Service Administrative Company (“USAC”) that upheld a decision of the Schools and Libraries Division (“SLD”) denying Webster’s request for Internet access funding for the 2003-2004 funding year. The SLD and USAC denied Webster’s funding request for 2003-2004 because perceived “similarities” between its Form 470 application and the applications of other E-rate Program applicants for the 2002-2003 funding year “suggest” to USAC improper vendor involvement in Webster’s competitive bidding process.

The “similarities” that resulted in Webster’s funding denial were the Form 470 school identifiers, the descriptions for some of the requested services, and minimal mailing assistance from SEND when Webster submitted its completed Form 470 certification pages. All of these similarities can be easily explained and are no indicative of impermissible service provider involvement. Notwithstanding the lack of evidence of actual rule violations, USAC claims that the mere existence of these similarities on the Form 470s represents a *per se* competitive bidding violation. USAC’s unproved “suggestion” of service provider involvement based upon permissible similarities in Form 470s, without proof of actual rule violations or impermissible service provider involvement (after subjecting Webster to a lengthy selective review process), does not justify denial of Webster’s funding request. The FCC previously acknowledged in the *Ysleta* case that applicants seeking E-rate Program funds may have similar Form 470s without violating FCC or Program competitive bidding requirements, and that is the case here.

The FCC already has before it multiple Requests for Review that appeal USAC’s funding denials for 2002-2003 and 2003-2004 applications and raise substantially identical issues as those raised in this case. Accordingly, Webster and SEND request that the filings be consolidated.

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To: The Commission

REQUEST FOR REVIEW

Webster Parish School District (“Webster”), through counsel, and SEND Technologies, LLC (“SEND”), pursuant to Section 54.719(c) of the Commission’s rules,¹ submit this Request for Review (“Request for Review”) seeking reversal of a decision of the Administrator of the Universal Service Administrative Company (“USAC”), issued on February 24, 2005.² Specifically, USAC upheld a decision of the Schools and Libraries Division (“SLD”) that denied Webster’s funding request through the Schools and Libraries Universal Service Program (“E-rate Program” or “Program”) for Internet access service for the 2003-2004 funding year. SEND is the service provider with whom Webster contracted for the service.

The Commission already has multiple appeals from Louisiana schools and SEND pending before it from the 2002-2003 and 2003-2004 funding years that raise the identical issue

¹ 47 C.F.R. § 54.719(c).

² Letters from the Universal Service Administrative Company to Mark Stevenson, SEND Technologies, LLC, (February 24, 2005) (“*Decision on Appeal*”), attached hereto as Exhibit A. The SLD initially denied Webster’s funding request on June 29, 2004. On August 26, 2004, SEND appealed the SLD’s denial to USAC.

involving the identical set of facts contained in the instant Request for Review.³ Accordingly, SEND and Webster request that the Commission consolidate these factually identical appeals. Webster and SEND also urge the Commission to act quickly on these Requests for Review. USAC has multiple cases pending before it for the 2004-2005 funding year that likely will be denied based upon the same permissible similarities. Consolidation and quick resolution of all Requests for Review will provide USAC with needed guidance on the “similarities” issue and forestall the needless expenditure of time and resources on the part of the Commission, USAC, the schools, and SEND in litigating the same issue multiple times.

I. INTRODUCTION.

Webster, a school district in Louisiana, has participated in the E-rate Program since its inception and has significantly benefited from the Program by providing its students and teachers with advanced telecommunications and Internet services.

Webster’s 2003-2004 funding request for Internet access service, the subject of this Request for Review, was denied based upon perceived “similarities” between its Form 470 application from the 2002-2003 funding year and applications filed by other Louisiana schools for the 2002-2003 funding year that also were denied based upon “similarities.” Webster’s 2002-2003 funding request *was not* denied based upon “similarities,” it was erroneously denied for another reason as discussed below. Although USAC fails to make this clear in its denial, it appears it denied Webster’s 2003-2004 funding request because it involved a continuation contract from the 2002-2003 funding year during which “similarities” in Form 470 applications

³ See 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 Aug. 23, 2004) (“Morehouse/Richland Request for Review”); 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 Jan. 10, 2005) (“Morehouse/Jackson Request for Review”).

led to funding denials for several other Louisiana schools.⁴ Although Webster could have simply taken advantage of its continuation contract with SEND for the 2003-2004 funding year, Webster entertained multiple additional competitive bids for the 2003-2004 funding year, and only decided to continue its contract with SEND after it was again found to be the low cost provider.⁵ Thus, Webster undertook a full and fair competitive bidding process for both 2002-2003 and 2003-2004 funding years.

As indicated above, Webster's funding request for the 2002-2003 funding year was not denied based upon "similarities." It was erroneously denied by USAC for allegedly violating Title 38 of the Louisiana Revised Statutes (the state procurement law), as interpreted by USAC. Based upon a Louisiana Attorney General opinion on this issue (which was filed with the FCC on December 21, 2004), Webster's competitive bidding process for the 2002-2003 funding year did not violate state procurement law. Webster's 2002-2003 funding denial also is the subject of a pending appeal.⁶

⁴ The conclusion that USAC denied Webster's 2003-2004 request for Internet access solely because it was a continuation contract is supported by the fact that the Webster's 2003-2004 funding request for internal connections, which was *not* a continuation contract, was granted by USAC. USAC denied only the funding requests that were based upon continuation contracts from the 2002-2003 funding year.

⁵ Due to USAC's two-year delay in processing the year 2002-2003 funding requests, SEND offered its customers the option of seeking new competitive bids for the 2003-2004 funding year. Many of SEND's customers accepted the offer, including Webster. Since Webster was unaware of any perceived problems with the prior year's applications, it referenced its year 2002-2003 Form 470 when it sought funding for 2003-2004. As noted below, Webster's 2002-2003 funding requests were still in selective review when it filed for the 2003-2004 funding year, so it had no knowledge that the prior year's application could be considered defective.

⁶ See 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); Letter from Kenneth Sills, counsel to the schools, to Marlene Dortch, Secretary, FCC, CC Docket No. 02-6 (Dec. 21, 2004) (supplementing the appeal with an opinion of the Louisiana Attorney General indicating that Webster did not violate the state procurement law). USAC fails to explain why it denied Webster's 2003-2004 funding request based upon "similarities" rather than on an alleged violation of Title 38 of the state procurement law as it did the prior year.

The crux of the issue presented to the FCC in the Requests for Review is whether the existence of perceived similarities in Form 470s for various Louisiana schools, including Webster, corrupted the competitive bidding process for the 2002-2003 funding year and beyond. The SLD and USAC made the presumption, incorrectly, that similarities among the Form 470 applications “suggest” SEND’s involvement in the competitive bidding process in violation of FCC and Program rules. The factual underpinnings of the three identified “similarities,” however, demonstrate that all are easily explained, and with the exception of one (minimal mailing assistance), are not related to any service provider. Furthermore, none of the similarities are indicative that any service provider was impermissibly involved in the competitive bidding process and USAC found no evidence to support its claim. An unproved “suggestion” of involvement based upon these similarities does not justify denying the schools’ applications for needed federal funds.

II. THERE WERE NO ACTUAL COMPETITIVE BIDDING VIOLATIONS DUE TO “SIMILARITIES” IN WEBSTER’S FORM 470 APPLICATION.

The SLD initially denied Webster’s 2003-2004 funding request for Internet access service for the following reason:

Similarities in Form 470s and in the preparation and submission of Forms 470s certification pages amongst applicants using this service provider *suggest* service provider involvement in the competitive bidding process.
(*emphasis added*)

The SLD’s generic statement did not explain what facts led to the SLD’s conclusion. Nor did it cite to any *actual* proof of impermissible service provider involvement in preparation of the applications or the competitive bidding process, which the SLD presumably would have known after subjecting Webster and other Louisiana schools to a two-year selective review process. Given that the SLD provided no information concerning the alleged similarities, SEND and Webster were left only to surmise the basis for the SLD’s claims when the SLD’s decision was

appealed to USAC.⁷ USAC's *Decision on Appeal*, which upheld the SLD's funding denial, provided slightly more information regarding the alleged similarities:

Webster Parish School Board's Form 470 identifier, Form 470 service descriptions, and Form 470 certification page submission by Mark Stevenson, President of SEND Technologies, LLC, displayed striking similarities to those of other applicants that selected SEND Technologies, LLC as their vendor. The similarities in the Forms 470 were only noted on applications that had SEND Technologies, LLC as a vendor, which indicates that SEND Technologies, LLC was improperly involved in the competitive bidding and vendor selection processes.⁸

These similarities are easily explained and do not rise to the level of a *per se* violation of the FCC's and the Program's competitive bidding rules. There are no FCC or Program rules or relevant decisions that indicate that the similarities found here could violate any competitive bidding rules, and USAC has not alleged any actual violations of the same.

A. The Perceived "Similarities" Across The Schools' Form 470 Applications Do Not Signify That SEND Was Improperly Involved In The Schools' Competitive Bidding Process.

Each of the alleged similarities identified by USAC can be easily explained, and the factual underpinnings do not indicate that there was impermissible service provider involvement that tainted the competitive bidding process.

⁷ Counsel for SEND previously asked the SLD to clarify its reasoning for denying the schools' funding requests so that the schools and SEND could respond appropriately to the SLD's allegations. *See* letter from Jennifer L. Richter, counsel to SEND, to Cynthia Schultz, Director of Service Provider Support, Universal Service Administrative Company (Feb. 10, 2004). Although the FCC has recognized that an applicant's appeal of a denial of a funding request, and consideration of that appeal, is impeded when the record developed by the SLD "does not reveal the facts and reasoning on which [the] SLD's determination is based with clarity," the SLD did not provide any clarifying information. *See* email from Cynthia Schultz to Jennifer L. Kostyu, counsel to SEND (Mar. 4, 2004). The correspondence between counsel and Ms. Schultz is attached hereto as Exhibit B.

⁸ *Decision on Appeal* at 2. USAC's allegation that similarities exist only on applications that list SEND as a vendor is inaccurate. At least one other E-rate applicant for the 2002-2003 funding year, West Carroll Parish School District, used a similar Form 470 to that of the schools, but did not choose SEND as its vendor.

Form 470 Identifiers. Webster’s and other schools’ use of certain Form 470 identifiers (e.g., the school district number assigned to the schools by the state) is a decision the schools made and is not connected to SEND. The Form 470 identifier is a label placed on the Form 470 that is chosen solely by the applicant to help the applicant identify the Form 470 at some later date. Webster and other Louisiana schools have used their school district numbers assigned by the State of Louisiana as their Form 470 identifiers for multiple years. For example, Webster’s school district number and Form 470 identifier are “060.” The chart attached hereto as Exhibit C lists the school district numbers that are used by many of the Louisiana schools as their Form 470 identifier. The chart demonstrates that any similarities in the identifiers are the result of the schools’ use of their state assigned numbers, not involvement by SEND.

Service Descriptions. Any perceived similarities in service descriptions between Webster’s and other schools’ applications also fail to demonstrate that SEND was impermissibly involved in their competitive bidding processes. Webster and other schools participated in training sessions and workshops held by USAC and various vendors, including SEND, which resulted in the development of a template for service descriptions.⁹ Accordingly, some of the service descriptions submitted by the schools may be “similar,” but such similarities are allowed and acknowledged by the FCC. E-rate Program rules state that service providers can communicate with applicants and provide basic information regarding the Program, including information regarding products and services.¹⁰ It is critical to note that while descriptions of

⁹ USAC also holds training sessions and workshops for Program participants. In the early years of the E-rate Program, vendors (including BellSouth, CenturyTel and SEND) sometimes conducted training sessions in a neutral, advisory role, to provide basic information about the E-rate Program and the application process to Program participants. Such general, basic assistance is explicitly allowed under Commission and Program rules. See USAC, “Service Provider Manual, Chapter 5 - Service Provider Role in Assisting Customers, available at <http://www.sl.universalservice.org/vendor/manual/chapter5.asp>.

¹⁰ USAC, “Service Provider Manual, Chapter 5 – Service Provider Role in Assisting Customers,” available at www.sl.universalservice.org/vendor/manual/chapter5.asp.

certain services might be similar, each school requested different services and different quantities in order to respond to their unique technology plans and needs. Copies of Webster’s Form 470 application for the 2002-2003 funding year and its Form 471 for the 2003-2004 funding year (which references the prior year’s Form 470) are attached as Exhibit D. A review of these documents and copies of the Form 470 and 471 applications of other Louisiana schools (Morehouse, Richland, and Jackson Parish School Districts) that were denied based upon the same “similarities” (attached as Exhibit E) shows no discernable “similarity” that would “indicate” improper service provider involvement.¹¹

The FCC stated in *Ysleta* that “while we do expect some variation among individual applicants, we stress that we are not prohibiting a state or school district from seeking uniformity in technological development, *i.e.*, through the use of statewide technology plans or requiring applicants to seek the same level or types of services.”¹² As explained above, any similarities among the schools’ Form 470s and the preparation thereof were due to decisions made by the schools, or permissible discussions and collaborations *between the schools*, and permissible discussions between the schools and various service providers, including SEND. Such

¹¹ First, the amount of services ordered from SEND clearly varies by school. Second, the schools also were paying different amounts for the ordered services. Third, the description of services and the quantity requested differed in each Form 470 depending upon the individual needs of each school. For example, in 2002-2003, Morehouse sought funding for Internet access and internal connections for 17 separate school sites; Richland sought funding for 14 sites; Jackson sought funding for nine sites; Webster sought funding for 11 sites. The schools sought different types and amounts of switches, services and equipment. The value of the services and products the schools sought from SEND also differed. Morehouse was purchasing Internet access service for \$104,400 and internal connections for \$6000; Richland was purchasing Internet access service for \$72,180 and internal connections for \$6025; Jackson was purchasing Internet access service for \$60,162 and internal connections for \$3000; Webster was purchasing Internet access service for \$130,980 and internal connections for \$7391. USAC also failed to identify what other applicants may have “similar” Form 470s, making it difficult for the schools and SEND to provide the Commission with additional facts that may be relevant to the Commission’s consideration of these Requests for Review.

¹² *Id.* ¶ 30, n.90.

communications did not violate any SLD Program rules or the rules and regulations of the FCC. Webster prepared its own applications and determined its own need for services.

Mailing. The final similarity among the 2002-2003 funding year applications noted by USAC is: “Form 470 certification page submission by Mark Stevenson.”¹³ Mark Stevenson is the president of SEND. USAC’s characterization is somewhat misleading. Mark Stevenson did not “submit” Form 470 certification pages for Webster or any other school in any funding year. Each school prepared its own application online, and signed and submitted its own certification page for the SLD’s consideration. Because timely delivery of regular mail is not guaranteed, and loss of a Form 470 certification would preclude receiving any E-rate support, overnight delivery is preferred so that mailings can be tracked in the event something goes awry. In order to use an overnight delivery service, Webster and the other Louisiana schools were typically required to submit and receive approval for a purchase order, although the cost of an overnight package is *de minimis*. Given SEND’s close proximity to a FedEx location, its relative ease in using the service, and the *de minimis* cost of overnight delivery (\$16.00), for the 2002-2003 funding year only SEND offered overnight mailing assistance for the already completed Form 470 certifications.¹⁴

Neither Webster nor SEND believed that offering minimal mailing assistance could be construed as improper service provider involvement and a competitive bidding violation, especially in light of the *de minimis* cost of overnight delivery. In addition, the minimal mailing assistance did not impact the competitive bidding processes of Webster or any other school. Each school sought competitive bids by posting its Form 470 on the SLD website as required by

¹³ *Decision on Appeal* at 2.

¹⁴ In some cases the schools may have mailed their certifications to USAC themselves, but used SEND’s FedEx account to do so.

FCC and Program rules, and based upon the bids various vendors submitted, some schools chose SEND, some chose SEND and other providers for different services, and some chose providers other than SEND. Providing minimal mailing assistance clearly did not corrupt the competitive bidding process or the independence of the schools in choosing service providers, nor did it violate any of the FCC's or the Program's competitive bidding rules.

B. SEND's Actions Did Not Contravene Applicable Guidelines For Permissible Service Provider Involvement.

The SLD describes on its website what role a service provider can take without violating the FCC's and the SLD's competitive bidding rules.¹⁵ For example, the SLD explains that service providers can communicate with an applicant so long as such communication is neutral and does not taint the competitive bidding process. A service provider can provide basic information regarding the E-rate Program to an applicant, and can assist with an applicant's RFPs so long as the assistance is neutral. A service provider also can provide an applicant with technical assistance on the development of a technology plan, including information regarding products and services that are being furnished to the applicant.

The SLD explains on its website that a service provider *cannot*: (1) sign a Form 470 or 471 for an applicant; (2) be listed as a contact person on a Form 470; (3) act as a technology plan approver for an applicant; (4) prepare RFPs for an applicant; (5) provide or waive funding for an applicant's undiscounted portion of equipment and services obtained through the E-rate Program; (6) coerce or pressure an applicant to use a specific service provider; and (7) interfere

¹⁵ USAC, "Service Provider Manual, Chapter 5 – Service Provider Role in Assisting Customers," available at www.sl.universalservice.org/vendor/manual/chapter5.asp.

with or obstruct an applicant's competitive bidding process.¹⁶ USAC and the SLD have not alleged that SEND engaged in any of the foregoing prohibited conduct.

The mere, easily explained similarity of certain aspects of Form 470s submitted by Webster and other schools for the 2002-2003 funding year does not justify finding that a service provider was improperly involved in the competitive bidding processes for that year or subsequent funding years. The FCC has previously acknowledged that applicants seeking E-rate Program funds may have similar technology plans and Form 470s without violating the Program's competitive bidding requirements.¹⁷

In *Ysleta* the E-rate Program applicants had submitted "carbon copy" Form 470s that listed every service or product eligible for discounts. Although the FCC concluded that such comprehensive lists did not comport with the competitive bidding requirements under the E-rate Program,¹⁸ it noted that applicants may validly have the same or similar filings.¹⁹ USAC states, however, that *Ysleta* is inapposite to the instant case because it concerned:

"encyclopedia Form 470s" that contain a list of virtually all eligible services. The FCC specifically found that where the Administrator finds carbon copy technology plans and Form 470s across a series of applications, especially where the same service provider is involved, it is appropriate for the Administrator to review these applications with more scrutiny to ensure that there has been no improper service provider involvement in the competitive bidding process. The SLD has not exceeded its authority in this instance. Like the *Ysleta* Order, the Winston-Salem Order expressed concern related to the use of overly broad Form 470s. However, nowhere in either order did the FCC determine that

¹⁶ *Id.*

¹⁷ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, CC Docket Nos. 96-45, 97-21, FCC No. 03-313 (Dec. 8, 2003) ("*Ysleta*"). In *Ysleta* the Commission addressed multiple requests to review the decisions of the SLD that were filed by E-rate applicants, but combined the requests as they had almost identical fact patterns.

¹⁸ *Id.* ¶¶ 26-37.

¹⁹ *Id.* ¶ 30.

“similarities” in Form 470 applications did not provide a basis for denial due to improper vendor involvement.²⁰

Webster and SEND do not object to USAC’s authority to scrutinize certain applications or deny applications if there is improper vendor involvement or other rule violations. Rather they disagree with USAC’s apparent perception that the mere existence of similarities across Form 470 applications *per se* equates to improper service provider involvement and a competitive bidding violation. There was no improper service provider involvement in the present case. Webster complied with all known rules and guidance regarding competitive bidding for the services they sought and USAC has not provided evidence of any actual rule violations.

USAC does not acknowledge why *Ysleta* is significant in the instant case. The FCC in *Ysleta* explicitly recognized that there are valid reasons why similarities may exist across Form 470 applications. By assuming the opposite, USAC creates a new policy – *i.e.*, that perceived similarities across Form 470s, even without actual proof of impermissible service provider involvement, indicate *per se* violations of the competitive bidding rules and justify denial of E-rate funding requests. USAC is not empowered to make this policy, interpret any unclear rule promulgated by the FCC, or create the equivalent of new Program guidelines.²¹ In addition, such a policy leads to absurd and unintended results when funding requests are denied based upon nothing more than similarities among applications. Such similarities are not tantamount to impermissible service provider involvement or violations of the competitive bidding rules. USAC and the SLD subjected Webster to a rigorous and lengthy selective review process and received information from the school about how it completed its applications and undertook

²⁰ *Decision on Appeal* at 2.

²¹ See 47 C.F.R. § 54.702(c); *Changes to the Board of Directors of the Nat’l Exchange Carrier Ass’n, Inc.*, 13 FCC Rcd 25058, 25066-67 (1998).

competitive bidding for the services it sought. USAC and the SLD did not learn, nor have they alleged, any specific facts that indicate that there was, *in fact*, impermissible service provider involvement. They have only alleged an unproved inference or “suggestion” of such involvement based upon perceived similarities among applications. An inference or a “suggestion” of service provider involvement is not enough justification to deny applications for needed federal funds.

III. CONCLUSION.

In view of the foregoing, Webster and SEND request that the FCC overrule USAC’s decision that denied Webster’s 2003-2004 funding request.

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April 25, 2005

CERTIFICATE OF SERVICE

I, Theresa Rollins, certify on this 25th day of April, 2005, a copy of the foregoing Request for Review has been served via electronic mail (*) or first class mail, postage pre-paid, to the following:

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