

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

In the Matter of)	
)	
Consolidated Requests for Review of)	CC Docket No. 02-6
Decisions of the Universal Service)	
Administrator)	
)	
Jackson Parish School District,)	File No. SLD-423981
)	
Morehouse Parish School District, and)	File No. SLD-409404
)	
Franklin Academy)	File No. SLD-412894

CONSOLIDATED REQUEST FOR REVIEW

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January 18, 2006

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SUMMARY

Jackson Parish School District, Morehouse Parish School District and Franklin Academy (collectively, the “Schools”), and SEND Technologies, LLC / Nexus Systems, Inc. (“SEND”), seek review of three decisions of the Universal Service Administrative Company (“USAC”) that upheld three decisions of the Schools and Libraries Division (“SLD”) denying the Schools’ requests for Internet access funding for the 2004-2005 funding year. The Schools’ FY2004-2005 funding requests were denied on grounds that each referenced a Form 470 application from a prior years which itself had been denied due to three “similarities” that the SLD and USAC perceived among these Form 470 applications and others that had been filed during the 2002-2003 funding year. Specifically, those perceived “similarities” apparently suggested to the SLD and USAC that there was improper vendor involvement in the Schools’ competitive bidding process.

Indeed, SEND was given an opportunity to explain the “similarities” to the SLD in March 2005, and the SLD agreed that tow of the three “similarities” were innocuous, that they did not (and could not) form a “pattern” implicating impermissible service provider involvement, and that there was no reason to deny applications having these same “similarities.” This decision was given effect going forward, in order to prevent further wrongful denials by the SLD, but it also should have been given effect to correct prior erroneous denials on identical grounds. Even if the “similarities” were not innocuous, USAC’s claim that the mere existence of these “similarities” on a Form 470 represents a *per se* competitive bidding violation cannot withstand scrutiny. All of these “similarities” are in fact easily explained, as the SLD acknowledged, and only one (certain *de minimis* mailing assistance that was offered in 2002) involved the service provider in any way. Further, a “pattern analysis” cannot be constituted upon a single “similarity.”

Finally, the denial of Franklin Academy's FY2004-2005 funding request is a manifest error on the SLD and USAC's part. USAC indicates that the application was denied because it referenced a Form 470 that was denied on "similarities" grounds. In fact, the FY2003-2004 Form 470 that was referenced in Franklin's FY2004-2005 funding request was approved by the SLD and, thus, Franklin Academy's FY2004-2005 funding request also should have been granted.

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To: The Commission

CONSOLIDATED REQUEST FOR REVIEW

Jackson Parish School District (“Jackson”), Morehouse Parish School District (“Morehouse”), through counsel, and Franklin Academy (“Franklin”) (collectively, the “Schools”), and SEND Technologies, LLC (“SEND”)¹, pursuant to Section 54.719(c) of the Commission’s rules,² submit this Consolidated Request for Review (“Request for Review”) seeking reversal of three decisions of the Administrator of the Universal Service Administrative Company (“USAC”), issued on December 30, 2005.³ Specifically, USAC upheld three decisions of the Schools and Libraries Division (“SLD”) that denied the funding requests of Jackson,

¹ The name listed as the service provider on the Schools’ FY2004-2005 Form 471 applications is Nexus systems, Inc. (“Nexus”). The service contracts associated with these applications were originally with SEND, but SEND assigned the contracts to Nexus, effective the FY2004-2005 funding year. SEND and Nexus are commonly controlled. For simplicity purposes, throughout the instant Consolidated Request for Review, all references to the SEND name are interchangeable with Nexus.

² 47 C.F.R. § 54.719(c).

³ Letters from the Universal Service Administrative Company to Jennifer L. Richter (counsel to SEND Technologies, LLC), dated December 30, 2005 (“*Decisions on Appeal*”), attached hereto as **Exhibits A1-A3**.

Morehouse and Franklin through the Schools and Libraries Universal Service Program (“E-rate Program” or “Program”) for Internet access service for the 2004-2005 funding year. SEND is the service provider with whom the Schools contracted for the service.

USAC’s decisions to uphold the SLD’s denials of the Schools’ FY2004-2005 funding requests should be reversed and remanded back to USAC because the SLD’s denials were contrary to the SLD’s own policies and decisions, and because the “similarities” analysis it employed was wholly without merit. In addition, USAC’s decision to uphold the denial of Franklin’s FY2004-2005 funding request clearly was due to a manifestly error on the SLD’s part.

I. INTRODUCTION

The underlying facts pertinent to the denials are as follows. The funding requests for various Louisiana schools for the 2002-2003 funding year were denied due to a “pattern” of three perceived “similarities” among their Form 470 applications.⁴ Those “similarities” involved the Form 470 school identifiers, the service descriptions, and *de minimis* mailing assistance offered by SEND to the Schools for the 2002-2003 funding year (only). The SLD and USAC made the incorrect presumption that the mere presence of these “similarities” among Form 470 applications submitted by schools that chose SEND as their service provider “suggested” impermissible involvement in the competitive bidding process on SEND’s part.

In March 2004, counsel for Send supplied SLD staff with proof that two of these three “similarities” (specifically, the school identifiers and the services descriptions) were innocuous

⁴ Morehouse’s appeal of that denial is now pending before the Commission. *See Consolidated Request for Review of Decisions of the Universal Service Administrator of Morehouse Parish School District and Richland Parish School District*, CC Docket No. 02-6 (filed Aug. 23, 2004). The SLD and USAC also denied Morehouse and Jackson’s FY2003-2004 funding requests on identical “similarities” grounds, and both schools have a consolidated appeal now pending before the Commission *See Consolidated Request for Review of Decisions of the Universal Service Administrator of Morehouse Parish School District and Jackson Parish School District*, CC Docket No. 02-6 (filed Jan. 10, 2005).

entries that had nothing at all to do with the service provider.⁵ SLD staff agreed and, acknowledging that one similarity among the applications did not constitute a “pattern,” removed a processing hold and granted more than 60 funding requests that were pending for Louisiana schools naming SEND as their service provider for 2004. The Schools’ FY2004-2005 funding requests were nonetheless denied, however, on grounds that the Form 470 applications (from prior years) failed a “pattern analysis.”⁶ In other words, because those earlier-filed Form 470s had been previously denied on “similarities” grounds, so were the FY2004-2005 applications that referenced them.

There are at least two bases for overturning USAC’s denial of the Schools’ FY2004-2005 funding requests. First, having realized the innocuous nature of the “similarities” in 2005 and thereafter approving funding requests containing such “similarities,” the SLD and USAC should have realized that the identical “pattern” analysis was just as erroneous as applied to FY2002-2003, FY2003-2004 or FY2004-2005 Form 470 applications. Funding requests from 2004-2005

⁵ See *Ex Parte* letter from Jennifer L. Richter, CC Docket No. 02-6 (filed July 8, 2005). Attached hereto as **Exhibit G**.

⁶ See *Decisions on Appeal* at 2. Because both Jackson and Morehouse entered into 3-year Internet access service contracts starting with the FY2002-2003 funding year, both had referenced the Form 470 applications submitted for the 2002-2003 funding year in their FY2003-2004 (and FY2004-2005) Form 471s. Accordingly, because the SLD and USAC denied Morehouse’s FY2002-2003 Form 470 on “similarities” grounds, they also denied Morehouse’s FY2003-2004 and FY2004-2005 funding requests – both of which referenced that FY2002-2003 Form 470 – on “similarities” grounds. Unlike Morehouse, Jackson’s FY2002-2003 funding request was denied by the SLD and USAC due to an administrative error on Jackson’s part, which was not appealed. However, Jackson’s FY2003-2004 funding request (which also referenced its FY2003-2003 Form 470) was denied on “similarities” grounds. It should also be noted that because USAC did not issue its denials of the Form 470 applications referenced in Jackson and Morehouse’s FY2004-2005 applications until November 9, 2004, and June 24, 2004, respectively, neither school had knowledge that the prior year’s application could be considered defective until after the application deadline for FY2004-2005 had passed.

should not have been denied based upon an erroneous “pattern” analysis from FY2002-2003.

The “pattern” analysis was never valid.⁷

Second, as Jackson and Morehouse explained in their FY2003-2004 appeal now pending before the Commission, and as SEND convincingly explained to the SLD in 2005, the factual underpinnings of the three identified “similarities” demonstrate that all are easily explained, and with the exception of one (*de minimis* mailing assistance), are not related to any service provider. In short, none of the “similarities” are indicative that any service provider was impermissibly involved in the competitive bidding process in FY2002-2003, FY2003-2004 or FY2004-2005, and USAC has not found or presented any evidence to the contrary.

The denial of Franklin’s FY 2004-2005 funding request – which was based upon the alleged denial (on “similarities” grounds) of the FY2003-2004 Form 470 referenced therein – was a manifest error on the SLD and USAC’s part. Specifically, unlike Jackson and Morehouse, USAC did *not* deny the Form 470 application referenced in Franklin’s FY2004-2005 funding request on “similarities” or any other grounds. Thus, Franklin’s FY2004-2005 funding request, which referenced the granted Form 470 from its FY2003-2004 application, should not have been denied.

II. THE GROUNDS FOR USAC’S DENIAL OF THE SCHOOLS’ FY2004-2005 FUNDING REQUESTS ARE INVALID

As a starting point, USAC itself has rejected the very “similarities” analysis it used to deny the Schools’ FY2004-2005 funding requests and, accordingly, there is (and was) no valid

⁷ The Schools also understand that the Commission may be in the process of preparing a blanket order that will grant the pending appeals of Morehouse and Jackson (*see* note 4 *infra*) and others whose funding requests were denied based upon the SLD and USAC’s “pattern” analysis of perceived “similarities.” The Form 470s at issue in those appeals are the exact same Form 470s at issue in the instant Request for Review (specifically, the Form 470s filed in FY2002-2003). Accordingly, if the Commission elects to grant the earlier-filed requests for review of Morehouse and Jackson now pending before the Commission, it also must grant the instant Request for Review because both appeals address precisely the same grounds for denial in the same Form 470s.

reason to uphold those denials. Specifically, in March 2005, counsel for Send supplied SLD staff with proof that the school identifiers listed by the schools on their Form 470 applications are the school district numbers assigned by the state, and that the services descriptions of the schools were tailored to each school's individual needs and were not similar.⁸ After consideration of the materials presented, SLD staff were no longer concerned with the two "similarities" and acknowledged that one similarity among the applications did not form a "pattern" sufficient to justify delay or denial of funding requests. The SLD then removed a processing hold and granted more than 60 funding requests that were pending for Louisiana schools naming SEND as their service provider for 2004. These two "similarities" are two of the same three similarities upon which USAC based its denials of the FY2002-2003, FY2003-2004 and FY2004-2005 funding requests (and, more importantly, the Form 470s referenced in the Schools' FY2004-2005 applications). If the SLD found its "similarities" analysis to be erroneous in 2005, then the identical analysis was obviously erroneous for all prior years. Accordingly, no funding applications of *any* funding year, including the Schools' FY2004-2005 applications, should have been denied based upon a "pattern" analysis of these "similarities."

The SLD's prior positions regarding these "similarities" were meritless (as detailed below) from the start in 2002. Its decisions regarding funding requests for FY2002, FY2003 and FY2004, which effectively apply two opposing legal interpretations to substantially identical fact patterns, is at once invalid, arbitrary and capricious.⁹

⁸ See *Ex Parte* letter from Jennifer L. Richter, CC Docket No. 02-6 (filed July 8, 2005). Attached hereto as **Exhibit G**.

⁹ See *Sharron Motor Lines, Inc. v. United States*, 633 F.2d 1115, 1117 (5th Cir. 1981) ("There may not be a rule for Monday, [and] another for Tuesday..."). See also, *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966) ("the [agency] cannot act arbitrarily nor can it treat similar situations in dissimilar ways."); *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1160 (5th Cir. 1977); *Revocation of License of Robert J. Listberger, Jr.*, 76 FCC 2d 212, 217 (Rev. Bd. 1980).

III. THE “SIMILARITIES” CITED BY THE SLD ARE NOT INDICATIVE OF ANY COMPETITIVE BIDDING VIOLATIONS

The SLD initially denied the Schools’ funding requests for Internet access services 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*)¹⁰

The SLD’s generic explanation provided no explanation of the facts that led to the SLD’s conclusion. Nor did the SLD cite to any actual *proof* of impermissible service provider involvement in preparation of the applications or execution of the competitive bidding process, despite the SLD having subjected the Schools to a selective review process during which the Schools provided the SLD with detailed information about their application and competitive bidding process.

USAC’s *Decisions on Appeal* also indicate that the “similarities” at issue pertain to the Form 470s *referenced* in the Schools’ FY2004-2005 funding requests:

Your funding request was denied because you referenced a FY2002-2003 Form 470, which had failed the pattern analysis for similarities in the Form 470 submission and Form 470 certification pages.¹¹

USAC has previously indicated that those similarities involved: (i) the Form 470 school identifiers; (ii) the descriptions for some of the requested services; and (iii) *de minimis* mailing

¹⁰ Copies of the SLD’s Funding Commitment Reports denying the Schools’ FY2004-2005 funding requests (and which provide next to no information) are attached as **Exhibits B1-B3**. The USAC *Decisions on Appeal* clarified that the denials were based upon earlier denials (on “similarities” grounds) of the Form 470s that were referenced in those FY2004-2005 funding requests. *Decisions on Appeal* at 2. Copies of the Schools’ appeals to USAC of the SLD’s denials of their FY204-2005 funding requests are attached as **Exhibits C1 and C2**.

¹¹ *Decisions on Appeal* at 2. As explained above, although USAC appears to justify its denial of Franklin’s FY2004-2005 funding request on grounds that it denied Franklin’s FY2003-2004 Form 470, that was simply wrong. USAC approved Franklin’s FY2003-2004 funding request.

assistance offered by SEND to the Schools for the 2002-2003 funding year (only), which they used to submit their completed Form 470 certification pages for FY2002-2003.¹²

Each of the alleged similarities in the FY2002-2003 Form 470 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.

A The Perceived “Similarities” Among The Schools’ Form 470 Applications Do Not Signify That SEND Was Improperly Involved In The Schools’ Competitive Bidding Process.

The SLD and USAC identified three “similarities” with respect to the Form 470s referenced by the Schools. As detailed herein, none of these “similarities” are indicative of any competitive bidding violations. That alone is enough to reverse the SLD and USAC’s denials of the Schools’ FY2004-2005 funding requests. Importantly, the SLD acknowledged in 2005 that two of the three “similarities” are innocuous, and that one unresolved “similarity” among applications is not enough to delay or deny funding requests due to a “pattern analysis.”

Form 470 Identifiers. As is (and was) the case with other Louisiana schools, Jackson and Morehouse’s 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. Jackson, Morehouse 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, Jackson’s school district number and Form 470

¹² See Letter from the Universal Service Administrative Company to Mark Stevenson, dated November 9, 2004 (affirming the SLD’s denial of Jackson’s FY2003-2004 funding request) (“*Jackson 2003 Decision on Appeal*”); Letter from the Universal Service Administrative Company to Kenneth F. Sills, dated June 24, 2004 (affirming the SLD’s denial of Morehouse’s FY2002-2003 funding request); and Letter from the Universal Service Administrative Company to Mark Stevenson, dated November 9, 2004 (affirming the SLD denial of Morehouse’s FY2003-2004 funding request) (“*Morehouse 2003 Decision on Appeal*”). All are attached hereto as **Exhibit H**.

identifier are “025” and Morehouse’s are “034.” The chart attached hereto as **Exhibit D** lists the state-assigned school district numbers. The chart demonstrates that any similarities in the identifiers are the result of the Schools’ use of their state assigned numbers as opposed to involvement on SEND’s part.

Service Descriptions. Any perceived similarities in service descriptions between Jackson, Morehouse and other schools’ applications also fail to demonstrate that SEND was impermissibly involved in their competitive bidding processes. Jackson, Morehouse 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.¹³ 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.¹⁴ It is critical to note that while descriptions of certain services might be similar, each school requested different services and different quantities in order to respond to their unique technology plans and needs.¹⁵ A review of the Form 470 and 471 applications of these and other Louisiana schools (Richland and Webster

¹³ 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>.

¹⁴ USAC, “Service Provider Manual, Chapter 5 – Service Provider Role in Assisting Customers,” available at www.sl.universalservice.org/vendor/manual/chapter5.asp.

¹⁵ Copies of the Schools’ Form 471s for the 2004-2005 funding year and the Form 470 applications referenced therein are attached as **Exhibits E1-E3**.

Parish School Districts) that were denied based upon the same “similarities” shows no discernable “similarity” that would “indicate” improper service provider involvement.¹⁶

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 service.”¹⁷ 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 communications did not violate any SLD Program rules or the rules and regulations of the FCC. The Schools prepared their own applications and determined their own needs for services.

¹⁶ 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 Parish School District sought funding for 14 sites; Jackson sought funding for nine sites; Webster sought funding for 11 sites. Copies of the Fy2002-2003 Form 470s for Richland and Webster Parish School Districts are attached as **Exhibits F1 and F2**, respectively. 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 the Requests for Review filed for these denials.

¹⁷ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, Order, 18 FCC Rcd 26406 at ¶ 30, n.90.(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.

Mailing. The final similarity among the Form 470 applications from FY2002-2003 noted by USAC is: “Form 470 certification page submission by Mark Stevenson.”¹⁸ Mark Stevenson is the president of SEND. USAC’s characterization is misleading. Mark Stevenson did not “submit” Form 470 certification pages for any schools 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, Jackson, Morehouse 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.¹⁹

Neither the Schools 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 any event, this *de minimis* mailing assistance did not impact the competitive bidding processes of Jackson, Morehouse or any other school. Each school sought competitive bids by posting its Form 470 on the SLD website as required by FCC and Program rules, and based upon the bids various vendors submitted, some schools chose SEND, some chose combinations of SEND and other providers

¹⁸ *Decision on Appeal* at 2.

¹⁹ In some cases the schools may have mailed their certifications to USAC themselves, but used SEND’s FedEx account to do so.

for different services, and some chose providers other than SEND. Providing \$16.00 worth of mailing assistance – which, it should be noted, was only offered for the FY2002-2003 funding year and did not even come into play until *after* the competitive bidding process had already been completed – 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.²⁰ 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; or (7) interfere

²⁰ 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.²¹ 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 Jackson, Morehouse 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. In the *Ysleta* case, the FCC acknowledged that applicants seeking E-rate Program funds may have similar technology plans and Form 470s without violating the Program's competitive bidding requirements.

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,²² it noted that applicants may validly have the same or similar filings.²³ In upholding the SLD's denial of Jackson and Morehouse's FY2003-2004 funding requests on "similarities" grounds, USAC stated that *Ysleta* is inapposite 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 "similarities" in Form 470 applications did not provide a basis for denial due to improper vendor involvement.²⁴

²¹ *Id.*

²² *Ysleta*. at ¶¶ 26-37.

²³ *Id.* ¶ 30.

²⁴ See *Jackson 2003 Decision on Appeal* and *Morehouse 2003 Decision on Appeal* at **Exhibit H**.

The Schools 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. The Schools 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 explain or even acknowledge why *Ysleta* is significant in the instant case (or with respect to the Form 470s that were referenced by the Schools' FY2004-2005 funding requests). 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.²⁵ 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 the Schools to a rigorous and lengthy selective review process and received information from the school about how it completed its applications and undertook competitive bidding for the services it sought. USAC and the SLD did not learn,

²⁵ 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).

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, “suggestion” or “indication” of such involvement based upon perceived similarities among applications. An inference, “suggestion” or “indication” of service provider involvement is not enough justification to deny applications for sorely needed federal funds.

IV. THE DENIAL OF FRANKLIN’S FY2004-2005 WAS A MANIFEST ERROR

Like the denials of Jackson and Morehouse’s FY2004-2005 funding requests, the SLD also appears to have denied Franklin’s FY2004-2005 funding request based upon alleged “similarities” in the Form 470 referenced therein.²⁶ Unlike the Jackson and Morehouse denials, however, USAC did *not* deny the Form 470 application referenced in Franklin’s FY2004-2005 funding request. Rather, Franklin initiated a new competitive process for FY 2003-2004, implemented a new contract for Internet access services in FY2003-2004 and filed a new Form 470 application covering FY2003-2004. Franklin’s funding request for the 2003-2004 funding year was granted – it was not denied based upon “similarities” or any other grounds. In fact, Franklin’s *FY2005-2006* funding request, which referenced the exact same Form 470 application covering FY2003-2004 that was referenced in the FY2004-2005 funding application, also was approved.²⁷ Thus, it is clear that Franklin’s FY2004-2005 funding request, which references the same Form 470 from FY2003-2004 that was granted by the SLD both in FY2003 and FY2005, should not have been denied. In any event, the sections above explaining why the so-called “similarities” alleged by the SLD and USAC are neither indicative nor dispositive of

²⁶ *Decision on Appeal* issued for Franklin at 2 (“Your funding request was denied because you referenced a FY2002-2003 Form 470, which had failed the pattern analysis for similarities in the Form 470 submission and Form 470 certification pages.”).

²⁷ Copies of the SLD’s Funding Commitment Reports approving Franklin’s FY2003-2004 and FY2005-2006 funding requests, citing the FY2003-2004 Form 470 which the SLD and USAC erroneously claim was denied, are attached as **Exhibit I**.

impermissible service provider involvement in the competitive bidding process apply with equal force to Franklin.

V. CONCLUSION

In view of the foregoing, the Schools and SEND request that the Commission overrule USAC's decisions that denied the Schools' FY2004-2005 funding request.

Respectfully submitted,

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January 18, 2006

CERTIFICATE OF SERVICE

I, David Munson, certify on this 18th day of January, 2006, 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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