

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

In the Matter of)	
)	
Requests for Review of the)	CC Docket No. 02-6
Decision of the Universal Service Administrator)	
By Send Technologies, LLC)	SPIN-143010002
)	
Schools and Libraries Universal Service)	
Support Mechanism)	
)	

To: The Commission

APPLICATION FOR REVIEW

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SUMMARY

Send Technologies, LLC (“SEND”), through counsel, files this Application for Review seeking the Commission to overturn an Order issued by the Wireline Competition Bureau (the “Bureau”) on March 13, 2007.¹ The *Union Parish Order* denied two Requests for Review filed by SEND on December 16, 2003 and March 22, 2004 (collectively, the “Requests for Review”). The Requests for Review sought reversal of decisions of the Administrator of the Universal Service Administrative Company (“USAC”) to recover E-rate funding that was granted to Union Parish School District (“Union Parish”) for funding years 1999, 2000 and 2001. The Commission should overturn the actions taken by the Bureau in the *Union Parish Order* because the Bureau made erroneous findings as to important, material questions of fact, and the Bureau’s actions conflict with applicable case precedent.

The specific questions presented for the Commission’s review are as follows: (1) Did the Bureau make erroneous findings of material fact by relying on a Louisiana legislative auditor report from 2002 and erroneously determining that SEND was required to defend itself once again with respect to the findings of such report?; (2) Did the Bureau erroneously conclude that there was not a fair and open competitive bidding process based on incorrect or inapplicable findings from the Legislative Auditor Report?; (3) Did the Bureau err by retroactively applying the precedent set in the *MasterMind* series of cases to the Union Parish applications which were filed before the applicable *MasterMind* cases were decided?; and (4) Did the Bureau err in not granting a waiver of the competitive bidding rules in this case?

¹ *Requests for Review of the Decision of the Universal Service Administrator by SEND Technologies, LLC; Schools and Libraries Universal Support Mechanism*, Order, 22 FCC Rcd 4950 (WCB 2007) (“Union Parish Order”).

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APPLICATION FOR REVIEW

Send Technologies, LLC (“SEND”), through counsel, and pursuant to Section 1.115 of the Commission’s rules,² files this Application for Review seeking the Commission to overturn *Union Parish Order* issued by the Wireline Competition Bureau (the “Bureau”) on March 13,2007. The *Union Parish Order* denied two Requests for Review³ filed by SEND on December 16,2003 and March 22,2004 (collectively, the “Requests for Review”).⁴ The Requests for Review, attached hereto as Exhibit 1, sought reversal of decisions of the Administrator of the Universal Service Administrative Company (“USAC”) to recover E-rate funding that was granted to Union Parish School District (“Union Parish”) for funding years 1999,2000 and 2001.⁵ The Commission should

² 47 C.F.R. § 1.115.

³ Consolidated Request for Review by SEND Technologies, LLC of Decisions of Universal Service Administrator Regarding Union Parish School Board (filed Dec. 16,2003); Consolidated Request for Review by SEND Technologies, LLC of Decisions of Universal Service Administrator Regarding Union Parish School Board (filed Mar. 22,2004).

⁴ The *Union Parish Order* mistakenly refers to the Requests for Review as having been filed on January 19, 2004 and March 22,2004. In fact, the Requests for Review were filed on December 16,2003 and March 22, 2004. Union Parish also filed its own appeal of the Administrator’s decisions in Union Parish School Board Consolidated Request for Review, Dkt. No. 02-6 (filed on Feb. 27,2004). We request that any decision on that Request for Review be held in abeyance until the Commission renders its decision with respect to this Application for Review.

⁵ Specific information regarding the funding requests for which USAC issued Commitment Adjustment Letters (“CALs”) is as follows (and can also be found as an attachment to the December Request for

overturn the actions taken by the Bureau in the *Union Parish Order* because the Bureau made erroneous findings as to important, material questions of fact,⁶ and the Bureau's actions conflict with applicable case precedent.⁷

The specific questions presented for the Commission's review are as follows: (1) Did the Bureau make erroneous findings of material fact by relying on a Louisiana legislative auditor report from 2002 and erroneously determining that SEND was required to defend itself once again with respect to the findings of such report?; (2) Did the Bureau erroneously conclude that there was not a fair and open competitive bidding process based on incorrect or inapplicable findings from the Legislative Auditor Report?; (3) Did the Bureau err by retroactively applying the precedent set in the *MasterMind* series of cases to the Union Parish applications which were filed before the applicable *MasterMind* cases were decided?; and (4) Did the Bureau err in not granting a waiver of the competitive bidding rules in this case?

Review): (1) FRN: 175066, Funding Year: 1999-2000, Form 471 Application Number: 121741, Billed Entity Number: 139313, filed on January 22, 1999, granted by USAC on August 28, 2000, CAL issued January 31, 2003 rescinding \$126,360.00; (2) FRN: 594052, Funding Year: 2001-2002, Form 471 Application Number: 229706, Billed Entity Number: 139313, filed on December 5, 2000, granted by USAC on August 7, 2001, CAL issued January 31, 2003 rescinding \$59,250.00; (3) FRN: 171021, Funding Year: 1999-2000, Form 471 Application Number: 119672, Billed Entity Number: 139313, CAL issued January 31, 2003 rescinding \$23,124.00; (4) FRN: 385823, Funding Year: 2000-2001, Form 471 Application Number: 160965, Billed Entity Number: 139313, filed on January 24, 2000, granted by USAC on April 14, 2000, CAL issued January 31, 2003 rescinding \$63,000.00; and (5) FRN: 405241, Funding Year: 2000-2001, Form 471 Application Number: 163210, Billed Entity Number: 139313, filed on January 24, 2000, granted by USAC on July 28, 2000, CAL issued January 31, 2003 rescinding \$80,900.40.

⁶ 47 C.F.R. § 1.115(b)(2)(iv).

⁷ 47 C.F.R. § 1.115(b)(2)(i).

I. THE BUREAU MADE ERRONEOUS FINDINGS OF MATERIAL FACT BASED UPON INCORRECT RELIANCE ON A LOUISIANA LEGISLATIVE AUDITOR REPORT FROM 2002; MOREOVER, THE BUREAU ERRONEOUSLY DETERMINED THAT SEND WAS REQUIRED TO DEFEND ITSELF (ONCE AGAIN) WITH RESPECT TO THE FINDINGS IN SUCH REPORT.

The Commission should overturn the actions taken by the Bureau in the *Union Parish Order* because the Bureau makes significant and material mistakes of fact that permeate all of the critical findings and decisions in the *Union Parish Order*. Specifically, when considering and deciding the Requests for Review, the Bureau placed all of its factual reliance on an Investigative Audit Report issued by the Office of the Legislative Auditor, State of Louisiana, dated October 2, 2002 (the "Legislative Auditor Report").⁸ The major factual findings and decisions made by the Bureau in the *Union Parish Order* reference the Legislative Auditor Report as though the allegations of the Louisiana auditor are authoritative and incontrovertible (*See*, for example, the Bureau's citations to the Legislative Auditor Report contained in paragraphs 4, 6, 7 and 8, and footnotes 12, 14, 26, 27, 31, and 32). Not only does the Bureau rely almost exclusively on the Louisiana Audit Report, and challenges the factual statements made under penalty of perjury in the Requests for Review by Tom Snell, Donna Cranford and Mark Stevenson,⁹ but the Bureau goes even further to accuse SEND of

⁸ *Union Parish Order*, ¶¶ 4 ("The Investigative Audit Report found that a conflict of interest existed between Send Technologies and Union Parish"), 6 ("[T]he Investigative Audit Report reveals that the contact person did, in fact, participate in the contract process by preparing the request for bid, and preparing analysis of bids submitted to Union Parish board members. The Investigative Audit Report determined that potential bidders were severely restricted in the time they had to respond, potential bidders were not afforded the opportunity to clarify or discuss any of the proposed specifications before the bid."), 7 ("[T]he audit report finds the following:" the competitive bidding process contained errors, school board approval was not sought before entering into contracts, services were paid for and not received or impermissible, payments to SEND violated the Louisiana Constitution, and enhanced services were paid for but never received) and 8 ("USAC was made aware of a violation of the Commission's rules by the Investigative Audit Report dated October 2002, and acted appropriately pursuant to the audit report's findings"), and nn. 12, 14, 26, 27, 31, and 32.

⁹ *See* Exhibit 1, December 16, 2003 Request for Review, Section 11, Statement of Facts, and the Declarations of Tom Snell, Donna Cranford and Mark Stevenson attached thereto.

“fail[ing]” to “make mention of other relevant findings from the [Legislative Auditor Report]” that the Bureau apparently took as uncontested fact.”

The Bureau erred in two respects by relying on the Legislative Auditor Report. First, the Bureau and USAC cannot have complete information about the methodology or tactics of the Legislative Auditor Report, and therefore cannot take the findings contained therein as the final determination of the facts. USAC and the Bureau should be making decisions about E-rate applications based on the record developed by USAC and its own selective review, and not relying on third party reports about which it has little information. In this case, there were many factual problems with the Legislative Auditor Report. The Bureau makes passing mention in footnote 12 of the *Union Parish Order* that “Union Parish denied wrongdoing regarding all of the allegations in the audit report,”¹⁰ but the Bureau doesn’t put any more credence in the fact that the Legislative Auditor Report findings were disputed.

To put the Legislative Auditor Report in context, it is important for the Bureau and the Commission to understand that there was significant criticism from Louisiana lawmakers about the investigative audit reports of the Louisiana legislative auditor. This contextual information was not provided in the Requests for Review because SEND and Union Parish were unaware of the Bureau’s heavy reliance on the Legislative Auditor Report. For example, press reports from 2003, when the legislative auditor stepped down, noted the concerns of Louisiana lawmakers with the auditor’s tactics which made subjects look guilty even though no legal action was ever taken by state agencies and lawmakers with jurisdiction. That certainly was the case with SEND – no Louisiana state agency, state body or law enforcement agency ever took official action against

¹⁰ *Union Parish Order*, ¶ 7.

¹¹ *Id.* at n. 12.

SEND based on the Legislative Auditor Report. Every relevant law enforcement agency in the state of Louisiana issued letters stating that they would not be pursuing legal action against Union Parish or SEND based on the Legislative Auditor Report. When the legislative auditor stepped down, and the state was interviewing replacements, lawmakers indicated an interest in a “less ambitious” state auditor’s office:

State Rep. Edwin Murray D-New Orleans, said last week he does not believe investigative audit reports should include listings of potential criminal and constitutional violations, as has been the practice of the Legislative Auditor’s Office. . . . Murray said listing in a public document specific laws and codes that might have been violated tends to make the subjects of negative audits look guilty without allowing them any defense. “It can really harm a person’s agency or reputation,” he said. “I don’t think it’s always appropriate.”¹²

Another Louisiana lawmaker, Senator Joe McPherson, D-Woodworth, voiced similar concerns: “He has tried to pronounce people guilty based on his legislative audit findings without anybody having the opportunity to review them.”¹³ The Bureau obviously needed to use more care in how much reliance it placed on the Legislative Auditor Report.

As the Bureau notes in the *Union Parish Order*, *Union Parish* contested the findings of the Legislative Auditor Report, but the Bureau apparently ignored *Union Parish*’s attempts to correct the record and sided with the Legislative Auditor.¹⁴ In addition, SEND and *Union Parish* prepared under penalty of perjury the facts relevant to *Union Parish*’s E-rate applications for FY 1999, 2000 and 2001. Those facts were contained in Section II of the Request for Review that was filed on December 16, 2003, and were supported by the declarations of three individuals who had first hand

¹² Patrick Courreges, *Bills Filed to Rein In Legislative Auditor*, *The Advocate*, Apr. 7, 2003.

¹³ Laura Maggi, *State Legislative Auditor Resigns After 13-year Stint; Kyle May Announce Run For Governor*, *Times-Picayune*, Jan. 18, 2003, at 4.

¹⁴ See Legislative Auditor Report, Attachment II, Management Response.

knowledge of the facts at the relevant times.¹⁵ Those facts and the independent response of Union Parish to the Legislative Auditor Report should have been considered by the Bureau, but were wholly disregarded.

Second, SEND and Union Parish had no notice that the Bureau would be relying so heavily on the Legislative Auditor Report and therefore had no opportunity to defend the Union Parish applications against the Legislative Auditor Report and to provide the Bureau with the proper context for that report. In USAC's Administrator's Decisions on Appeal that SEND appealed to the Bureau in the Requests for Review, the Legislative Auditor Report was mentioned in a parenthetical: "After a thorough review of the appeal, and the documentation (audit report from the State of Louisiana Legislative Auditor) which was obtained by the SLD, it was determined . . ."¹⁶ Although USAC did not specifically identify the report to which it was referring, that fact was not relevant because what SEND and Union Parish needed to respond to was an allegation of a specific rule violation made by USAC, not the allegations of the legislative auditor. The thrust of the Administrator's Decisions on Appeal, and what SEND and Union Parish addressed, was whether or not Tom Snell's 15% passive ownership interest in SEND was a conflict of interest and a violation of the competitive bidding guidelines.¹⁷ USAC never asked SEND and Union Parish to defend themselves against the findings in the Legislative Auditor Report, and so the Requests for Review did not address the Legislative Auditor Report. USAC was well aware of the factual challenges made by Union Parish with respect to the report. Given all of the foregoing, it was patently unfair

¹⁵ See Exhibit 1, December 16, 2003 Consolidated Request for Review, Declarations of Union Parish Superintendent Tom Snell, Union Parish Business Manager Donna Crawford, and Mark Stevenson.

¹⁶ See Exhibit 1, December 16, 2003 Consolidated Request for Review, Exhibit 1, Administrator's Decision on Appeal, p. 2.

¹⁷ See Administrator's Decision on Appeal.

of the Bureau to suggest that SEND was under some obligation to make mention of or to explain the findings of the Legislative Auditor Report in the Requests for Review.¹⁸ Whether or not Snell's passive ownership interest in SEND constituted a conflict of interest and a competitive bidding violation under the rules was in issue, NOT the Legislative Auditor Report. The Bureau cannot be allowed to accept the findings in the Legislative Auditor Report as fact, disregard the controverted facts raised by Union Parish and SEND, and make a finding that SEND "failed" to address the Legislative Auditor Report in the Requests for Review. The Bureau's complete reliance on the Legislative Auditor Report, and its disregard for other facts in the record, resulted in the Bureau making material errors of fact and law and requires that the Commission overturn the Bureau's actions in the *Union Parish Order*.

11. THE BUREAU ERRONEOUSLY CONCLUDED THAT THERE WAS NOT A FAIR AND OPEN COMPETITIVE BIDDING PROCESS BASED ON INCORRECT FINDINGS FROM THE LEGISLATIVE AUDITOR REPORT.

In paragraphs 6 and 7 of the *Union Parish Order*, the Bureau makes the assertion that Union Parish did not conduct a fair and open competitive bidding process." This conclusion is based on erroneous findings of fact in two respects.

First, the Bureau erred in concluding that Snell did not recuse himself. The Bureau states: "Despite Send Technologies' assertion that the Union Parish employee was isolated from the bidding process, the Investigative Audit Report reveals that the contact person did, in fact, participate in the contract process by preparing the request for bid, and preparing an analysis of bids

¹⁸ *Union Parish Order*, ¶ 7

¹⁹ *Id.*, ¶¶ 6 and 7.

submitted to Union Parish board members.”²⁰ As indicated in the Request for Review that was filed December 16, 2003,²¹ and as detailed in the Union Parish Management Response to the Legislative Auditor Report,²² Snell recused himself from the competitive bidding process for the applicable funding years, 1999,2000 and 2001. The Superintendent, not Snell, evaluated the bids.²³ Based on the Bureau’s belief that Snell was involved, when he was not, the Bureau found a competitive bidding violation.²⁴ The Bureau’s finding of Snell’s involvement, which is significant in its determination that there was not a fair and open competitive bidding process, is in error and must be overturned.

Second, the Bureau alleges that the method in which the bidding was handled with respect to other potential bidders was flawed due to the relationship between Union Parish and SEND by virtue of Snell. The Bureau states that other “potential bidders were severely restricted in the time they had to respond, potential bidders were not afforded the opportunity to clarify or discuss any of the proposed specifications before the bid,” and “competing bidders were not given ample time to prepare questions and received no information regarding its inquiries.”²⁵ The Bureau concluded, therefore that “the relationship between Union Parish’s contact person and the service provider, Send Technologies, involved a conflict of interest and in fact impeded fair and open competition, as prohibited by the Commission’s precedent.”²⁶ The Bureau’s conclusions, again, are in error and

²⁰ *Id.*, ¶ 6.

²¹ See Exhibit 1, December 16,2003 Consolidated Request for Review, at pp. 6, 9, 11-12.

²² Legislative Auditor Report, Attachment II, Management Response, at p. 5.

²³ See Exhibit 1, December 16,2003 Consolidated Request for Review, at p. 12.

²⁴ *Union Parish Order*, ¶ 6.

²⁵ *Id.*

²⁶ *Id.*

must be overturned. The Bureau's findings are based on information in the Legislative Auditor Report related to the competitive bidding process for FY 1998. Applications from FY 1998 are not the subject of any of the Commitment Adjustment Letters, the Requests for Review or this Application for Review.

Although the competitive bidding process in 1998 is not in controversy, since the Bureau cites to pages 9-12 of the Legislative Auditor Report as evidence of competitive bidding problems because of Snell, we will address it and correct the record. Despite what was implied in the Legislative Auditor Report about an abbreviated bid process in 1998, the bid process was actually extended beyond what the Commission's rules require. Union Parish issued a Form 470 in *March 1998*, waited the appropriate 28 days, received a quote from SEND, and after that bidding process concluded, it issued a purchase order to SEND. As was not unusual in 1998, there were no other bids received. AFTER that process, the Superintendent instructed the Business Manager to re-open the process and seek additional quotes in the interest of due diligence. The Business Manager contacted several national vendors and requested quotes. Multiple vendors were contacted and some responded. The Superintendent evaluated the bids. The total time for competitive bidding was actually longer, not more abbreviated. All of this is covered in the Request for Review filed in December of 2003.²⁷

The Bureau also finds in the *Union Parish Order* (again, citing findings from the Legislative Auditor Report related to 1998, which are not relevant here) that other bidders were not given ample time to bid, clarify, prepare questions, etc., and it blames this fact on the relationship between Union Parish and SEND. It is not correct that other bidders did not have ample time for all components of the competitive bidding process. Union Parish reopened the bidding and extended the response

²⁷ See Exhibit 1, December 16, 2003 Consolidated Request for Review at pp. 8-12, 15-16.

period beyond the original bid period required by FCC rules in order to seek additional bids. Union Parish advertised for E-rate bids for over 30 days, then re-opened the bidding period and proactively contacted service providers and vendors requesting a response when there was no obligation to do so except for their own desire for diligence. Again, see the December 16, 2003 Request for Review for a full recitation of the facts related to the competitive bidding processes undertaken by Union Parish.

With respect to the competitive bidding process undertaken by Union Parish in each program year, it is clear that a full and open competitive bidding process was undertaken, that Snell was not involved notwithstanding his name being listed on the Form 470, and that Union Parish received services from a variety of vendors which it chose consistent with having undertaken a competitive bidding process and soliciting bids from multiple vendors. The Bureau's conclusions based on the Legislative Auditor Report are incorrect and resulted in the Bureau finding that Union Parish did not observe the competitive bidding rules. The Bureau's findings are in error and must be overturned.

Again, it is very important to note that the Bureau's findings related to competitive bidding violations refer to a section of the Legislative Auditor Report, pages 9-12, that address the auditor's allegations about FY 1998. FY 1998 is not the subject of USAC's commitment adjustments, the Requests for Review, or this Application for Review. Instead, our focus here is on Union Parish's funding requests for 1999, 2000 and 2001. To the extent any irregularities in the competitive bidding process actually occurred in 1998, the first program year for the E-rate program, the Commission and the Bureau waived perceived or actual violations of the rules, including competitive bidding violations, because applicants and providers in the first year of the schools and libraries program may have submitted applications that were not fully compliant with the rules due

to inexperience and “may have reasonably relied on USAC’s commitment letter as confirmation that their applications did in fact comply with Commission rules.”²⁸ Union Parish certainly relied on the grant of its funding requests for FY 1998, 1999, 2000 and 2001 as evidence that it was in compliance with Commission rules. Given all the precautions it took to insulate Tom Snell from the competitive bidding process, to receive guidance from the Louisiana Ethics Board, and to conduct fair and open competitive bidding processes, there is no way Union Parish could have known that by listing their own technology director on the Form 470s that a competitive bidding violation would be asserted years later. USAC first issued its Commitment Adjustment Letters in 2003 and the *MasterMind*²⁹ decisions dealing with “associations” between applicants and service providers were not released until 2001, after all the applications in question were filed. There is no way Union Parish could have known of potential problems with its FY 1999-2001 applications at the time the applications were filed.

111. THE BUREAU ERRED BY RETROACTIVELY APPLYING THE PRECEDENT SET IN *MASTERMIND* AND ITS PROGENY TO APPLICATIONS THAT WERE FILED BEFORE SUCH CASES WERE DECIDED.

The Commission should overturn the actions of the Bureau in the *Union Parish Order* because the Bureau is misapplying the law with respect to retroactive application of new precedent.

One of the most critical aspects of the Union Parish case is whether or not it was permissible for USAC and the Bureau to apply the applicable precedent set in *MasterMind* and its progeny to

²⁸ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal State Joint Board on Universal Service*, Order, 15 FCC Rcd 7197, ¶¶ 6, 10 (1999); *See also, Request for Review of the Decision of the Universal Service Administrator by Folsom Cordova Unified School District*, Order, 16 FCC Rcd 20215, ¶¶ 13-14 (2001); *Request for Review of the Decision of the Universal Service Administrator by Shawnee Library System*, Order, 17 FCC Rcd. 11824, ¶ 11 (2002).

²⁹ *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.; Federal-State Joint Board on Universal Service*, Order, 16 FCC Rcd 4028 (2000) (“*MasterMind*”).

Union Parish applications that were filed before the relevant cases were decided. In the *Union Parish Order*, the Bureau defends application of the new *MasterMind* precedent to the previously filed Union Parish applications utilizing the wrong justification: “USAC was made aware of a violation of the Commission’s rules by the Investigative Audit Report dated October 2002, and acted appropriately pursuant to the audit report’s findings. As such, Send Technologies’ argument that the 2000 *Mastermind Order* is being applied retroactively is unavailing.”³⁰ The Bureau’s view is that because the *MasterMind Order* was released in May of 2000 before the Legislative Auditor Report was released in October of 2002, the precedent set in *MasterMind* can be used against the Union Parish Applications that were filed in 1999 and 2000. In addition to the fact that the Bureau’s holding is overly broad, because *MasterMind* decisions related to “associations” between service providers and applications were not adopted by the Commission until 2001 and were not provided as guidance on the USAC website until 2002, the Bureau’s conclusion (quoted above) directly contradicts Bureau and Commission precedent about prospective-only application of new rules and precedent. With respect to questions of retroactive application of new laws, rules or regulations, the relevant timing is not the state of the law when a regulator learned of a potential violation but, rather, the state of the law when an applicant filed its application. It is about notice, due process and fairness to applicants. It is clear from the quote above that the Bureau misapplied the law with respect to retroactivity in the *Union Parish Order* and the Bureau’s decision must be overturned.

It might be helpful to review, in detail, when the relevant applications were filed **and** when the relevant *MasterMind* decisions were issued. For FY 1999, the Form 470 was filed by Union Parish on January 22, 1999. For FY2000, the Form 470 was filed by Union Parish on December 1,

³⁰ *Union Parish Order*, ¶ 8.

1999. For FY2001, the Form 470 was filed by Union Parish on December 5,2000. The original *MasterMind* decision was released on May 23,2000, after the FY 1999 and FY2000 applications were filed but 7 months before the FY2001 application was filed. The first *MasterMind* decision was ~~an~~ important decision, but it stood for the proposition that it is improper for a service provider to prepare or sign the Form 470,³¹ and surrender control of the bidding process “to a service provider that participates in that bidding process.”³² The Commission further found that an open and fair competitive bidding process does not occur when the service provider is listed as the contact person and participates in the bidding process.³³ None of these findings could have served as notice to Snell or Union Parish of a potential problem in their case. The *MasterMind* decision addressing prohibited “associations” between service providers and applicants, which might have served as a clue to Union Parish about how Snell’s employment at Union Parish and his passive investment in SEND could violate the Commission’s competitive bidding rules, notwithstanding determinations by Louisiana regulatory bodies that his situation was permissible, was first announced in a *MasterMind* decision called *Carethers* in March of 2001.³⁴ This decision was reached AFTER all the Union Parish applications for FY 1999, FY2000 and FY2001 were filed. As discussed in the Requests for Review,³⁵ Union Parish complied with all known Commission and

³¹ *MasterMind*, ¶10.

³² *Id.*, ¶10.

³³ *Id.*, ¶11.

³⁴ *Request for Review of the Decision of the Universal Service Administrator by A. R. Carethers SDA School, Houston, TX et al.*, Order, 16 FCC Rcd 6943, ¶ 8 (2001). The Commission found that contact person on the Form 470 was likely a representative or employee of the service provider, and was married to another employee of the service provider.

³⁵ See Exhibit 1, December 16,2003 Consolidated Request for Review, pp. 8-12; March 22,2004 Consolidated Request for Review, pp. 5-6.

USAC rules and precedents regarding competitive bidding that applied to Union Parish in 1999 and 2000 when its applications were filed.

It is a basic tenet of American jurisprudence that if a court overturns its prior precedent in a line of cases or creates new precedent, the new precedent is applied prospectively only. The court does not re-open every prior case, retroactively apply the new precedent and overturn all prior concluded decisions.³⁶ Here the FCC precedent that made Snell's association with both Union Parish and SEND a potential competitive bidding violation was not decided until March of 2001, after the Union Parish applications for FY 1999, FY2000, and FY2001 were filed.

In *RKO General v. FCC*,³⁷ the U.S. Court of Appeals for the D.C. Circuit addressed retroactive application of new Commission precedent very clearly:

Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed. . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.³⁸

It was not until March 2001, after the Union Parish Applications for FY 1999, FY2000 and FY2001 were filed, that the Commission adopted the decision in *Carethers* and first began considering that an "association" with a service provider could run afoul of the competitive bidding requirements.³⁹ The Commission also later discussed "associations" with service providers in

³⁶ See generally 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review.").

³¹ *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

³⁸ *Id.* at 223-24 (citing *Boston Edison Co. v. PFC*, 557 F.2d 845 (D.C. Cir. 1977) cert. denied sub nom. *Towns of Norwood, Concord and Wellesley, Mass. v. Boston Edison Co.*, 434 U.S. 956 (1977)).

³⁹ *Carethers*, ¶ 8. The Commission found that contact person on the Form 470 was likely a representative or employee of the service provider, and was married to another employee of the service provider.

College Prep, Consorcio, and Dickenson.⁴⁰ It is important to note, however, that in all of these cases, beginning with *Curethers* and continuing through *Dickenson*, the contact person listed on the Form 470 was **not** an employee of the school or library but was, rather, “associated with” and employed by the service provider in some capacity. Thus the prohibited “association” the FCC has sanctioned in the *MasterMind* cases discussed above was an exclusive association with a service provider, not a situation in which an employee of an applicant might have a minority unitholder interest in a service provider. The decision the Bureau just reached in the *Union Parish Order* may be the first instance in which applicants can be charged with understanding that a Union Parish-type fact pattern could run afoul of the competitive bidding rules.

Even if the precedent established in *College Prep, Consorcio, and Dickenson* was available to Union Parish in **1999**, which it was not, it is questionable whether Union Parish could have understood that listing its own employee as a contact person on its Form 470 could violate the competitive bidding rules, especially when there were no FCC or SLD rules or guidelines regarding conflicts of interest, Snell’s passive ownership interest in SEND was ruled not to be a conflict of interest under Louisiana law, and Snell was insulated from the competitive bidding process.⁴¹ The new *Carethers* standard about “associations” between applicants and service providers was not posted to USAC’s website as a Support Mechanism rule, providing applicants with notice of the

⁴⁰ *Request for Review of the Decision of the Universal Service Administrator by College Prep School of America, Lombard IL et al.*, Order, 17 FCC Rcd 1738, ¶ 6 (2002) (stating that the core issue in the case “is whether the individual listed as the contact person on the applicants’ FCC Form 470 was in fact associated with the service provider with whom the applicants contracted for service”); *Request for Review of the Decision of the Universal Service Administrator by Consorcio de Escuelas y Bibliotecas de Puerto Rico, San Juan PR*, Order, 17 FCC Rcd 13624, ¶ 6 (2002) (“The presence of a representative or employee of a Service Provider as the contact on the Form 470, **or any contact information associated with a service provider on the Form 470**, renders that Form 470 invalid.”) (internal citation omitted, emphasis in original); *Request for Review of the Decision of the Universal Service Administrator by Dickenson County Public Schools, Clintwood, VA*, Order, 17 FCC Rcd 15747, ¶ 4 (2002).

⁴¹ See Exhibit 1, December 16, 2003 Consolidated Request for Review, pp. 10-13; March 22, 2004 Consolidated Request for Review, pp. 5-6.

changed standard, until September of 2002. Consistent with the finding in *RKO*, new or changed standards can be applied prospectively only to pending or future applications, not retroactively.

There is an extensive body of case law regarding impermissible retroactivity in which the courts discuss basic notions of equity and fairness and detrimental reliance by citizens on prior agency policies.⁴² There is no need to present a full discussion of such retroactivity here, as the FCC's own decisions in prior E-rate matters reflect its own concern about the retroactive application of new precedent. It's clear from all the relevant case law, at the Commission and in the federal courts, that the Bureau erred when it applied the precedent set in *Carethers* to E-rate applications that were filed by Union Parish months if not years before that decision was rendered.

⁴² See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *Verizon Tel. Co. v. FCC*, 269 F.3d 1098, 1109 (2001) (citing *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)) (“[T]he governing principle is that when there is a ‘substitution of new law for old law that was reasonably clear,’ the new rule may justifiably be given prospectively-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’”). Moreover, retroactivity will be denied “when to apply the new rule to past conduct or to prior events would work a manifest injustice.” *Id.* (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)). To determine whether a manifest injustice will result from the retroactive application of a statute, a court must balance the disappointment of private expectations caused by retroactive application against the public interest in enforcement of the statute. *Demurs v. First Sew. Bank for Sav.*, 907 F.2d 1237, 1240 (1st Cir. 1990) (citing *New England Power v. United States*, 693 F.2d 239, 245 (1st Cir. 1982)). The D.C. Circuit Court notes that it has not been entirely consistent in enunciating standards to determine when to deny retroactive effect in cases involving “new application of existing law, clarifications and additions” resulting from adjudicatory actions. In *Cassell v. FCC*, the court acknowledges that it has used the five-factor test set forth in *Clark-Cowlitz* as the “framework for evaluating retroactive application of rules announced in agency adjudications.” *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (citing *Clark-Cowlitz*, 826 F.2d at 1081). In a subsequent case, the court substituted a similar three-factor test. See *Dist. Lodge 64 v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). Today, the court has moved from multi-pronged balancing tests for impermissible retroactivity in favor of applying basic notions of equity and fairness. See *Cassell*, 154 F.3d at 486 (declining to “plow laboriously” through the *Clark-Cowlitz* factors, which “boil down... to a question of concerns grounded in notions of equity and fairness”); *PSCC v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (concluding that “the apparent lack of detrimental reliance . . . is the crucial point [supporting retroactivity]”). In *Chadmoore Communications, Inc. v. FCC*, the court stated that the test it commonly uses to determine whether a rule has retroactive effect is if “it does not ‘impair[] rights a party possessed when it acted, increase[] a party’s liability for past conduct, or impose[] new duties with respect to transactions already completed.’” *Chadmoore*, 113 F.3d 235, 240 (D.C. Cir. 1997) (citing *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994))).

In a November 5, 1999 Commission decision involving the E-rate Program, the Commission considered a case in which the Prairie City School District (“Prairie City”) sought review of a USAC denial of its application for universal service support.⁴³ Prairie City argued that USAC’s denial should be overturned because Prairie City filed its application in reliance on filing guidelines provided by USAC on its website. The FCC agreed with Prairie City and directed USAC to issue a new funding commitment decision letter. Citing *Williamsburg-James City*, the Commission found that where an application was submitted before the establishment of a particular and applicable rule, the applicants could not have been aware of the application requirements.⁴⁴ Clearly the Bureau’s actions in the *Union Parish Order* conflict with this case precedent.⁴⁵ Like Prairie City, Union Parish completed its E-rate applications in reliance on the filing guidelines provided by USAC on its website at the time they filed their application. Union Parish’s E-rate applications were filed before the Commission decided the *Carrethers* case which established for the first time that there could be a violation of the competitive bidding rules if there was any form of “association” between the school and the Service Provider. Given that there is no way Union Parish could have been aware of this new requirement, USAC should not be allowed to seek recovery of the E-rate funding to Union Parish which was properly granted.

⁴³ *Request for Review of the Decision of the Universal Service Administrator by Prairie City School District*, Order, 15 FCC Rcd 21826, ¶ 5, (CCB 1999).

⁴⁴ *Id.* (citing *Request for Review of the Decision of the Universal Service Administrator by Williamsburg-James City Public Schools*, Order, 14 FCC Rcd 20152, ¶ 6 (1999) (“Williamsburg could not have been aware of the rules of priority at the time it filed its application.” Williamsburg’s application was also remanded for reprocessing and issuance of a new funding commitment decision letter. The applicant submitted its application in April of 1998 and new rules were adopted by the Commission in June of 1998.)).

⁴⁵ 47 C.F.R. § 1.115(b)(2)(i).

The Commission also recognized in *Ysleta*⁴⁶ and *Winston-Salem*⁴⁷ that clarifications of its universal service policies are to be applied prospectively only. In those cases, the Commission found that comprehensive lists of services did not comport with the competitive bidding requirements under the E-rate Program.⁴⁸ However, the Commission did not invalidate the applicants' Form 470 applications based upon this error.⁴⁹ Instead, it acknowledged that USAC had previously granted funding requests based upon Form 470s that listed most or all possible services or products eligible for discounts under the E-rate Program and that participants in the Program could have reasonably relied on those approvals.⁵⁰ The Commission determined that such all-inclusive Form 470s "should not be permitted on a going-forward basis."⁵¹ The Commission therefore "clarif[ied] prospectively that requests for service on the FCC Form 470 that list all services eligible for funding under the E-rate Program do not comply with the statutory mandate."⁵² The Commission in *Ysleta* also provided additional guidance regarding other aspects of the E-rate Program rules "to provide greater clarity to *those applicants re-bidding services and future applicants.*"⁵³

⁴⁶ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, TX, et al.*, Order, 18 FCC Rcd 26406 (2003) ("*Ysleta*"). In *Ysleta* the Commission addressed multiple requests to review the decisions of USAC that were filed by E-rate applicants, but combined the requests as they had almost identical fact patterns.

⁴⁷ *Request for Review of the Decision of the Universal Service Administrator by Winston-Salem/Forsyth County School District, Winston-Salem, NC, et al.*, Order, 18 FCC Rcd 26457 (2003) ("*Winston-Salem*").

⁴⁸ *Ysleta*, ¶¶ 26-37; *Winston-Salem*, ¶ 13.

⁴⁹ As discussed below, the Commission concluded in *Ysleta* that the applicants violated the E-rate Program's rules, although not because of the broad list of services included in the applicants' Form 470s. *Ysleta*, ¶ 31.

⁵⁰ *Ysleta*, ¶ 35; *see also Winston-Salem*, ¶ 13.

⁵¹ *Ysleta*, ¶ 35; *see also Winston-Salem*, ¶ 13.

⁵² *Ysleta*, ¶ 36 (citation omitted); *see also Winston-Salem*, ¶ 13.

⁵³ *Ysleta*, ¶ 59 (emphasis added). The Commission also noted that the "SLD will carefully scrutinize applications" to ensure that they comply with the clarifications elucidated in this case. *Id.*, ¶ 65 (emphasis

Similar to the precedent set in *Ysleta* and *Winston-Salem*, the Commission should find that the USAC and the Bureau are not permitted to retroactively apply new precedent regarding interpretations of prohibited associations to Union Parish's case, if any such interpretations can even be found to apply. As in *Ysleta* and *Winston-Salem*, the Commission has never determined until the *Union Parish Order* that such passive unitholder interest creates an improper association between an applicant and service provider. Furthermore, Union Parish's applications were filed well before the Commission announced in *Carethers* that certain associations between applicants and service providers could violate the E-rate Program's competitive bidding rules. Union Parish and SEND relied on the competitive bidding rules, and interpretations thereof, that were current in 1999 and 2000 and reasonably interpreted them to support the conclusion that the type of association presented in Union Parish and SEND's case was permissible – especially since state and local procurement guidelines also were observed and no conflict of interest was found to exist by the state of Louisiana. The Commission's precedent in these cases demonstrates that it intends for current E-rate Program rules to be applied to pending and future applications. The same treatment should be afforded to Union Parish and SEND.

IV. THE BUREAU ERRED IN NOT GRANTING A WAIVER OF THE COMPETITIVE BIDDING RULES IN THIS CASE.

The Bureau found in the *Union Parish Order* that “a waiver allowing Send Technologies to violate the Commission's competitive bidding requirements would not serve the public interest.”⁵⁴ The Bureau also found that SEND failed to demonstrate special circumstances warranting a

added). If the Commission wanted USAC to apply those clarifications retroactively to prior SLD decisions, it would have specifically directed USAC to do so.

⁵⁴ *Union Parish Order*, ¶ 9.

waiver.” The Bureau’s decision regarding a waiver must be overturned because the Bureau’s findings that SEND or Union Parish violated the competitive bidding requirements were based on erroneous facts from the Legislative Auditor Report with respect to a funding year, 1998, that is not in question here. As the Requests for Review make clear, the competitive bidding rules were followed in Union Parish’s case and, in fact, the service contracts to SEND were awarded after a full, fair and open competitive bidding process. If the Commission find that Union Parish and SEND, based upon relevant facts, have violated the competitive bidding rules, as such rules were written at the time Union Parish filed its FY 1999, FY2000 and FY2001 applications, then the Commission should waive the competitive bidding rules in this case.

Pursuant to Section 1.3 of its rules, the Commission may waive one of its rules or procedures when good cause is shown.⁵⁶ The U.S. Court of Appeals for the District of Columbia has found that a waiver is appropriate “if special circumstances warrant a deviation from the general rule **and** such deviation will serve the public interest.”⁵⁷ Furthermore, there must be a rational policy supporting the grant a waiver.⁵⁸ In reviewing a waiver request, the Commission also can weigh “considerations of hardship, equity, or more effective implementation of overall policy.”⁵⁹ SEND’s waiver request meets this standard and should therefore be granted.

Grant of a waiver in this case will serve the public interest. As previously discussed, there is no way Union Parish could have known when it filed its Form 470s that listing Snell, an employee of Union Parish, would create a potential competitive bidding issue solely because SEND would

⁵⁵ *Id.*

⁵⁶ 47 C.F.R. § 1.3.

⁵¹ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 n.3 (D.C. Cir. 1990) (“*Northeast Cellular*”); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 n.8 (D.C. Cir. 1969) (“*WAIT Radio*”).

⁵⁸ *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

⁵⁹ *WAIT Radio*, 418 F.2d at 1159 n.8.

later choose to bid on Union Parish's services, and the Commission would later decide the *Carethers* case, raising concerns about associations between applicants and Service Providers. When the Union Parish applications were filed, there were no federal rules applicable to the E-rate Program that applied to the Snell fact pattern. Furthermore, the Louisiana Ethics Board reviewed the facts of this case and found that there was no prohibited conflict of interest. Federal law in these matters, to the extent any existed, do not preempt state law. As previously discussed, and as discussed in the Requests for Review, Tom Snell was insulated from the competitive bidding process and Union Parish remained in control of the competitive bidding process and did not delegate to SEND any authority with regard to the bidding process. SEND also did not intervene in or attempt to influence the competitive bidding process to the detriment of other service providers. In fact, the bids Union Parish accepted from SEND were the lowest for the services received from SEND in response to the Form 470.

The critical public interest policies served by the Commission's competitive bidding rules are to ensure that schools and libraries seeking support through the E-rate Program obtain the most cost-effective services available, thereby lessening applicants' demands on universal service funds and increasing funds available to other applicants.⁶⁰ Through Union Parish's competitive bidding process, there was fair and open competitive bidding for services, and at the end of the bidding process, SEND was found to be the most cost-effective choice with respect to certain services. The process Union Parish went through to choose SEND explicitly met the public policy objectives that underlay the competitive bidding rules.

⁶⁰ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776,9029 (1997), as corrected by Errata, 12 FCC Rcd 8776 (1997), *aff'd in part Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming Universal Service Order in part and reversing and remanding on unrelated grounds), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (2000), *cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (2000), *cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (2000).

A waiver in this case also is warranted because the Commission did not explain that a fact pattern like Union Parish's could violate the competitive bidding rules until the *Union Parish Order*. Even assuming that Union Parish could have read the holding in *Curethers* as a fair warning sign, the Commission did not adopt the precedent that being "associated" with a service provider may run afoul of the E-rate Program's competitive bidding requirements until March 2001, well after Union Parish submitted its Form 470s.⁶¹ At the time Union Parish submitted its Form 470s there was very little information available regarding the competitive bidding process (and no information regarding conflicts of interest or passive unitholder interests by employees of schools or libraries in service providers). Union Parish therefore followed and complied with the competitive bidding rules and the conflict of interest regulations set forth in the state and local procurement guidelines, and it received a favorable ruling from the state on the conflict of interest issue.

The Commission has previously granted waiver requests "in light of the uncertain application of our rules to the novel situation presented."⁶² For example, in *Ysleta* the Commission directed the SLD to allow certain applicants to reapply for E-rate discounts, even though the Commission concluded that the applicants violated the E-rate Program's competitive bidding process by using a two-step System Integration approach.⁶³ According to the Commission, a waiver was appropriate in *Ysleta* because the applicants were likely confused by the application of a new rule to the novel facts presented in that case.⁶⁴ The Commission should similarly conclude that a

⁶¹ *Carethers*, 16 FCC Rcd at 6947-48 (holding that the contact person listed on a Form 470 was likely "associated" with a service provider because the last name of the contact person was the same last name of an employee of the service provider). As previously noted, Union Parish's Form 470s were submitted on January 22, 1999 and December 1, 1999 and approved by the SLD on July 8, 1999, April 14, 2000 and July 28, 2000.

⁶² *Ysleta*, ¶ 72.

⁶³ *Id.*, ¶ 66.

⁶⁴ *Id.*, ¶ 72.

waiver is appropriate here because the Bureau is trying to apply later-adopted precedent regarding associations to a novel fact pattern related to applications that were filed before the precedent was adopted.

The Commission in *Ysleta* also took into consideration that the applicants relied on the SLD's tacit prior approval of two-step System Integration approach:

The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules. Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants. Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.⁶⁵

Union Parish continued to submit Form 470s with Snell listed as the contact person for the school system because USAC continued to approve Union Parish's funding requests. In good faith, Union Parish relied on USAC's prior approvals of its Form 470s and would not have submitted additional funding requests had it thought or known that listing Snell as its contact person, notwithstanding that he was insulated from the competitive bidding process, violated the intent of the E-rate Program's competitive bidding process. In reliance on the granted and funded applications, valuable services were rendered and paid for. As in *Ysleta*, the Commission should consider Union Parish's reliance on the rules and interpretations regarding competitive bidding that were available when the Union Parish applications were filed, and grant this waiver request.

⁶⁵ *Id.*, ¶ 73 (citations omitted).

V. CONCLUSION.

For all of the reasons stated herein, SEND requests that the Commission find that the Bureau made erroneous findings as to important, material questions of fact, and applied the law in a manner that conflicts with applicable Commission case precedent. Accordingly, the Commission should overturn the actions of the Bureau in the *Union Parish Order*, and direct USAC to withdraw the commitment adjustment letters it issued to SEND and Union Parish seeking to recover E-rate funds for FY 1999, 2000 and 2001. If, however, the Commission does not overturn the Bureau's actions, then SEND requests a waiver of the E-rate Program's competitive bidding rules.

Respectfully submitted,

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April 12, 2007

CERTIFICATE OF SERVICE

I, Peter M. Andros, certify on this 12th day of April, 2007, a copy of the foregoing Application for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

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