

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

In the Matter of)	
)	
Joint Consolidated Request for Review of Decisions of the Universal Service Administrator)	CC Docket No. 02-6
)	
Agra Independent School District 34)	File No. SLD1469839 (FY2006)
)	
Boley Independent School District I-13)	File No. SLD1480206, SLD1487825 (FY2006)
)	
Graham Independent School District 32)	File No. SLD1411323 (FY2006)
)	
Maud Independent School District 117)	File No. SLD1486686 (FY2006)
)	
Millwood Independent School District 37)	File No. SLD1441742 (FY2006)
)	
Oklahoma School for the Deaf)	File No. SLD1418893 (FY2006)
)	
Paden Independent School District 14)	File No. SLD1449646, SLD1449694 (FY2006)
)	
Wewoka Independent School District 2 (collectively, "the Schools"))	File No. SLD1483653 (FY2006)

JOINT CONSOLIDATED REQUEST FOR REVIEW

Alvin Myers
United Systems, Inc.
4335 Classen Boulevard
Oklahoma City, OK 73118
(405) 523-2162

Cynthia B. Schultz
Patton Boggs LLP
2550 M Street NW
Washington, DC 20037
(202) 457-6000

Counsel to United Systems, Inc.
(Service Provider to the Schools)

Wes McFarland
Agra Public Schools
112 S. Main
Agra, OK 74824
(918) 375-2262

Kim Moore
Graham School District
RR 1
Weleetka, OK 74880-9801
(918) 652-8935

Gretana Gonzales Hall
Boley Public Schools
124 N. Oak Street
Boley, OK 74829
(918) 667-3324

J.E. Pryor
Maud Public Schools
P.O. Box 130
Maud, OK 74854-0130
(405) 374-2416

Gloria Griffin
Millwood Public Schools
6724 Martin Luther King Avenue
Oklahoma City, OK 73111-7943
(405) 478-1336

Betty Stephens
Oklahoma School for the Deaf
1100 East Oklahoma Street
Sulphur, OK 73086
(580) 622-4900

D. Keith Kinkade
Paden Public Schools
10th and Elm Streets
Paden, OK 74860
(405) 932-4465

Gloria Pearson
Wewoka Public Schools
1121 S. Okfuskee Avenue
Wewoka, OK 74884
(405) 257-5475

January 15, 2008

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SUMMARY

The Schools and Libraries Division of the Universal Service Administrative Company's ("SLD" or "USAC") pattern analysis procedure has resulted in over \$144 million dollars of denied funding for over 1000 FRNs between 2003 and 2005 alone. The Federal Communications Commission ("Commission") attempted to address USAC's unfettered and unregulated use of its pattern analysis procedures in its *Pattern Analysis Order* issued in May 2006. It appears that USAC did not get the message, did not follow Commission directive and, as a result, now eight innocent, small and/or rural schools from Oklahoma and United Systems, Inc. ("United") have been unjustly denied funding.

USAC's pattern analysis procedure is flawed and is creating unjust havoc on the E-rate Program to the detriment of our nations' children and against the congressional spirit of the Communication Act of 1934, as amended, and Congress who created this important and meaningful Program. The Commission must either provide guidance and greater clarity to USAC or dismantle the pattern analysis procedure before it simply dissuades those reputable School Administrators and service providers that are caught in its wrath to forego participation in the E-rate Program.

United, a provider of internal connections, and the Schools appeal the adverse decisions by USAC in connection with FCC Form 471 Applications listed above for FY2006.¹ Specifically, the SLD denied all FRNs finding similarities in the Schools Form 470 Applications

¹ United and the Schools respectfully submit that they are aggrieved by the denial decisions of SLD. This Consolidated Appeal is being filed within sixty (60) days of SLD's denial the Schools' and United's appeal on November 16 and December 31, 2007. United's and the Schools' appeal must be considered timely filed under 47 C.F.R. §§ 54.719-54.721.

and Requests for Proposals (“RFPs”). The SLD erroneously concluded that because the Schools were not able to explain the basis for the similarities, a competitive bid violation occurred.²

On September 17, 2007, the Schools and United filed a Consolidated Appeal with the Schools and Libraries Division of USAC. In a series of form denial letters dated September 27, 2007, November 16, 2007, and December 31, 2007, USAC denied the Consolidated Appeal. Instead of issuing one denial, USAC issued three denials at three separate times for the same appeal. The first denial was for four (4) of the eight schools and was one page in length with no support or citation to any specific FCC rule violation. When this issue was raised with USAC management, USAC agreed to reconsider the denials on its own accord. On November 16, 2007, USAC issued another denial. This time the denials went to four (4) of the eight schools and, although the denial reason was lengthier, USAC still failed to meet the Commission’s *Pattern Analysis Order* requirements and failed to cite to any specific rule violation. Then, on December 31, 2007, USAC denied the four (4) remaining schools. The denial reasons were identical to the November 16, 2007 denials. The denial letters ignored the arguments raised by United and the Schools in the Consolidated Appeal and failed to consider the unique facts and circumstances of each School.

The SLD utilized the pattern analysis procedure without establishing that a Commission competitive bid violation occurred. This it cannot do. The Commission has squarely placed the burden on USAC, when it utilizes the pattern analysis procedure, to specifically identify a Commission competitive bid violation on a case-by-case (school-by-school) basis.

Specifically, United and the Schools argue that the SLD erred in its decision for the following reasons. First, the SLD’s denial and pattern analysis procedures, program integrity

² See FCC Administrative Record at 1a-1n (United Funding Commitment Decision Letter dated July 18, 2007).

assurance procedures, and appeal procedures are flawed, because USAC failed to disclose any of the documents to the Schools or provide any examples to the Schools identifying the USAC “alleged similarities.” Withholding critical information to exonerate a School and then denying the School based upon failure to answer questions related to this withheld information is a travesty of justice and due process. Second, the SLD’s denials and pattern analysis procedure is flawed because all of the alleged similarities are vendor neutral. As such, no competitive bid violation could occur. Third, the SLD’s denials and pattern analysis procedure is flawed because the SLD failed to provide any evidence establishing that the Form 470s and RFPs were tainted in any manner by United. Fourth, the SLD completely disregarded the record evidence and certifications by each School that clearly evidenced that each School was in complete control of its competitive bid process.

The facts in this case unequivocally demonstrate that each School was in complete control of its competitive bid process. The similarities that the SLD alleges were the result of the Schools trading and sharing information and using information that they received from training, Internet searches, and fellow colleagues. Each school has told its story through PAIR responses and Declarations. Each story results in the same ending—namely that there was no impermissible service provider involvement in the competitive bid process and not one school surrendered control to United or any service provider. As a result, there was no competitive bid violation.

As a general matter, USAC used a canned script for each of the eight schools and completely disregarded the different statements and facts made by each school official under penalty of perjury. USAC was required to conduct an unbiased and fair review based upon FCC Orders and rules. The responses below clearly demonstrate that USAC’s only continuing

objective is to turn a blind eye to justice, to fail its responsibilities as Administrator and to continue to make up rules and rely upon subsequent legal arguments made in an appeal to support its improper decision.

Congress and the Commission have directed the USAC to administer this program in a fair, efficient and neutral manner. This Joint Consolidated Appeal by eight small and/or rural schools and one service provider has come at a high cost of time, money, denied funding, multiple levels of reviews that have incurred in excess of hundreds of hours for each School Administrator who is in the business of running a school and teaching the children of Oklahoma. Instead, they have had to commit untold resources to spending hundreds of hours year after year answering multiple selective reviews, special compliance reviews, PAIR reviews, PIA inquiries, special compliance inquiries, and enduring USAC special compliance on site visits, KPMG E-rate audits, USAC Bearing Point site visits, and, most recently, a USAC HATS visit that offered no benefit to the Schools—one of these schools has less than 100 students. Clearly, this could not have been the intent of Congress when it established this noble Program.

At some point one is left with these questions—Where is the efficiency, fairness, neutrality and due process in E-rate for these schools and service provider? USAC has known about this template RFP for years, yet waited until last month, December 14, 2007 to include it in an SLD News Brief—Why? Rules are made to be followed. Every teacher teaches this, every student learns this. Every person knows that it is fundamentally unfair to make up the rules as you go along and hold people accountable to an unwritten and unpublished rule, yet, this is exactly what has happened here as will be demonstrated in more detail below.

The Schools and United respectfully request the Commission to grant this appeal and require USAC to issue a positive FCDL to each School within 30 days of release of this Order.

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Wewoka Independent School District 2 (collectively, "the Schools"))	File No. SLD1483653 (FY2006)

JOINT CONSOLIDATED REQUEST FOR REVIEW

United Systems, Inc. ("United"), acting through counsel, and Agra ISD 134 ("Agra"), Boley ISD I-13 ("Boley"), Graham ISD 32 ("Graham"), Maud ISD 117 ("Maud"), Millwood ISD 37 ("Millwood"), Oklahoma School for the Deaf ("OSD"), Paden ISD 14 ("Paden"), and Wewoka ISD ("Wewoka") (collectively, "the Schools"), hereby file this Joint Consolidated Request for Review ("Appeal"),³ pursuant to and in accordance with Section 54.719(c) of the

³ On November 19, 2007, United, Maud, OSD, Paden and Wewoka filed a Consolidated Request for Review with the Commission seeking review of the Schools and Libraries Division of the Universal Service Administrative Company's ("SLD" or "USAC") September 27, 2007 denial of their appeal. United, OSD, Paden and Wewoka request that their November 19, 2007 appeal be consolidated with this instant appeal.

Federal Communication Commission's ("Commission") rules, denying the Schools' appeals⁴ and associated funding requests⁵ for the Schools and Libraries Universal Service Program for funding year 2006. These appeals are consolidated because they involve similar parties and similar facts.

The Schools' and United's appeal is timely. Section 54.720(b) of the Commission's rules requires the filing of an appeal "within sixty (60) days of issuance" of a decision by USAC. The November USAC Denial Letters are dated November 16, 2007, and 60 days thereafter is January 15, 2008 and the due date for the appeal. The December USAC Denial Letters are dated December 31, 2007, and those appeals must be filed no later than February 29, 2008. Because this Appeal is being filed on the earliest of the appeal due dates, the Appeal is timely filed.

⁴ FCC Administrative Record ("FCCAR") at 2-2c (USAC Denial Letter dated Sept. 27, 2007, denying Maud's Request for Appeal from the Consolidated Request for Appeal ("Maud Denial")), FCCAR00003-3c (USAC Denial Letter, dated Sept. 27, 2007, denying OSD's Request for Appeal from the Consolidated Request for Appeal ("OSD Denial")), FCCAR00004-4c (USAC Denial Letter, dated Sept. 27, 2007, denying Paden's Request for Appeal from the Consolidated Request for Appeal ("Paden Denial")), and FCCAR000005-5c (USAC Denial Letter, dated Sept. 27, 2007, denying Wewoka's Request for Appeal from the Consolidated Request for Appeal ("Wewoka Denial") (collectively, the "September Denial Letters")); FCCAR00006-6e (USAC Second Denial Letter, dated Nov. 16, 2007, denying Maud's Request for Appeal from the Consolidated Request for Appeal ("Maud November Denial")), FCCAR00007-7e (USAC Second Denial Letter, dated Nov. 16, 2007, denying OSD's Request for Appeal from the Consolidated Request for Appeal ("OSD November Denial")), FCCAR00008-8e (USAC Second Denial Letter, dated Nov. 16, 2007, denying Paden's Request for Appeal from the Consolidated Request for Appeal ("Paden November Denial")), and FCCAR00009-9e (USAC Second Denial Letter, dated Nov. 16, 2007, denying Wewoka's Request for Appeal from the Consolidated Request for Appeal ("Wewoka November Denial") (collectively, the "November Denial Letters")); FCCAR00010-10f (USAC Denial Letter, dated Dec. 31, 2007, denying Agra's Request for Appeal from the Consolidated Request for Appeal ("Agra Denial")), FCCAR00011-11f (USAC Denial Letter, dated Dec. 31, 2007, denying Boley's Request for Appeal from the Consolidated Request for Appeal ("Boley Denial")), FCCAR00012-12f (USAC Denial Letter, dated Dec. 31, 2007, denying Graham's Request for Appeal from the Consolidated Request for Appeal ("Graham Denial")), FCCAR00013-13f (USAC Denial Letter, dated Dec. 31, 2007, denying Millwood's Request for Appeal from the Consolidated Request for Appeal ("Millwood Denial") (collectively, December Denial Letters)).

⁵ FCCAR00001e-1n (USAC Funding Commitment Report attached to Funding Commitment Decision Letter for the Schools dated Jul. 18, 2007).

I. STATEMENT OF THE SCHOOLS' AND UNITED'S INTEREST IN THIS JOINT CONSOLIDATED REQUEST FOR REVIEW

The Schools and United have standing to file this appeal because Section 54.719(c) of the Commission's rules provides that, "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission."⁶ In this case, the Schools and United are directly aggrieved by USAC's denial of funding, because the SLD erroneously concluded there were competitive bid violations as a result of the Schools being unable explain similarities in their Requests for Proposals ("RFP") and FCC Form 470 applications with other schools despite the fact that USAC failed to provide them with the documentation of the similarities.

II. INTRODUCTION

On July 18, 2006, USAC issued a Funding Commitment Decision Letter, in which it denied eight schools and ten (10) FRNs ("FCDL Denials").⁷

United, a provider of internal connections, and the Schools appeal the adverse decisions by the Schools and Libraries Division of the Universal Service Administrative Company ("SLD" or "USAC") in connection with FCC Form 471 Applications listed above for FY2006.⁸ Specifically, the SLD denied all FRNs finding similarities in the Schools' Form 470 Applications

⁶ 47 C.F.R. § 54.719(c).

⁷ See FCCAR00001-1n (United Funding Commitment Decision Letter dated July 18, 2007 ("United's FCDL") that contain the SLD's Funding Commitment Reports denying funding to the following Schools: Agra, FRN 1469839 ("Agra SLD Denial"); Boley, FRNs 1480206 & 1487825 ("Boley SLD Denial"); Graham, FRN 1411323 ("Graham SLD Denial"); Maud, FRN 1486686 ("Maud SLD Denial"); Millwood, FRN 1441742 ("Millwood SLD Denial"); OSD, FRN 1418893 ("OSD SLD Denial"); Paden, FRNs 1449646 & 1449694 ("Paden SLD Denial"); and, Wewoka, FRN 1483653 ("Wewoka SLD Denial")).

⁸ United and the Schools respectfully submit that they are aggrieved by USAC's denial decisions.

and Requests for Proposals (“RFPs”). The SLD erroneously concluded that because the Schools were not able to explain the basis for the similarities, a competitive bid violation occurred.⁹

On September 17, 2007, the Schools and United filed a Consolidated Appeal with the Schools and Libraries Division (“SLD”) of USAC (“Consolidated Appeal”).¹⁰ On September 27, 2007, the SLD summarily denied the Consolidated Appeal for only four of the Schools, namely, Maud, Paden, OSD and Wewoka without providing a basis for its decision in law or fact. At that time, the SLD had not issued a consolidated denial or individual letter denials for the remaining four schools, Agra, Boley, Graham and Millwood.

On November 16, 2007, the SLD re-evaluated the original Consolidated Appeal and provided a more detailed but still non-responsive decision for same four schools--Maud, Paden, OSD and Wewoka. On December 31, 2007, the SLD denied the Appeal requests for the four remaining Schools, Agra, Boley, Graham and Millwood, using the same detailed but non-responsive decision it issued for the Maud, Paden, OSD and Wewoka.

The SLD utilized the pattern analysis procedure and denied without establishing that a Commission competitive bid violation occurred. This it cannot do.¹¹ The Commission has

⁹ See FCCAR00001-1n (United’s FCDL).

¹⁰ United and the Schools filed an appeal of these denials for some of the schools with the Commission on November 19, 2007. FCCAR00014-14c (November Appeal).

¹¹ USAC, for the first time, states there has been a competitive bid violation in the November Denial Letters and the December Denial: “USAC, after careful consideration has determined that a competitive bid violation occurred and that a fair and open competition did not occur, as a result the appeal is denied.” FCCAR00006e (Maud November Denial), 7e (OSD November Denial), 8e (Paden November Denial), 9e (Wewoka November Denial), 10e (Agra Denial), 11e (Boley Denial), 12e (Graham Denial) and 13e (Millwood Denial). In the September Denial Letters, USAC only stated that “United Systems was improperly involved in the competitive bidding and vendor selection process.” FCCAR00002-2a (Maud Denial), 3-3a (OSD Denial), 4-4a (Paden Denial) and 5-5a (Wewoka Denial). The United FCDL states “Because you have not explained why the documents are similar, you have not demonstrated that you did not allow your service provider to participate in the competitive bidding process.” FCCAR00001e (Agra SLD Denial), 1f-1g (Boley SLD Denial), 1h (Graham SLD Denial), 1i (Maud SLD Denial), 1j (Millwood SLD Denial), 1k (OSD SLD Denial), 1l-1m (Paden SLD Denial) and 1n (Wewoka SLD Denial). This is not the same as concluding there has been a competitive bid violation.

squarely placed the burden on USAC, when it utilizes the pattern analysis procedure, to specifically identify a Commission competitive bid violation on a case-by-case (school-by-school) basis.

Specifically, United and the Schools argue that the SLD erred in its decision for the following reasons. First, the SLD's denial and pattern analysis procedures, program integrity assurance procedures, and appeal procedures are flawed, because USAC failed to disclose any of the documents to the Schools or provide any examples to the Schools identifying the USAC "alleged similarities." Withholding critical information to exonerate a School and then denying the School based upon failure to answer questions related to this withheld information is a travesty of justice and due process. Second, the SLD's denials and pattern analysis procedure is flawed because all of the alleged similarities are vendor neutral. As such, no competitive bid violation could occur. Third, the SLD's denials and pattern analysis procedure is flawed because the SLD failed to provide any evidence establishing that the Form 470s and RFPs were tainted in any manner by United. Fourth, the SLD completely disregarded the record evidence and certifications by each School that clearly evidenced that each School was in complete control of its competitive bid process.

The facts in this case unequivocally demonstrate that each School was in complete control of its competitive bid process. The similarities that the SLD alleges were the result of the Schools trading and sharing information and using information that they received from training, Internet searches, and fellow colleagues. Each school has told its story through PAIR responses and Declarations.¹² Each story results in the same ending—namely that there was no

¹² FCCAR00226-27 (Declaration of Wes McFarland, Superintendent of Agra ("Agra Declaration")); FCCAR00228 (Declaration of Gretana Gonzales-Hall, Superintendent of Boley ("Boley Declaration")); FCCAR00229-31 (Declaration of Kim Moore, Technology Coordinator, E-Rate Coordinator and Secretary at Graham ("Graham Declaration")); FCCAR00232-34 (Declaration of J.E. Pryor,

impermissible service provider involvement in the competitive bid process and not one school surrendered control to United or any service provider. As a result, there was no Commission competitive bid violation.

All that USAC found was that there were similarities in the Schools' FCC Form 470s, RFPs,¹³ and several SRIR responses. Without identifying one example of such a similarity across the application, which only the SLD had knowledge of, the SLD improperly denied all of the applications at issue in the Consolidated Appeal, because the schools could not prove why the similarities existed.¹⁴ There is no programmatic or Commission rule to support a denial, based either upon similarities alone or because a school cannot explain why similarities exist between its documents and other third party documents reviewed by the SLD, to which the schools have no access. In fact, the SLD acknowledged this at its most recent 2007 Outreach Training held on September 13-14, 2007, in Washington, D.C., when an SLD staff member (John Noran) stated in response to a participant inquiry that there was no FCC rule violation for similarities.

Superintendent of Maud ("Maud Declaration"); FCCAR00235-37 (Declaration of Gloria Griffin, Superintendent of Millwood ("Millwood Declaration")); FCCAR00238-40 (Declaration of Betty Stephens, Business Manager at OSD ("OSD Declaration")); FCCAR00241-43 (Declaration of D. Keith Kincade, Superintendent of Paden ("Paden Declaration")); FCCAR0244-46 (Declaration of Gloria Pearson, Superintendent's Secretary at Wewoka ("Wewoka-Pearson Declaration")); and FCCAR00247-48 (Declaration of Sam McElvany, Superintendent of Wewoka ("Wewoka-McElvany Declaration")).

¹³ FCCAR00027-28 (Agra RFP for E-rate Basic Maintenance); FCCAR00029-30 (Graham RFP for Basic Maintenance Only); FCCAR00031-32 (Maud RFP for E-rate Basic Maintenance); FCCAR00033-34 (Millwood RFP Basic Maintenance Only); FCCAR00035-36 (OSD RFP for E-rate Basic Maintenance); FCCAR00037-40 (Paden RFP for E-Rate Internal Connections and Basic Maintenance); and FCCAR00041-42 (Wewoka RFP for E-rate Basic Maintenance).

¹⁴ USAC never identified any of the similarities to the Schools or United, nor did it provide any examples in its Funding Commitment Denial Comments. United requested the Administrative Record for all of the Schools. FCCAR00190a-c. On September 6, 2007, USAC denied United's request. *See* FCCAR00189-90.

Furthermore, where the SLD's analysis went wrong is that it failed to consider compelling and decisive evidence in each School's response—namely that each School was responsible for the drafting, filing, submission and certifications of the requisite FCC forms, RFPs, and SRIR and PAIR responses.

The facts in this case are simple and undisputed. They are as follows: (1) similarities exist in Block 11 of each School's FCC Form 470 in the description of services for basic maintenance of internal connections, (2) similarities exist in the Schools' RFPs, (3) United provided training to the Schools and used a vendor neutral template RFP in its training materials, parts of which may have been utilized by the schools as they drafted their own RFPs, and (4) no similarities exist in the SRIR vendor selection responses. The only question that needs to be answered is whether these similarities equate to a Commission competitive bid violation. The answer is "no." The reason is that United was not in any way involved in any of the Schools' competitive bid process¹⁵ and the similarities as they appear are vendor neutral.¹⁶

The facts below will demonstrate that United provided open training to schools every year and during that training, while reviewing the requirements of the competitive bid process, discussed the FCC Form 470 process and general RFP requirements outlined in a template RFP. The training and all information provided were conducted in a vendor neutral manner. In addition, the template RFP was completely vendor neutral and simply a sample template for the

¹⁵ FCCAR00249 (Declaration of Rick Loven, Director of Business Development at United ("United-Loven Declaration")) and FCCAR00250-251 (Declaration of Alvin Myers, President and Chief Operating Office of United ("United-Myers Declaration")).

¹⁶ USAC's rules require that the service provider provide "vendor neutral" information. USAC has interpreted this to mean that the information provided cannot taint the competitive bid process in such a manner to favor only the vendor providing the information. This can be interpreted to mean that information about E-rate should be objective information, but this phrase should not be interpreted to mean that all information from the service provider must be fully balanced. The competitive marketplace demands that service providers provide information that favors their own products and services.

participants to consider. A couple of the Schools used this general, vendor neutral information and may have included some of the language in drafting their own FCC Form 470s and RFPs. Moreover, as is typical, the Schools share information. United, as many other vendors, also provides vendor neutral assistance to its customers when called upon and asked questions about various E-rate requirements and processes.

The only two relevant issues in this appeal are (1) whether the template RFP and assistance provided by United to its customers were vendor neutral and (2) whether the Schools at any time abrogated their responsibilities during the competitive bid process to United by allowing United to step in their shoes and take over the competitive bid process. The facts clearly establish that the template RFP is vendor neutral and the Schools conducted an open and fair competitive bid process. None of the facts support the SLD's conclusion in reaching its funding denials for the Schools. There was no Commission competitive bid violation. As a result, the Commission should grant this Joint Consolidated Appeal.

III. KEY BACKGROUND FACTS¹⁷

A. The Parties

Agra is a small, rural, public school district with an elementary and high school. Approximately 500 students attend Agra. Boley is a very small school district in the state of Oklahoma with only 61 students. Paden is a small, rural pre-k through 12th grade school district with approximately 300 students.

¹⁷ All of the facts set forth in the "Key Background Facts" section of this Joint Consolidated Request for Review have been attested to, under penalty of perjury, by United's President and COO, United's Director of Business Development and each School's Superintendent or Technology Director. FCCAR00250-251 (United-Myers Declaration), FCCAR00249 (United-Loven Declaration), FCCAR00226-27 (Agra Declaration), FCCAR00228 (Boley Declaration), FCCAR00229-31 (Graham Declaration), FCCAR00232-34 (Maud Declaration); FCCAR00235-37 (Millwood Declaration), FCCAR00238-40 (OSD Declaration), FCCAR00241-43 (Paden Declaration), FCCAR00244-46 (Wewoka-Pearson Declaration), and FCCAR00247-48 (Wewoka-McElvany Declaration).

Graham is a rural school district with approximately 2400 students. Graham provides high quality educational services to pre-k through 12th grade students and challenges its students to be responsible citizens with clear personal and career goals.

Maud is a small rural school where students and teachers work together in the learning process. Maud has a low student to teacher ratio and students receive the individual attention needed to excel.

Millwood is a pre-k through 12th grade school district with approximately 1100 students. Millwood includes an arts academy, a ninth grade academy, a pre-school program and two community learning centers. Millwood traces its roots back to 1900 as an outgrowth of the Deep Fork School when Oklahoma was only a territory. Today Millwood is proud to be an Oklahoma A+ School which takes a comprehensive and integrated approach to learning based on the idea of offering a whole-school curriculum.

OSD is a residential school for deaf and hard of hearing students. OSD seeks to educate its students in a safe, barrier-free environment so that its students are able to achieve academic excellence, increased self-esteem, and improved work habits.

Wewoka is a rural school district educating pre-k through 12th grade students. Wewoka's goal is to help its students achieve success and become efficient members of society. Wewoka helps students find their place in society and provides them with the understanding and skills needed in order to be successful.

United provides E-rate eligible internal connections to the K-12 educational market in Oklahoma where they have served over 200 schools since 1984.

B. The Template RFP

United has participated in the E-rate Program since its inception. In earlier years, the SLD encouraged service providers to take a very active role in informing their customers about

the opportunities of E-rate. The SLD also encouraged service providers to train their customers, *i.e.*, schools and libraries, about the forms and rules of the E-rate Program as well as about the eligible services and technology available for E-rate funding. United was one of many service providers that chose to provide training to schools.

Every year after attending the SLD's training, United has provided a one-day training seminar for schools highlighting the rules of the E-rate Program and programmatic changes. The training covered all aspects of the Program, including generic, vendor neutral information about the competitive bid process.¹⁸ In the earlier, formative years of the Program, and before the Commission's *MasterMind* Order,¹⁹ there were not many Commission rules surrounding the competitive bid process. But it would not be uncommon for United or any service provider to train on the competitive bid requirements that included discussions and information about the FCC Form 470 and RFPs. In fact, this is still common practice today. It is also general practice for schools and libraries to look to vendors for assistance on the various types of technology that are E-rate eligible.²⁰

¹⁸ FCCAR00250-51 (United–Myers Declaration).

¹⁹ *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.*, Order, 16 FCC Rcd 4028 (2000) (“MasterMind”).

²⁰ E. Herman, “Telecom Carriers Want Easier E-Rate Process,” *Communications Daily*, Jan. 10, 2008, at pp. 6-7 (“SECA doesn’t like the plan because it ‘puts all the burden on the school or library’ to make sure a service is eligible for e-rate reimbursement, chairman Gary Rawson said. Schools and libraries often rely on technical expertise from telecom companies and other contractors, he said. A rural school district with no employees responsible for technology could ‘lose out’ if it had to ‘assume total responsibility’ for the details of e-rate eligibility, material to be filed on forms, and procedures to follow, Rawson said. ‘We want service providers to share the responsibility because they are more likely to be tech savvy,’ he said, urging establishment of a middle ground.”). FCCAR00015-15a. Even the State E-rate Coordinator’s Alliance recently acknowledged that schools, especially rural districts with no employees responsible for technology, should be able to look to their service provider for assistance with details of “e-rate eligibility, material to be filed on forms, and procedures to follow.”

Part of United's training included a slide and discussion about a vendor neutral template RFP.²¹ The template RFP highlighted three areas—a suggested list of description of services, vendor qualifications and vendor requirements.²² Of the three, the most significant for the purposes of this appeal is the description of services, which appears in similar fashion in the service and function box of Block 11 on the Schools' FCC Form 470s.

RFP Template-Description of Services

The suggested list of description of services for internal connections basic maintenance included:

Routers, Servers, Switches, UTP and Fiber Cabling, Network Racks and accompanying e-rate eligible accessories, Network Operating System, UPS, wireless access points/switches and accompanying e-rate eligible accessories, phone systems.²³

This list is a generic, vendor neutral list. Any provider of basic maintenance could submit a bid proposal to compete for the services listed.

RFP Template-Suggested List of Vendor Qualifications

The **suggested list** of vendor qualifications included:

- Novell Platinum Partner
- Microsoft Certified Solutions Provider
- IBM Premier Service Provider
- HP Authorized Dealer
- HP Certified Education Partner
- Cisco Systems Solutions Provider
- IBM Global Services Provider
- HP Procurve Elite
- 3Com Focus Solutions Partner
- Lexmark Authorized Dealer
- IBM EXAct Certified Partner
- Panduit Global Certified Installer

²¹ FCCAR00043-44 (“Request for Proposal, Basic Maintenance Only,” Template, United, Inc. (“Template RFP”)).

²² *Id.*

²³ *Id.* at FCCAR00043.

- Leviton Mohawk Certified Installer²⁴

Likewise, the suggested vendor qualification list simply included a list of potential industry standard manufacturer certifications for different products. First, the list of qualifications is clearly an example only based on the introductory wording: “this is just a sample of qualifications that might apply to your school.” If it was strongly recommended or necessary to include all of these vendor qualifications in the RFP then the introductory language would have been different. Second, these types of certifications are recommended by the manufacturers of the products. One reason for this is to ensure that the company and its employees are qualified to install and maintain the equipment. Many manufacturers will not honor the warranty of their products unless they have been installed by a properly certified specialist. In essence, without proof of certification, the warranty would be void. Third, such certification requirements ensure that the schools are soliciting services from qualified vendors. Finally, the certification requirements are merely provided as an example because there is overlap between the credentials listed. For example, the list includes “IBM Premier Service Provider,” “IBM Global Services Provider,” and “IBM EXAct Certified Partner.” A school only needs to list the relevant IBM certification based on the equipment in use by the school.

RFP Template-List of Vendor Requirements

The list of vendor requirements included:

- Vendor must have Toll free telephone support.
- Vendor must agree to sign an affidavit to meet all requirements of the Oklahoma Sex Offenders Act to work on school property.
- Vendor must sign a non-collusion statement.
- All cost must be included and in bid. No back charges will be accepted.
- Contractors will provider on site people who are dependable, free of substance abuse, safety conscious, technically qualified and able to work well with other on site and

²⁴ *Id.*

remote contractors. All persons sent to school must be free of any felony convictions of drug, alcohol, or sexual matter.

- Contractor will not use subcontractors unless approved by this school district.²⁵

This suggested vendor requirements list is simply a non-exhaustive list of possible requirements, some of which are required by Oklahoma state law and which are found on other Oklahoma RFPs for major school districts.²⁶

C. The Schools' FCC Form 470—Description of Services

All of the Schools posted an FCC Form 470 requesting funding for basic maintenance of their internal connections.²⁷ The service and function box in Block 11 contained similar language for each School. This language was also similar to the language that appeared on United's vendor neutral Template RFP. The Schools either relied upon the Template RFP, other schools, or previous FCC Form 470s in using this language. The language is standard, generic language for basic maintenance services.

D. The SLD's Pattern Analysis Review

The SLD issued PAIR Letters to each of the Schools asking for the following information:

Form 470 and Form 470 Certifications

Program rules prohibit service providers from participating in the development, completion and posting of the Form 470. We have determined that Forms 470 cited by United Systems, Inc. entities are similar in their services sought, which implies that United Systems participated in the completion and/or posting of your entity's Form 470.

²⁵ *Id.* at FCCAR00043-44 (emphasis in original).

²⁶ FCCAR00045-84 (Copy of RFP for Mid Del); FCCAR0085-110 (Copy of RFP for Oklahoma City Public Schools).

²⁷ FCCAR00111-18 (Agra FY2006 Form 470); FCCAR00119-26 (Boley FY2006 Form 470); FCCAR00127-34 (Graham FY2006 Form 470); FCCAR00135-42 (Maud FY2006 Form 470); FCCAR00143-50 (Millwood FY2006 Form 470); FCCAR00151-58 (Oklahoma FY2006 Form 470); FCCAR00159-66 (Paden FY2006 Form 470); and FCCAR00167-74 (Wewoka FY2006 Form 470). *See also* FCCAR00026 (FCC Form 470 Comparison Chart).

1. Please provide the name, title, and employer of the individual who filled out and submitted (i.e., mailed or posted the Form 470 on the Schools and Libraries website) [your Form 470]. Also provide that individual's contact information. If they are not an employee of your organization, how are they affiliated with your entity and why were they selected to complete or post your Form 470?
2. Please provide the specific location from which [your Form 470] was filed and submitted. If the Form 470 was not posted from your organization's location, please explain why.
3. If a service provider employee assisted in the completion and/or posting of [your Form 470], please provide the name and title of the Service Provider's employee and describe the assistance. Please also provide that individual's contact information. Explain why you selected them to assist your organization with completing or posting your Form 470. To the best of your knowledge, explain whether the service provider was aware that an employee assisted with the completion and/or posting of your entity's Form.

Form 470 Service or Need Description Summary

Applicants that selected discount services from United Systems, Inc. share similar statements in their Form 470 Block 2: *Summary Description of Needs or Services Requested*. These similarities imply that the service provider participated in the development, completion and/or posting of the Form 470.

1. Please explain the process your entity used to determine the type(s) of service(s) for which your entity sought bids. Provide documentation, if available that will support your response (e.g., needs assessment, memorandums).
2. Provide the name of the individual and their organization's name who participated in determining what services your entity sought bids for and in determining the Applicant Form Identifier that are not employees of your organization. Explain how they became involved in the process, their level of involvement, and why your organization sought their participation in your competitive bidding process.

Request for Proposal (RFP)

1. In response to our FY 2006 Selective Review Information Request (SRIR), you provided a Request for Proposal (RFP) that was used in the competitive bidding procurement process that led to the selection of United Systems, Inc. to be a service provider for your School District. Your Request for Proposal is similar to other billed entity RFPs. Please explain why these similarities exist. Provide documentation, if available, that will support your response (e.g., needs assessment, memorandums).
2. Please provide the name, title and employer of each of the individuals, both within and outside of the School District that helped in the preparation of your RFP. If you had assistance in preparing your RFP outside of the Schools District please indicate who provided such assistance (and indicate whom they

- represent), how they became involved in the process, and their level of involvement in the process.
3. Please indicate if your RFP was based on a template RFP that was provided to the School District. If your RFP was based on a template RFP, please cite the organization responsible for the organization of the template RFP.

Selective Review Information Request Response

1. In response to our FY2006 Selective Review Information Request (SRIR), you submitted a response to the vendor selection and implementation description portions of the Selective Review that was similar in format and language to other entities' responses. Explain how you prepared your documentation and the process, if any, that was used.
2. Provide the name, title and employer of the individual who prepared your SRIR response and the process used to respond. If you had assistance in preparing your Selective Review response please indicate who provided such assistance (and indicate who they represent), how they became involved in the process, and their level of involvement in the process.

The SLD issued SRIRs to all of the Schools and found that several of the responses to the vendor selection process were similar. The SLD took the position with respect to Agra, Maud, Millwood, and OSD that these alleged similarities indicated that the vendor, United, improperly participated in the drafting of these responses. A review of the responses demonstrates the contrary - namely, that there were no similarities. The SLD's finding of such was wrong and any conclusion as a result of this flawed finding can only be based upon pure conjecture.

E. The Schools' Responses to the SLD's PAIR Letter

All of the Schools responded that they were responsible for the (1) drafting, filing, and certifying of their FCC Form 470s, (2) drafting and posting of their RFPs, and (3) drafting and certifying of their vendor selection responses on their SRIRs, where applicable. All of the Schools and United were in compliance with the competitive bid requirements. None of the Schools and United engaged in any activity prohibited by the Commission's *MasterMind* Order or rules.

What follows are the stories of each School as told to the SLD through their responses to the SLD's PAIR Letter and supported by their Declarations attached hereto. There are several common themes in each of these stories. These Schools rely heavily upon one another in seeking assistance and sharing knowledge with matters pertaining to technology, procurement, and E-rate. These Schools have dedicated and committed staffs who work very hard to follow the rules of E-rate and navigate the process. These Schools are small school districts that do not have in-house information technology departments. The Schools' teachers in most instances are also the Schools' technology staff and their concerns are software issues and data input. The Schools look to their service provider for help with routers, servers, switches, cabling and other aspects of internal connections. These Schools are simply too small to have anyone employed who has significant knowledge of hardware issues much less any of the certifications, training and experience necessary to oversee internal connections and maintenance of such connections. The Schools rely on service providers to provide information about what is needed to create and/or maintain their systems.

These Schools all drafted, completed, submitted, and certified their FCC Form 470s; drafted and made their RFPs available to the general public; evaluated bid responses and conducted an open and fair competitive bid process; and, chose their vendors based upon the Commission's competitive bid criteria. And, finally, these Schools are appreciative of the E-rate funding they receive.

1. Graham Independent School District 32²⁸

In its PAIR Response, Graham explained that it is a small, rural school district and the Superintendent and the Technology Coordinator work together to determine the district's technology needs.²⁹ Graham also consults with United, its incumbent service provider, to determine if any new equipment is recommended or if any existing equipment needs to be replaced.³⁰ With all of this information and the school's technology plan, the Superintendent and Technology Coordinator are responsible for (1) determining what services to seek funding for, (2) drafting the RFP, and (3) drafting and posting the FCC Form 470.³¹ Graham noted in its response that United is generally the only vendor that responds to its RFPs and has been the school's vendor since 1998.³² In its PAIR Response, Graham specifically stated that Kim Moore, the Technology/E-Rate Coordinator/Secretary at Graham, was responsible for completing and posting the Form 470, that the Form 470 was posted from Graham's office, and "no service provider assisted in the completion and/or posting of Form 470

²⁸ USAC never identified any of the similarities to the Schools or United, nor did it provide any examples in its Funding Commitment Denial Comments. United requested the Administrative Record for all of the Schools. FCCAR00190a-c. On September 6, 2007, USAC denied United's request. *See* FCCAR00189-90. The appeals process is cumbersome for schools and service providers when there is a lack of transparency in the SLD's decision-making and no access to the specific language or documents that support SLD's decision. Access to underlying supporting records is reasonable, fair, and just. This Joint Consolidated Appeal includes all of the PAIR Responses with the exception of Boley's response. However, its FCC Form 470 and RFP contain the same type of similarities as the other Schools and are included herein by reference. In addition, Boley has provided a declaration stating that there was no service provider involvement in the competitive bid process and those representatives of its school filled out, drafted, certified, and filed Boley's FCC Forms 470s and RFPs. Boley's responses evidence no impermissible service provider involvement. *See* AR00228 (Boley Declaration).

²⁹ FCCAR00191 (Letter from Kim Moore, Graham to Michael Deusinger, USAC, responding to the Graham PAIR Letter, dated Dec. 13, 2006 ("Graham PAIR Response")); *see also* Graham Declaration at FCCAR00229-31.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

#972390000564721.”³³ Graham also stated that “[w]e did not have assistance in determining what services we sought bids on. The school superintendent and technology coordinator of Graham School District were the only people involved in determining the services we sought for bid.”³⁴

In response to the SLD’s questions regarding RFP similarities, Graham stated that “[w]e did not have assistance in preparing our RFP.”³⁵ Graham did report that it used a template provided by United during a training seminar, but tailored it to meet its needs. Specifically, Graham stated that it “added our own language to make it specific to our school district so any potential vendor would have the proper information needed to bid on the services being sought by our district.”³⁶ Graham’s responses evidence no improper service provider involvement.

2. Maud Independent School District 117

In response to the Maud PAIR Letter, Maud stated that Judy McGee, Administrative Secretary at Maud, was responsible for submitting its FCC Form 470 from her computer at the Maud School District Board of Education and Administrative Office.³⁷ Maud also stated that no service provider or service provider employee assisted in the “completion and/or posting of Form 470 #914920000576754.”³⁸ At Maud, the Superintendent and technology personnel are responsible for determining if Maud needs any new services.³⁹ To make this determination,

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at FCCAR0192.

³⁷ FCCAR00193 (Letter from J.E. Pryor, Maud, to Michael Deusinger, USAC, responding to the Maud PAIR Letter, dated Dec. 13, 2006 (“Maud PAIR Response”)); *see also* Maud Declaration at FCCAR00232-34.

³⁸ *Id.*

³⁹ *Id.*

Maud consults with the school's service provider to ascertain the condition of the school's current equipment and if any equipment is outdated or needs to be replaced.⁴⁰

Maud and United, its incumbent service provider, have a long working relationship. United's involvement in the Maud competitive bidding process is limited to permissible contact regarding technical information about Maud's equipment and services. Maud stated that "United Systems has been our service provider since 1999. Their level of involvement in the bidding process is only to provide their expertise on the condition of our present technology equipment. Any decision to replace equipment remains totally at the discretion of the school district."⁴¹ Alvin Myers, President and Chief Operating Officer of United, provided permissible information to Maud regarding the status of Maud's equipment in order to assist Maud in its determination of its needs to request new services or replace existing equipment. United had no further involvement in the Maud competitive bidding process.⁴²

In an effort to explain the alleged similarities between Maud's RFP and that of other applicants, Maud stated that "[t]he use of similar language by applicants for federal programs is not uncommon especially in small school districts such as we are. It is common for personnel from small school districts to attend the same seminar or training program which provide similar format for use by the schools."⁴³ Maud stated that J.E. Pryor, Superintendent, and Judy McGee, Administrative Secretary, participated in the preparation of Maud's RFP and "[o]ther than information received at conferences sponsored by the state department of education or other school organizations no outside help was received in the preparation of the RFP [and the] RFP

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at FCCAR00193-94.

⁴³ *Id.*

was not based on a template RFP.”⁴⁴ The Maud PAIR Response makes no mention of any United participation in the preparation of the Maud RFP or Maud’s SRIR response.⁴⁵

Maud, in its response to the SRIR, explained its vendor selection process as follows:

Once we filled out form 470 we developed an RFP and sent [it] to any vendors that requested it. We waited for the minimum amount of 28 days and only received one bid for internal connections. Our one bid was from United Systems and their proposal met all standards which we required. In regard to our telephone service, we are a small community of about 1000 population with 350 students in our school system. Southwestern bell [sic] is the only service provider from which we have to choose for telephone service. Our internet service is provided by One Net which is the state’s telecommunications and information network for education. Since we only received one bid for internal connections a selection matrix was not necessary.⁴⁶

This response is not at all similar to Wewoka’s response that the SLD claims is similar. In support of its SRIR response, Maud stated in its PAIR Response that

the format and language from one school to the next will be similar due to the fact that we attend the same informative meetings [and] ... it is not uncommon for school districts to share information with each other. Our response to the selective review information request was just stating the facts on how we select vendors and how E-rate implementation is done. I would not hesitate to guess that a majority of small school districts would give you the same information in the same format because our needs are basically the same.⁴⁷

At no time did Maud state that it received impermissible service provider assistance during the competitive bidding process. Maud looked to other schools and training sessions for additional information for advice on how to conduct the competitive bidding and vendor selection processes. Maud’s responses evidence no improper service provider involvement.

⁴⁴ *Id.* at FCCAR00194.

⁴⁵ *Id.*

⁴⁶ FCCAR00197 (Letter from J.E. Pryor, Superintendent, Maud, to Kippy Piedici, USAC, Response to USAC letter dated Oct. 9, 2006, dated Oct. 17, 2006 at “Vendor Selection Exhibit.”).

⁴⁷ FCCAR00194 (Maud Pair Response).

3. Millwood Independent School District 37

Millwood stated in its PAIR response to the SLD that it did not receive assistance in the preparation and submission of its FCC Form 470 and that it submitted its FCC Form 470 from Millwood's Superintendent's Office.⁴⁸ In response to the Millwood PAIR Letter asking if service provider assistance was received in the completion or posting for Form 470, Millwood stated that it "did not receive any assistance outside the district with Form 470 #686240000553891."⁴⁹ The Millwood Technology Committee is responsible for determining what services to request and Millwood stated that "[n]o individuals nor organizations outside of the district participated in determining what services Millwood Public Schools sought for bids."⁵⁰

Regarding the preparation of Millwood's RFP, Millwood stated that its FY2006 RFP was the same as its FY2005 RFP, because it determined that it needed the same services as the previous year.⁵¹ Millwood stated that Shannon Hayes, Technology Coordinator, and Mary Miller, Executive Assistance to the Superintendent, both Millwood employees, were responsible for preparing the RFP.⁵² Millwood also stated that its RFP was prepared using a simple word processing format by school employees and only school employees were involved in the preparation of its response to the SLD's SRIR.⁵³

⁴⁸ FCCAR00198 (Letter from Gloria Griffin, Millwood, to Michael Deusinger, USAC, responding to the Millwood PAIR Letter, dated Dec. 13, 2006 ("Millwood PAIR Response")); *see also* Millwood Declaration at FCCAR00235-37.

⁴⁹ *Id.* at FCCAR00199

⁵⁰ *Id.*

⁵¹ *Id.* at FCCAR00200.

⁵² *Id.*

⁵³ *Id.* at FCCAR00200-01.

Millwood merely used the Template RFP and customized it for its individual needs. The changes in the Template RFP include adding PVBX to the services requested; deleting certification requirements for Novell Platinum Partner, IBM Global Services Provider, 3Com Focus Solutions Provider, Lexmark Authorized Dealer, and IBM EXAct Certified Partner; and adding requirements for having knowledge of SIF, including the SPIN number, being financially solvent and being in the Oklahoma City area in order that the school would receive prompt responses to service calls.⁵⁴

Millwood also received an SLD SRIR. In its PAIR Response, Millwood explained that “[t]he vendor selection process was done in the sequence of events required by the USAC and the Millwood Board of Education. Simple statements were used too describe what occurred during the selection process. (See Attached Documentation e.g., Board Minutes and Board Policy D-04 and Regulation D04-R1).”⁵⁵ In reporting who assisted in the preparation of the SRIR response, Millwood stated: “[t]he following Millwood Public Schools employees prepared responses to Millwood’s SRIR (Selective Review Information Request). They are as follows: Shannon Hayes, Technology Coordinator; Beauford Kelley, Business Manager; Lavinnie Moore, Teacher/Professional Development Coordinator; Mary Miller, Executive Assistant to the Superintendent; and Dr. Gloria Griffin, Superintendent.”⁵⁶ Millwood clearly stated that its employees prepared the SRIR Response and there is no mention of United or any of its employees in the detailed description of the vendor selection process or in the list of individuals that prepared that response.

The vendor selection response of Millwood’s SRIR follows:

⁵⁴ FCCAR00033-34 (Millwood RFP).

⁵⁵ FCCAR00201 (Millwood PAIR Response).

⁵⁶ *Id.*

Vendor Selection Process

The Millwood Public School District consists of three district sites located on a span of seven city blocks. The sites' systems are integrated and require services by skilled professionals who understand system structure.

Due to the complexity of the environment, the Board seeks vendors who can provide service and products for all Internet and network elements of the organizations.

The above provides a foundation for the vendor process listed below

- Filed Form 470
- Issued Request for Proposal (RFP)
- Sent RFP to all vendors who requested it.
- Waited minimum of 28 days for response to be delivered
- Received one proposal for basic maintenance for internal connections and one for cellular services
- Reviewed responses and evaluated their compliance with minimum requirements set forth in the RFP.
- In accordance with its policies, the Board selected the lowest, best bids. Thus the proposal for basic maintenance for internal connections was selected and the cellular proposal was rejected. The Board chose to remain with current cellular provider because it was cost effective for the district.
- Filed Form 471.⁵⁷

As this response demonstrates, there is not any similarity of this response to Wewoka's SRIR Vendor Selection Response that even remotely suggests that United was involved in Millwood's response. Millwood's responses evidence no improper service provider involvement.

4. Oklahoma School for the Deaf

OSD stated in its PAIR response to the SLD, like the other Schools, that it did not receive outside help preparing and posting its FCC Form 470 or preparing its RFP.⁵⁸ The OSD FCC Form 470 was prepared and filed by Max Martin, teacher/media specialist, and Harvey Stinson, teacher/computer technician, both OSD employees.⁵⁹ The FCC Form 470 was submitted to USAC from Mr. Martin's computer at OSD, and OSD stated that "[n]o individuals outside of the

⁵⁷ FCCAR00203-13 (Millwood's SRIR Vendor Selection Response).

⁵⁸ FCCAR00214, 216 (Letter from Betty Stephens, OSD, to Michael Deusinger, USAC, responding to the OSD PAIR Letter, dated Dec. 13, 2006 ("OSD PAIR Response")); *see also* OSD Declaration at FCCAR00238-40.

⁵⁹ *Id.* at FCCAR00214.

Oklahoma School for the Deaf employees assisted in the filing or the posting of the Form 470.”⁶⁰ OSD’s FCC Form 470 services and needs description was based on “the terminology in that block from the 2005 year Form 470” and OSD’s Technology Plan.⁶¹

OSD’s technology needs were ascertained by both school employees Mr. Martin and Mr. Stinson. In the OSD PAIR Response, OSD stated that similarities may exist in its RFP because “an RFP from another school was used as a guideline. The RFP was modified to meet the need of our school. We wanted to be sure and include everything needed in the RFP to make sure we were covered.”⁶² OSD prepared OSD’s RFP using a template RFP that was provided to OSD at its request from the technology person at Pauls Valley School.⁶³

The SLD issued a SRIR to OSD, and OSD responded that it prepared its SRIR response. OSD further stated that it only consulted United, its current service provider, for assistance with technical questions related to the SRIR, and United reviewed OSD’s response to the technical SRIR questions for accuracy.⁶⁴ United did not assist OSD in responding to OSD’s Vendor Selection process nor were there any similarities found in OSD’s Vendor Selection responses similar to those of Agra, Maud, Millwood, or Wewoka.

As explained in its PAIR Response, OSD did the following to respond to the SLD’s SRIR:

On the day that OSD received the SRIR, Betty Stephens forwarded the request to Max Martin and Harvey Stinson for their review. The three of us, all OSD employees, had a working meeting to review, discuss and respond to the questions to the best of our knowledge. Each question was carefully read and responded to

⁶⁰ *Id.*

⁶¹ *Id.* at FCCAR00215.

⁶² *Id.* at FCCAR00216.

⁶³ *Id.* at FCCAR00217.

⁶⁴ *Id.* at FCCAR00217-18.

by whoever could best provide the answer. To thoroughly answer some questions, we gathered information from other OSD employees (e.g. staff development, staff training and building retrofitting). We asked for and received help from United Systems in answering some technical questions that we were not sure of. A representative from United Systems helped us finalize the SRIR to assure that all technical questions were answered completely and accurately. ... The following individuals worked together to prepare thorough responses to the SRIR: Max Martin, OSD Teacher/Media Specialist, hardware/software inventory, technology terminology; Harvey Stinson, OSD Teacher/Computer Technician, technology operations; Betty Stephens, OSD Business Manager, financials and budgeting; OSD Classroom Teachers, staff development; OSD Human Resources, training; OSD Maintenance Department, retrofitting; Mr. Alvin Myers, CEO of United Systems, provided review for accuracy of answers regarding system maintenance.⁶⁵

At the request of OSD, United provided technical information to assist the school in preparing a response to the SRIR. The SLD's rules and educational training allow for this type of assistance - namely that the service provider may assist with answering technical questions. OSD is a small school without a dedicated technical staff and was concerned it was accurately and completely describing the technical details of its network to USAC. Accordingly, it asked its service provider, United, for permissible help - to provide OSD with technical information about its network and then to review the response prepared for the SRIR to ensure it was accurate. OSD's responses evidence no improper service provider involvement.

5. Paden Independent School District 14

Paden also responded to the SLD's PAIR Letter stating that it did not receive assistance during the competitive bidding process.⁶⁶ Paden's technological needs, FCC Form 470, and RFP were all determined, drafted, and posted by the school's Superintendent, Keith Kincade.⁶⁷ Paden stated that it prepared and posted the FCC Form 470 from Mr. Kincade's computer in his office

⁶⁵ *Id.*

⁶⁶ FCCAR00219-20 (Letter from D. Keith Kincade, Superintendent, Paden, to Michael Deusinger, USAC, responding to the Paden PAIR Letter, dated Dec. 18, 2006 ("Paden PAIR Response")); *see also* Paden Declaration at FCCAR00241-43.

⁶⁷ *Id.*

at Paden.⁶⁸ Paden does not employ a computer expert, seeks the advice of other Superintendents, and Mr. Kincade attends vendor sponsored workshops to determine the technology needed to keep Paden up to date.⁶⁹

For the FCC Form 470 Service or Need Description, Paden stated that it determined what services were needed and “[t]he decisions were [Mr. Kincade’s], with the help of members of [the Paden] technology committee. However the final decision was [Mr. Kincade’s].”⁷⁰ Paden did not receive any assistance from United during its competitive bidding process.⁷¹

In preparing the Paden RFP, Mr. Kincade explained that this was his first RFP and he searched the Internet for sample RFPs prepared by more experienced Superintendents. Paden relied on those RFPs to draft the Paden RFP. Mr. Kincade also commented that he uses other schools’ work, which is common in his business. Indeed, he stated that “[o]n numerous occasions I rely on other, more experienced, Superintendents. I have used their written policy to bring my district up to date in several areas. This practice is quite common in my business (We beg, borrow, and steal to keep our districts functioning).”⁷² Clearly Paden did everything possible to obtain the information it needed to prepare the FCC Form 470 and RFP for Paden, and none of those efforts included seeking out the assistance of United or any other service provider.⁷³ Paden’s responses evidence no improper service provider involvement.

⁶⁸ *Id.* at FCCAR00219.

⁶⁹ *Id.* at FCCAR00220.

⁷⁰ *Id.*

⁷¹ *Id.* at FCCAR00219-20.

⁷² *Id.* at FCCAR00220.

⁷³ *Id.* at FCCAR00219-20.

6. Wewoka Independent School District 2

Wewoka stated that it was offered and accepted assistance in completing its FCC Form 470, RFP, and response to SRIR from United but at all times, Wewoka was in control of its competitive bidding process.⁷⁴ The Wewoka PAIR Response was not specific as to the type of assistance provided, and the SLD did not request clarification to determine whether there was improper service provider involvement that rose to the level of “tainting” the competitive bid process. The SLD, however, relied solely upon Wewoka’s response in denying all other Schools in this appeal.⁷⁵

The Wewoka PAIR Response was prepared by Gloria Peterson, the Superintendent’s Secretary.⁷⁶ Wewoka stated it received permissible assistance from United during the competitive bidding process and that Wewoka was responsible for posting and certifying its FCC Form 470 and RFP.⁷⁷ At all times, Wewoka remained in control of its competitive bidding process—not United or any other vendor.⁷⁸

Wewoka was responsible for drafting, filing and certifying its Form 470.⁷⁹ At no time did it relinquish that control. United is Wewoka’s current service provider and their assistance was needed by Wewoka in order to determine what technology was currently in place.⁸⁰

Wewoka’s Superintendent stated that:

⁷⁴ FCCAR00221-22 (Letter from Gloria Pearson, Superintendent’s Secretary, Wewoka, to Michael Deusinger, USAC, responding to the Wewoka PAIR Letter, dated Dec. 15, 2006 (“Wewoka PAIR Response”)); *see also* Wewoka-Pearson Declaration at FCCAR00244-46 and Wewoka-McElvany Declaration at FCCAR00247-48.

⁷⁵ *Id.* at FCCAR00221.

⁷⁶ *Id.*

⁷⁷ *Id.* at FCCAR00221-22.

⁷⁸ FCCAR00249 (Wewoka-McElvany Declaration).

⁷⁹ *Id.*

⁸⁰ *Id.*

It is not uncommon for Mrs. Pearson as the Superintendent's Secretary to speak with our service providers and request assistance about E-rate products and services. Regardless of what assistance she may have received from United Systems, Mrs. Pearson was responsible for the drafting, filing, and assisting interim superintendent in certifying of the Form 470.

...

While United Systems provided a template RFP, it was the current superintendents both Carl Moore and David Cox, who were responsible for drafting the RFP.

In the competitive bid process, Forms 470 and 471 were completed and filed by Mrs. Pearson, under the direction of Wewoka Superintendents. Wewoka evaluated the bids and selected the only vendor to bid for Basic Maintenance, United Systems. Wewoka chose United Systems as its incumbent service provider. David Cox, Interim Superintendent, verified and submitted the Form 471.⁸¹

The facts are clear that at all times Wewoka remained in control of its competitive bidding process and only accepted vendor neutral and technical information from United.⁸²

Wewoka received a SRIR from USAC dated July 12, 2006 ("Wewoka SRIR"). In response to the vendor selection process inquiry, Wewoka stated the following:

We filed our Form 470 and developed the RFP form. The RFP was sent to the vendors who requested it. We waited the minimum 28 days for a response. We had one request and received one response. Since we received only one bid, no scoring was necessary for the vendor selection. We went with the incumbent and filed our Form 471.⁸³

Wewoka's SRIR response clearly stated that it was responsible for and in control of the competitive bidding process. There is no indication in this response or any other that there was any impermissible service provider involvement in the competitive bidding process.⁸⁴

⁸¹ *Id.*

⁸² Wewoka also stated that Rick Loven, Director of Business Development with United, provided draft language to Wewoka for its SRIR response, but it was Wewoka that prepared its response and completed the SRIR certification. *Id.*

⁸³ FCCAR00225 (Wewoka, SRIR Response, dated Aug. 28, 2007, at Exh. 6).

⁸⁴ See Wewoka-Pearson Declaration at FCCAR00244-46 and United-Loven Declaration at FCCAR00249.

F. The SLD Denied Funding to the Schools

1. The July 18, 2007 FCDLs

On July 18, 2007, the SLD issued United's FCDL denying funding to the Schools. Each Funding Commitment Decision Explanation ("Denial Explanation") is similar except for a few instances where the SLD allegedly found similarities in the vendor selection responses in some of the SRIRs.⁸⁵ In each FCDL, the Denial Explanation begins with the same language:

USAC recently contacted applicants and explained that for applicants who had chosen United Systems, Inc., SPIN 143004698, as their service provider, entities provided documents with striking similarities to USAC to support their funding requests. For each type of document, USAC asked applicants to explain how they prepared each type of document, to provide any supporting documentation, and to specify the individual who prepared the relevant documents. Your associated FCC Form 470 and Request for Proposal (RFP) contain striking similarities with those submitted by other applicants. In response to USAC's questions providing you with the opportunity to demonstrate that you did not violate the FCC's competitive bidding rules.⁸⁶

After a short summary of the supporting information provided by the School to USAC, each FCDL then denied funding for the same reason:

However, another applicant whose associated FCC Form 470 and RFP contains identical language to your documents, has stated that United Systems assisted them in the completion of their FCC Form 470 and provided them with the RFP. Your response does not explain why your FCC Form 470 and RFP is similar to those of other applicants who selected United Systems, one of whom stated that (1) a United Systems employee assisted with answering each question on the FCC

⁸⁵ The SLD found alleged similarities in the vendor selection responses for the following Schools: Maud, Millwood, OSD, and Wewoka. *See* FCCAR00001i (Maud SLD Denial) ("Your associated FCC Form 470, Request for Proposal (RFP), and response to USACs [sic] questions about how you selected your vendor contain striking similarities with those submitted by other applicants. ... Your response does not explain why your FCC Form 470, RFP and response to USACs [sic] question about how you selected your vendor is similar to those of other applicants who selected United Systems"), FCCAR00001j (Millwood SLD Denial), FCCAR00001k (OSD SLD Denial), and FCCAR00001n (Wewoka SLD Denial).

⁸⁶ *See* FCCAR00001e (Agra SLD Denial), FCCAR00001f-1g (Boley SLD Denial), FCCAR00001h (Graham SLD Denial), FCCAR00001i (Maud SLD Denial), FCCAR00001j (Millwood SLD Denial), FCCAR00001k (OSD SLD Denial), FCCAR00001l-1m (Paden SLD Denial), and FCCAR00001n (Wewoka SLD Denial).

Form 470 and provided the wording to use, and (2) a United Systems employee gave them the RFP to use. Because you have not explained why the documents are similar, you have not demonstrated that you did not allow your service provider to participate in the competitive bidding process. Therefore, the FRN is denied.⁸⁷

The FCDLs do not identify the other applicants for which there are alleged application similarities, do not provide specific language identifying the exact similarities within the FCC Form 470s and applicant RFPs, and do not provide a Commission competitive bidding violation. But rather the SLD Denial Explanation only states that the applicant has not sufficiently explained the similarities between its application and that of other unknown applicants. As is demonstrated below, this finding is not enough to equate to a Commission competitive bid violation.

2. The September 27 Denial Letters

On September 27, 2007, the SLD issued the September Denial Letters in response to the Consolidated Appeal but only for four (4) of the eight (8) schools in the appeal: Maud, OSD, Paden and Wewoka. The September Denial Letters contain the same denial reasons for each school rather than a separate analysis based each school's unique facts. The reasons for denial are the following:

During the Appeal Review, USAC thoroughly assessed the facts presented in the appeal letter, the relevant documentation on file, and the FCC Rules and Procedures before making its determination on your appeal. USAC has determined that [the school's] Request(s) for Proposal (RFP), Form 470 service descriptions and Selective Review responses regarding vendor selection displayed striking similarities to the Request(s) for Proposal (RFP), Form 470 descriptions and Selective Review responses regarding vendor selection of other applicants that selected United Systems as their vendor. The similarities in the Request(s) for Proposal (RFP), Form 470 service description and Selective Review responses regarding vendor selection was only noted on applications that had United Systems as a vendor, which indicates that United Systems was improperly involved in the competitive bidding and vendor selection process. Additionally,

⁸⁷ *Id.*

an applicant with these similarities indicated that United Systems was involved in the competitive bidding and vendor selection process. During the review process, USAC gave the applicant an opportunity to demonstrate that the competitive bidding process was not compromised and the applicant failed to do so. On appeal, you have not demonstrated that USAC's determination was incorrect. Consequently, your appeal is denied.

FCC Rules require that, except under limited circumstances, an eligible school, library or consortium that includes an eligible school or library shall seek competitive bids for all services eligible for support. See 47 C.F.R. sec. 54.504(a). An applicant violated the FCC's competitive bidding requirements when it surrenders control of the bidding process to a service provider who participated in the competitive bidding process as a bidder. See Request for Review by Mastermind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45, Order 16 FCC Rcd 4028, FCC 00-167, para. 9-10 (rel. May 23, 2000). In cases where the Administrator finds "carbon copy" technology plans and FCC Forms 470 across a services of applications, especially where the services and products requested are complex or substantial, and when the same service provider is involved, it is appropriate for the Administrator to subject such applications to more searching scrutiny to ensure there has been no improper service provider involvement in the competitive bidding process. See Request for Review by Ysleta Independent School District, et. al, Federal State Joint Board on Universal Service, Changes to the Board of Directors of the National exchange Carrier Association, Inc., CC Docket Nos. 96-45, 97-21, Order, FCC 03-313 para. 30 (rel. Dec. 8, 2003). The FCC's Fifth Report and Order and Order, 19 FCC Rcd 15815-15816, FCC 04-190 para. 21 (rel. Aug. 13, 2004).⁸⁸

3. November 16, 2007 Denial Letters.

On November 16, 2007, after re-evaluating the Consolidated Appeal, SLD issued a second set of denial letter for Maud, OSD, Paden and Wewoka.⁸⁹ The November Denial Letters do not explain the relationship between the September Denial Letters and the November Denial Letters and still do not respond to the issues raised in the Consolidated Appeal.⁹⁰ In spite of the

⁸⁸ FCCAR000002-2a (Maud Denial), FCCAR00003-3a (OSD Denial), FCCAR00004-4a (Paden Denial), FCCAR00005-5a (Wewoka Denial).

⁸⁹ FCCAR00006-9e (November Denial Letters).

⁹⁰ To preserve the appeal rights of Maud, OSD, Paden and Wewoka with respect to the September Denial Letters, a timely appeal was filed with the Commission on November 19, 2007 and the parties stated that the appeal would be amended or withdrawn once USAC completed its review of the Consolidated

differences in the facts for each School, USAC still issued a form response for Maud, OSD, Paden and Wewoka. That response is the following:

During Program Integrity Assurance Review, it was determined that [the school's] FCC Form 470, RFP, SRIR implementation description and SRIR vendor selection response bore striking similarities to that of other applicants who selected United Systems as their vendor. USAC sent you a Pattern Analysis Information Request (PAIR). You responded to the PAIR stating that "the use of similar language by applicants for federal programs is not uncommon especially in small school districts such as we are. It is common for personnel from small school districts to attend the same seminar or training program which provide similar format for use by the schools." USAC, having reviewed the PAIR response, concluded that you failed to demonstrate that you did not allow United Systems to participate in the competitive bidding process and subsequently denied the funding request(s). To the contrary, the responses to the PAIR indicated that United Systems did participate by providing RFPs, filing out FCC Forms 470, and providing responses to USAC's Selective Review Information Requests. As a part of a consolidated appeal, you make several arguments. The arguments are reiterated below with (A) identifying each appellant argument. The USAC response to each appellant argument is listed directly beneath each argument, with (U) identifying the USAC response.

A1: USAC denied the FRN(s) due to similarities. There is no program rule associated with similarities. USAC is not empowered to make policy.

U1: USAC determined that there were similarities in FCC Forms and program-related documents among applicants who selected United Systems. Consistent with the *Pattern Analysis Order*, USAC contacted each applicant to ask them to explain why similar language was used in the forms and documents. See *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies, et al., Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-418938, et al., CC Docket No. 02-6, Order, FCC 06-55 1 6 (2006) (Pattern Analysis Order)*. USAC reviewed each response, and then denied certain FRNs after determining, pursuant to USAC's authority to administer the Schools and Libraries program, that the competitive process was not fair and open because United Systems participated in the competitive process by providing the RFP, filing out the FCC Form 470 and/or providing responses to USAC's Selective Review Information Requests for the applicants. See *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, 16 FCC Rcd*

Appeal. That review has been completed and by separate letter, the parties now consolidate the appeal filed with the Commission on November 19, 2007, with this Joint Consolidated Request for Review.

4028-4032-33, ¶ 10 (2000); *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479 et al., CC Docket Nos. 96-45,97-21, Order, 19 FCC Rcd 6858, ¶ 60 (2003). USAC denied FRNs where the applicant informed USAC that United Systems had provided the RFP, filled out the FCC Form 470, and/or provided responses to USAC's Selective Review Information Requests for the applicants. USAC also denied FRNs where the applicants did not inform USAC of this, but where, as a result of similarities in these documents amongst applicants, there was no reasonable explanation for the similarities other than that United Systems provided the RFP, filled out the FCC Form 470, and/or provided responses to USAC's Selective Review Information Requests for the applicants. USAC's determinations are consistent with its authority to administer the Schools and Libraries program consistent with FCC rules, and does [sic] not amount to making policy.

A2: USAC was not in compliance with the Pattern Analysis Order (FCC 06-55) when these FRN(s) were denied because USAC did not consider each PAIR response on its own merit. All entities were denied based on the Wewoka response.

U2: To the contrary, USAC was fully in compliance with the *Pattern Analysis Order*. Specifically, USAC made individual contact with each applicant to determine why similarities existed. The facts are as follows: Wewoka admitted that United Systems was improperly involved because United Systems provided the provided the RFP, filled out the FCC Form 470 and provided responses to USAC's Selective Review Information Requests. There was a lack of explanation by the other applicants as to why the striking similarities existed between their documents and Wewoka's. Each applicant had the opportunity to provide USAC with a response that would overcome the striking similarities and they did not. In the PAIR response, Wewoka stated: "United Systems offered to assist and did assist in the completion of our Form 470. I cannot honestly say I remember whether someone at their company filled it out or not. However if they did not fill it out I would have done so when Alvin Meyers [sic], President of United Systems, came and would have assisted me in completing the form at that time. The assistance I would have received was in how to answer each question and what wording to use. I was not aware that they could not do this. I was told by them that they could not do the actual submission of the form, but I assumed since they were offering assistance this was appropriate... The reason our RFP is similar to other billed entity RFPs is probably because United Systems gave us the RFP to use... In preparing to do the SRIR, Rick Loven, Director of Business Development, United Systems, went over the checklist and Item 25 Worksheet. He suggested the wording I could use on the Vendor Selection portion and that is what I used."

The Wewoka district superintendent, Sam McElvany, prefaced this response by offering information regarding the hardships the district has endured, “not as an excuse, but as information.” He states that Mrs. Pearson, who was responsible for the E-rate forms, did the best she could with no training and had absolutely no intent “to file any claim without expectations that it was done completely properly.” He states that he has since instructed her to ask him questions rather than the service provider, and that he also instructed her to answer USAC’s questions as honestly as possible. He states: “from this point forward, we will be in full compliance with all regulations and rules.” Mr. McElvany then requested that any penalties be waived.

A3: Similarities were, in general, due to schools working together, which is not a rule violation.

U3: USAC agrees that similarities are not a rule violation. However, these FRNs were not denied because of similarities, rather they were denied as described above.

A4: The RFP written by United Systems, used by each school, was vendor-neutral as was all other assistance from United Systems. Providing technical assistance on the FCC Form 470 does not equate to a competitive advantage.

U4: USAC disagrees that the RFP was vendor-neutral because the vendor qualifications in the RFP mirror United Systems’ qualifications in its marketing materials provided to USAC as a part of Selective Review responses. The RFP presents these qualifications as necessary, which would limit potential bidders. FCC-approved guidance on the USAC website indicates that neutral assistance is permissible. However, the appellant states: “The competitive marketplace demands that service providers provide information that favors their own products and services.” The appellant further states, “Vendors are in the business of selling their own products and services and cannot and should not be expected to provide information that is neutral.” Thus, the appellant provides contradictory arguments, stating that the assistance from United Systems was vendor neutral, while also stating that vendor-neutral assistance is impossibility. USAC agrees with the appellant in that the assistance provided by United Systems was not limited to vendor-neutral assistance.

USAC agrees that a service provider’s technical assistance on the 470 does not necessarily equate to a competitive advantage. However, in this instance, the RFP used by each school named in the consolidated appeal was written by United Systems. The fact that a service provider wrote the RFP is unequivocally a competitive advantage that does not allow for fair and open competitive bid process. Clearly, writing the RFP goes far beyond “technical assistance”.

A5: The MasterMind Order does not apply to these denials. There is no service provider contact information on the FCC Form 470. The entities did not at any time abrogate any part of the competitive bid process to the service provider, United Systems. The SLD disregarded the statements and certifications from each entity stating such.

U5: USAC agrees that there is no service provider contact information on the FCC Forms 470. To the extent the entities stated and certified that they did not abrogate the competitive bidding process to United Systems, USAC disagrees because the entities allowed United Systems to provide the RFP, fill out the FCC Form 470, and/or provide responses to USAC's Selective Review Information Requests for the applicants. USAC routinely tests applicant's certifications in order to protect program integrity[.]

A6: The template RFP written by United Systems and used by the entities was generic, and was modified by each school.

U6: USAC disagrees that the template RFP was generic in the area of vendor qualifications. The vendor qualifications in the RFP mirror United Systems qualifications as noted in marketing material previously provided to USAC as a part of Selective Review responses. The RFP presents these qualifications as necessary, which would limit potential bidders. However, USAC does acknowledge that not every applicant listed every qualification on their version of United Systems' RFP.

A7: The list of vendor requirements and description of services are vendor-neutral.

U7: USAC agrees that the RFP's description of services and list of vendor requirements does not appear to be so specific as to prevent other vendors from bidding. However, the appellant states: "The competitive marketplace demands that service providers provide information that favors their own products and services." The appellant further states, "Vendors are in the business of selling their own products and services and cannot and should not be expected to provide information that is neutral." Thus, the appellant provides contradictory arguments, stating that the assistance from United Systems was vendor-neutral, while also stating that vendor-neutral assistance is impossibility. USAC agrees with the appellant in that the assistance provided by United Systems was not limited to vendor-neutral assistance.

A8: There are no similarities in the vendor selection responses.

U8: In the instances of Millwood, Maud, Wewoka and Oklahoma School for the Deaf, USAC disagrees. The documentation shows clear similarities in the vendor selection responses provided by these entities. Regarding the vendor selection response, Wewoka's PAIR response states: "In preparing to do the SRIR, Rick Loven, Director of Business Development, United Systems, went

over the checklist and Item 25 worksheet. He suggested the wording I could use on the Vendor Selection portion and that is what I used.”

A9: No unallowable assistance was provided according to the USAC website’s article regarding inappropriate roles for service providers.

U9: USAC website’s article regarding inappropriate roles for service providers is not an exhaustive list of potential competitive bid violations.

A10: It is not reasonable to ask an entity to explain why it is similar with other entities without providing detail regarding which entities their documentation is similar to and what those similarities are.

U10: USAC will consider addressing this issue on a going-forward basis. However, to the extent USAC did not provide this information in this situation, it has not prevented a meaningful appeal by these entities.

A11: The PAIR confused Wewoka, the applicant whose PAIR response was the basis of the denials. Declarations have been provided from this applicant and the other applicants as well as the service provider stating that no rule violations occurred.

U11: USAC, as the Administrator, is not empowered to waive FCC rules because an applicant states that it was confused, because an applicant recants their original statements, or in light of documents that the Administrator determines have violated the competitive bidding and fair and open competition requirements of the program. As stated above, USAC routinely tests applicant’s statements and certifications in order to protect program integrity.

A12: USAC failed to prove how the competitive bid process was skewed to favor United Systems.

U12: Consistent with the FCC’s direction in the Pattern Analysis Order, the applicants were given the opportunity to demonstrate that they complied with the FCC’s competitive bidding rules. The applicants were unable to demonstrate through their own words and documents as described earlier that there was a fair and open competitive bidding process.

A13: The letter and the spirit of the competitive bid process were followed.

U13: USAC disagrees that the letter and the spirit of the competitive bid process was followed, as detailed above. USAC is not compelled by the arguments in the letter of appeal, including the appellant’s suggestion that USAC make decisions based solely on the wording of each individual applicant’s PAIR response rather than making decisions subsequent to a full analysis of facts and documentation.

USAC, after careful consideration has determined that a competitive bid violation occurred and that a fair and open competition did not occur, as a result the appeal is denied.⁹¹

4. The December 31, 2007 Denial Letters.

On December 31, 2007, the SLD issued denial letters for the remaining schools (Agra, Boley, Graham and Millwood) from the Consolidated Appeal filed with USAC on September 17, 2007.⁹² The December Denial Letters contain the same form language that is not specific to the facts and circumstances of each School as used by USAC in the November Denial Letters.⁹³ Once again, USAC issued denial letters that do not address the arguments raised in the original Consolidated Appeal.

IV. STANDARD OF REVIEW

USAC's authority to administer the E-Rate Program is limited to implementing and applying the Commission's rules and the Commission's interpretations of those rules as found in agency adjudications.⁹⁴ USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission,⁹⁵ or to create the equivalent of new guidelines.⁹⁶ USAC is responsible for "administering the universal support mechanisms in an efficient, effective, and competitively neutral manner."⁹⁷

⁹¹ FCCAR00006a-6e (Maud November Denial), FCCAR00007a-7e (OSD November Denial), FCCAR00008a-8e (Paden November Denial) and FCCAR00009a-9e (Wewoka November Denial).

⁹² FCCAR00010-10f (Agra Denial), FCCAR00011-11f (Boley Denial), FCCAR00012-12f (Graham Denial) and FCCAR00013-13f (Millwood Denial).

⁹³ FCCAR00006a-6e (Maud November Denial), FCCAR00007a-7e (OSD November Denial), FCCAR00008a-8e (Paden November Denial) and FCCAR00009a-9e (Wewoka November Denial).

⁹⁴ 47 C.F.R. § 54.702(c).

⁹⁵ *Id.*

⁹⁶ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc., Third Report and Order*, 13 FCC Rcd 25058, 25066-67 (1998).

⁹⁷ 47 C.F.R. § 54.701(a).

The Schools and United brings this request to the Commission⁹⁸ after appealing to USAC, because the issues raised in this Joint Consolidated Appeal involve novel questions of fact, law and policy. It was not until December 14, 2007, in the USAC Schools and Libraries News Brief⁹⁹ and after United sent a Letter to the Chair of the SLD Committee that USAC published any guidelines pertaining to the facts raised in this appeal—two years after the funding at issue in these appeals. In addition, USAC previously funded applications where it had full knowledge that the service provider provided template RFPs to the applicants. USAC’s denials are not supported by FCC law. USAC simply dismissed the Consolidated Appeal with canned form denial reasons without addressing and reviewing each school’s appeal on a case-by-case (school-by-school) basis.¹⁰⁰

V. THE CONTROLLING LAW

A. The Competitive Bid Statute

The competitive bid requirements of the E-rate federal statute require applicants (schools and libraries) to seek competitive bids for eligible services through completing, certifying, and submitting an FCC Form 470 to USAC.¹⁰¹ The FCC Form 470 identifies the services sought by the applicant and identifies other competitive bid requirements.¹⁰² Because it is the applicant’s

⁹⁸ 47 C.F.R. § 54.723(b) (“The Commission shall conduct *de novo* review of request for review of decisions issue[d] by the Administrator that involve novel questions of fact, law, or policy”)

⁹⁹ FCCAR000254 (Schools and Libraries News Brief dated Dec. 14, 2007 (“Keep service providers out of any roles in your competitive bidding process other than that of bidder.”))

¹⁰⁰ FCCAR000002-2a, 3-3a, 4-4a, 5-5a (September Denial Letters); FCCAR00006a-6e, 7a-7e, 8a-8e and 9a-9e (November Denial Letters); and FCCAR00010-10f, 11-11f, 12-12f and 13-13f (December Denial Letters).

¹⁰¹ 47 C.F.R. § 54.504(a).

¹⁰² Schools and Libraries Universal Service, *Description of Services Requested and Certification Form*, OMB 3060-0806 (FCC Form 470).

official type of “RFP” for E-rate purposes, the Commission has adopted certain requirements that the applicant must follow to ensure that the competitive bid process is fair and open.

For example, the FCC Form 470 must be completed by an applicant that will negotiate with prospective service providers and signed by a person authorized to request the services on behalf of the applicant.¹⁰³ The FCC Form 470 also requires the applicant to name a contact person, who is responsible to speak to prospective service providers as well as assist prospective service providers with obtaining a separately prepared RFP, if applicable.¹⁰⁴ Finally, the statute requires the applicant to wait 28 days¹⁰⁵ before selecting “the most cost-effective service or equipment offering, with price being the primary factor.”¹⁰⁶

B. The Commission’s *MasterMind* Decision Interpreted the Competitive Bid Requirements and Provided Further Guidance

In 2000, for the first time, the Commission addressed the violation of competitive bid requirements in the E-rate Program in its *MasterMind* Order.¹⁰⁷ The Commission in the *MasterMind* Decision interpreted the competitive bid statute to hold that **a competitive bid violation would occur where the applicant surrendered its control to the service provider during the competitive bid process by allowing the service provider to—**

- (1) sign the FCC Form 470,**
- (2) act as the point of contact on the FCC Form 470,**
- (3) prepare and issue an FCC Form 470 or RFP that was not competitively neutral, i.e., seeking products and services that only were tailored in favor of one provider,**
- (4) receive the proposals of other competitors,**
- (5) control information flowing from the applicant to other service providers,**

¹⁰³ FCC Form 470 Instructions at 19-20.

¹⁰⁴ *Id.*

¹⁰⁵ 47 C.F.R. § 54.504(b)(4).

¹⁰⁶ 47 C.F.R. § 54.504(b)(2)(vii).

¹⁰⁷ *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.*, Order, 16 FCC Rcd 4028 (2000) (“*MasterMind*”).

- (6) assist in the evaluation of the bids for which the service provider was also bidding,
- (7) provide advice and assistance to the applicants with respect to competitors' bids, and/or
- (8) receive the applicant RFP prior to it being made available publicly, so that such receipt would provide a competitive advantage to one provider over another.¹⁰⁸

However, most significant and applicable to the facts of this Consolidated Appeal is the finding by the Commission in *MasterMind* that no competitive bidding violation occurred, despite hands on service provider involvement, where (1) the applications did not name a MasterMind employee as the contact person and (2) a MasterMind employee did not sign the FCC Form 470 or FCC Form 471.¹⁰⁹ Thus, the Commission clearly recognized that the service provider will participate as a vendor during the competitive bid process and may provide assistance.

The facts in this Consolidated Appeal clearly establish that neither the Schools nor United violated the law or spirit of the *MasterMind* Decision. The Schools never surrendered control of their competitive bid process and United never committed any act that violated the criteria articulated in the *MasterMind* Decision.

C. The Commission's *Pattern Analysis Remand Order*

The SLD's "pattern analysis procedure" has always been controversial. USAC, not the Commission, created this procedure. In 2006, the Commission instructed USAC that the mere presence of a pattern or similarity does not rise to the level of a Commission competitive bid rule violation in its *Pattern Analysis Remand Order*.¹¹⁰ Specifically, the Commission found that USAC improperly denied the funding requests based on a "pattern analysis," because USAC

¹⁰⁸ *Id.*, ¶¶10-14 (emphasis added).

¹⁰⁹ *Id.* at 4034-35 ¶14.

¹¹⁰ *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies San Antonio, TX, et al. and Schools and Libraries Universal Service Support Mechanism, Order*, 21 FCC Rcd 5348, ¶1 (2006) ("Pattern Analysis Remand Order").

failed to make a determination on a case-by-case basis that the Commission’s competitive bid rules were violated.¹¹¹

While the Commission acknowledged the utility of a “pattern analysis procedure” in helping to identify malfeasance,¹¹² in the *Pattern Analysis Remand Order*, the Commission made the following important points about mistakes USAC should not make again in its consideration of the appeals on remand **or other application reviews** when utilizing the “pattern analysis procedure:”

- USAC improperly denied the requests for funding without determining whether the Commission’s rules were violated due to improper third-party participation in the applicants’ competitive bidding processes;¹¹³
- USAC presumed that schools violated the competitive bidding rules based on reviewing another applicant’s information, without performing any applicant-specific evaluations;¹¹⁴
- It is incumbent on USAC to conduct further investigation and analysis prior to denying funding based on a “pattern analysis.”¹¹⁵ A pattern analysis, alone, does not justify a finding that an applicant has violated program rules or engaged in waste, fraud, or abuse;¹¹⁶
- USAC should not issue summary denials of requests for funding solely because applications contain similar language;¹¹⁷ and
- USAC must determine whether funding is warranted and whether an applicant actually violated program rules.¹¹⁸

¹¹¹ *Id.*, ¶ 5.

¹¹² *Id.*, ¶ 8.

¹¹³ *Id.*, ¶ 1.

¹¹⁴ *Id.*, ¶ 6.

¹¹⁵ *Id.*, ¶ 7.

¹¹⁶ *Id.*, ¶ 8.

¹¹⁷ *Id.*, ¶ 7.

¹¹⁸ *Id.*, ¶ 8.

VI. ARGUMENT

A. The Facts in this Case Demonstrate that the Schools Conducted Their Own Competitive Bid Process Without Any Service Provider Involvement

Each Authorized School Representative provided complete answers to each question. Each School represented that either he/she or an employee of the School was responsible for preparing and filing the relevant Form 470.¹¹⁹ Each School Representative stated that only authorized representatives of their respective schools were engaged in determining the types of services sought and specifically noted that no outside organization was used in determining the bid process.¹²⁰ Each Authorized School Representative signed a Declaration and, in most cases a Pattern Analysis Certification declaring under penalty of perjury that there was no service provider involvement in the preparation or filing of the Form 470, or in the competitive bidding process.¹²¹ Each School specifically stated that United did not participate in the preparation or filing of the Form 470 or the competitive bidding process.¹²² USAC found in all cases that the School was responsible for completing and filing its Form 470.¹²³ USAC cannot be allowed to disregard these facts and the clear evidence in the record that there was no impermissible service provider involvement by United. Yet, this is exactly what USAC has done in its second issuance of denials. It is completely unlawful for USAC to insist despite certifications made under

¹¹⁹ FCCAR00174a-f (Agra PAIR Response); FCCAR00226-27 (Agra Declaration); FCCAR00228 (Boley Declaration); FCCAR00191-92 (Graham PAIR Response); FCCAR00229-31 (Graham Declaration); FCCAR00193-95 (Maud PAIR Response); FCCAR00232-34 (Maud Declaration); FCCAR00198-202 (Millwood PAIR Response); FCCAR00235-37 (Millwood Declaration); FCCAR00214-18 (OSD PAIR Response); FCCAR00238-40 (OSD Declaration); FCCAR00219-20 (Paden PAIR Response); FCCAR00241-43 (Paden Declaration); FCCAR00221-23 (Wewoka PAIR Response); FCCAR00244-46 (Wewoka-Pearson Declaration); and FCCAR00247-48 (Wewoka-McElvany Declaration).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ FCCAR00006c, 7c, 8c and 9c (November Denial Letters); and FCCAR00010c, 11c, 12c and 13c (December Denial Letters).

penalty of perjury by each school that the schools were not responsible for filling out their own Form 470s. USAC's findings are contradictory, self-serving and not grounded in fact or law. No such involvement or rule violations on this basis were found by USAC as required by the *Pattern Analysis Remand Order*. Accordingly, the denials must be overturned and this Consolidated Appeal granted.

The SLD ignored critical factual differences in this case from the *MasterMind* line of cases. First, in *MasterMind* and its progeny, the Commission denied the applicants' requests for funding because in each case an *employee or representative of the service provider* was listed as the contact for the applicant. In this case, however, there is no evidence that United is an employee or representative of the Schools. In addition, a service provider was not listed as a contact on the Schools FCC Form 470s.

The mere, easily explained similarity of certain language that appears on the FCC Form 470s submitted by the Schools 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*¹²⁴ Order, 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.¹²⁵

The Schools and United 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

¹²⁴ *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").

¹²⁵ 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 (*Ysleta*, ¶¶26-37), it noted that applicants may validly have the same or similar filings. *Id.*, ¶30.

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 mere similarities in the FCC Form 470 rise to a competitive bid violation. 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.¹²⁶ 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 PAIR review process, and received information from the Schools about how they completed their applications and undertook competitive bidding for the services they 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, “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 E-rate funds.

¹²⁶ 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 did United prepare and distribute RFPs on behalf of certain schools or participate in any manner, other than as a competitively neutral service provider, during the competitive bidding process. There is not one piece of evidence that the authorized representatives of any of the Schools ceded control in any way to United or to any other service provider pertaining to their E-rate funding requests. In fact, all of the Schools expressly stated in their Declarations, PAIR responses and affidavits that there was “NO” service provider involvement in the competitive bidding process.¹²⁷ Therefore, USAC erred in its finding that there was any inappropriate service provider involvement by United.

Furthermore, unlike *MasterMind* and its progeny, the Schools did not delegate the task of disseminating information regarding the services requested to United. All of the Schools undertook their own competitive bidding process in good faith; complied with all federal, state, and local rules; and, considered all factors set forth under those rules.¹²⁸ Accordingly, the Schools conducted a fair and open competitive bidding process.

Unlike the applicants in the *MasterMind* line of cases, the School’s bidding process was wholly consistent with the public interest requirements underlying the integrity of the competitive bidding process. It is clear that the facts in this case simply do not support the SLD’s conclusion. Indeed the facts indicate just the opposite, that the Schools employees submitted the FCC Form 470s to USAC wholly without involvement of any service provider. The Schools conducted a bid process in compliance with the E-rate competitive bid rules and

¹²⁷ FCCAR00174a-f (Agra PAIR Response); FCCAR00226-27 (Agra Declaration); FCCAR00228 (Boley Declaration); FCCAR00191-92 (Graham PAIR Response); FCCAR00229-31 (Graham Declaration); FCCAR00193-95 (Maud PAIR Response); FCCAR00232-34 (Maud Declaration); FCCAR00198-202 (Millwood PAIR Response); FCCAR00235-37 (Millwood Declaration); FCCAR00214-18 (OSD PAIR Response); FCCAR00238-40 (OSD Declaration); FCCAR00219-20 (Paden PAIR Response); FCCAR00241-43 (Paden Declaration); FCCAR00221-23 (Wewoka PAIR Response); FCCAR00244-46 (Wewoka-Pearson Declaration); and FCCAR00247-48 (Wewoka-McElvany Declaration).

¹²⁸ *Id.*

were responsible for filling out their forms, preparing their RFPs, and answering and certifying questions in their selective reviews and PAIR responses.¹²⁹

Moreover, the FCC clearly required USAC to demonstrate that a competitive bid violation occurred on a case-by-case (school-by-school) basis. In this case, USAC failed to demonstrate through factual findings that United was improperly involved in the competitive bidding process through (1) signing the FCC Form 470, (2) acting as the point of contact on the FCC Form 470, (3) preparing and issuing a FCC Form 470 or RFP that was not competitively neutral, *i.e.*, seeking products and services that only were tailored in favor of one provider; (4) receiving the proposals, (5) controlling information flowing from the applicant to other service providers, (6) assisting in the evaluation of the bids, (7) providing advice and assistance with respect to competitors' bids, and/or (8) receiving the applicant RFP prior to it being made available publicly.

USAC's attempt to create a nexus of service provider involvement through its contested summary finding of FCC Form 470 and RFP similarities fails. The holdings in the various *MasterMind* cases cannot be used as a blunt instrument, or a bright line test, without regard to the individual facts of a case. To do so misses the essential point – that the spirit and letter of the competitive bidding process and rules were observed and the public interest was served by the bidding process undertaken by the Schools. The only fair and equitable result in these cases lies in the funding of these applications.

B. United'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.¹³⁰ For example, the SLD explains that

¹²⁹ *Id.*

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.¹³¹ 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 with or obstruct an applicant's competitive bidding process.¹³² USAC has not made any factual finding that United engaged in any of the foregoing prohibited conduct.

USAC has funded applications in the past where service providers in situations where service providers have assisted applicants and provided vendor neutral template RFPs. In addition, it was not until USAC's unlawful and arbitrary actions were brought to the attention of the Chair of the SLD Committee by letter dated November 26, 2007, that USAC, for the first time, issued its policy guidance and interpretation of the Commission's *Mastermind* Order to include template RFPs.¹³³ FCC rules specifically prohibit USAC from making or interpreting

¹³⁰ USAC, "Step 5: Assist Applicants with Application Review," *available at* <http://www.universalservice.org/sl/providers/step05/>.

¹³¹ USAC, "Step 1: Proper Service Provider Assistance to Applicants," *available at* <http://www.universalservice.org/sl/providers/step01/proper-service-provider-assistance.aspx>.

¹³² *Ysleta*, ¶30.

¹³³ FCCAR00252-254 (SLD News Brief).

FCC policy.¹³⁴ USAC cannot be allowed to randomly create such policy in December 2007 and then apply it retroactively to applications for funding filed two years earlier. This type of unlawful, arbitrary and capricious action by the Administrator compels the Commission to not turn a blind eye to justice and due process.

C. USAC’s Utilization of Its Pattern Analysis Procedure Must Fail

Based upon the facts and controlling law set forth above, USAC should grant this Consolidated Appeal for all applications and FRNs. The reason is simple—the pattern analysis review conducted fell short of complying with the Commission’s rules and made no finding in fact or law of a Commission competitive bid violation.

D. The Alleged Similarities Are Vendor Neutral and Do Not Equate to a Competitive Bid Violation

All of the similarities on the FCC Form 470s and RFPs are vendor neutral. In fact, USAC has not made any finding that the alleged similar language in any way can be construed to favor United over any other provider. Nor can USAC make any such finding, because the description of services that appears in Block 11 on the FCC Form 470s seeks basic maintenance for generic equipment that is E-rate eligible. The provision of basic maintenance covers precisely these types of E-rate eligible products, such as routers, servers, switches, UTP and fiber cabling, network racks and accompanying e-rate eligible accessories, Network Operating System, UPS, wireless access points/switches and accompanying e-rate eligible accessories, and phone systems.

Likewise, USAC has made no finding that any of the language that appears in United’s template RFP is not vendor neutral. USAC also made no finding that United drafted the RFP for

¹³⁴ 47 C.F.R. § 54.702(c) (“The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”).

any of the Schools. First, the vendor neutral template RFP is only a sample of suggested items that a school may or may not choose to use in drafting its RFP. The template RFP included a sample list of suggested vendor qualifications that a school might choose to request depending on the products that it uses. The template RFP also contained a suggested list of vendor requirements modeled after other RFPs. Again, the Schools were free to include any of the requirements in drafting their RFPs.

The facts above demonstrate that each School drafted its own RFP and tailored it to its specific needs after conferring with other School employees or other employees from other school districts. This is succinctly demonstrated in an attached chart, which shows the similarities in each of the Schools' FCC Form 470s and RFPs and highlights the differences.¹³⁵

If USAC were concerned that any of these similarities tainted the competitive bid process by favoring United, then it was incumbent upon USAC to make such a finding in its multi-tiered review process. USAC failed to make such a finding, because such a finding would be unsupported as is demonstrated through the facts and Declarations of each School.¹³⁶ USAC cannot fabricate an impermissible nexus between the service provider and the Schools through pure conjecture where none exists.

As a part of its applicant training, United provided a vendor neutral template to illustrate the type of information that should be included in an RFP. United had every right to provide this

¹³⁵ FCCAR00016-26 (RFP Comparison Chart and FCC Form 470 Comparison Chart).

¹³⁶ See FCCAR00174a-f (Agra PAIR Response); FCCAR00226-27 (Agra Declaration); FCCAR00228 (Boley Declaration); FCCAR00191-92 (Graham PAIR Response); FCCAR00229-31 (Graham Declaration); FCCAR00193-95 (Maud PAIR Response); FCCAR00232-34 (Maud Declaration); FCCAR00198-202 (Millwood PAIR Response); FCCAR00235-37 (Millwood Declaration); FCCAR00214-18 (OSD PAIR Response); FCCAR00238-40 (OSD Declaration); FCCAR00219-20 (Paden PAIR Response); FCCAR00241-43 (Paden Declaration); FCCAR00221-23 (Wewoka PAIR Response); FCCAR00244-46 (Wewoka-Pearson Declaration); and FCCAR00247-48 (Wewoka-McElvany Declaration).

information. Applicants require guidance in the complex details of the E-rate program and provision of this information in no way turned over responsibility for the competitive bidding process from the applicant to United.

Commission requirements for competitive bidding rightly mandate that the applicant stay in control of the competitive bidding process and not turn this responsibility over to the service provider. With that control, applicants are able to evaluate the marketing statements of service providers to proceed based on their own best interests even if not aligned with a service providers' best interest. This actual Commission rule is an entirely different standard than a USAC-invented requirement for "vendor neutrality,"¹³⁷ which in fact is a fiction in a competitive marketplace.

Any organization seeking information about technology products will educate itself regarding the various offerings available. Conferences, vendor displays, sales efforts, and marketing information are all a part of this. In fact, template RFPs are in no way unique to the E-rate program, but are a standard vehicle for vendors to provide useful information to their customers and prospective customers. USAC's focus on similarities in template RFPs in this regard is misplaced, because the focus should be on whether an actual Commission competitive bid violation has occurred, *i.e.*, whether the applicant has surrendered its competitive bidding process to the service provider as outlined in the *MasterMind* Order. In the instant case, there is absolutely no indication that this has occurred.

The Template RFP used by United in its training is in fact vendor neutral. The Template RFP is two pages in length, and consists of four parts, as follows.

¹³⁷ USAC at various times has indicated that any information provided by a service provider related to program rules must be "vendor neutral." In fact, vendors are in the business of selling their own products and services and cannot and should not be expected to provide information that is "neutral." There is no FCC rule that calls for such neutrality despite USAC statements to the contrary.

Part 1 of the Template RFP stated:

All School information here:

- Address
- Contact Name
- Contact information
- Individual school site information (elementary, middle, high)
- Due dates
- Local, state, or federal regulations¹³⁸

None of this information in any way is biased toward the selection of any particular service provider.

Part 2 of the Template RFP stated:

Type of service you are requesting:

- Basic Maintenance only on:

Routers, Servers, Switches, UTP and Fiber Cabling, Network Racks and accompanying e-rate eligible accessories, Network Operating System, UPS, wireless access points/switches and accompanying e-rate eligible accessories, phone systems.¹³⁹

This listing is clearly a description of E-rate eligible equipment for which maintenance services would be required. No particular vendor would obtain an advantage from this specification.

Therefore, this list is vendor neutral.

In fact, this information is of critical importance to applicants, some who may not realize that a successful funding request must be limited to only “basic” maintenance and that any service beyond the FCC’s definition of basic maintenance leads to denial of the entire funding request. By suggesting this language in the Template RFP, United is ensuring that the FCC’s objective of funding eligible schools for eligible services is achieved.

¹³⁸ FCCAR00043 (Template RFP).

¹³⁹ *Id.*

Part 3 of the Template RFP stated:

List the qualifications you want the service provider to have: **(this is just a sample of qualifications that might apply to your school)**

Vendor must be a:

- Novell Platinum Partner
- Microsoft Certified Solutions Provider
- IBM Premier Service Provider
- HP Authorized Dealer
- HP Certified Education Partner
- Cisco Systems Solution Provider
- IBM Global Services Provider
- HP Procurve Elite
- 3Com Focus Solutions Partner
- Lexmark Authorized Dealer
- IBM EXAct Certified Partner
- Panduit Global Certified Installer
- Leviton Mohawk Certified Installer¹⁴⁰

In specifying this comprehensive list of **potential and suggested qualifications**, United created as complete a list as it could to accommodate the requirements of all known attendees. It was left to customers to select (or not select) whether an appropriate qualification might be “IBM Premier Service Provider” rather than “IBM EXAct Certified Partner.” United was well-suited to provide this list of potential credentials, having in many cases, installed the components for which maintenance was required and/or having provided maintenance services for the components in past years.

This type of information in indicating potential credentials was extremely important for guiding applicants to the specific services that they should be seeking.¹⁴¹ At no time could the list of potential qualifications be taken as a surrender or loss of control of the competitive bidding process by applicants. At no time was the purpose of the list to narrow the qualified

¹⁴⁰ *Id.*

¹⁴¹ In some cases, manufacturer warranties require that service only be performed by technicians who have been found to be qualified through a manufacturer’s certifications program, else the warranty will be void, creating a subsequent higher maintenance expense than would otherwise be the case.

service providers to only United, but rather was intended to illustrate that proper qualifications are important and appropriate for adequate maintenance services.

In training applicants, it is most appropriate for a qualified, reputable, and seasoned vendor to recommend that applicants seek vendors that have the appropriate skills and qualifications. To find otherwise would waste E-rate dollars by funding services that are insufficient for appropriate maintenance needs. Applicants may not unfairly disqualify competing vendors, but an indication that certain qualifications are necessary is fully appropriate when the intent is to ensure that the services will be performed with acceptable quality. Neither applicants nor United violated any FCC rule by recognizing that the vendor chosen for maintenance services should be appropriately qualified.

Part 4 of the Template RFP stated:

Requirements:

- Vendor must have Toll free telephone support.
- Vendor must agree to sign an affidavit to meet all requirements of the Oklahoma Sex Offenders Act to work on school property.
- Vendor must sign a non-collusion statement
- All cost must be included in the bid. No back charges will be accepted.
- Contractors will provide on site people who are dependable, free of substance abuse, safety conscious, technically qualified and able to work well with other on site and remote contractors. All persons sent to school must be free of any felony convictions of drug, alcohol, or sexual matters.
- Contractors will not use subcontractors unless approved by this school district.¹⁴²

These suggested requirements were recommended by applicants to United during training or were taken from other large school district RFPs and templates available in the Oklahoma educational market.¹⁴³ Each applicant has the discretion to select the criteria that they find useful to them, so long as the specification serves a legitimate purpose.

¹⁴² FCCAR00043-44 (Template RFP).

¹⁴³ FCCAR00045-110 (Mid Del and Oklahoma City RFPs).

USAC's fundamental error is that it failed to see that similarly situated applicants have similar needs and, thus, would issue similar RFPs. The applicants affected are generally in the same geographic region. They were current customers of a single service provider who had provided exemplary past service and who had gained a reputation as being knowledgeable in E-rate matters. In many cases, the Schools also had installed similar equipment. In all cases they were seeking basic maintenance services, which have highly specific eligibility requirements. USAC has found the resulting similarities to be troublesome, when in fact the resulting similarities should be fully expected and in no sense constitute a rule violation or indicate that applicants failed to maintain full control over the competitive bidding process.

E. USAC Violated the *MasterMind Order* and the *Pattern Analysis Remand Order* by Denying the Schools' Applications Based on Wewoka's Information

It is clear from the record in this matter that USAC is impermissibly using its analysis of Wewoka's facts and circumstances to deny not only the Wewoka funding requests, but also the funding requests of seven other Schools for whom USAC has neither found, nor alleged, any actual rule violations. This violates the Commission's explicit direction in the *Pattern Analysis Remand Order* that USAC cannot presume a competitive bidding violation for one school based on reviewing another school's information.¹⁴⁴

Applicant-specific evaluations are required, and in order to justify denial of an underlying Application, the *Pattern Analysis Remand Order* requires that USAC make a finding that each applicant actually violated a Commission competitive bid rule.¹⁴⁵ The burden is on USAC to substantiate an FCC rule violation based upon findings of fact and not just USAC's unfounded suspicions or findings of similarities. The denial reasons provided by USAC in SLD's Denial

¹⁴⁴ *Pattern Analysis Remand Order*, ¶6.

¹⁴⁵ *Id.*, ¶¶1, 8.

Decisions do not actually allege any rule violations for any of the Schools. USAC cannot deny the applications of seven other Schools based on an alleged rule violation by Wewoka that is also unsupported by the facts.

USAC's reasoning cannot stand for three reasons. First, neither the *Pattern Analysis Remand Order*, nor the FCC's rules, nor the program rules, require a school to prove a negative, that a service provider was NOT involved. Instead, it is incumbent on USAC to prove rule violations in order to deny applications for federal funds.¹⁴⁶ USAC has not met its burden. Second, as addressed in the Consolidated Appeal, and in numerous other prior appeals to USAC and the FCC, the similarities in the School districts' FCC Form 470s service descriptions were easily explained and were not indicative of impermissible service provider involvement.¹⁴⁷ None of the similarities, including the language on the FCC Form 470 and vendor neutral template RFP, amounted to a rule violation, and none of those factors can be used as a justification to deny the applications of the Schools. Finally, the *Pattern Analysis Remand Order* specifically instructed USAC that a pattern analysis alone does not justify a finding that an applicant has violated program rules and, as such, USAC should not issue summary denials of requests for funding solely because applications contain similar language. By denying the applications of the Schools, who were not found to violate any rules, based upon Wewoka's alleged rule violation and a pattern analysis of similar application language, USAC has violated the Commission's explicit instructions from the *Pattern Analysis Remand Order* that denials cannot be based on a pattern analysis alone.¹⁴⁸ For all of these reasons, the Commission should grant this Consolidated Appeal and fund the denied applications.

¹⁴⁶ *Id.*

¹⁴⁷ *See, supra*, at 13-28.

¹⁴⁸ *Pattern Analysis Remand Order*, ¶8.

F. USAC Failed to Find a Commission Competitive Bid Violation

In a line of decisions beginning with the Commission's Order in *MasterMind*,¹⁴⁹ the Commission has neither broadened nor sanctioned a new set of guidelines defining what constitutes a competitive bidding violation. The Commission's Rules and Orders only require that applicants must seek competitive bids; prepare, fill out and sign their FCC Form 470s; not abrogate their responsibility to the service provider during the competitive bidding process; and comply with state and local procurement laws and regulations.

The burden lies with USAC, not the applicant and not the service provider, to prove a Commission competitive bid rule violation.¹⁵⁰ More specifically, in these cases USAC has the burden to demonstrate that United improperly participated in the competitive bid process in such a way as to "taint" the process, *i.e.*, skew it in a way that could only favor the outcome of United being chosen as the service provider and to make a factual finding that a Commission competitive bid rule was violated. As such, USAC carries the burden to demonstrate that the template RFP used by United in its annual training for applicants was not vendor neutral and tainted the process in such a way that only United could win the bid, (2) that the similar and generic language used by the applicants on their FCC Form 470s for basic maintenance of internal connections was provided by United and, if so proven, such language is skewed in such a manner to favor only United, (3) that United technical assistance in providing general program information for the language to be used for the description of services in the FCC Form 470 demonstrated that the service provider was expressly involved in the filing of the FCC Form 470, *i.e.*, drafted or prepared the FCC Form 470 or had prior knowledge of its content such as to provide it with a competitive advantage over other prospective service providers, and (4) for

¹⁴⁹ *MasterMind*, 16 FCC Rcd at 4028.

¹⁵⁰ *Pattern Analysis Remand Order*, ¶¶1, 8 (2006).

those cases involving selective review responses on vendor selection, USAC must prove that not only do similarities exist, but that those similarities are a direct result of United drafting the responses. USAC has failed to meet its burden as a matter of fact and law on all points.

The facts in this Joint Consolidated Appeal demonstrate that USAC did not find that the Schools and United failed to comply with the Commission's competitive bid requirements. Rather, USAC's sole focus was on similarities in language, which was explained by all of the Schools in their PAIR responses and Declarations when they stated that they frequently share information amongst and between one another. The FCC acknowledged that similarities based upon sharing of information do not rise to a competitive bid violation.¹⁵¹ The conclusion drawn is that because one school, Wewoka, stated that United provided information, albeit, undefined, and because there was similarities in its FCC Form 470 and RFPs with other schools, everybody loses. The SLD concludes that this amounts to a competitive bid violation.¹⁵² Yet, the SLD fails to cite to any Commission competitive bidding requirements or guidelines to support this improper conclusion. The reason it fails to do so is both simple and clear – no such rules or guidelines exist.

G. USAC's PAIR Review Is Flawed

The purpose of USAC's "pattern analysis procedure" is to determine whether a malfeasance or wrongdoing by an applicant or service provider occurred that would rise to the level of a Commission competitive bid violation. USAC created this procedure and it went unsanctioned until the more recent *Pattern Analysis Remand Order*. When utilizing the "pattern analysis procedure" USAC required three findings of similarity within an application before

¹⁵¹ *Pattern Analysis Remand Order*, ¶8.

¹⁵² FCCAR00001e-1n (Agra SLD Denial, Boley SLD Denial, Graham SLD Denial, Maud SLD Denial, Millwood SLD Denial, OSD SLD Denial, Paden SLD Denial, and Wewoka SLD Denial).

denying an application.¹⁵³ Basically, the pattern analysis procedure is to serve as a tool in reviewing the applications. The Commission was very clear in the *Pattern Analysis Remand Order* that a mere finding of similarities alone do not establish a Commission competitive bid rule violation. As such, the Commission clearly directed USAC to cease using the “pattern analysis procedure” unless it could make a clear showing on a case-by-case basis that a Commission competitive bid violation occurred.

The reason the PAIR review is flawed is because the PAIR Review requires a four-pronged approach: (1) the finding of similarities, (2) the finding that a service provider was responsible for the similarities, (3) the factual finding that the similarities were not vendor neutral, and (4) the finding that the service provider’s involvement “tainted” the competitive bid process through an act as set forth in the *MasterMind* line of cases; these four prongs if factually proven affirmatively would give rise to a Commission competitive bid rule violation. In this Consolidated Appeal, USAC only met the first prong. Because it failed to make the factual findings and establish a Commission competitive bid rule violation pursuant to the second, third, and fourth prongs, its “pattern analysis procedure” fails.

H. USAC’s Second Set of Denial Reasons Issued in November and December Do Not Overcome Any of the Above Legal Infirmities

As a general matter, USAC used a canned script for each of the eight schools and completely disregarded the different statements and facts made by each school official under penalty of perjury. USAC has also failed to meet any of the legal requirements set forth above in providing the responses below. The Schools and United (“Appellants”) also note that USAC has cherry picked the legal arguments and drafted them in a way different than presented on appeal.

¹⁵³ It appears that USAC may inconsistently implement this procedure in that USAC does not always require three prongs, sometimes it denies on two prongs.

For these reasons, in addition to the arguments raised above, the Appellants make the additional following arguments after each numbered category of USAC's response to the Consolidated Appeal.

1. USAC's First Response

AI: USAC denied the FRN(s) due to similarities. There is no program rule associated with similarities. USAC is not empowered to make policy.

UI: USAC determined that there were similarities in FCC Forms and program-related documents among applicants who selected United Systems. Consistent with the *Pattern Analysis Order*, USAC contacted each applicant to ask them to explain why similar language was used in the forms and documents. See *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies, et al.*, Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-418938, et al., CC Docket No. 02-6, Order, FCC 06-55 1 6 (2006) (*Pattern Analysis Order*). USAC reviewed each response, and then denied certain FRNs after determining, pursuant to USAC's authority to administer the Schools and Libraries program, that the competitive process was not fair and open because United Systems participated in the competitive process by providing the RFP, filing out the FCC Form 470 and/or providing responses to USAC's Selective Review Information Requests for the applicants. See *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028-4032-33, ¶ 10 (2000); *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, SLD Nos. 321479 et al., CC Docket Nos. 96-45,97-21, Order, 19 FCC Rcd 6858, ¶ 60 (2003). USAC denied FRNs where the applicant informed USAC that United Systems had provided the RFP, filled out the FCC Form 470, and/or provided responses to USAC's Selective Review Information Requests for the applicants. USAC also denied FRNs where the applicants did not inform USAC of this, but where, as a result of similarities in these documents amongst applicants, there was no reasonable explanation for the similarities other than that United Systems provided the RFP, filled out the FCC Form 470, and/or provided responses to USAC's Selective Review Information Requests for the applicants. USAC's determinations are consistent with its authority to administer the Schools and Libraries program consistent with FCC rules, and does [sic] not amount to making policy.

Clearly, USAC disregarded the record evidence on this appeal and did not cite to any facts specific to any school. USAC failed to address the argument raised upon appeal

that there is no program violation with respect to similarities and failed in finding any specific program violation in its response above.

2. USAC's Second Response

A2: USAC was not in compliance with the Pattern Analysis Order (FCC 06-55) when these FRN(s) were denied because USAC did not consider each PAIR response on its own merit. All entities were denied based on the Wewoka response.

U2: To the contrary, USAC was fully in compliance with the *Pattern Analysis Order*. Specifically, USAC made individual contact with each applicant to determine why similarities existed. The facts are as follows: Wewoka admitted that United Systems was improperly involved because United Systems provided the provided the RFP, filled out the FCC Form 470 and provided responses to USAC's Selective Review Information Requests. There was a lack of explanation by the other applicants as to why the striking similarities existed between their documents and Wewoka's. Each applicant had the opportunity to provide USAC with a response that would overcome the striking similarities and they did not. In the PAIR response, Wewoka stated: "United Systems offered to assist and did assist in the completion of our Form 470. I cannot honestly say I remember whether someone at their company filled it out or not. However if they did not fill it out I would have done so when Alvin Meyers [sic], President of United Systems, came and would have assisted me in completing the form at that time. The assistance I would have received was in how to answer each question and what wording to use. I was not aware that they could not do this. I was told by them that they could not do the actual submission of the form, but I assumed since they were offering assistance this was appropriate... The reason our RFP is similar to other billed entity RFPs is probably because United Systems gave us the RFP to use... In preparing to do the SRIR, Rick Loven, Director of Business Development, United Systems, went over the checklist and Item 25 Worksheet. He suggested the wording I could use on the Vendor Selection portion and that is what I used."

The Wewoka district superintendent, Sam McElvany, prefaced this response by offering information regarding the hardships the district has endured, "not as an excuse, but as information." He states that Mrs. Pearson, who was responsible for the E-rate forms, did the best she could with no training and had absolutely no intent "to file any claim without expectations that it was done completely properly." He states that he has since instructed her to ask him questions rather than the service provider, and that he also instructed her to answer USAC's questions as honestly as possible. He states: "from this point forward, we will be in full compliance with all regulations and rules." Mr. McElvany then requested that any penalties be waived.

Wewoka never admitted that United was “improperly involved” as the record clearly demonstrates. This is an egregious example of USAC spinning the facts to reach the result it is seeking—namely to continue to support its poorly designed and ill-fated pattern analysis procedure that has produced more undue hardship on schools across this country than ever contemplated by the Commission. USAC then states “[t]here was a lack of explanation by the other applicants as to why the striking similarities existed between their documents and Wewoka’s.” Yet, in USAC’s Tenth Response below it clearly admits that it did not provide the applicants with any information to respond to—

A10: It is not reasonable to ask an entity to explain why it is similar with other entities without providing detail regarding which entities their documentation is similar to and what those similarities are.

U10: USAC will consider addressing this issue on a going-forward basis. However, to the extent USAC did not provide this information in this situation, it has not prevented a meaningful appeal by these entities.

Clearly, USAC cannot be allowed to not provide each school with such information and then simply deny their funding and state that they will consider addressing this fundamental issue of transparency and due process on a going-forward basis. The FCC and every other government agency are held to the Administrative Procedure Act and fundamental legal tenets of due process. USAC should not be able to claim immunity from such federal rules. The Commission should hold USAC accountable to such standards as well by mandating that the APA is applicable to USAC.

3. USAC's Third Response

A3: Similarities were, in general, due to schools working together, which is not a rule violation.

U3: USAC agrees that similarities are not a rule violation. However, these FRNs were not denied because of similarities, rather they were denied as described above.

USAC did not cite to any record facts that demonstrate any rule violation. No School stated that United was improperly involved in its competitive bid process.

Indeed, the facts for each school state the complete opposite.

4. USAC's Fourth Response

A4: The RFP written by United Systems, used by each school, was vendor-neutral as was all other assistance from United Systems. Providing technical assistance on the FCC Form 470 does not equate to a competitive advantage.

U4: USAC disagrees that the RFP was vendor-neutral because the vendor qualifications in the RFP mirror United Systems' qualifications in its marketing materials provided to USAC as a part of Selective Review responses. The RFP presents these qualifications as necessary, which would limit potential bidders. FCC-approved guidance on the USAC website indicates that neutral assistance is permissible. However, the appellant states: "The competitive marketplace demands that service providers provide information that favors their own products and services." The appellant further states, "Vendors are in the business of selling their own products and services and cannot and should not be expected to provide information that is neutral." Thus, the appellant provides contradictory arguments, stating that the assistance from United Systems was vendor neutral, while also stating that vendor-neutral assistance is impossibility. USAC agrees with the appellant in that the assistance provided by United Systems was not limited to vendor-neutral assistance.

USAC agrees that a service provider's technical assistance on the 470 does not necessarily equate to a competitive advantage. However, in this instance, the RFP used by each school named in the consolidated appeal was written by United Systems. The fact that a service provider wrote the RFP is unequivocally a competitive advantage that does not allow for fair and open competitive bid process. Clearly, writing the RFP goes far beyond "technical assistance".

USAC has the facts wrong. United provided a vendor neutral template RFP that contained vendor neutral information and suggested and potential qualifications. Each School issued its own RFP. Contrary to USAC's incorrect finding, there is no record evidence by any School that states unequivocally that United drafted the RFP used by the Schools. A draft vendor neutral template RFP that is based upon information gathered through years of vendor experience and other successful schools' RFPs does not even meet a presumptive finding of an unfair or biased competitive bid process. Indeed, USAC has funded other FRNs where they have found draft template RFPs provided by the service provider.

Further, USAC uses a completely rationale economic legal argument made in the Consolidated Appeal as a basis for its denial. USAC is required to make a finding on the facts during its review and not rely upon legal arguments in a subsequent appeal to provide the basis for its rationale. USAC denied these FRNs in July 2007. It is completely improper for USAC to now shore up its infirmities by relying upon legal arguments made in an appeal.

For example, USAC quotes one of the appellants' legal arguments that "[t]he competitive marketplace demands that service providers provide information that favors their own products and services. . . . [and that] Vendors are in the business of selling their own products and services and cannot and should not be expected to provide information that is neutral." USAC took this quote out of context. What the argument stated in a footnote was that USAC has interpreted vendor neutral "to mean that information provided cannot taint the competitive bid process in such a manner to favor only the vendor providing the information. This can be interpreted to mean that information about

E-rate should be objective information.” The Appellants agree that vendor neutral information must be objective and not skewed in a manner to favor only one provider.

However, USAC draws the most erroneous conclusion that vendor-neutral assistance is impossible, because vendors compete in an open market place. Not only is USAC’s conclusion wrong; it also defies the fundamental concepts and theories of a market, capitalist economy based upon open competition.

5. USAC’s Fifth Response

A5: The MasterMind Order does not apply to these denials. There is no service provider contact information on the FCC Form 470. The entities did not at any time abrogate any part of the competitive bid process to the service provider, United Systems. The SLD disregarded the statements and certifications from each entity stating such.

U5: USAC agrees that there is no service provider contact information on the FCC Forms 470. To the extent the entities stated and certified that they did not abrogate the competitive bidding process to United Systems, USAC disagrees because the entities allowed United Systems to provide the RFP, fill out the FCC Form 470, and/or provide responses to USAC’s Selective Review Information Requests for the applicants. USAC routinely tests applicant’s certifications in order to protect program integrity[.]

USAC again improperly makes a finding against record evidence in this case.

United provided a vendor neutral template RFP during training, that is different from the USAC’s erroneous suggestion that the applicants “allowed United Systems to provide the RFP.” Not one School stated that United drafted their RFP. Not one School stated that United filled out their FCC Form 470, and only one school stated that it received assistance with its selective review—the type of assistance that is completely permissible under Program rules.

6. USAC's Sixth Response

A6: The template RFP written by United Systems and used by the entities was generic, and was modified by each school.

U6: USAC disagrees that the template RFP was generic in the area of vendor qualifications. The vendor qualifications in the RFP mirror United Systems qualifications as noted in marketing material previously provided to USAC as a part of Selective Review responses. The RFP presents these qualifications as necessary, which would limit potential bidders. However, USAC does acknowledge that not every applicant listed every qualification on their version of United Systems' RFP.

The template RFP drafted by United was a vendor neutral template used in training. The vendor qualifications were suggested and potential lists for schools to draw from in drafting their individual RFPs. USAC has failed to make a finding that the information was not vendor neutral and did not identify any specific language to prove that the template RFP was skewed solely in United favor. The reason is because it was not.

7. USAC's Seventh Response

A7: The list of vendor requirements and description of services are vendor-neutral.

U7: USAC agrees that the RFP's description of services and list of vendor requirements does not appear to be so specific as to prevent other vendors from bidding. However, the appellant states: "The competitive marketplace demands that service providers provide information that favors their own products and services." The appellant further states, "Vendors are in the business of selling their own products and services and cannot and should not be expected to provide information that is neutral." Thus, the appellant provides contradictory arguments, stating that the assistance from United Systems was vendor-neutral, while also stating that vendor-neutral assistance is an impossibility. USAC agrees with the appellant in that the assistance provided by United Systems was not limited to vendor-neutral assistance.

See response to USAC's Fourth Response above.

8. USAC's Eighth Response

A8: There are no similarities in the vendor selection responses.

U8: In the instances of Millwood, Maud, Wewoka and Oklahoma School for the Deaf, USAC disagrees. The documentation shows clear similarities in the vendor selection responses provided by these entities. Regarding the vendor selection response, Wewoka's PAIR response states: "In preparing to do the SRIR, Rick Loven, Director of Business Development, United Systems, went over the checklist and Item 25 worksheet. He suggested the wording I could use on the Vendor Selection portion and that is what I used."

This is another example of USAC playing "hide and seek." There is no evidence in the record that demonstrates similarities in vendor selection responses. Moreover, given the true facts of the record, one questions the utility of a pattern analysis review of selective review questions, because the competitive review process has already been completed and certified. It would not be unusual for schools to draw from each other in providing answers. The problem is that when they do and state this to USAC under penalty of perjury, USAC chooses to simply ignore these statements and the facts in the record by drawing its own conclusions.

9. USAC's Ninth Response

A9: No unallowable assistance was provided according to the USAC website's article regarding inappropriate roles for service providers.

U9: USAC website's article regarding inappropriate roles for service providers is not an exhaustive list of potential competitive bid violations.

USAC concedes that it never provided any guidance on this issue on its web site despite its responsibility as Administrator to "educate" the beneficiaries of this Program by clearly articulating the FCC policy, interpretations, rules and USAC's programmatic rules. Instead, USAC chose not to seek FCC guidance and interpretation of its rules, not to publish its own interpretation of the federal E-rate competitive rules, but rather mull it

over for a couple of years and hold these applications hostage, thereby potentially subjecting many other applications to denial from other schools. USAC is not allowed to create such smoking mirrors around rules and policies and engage in “go fish” and “hide and seek” tactics. It has had this information for many years and should have sought approval from the FCC and published FCC guidelines related to template RFPs on its web site. It waited, however, until December 14, 2007, to do so, and it remains unclear to date whether this guidance was made by the FCC or made by USAC and endorsed by the FCC or simply made by USAC acting on its own authority.

10. USAC’s Tenth Response

A10: It is not reasonable to ask an entity to explain why it is similar with other entities without providing detail regarding which entities their documentation is similar to and what those similarities are.

U10: USAC will consider addressing this issue on a going-forward basis. However, to the extent USAC did not provide this information in this situation, it has not prevented a meaningful appeal by these entities.

Here, we arrive at the heart of the entire problem due to USAC’s complete lack of due process and proper administration of FCC rules. USAC concedes that it failed to provide the Schools with the very information that they needed to be able to answer USAC’s questions. And, then, in an act of arrogance, USAC basically takes the position in its response of “so what”—maybe we will consider doing this on a going forward basis. This response is demonstrative of USAC’s inability to conduct an open and fair competitive bid process and indicates lack of rules and understanding of the Administrative Procedures Act and rules of procedures and standards of review.

11. USAC's Eleventh Response

A11: The PAIR confused Wewoka, the applicant whose PAIR response was the basis of the denials. Declarations have been provided from this applicant and the other applicants as well as the service provider stating that no rule violations occurred.

U11: USAC, as the Administrator, is not empowered to waive FCC rules because an applicant states that it was confused, because an applicant recants their original statements, or in light of documents that the Administrator determines have violated the competitive bidding and fair and open competition requirements of the program. As stated above, USAC routinely tests applicant's statements and certifications in order to protect program integrity.

Again, this exemplifies USAC's lack of knowledge and understanding of the rules that they are responsible for administering. There was no rule violation; therefore no waiver is required. The Commission has neither issued any Order or amended or codified any rule that stated that vendor neutral template RFPs used in E-rate training are impermissible and taint the competitive bid process or that vendor neutral assistance on the Form 470 is a rule violation and taints the competitive bid process. The guidance that the Commission has provided in the *Mastermind* and *Ysleta* Orders are not at issue in the facts of this case.

The reason that Wewoka stated it was confused is because USAC asked the questions in such a broad, general way--thereby leading to understandable confusion for the applicant. Wewoka addressed this issue in its Declaration. The Commission has been very understanding, clear, and lenient in allowing schools and libraries to correct information previously submitted due to a lack of understanding, confusion, etc. In this regard the Commission has issued numerous global Orders since 2006, beginning with *Bishop Perry* and its progeny.

12. USAC's Twelfth Response

A12: USAC failed to prove how the competitive bid process was skewed to favor United Systems.

U12: Consistent with the FCC's direction in the Pattern Analysis Order, the applicants were given the opportunity to demonstrate that they complied with the FCC's competitive bidding rules. The applicants were unable to demonstrate through their own words and documents as described earlier that there was a fair and open competitive bidding process.

See appellants' response to USAC's Fourth and Tenth Responses above.

13. USAC's Thirteenth Response

A13: The letter and the spirit of the competitive bid process were followed.

U13: USAC disagrees that the letter and the spirit of the competitive bid process was followed, as detailed above. USAC is not compelled by the arguments in the letter of appeal, including the appellant's suggestion that USAC make decisions based solely on the wording of each individual applicant's PAIR response rather than making decisions subsequent to a full analysis of facts and documentation.

USAC, after careful consideration has determined that a competitive bid violation occurred and that a fair and open competition did not occur, as a result the appeal is denied.

Appellants disagree with USAC's finding and rely upon the Commission to review the legal arguments and reverse USAC's decisions.

VII. CONCLUSION AND REQUEST FOR RELIEF

United requests the Commission to grant this Appeal for the Schools' FY2006 Applications. For the reasons set forth above, United requests the Commission to make a finding that USAC did not properly apply its pattern analysis procedures and based on the evidence submitted, there has been no competitive bid rule violation. United requests the Commission to remand the application to USAC with instructions to issue positive FCDLs no later than 30 days

from the release date of the Commission's Order granting this Joint Consolidated Appeal.

Respectfully submitted,



Cynthia B. Schultz
Patton Boggs LLP
2550 M Street NW
Washington, DC 20037
(202) 457-6000

Counsel to United Systems, Inc.
(Service Provider to the Schools)

_____/s/_____
Alvin Myers
United Systems, Inc.
4335 Classen Boulevard
Oklahoma City, OK 73118
(405) 523-2162

_____/s/_____
Wes McFarland
Agra Public Schools
112 S. Main
Agra, OK 74824
(918) 375-2262

_____/s/_____
Gretana Gonzales Hall
Boley Public Schools
124 N. Oak Street
Boley, OK 74829
(918) 667-3324

_____/s/_____
Gloria Griffin
Millwood Public Schools
6724 Martin Luther King Avenue
Oklahoma City, OK 73111-7943
(405) 478-1336

_____/s/_____
D. Keith Kinkade
Paden Public Schools
10th and Elm Streets
Paden, OK 74860
(405) 932-4465

_____/s/_____
Kim Moore
Graham School District
RR 1
Weleetka, OK 74880-9801
(918) 652-8935

_____/s/_____
J.E. Pryor
Maud Public Schools
P.O. Box 130
Maud, OK 74854-0130
(405) 374-2416

_____/s/_____
Betty Stephens
Oklahoma School for the Deaf
1100 East Oklahoma Street
Sulphur, OK 73086
(580) 622-4900

_____/s/_____
Gloria Pearson
Wewoka Public Schools
1121 S. Okfuskee Avenue
Wewoka, OK 74884
(405) 257-5475

January 15, 2008

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 15th day of January, 2008, a copy of the foregoing Joint Consolidated Request for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

Michelle Carey
Senior Legal Advisor to Chairman Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Michelle.Carey@fcc.gov

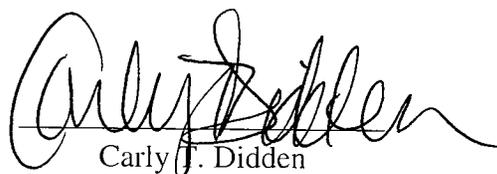
Dana R. Shaffer
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Dana.Shaffer@fcc.gov

Randy Clarke
Legal Counsel to the Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Marcus.Maher@fcc.gov

Jeremy Marcus
Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Jeremy.Marcus@fcc.gov

Gina Spade
Assistant Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Gina.Spade@fcc.gov

Letter of Appeal
Schools and Libraries Division-
Correspondence Unit
100 S. Jefferson Road
P.O. Box 902
Whippany, NJ 07981



Carly T. Didden