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

In the Matter of	)	
	)	
Request for Review of the Decision of the Universal Service Administrator	)	
	)	Application File Nos.
by Union Parish School Board Farmerville, Louisiana	)	119672, 121741, 160965 163210, 209497, 229706
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6
	)	

To: The Commission

APPLICATION FOR REVIEW AND REQUEST FOR CONSOLIDATION

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October 26, 2012

EXECUTIVE SUMMARY

Union Parish School Board ("Union Parish"), through counsel, and pursuant to Section 1.115 of the Commission's rules, files this Application for Review regarding an Order issued by the Wireline Competition Bureau (the "Bureau") on September 26, 2012 ("*Second Union Parish Order*"). Union Parish requests that the Commission consolidate this Application for Review with the Application for Review filed by SEND Technology, LLC ("SEND") on April 17, 2007 (the "SEND Application for Review"), which is attached hereto and incorporated herein by reference. Consolidation is appropriate because the *Second Union Parish Order* was based upon the precedent set in the *First Union Parish Order*; the SEND Application for Review was filed in response to the *First Union Parish Order*.

The SEND Application for Review, pending at the Commission for over five years, details fundamental and significant errors made by the Bureau in the *First Union Parish Order* and, by extension, the *Second Union Parish Order*, including: (1) the Bureau's key findings were taken from a contested third party report and pertain to the wrong funding year; and (2) the Bureau erred by retroactively applying new universal service policy against Union Parish and SEND, which is against Commission precedent. Waiver is appropriate here because, just as the Commission decided in other similar cases, E-rate applicants should not be unfairly penalized for failing to follow new policies that are contained in Commission orders that are released <u>after</u> applications are filed.

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Union Parish School Board ("Union Parish"), through counsel, and pursuant to Section 1.115 of the Commission's rules,[1] files this Application for Review regarding an Order issued by the Wireline Competition Bureau (the "Bureau") on September 26, 2012 ("*Second Union Parish Order*").[2] Union Parish requests that the Commission consolidate this Application for Review with the Application for Review filed by SEND Technology, LLC ("SEND") on April 17, 2007 (the "SEND Application for Review"), which is attached hereto and incorporated herein by reference. Consolidation is appropriate because the *Second Union Parish Order* was based upon the precedent set in the *First Union Parish Order*; the SEND Application for Review was filed in response to the *First Union Parish Order*.[3]

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[1] 47 C.F.R. § 1.115.

[2] *Request for Review of the Decision by the Universal Service Administrator by Union Parish School Board,* Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, DA 12-1526 (Wireline Comp. Bur. 2012).

[3] *See Request for Review of the Decision by the Universal Service Administrator by SEND Technologies, LLC*, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 22 FCC Rcd 4950 (Wireline Comp. Bur. 2007).

The SEND Application for Review, pending at the Commission for over five years, details fundamental and significant errors made by the Bureau in the *First Union Parish Order* and, by extension, the *Second Union Parish Order*, including: (1) the Bureau's key findings were taken from a contested third party report and pertain to the wrong funding year; and (2) the Bureau erred by retroactively applying new universal service policy against Union Parish and SEND, which is against Commission precedent. Waiver is appropriate here because, just as the Commission decided in other similar cases, E-rate applicants should not be unfairly penalized for failing to follow new policies that are contained in Commission orders that are released after applications are filed.

I. BACKGROUND.

To fully understand this case, a complete review of the SEND Application for Review, and the incorporated December 16, 2003 Consolidated Request for Review ("2003 Consolidated Request") and the March 22, 2004 Consolidated Request for Review, is needed. However, by way of brief background, Union Parish is a school system in Farmerville, Louisiana that participates in the E-rate Program. SEND is one of the service providers that was chosen by Union Parish to supply E-rate services. An employee of Union Parish, the technology systems administrator, Tom Snell, was the contact person on Union Parish's Form 470 applications. Union Parish filed applications for E-rate funding for FY1999, FY2000 and FY2001 that were signed by the Union Parish Superintendent.

At issue was Snell's 15% passive unitholder interest in SEND. At the time the applications were filed, there was no Commission precedent addressing whether this type of interest, held by an employee of a school, would impact Union Parish's E-rate applications. The Commission's rules did, however, require compliance with local and state competitive bidding and procurement laws.[4]

[4] The Commission's rules in 1999 required the following with respect to competitive bidding: 47 C.F.R. § 54.504(a): "*Competitive bid requirements.* Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the

Accordingly, Union Parish sought and received a determination from the State of Louisiana that Snell's unitholder interest in SEND did not pose a conflict of interest.[5] Union Parish nevertheless determined to wall Snell off from the competitive bidding process in order to ensure full and fair competitive bidding.[6]

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requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements."). *See* 2003 Consolidated Request at 6-8.

[5] As covered in detail in the 2003 Consolidated Request at 10-15, the Louisiana Board of Ethics investigated the matter and found that Snell owned only 15% of SEND (the legal standard in Louisiana for a conflict of interest is 25%), he was not an employee of SEND, and he did not participate in the initial contract between SEND and Union Parish. In a January 24, 2002 letter to Snell, the Louisiana Board of Ethics specifically stated: "Based upon the information obtained, the Board concluded and instructed me to inform you that no violation of the Code of Governmental Ethics was presented by your ownership interest in SEND Technologies." Based upon the state of Louisiana finding that Snell committed no ethical violation, the absence of FCC rules addressing conflict of interest issues in these circumstances, and the FCC's conclusion that its competitive bidding rules do not preempt state and local rules, the Bureau's subsequent finding, years after the fact, is difficult to understand. Moreover, Union Parish undertook a full and fair competitive bidding process, in good faith, and there is no evidence that the bidding process was affected in any way by Snell's minor, passive holdings.

[6] For each program year, Union Parish sought competitive bids as required under FCC rules by posting its Form 470 application on the SLD website. Unlike the applicants in the *MasterMind* cases (discussed *infra*, n.22), "Union Parish did not delegate the task of disseminating information regarding the services they requested to any service provider, including SEND. Union Parish undertook its own competitive bidding process, complied with all federal, state and local rules, considered all factors set forth under those rules, and went the extra step of obtaining a ruling from the Louisiana Board of Ethics confirming that Snell had no conflict of interest that would violate state and local competitive bidding laws." 2003 Consolidated Request at 20. Even so, Snell was walled off from the solicitation and evaluation of bids for any services in which SEND was involved as a competing bidder in order to protect the integrity of the process. Superintendent Lazenby "instructed Snell that any proposal or contract negotiations or decisions involving SEND would be conducted by the school board or the Superintendent . . . Superintendent Lazenby continued to personally evaluate proposals and conduct negotiations in each successive funding year, and he initiated and approved all contracts with SEND." *See* 2003 Consolidated Request at 11. In the relevant funding years, SEND bid on both Internet Access services and internal connections. Union Parish received inquiries from other vendors, including Mastermind Internet Services and Icon Technologies. "Because SEND's service proposals would cost Union Parish one-fifth to one-half of what the other service providers offered for comparable services, Union Parish chose SEND to provide it with Internet services in 1999 and 2000 and internal connections in 2000. Various other vendors were selected by Union Parish to provide telecommunications and internal connections for each year." 2003 Consolidated Request at 9. Indeed, based upon bid evaluations, Union Parish selected eight service providers beyond Union Parish to provide for its communications needs. "The critical public interest policies served by the Commission's competitive bidding rules are to ensure that schools and libraries seeking support through the E-rate Program obtain the most cost-effective services available, thereby lessening applicants' demands on universal service funds and increasing funds available to other applicants. Through Union Parish's competitive bidding process, there was fair and open competitive bidding for services, and at the end of the bidding process, SEND was found to be the most cost-effective choice with respect to certain services. The process Union Parish went through to choose SEND explicitly

Three years after the applications were granted and funded, USAC sought to void the granted applications and rescind the funding on the grounds that there was a conflict of interest and a violation of the competitive bidding rules because "the authorized contact person listed on the Form 470 cannot be **associated in any way** with a service provider."[7] The flaw in this decision is that USAC is retroactively applying later-adopted competitive bidding guidelines, released by the Commission in 2001, to applications that were filed in 1999 and 2000. When the Union Parish applications were filed, there was no federal guidance to assist Union Parish and SEND. There were no competitive bidding guidelines or Commission precedent about prohibited "associations." Indeed, the first Commission guidance regarding "prohibited associations" was issued in 2001, after the relevant applications were filed. Moreover, there was never a decision directly addressing prohibited associations based on passive unitholder interests held by school employees until the *First Union Parish Order* in 2007.

As the SEND Application for Review and the 2003 Consolidated Request details, Union Parish and SEND were in full compliance with Commission rules and guidelines when the applications were filed. Just as important, Union Parish's efforts to seek guidance from the State of Louisiana and insulate Snell from the competitive bidding process demonstrate that every attempt was made by Union Parish to uphold both the letter and the spirit of the competitive bidding rules. All of these facts were ignored by USAC and the Bureau.

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met the public policy objectives that underlay the competitive bidding rules." SEND Application for Review at 21 (internal citation omitted) (emphasis added). All of the facts set forth in this footnote are supported by affidavits in the prior appeals.

[7] 2003 Consolidated Request at 2 (emphasis added).

II. THE BUREAU'S KEY FINDINGS WERE TAKEN FROM A CONTESTED THIRD PARTY REPORT AND PERTAIN TO INFORMATION FROM THE WRONG FUNDING YEAR.

The Bureau made two key findings in the *First Union Parish Order* based upon contested information from the ***wrong funding year*** that was contained in a "report" that was not prepared or vetted by USAC. The Bureau found that: (1) "under Commission precedent, a prohibited conflict of interest existed between Union Parish and SEND Technologies;"[8] and (2) the conflict of interest "impeded fair and open competition as prohibited by the Commission's precedent."[9] The Bureau's only support for these findings was a contested Investigative Audit Report issued by a legislative auditor from the State of Louisiana in October 2002.[10] The Bureau stated the following:

> Despite SEND Technologies' assertion that the Union Parish employee was isolated from the bidding process, the Investigative Audit Report reveals that the contact person [Tom Snell] did, in fact, participate in the contract process by preparing the request for bid, and preparing an analysis of bids submitted to Union Parish board members. The Investigative Audit Report determined that potential bidders were severely restricted in the time they had to respond, potential bidders were not afforded the opportunity to clarify or discuss any of the proposed specifications before the bid. In addition, that the competing bidder was not given ample time to prepare questions and received no information regarding its inquiries.[11]

Inexplicably, these Bureau statements from the *First Union Parish Order* reference a discussion in the Investigative Audit Report (pp. 9-12) which pertains to auditor allegations about **FY1998**.[12]

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[8] *First Union Parish Order*, ¶ 6.

[9] *Id.*

[10] *See* Investigative Audit Report, Office of the Legislative Auditor, State of Louisiana (dated October 2, 2002) ("Investigative Audit Report").

[11] *First Union Parish Order*, ¶ 6. As indicated in SEND's 2003 Consolidated Request, and as detailed in the Union Parish Management Response to the Legislative Audit Report, Snell recused himself from the competitive bidding process for the applicable funding years, 1999-2001. The Superintendent, not Snell, evaluated the bids. *See* SEND Application for Review at 7-11 for a full discussion of the factual problems with the Bureau's quote above; *see also* Legislative Audit Report, Attachment II, Management Response at 5; *see also supra*, n.6 for a discussion of the competitive bidding process undertaken by Union Parish each year to ensure a full and fair competitive bidding process.

[12] *See, e.g.*, Investigative Audit Report at 10 ("SEND was awarded the initial Internet access contract on May 11, 1998, as the result of a competitive bidding process . . ."); *id.* ("During April 1998, the school district submitted USAC Form 471 . . . requesting funding for Internet access. Form 471 listed SEND as the school

FY1998 is ***not*** the subject of USAC's commitment adjustments in this case. Yet, based upon these "facts" from FY1998, which were contested by both Union Parish and SEND, the Bureau determined that there were competitive bidding violations in **FY1999, FY2000 and FY2001.**[13] Then, based upon these "findings," the Bureau authorized USAC to recover approximately $624,429.77 in funds from Union Parish and SEND.[14] There are no findings of any competitive bidding violations by Union Parish for the relevant funding years – FY1999, FY2000 and FY2001. Accordingly, USAC's decisions to deny federal funding for FY1999, FY2000 and FY2001 have not been justified and cannot stand.

Union Parish and SEND provided specific information and declarations under penalty of perjury about the competitive bidding process that was undertaken in each of the relevant funding years, FY1999, FY2000 and FY2001. Those facts reveal a full and fair competitive bidding process and insulation of Tom Snell from the process.[15]

It is perplexing that the Bureau relied so heavily on the contested auditor's report without independent verification by USAC of the facts, but it is even more astounding that the Bureau would

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district's Internet service provider (ISP) and Mr. Snell as the school district's E-Rate contact person."); *id.* ("The school district sent formal requests for ISP bids to vendors on April 30, 1998, requesting a response (bid) by May 6, 1998 . . . Ms. Cranford could not provide documentation to indicate that a request for a bid was faxed to SEND. The school district received written bids from SEND and LDS on May 5, 1998, and May 6, 1998, respectively."); *id.* at 11 ("According to school district records, Ms. Cranford provided a memo to school board members during the May 11, 1998, school board meeting informing them that (1) SEND and LDS had submitted bids; (2) SEND was the lowest bidder; and (3) Mr. Snell and Ms. Earle were members of SEND."); *id.* at 12 ("Records from former MCBS Accountant Kim Smalling's computer indicate that Mr. Snell was the author of a document similar to the document presented to the school board members on May 11, 1998, listing differences between the bids received from SEND and LDS.").

[13] *See* Legislative Audit Report, Section II, Management Response for Union Parish and SEND's response contesting the findings of the Legislative Audit Report; *see also* SEND Application for Review at 7-11.

[14] *See* Attachment 1 for calculations of the recovery sought from Union Parish, totaling $315,132.27. *See* Attachment 2 for calculations of the recovery sought from SEND, totaling $309,297.40.

[15] *See supra*, n.6 and n.11.

cite that report as evidence of rule violations for FY1999-FY2001, when the conduct to which it cites relates to FY1998, a funding year that is not in question.[16]

The Bureau and USAC cannot take untested findings contained in a contested third party report as a final determination of facts that is then used as the basis for stripping Union Parish and SEND of federal funding. As the SEND Application for Review makes clear, the auditor "reports," issued against many different parties over time, were not fact-based, objective and unbiased reports issued by the State of Louisiana after a thorough investigation, public hearings and fair presentation of evidence by all impacted parties. These auditor "reports" and the tactics used by the legislative auditor purposefully made subjects look guilty even though no legal action was ever taken by state agencies and lawmakers with jurisdiction.[17] As one Louisiana lawmaker noted when the legislative auditor resigned, "He has tried to pronounce people guilty based on his legislative audit findings without anybody having the opportunity to review them."[18]

As the Commission emphasized in the *Academy of Careers* decision, when USAC suspects there are competitive bidding violations, "it is incumbent on USAC to conduct further investigation

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[16] "To the extent any irregularities in the competitive bidding process actually occurred in 1998, the first program year for the E-rate program, the Commission and the Bureau waived perceived or actual violations of the rules, including competitive bidding violations, because applicants and providers in the first year of the schools and libraries program may have submitted applications that were not fully compliant with the rules due to inexperience and 'may have reasonably relied on USAC's commitment letter as confirmation that their applications did in fact comply with Commission rules.'" SEND Application for Review at 10-11 (*citing Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal State Joint Board on Universal Service,* Order, 15 FCC Rcd 7197, ¶¶ 6,10 (1999)); *see also Request for Review of the Decision of the Universal Service Administrator by Folsom Cordova Unified School District,* Order, 16 FCC Rcd 20215, ¶¶ 13-14 (2001); *Request for Review of the Decision of the Universal Service Administrator by Shawnee Library System,* Order, 17 FCC Rcd 11824, ¶ 11 (2002).

[17] *See* SEND Application for Review at 3-7 (detailing the problems of the Legislative Audit Report and the Bureau's misplaced reliance on it).

[18] *Id.* at 5 (*citing* Laura Maggi, *State Legislative Auditor Resigns After 13-year Stint; Kyle May Announces Run for Governor*, Times-Picayune, Jan. 18, 2003, at 4).

and analysis prior to denying funding."[19] The *Academy of Careers* decision involved a string of cases in which USAC assumed there were competitive bidding violations based on information external to a particular application. USAC then denied funding without making specific findings of actual competitive bidding violations. The Commission overturned USAC's funding denials in *Academy of Careers* because USAC never gathered facts, obtained additional information or made findings that would evidence an actual rule violation prior to denying funding requests.[20] The same situation is present here. Instead of relying on a contested third-party report and wholly inapplicable information from 1998 and making the assumption that there were competitive bidding violations in later years, it was incumbent on USAC to gather facts and additional information about the competitive bidding process undertaken by Union Parish in the relevant funding years, FY1999-FY2001, so that USAC could determine whether Snell's interest in SEND did, ***in fact***, compromise the competitive bidding process in any manner. In the absence of this information, SEND and Union Parish provided detailed information to USAC and to the Bureau about the processes they undertook to ensure a full and fair competitive bidding process, including the insulation of Snell from the process. This information was, apparently, wholly disregarded by USAC and the Bureau. USAC and the Bureau do not have any evidence of competitive bidding violations from FY1999, FY2000 and FY2001. Accordingly, USAC and the Bureau cannot justify seeking return of $624,429.77 from Union Parish and SEND.

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[19] *Request for Review of the Decision of the Universal Service Administrator by Academy of Careers and Technologies, San Antonio, TX, et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5348, ¶ 7 (2006) ("Academy of Careers Order").

[20] *Id.*, ¶¶ 5-6. It should also be noted that neither USAC nor the Bureau ever asked SEND or Union Parish to respond to the Legislative Audit Report. Thus, the Bureau's admonishment of SEND for failing "to make mention of other relevant findings form the Investigative Audit Report" is beyond unfair and is devoid of basic notice and due process.

Based upon the Bureau's reliance on contested third-party information from FY1998, the wrong funding year, and the failure of USAC to advance its own evidence of competitive bidding violations for the relevant funding years, 1999-2001, and in view of the actual facts about the funding years in question that were proffered under penalty of perjury by people that were actually involved, the Commission should find that the decisions reached by the Bureau in the *First Union Parish Order* and the *Second Union Parish Order* are in error and should be overturned.

III. THE BUREAU VIOLATED COMMISSION PRECEDENT BY RETROACTIVELY APPLYING NEW UNIVERSAL SERVICE POLICY AGAINST UNION PARISH AND SEND.

The decision reached by the Bureau in 2007 in the *First Union Parish Order* was the first time the Commission ever determined that a unitholder interest in a service provider, held by an employee of a school district, could create an improper association between an applicant and a service provider. Even a liberal reading of Commission policy about prohibited associations that existed prior to the *First Union Parish Order* in 2007 reveals that it was not until the *Carethers* case in March of 2001, after all of the applications in question were submitted, that the Commission established for the first time that there could be a violation of the competitive bidding rules if there was any form of "association" between a school and a service provider.[21] This is the language used by USAC in its original commitment adjustments to Union Parish and SEND, but it is based on decisions that were issued after the applications were filed.[22] This is against Commission practice and precedent.[23]

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[21] *See* SEND Application for Review at 12-14 (clarifying that the decision addressing prohibited "associations" between service providers and applicants was first announced in *Carethers* in March of 2001, after all the Union Parish applications for FY1999, FY2000 and FY2001 were filed. In *Carethers*, the Commission found that the contact person on the Form 470 was likely a representative or employee of the service provider, and was married to another employee of the service provider. *See Request for Review of the Decision of the Universal Service Administrator by A. R. Carethers SDA School, Houston, TX et al.*, Order, 16 FCC Rcd 6943, ¶ 8 (2001)).

[22] For a full discussion of how Commission policy shifted, largely after the relevant Union Parish applications were filed, *see* 2003 Consolidated Request at 16-21 and SEND Application for Review at 11-14.

The Bureau is simply not correct that "under Commission precedent a prohibited conflict of interest existed."[24] The decisions made by the Bureau in the *First Union Parish Order* and the *Second Union Parish Order* were ***not*** based upon "Commission precedent" regarding conflicts of interest that existed in 1999 and 2000 when the relevant applications were filed.

As described by SEND in its Application for Review, at the time Union Parish submitted its Form 470s in 1999 and 2000 (the FY1999 application was filed January 22, 1999, the FY2000 application was filed December 1, 1999, and the FY2001 application was filed December 5, 2000), there was very little available information regarding the competitive bidding process, and no information regarding conflicts of interest that could arise from passive unitholder interests in service providers held by employees of schools.[25] The FCC's rules simply provided that applicants "shall seek competitive bids" and comply with state and local procurement regulations – the federal

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The original *MasterMind* decision was released on May 23, 2000, after the FY1999 and FY2000 applications were filed but 7 months before the FY2001 application was filed. The first *MasterMind* decision was an important decision, but it stood for the proposition that it is improper for a service provider to prepare or sign the Form 470, and surrender control of the bidding process "to a service provider that participates in that bidding process." The Commission further found that an open and fair competitive bidding process does not occur when the service provider is listed as the contact person and participates in the bidding process. None of these findings could have served as notice to Snell or Union Parish of a potential problem in their case. The *MasterMind* decision addressing prohibited "associations" between service providers and applicants, which might have served as a clue to Union Parish about how Snell's employment at Union Parish and his passive investment in SEND could violate the Commission's competitive bidding rules, notwithstanding determinations by Louisiana regulatory bodies that his situation was permissible, was not announced until *Carethers* in March of 2001. Moreover, the *MasterMind* line of cases is easily distinguishable from the Union Parish case. In the *MasterMind* cases, the conflict of interest presented is obvious because, in each case, the schools delegated their responsibility to undertake competitive bidding to service providers. That is clearly not the case here, and not what Union Parish did.

[23] It is important to note that in all of the *Mastermind* cases, including *Carethers*, the prohibited association found by the Commission involved an individual with an exclusive association with a **service provider** serving as a contact person on the Form 470 application. The Union Parish case was the first time the Commission addressed a potential conflict of interest that could be created by an employee of the applicant serving as the contact person, where that person holds a minority unit holder interest in a service provider. *See* SEND Application for Review at 15; 2003 Consolidated Request at 19-20.

[24] *First Union Parish Order*, ¶ 6.

[25] *See* 2003 Consolidated Request at 22; SEND Application for Review at 11-13.

regulations were not intended "to preempt such state or local requirements."[26] USAC did not have rules posted on its website in 1999 that addressed conflicts of interest or prohibited associations. SEND and Union Parish complied with all known rules, and Union Parish sought and received additional guidance from its State.

As the Commission determined in *Prairie City*, *Williamsburg-James City Public Schools*, *Ysleta* and *Winston Salem,* where an application was submitted before release of new or clarified rules, and the applicants could not have been aware of the new requirements, clarifications of universal service policies are to be applied prospectively only.[27] That is what the Bureau should have done in the case of Union Parish and SEND – it should have applied new policy going forward. Instead, the Bureau applied new policy retroactively and authorized USAC to seek return of approximately $624,429.77 in funding. Union Parish and SEND had no notice of the Commission's later-adopted policies on prohibited "associations" when the applications at issue were prepared in 1999 and 2000 and, consistent with the *Williamsburg-James* case, the new policy set forth in the *Carethers* case should not have been applied against them.

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[26] *See supra,* n.4.

[27] *See Request for Review of the Decision of the Universal Service Administrator by Prairie City School District*, Order, 15 FCC Rcd 21826, ¶ 5 (1999) (*citing Request for Review of the Decision of the Universal Service Administrator by Williamsburg-James City Public Schools*, Order, 14 FCC Rcd 20152, ¶ 6 (1999) ("Williamsburg could not have been aware of the rules of priority at the time it filed its application." In *Williamsburg-James*, the applicant submitted its application in April of 1998 and new rules were adopted by the Commission in June of 1998. This timing is very similar to the Union Parish timing. Their last application was submitted in December 2000, and the *Carethers* case was decided in March of 2001.); *see also Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, TX, et al.*, Order, 18 FCC Rcd 26406 (2003) ("Ysleta Order"); *Request for Review of the Decision of the Universal Service Administrator by Winston-Salem/Forsyth County School District, Winston-Salem, NC, et al.*, Order, 18 FCC Rcd 26457 (2003) ("Winston-Salem Order"). In both the Ysleta Order and the Winston-Salem Order, the Commission recognized that clarifications of its universal service policies are to be applied prospectively only.

The Bureau's retroactive application of new policy precedent against Union Parish and SEND, whether it was the March 2001 policy articulated in *Carethers* or the 2007 policy articulated in the *First Union Parish Order*, justifies overturning the decisions in the *First Union Parish Order* and the *Second Union Parish Order* or, at a minimum, deciding that no recovery should be sought by USAC against Union Parish or SEND for violation of a policy that did not exist when the applications were filed.

IV. CONSISTENT WITH COMMISSION PRECEDENT IN OTHER UNIVERSAL SERVICE CASES, THE BUREAU SHOULD HAVE GRANTED SEND AND UNION PARISH A WAIVER.

Even if the Commission wishes to prospectively uphold the policy decision reached in the *First Union Parish Order* and the *Second Union Parish Order*, prohibiting associations based upon stock or unitholder interests held by school employees, this new policy, and the consequence for failing to live up to it, should be waived as to Union Parish and SEND. This policy was not known when the Union Parish applications were filed.[28]

The Commission has previously granted waiver requests in *Ysleta*, for example, "in light of the uncertain application of our rules to the novel situation presented."[29] In *Ysleta*, the Commission directed USAC to allow certain applicants to reapply for E-rate discounts even though the Commission concluded that the applicants violated the E-rate program's competitive bidding process by using a two-step System Integration approach.[30] According to the Commission, a waiver was appropriate in *Ysleta* because it was not clear to the applicants that a new rule would apply to the novel facts presented in their case.[31] The same situation is present here.

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[28] The Commission's rules may be waived for good cause. *See* 47 C.F.R. § 1.3. Further, the "Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest." *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[29] Ysleta Order, ¶ 72.

[30] *See* SEND Application for Review at 22 (*citing* Ysleta Order, ¶ 66).

[31] *Id.* (*citing* Ysleta Order, ¶ 72).

Furthermore, the Commission has specifically granted a waiver of its rules so that an E-rate applicant would not be unfairly penalized for violating new competitive bidding policies contained in an order that had not been released by the Commission until after the applicant had initiated its E-rate vendor selection process.[32] In *Colegio Nuestra Senora,* because a new policy was adopted after an applicant drafted and prepared its RFP for competitive bidding, and the new policy differed from the policy that was in place when the applicant released its RFP, the Commission found that good cause existed to grant a waiver of Section 54.511 of the Commission's rules. Likewise, in the case of Union Parish and SEND, relevant policy regarding prohibited associations was not adopted until 2001 or 2007, well after the Union Parish applications were filed in 1999 and 2000. Given this, a waiver of the Commission's rules is justified for Union Parish and SEND, just as it was justified for the applicants in the *Ysleta* and the *Colegio Nuestra Senora* cases.

In reviewing a waiver request, the Commission also can weigh "considerations of hardship, equity, or more effective implementation of overall policy."[33] Indeed, the Commission has cited hardship as a consideration in granting waivers in previous decisions.[34] Here, without a waiver, if

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[32] *See Request for Review of the Decision by the Universal Service Administrator by Colegio Nuestra Senora del Carmen, Hatillo, Puerto Rico, et al.,* Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 23 FCC Rcd 15568, ¶ 13 (2008) ("Although the *Ysleta Order* was in effect when Edgewood released its RFP, we find that a limited waiver is warranted in this instance because the *Tennessee Order* was in effect while Edgewood drafted and prepared its RFP.").

[33] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[34] *See e.g., Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District, Aberdeen, WA, et al.,* Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 22 FCC Rcd 8757, ¶ 9 (2007) ("Based on the facts and the circumstances of these specific cases, we find that good cause exists to waive section 54.504(b)(4) of the Commission's rules, . . . While we emphasize that our competitive bidding rules are important to ensure a fair bidding process, **we find that denying these Petitioners requests for funding would create undue hardship and prevent these potentially otherwise eligible schools and libraries from receiving E-rate funding.** We therefore find that good cause exists to grant Petitioners a waiver . . .") (emphasis added); *Request for Review of a Decision of the Universal Service Administrator by Cincinnati City School District, Cincinnati, Ohio,* Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order, 21 FCC Rcd 5994, ¶ 8 (2006) ("Here, we note there is no evidence in the record, at this time, that Cincinnati School engaged in activity intended to defraud or abuse the E-rate program. Finally, we find that, for this applicant, **denying its requests for funding would create undue hardship and prevent it from receiving E-rate**

USAC seeks to recover approximately $315,132.37 from Union Parish, the school system will be forced into financial ruin as it does not have the budget to return these funds which were used more than a decade ago for needed E-rate services. This outcome is inconsistent with the express purpose of the E-rate program, which was established to provide affordable access to telecommunications services for all eligible schools and libraries, particularly those in rural and economically disadvantaged areas, like Union Parish.[35]

V. CONCLUSION.

Union Parish requests that the Commission consolidate this Application for Review with the SEND Application for Review that has been pending for over five years. The SEND Application for Review details fundamental and significant errors made by the Bureau in the *First Union Parish Order* and, by extension, the *Second Union Parish Order*, including: (1) the Bureau's key findings were taken from a contested third party report and pertain to the wrong funding year; and (2) the Bureau erred by retroactively applying new universal service policy against Union Parish and SEND, contrary to Commission precedent. The Commission should either overturn the decisions reached in the *First Union Parish Order* and the *Second Union Parish Order* in their entirety, or the Commission should find that it would be inequitable and unfair to Union Parish and SEND to apply the new policy against them. Waiver is appropriate here, as it was in other cases, because E-rate applicants should not be unfairly penalized for violating new competitive bidding policies contained in orders that are released by the Commission after an application was filed.

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funding for work already performed by BCS. Accordingly, we find that good cause exists to grant Cincinnati School a waiver of section 54.504(c) of the Commission's rules.") (emphasis added).

[35] *See* FCC "E-rate" webpage, *available at* http://transition.fcc.gov/learnnet/.

Respectfully submitted,

_____/s/_____

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October 26, 2012

Attachment 1

Union Parish School Board COMAD List

Total recovery sought by USAC: $315,132.37

Year	App	FRN	Vendor		Amt
1999	119672	171014	BellSouth	$	38,838.86
1999	121741	176108	Global Data	$	13,194.90
1999	121741	176115	Global Data	$	4,149.00
1999	121741	176121	Global Data	$	4,149.00
1999	121741	176128	Global Data	$	3,456.00
1999	121741	176132	Global Data	$	3,456.00
2000	160965	385749	BellSouth	$	89,739.38
2000	160965	385761	AT&T	$	4,451.66
2000	160965	405626	CenturyTel	$	368.05
2000	163210	405275	Dell Marketing	$	7,024.08
2000	163210	405449	Anixter	$	39,388.22
2001	229706	594001	BellSouth	$	89,685.89
2001	229706	594023	AT&T	$	5,996.31
2001	229706	594092	CenturyTel	$	3,428.45
2001	229706	594323	Metrocall	$	169.31
2001	229706	618168	CenturyTel of Central LA	$	7,637.26
				$	**315,132.37**

Attachment 2

SEND Technology, LLC COMAD List
Total recovery sought by USAC: $ 309,297.40

Service	Application	FRN	Year	Disbursed
Internet Access	119672	171021	1999	$ 23,124.00
Internal Connections	121741	175066	1999	$ 126,260.00
Internet Access	160965	385823	2000	$ 63,000.00
Internal Connections	163210	405241	2000	$ 67,288.40
Internet Access	229706	594052	2001	$ 29,625.00
Totals 1999-2001				**$ 309,297.40**

CERTIFICATE OF SERVICE

I, Yosef Getachew, certify on this 26th day of October, 2012, a copy of the foregoing Application for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

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