

December 19, 2012

Jennifer L. Richter
Direct Tel: 202-457-5666
Direct Fax: 202-457-6315
jrichter@pattonboggs.com

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Ex Parte Notice – CC Docket No. 02-6, Application File Nos. 119672, 121741, 160965, 163210, 209497, 229706 – Application for Review and Request for Consolidation – Union Parish School Board**

Dear Ms. Dortch:

This letter memorializes an ex parte meeting that took place on December 18, 2012, between Jennifer Richter, Monica Desai, and Benjamin Bartlett, counsel to SEND Technologies, LLC (“SEND”), Marcus Maher from the Office of General Counsel, and the following personnel in the Wireline Competition Bureau: Lisa Hone, Regina Brown and Erica Myers. The purpose of this meeting was to discuss the Application for Review and request by Union Parish School Board (“Union Parish”),¹ for consolidation of its Application for Review with the Application for Review filed by SEND in 2007.²

The undersigned emphasized that the Commission should overturn its previous two Union Parish decisions because they were wrongly decided based on factual errors.³ Alternatively, even if the Commission were to find that the Bureau’s policy decision is correct, that decision should be waived with respect to Union Parish and SEND because: (1) Union Parish conducted a full and fair competitive bidding process; (2) Union Parish and SEND took steps to confirm compliance; and (3) Commission precedent for the application years in question provided no notice that the facts of this

¹ See Union Parish School Board’s Application for Review and Request for Consolidation, CC Docket No. 02-6, Application File Nos. 119672, 121741, 160965, 163210, 209497, 229706 (October 26, 2012) (“Union Parish 2012 Application for Review”).

² See SEND Technologies, LLC Application for Review, CC Docket No. 02-6, SPIN-143010002 (April 12, 2007) (“SEND 2007 Application for Review”).

³ See *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 (2012) (“*Second Union Parish Order*”); *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 (2007) (“*First Union Parish Order*”).

Federal Communications Commission

December 19, 2012

Page 2

case could constitute a violation of the Commission's rules. Just as the Bureau recently decided in its *Ysleta/IBM Order* and other similar cases,⁴ E-rate applicants should not be unfairly penalized through the retroactive application of new policies that are contained in Commission orders released after E-rate applications are filed.

In connection with the Union Parish Application for Review, the undersigned discussed the following points.

I. Background.

To fully understand this case, it is important for the Commission to examine the SEND Application for Review filed on April 17, 2007, the Consolidated Request for Review filed on December 16, 2003, and the Consolidated Request for Review filed on March 22, 2004.⁵ Each of these filings is attached to the Application for Review filed on October 26, 2012.

As discussed in those filings, Union Parish filed applications for E-rate funding for FY 1999, 2000, and 2001 that were signed by the Union Parish Superintendent. At issue is whether a conflict of interest existed, and whether that conflict corrupted the competitive bidding process, because an employee of Union Parish, Tom Snell, the technology services director, held a 15% passive interest in SEND, one of several E-rate service providers that bid to provide E-rate services to Union Parish.

In the *First Union Parish Order*, the Bureau found that: (1) "under Commission precedent, a prohibited conflict of interest existed between Union Parish and SEND Technologies;"⁶ and (2) the conflict of interest "impeded fair and open competition as prohibited by the Commission's precedent."⁷ However, at the time Union Parish's applications were filed, there was no Commission precedent addressing whether this type of passive investment interest, held by an employee of a school, could impact the competitive bidding process and the viability of an E-rate application.

⁴ See *Request for Review of a Decision of the Universal Service Administrator by International Business Machines, Inc. and Ysleta Independent School District*, Order, CC Docket No. 02-6, File No. SLD-179273 (November 14, 2012) ("*Ysleta/IBM Order*"); see also *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)); *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) ("*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).

⁵ See SEND 2007 Application for Review; SEND Technologies, LLC Consolidated Request for Review, CC Docket No. 02-6 (December 16, 2003); SEND Technologies, LLC Consolidated Request for Review, CC Docket No. 02-6 (March 22, 2004).

⁶ *First Union Parish Order*, ¶ 6.

⁷ *First Union Parish Order*, ¶ 6.

Federal Communications Commission

December 19, 2012

Page 3

In the absence of Commission or USAC guidance, Union Parish took every possible step to ensure it conducted a full and fair competitive bidding process. Critically, Commission rules did require compliance with local and state competitive bidding and procurement laws. Union Parish proactively sought and received a determination from the State of Louisiana that Mr. Snell's passive interest in SEND did not pose a prohibited conflict of interest. Further, the school system took additional steps in 1999-2001 to wall Mr. Snell off from the competitive bidding process. And, significantly, SEND was chosen to provide Union Parish with only those services for which SEND was the lowest bidder. Eight other service providers also were chosen to provide Union Parish with various services.

Union Parish and SEND were in full compliance with Commission rules and guidelines when the applications were filed. Moreover, Union Parish's efforts to seek guidance from the State of Louisiana and insulate Mr. Snell from the bidding process demonstrate that every attempt was made by Union Parish to uphold the letter and spirit of the competitive bidding rules. A full and fair competitive bidding process was undertaken in each of the funding years in question (1999, 2000 and 2001), and no one, including USAC, has asserted otherwise.

II. The Previous Union Parish Decisions Were Wrongly Decided Based on Factual Errors. The Bureau's Key Findings Were Taken From a Contested Third-Party Report and Pertain to Information From the Wrong Funding Year.

The Bureau based its key findings in the *First Union Parish Order*, released in 2007, on contested information from 1998, the wrong funding year. Most critically, the conduct from 1998 cited by the Bureau as the basis for its decision is wholly irrelevant because: (1) that funding year was not in question for Union Parish; and (2) the Bureau waived all violations of the E-rate rules for 1998 because it was the first year of the E-rate program, and the Bureau recognized that applicants may have made errors due to inexperience and reasonable reliance on USAC's commitment letter as confirmation that they were in compliance.⁸ This certainly happened with Union Parish, as their applications were granted each year, and they relied on the prior grants as confirmation that they were in compliance.

USAC did not advance findings of any competitive bidding violations for the relevant funding years, FY1999, 2000 and 2001. Moreover, Union Parish and SEND provided the Bureau with specific information and declarations under penalty of perjury regarding the competitive bidding process that was undertaken by Union Parish in each of these years. As discussed above, Union Parish took every step possible to ensure a full and fair competitive bidding process.

⁸ See *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).

Federal Communications Commission

December 19, 2012

Page 4

The Commission's *Academy Careers* decision requires that, when USAC suspects there are competitive bidding violations, it is incumbent on USAC to conduct further investigation and analysis prior to denying funding.⁹ It appears USAC relied only on, and took at face value, contested information from 1998 contained in an incomplete and highly questionable Louisiana Investigative Audit Report, which was itself the subject of an investigation. The information from 1998 contained in the audit report also appears to have been taken at face value by the Bureau even though the relevant "facts" were contested by both Union Parish and SEND.

The Commission cannot allow USAC to take at face value untested findings contained in a contested third-party report and pertaining to the wrong funding year as a final determination of "facts" for later funding years, and on that tenuous basis strip E-rate participants of needed federal funding.

III. The Bureau Violated Commission Precedent by Retroactively Applying New Universal Service Policy Against Union Parish and SEND Without Notice.

Commission precedent is clear that where a funding application was submitted before release of new or clarified rules, and the applicants could not have been aware of the new requirements when they filed their applications, the new rules must be applied prospectively only.

The Bureau recently followed this precedent in the November 14 *Ysleta / IBM Order*. In that case, the Bureau found that there was no violation of E-rate rules because the Ysleta school system had complied with the rules that were in effect when it submitted its applications in 2000. Although new rules were adopted in 2003, these rules could not be applied to the applications that were filed before the new rules were released.

In its 2008 *Colegio Nuestra* decision, the Bureau specifically granted a waiver so that an E-rate applicant would not be unfairly penalized for violating new competitive bidding policies contained in an order released after the applicant had initiated its E-rate vendor selection process.¹⁰

The Union Parish case is analogous. The decision reached by the Bureau in the *First Union Parish Order* in 2007 was the first time the Commission ever determined that a minority-share, passive interest in a service provider, held by a school district employee, could create an improper association between an applicant and a service provider. The Union Parish applications were filed in 1999, 2000 and 2001. It was not until the *Carethers* case in March 2001¹¹ – after all of the Union

⁹ See *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).

¹⁰ See *Request for Review of the Decision by the Universal Service Administrator by Colegio Nuestra Senora del Carmen, Hatillo, Puerto Rico, et al.*, CC Docket No. 02-6, Order, 23 FCC Rcd 15568, ¶ 13 (2008) ("*Colegio Nuestra Order*").

¹¹ See *Request for Review of the Decision of the Universal Service Administrator by A.R. Carethers SDA School, Houston, TX et al.*, CC Docket No. 96-45, *et al.*, Order, 16 FCC Rcd 6943 (2001).

Parish applications 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.

The only available precedent in 1999, 2000 and 2001 regarding conflicts of interest and the competitive bidding process was the *MasterMind* case, which held that it was improper for a service provider to prepare or sign the Form 470, and to surrender control of the bidding process to a service provider that participates in that bidding process.¹² Under *MasterMind*, the competitive bidding rules would be violated if the service provider was listed as the contact person and participates in the bidding process. That situation was not present here. Indeed, to the contrary, (1) Union Parish prepared and filed its own Form 470; (2) the Form 470s were signed by the superintendent; (3) Union Parish had control of its own bidding process; (4) Mr. Snell was walled off from the process; and (5) a service provider was not listed as the contact person on the Form 470.

Clearly, at the time the Union Parish E-rate applications were filed, there was no available information regarding potential conflicts of interest that could arise from passive interests in service providers held by employees of schools. Union Parish and SEND took steps to ensure, and then conducted, a full and fair competitive bidding process, complied with all known rules and, in the absence of federal rules, complied (as required) with local and state procurement laws, including seeking and receiving a determination from the State of Louisiana that there was no conflict of interest.

IV. Consistent With Commission Precedent in Other Universal Service Cases, the Bureau Should Have Granted Union Parish and SEND a Waiver.

Even if the Bureau were to find that the bare fact of a school employee holding a passive interest in a service provider constitutes a violation of the competitive bidding rules, that decision should be waived with respect to Union Parish and SEND because: (1) Union Parish conducted a full and fair competitive bidding process; (2) Union Parish and SEND took steps to confirm compliance; and (3) Commission precedent provided no notice that the facts of this case could constitute a violation of the Commission’s rules.

As already discussed, Union Parish conducted a full and fair competitive bidding process in 1999-2001. Union Parish proactively sought and received a determination from the State of Louisiana that Mr. Snell’s passive interest in SEND did not pose a conflict of interest. The school system, out of an abundance of caution, took additional steps to wall Mr. Snell off from the competitive bidding process. And SEND was only selected to provide services to Union Parish for which it was the lowest bidder. There was no waste, fraud or abuse present in this case. The letter and spirit of the e-rate rules were fully observed.

¹² See *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.*, CC Docket No. 96-45, Order, 16 FCC Rcd 4028 (2000).

Federal Communications Commission

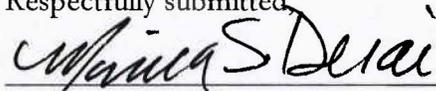
December 19, 2012

Page 6

Moreover, a waiver is warranted where Commission precedent does not provide applicants notice that the facts of their case could constitute a violation of the Commission's rules. Indeed, in its 2003 *Ysleta Order*, the Commission granted a waiver "in light of the uncertain application" of E-rate rules to the "novel situation presented."¹³ The same situation is present here.

Based on the foregoing facts and clear Commission precedent, the undersigned emphasized that the Commission should either overturn its previous two Union Parish decisions based on factual errors, or at a minimum, grant Union Parish and SEND a waiver.

Respectfully submitted,



Jennifer L. Richter and Monica S. Desai

Patton Boggs, LLP

2550 M Street, NW

Washington, DC 20037

(202) 457-5666

Counsel to SEND Technologies, LLC

cc:

Lisa Hone

Regina Brown

Erica Myers

Marcus Maher

¹³ 2003 *Ysleta Order*, ¶ 72; see also *Colegio Nuestra Order*, ¶ 8.