

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**ORDER**

**Adopted: March 13, 2007**

**Released: March 13, 2007**

By the Acting Deputy Chief, Wireline Competition Bureau:

1. The Wireline Competition Bureau has under consideration two Requests for Review filed by Send Technologies L.L.C. (Send Technologies) relating to services provided by Send Technologies to Union Parish School Board, Farmerville, Louisiana (Union Parish).<sup>1</sup> Send Technologies seeks review of decisions by USAC denying Send Technologies' appeal of commitment adjustment recovery actions.<sup>2</sup> Consistent with precedent, we deny the Requests for Review and direct USAC to continue the commitment adjustment recovery actions regarding this matter. To the extent that Send Technologies requests a waiver of the Commission's rules, we deny that request as well.

2. Under the schools and libraries universal service support mechanism (also known as the E-rate program), eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.<sup>3</sup> The Commission's rules provide that, with one limited exception for existing, binding contracts, an eligible school, library, or consortium that includes eligible schools or libraries must seek competitive

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<sup>1</sup>See Letter from Jennifer L. Richter, on behalf of Send Technologies, L.L.C., to Federal Communications Commission, filed January 19, 2004; Letter from Jennifer L. Richter, on behalf of Send Technologies, L.L.C., to Federal Communications Commission, filed March 22, 2004 (Requests for Review). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company (USAC or Administrator) may seek review from the Commission. 47 C.F.R. § 54.719(c).

<sup>2</sup>See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Mark Stevenson, Send Technologies, L.L.C., dated October 17, 2003; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Mark Stevenson, Send Technologies, L.L.C., dated January 20, 2004; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Steven J. Katz, on behalf of Union Parish School Board, dated January 20, 2004 (collectively, Administrator's Decisions on Appeal).

<sup>3</sup>47 C.F.R. §§ 54.502, 54.503.

bids for all services eligible for support.<sup>4</sup> In accordance with the Commission's rules, an applicant must file with USAC, for posting to its website, an FCC Form 470 requesting services.<sup>5</sup> The applicant must wait 28 days before entering into an agreement with a service provider for the requested services and submitting an FCC Form 471 requesting support for the services ordered by the applicant.<sup>6</sup>

3. The FCC Form 470 describes the applicant's planned service requirements, as well as other information regarding the applicant and its competitive bidding process that may be relevant to the preparation of bids.<sup>7</sup> Applicants are required, in Item 6 of the FCC Form 470, to name a person that prospective service providers may contact for additional information (Item 6 contact person) about the application.<sup>8</sup> In addition, in Item 11 of the FCC Form 470, applicants may, at their option, name another contact person (Item 11 contact) "who can provide additional technical details and other information about [the applicant's] services to vendors seeking to bid."<sup>9</sup> This need not be the same person listed as the Item 6 contact person for the entire application. The Commission has also concluded that, to the extent a service provider employee is listed as the contact person on the FCC Form 470 that initiates a competitive bidding process in which that service provider participates, such forms are defective and violate the Commission's competitive bidding requirements.<sup>10</sup>

4. USAC's decisions at issue in the Requests for Review involve commitment adjustment recovery actions to pursue monies previously disbursed to Send Technologies and Union Parish.<sup>11</sup> The commitment adjustment recovery actions were commenced as a result of an Investigative Audit Report issued by the Office of the Legislative Auditor, State of Louisiana. The Investigative Audit Report found that a conflict of interest existed between Send Technologies and Union Parish.<sup>12</sup> USAC determined that

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<sup>4</sup>47 C.F.R. §§ 54.504, 54.511(c).

<sup>5</sup>See Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470).

<sup>6</sup>47 C.F.R. § 54.504(c). See also Schools and Libraries Universal Service, Service Ordered and Certification Form, OMB 3060-0806 (October 1999) (FCC Form 471).

<sup>7</sup>47 C.F.R. § 54.504(b).

<sup>8</sup>FCC Form 470, Item 6; Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (Form 470 Instructions), at 7.

<sup>9</sup>FCC Form 470, Item 11; Form 470 Instructions at 10.

<sup>10</sup>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.*, SPIN-143006149, CC Docket No. 96-45, 16 FCC Rcd 4028, at 4032-4033, paras. 9-10 (2000) (*Mastermind Order*).

<sup>11</sup>See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Mark Stevenson, Send Technologies, L.L.C., dated January 31, 2003; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Mark Stevenson, Send Technologies, L.L.C., dated October 17, 2003 (Commitment Adjustment Letters).

<sup>12</sup>See Investigative Audit Report, Office of the Legislative Auditor, State of Louisiana, dated October 2, 2002 (Investigative Audit Report). The audit report states that the Union Parish School District Technology Coordinator used his position to secure contracts totaling \$473,260 to his private company, thus causing the school board to enter into contracts with a company partly owned by its employees. In addition, the audit report finds the following: 1) that the competitive bidding process was flawed; 2) contracts were entered into without the approval of the school board members; 3) the school board paid for services that were either not allowed or not provided; 4) payments were issued to Send Technologies in violation of the state constitution; and 5) the school board paid for enhanced services that were never provided. Union Parish denied wrongdoing regarding all of the allegations in the audit report.

this conflict of interest violated the Commission's competitive bidding requirements.<sup>13</sup> Specifically, the designated contact person for Union Parish, a Union Parish employee, owned a 15 percent interest in Send Technologies, the service provider with the winning bid to provide internet access and internal connections for Union Parish.<sup>14</sup> In light of the Commission's decision in the *Mastermind Order*,<sup>15</sup> USAC deemed this relationship to be a conflict of interest and a violation of the Commission's competitive bidding rules.<sup>16</sup>

5. Send Technologies appealed to USAC, stating that under Louisiana law, a 15 percent interest is deemed to be a minority interest that does not rise to the 25 percent threshold for an attributable interest, and therefore does not constitute a conflict of interest.<sup>17</sup> In addition, Send Technologies argues that the contact person sought an opinion from Union Parish's attorney to clarify the issue.<sup>18</sup> USAC rejected Send Technologies' arguments, stating that the authorized contact person listed on the FCC Form 470 cannot be associated in any way with the service provider because it violates the intent of the bidding process regarding fair and open competition.<sup>19</sup> USAC did not make a finding as to whether Send Technologies violated Louisiana procurement law. Send Technologies then filed the instant Requests for Review, stating that the Commission consider the following issues: 1) whether the appointment of a limited partner in Send Technologies as the contact person for Union Parish constituted a conflict of interest, despite no violation of Louisiana state law; 2) whether the letter, spirit or intent of the Commission's competitive bidding requirements were violated; 3) whether USAC exceeded its authority when it applied the *Mastermind Order* retroactively to the instant matter; and 4) whether the Commission should grant a waiver request if it finds that Union Parish and Send Technologies violated the Commission's competitive bidding requirements.<sup>20</sup> After review of the record, we find that Send Technologies violated the Commission's competitive bidding requirements.

6. First, we find that under Commission precedent, a prohibited conflict of interest existed between Union Parish and Send Technologies.<sup>21</sup> The contact person identified on the FCC Form 470 for Union Parish is a Union Parish employee and an owner of a 15 percent interest in the service provider. The applicant did not replace the contact person or contact USAC to determine whether this relationship would impair its ability to be reimbursed from the schools and libraries fund. As noted above, in the *Mastermind Order*, the Commission held that, where an FCC Form 470 lists a contact person who is an employee or representative of a service provider who participates in the competitive bidding process, the

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<sup>13</sup>See Commitment Adjustment Letters at 4.

<sup>14</sup> See Investigative Audit Report at 1-2.

<sup>15</sup>See *Mastermind Order*, 16 FCC Rcd at 4033, para. 11.

<sup>16</sup>See Administrator's Decisions on Appeal at 2.

<sup>17</sup>See Letters from Mark Stevenson, Send Technologies, L.L.C., to Schools and Libraries Division, Universal Service Administrative Company, dated April 1, 2003 (Appeal to USAC).

<sup>18</sup>See Appeal to USAC at 4.

<sup>19</sup>See Administrator's Decisions on Appeal, at 2-3.

<sup>20</sup>See Request for Review, at iii. Send Technologies also argues that USAC exceeded its authority when it applied the federal procurement rules in Part 48 of the Code of Federal Regulation to the instant matter. We refrain from addressing the merits of this argument because we otherwise find that the Commission's competitive bidding requirements were violated.

<sup>21</sup>*Mastermind Order*, 16 FCC Rcd at 4033, para. 11.

FCC Form 470 is defective.<sup>22</sup> The Commission observed that the contact person influences an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested.<sup>23</sup> On this basis, the Commission found that when an applicant delegates that power to an entity that also participates in the bidding process as a prospective service provider, the applicant impairs its ability to hold an open and fair competitive bidding process.<sup>24</sup> The *Mastermind Order* determined that a contact person that has a relationship with a prospective service provider may influence the competitive bidding process in two ways; either other prospective bidders may decide not to bid, or the contact person may not provide information to other bidders of the same type and quality that the contact person retains for its own use as a bidder.<sup>25</sup> Despite Send Technologies' assertion that the Union Parish employee was isolated from the bidding process, the Investigative Audit Report reveals that the contact person did, in fact, participate in the contract process by preparing the request for bid, and preparing an analysis of bids 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.<sup>26</sup> In addition, that the competing bidder was not given ample time to prepare questions and received no information regarding its inquiries.<sup>27</sup> Thus, we find that the relationship between Union Parish's contact person and the service provider, Send Technologies, involved a conflict of interest, and in fact, impeded fair and open competition, as prohibited by the Commission's precedent.<sup>28</sup>

7. We also find that the competitive bidding process in the instant matter violated the letter, spirit and intent of the Commission's competitive bidding requirements. Although compliance with any applicable state and local procurement laws is one of the minimum requirements for selecting services under the E-rate program, there are also certain specific Commission requirements with which all E-rate applicants must comply. Section 54.504(a) of the Commission's rules specifically states that the Commission's "competitive bid requirements apply in addition to state and local competitive bidding requirements."<sup>29</sup> While Send Technologies points out that the Investigative Audit Report determined that the Union Parish employee's 15 percent interest in Send Technologies did not by itself violate Louisiana state law, Send Technologies fails to make mention of other relevant findings from the Investigative Audit Report.<sup>30</sup> Specifically, the audit report finds the following: 1) that the competitive bidding process was flawed; 2) contracts were entered into without the approval of the school board members; 3) the school board paid for services that were either not allowed or not provided; 4) payments were issued to Send Technologies in violation of the state constitution; and 5) the school board paid for enhanced services that were never provided.<sup>31</sup> In addition, as discussed above, it appears that other potential

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<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*See id.*

<sup>26</sup>*See* Investigative Audit Report at 9-12.

<sup>27</sup>*Id.*

<sup>28</sup>*See Mastermind Order*, 16 FCC Rcd at 4033, para. 11.

<sup>29</sup>47 C.F.R. § 54.504(a).

<sup>30</sup>*See* Request for Review at 2-4.

<sup>31</sup>*See* Investigative Audit Report at 2-5.

bidders did not receive from the contact person information of the same type and quality as that afforded to SEND.<sup>32</sup> Thus, based on our review of the record, we agree with USAC's determination that Send Technologies violated the Commission's rules regarding the competitive bidding process.<sup>33</sup>

8. Further, we find that USAC did not exceed its authority when it acted to recover monies erroneously disbursed to Send Technologies in contravention of the Commission's competitive bidding rules. The Commission has established that the Commission is required to seek repayment of monies erroneously disbursed due to a violation of Commission rules.<sup>34</sup> Therefore, USAC, as the administrator of the schools and libraries support mechanism, is required to commence recovery actions when it is made aware of a violation of the Commission's rules.<sup>35</sup> In the instant matter, USAC was made aware of a violation of the Commission's rules by the Investigative Audit Report dated October 2002, and acted appropriately pursuant to the audit report's findings. As such, Send Technologies' argument that the 2000 *Mastermind Order* is being applied retroactively to this case is unavailing.<sup>36</sup> We find that USAC correctly applied the Commission's competitive bidding requirements to the instant matter, and recovery of funds is appropriate under the Commission's commitment adjustment recovery orders.<sup>37</sup>

9. To the extent that Send Technologies additionally asks the Commission to waive our rules in this instance, we deny its request.<sup>38</sup> Waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than strict adherence to the general rule.<sup>39</sup> SEND Technologies has failed to demonstrate special circumstances to warrant waiver. Further, a waiver allowing Send Technologies to violate the Commission's competitive bidding requirements would not serve the public interest.

10. For the foregoing reasons, we deny the Request for Review and remand the relevant applications to USAC to continue the commitment adjustment recovery actions.

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<sup>32</sup>See Investigative Audit Report at 10-15.

<sup>33</sup>See *Mastermind Order*, 16 FCC Rcd at 4032, para. 9. We rely here on a violation of our own rules, and make no finding whether Louisiana law was violated.

<sup>34</sup>See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd at 7197, para. 7 (1999) (*Commitment Adjustment Order*).

<sup>35</sup>See *Commitment Adjustment Order*, 15 FCC Rcd at 7200, para. 8 (the Commission determined that Congress required the Commission to recover monies erroneously disbursed under the E-rate program). See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, 15 FCC Rcd 22975 (2001) (*Commitment Adjustment Implementation Order*) (the Commission established procedures for implementing commitment adjustment recovery actions).

<sup>36</sup>See *Mastermind Order*, 16 FCC Rcd at 4032-4033, para. 10 (concluding that a competitive bidding violation occurred despite the lack of a specific rule addressing the facts at issue).

<sup>37</sup>*Id.*

<sup>38</sup>47 C.F.R. § 54.720(b).

<sup>39</sup>47 C.F.R. § 1.3. See *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

11. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Requests for Review filed by Send Technologies, L.L.C., on January 19, 2004 and March 22, 2004 ARE DENIED and the underlying applications ARE REMANDED to USAC for further processing consistent with this Order.

12. ACCORDINGLY, IT IS ORDERED, pursuant to authority contained in sections 1- 4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 1.3, 54.722(a) and pursuant to the authority delegated in sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Requests for Waivers filed by Send Technologies, L.L.C. ARE DENIED and the underlying applications ARE REMANDED to USAC for further action consistent with this Order.

13. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 1.102 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Renée R. Crittendon  
Acting Deputy Chief  
Wireline Competition Bureau