

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Requests for Review of Decisions of the)
Universal Service Administrator by)
Caldwell Parish School District, et al.) File Nos. SLD-289493, et al.
Columbia, Louisiana)
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: February 22, 2008

Released: February 22, 2008

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant in part and deny in part two Requests for Review filed by SEND Technologies, L.L.C./Nexus Systems, Inc. (SEND) seeking review of decisions by the Universal Service Administrative Company (USAC) denying one school and eight school districts discounted services for Funding Years 2002-2004 under the schools and libraries universal service support mechanism. The decisions at issue involve the denial of funding by USAC on the ground that the underlying applications violated the Commission’s competitive bidding rules. For the reasons discussed below, we grant the appeals related to the following eight applicants: Caldwell Parish School District (Caldwell), Franklin Academy (Franklin), Lincoln Parish School District (Lincoln), Madison Parish School District (Madison), Morehouse Parish School District (Morehouse), Richland Parish School District (Richland), Tensas

1 The list of applicants is attached in an Appendix to this Order. In this Order, we use the term “appeals” to generally refer to requests for review of decisions by USAC. Section 54.719(c) of the Commission’s rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 See 47 C.F.R. §§ 54.504 (a)-(c). See Consolidated Request for Review of the Decisions of the Universal Service Administrator, Franklin Academy, Jackson Parish School District, Morehouse Parish School District, Richland Parish School District, and Webster Parish School District (filed Nov. 20, 2006) (November 2006 Appeal); Supplement to Consolidated Request for Review of the Decisions of the Universal Service Administrator, Franklin Academy, Jackson Parish School District, Morehouse Parish School District, Richland Parish School District, and Webster Parish School District (filed Mar. 14, 2007) (March 2007 Supplement), Consolidated Request for Review of the Decisions of the Universal Service Administrator, Caldwell Parish School District, Lincoln Parish School District, Tensas Parish School District, and Webster Parish School District (filed Apr. 9, 2007) (April 2007 Appeal) (collectively, SEND Consolidated Appeals). SEND also seeks a waiver of the Commission’s competitive bidding rules on behalf of the applicants at issue. See April 2007 Appeal at 11-12. Because we grant the appeals related to eight of the applicants, the waiver request only pertains to the remaining applicant, Jackson. For the reasons discussed below, we do not find good cause to grant a waiver of our competitive bidding rules in this instance. 47 C.F.R. §1.3; see infra paras. 15-18.

Parish School District (Tensas), and Webster Parish School District (Webster).³ We find that USAC improperly denied the requests for funding without sufficiently examining whether the Commission's rules were violated due to improper service provider involvement in the applicants' competitive bidding processes. Therefore, we remand the underlying applications associated with these appeals to USAC for further action consistent with this Order. We deny the appeal related to one applicant, Jackson Parish School District (Jackson), because the record shows that Jackson's competitive bidding process violated the Commission's competitive bidding rules.⁴

2. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in the Appendix and issue an award or denial based on a complete review and analysis no later than 60 days from release of this Order.⁵ In addition, we direct USAC to conduct further investigation and analysis prior to denying funding for suspected competitive bidding violations of the type addressed herein. In particular, during the initial and selective review processes, we direct USAC to be more specific when seeking information from and making document requests from applicants and to explain the consequences of not providing the requested documentation or information when it makes the requests.

II. BACKGROUND

3. 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.⁶ The Commission's rules provide that, with one limited exception for existing, binding contracts, an eligible school, library, or consortium that includes eligible schools and libraries must seek competitive bids for all services eligible for support.⁷

4. In accordance with the Commission's rules, each applicant must submit for posting on USAC's website an FCC Form 470 requesting discounts for E-rate eligible services, such as tariffed telecommunications services, month-to-month Internet access, or any services for which the applicant is seeking a new contract.⁸ The applicant must describe the desired services with sufficient specificity to enable potential service providers to submit bids for E-rate eligible services.⁹ The applicant must provide this description on its FCC Form 470 or indicate on the form that it has a Request for Proposal (RFP)

³ We estimate that the appeals granted in this Order involve application for approximately \$1,397,348.88 in funding. We note that USAC has already reserved sufficient funds to address outstanding appeals. *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2008 (Feb.1, 2008). Thus, we determine that the action we take today should have minimal impact on the Universal Service Fund as a whole.

⁴ *See* November 2006 Appeal; March 2007 Supplement.

⁵ In performing a complete review and analysis of each underlying application, USAC shall either grant the underlying application before it, or, if denying the application, provide the applicant with any and all grounds for denial.

⁶ 47 C.F.R. §§ 54.501-54.503.

⁷ 47 C.F.R. §§ 54.504, 54.511(c).

⁸ 47 C.F.R. § 54.504(b).

⁹ *See Federal-State Joint Board on Universal Service*, CC Docket No.96-45, Report and Order, 12 FCC Rcd 8776, 9077-80, para. 575 (1997) (*Universal Service First Report and Order*) (subsequent history omitted).

available providing detail about the requested services.¹⁰ The RFP must be available to all potential bidders for the duration of the bidding process.¹¹

5. After the FCC Form 470 is posted on USAC's website for all potential competing service providers to review, the applicant must wait at least 28 days before entering an agreement for services.¹² Prior to entering into an agreement with a service provider, the Commission's rules require that the applicant carefully consider all bids submitted for provision of the requested services.¹³ The Commission concluded that price should be the primary factor in selecting a bid, but noted several additional factors that also should be considered by the applicant in determining which service provider meets their needs "most effectively and efficiently."¹⁴ After entering into a contract for eligible services, the applicant files the FCC Form 471 to request discounts on the eligible services to be provided.¹⁵ USAC then issues funding commitment decision letters approving or denying the requests for discounted services.

6. Among other things, USAC is responsible for administering the application process for the E-rate program.¹⁶ Pursuant to this authority, USAC developed a procedure to detect applications that may be in violation of the Commission's competitive bidding rules by searching for similar language used in FCC Forms 470 filed by other schools, libraries, and consortia that selected the same service provider through their competitive bidding processes.¹⁷ This procedure, described by USAC as "pattern analysis," contemplates the possibility that a group of applicants, all with the same service provider, violated the competitive bidding rules.

7. In the *Academy of Careers Order*, the Commission determined that USAC improperly denied requests for funding based on its "pattern analysis" procedure when USAC stopped its review after identifying a pattern in certain applications without sufficiently examining whether the Commission's rules were actually violated due to improper third-party participation in the competitive bidding process,

¹⁰ See, e.g., Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (May 2003) (FCC Form 470).

¹¹ *Id.* Applicants are also required on the FCC Form 470 to name a person whom prospective service providers may contact for additional information about the application and RFP. See FCC Form 470, Item 6 and Item 11, FCC Form 470 Instructions at 7, 10. In the *MasterMind Order*, the Commission concluded that an applicant would be in violation of its competitive bidding rules "when a service provider that is listed as the contact person on the FCC Form 470 also participates in the competitive bidding process as a bidder." *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, 4033, para. 10 (2000) (*MasterMind Order*).

¹² 47 C.F.R. §§ 54.504(b), (c); see e.g., Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 471).

¹³ 47 C.F.R. § 54.511(a).

¹⁴ *Universal Service First Report and Order*, 12 FCC Rcd at 9029, para. 481. Additional factors that an applicant should consider when permitted by state and local procurement rules include "prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives." *Id.*

¹⁵ See FCC Form 471.

¹⁶ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058, 25064-65, para. 12 (1998).

¹⁷ 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*, CC Docket No. 02-6, Order, 21 FCC Rcd 5348, 5349, para. 3 (*Academy of Careers Order*).

and granted the appeals at issue.¹⁸ Additionally, the Commission required USAC to conduct further investigation and analysis prior to denying funding where USAC suspects that a service provider has improperly participated in an applicant's bidding process due to the results of its pattern analysis procedure.¹⁹ In response to the direction given by the Commission in the *Academy of Careers Order*, USAC began to issue Pattern Analysis Information Request (PAIR) letters seeking additional information from applicants where USAC suspects that the service provider has improperly participated in the competitive bidding process.²⁰

8. With regard to the applications at issue in this Order, USAC denied funding on the grounds that the applicants' responses to the questions presented in the PAIR letters failed to demonstrate that the service provider, SEND, did not participate in the competitive bidding process in violation of the Commission's competitive bidding rules.²¹ SEND seeks review of the decisions by USAC and contends that the assistance it provided to the applicants does not constitute improper service provider involvement in the competitive bidding process and does not violate the Commission's competitive bidding rules.²²

III. DISCUSSION

9. Based on the record before us, we grant the appeals related to eight applications – Caldwell, Franklin, Lincoln, Madison, Morehouse, Richland, Tensas, and Webster. We deny the appeal related to Jackson.

10. *Applications Filed by Caldwell, Franklin, Lincoln, Madison, Morehouse, Richland, Tensas, and Webster.* We find that USAC improperly denied these eight requests for funding without sufficiently examining whether the Commission's rules actually were violated due to improper service provider involvement in the applicants' competitive bidding processes. USAC denied funding to these eight applicants on the grounds that the applicants' responses to the questions presented in the PAIR letters failed to demonstrate that the service provider, SEND, did not participate in the competitive bidding process in violation of the Commission's competitive bidding rules.²³ Specifically, USAC indicated that the applicants did not explain why the section regarding the "Summary of Needs or Services Requested" on their FCC Forms 470 was similar to those of other applicants at issue here who also selected SEND as their service provider.²⁴ In explaining the funding denials, USAC stated that "[s]ince you have not explained why the documents are similar, and since you allowed Send Technologies to mail in your FCC Form 470 certification page during the competitive bidding process, you have not demonstrated that you did not allow your service provider to participate in the competitive bidding

¹⁸ *Id.* at 5350-51, para. 6.

¹⁹ *Id.* at 5351, para. 7.

²⁰ *See e.g.*, Letter from USAC, Schools and Libraries Division, to Patsy Whitlow, Webster Parish School District (dated June 6, 2006) (USAC June 6 Webster Letter); Letter from USAC, Schools and Libraries Division, to Regena Green, Richland Parish School District (dated June 5, 2006) (USAC June 5 Richland Letter).

²¹ *See e.g.*, Further Explanation of Administrator's Funding Decision Letter from USAC, Schools and Libraries Division, to Tim Richmond and Cindy Mohler, Caldwell Parish School District (dated Feb. 8, 2007); Further Explanation of Administrator's Funding Decision Letter from USAC, Schools and Libraries Division, to Patsy Whitlow, Webster Parish School District (dated Feb. 8, 2007).

²² *See generally* SEND Consolidated Appeals.

²³ *See infra* n.27.

²⁴ *See e.g.*, Letter from USAC, Schools and Libraries Division, to Debbie Sandidge/Wanda Mitchell, Lincoln Parish School District (dated Feb. 8, 2007); Letter from USAC, Schools and Libraries Division, to Ann Thomas, Madison Parish School District (dated Feb. 8, 2007) (USAC February 8 Madison Letter).

process.”²⁵ Additionally, USAC stated that “since you have not explained why your documents are similar, containing the same entries as other applications that have been deemed to violate program rules, you have not demonstrated that you did not allow your service provider to participate in the competitive bidding process.”²⁶

11. We conclude that any perceived similarities on the applicants’ FCC Forms 470 may not have been due to improper service provider involvement. Instead, the applicants’ failure to explain any similarities was the result of confusion regarding the information sought from the PAIR letters, rather than an admission that a competitive bidding violation occurred. Although each PAIR letter stated in the introductory paragraph that the applicant’s FCC Form 470 had similarities to the FCC Forms 470 of other applicants who also chose SEND as their service provider, the questions themselves did not ask the applicants to explain such similarities.²⁷ Instead, the questions asked for information about the person who filled out and submitted the FCC Form 470, the location from which the form was filled out and submitted, any service provider employee who assisted in the completion and/or posting of the FCC Form 470, the process used to determine the types of services for which applicant sought bids, and the individual or organization who participated in determining the services for which the applicant sought bids.²⁸ Although each applicant answered the PAIR letter questions, only one applicant, Richland, addressed the issue of alleged similarities between its FCC Form 470 and other FCC Forms 470.²⁹ Specifically, Richland stated that any similarities between its FCC Form 470 language and that of another district’s “was more likely the result of conversations between district personnel than a service provider.”³⁰ SEND also states in its appeal that any perceived similarities might have been due to the use of a service description template that was developed after training sessions and workshops held by USAC and various vendors.³¹ Thus, had USAC in its PAIR letters been more specific in its requests for information regarding the suspected competitive bidding violations, the applicants would have been able to provide the specific information and/or documentation necessary to demonstrate that they did not violate the Commission’s competitive bidding rules.

12. Additionally, as indicated above, USAC also based its funding denials on the fact that all of the applicants gave their FCC Forms 470 certifications to Mark Stevenson, an employee of SEND, to mail to USAC using SEND’s Federal Express account.³² Thus, in addition to the questions about the similarities of their FCC Forms 470, the PAIR letters also asked each applicant to explain why the certification of the FCC Form 470 was mailed in by Mark Stevenson of SEND and to describe the role Mr. Stevenson played in the FCC Form 470 process.³³ Franklin, Madison, Morehouse, Richland, Tensas,

²⁵ See e.g., Letter from USAC, Schools and Libraries Division, to Scott Lautigar, Morehouse Parish School District (undated) (USAC Undated Morehouse Letter); Letter from USAC, Schools and Libraries Division, to Patsy Whitlow, Webster Parish School District (undated) (USAC Undated Webster Letter).

²⁶ See e.g., Letter from USAC, Schools and Libraries Division, to Tim Richmond/Cindy Mohler, Caldwell Parish School District (dated Feb. 8, 2007); USAC February 8 Madison Letter.

²⁷ See e.g., Letter from USAC, Schools and Libraries Division, to Leigh Jonson, Franklin Academy (dated June 6, 2006); USAC June 5 Richland Letter.

²⁸ See e.g., USAC June 6 Webster Letter; Letter from USAC, Schools and Libraries Division, to Scott Lautigar, Morehouse Parish School District (dated June 5, 2006) (USAC June 5 Morehouse Letter).

²⁹ See Letter from Regena Green, Richland Parish School District, to Michael Deusinger, USAC (dated June 20, 2006) (Richland June 20 Letter).

³⁰ See *id.* at 2.

³¹ See November 2006 Appeal at 16.

³² See e.g., USAC Undated Morehouse Letter; USAC Undated Webster Letter; Letter from USAC, Schools and Libraries Division, to Regena Green, Richland Parish School District (undated) (USAC Undated Richland Letter).

³³ See e.g., USAC June 5 Morehouse Letter.

and Webster responded that Mark Stevenson provided FedEx shipping service as a means to track delivery and that he played no other role with respect to their FCC Form 470s.³⁴ Caldwell stated that the school employee who was responsible for mailing in the certification did not recall receiving mailing assistance from Mark Stevenson.³⁵ Lincoln stated that it could not find any documentation to support the mailing location of the certification, but that Mark Stevenson played no direct role in the FCC Form 470 process.³⁶ Nonetheless, USAC determined that this action, in conjunction with unexplained similarities in the FCC Forms 470, constituted improper service provider involvement and violated the Commission's competitive bidding rules.³⁷ We find that SEND's provision of Federal Express mailing service for the certifications does not, by itself, rise to the level of a violation of the competitive bidding process. Although we do not condone such actions, we cannot conclude under these circumstances that such assistance alone interfered with the competitive bidding process.

13. More importantly, we find that the applicants provided evidence that there was no improper service provider involvement. Each applicant asserted by sworn statement and under penalty of perjury that SEND did not participate in the competitive bidding process.³⁸ In response to the PAIR letters, these eight applicants each identified school personnel as the persons involved with filling out and submitting the FCC Forms 470 and that all FCC Forms 470 were filed from the applicant's premises.³⁹ Additionally, in their responses to the PAIR letters, each applicant stated that no one outside of its school district assisted with determining the types of services for which it would seek bids.⁴⁰ In fact, each applicant described the decision-making structure employed by the school and identified the school board or school staff involved in making the final determination of the services requested and the vendor selected.⁴¹ SEND argues that the responses demonstrate that it did not improperly participate in the competitive bidding process and the Commission's competitive bidding rules were not violated.⁴² We agree and find that each of the applicants' responses identifies school personnel as the parties responsible for filling out and submitting the FCC Forms 470 and that a service provider was not involved with these tasks.

³⁴ See Letter from Leigh Jonson, Franklin Academy, to USAC, Schools and Libraries Division (dated June 7, 2006); Letter from Ann Thomas, Madison Parish School District, to USAC, Schools and Libraries Division (dated Dec. 4, 2006); Letter from Scott Lautigar, Morehouse Parish School District, to USAC, Schools and Libraries Division (dated June 16, 2006); Letter from Regena Green, Richland Parish School District, to USAC, Schools and Libraries Division (dated June 20, 2006); Letter from William Fletcher, Tensas Parish School District, to USAC, Schools and Libraries Division (dated Nov. 8, 2006); Letter from Patsy Whitlow, Webster Parish School District, to USAC, Schools and Libraries Division (dated June 19, 2006).

³⁵ See Letter from John Sartin, Caldwell Parish School District, to Michael Deusinger, USAC (dated Aug. 8, 2006).

³⁶ See Letter from Wanda Mitchell, Lincoln Parish School District, to Michael Deusinger, USAC (dated Dec. 7, 2006) (Lincoln December 7 Letter).

³⁷ See e.g., USAC Undated Morehouse Letter; USAC Undated Webster Letter; USAC Undated Richland Letter.

³⁸ See e.g., Letter from Patsy Whitlow, Webster Parish School District, to Michael Deusinger, USAC at 4 (dated June 19, 2006) (Webster June 19 Letter); Letter from John Sartin, Caldwell Parish School District, to Michael Deusinger, USAC at 5 (dated Aug. 21, 2006) (Caldwell August 21 Letter).

³⁹ See e.g., Webster June 19 Letter; Caldwell August 21 Letter.

⁴⁰ See e.g., Richland June 20 Letter; Lincoln December 7 Letter.

⁴¹ See e.g., Caldwell August 21 Letter; Letter from Leigh Jonson, Franklin Academy, to Michael Deusinger, USAC at 1-2 (dated June 7, 2006); Lincoln December 7 Letter; Letter from Ann Thomas, Madison Parish School District, to Michael Deusinger, USAC at 2-3 (dated Nov. 7, 2006); Letter from Scott Lautigar, Morehouse Parish School District, to Michael Deusinger, USAC at 2 (dated June 16, 2006); Richland June 20 Letter; Webster June 19 Letter.

⁴² November 2006 Appeal at 9-11. See 47 C.F.R. §§ 54.504 (a)-(c).

14. Therefore, based on the record before us, we find that these eight applicants and their service provider, SEND, did not violate the Commission's competitive bidding rules when completing and submitting their FCC Forms 470. Accordingly, we grant the appeals related to the applications filed by Caldwell, Franklin, Lincoln, Madison, Morehouse, Richland, Tensas, and Webster, and remand the underlying applications to USAC for further action consistent with this Order. We direct USAC to complete its review of these applications and issue an award or denial based on a complete review and analysis no later than 60 days from release of this Order.⁴³ In remanding these applications to USAC, we make no finding as to the ultimate eligibility of the requested services.⁴⁴

15. *Application Filed by Jackson.* Based on the record before us, we find that Jackson's competitive bidding process violated the Commission's competitive bidding rules.⁴⁵ In response to USAC's question about whether any service provider played a role in its competitive bidding process, Jackson stated that Mark Stevenson, a SEND employee: (1) advised Jackson in determining the types of services it needed and for which it would seek bids; (2) assisted Jackson in filling out the FCC Form 470; and (3) submitted the FCC Form 470 from SEND's office.⁴⁶ SEND, however, argues that it complied with program guidelines provided by USAC and the Commission's rules.⁴⁷ Specifically, SEND asserts that its actions reflect the type of vendor-neutral assistance that is permitted according to USAC's website and that the actions of Jackson and SEND are in compliance with the Commission's rules and orders, including the Commission's *MasterMind Order*.⁴⁸

16. We disagree with SEND that its actions reflect permitted vendor-neutral assistance. The Commission's rules require applicants to comply with its competitive bidding rules.⁴⁹ USAC provides guidelines regarding E-rate matters, including competitive bidding, on its website in the form of written training presentations.⁵⁰ Specifically, the 2001 training presentation stated that it was permissible for service providers to assist in developing RFPs under certain conditions.⁵¹ One of these conditions was that the applicant could not reveal information to the service provider that the applicant did not share with all prospective bidders.⁵² In addition, the training presentation indicated that service providers were prohibited from filling out E-rate program forms for applicants that require applicant certifications, such

⁴³ In performing a complete review and analysis of each underlying application, USAC shall either grant the underlying application before it, or, if denying the application, provide the applicant with any and all grounds for denial.

⁴⁴ Nothing in this order is intended to authorize or require payment of any claim that has previously been released by a service provider or applicant, including in a civil settlement or criminal plea agreement with the United States.

⁴⁵ See 47 C.F.R. §§ 54.504 (a)-(c).

⁴⁶ See Letter from Mike Staples, Jackson Parish School Board, to Michael Deusinger, USAC (dated June 20, 2006) (Jackson PAIR Response).

⁴⁷ See November 2006 Appeal at 12-14; March 2007 Supplement at 5-6, 10-11; April 2007 Appeal at 7.

⁴⁸ See March 2007 Supplement at 11-12, 14-19 (citing *MasterMind Order*, 16 FCC Rcd at 4030, para. 4).

⁴⁹ 47 C.F.R. §§ 54.504, 54.511.

⁵⁰ See e.g., USAC website, 2001 Training Materials (Enforcement Review), <http://www.usac.org/sl/about/training-presentations/2001-presentations.aspx> (retrieved Feb. 11, 2008). The relevant training presentation is from 2001, because Jackson signed its multi-year contract with SEND in Funding Year 2002. See Letter from Mark Stevenson, SEND Technologies to Talton Barron, Jackson Parish School District (dated Jan. 3, 2002).

⁵¹ See USAC website, 2001 Train the Trainer Presentations (Enforcement Review), <http://www.usac.org/sl/about/training-presentations/2001-presentations.aspx> at 30-31 (retrieved Feb. 11, 2008).

⁵² *Id.*

as the FCC Form 470.⁵³ Finally, the training presentation stated that the FCC Form 470 must be completed by the entity that will negotiate with prospective bidders.⁵⁴

17. In this instance, the actions of Jackson and SEND violated these conditions. First, Jackson admitted that Mark Stevenson from SEND helped Jackson to determine what types of services to seek.⁵⁵ In so doing, Jackson necessarily revealed information to SEND that it did not reveal to any other prospective bidder. Second, Jackson also admitted that Mark Stevenson assisted in filling out the FCC Form 470 and submitted the form from SEND's office.⁵⁶ This was a clear violation of the prohibition against service providers filling out forms that require an applicant's certification, as well as a violation of the mandate that the FCC Form 470 be completed by the entity that will negotiate with prospective bidders.⁵⁷ In this case, SEND assisted in completing the FCC Form 470 even though Jackson was the school that would negotiate with prospective bidders. We find that this level of involvement inhibits the applicant's competitive bidding process. Because Jackson gave SEND the opportunity to tailor the FCC Form 470 to the exact services that SEND offers, Jackson gave SEND information that it did not provide to competing service providers. Third, SEND performed many of the competitive bidding tasks that would ordinarily have been performed by Jackson. For example, Jackson did not have to prepare a list of services to bid out, fill out the FCC Form 470, or submit the FCC Form 470 to USAC. Therefore, the assistance that SEND provided to Jackson may have caused Jackson to look more favorably on SEND's bid as opposed to bids from companies who did not provide such assistance. Such an outcome is inconsistent with the Commission's determination that competitive bidding is the most efficient means for ensuring awareness by schools and libraries of the array of choices available to them and enabling the schools and libraries to choose the best and most efficient provider of the requested services.⁵⁸

18. We also disagree with SEND's argument that the actions of Jackson and SEND complied with the Commission's findings in the *MasterMind Order*.⁵⁹ As discussed above, the Commission concluded in the *MasterMind Order* that a competitive bidding violation occurred where a service provider that was listed as the contact person on the FCC Form 470 also was a bidder in the competitive bidding process.⁶⁰ SEND argues that it was in compliance with the *Mastermind Order* because it was not an employee or representative of Jackson and was not listed as a contact on the FCC Form 470.⁶¹ We do not find this argument to be persuasive. Although SEND was not listed as a contact on the FCC Form 470, the Commission stated in the *MasterMind Order* that the FCC Form 470 must be completed by the entity that will negotiate with prospective service providers.⁶² In this case, SEND assisted with completing the FCC Form 470, identified the services for which Jackson would solicit bids, and submitted the FCC Form 470 from its offices.⁶³ As stated above, these were actions that should have been performed by Jackson, the school that would negotiate with prospective service providers. We

⁵³ *Id.*

⁵⁴ *Id.* at 27 (citing *MasterMind Order*, 16 FCC Rcd at 4030, para. 4).

⁵⁵ See Jackson PAIR Response at 2-3.

⁵⁶ *Id.*

⁵⁷ See USAC website, 2001 Training Materials (Enforcement Review), <http://www.usac.org/sl/about/training-presentations/2001-presentations.aspx> at 27, 30 (retrieved Feb. 11, 2008).

⁵⁸ *Universal Service First Report and Order*, 12 FCC Rcd 9029, para. 480.

⁵⁹ March 2007 Supplement at 13-20; April 2007 Appeal at 10-12. See *MasterMind Order*, 16 FCC Rcd 4028.

⁶⁰ *Supra* n.11; *MasterMind Order*, 16 FCC Rcd at 4030, para. 4.

⁶¹ March 2007 Supplement at 14-20; April 2007 Appeal at 10-12.

⁶² *MasterMind Order*, 16 FCC Rcd at 4030, para. 4.

⁶³ See Jackson PAIR Response at 2-3.

conclude that such direct involvement between SEND and Jackson at the FCC Form 470 stage infringed upon the competitive bidding process because allowing SEND to choose the services requested may have given SEND a competitive advantage, and also may have influenced Jackson to view SEND's bid favorably.⁶⁴ Therefore, we find unpersuasive SEND's arguments that Jackson's competitive bidding process did not violate the E-rate program guidelines and the Commission's competitive bidding rules. Accordingly, we deny the appeal related to the application filed by Jackson.

19. Moreover, SEND argues that USAC should grant funding to each applicant at issue here because USAC failed to meet the Commission deadline for addressing its applications associated with the *Academy of Careers Order*.⁶⁵ We disagree. In the *Academy of Careers Order*, the Commission directed USAC to complete its review of each application and issue an award or denial based on a complete review and analysis no later than 120 days from the release of the order.⁶⁶ We find good cause to waive the deadline articulated in the *Academy of Careers Order* for all applications at issue here.⁶⁷ We note that USAC's decisions to the remanded applicants in this Order were issued only two or three days late.⁶⁸ Due to the volume and complexity of the applications at issue in the *Academy of Careers Order*, and given the fact that USAC missed the deadline by only two or three days, we believe that giving USAC additional time to process the applications related to the SEND appeals is in the public interest.⁶⁹ We therefore, on our own motion, waive the deadline provided in the *Academy of Careers Order* for the applications at issue here.

20. Finally, we emphasize that the Commission is committed to guarding against waste, fraud, and abuse, and ensuring that funds disbursed through the E-rate program are used for appropriate

⁶⁴ See *Requests for Review of the Decisions 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*, CC Docket Nos. 96-45, 97-41, Order, 18 FCC Rcd 26407, 26434, para. 60 (2003) (the Commission found that direct involvement in the application process by a service provider would thwart the competitive bidding process). In this matter, Jackson admits that SEND had direct involvement in the FCC Form 470 application process. Jackson PAIR Response at 2-3.

⁶⁵ November 2006 Appeal at 5-6.

⁶⁶ See *Academy of Careers Order*, 21 FCC Rcd at 5348, para. 1.

⁶⁷ Generally, the Commission's rules may be waived for good cause shown. 47 C.F.R. § 1.3. 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) (*Northeast Cellular*); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio*, 418 F.2d at 1157. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

⁶⁸ The *Academy of Careers Order* remanded applications for Franklin, Jackson, Morehouse, Richland, and Webster on May 19, 2006 and the 120-day deadline was September 19, 2006. See *Academy of Careers Order*, 21 FCC Rcd at Appendices A, C. USAC's decisions for these applicants were dated either September 21 or 22, 2006. Letter from USAC, Schools and Libraries Division, to Cynthia Roberson, Franklin Academy (dated Sept. 22, 2006); Letter from USAC, Schools and Libraries Division, to Talton Barron, Jackson Parish School District (dated Sept. 21, 2006); Letter from USAC, Schools and Libraries Division, to Mike Staples, Jackson Parish School District (dated Sept. 22, 2006); Letter from USAC, Schools and Libraries Division, to Rick vanLoon, Morehouse Parish School District (dated Sept. 22, 2006); Letter from USAC, Schools and Libraries Division, to Rick vanLoon, Morehouse Parish School District (dated Sept. 21, 2006); Letter from USAC, Schools and Libraries Division, to Rick vanLoon, Morehouse Parish School District (dated Sept. 22, 2006); Letter from USAC, Schools and Libraries Division, to Regena Green, Richland Parish School District (dated Sept. 22, 2006); Letter from USAC, Schools and Libraries Division, to Linda Williams, Webster Parish School District (dated Sept. 21, 2006).

⁶⁹ 47 U.S.C. § 254(b).

purposes. Although we grant the appeals related to eight applications, this action does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with the E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or the Commission's rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. We emphasize that the Commission retains the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred and that recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

21. 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 November 20, 2006 and April 9, 2007 ARE GRANTED as they relate to Morehouse Parish School District, Richland Parish School District, Webster Parish School District, Franklin Academy, Caldwell Parish School District, Lincoln Parish School District, Madison Parish School District, and Tensas Parish School District, and the underlying applications ARE REMANDED to USAC for further processing consistent with this Order.

22. IT IS FURTHER 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 Request for Review filed by SEND Technologies, L.L.C., on November 20, 2006, as it relates to Jackson Parish School District IS DENIED.

23. IT IS FURTHER ORDERED that, pursuant to the 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 pursuant to the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, USAC SHALL COMPLETE its review of each remanded application and ISSUE an award or a denial based on a complete review and analysis no later than 60 calendar days from release of this Order.

24. 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, and 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Dana R. Shaffer
Chief
Wireline Competition Bureau

APPENDIX

| Applicant Name | FCC Form 471 Number | Funding Year |
|----------------------------------|----------------------------|---------------------|
| Caldwell Parish School District | 289493 | 2002 |
| Franklin Academy | 412894 | 2004 |
| Jackson Parish School District | 376220, 423981 | 2003, 2004 |
| Lincoln Parish School District | 302051 | 2002 |
| Madison Parish School District | 287193 | 2002 |
| Morehouse Parish School District | 301743, 360815, 409404 | 2002, 2003, 2004 |
| Richland Parish School District | 291953 | 2002 |
| Tensas Parish School District | 288236 | 2002 |
| Webster Parish School District | 292756, 363968 | 2002, 2003 |