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

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| In the Matter of<br>Request for Review by<br>the Department of Education of the<br>State of Tennessee of the Decision of<br>the Universal Service Administrator | ) | Application No. 18132 |
| Request for Review by<br>Integrated Systems and Internet Solutions, Inc.<br>of the Decision of<br>the Universal Service Administrator | ) | |
| Request for Review by<br>Education Networks of America<br>of the Decision of<br>the Universal Service Administrator | ) | |
| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| Changes to the Board of Directors<br>of the National Exchange Carrier<br>Association, Inc. | ) | CC Docket No. 97-21 |

## ORDER

Adopted: August 11, 1999 Released: August 11, 1999

By the Commission: Commissioner Furchtgott-Roth approving in part, concurring in part, and dissenting in part, and issuing a statement at a later date.

## I. INTRODUCTION

1. By this Order, we grant in part and deny in part the requests for review filed by the Department of Education of the State of Tennessee (Tennessee) and Education Networks of America (ENA). As explained more fully below, we find that Tennessee may receive discounts on Internet access service provided by ENA, but may not receive discounts on charges by ENA to Tennessee related to components of the ConnecTEN network it previously owned, but sold to ENA. We also deny the request for review filed by Integrated Systems and Internet Solutions, Inc. (ISIS 2000) and dismiss as moot its Objection to

Application/Request for Expedited Declaratory Ruling filed April 3, 1998.[1] As described below, we find that, contrary to ISIS 2000's claim, Tennessee complied with our competitive bidding requirements.

## II. BACKGROUND

2. Section 254(h)(1)(B) of the Communications Act of 1934, as amended, requires:

> [a]ll telecommunications carriers . . . upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(2), [to] provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.[2]

Section 254(c)(3) states that, in addition to services designated as eligible for universal service support generally, the Commission "may designate additional services for such support mechanisms for schools . . . for the purposes of subsection (h)."[3] In light of these provisions, the Commission concluded that the definition of universal service for schools and libraries includes telecommunications services, internet access and internal connections ("eligible services").[4]

3. Schools may receive discounted telecommunications services only from telecommunications carriers, but may receive discounted Internet access services and internal connections even from non-telecommunications providers.[5] In order to receive discounts on eligible services, schools must file certain information with the administrator of the universal service support mechanisms, the Universal Service Administrative Company (USAC or Administrator).[6] Specifically, the school must file an application with the Administrator that,

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[1] We note that, in submitting reply comments to ISIS 2000's request for review, ENA filed, in the alternative, a motion to accept late-filed pleadings. We see no need to grant the motion because ENA filed within the requisite time period.

[2] 47 U.S.C. § 254(h)(1)(B).

[3] 47 U.S.C. § 254(c)(3).

[4] *Federal -State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9002 at para. 425 (1997) *(Universal Service Order)*, as corrected by *Errata*, CC Docket No. 96-45 (rel. June 4, 1997), *affirmed in pertinent part, Texas Office of Pub. Util. Counsel v. FCC*, 1999 WL 556461 (5th Cir. 1999).

[5] *Universal Service Order*, 12 FCC Rcd 8776, 9002 at para. 425 and 9084-9089 at paras. 589-600.

[6] Prior to January 1, 1999, the Schools and Libraries Corporation (SLC) was responsible for administering the schools and libraries universal service support mechanism. On January 1, 1999, the SLC merged into the USAC, and USAC became the Universal Service Administrator for the schools and libraries universal service

*inter alia*, sets forth the school's technological needs and the services for which discounts are sought (Form 470). The school must generally use the Form 470 application as the basis for seeking competitive bids on the services for which discounts are sought.[7] Once the school has signed a contract for the eligible services, it must notify the Administrator of the signed contract, as well as of the estimate of funds needed to cover the discounts to be given those services that qualify as eligible services. Notification is accomplished by filing the Form 471 application. The Administrator then determines the amount of discounts for which the school is eligible.

4. Consistent with these requirements, Tennessee submitted its Form 470 application to the Administrator for receipt of competitive bids, and announced its intent to award the contract for Internet access service to ENA on March 20, 1998. ISIS 2000 also bid on Tennessee's request for Internet access service without success. Subsequent to the contract award, but prior to the time Tennessee filed its Form 471 application with the Administrator, ISIS 2000 filed an objection with the Commission and the Administrator.[8] At the same time, ISIS 2000 also availed itself of Tennessee's comprehensive bid protest process.[9] After the administrative review part of the Tennessee bid protest process was completed, and ISIS 2000's bid protest was denied,[10] Tennessee filed its Form 471 application with the Administrator. On February 26, 1999, the Administrator notified Tennessee that it would not receive support it requested from the schools and libraries universal service support mechanism for discounts on Internet access service.[11] On March 29, 1999, Tennessee, ENA,

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support mechanism. *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.* (CC Docket No. 97-21), *Federal-State Joint Board on Universal Service* (CC Docket 96-45), Third Report and Order and 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 (1998). Upon the merger of the SLC into USAC, SLC became the Schools and Libraries Division (SLD) of USAC.

[7] *See* 47 C.F.R. §§ 54.504 and 54.511. Pre-existing contracts, as defined by our rules, are exempt from the competitive bidding requirements. *See* 47 C.F.R. § 54.511(c).

[8] *See* Appendix A for a complete chronology of the numerous filings by the parties requesting review of the Administrator's decision. We will include those pleadings in this record. Appendix A also contains the short form names by which we will refer to the pleadings discussed herein.

[9] *See* ISIS 2000 1998 Reply to Consolidated Response at Attachment A. *See also* Letter from Kenneth J. Krisko, Wiley, Rein & Fielding, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated June 25, 1999 (*June 25th Ex Parte Letter*).

[10] We note that ISIS 2000 had a right to pursue its complaint in state court, but we have no evidence that it did so. *See* Tennessee 1998 Opposition at 5 and Attachment I.

[11] *See* Letter from Debra M. Kriete, General Counsel, Schools and Libraries Division, Universal Service Administrative Company to William K. Coulter, Coudert Brothers, Jeffrey S. Linder, Wiley, Rein & Fielding, and Ramsey L. Woodworth, Wilkes, Artis, Hedrick & Lane, dated February 26, 1999 (Administrator's Decision

and ISIS 2000 requested Commission review of the Administrator's decision.[12] These requests for review are the subject of this decision.

## III. DISCUSSION

### A. Compliance with the Commission's Competitive Bid Requirements

#### 1. Administrator's Decision

5. ISIS 2000 generally complained before the Administrator that Tennessee failed to comply with the Commission's competitive bid requirements found in sections 54.504 and 54.511 of the Commission's rules.[13] With regard to this specific issue, ISIS 2000 essentially took issue with the fact that Tennessee, in its consideration of the cost factor, awarded more bid points to ENA's bid even though ENA's total, initial bid was greater than ISIS 2000's bid. The Administrator determined that it would "defer to the state and local competitive bid procurement review procedures and findings."[14] ISIS 2000 seeks review of this aspect of the Administrator's decision.

#### 2. Discussion

6. For the reasons discussed below, we conclude that, contrary to ISIS 2000's argument and consistent with the Administrator's finding, Tennessee did comply with the Commission's competitive bid requirements. In particular, we find that Tennessee adequately considered price, as well as other factors, in determining the most cost-effective bid. Therefore, we deny ISIS 2000's request for review with respect to the Administrator's determination on this issue.

7. As ISIS 2000 correctly notes, the Commission's rules generally require schools to seek competitive bids on the services for which they seek a discount.[15] In addition, section 54.511 states that schools shall "carefully consider all bids submitted and may consider

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Letter).

[12] Tennessee Request for Review, ENA Request for Review, and ISIS 2000 Request for Review (filed March 29, 1999).

[13] 47 C.F.R. §§ 54.504(a) and 54.511.

[14] Administrator's Decision Letter at 2.

[15] 47 C.F.R. § 54.504.

relevant factors other than the pre-discount prices submitted by providers."[16] The Commission explained its competitive bid requirements by stating that it concurred with the Joint Board's recommendation that the Commission permit schools "'maximum flexibility' to take service quality into account and to choose the offering . . . that meets their needs 'most effectively and efficiently,'" but noted that price should be the "primary factor" in selecting a bid.[17] Indeed, in discussing the competitive bid requirements specifically with regard to Internet access, the Commission noted that the Joint Board recommended that "the Commission require schools and libraries [only] to select the most cost-effective supplier of access."[18] Moreover, the Commission specifically stated in this regard that other factors, such as "prior experience, personnel qualifications, including technical excellence, and management capability, including schedule compliance," form a "reasonable basis on which to evaluate whether an offering is cost-effective."[19] The Commission later reaffirmed its position that "schools . . . are not required to select the lowest bids offered, although the Commission stated that price should be the 'primary factor.'"[20]

8. In its request for review, ISIS 2000 argues that our rules require that "[b]efore non-cost factors may even be considered, section 54.504 requires the objective consideration of pre-discount price."[21] Although we are not certain that the order in which factors are considered is important, we disagree with ISIS 2000 to the extent that it is suggesting that the Commission intended its statement that "price should be the primary factor in selecting a bid" to mean that price should be the initial determining factor considered to the exclusion of other factors. Price cannot be properly evaluated without consideration of what is being offered. Interpreting the Commission's competitive bid rules as requiring schools to select the lowest bid with little regard for the quality of services necessary to achieve technology goals would

[16] 47 C.F.R. § 54.511.

[17] *Universal Service Order*, 12 FCC Rcd at 9029, para. 481.

[18] *Universal Service Order*, 12 FCC Rcd at 9029, para. 481.

[19] *Universal Service Order*, 12 FCC Rcd at 9030, para. 481.

[20] *Federal State Joint Board on Universal Service* (CC Docket No. 96-45); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge* (CC Docket Nos. 96-262, 94-1, 91-213, 95-72), Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5429 at para. 192 (1997) (*Fourth Reconsideration Order*).

[21] ISIS 2000 Request for Review at 8.

obviate the "maximum flexibility" the Commission expressly afforded schools.[22] That was not the Commission's intention.

9. In light of ISIS 2000's complaint here, we take this opportunity to provide useful guidance with regard to our competitive bid requirements and factors that may be considered in evaluating competitive bids for purposes of our rules. As stated above, we concurred with the Joint Board's recommendation that schools involved in the competitive bid process be allowed to "take service quality into account and to choose the offering . . . that meets their needs 'most effectively and efficiently.'" Indeed, just after we stated that price should be the primary factor in selecting a bid, we continued the discussion by focusing on cost-effectiveness.[23] In addition, we specifically listed factors other than price, such as technical excellence, that could "form a basis on which to evaluate whether an offering is cost-effective." The paragraph on this issue in the *Universal Service Order* should be read as a whole to say that a school should have the flexibility to select different levels of service, to the extent such flexibility is consistent with that school's technology plan and ability to pay for such services, but, when selecting among comparable services, a school should be guided by price in its selection. Even among bids for comparable services, however, this does not mean that the lowest bid must be selected. Price, however, should be carefully considered at this point to ensure that any considerations between price and technical excellence (or other factors) are reasonable.

10. We expect that we can generally rely on local and/or state procurement processes that include a competitive bid requirement as a means to ensure compliance with our competitive bid requirements. That is, we believe it sensible, as the Administrator did, to rely on state and/or local procurement rules and practices for determining compliance with our competitive bid requirements because such rules and practices will generally consider price to be a "primary factor" (as explained *supra*), and select the most cost-effective bid. Thus, consistent with Tennessee's view,[24] and contrary to ISIS 2000's view,[25] we conclude that the Administrator need not make a separate finding of compliance with our competitive bid requirements in this instance. We note that, even in those instances when schools do not have

[22] We note, moreover, that requiring schools to evaluate price first may lead to a conflict with state and/or local government procurement laws, rules, or practices. Indeed, Tennessee procurement laws and rules require cost proposals to be opened only after evaluation of the non-cost sections of the proposals have been completed. *See* Tenn. Code Ann. section 12-4-109(a)(1)(A)(iii); *see also* Tennessee Opposition at 8. As section 54.504 states, "[the Commission's] competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements." 47 C.F.R. § 54.504.

[23] *Universal Service Order*, 12 FCC Rcd at 9029-9030, para. 481.

[24] Tennessee 1999 Opposition at 6.

[25] ISIS 2000 Request for Review at 9.

established competitive bid procurement processes, the Administrator generally need not make a separate finding that a school has selected the most cost-effective bid. Such a finding is not generally necessary because a school has an incentive to select the most cost-effective bid, even apart from any procurement requirements, because it must pay its pro rata share of the cost of the services requested.[26] Absent evidence to the contrary in a particular case, we believe that this incentive is generally sufficient to support a conclusion that a school has selected the most cost-effective bid for requested services.

11. In that regard, we note that this record reflects that the procurement process at issue here did consider price as a "primary factor," and required selection of the most cost-effective bid. Specifically, Tennessee law states that procurement regulations "shall require: (1) [t]o the greatest practicable extent, evaluation and consideration of . . . cost in the awarding of the contracts."[27] In addition, Tennessee's request for bids indicated that the contract would be awarded to the most cost effective bidder.[28] We believe all of this supports the conclusion that the procurement process at issue here complies with our competitive bid requirements, and therefore, our competitive bid requirements were met.

12. As to ISIS 2000's narrower complaint that section 54.504 of our rules requires schools to consider only the prediscount price when evaluating the cost component of a bid (assuming a bidding process that evaluates cost in a separate category from other non-cost factors), we note at the outset that, regardless of whether we agree with this interpretation, the record evidence supports Tennessee's and ENA's argument that differences in the service offerings were such that Tennessee could reasonably prefer the ENA service offering over the ISIS 2000 service offering.[29] As such, a comparison of price is not determinative of a cost-effective bid in this case.

13. Moreover, to the extent that ISIS 2000 is suggesting that, when a school evaluates cost in a separate category from other non-cost categories, the school must always award the most points for the cost category to the lowest bidder in order to comply with section 54.504, we cannot agree. While we certainly expect that schools will evaluate the actual dollar amount proposed by a bidder, we do not intend to limit them to considering only the absolute

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[26] We found this particularly compelling with regard to pre-existing contracts. *See e.g.*, *Universal Service Order*, 12 FCC Rcd at 9064, para. 547; *Federal-State Joint Board on Universal Service*, Order on Reconsideration, 12 FCC Rcd 10095, 10097 at para. 7 (1997).

[27] *See* Tenn Code Ann. § 12-4-109(a)(1)(A)(i).

[28] *See generally* ISIS 2000 1998 Objection at Attachment E (Portion of State of Tennessee Request for Proposal establishing criteria and weight to be given criteria in awarding contract).

[29] *See* ISIS 2000 1998 Reply to Consolidated Response at Attachment A, pp. 78-81. *See also June 25th Ex Parte Letter.*

dollar amount proposed such that they must always award the most points in the cost category to the lowest bid. Schools should be free to consider other issues relevant to cost, such as whether the price bid is realistic for the services proposed. While we appreciate ISIS 2000's concern for fiscal responsibility in the schools and libraries universal service program, we note that, as ISIS 2000 itself references,[30] requiring schools to pay their pro rata share of the overall prediscount price provides some incentive for schools to show fiscal constraint.

14. It appears that ISIS 2000's ultimate complaint in this regard is that Tennessee's criteria for evaluating cost "incentivized bidders to offer the highest pre-discount price."[31] While we need not address this specific concern for the reasons discussed above, we note that ISIS 2000's argument does not work as an absolute.[32] That is, although the actual formula used to evaluate the prices of the bidders resulted in ENA receiving more points than ISIS 2000 in the cost category, even though ISIS 2000's bid was lower than ENA's bid at that point in time,[33] as Tennessee points out, under other circumstances, a lower bid would receive more points.[34] Although the formula used to evaluate cost may have awarded the highest points for cost to bids maximizing federal support, this is not prohibited by our rules.

## B. Eligibility for Discounts on Services Related to Existing ConnecTEN Components

### 1. Administrator's Decision

[30] *See e.g.*, ISIS 2000 Request for Review at 5-6 (noting that, in allowing exemptions from the competitive bid process for certain pre-existing contracts, the Commission found such entities would have "the necessary incentive to select fiscally reasonable arrangements . . . because they would be required to pay their pro-rata share of the overall pre-discount contract price," citing to *Federal-State Joint Board on Universal Service*, Order on Reconsideration, 12 FCC Rcd 10095 (1997)).

[31] ISIS 2000 Request for Review at 8. The evaluation criteria of cost was expressed as a formula: Total State & Local, Other Funds, Savings, and FCC funds paid to proposer/Total State and Local Funds = cost factor of proposal being evaluated. The proposal with the highest cost factor was awarded the full points available for the cost proposal category. Other proposals were awarded points based on a comparison to the proposal with the highest cost factor. *See* ISIS 2000 1998 Objection at Attachment E.

[32] Although not dispositive of the issue before us, we note that ISIS 2000 had an opportunity to object to the cost formula used by Tennessee prior to the submission of bids, but did not do so. *See* ISIS 2000 Reply to Consolidated Response at Attachment A, p. 77. *See also June 25th Ex Parte Letter*.

[33] We note that, during the bid protest process, there was evidence to suggest that the ISIS 2000 bid was insufficient for the services proposed. *See* ISIS 2000 1998 Reply to Consolidated Response at Attachment A, p. 86; ENA 1999 Opposition at 7. *But see* ISIS 2000 1999 Reply at 2. We do not, however, make a finding with regard to this point because it is unnecessary to the disposition of the case.

[34] Tennessee 1999 Opposition at 12 (showing that a bid of $75 could have a bid cost factor of 4.2, while a bid of $65 could have a bid cost factor of 4.5. Thus, under the formula, the $65 bid would receive the most points for the cost factor category.).

15. Before the Administrator, ISIS 2000 argued generally that a transaction underlying Tennessee's requests for discounts on its Form 471 application rendered some amount of the requests ineligible.[35] Specifically, in its bid to provide Internet access to Tennessee, ENA proposed to buy software and the right to use certain components of the existing wide area network[36] owned and used by the schools of Tennessee, the ConnecTEN network, in its (ENA's) provision of Internet access service during a transitional period. ISIS 2000 argued that payment by Tennessee to ENA for Internet access service provided over components of a wide area network and any associated internal connections (the ConnecTEN network), formerly owned by Tennessee, but sold to ENA, should not be considered as part of a service eligible for discounts because the wide area network and internal connections were delivered to, and paid for by, Tennessee before January 1, 1998. ISIS 2000 argued that these components corresponded to the first few request lines on Tennessee's Form 471 application.

16. The Commission's rules do not provide for discounts on services provided to schools before January 1, 1998.[37] The Administrator denied discounts on costs related to the ConnecTEN network, finding that:

> [f]irst, the purchase and installation of the facilities in question were made prior to January 1, 1998. Second, the purchase of components of a wide area network is not eligible for discounts under the Schools and Libraries Universal Service Support Mechanism. Both of these principles would have precluded the funding of discounts for these costs had [Tennessee] retained ownership of these facilities. Third, the rules which restrict discounts from being approved on services delivered or equipment purchased prior to January 1, 1998 cannot be avoided by virtue of transferring ownership of the facilities in question to ENA and providing for ENA's charging of these costs back to [Tennessee] as part of the costs of Internet access.[38]

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[35] Schools filing Form 471 applications were required to list each request for discounted services on a separate line on the application. The relevant portion of Tennessee's Form 471 divided its Internet access service into 10 different requests. The first few requests refer to "basic Internet access service," with the remaining referring to different service levels of Internet access service. According to ENA and Tennessee, these different service levels correspond to faster and better Internet access. *See* ENA Request for Review at Attachment 2 (Tennessee FCC Form 471 Application).

[36] The components to be used were routers located on school premises. ENA has described the routers, both those in the existing ConnecTEN network and those to be purchased by ENA to be used in its provision of an upgraded Internet access service to Tennessee, as allowing the Internet service provider to provide specific Internet addressing and monitoring functions related to telecommunications connection quality and traffic service levels. ENA Request for Review at 23.

[37] 47 C.F.R. § 54.507(f).

[38] Administrator's Decision Letter at 3-4.

Both Tennessee and ENA seek review of this aspect of the Administrator's decision.

**2. Discussion**

17. We deny Tennessee's request that we find the use of existing ConnecTEN components to be part of ENA's eligible Internet access service because we conclude that such components were part of an ineligible wide area network when owned by Tennessee.[39] Although we believe the components at issue are part of an ineligible wide area network based on the description in the record, we note that, it is conceivable they could be internal connections. If they are internal connections, they do not meet the requirement that services eligible for discounts must be received by a school after January 1, 1998.[40] Specifically, we find that the transfer of some components of the ConnecTEN system from Tennessee to ENA does not change the eligibility status of those components.

18. As described in the record, the ConnecTEN network is a network that connects all Tennessee K-12 public schools to each other and to the Internet.[41] Section 54.500 of our rules defines a wide area network as "a voice or data network that provides connections from one or more computers within an eligible school . . . to one or more computers or networks that are external to such eligible school."[42] Section 54.518 of our rules states that "[t]o the extent that states [or] schools . . . build or purchase a wide area network to provide telecommunications services, the cost of such wide area networks shall not be eligible for universal service discounts."[43] Although we believe the record supports a finding that the components at issue are part of a wide area network, we note that the record is not as precise as we would like for determining where the ConnecTEN network ended and internal connections may have begun. Thus, it is conceivable that some of the components purchased by ENA could have been internal connections used by the schools to connect to the ConnecTEN network.[44] The Commission allows discounts on internal connections, which have been described as a "service [that] is eligible for support as a component of the

[39] *See* 47 C.F.R. § 54.518.

[40] 47 C.F.R. § 54.507(f).

[41] ENA 1998 Opposition at 15. *See also* ISIS 2000 1998 Objection at 4 (describing ConnecTEN as "a wide area network connecting all public schools in the State").

[42] 47 C.F.R. § 54.500 (l).

[43] 47 C.F.R § 54.518.

[44] *See* Letter from William K. Coulter, Coudert Brothers to Magalie Roman Salas, Secretary, Federal Communications Commission, dated June 17, 1999, at Attachment (describing ConnecTEN network both outside and inside school buildings). *See also* 47 C.F.R. § 54.506 (defining internal connections as "service . . . necessary to transport information within one or more instructional buildings of a single school campus.").

institution's internal connections only if it is necessary to transport information all the way to individual classrooms."[45] Section 54.507(f) of the Commission's rules, however, limits funding any discounts for eligible services to services received after January 1, 1998."

19. Based on the record before us, we find that the ConnecTEN network was a wide area network that, if Tennessee had retained ownership, would have been ineligible for federal universal service discounts.[46] Moreover, although we believe that the ConnecTEN network is a wide area network, to the extent that there is the possibility that any of the software or use of routers purchased by ENA could have been internal connections when owned by Tennessee, these internal connections to the ConnecTEN network were installed before January 1, 1998, thereby disqualifying them from eligibility pursuant to section 54.507(f), unless the change in ownership affects such eligibility.

20. We note at the outset that there is some dispute in the record regarding what ENA actually purchased from Tennessee. Even if we assume the facts as presented by ENA and Tennessee, that ENA purchased software and the right to use routers to deliver Internet access service,[47] we think that the fact that these components would not be eligible for discounts if the state continued to own them is determinative of how they should be treated upon transfer of their ownership to ENA.[48] Given that the rules that would apply to Tennessee were part of the Commission's attempt to define eligibility parameters, we are concerned that, were we to allow transfers such as the one made by Tennessee to ENA to receive funding, the effect of these rules would be severely undermined. In particular, if we were to allow schools to transfer their state-built wide area networks to private parties, who then used that network to provide service and included in the charges to the school some portion of the cost of that network, our rule prohibiting the funding of wide area networks built or purchased by schools

[45] *Universal Service Order*, 12 FCC Rcd at 9021, para. 459. *See also* 47 C.F.R. § 54.506.

[46] Tennessee appears to recognize this in its 1998 Opposition when it states that the ISIS 2000 proposal, which has been described by Tennessee as requiring the "State to continue owning, operating and funding ConnecTEN, or [] 'scrap it' and purchase a new ConnecTEN II, which would require an investment to be owned by the State," "could not recover the costs [] 'because . . the components would be state purchased.'" Tennessee 1998 Opposition at 4 and 15.

[47] *See* ENA 1999 Reply at 7. We note that, although we believe the record supports a finding that these components are part of a wide area network, the record is not as precise as we would like on this point. For this issue, however, the distinction is unimportant because whether they are part of a wide area network or internal connections, as described below, we would not find them eligible for discounts.

[48] In so finding, we do not imply that the transfer here evidences an intent to circumvent our rules. Nor do we imply that Tennessee's determination that this approach was the most cost-effective approach to gaining Internet access service is incorrect. A finding that this was the most cost-effective approach to receiving Internet access service is a separate question from whether some part of such a transaction is eligible for discounts from the Federal Universal Service Fund.

would very likely be vitiated. Contrary to the intent of the rule, there would be a significant incentive to have some portion of that network, previously paid for completely by the state or school, subsequently funded by the federal universal service fund.

21. We also find that, to the extent that these components could be internal connections, rather than wide area network components, charges to Tennessee related to these internal connections would not be eligible for discounts. Since any internal connections that might have been purchased were installed prior to January 1, 1998, they would not generally be eligible for discounts. Consistent with the Administrator's decision, we believe that, were we to allow Tennessee discounts on services that it purchased prior to the start date of the federal schools and libraries program merely because it transferred its ownership to another entity, we would undercut section 54.507(f). We note that this is analogous to the lease/purchase arrangement discussed in the Administrator's Clients' Commonly Asked Questions - Set III.[49] There the Administrator correctly explained that "if an eligible school . . . originally purchased internal connections prior to January 1, 1998, and later refinanced the purchase sometime after January 1, 1998, the date of service delivery will be the original purchase or acquisition date, which in this example, is prior to January 1, 1998."[50]

22. We understand Tennessee's and ENA's argument that Tennessee requested support from the universal service fund for the provision of basic Internet access and no Internet access service was provided prior to January 1, 1998.[51] Moreover, we recognize the appeal of their argument that the ConnecTEN components are "necessary for the efficient transmission of information to students and teachers,"[52] and thus, should be considered a part of the provision of Internet access service. We think, however, that, in order to ensure that schools do not transfer otherwise ineligible components or services to third parties so that they may receive discounts that they would not otherwise be entitled to, we must apply sections 54.518 and 54.507(F) to these circumstances. Moreover, although a state network may be eligible to receive discounts in the provision of internet access service under certain circumstances,[53] we have no basis on the record to determine if that would be the case here.

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[49] *See* http://www.sl.universalservice.org/reference/FAQ/CCAQ-Set-III.asp

[50] *See* http://www.sl.universalservice.org/reference/FAQ/CCAQ-Set-III.aspat "Eligible Services - Lease Purchase."

[51] *See* Tennessee Request for Review at 23-24 and ENA Request for Review at 23.

[52] ENA Request for Review at 23.

[53] *Fourth Reconsideration Order*, 13 FCC Rcd at 5429, para. 191. *But see id.* at 5430-5431, para. 193 ("[t]hird, wide area networks built and purchased by schools and libraries do not appear to fall within the narrow provision that allows support for access to the Internet because wide area networks provide broad-based telecommunications.").

As we explained above, the fact that a component of a network is used in the provision of Internet access service is not the sole determinant of its eligibility. Therefore, we deny funding requests by Tennessee for charges including costs associated with the ConnecTEN network.

23. We also agree with ENA that section 54.507(f), prohibiting the funding of services prior to January 1, 1998, cannot be interpreted to mean that Internet access service providers must use equipment in their networks that was purchased after January 1, 1998.[54] The basis of our decision here, however, is not whether the service provider owned equipment purchased prior to January 1, 1998 and used thereafter to provide Internet access service. Rather, the basis of our decision, as explained above, is grounded in the highly, fact-specific nature of this case, *i.e.*, that the facilities that Tennessee sold to ENA were part of a wide area network that would have been ineligible for discounts when owned by Tennessee or, to the extent such facilities could conceivably be existing internal connections, that they would be ineligible for discounts.

24. Both ENA and Tennessee argue that the ConnecTEN transaction was the most cost-effective method for providing Internet access service to the schools of Tennessee, and that any other approach would have burdened the federal universal service fund more.[55] Cost-effectiveness with regard to one particular request, however, misses the broader, more significant issue. Cost-effectiveness cannot transform an ineligible service into an eligible service, and as described above, our rules are designed to ensure cost-effective administration of the schools and libraries support mechanism as a whole. Accepting Tennessee's argument here could lead to circumvention of these rules, which ultimately could lead to costly funding for ineligible services overall.

## C. Eligibility for Discounts on Services Related to ENA Network Upgrades

### 1. Administrator's Decision

25. The Administrator denied Tennessee's request for discounts on the charges ENA will assess Tennessee for the construction of "Education Hub sites"[56] and purchase of caching

[54] *See* ENA's Request for Review at 25.

[55] *See* ENA Request for Review at 24-25; Tennessee Request for Review at 24.

[56] ENA described the hub sites as five points of presence to be used to provide, among other things, "more efficient routing of Internet access traffic and more secure, web-based e-mail capabilities." ENA 1998 Opposition at 17-18. ENA describes the components of these hub sites as "two large routers, one facing the Internet and the other facing the ENA/BellSouth Connectionless Data Service "cloud." Sandwiched in between each router are a firewall, caching server, mail server and K-12 domain name service servers. ENA 1998 Opposition at 18.

servers[57] to be used in ENA's provision of Internet access service. In addition, this decision is applicable to new router facilities to be purchased by ENA[58] and located at individual schools.[59] Because we discuss the router facilities and hub sites together, we will refer to them collectively as hub sites. Although ENA and Tennessee argued that the hub sites were an integral part of ENA's provision of Internet access service, the Administrator reasoned that the related costs for which discounts were requested were for the purchase and installation of facilities. Under the schools and libraries program, these facilities are generally viewed as either internal connections or wide area network components. If these facilities are viewed as internal connections, Tennessee would receive no support because funding for internal connections in the first year of this program was insufficient to provide discounts at the level for which Tennessee was qualified.[60] If these facilities are wide area network components, the Administrator found that, "[t]hese wide area network components are ineligible for discounts because purchased wide area network components are not eligible for support."[61] With regard to the caching servers, although ENA made an alternative argument that they were expressly authorized by the Commission as eligible internal connections, the Administrator concluded that the caching servers were not eligible internal connections because they "are not necessary to transport information all the way to individual classrooms."[62]

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[57] These caching servers are used to collect, update and store the Internet information, such as web sites most frequently accessed by users on a network. *See* Administrator's Decision Letter at 5. *See also* Tennessee Request for Review at 20-21.

[58] These will be router facilities purchased and owned by ENA and not those for which it purchased a "right to use" from Tennessee.

[59] The Administrator's Decision Letter denied funding for several individual amounts requested by Tennessee on its FCC Form 471 Application, the application upon which the Administrator bases discount decisions, *see* 47 C.F.R. § 54.504(c). Some of these amounts related to both the five hub sites described above in n. 56 as well as the routers to be added by ENA at individual school sites.

[60] In the *Fifth Reconsideration Order*, the Commission established new rules to govern how discounts will be allocated when available funding is less than total demand. *See Federal-State Joint Board on Universal Service*, Fifth Reconsideration Order, 13 FCC Rcd 14915, 14934 at para. 31 (1998) (*Fifth Reconsideration Order*). These rules provide that requests for telecommunications and Internet access services for all discount categories shall receive first priority for available funds. When sufficient funds are not available to fund all requests for discounts on internal connections, the Administrator shall allocate funds for discounts to schools beginning with those applicants eligible for a ninety percent discount level and, to the extent funds remain, continue to allocate funds for discounts to applicants at each descending single discount percentage, *e.g.*, eighty-nine percent, eighty-eight percent, and so on. For this first funding year, the Administrator allocated funds to cover discounts down to the seventy percent level. Tennessee fell below the seventy percent level, and thus, did not qualify for discounts on internal connections.

[61] Administrator's Decision Letter at 5.

[62] Administrator's Decision Letter at 6.

**2. Discussion**

26. The issue before us devolves to whether Tennessee essentially requested discounts for the purchase of ineligible facilities or eligible services. Based on the specific facts in the record before us, we conclude that the service offered by ENA is Internet access service that is fully supportable, with the exception of charges related to the purchase of existing ConnecTEN components. Therefore, we find that costs related to ENA's purchase of hub sites and caching servers made to provide Internet access service to Tennessee may be properly characterized as part of its Internet access service and instruct the Administrator to work with the Bureau and Tennessee to determine the exact amount of funds necessary to cover the discounts for Tennessee's Internet access service except as expressly disallowed in section B above. Thus, where we refer to ENA's network in this section of our decision, our analysis is only applicable to the upgrades made by ENA to provide Internet access service to Tennessee.[6]

27. At the outset, we find, contrary to ENA's and Tennessee's position, that we can, where appropriate, look behind transactions underlying requests for discounts to ensure that they comply with our rules.[64] Indeed, although our *de novo* review in this instance leads to a finding that is contrary to the Administrator's finding,[65] we applaud the Administrator's efforts and diligence in examining this particular request for discounts, as well as all such requests. In order to reach our goal of ensuring that as many schools receive discounts for eligible services as possible, we believe the Administrator must be as diligent in examining transactions underlying requests as it was here. We believe that the Administrator must undertake this type of examination when it has reason to believe further examination of an application is necessary, and therefore, find that the Administrator undertook the correct course in its diligent examination of this application.

28. As stated above, however, the question to be answered here is whether ENA will provide Internet access services or another service to Tennessee, or whether Tennessee is actually purchasing ineligible facilities. To determine the answer to this question, we must look to our relevant eligibility rules, which are: (1) the definition of eligible services,[66] and

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[63] We note that, but for the fact that the ConnecTEN components were previously owned by Tennessee or purchased prior to January 1, 1998, there would be some tension between our discussion here and our discussion in section B above. However, as we explained above, we are concerned that allowing charges associated with those components to receive discounts would allow indirectly what is not allowed directly by sections 54.518 and 54.507(f), and thus significantly undermine the effect of those rules. Therefore, we believe any perceived tension has been explained.

[64] *See* Tennessee Request for Review at 5-7; ENA Request for Review at 14-18.

[65] 47 C.F.R. § 54.723.

[66] 47 C.F.R. §§ 54.506 and 54.517(b).

(2) the rule excluding support for wide area networks.[67] With regard to eligible services, our rules allow non-telecommunications carriers to be eligible for universal service support for providing Internet access service and installation and maintenance of internal connections.[68] Section 54.5 of our rules defines Internet access as "[t]he transmission of information as part of a gateway to an information service, [and] may include data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access information services."[69] Section 54.506 states that a service is eligible for support as internal connections if "such service is necessary to transport information within one or more instructional buildings of a single school campus."[70] Moreover, as previously stated, section 54.518 of rules states that "[t]o the extent that states, schools, or libraries build or purchase a wide area network to provide telecommunications services, the cost of such wide area networks shall not be eligible for universal service discounts provided under this subpart."[71]

29. We note at the outset that no one questions that ENA will provide Internet access service to Tennessee. Rather, the issue that ISIS 2000 raises is whether the fact that ENA will use universal service support to build the underlying facilities to provide Internet access service makes a difference for support eligibility.[72] We find that, under the narrow circumstances presented, this fact does not affect support eligibility. We recognize that all service providers include within their prices to customers some amount of the cost of building facilities to provide the service. Indeed, by way of analogy, we have allowed common carriers to include within their rates to customers, some amount of the cost of the facilities used to provide such services to customers.[73] Similarly, we would expect ENA to include at least some portion of the cost of the facilities used to provide Internet access service in its rates to Tennessee. Therefore, because we expect Internet access service providers to include some portion of the cost of facilities used to provide Internet access service within the charges for providing Internet access service, and because our rules do not otherwise specifically prohibit support to Internet access service as provided by ENA (as explained below), we

[67] 47 C.F.R. § 54.518.

[68] 47 C.F.R. § 54.517.

[69] 47 C.F.R. § 54.5.

[70] 47 C.F.R. § 54.506.

[71] 47 C.F.R. § 54.518

[72] *See* ISIS 2000 1999 Opposition at 12 ("the USF program is not now and never was designed to fund publicly-owned regional [wide area network] infrastructure costs, let alone privately-owned facilities.").

[73] *See generally* 47 C.F.R. Parts 32, 36, 65, and 69. *See also* Charles F. Phillips, Jr., *The Regulation of Public Utilities* (1993).

cannot, at this time, find that the costs of the underlying facilities to be built by ENA to provide Internet access service to Tennessee should be excluded from ENA's charges for providing Internet access service.

30. Looking first at whether this is a wide area network ineligible for discounts pursuant to section 54.518, we conclude that the hub sites and caching servers described above that are specifically related to ENA's upgrades made to provide Internet access service to Tennessee, are not part of an ineligible wide area network that was built or purchased by a state, school, or library to provide telecommunications services. As described in the record, Tennessee will have no ownership of the ENA network, including the hub sites and caching servers.[74] Moreover, we note that Tennessee asserts, without dispute from other parties, that the ENA network, including the hub sites and caching servers, will not be used by Tennessee for telecommunications services, but only will provide Internet access services.[75] Thus, it would appear that, even if this were a wide area network built for Tennessee, it was not built to provide telecommunications services, and thus falls outside the reach of section 54.518. We note, however, that this is not the sole determinative factor here. We would hesitate to rely on this factor alone without further investigation, out of concern that a wide area network such as this could be used to provide telecommunications services.

31. Consistent with our decision *supra*, with regard to the ConnecTEN components, we must consider whether the arrangement between Tennessee and ENA reaches essentially the same result as that which is prohibited by section 54.518; namely whether, through the contract between Tennessee and ENA, Tennessee has in essence built or purchased a wide area network to provide telecommunications services. We believe relevant indicia for making this determination include, but are not limited to, the service provided over the network, exclusivity arrangements, lease purchase arrangements, and the structure of the contract (*e.g.*, substantial payment for upfront capital costs). None of these factors alone is necessarily determinative, but they must be considered in light of facts presented.[76]

32. As previously stated, Tennessee asserts that the ENA network, including hub sites

[74] *See* ISIS 2000 1998 Reply to Oppositions at Appendix Q, p.13 (Stapleton Report describing the end result of the ENA contract as "ENA will own a network asset," and "Tennessee .. . will own no part of ENA."). *See also* Tennessee Request for Review at 18-19 and ENA 1998 Opposition at 19 ("ENA's network is privately owned and operated; this is not a case of a state seeking direct reimbursement for a [wide area network] that it has built or purchased from another party.").

[75] Tennessee Request for Review at 16.

[76] We note that this issue is separate and distinct from the issue with respect to the ConnecTEN network. There, evidence clearly showed that ConnecTEN was a wide area network built and/or purchased by Tennessee to provide telecommunications services. Thus, the only question there was whether an ownership transfer should change its status. Here, the issue is whether we should impute ownership in the first instance.

and caching servers, will only be used to provide Internet access service, not telecommunications service. Moreover, on the whole, the record does not provide a basis for finding that Tennessee and ENA have an exclusivity arrangement limiting the use of the ENA network to Tennessee. As ISIS 2000 notes, the ENA network could "ultimately serve many users."[77] Indeed, ISIS 2000 cites to an ENA Investment proposal to show that ENA "expects to add more users such as private schools [and] health care providers."[78] Although Tennessee has suggested that it would "utilize the full capacity of the ENA network [for the duration of the contract],"[79] ENA later claims that "ENA and its team in fact are providing Internet access today to over 100,000 computers located in the State's K-12 schools as well as access to thousands of other customers."[80] Although it would be difficult to determine whether Tennessee is ENA's only customer because ENA is comprised of a number of entities, including ISDN-NET, a large Internet service provider in Tennessee, we note that, even if Tennessee were ENA's only customer, that fact alone does not prove that Tennessee has an exclusive right to use the network. In addition, with regard to any lease-purchase arrangement, ENA states that "there is no provision for the State to own any part of the system that ENA will own and use during *or after* the contract period."[81]

33. There is significant dispute on the record with regard to the structure of this contract. Some evidence suggests that ENA sought a significant upfront payment that would be used to finance its capital investment,[82] including the hub sites and caching servers, but other evidence shows that Tennessee will actually pay both recurring and nonrecurring charges to ENA.[83] Moreover, ENA and Tennessee present evidence showing that some Internet service providers regularly structure charges to customers using both upfront, nonrecurring and recurring charges.[84] Tennessee's actual application, as submitted to the

[77] ISIS 2000 1998 Supplement to Reply at 3. We note that ISIS 2000's contention in this regard is that ENA is constructing a private network solely through the use of federal and state funds.

[78] ISIS 2000 1998 Supplement to Reply at 3.

[79] Tennessee 1998 Consolidated Response at 20.

[80] ENA 1999 Reply at 6.

[81] ENA 1998 Opposition at 17 (emphasis added). Although ENA makes this statement with regard to the ConnecTEN components, the statement would seem to include the ENA hub sites and caching servers at issue here.

[82] *See* ISIS 2000 1998 Supplement to Reply at 2-3.

[83] *See* ENA Request for Review at Attachment 2 (Tennessee's FCC form 471 Application). The Form 471 is the application upon which the Administrator bases discount decisions. *See* 47 C.F.R. § 54.504(c).

[84] *See* ENA Request for Review at 14 and n. 36. *See also* Tennessee 1999 Reply at Attachment A (Letter from Bob Collie, Vice President/Chief Technical Officer, TelaLink Internet).

Administrator, shows that for each Internet access service level above basic Internet access service, the nonrecurring charges to be paid by Tennessee to ENA are greater than the recurring charges.[85] Tennessee avows, however, that the nonrecurring charges cannot be considered evidence of a "purchase" of facilities, but rather were accepted as a way to reduce the total cost of Internet access service.[86] Although we are somewhat concerned about the level of the nonrecurring charges, because high nonrecurring charges weigh more in favor of an appearance of "purchase" of facilities by Tennessee, we believe other factors, as discussed above and Tennessee's statement with regard to its payment structure, tilt the balance toward not imputing a finding that ENA built a wide area network for Tennessee. Thus, we find that the hub sites and caching servers are not ineligible facilities pursuant to section 54.518.

34. We must now consider whether these hub sites and caching servers are within the definition of eligible services. As previously stated, the relevant eligible services to consider here are internal connections and Internet access service. Moreover, although internal connections are generally eligible for discounts, in this first year of our program, discounts for internal connections were provided only to schools with discounts levels of seventy percent or above, and Tennessee's discount level fell below the seventy percent level. Thus, if these facilities are internal connections, they will be ineligible for this first program year.

35. In light of the funding constraints on internal connections, we note that there may be some incentive for schools to claim that facilities used in reaching the Internet are part of the end-to-end Internet access service, rather than internal connections. Moreover, as a practical matter, we believe that there are instances where it is difficult to draw a line between end-to-end Internet access service and internal connections because Internet service providers configure their networks and services differently. For example, ENA maintains that these facilities fall within the definition of Internet access because they are used in the "transmission of information as part of a gateway to an information service," and (for the hub sites) are "navigational systems that enable users to access information services." Indeed, ENA explains that the hub sites are used "to route Internet access traffic and provide access to web-based e-mail capabilities, virtual reserve desks, and custom security."[87] Moreover, ENA points out that the caching servers will allow storage of the "most frequently visited sites [on the Internet]," and will thus, allow for the "most efficient possible 'transmission of information as

[85] *See* ENA Request for Review at Attachment 2 (Tennessee FCC Form 471 Application). For example, the line on the application corresponding to service level four shows that the nonrecurring charge is $1,691,151 and the recurring charges are $868,712.

[86] *See* Tennessee Request for Review at 12. *See also* Letter from William K. Coulter, Coudert Brothers, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated July 22, 1999.

[87] ENA Request for Review at 20.

part of a gateway to an information service.'"[88]

36. There is no dispute that these facilities will function in the way described by ENA. Indeed, ENA and Tennessee present evidence that many Internet service providers operate their Internet networks in a similar fashion.[89] Thus, if we find that these upgrades are not internal connections, we believe there is a sufficient basis for finding them to be part of an end-to-end Internet access service. But, as the Administrator found, certain components in the ENA network, such as the routers located at the schools, may be considered, at least in some circumstances, internal connections.[90] Thus, we must decide where to draw the line in these particular circumstances. In drawing this line, we will, consistent with the definition of internal connections, also take into account practical considerations, such as administrative ease and expediency in evaluating applications for discounts and how our priority rules with regard to eligible services may be affected by our decision herein.[91]

37. Under the definition of internal connections, a service is considered a component of internal connections if it is necessary "to transport information within one or more instructional buildings of a single school campus." In interpreting this definition *vis-a-vis* Internet access services, we believe it reasonable to establish a rebuttable presumption that, if a service includes facilities that are located on the school premises and are used to transport information, they are internal connections. It seems reasonable to presume that, if the facilities used in providing a service are located on the school premises, they are generally necessary to transport information within one or more buildings of the school campus, and are not part of an end-to-end Internet access service. Thus, in evaluating applications for discounts, the Administrator may generally presume that facilities located on a single school campus are internal connections. We believe this provides clearer guidance to the Administrator in evaluating applications for discounts, and reaches the right balance in regard to burdens on schools to show that certain facilities used in providing a service are truly part of an end-to-end Internet access service, and not mislabeled internal connections to the detriment of other schools' abilities to receive telecommunications services or Internet access service.

38. We believe, however, that schools may rebut this presumption in the application evaluation process. To rebut this presumption, we believe it reasonable to consider evidence

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[88] ENA Request for Review at 64.

[89] *See e.g.*, ENA Request for Review at 19.

[90] Administrator's Decision Letter at 5. *See also Universal Service Order*, 12 FCC Rcd at 9021, para. 460.

[91] *See supra* at n. 60 (explaining that, for this first schools and libraries program year, telecommunications and Internet access services for all discount categories receive first priority, and internal connections are to receive discounts only after support is provided for those priority services to all eligible requests for discounts.).

of where the Internet access service begins and/or ends. As described in detail in the record, the hub sites located at the schools (excluding for the purpose of this discussion those related to the ConnecTEN network as described *supra*) are ENA's point of presence.[92] In essence, the hub sites located on the school premises do not "function solely to transmit information over the distance from the classroom to the Internet service provider,"[93] rather they act as the point where ENA, the Internet access service provider, begins to provide Internet access service. Indeed, according to ENA and Tennessee, the schools' internal networks will function without connection to the ENA hub site located on the schools' premises, thus, indicating that these hub sites are not necessary to transport information *within* the schools' instructional buildings on a single campus,[94] and are thus, not internal connections. As described in the record, Tennessee's schools have routers and hubs within the schools that act to transmit the information from the classroom to the hub sites at issue here.[95] ENA has located its point of presence for Internet access service at the schools. Moreover, we note that ENA and Tennessee avow that the facilities at issue operate solely for the purpose of providing Internet access service, which we believe, because they serve no other purpose, provides some indication that they are part of an Internet access service.

39. We note, however, that our inquiry cannot end here because, when the rules of priority are in effect, there is an incentive to characterize certain facilities used in the provision of internal connections that may also be provided by the Internet access service provider as Internet access service. For example, the Internet service provider may end its service at a regional office, but provide a school with internal connections such as routers used to aggregate traffic within the school. To minimize the potential for mischaracterization, where warranted, we will also look at other indicia to determine if a component of a service is indeed part of the specified service. Relevant indicia include, but are not limited to, ownership of the facility used to provide the service, any lease-purchase arrangements regarding such facility, exclusivity arrangements regarding such facility, maintenance agreements regarding such facility and upfront capital costs.

40. Using these indicia, we find that the hub sites at issue here are not internal

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[92] *See* Letter from William K. Coulter, Coudert Brothers, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated July 7, 1999 at Attachment A, p. 1 (*July 7,1999 Ex Parte Letter*).

[93] *Universal Service Order*, 12 FCC Rcd at 9021, para. 460 (explaining why such items as routers, hubs, and network file servers meet the definition of internal connections).

[94] *See July 7, 1999 Ex Parte Letter* at Attachment A, p. 1 ("If[the connection between the school local area network and ENA's router] is unplugged, the [local area network] operates independently and there is no connection to the Internet via the ISP, nor is there any interruption in communications between and among classrooms.")

[95] *See July 7, 1999 Ex Parte Letter.*

connections. First, there is no evidence that the hub sites at issue here are, or will be, owned by Tennessee. Nor, is there evidence of a lease-purchase agreement between ENA and Tennessee for Tennessee to purchase the hub sites at the end of the contract term. In addition, although the service provided by ENA to Tennessee has been described as "dedicated access,"[96] the hub sites located on school premises have "other ports for access from other customers[;] the point of presence router is not dedicated to Tennessee."[97] Finally, although the nonrecurring charges related to ENA's upgrades are large, thus providing some indication that this seems more like a purchase of a facility that could be used for internal connections, we believe all factors taken together weigh against a finding of internal connections and in favor of a finding of Internet access service.[98]

41. With regard to the caching servers, we note that the Administrator concluded that they do not meet the definition of internal connections because, as described on the record, they are not "necessary to transport information *within* one or more instructional buildings of a single school campus." Even if Tennessee owned these facilities and they resided on school premises, we would not find them to be internal connections because, based on the record, they seem to provide levels of efficiency in the delivery of information, but are not necessary to transporting such information. We note, however, that when used by an Internet service provider in its provision of Internet access service, caching servers may be included as part of the cost of that service, as described above.

42. Although we find that the hub sites and caching servers here are part of the underlying facilities used to provide Internet access service, and thus, may be properly included as part of the cost of providing such service, we are troubled by the effect of this decision. When we started this program, we did not envision providing support to fund significantly the backbone of a provider's network. At the same time, we obviously did not wish to foreclose competition by funding only established service providers. Indeed, if we concluded that ENA were prohibited from support in this instance, we could very well start down the path of excluding significant competition. We believe we need to consider in the very near future a way to reach a balance between ensuring that schools receive supported services and significantly funding a new company's network.

### D. Public Interest Issue

43. We do not find it in the public interest to waive our rules to allow Tennessee to

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[96] *See* ENA Request for Review at 13.

[97] *July 7, 1999 Ex Parte Letter* at Attachment A, p.1.

[98] Note in para. 36 *supra*, we have already concluded that, if these facilities are not internal connections, they are sufficiently related to the provision of Internet access service to be considered part of such service.

receive discounts on charges related to the ConnecTEN network. Although Tennessee has requested that the Commission find it in the "public interest" to ensure Internet access service with support from the universal service fund for Tennessee's public schools to avoid a "digital-divide," we cannot conclude that Tennessee has made the requisite showing to support a waiver of our rules with regard to the ConnecTEN network. Moreover, we note that our decision with regard to the ENA upgrades discussed *supra* in section C, should mitigate any concerns with regard to a "digital divide."

44. Since we have found that Tennessee's request for discounts on charges related to the ConnecTEN network should be denied support under our rules, we presume Tennessee seeks a waiver of sections 54.507(f) and 54.518 to allow for funding of discounts on its requested services. Section 1.3 of the Commission's rules provides that "[a]ny provision of the rules may be waived by the Commission . . . if good cause therefor is shown."[99] As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest.[100] Tennessee has failed to show that special circumstances warrant deviation from applicable rules.

45. Specifically, although we applaud Tennessee's laudable goal of providing high quality Internet access to all of its public schoolchildren to avoid a "digital divide" among them, we will not waive our rules solely because Tennessee made a good faith attempt, but failed, to follow such rules. In other words, the fact that Tennessee was not able to meet its goal of providing high quality Internet access to all of its public school children in this first year of our schools and libraries program does not establish "special circumstances" warranting deviation from our rules. Given our competing goals of providing universal service support to enhance "access to advanced telecommunications and information services" for classrooms and keeping telephone rates affordable throughout the country, we will not waive our universal service support rules affecting discounts for schools for "good faith" attempts to comply with the rules. Moreover, we also are concerned that the neediest schools receive eligible service first, as indicated by our priority rules,[101] and a waiver in this instance would likely adversely affect a needier school. Therefore, while we have reason to believe that Tennessee followed its procurement rules and awarded a contract for what it terms "Internet access service" to a service provider in such a way as to guarantee the most cost-effective service, such actions do not constitute "special circumstances" sufficient to waive applicable rules.

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[99] 47 C.F.R. § 1.3.

[100] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*citing Wait Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

[101] *See supra* n. 60.

## E. Other Issues

46. Although ISIS 2000's request for review states that it seeks "partial" review of the Administrator's decision as it relates to the competitive bid requirements, it also states in a footnote that:

> [i]n addition, currently pending before the Commission is ISIS 2000's Request for Expedited Declaratory Ruling, filed April 3, 1998, and subsequent pleadings requesting a declaratory ruling from the Commission with respect to the issues raised by the Department's competitive bidding process and subsequent application for funding. ISIS 2000 requests that these issues be resolved in conjunction with this appeal.[102]

ISIS 2000's initial pleadings, to which this footnote makes reference, raises broader issues than those for which it ultimately seeks review here. As such, it is not entirely clear if this limited reference is intended as a request for broader review. Regardless of that answer, however, we believe that, through Tennessee's and ENA's requests for review, we have essentially addressed all issues raised by ISIS 2000's initial pleadings; namely, whether Tennessee should receive support for costs related to the ConnecTEN network and ENA's upgraded network. Therefore, we find that, because we have addressed these issues herein, ISIS 2000 1998 Objection, and subsequently-filed related pleadings, is rendered moot. We note that ISIS 2000 also originally objected to requests for discounts on technical support for the facilities at issue here. Although not specifically raised in its request for review, we note that the Administrator correctly explained that this technical support will be part of an eligible service to the extent the underlying service is eligible.

## IV. Conclusion

47. We therefore deny ISIS 2000's request for review regarding Tennessee's compliance with our competitive bidding processes because we conclude that Tennessee indeed complied with those requirements. Moreover, we grant in part, and deny in part, ENA's and Tennessee's requests for review. Specifically, we find that, because Tennessee owned the ConnecTEN network, and subsequently sold it to ENA, who then used it to provide Internet access service to Tennessee, we will not allow discounts with regard to such transaction for the reasons discussed above. In addition, we find that, because ENA has shown that it is providing an end-to-end Internet access service, we will allow discounts on charges for the provision of its Internet access service, including the cost of facilities used to provide such service, except with regard to charges related to the ConnecTEN network.

48. We require the Bureau, through its oversight role, to work with the Administrator

[102] ISIS 2000 Request for Review at 2, n. 1.

and Tennessee to implement this decision. We expect that Tennessee will provide, to the extent necessary, any relevant information to the Administrator regarding charges related to the ConnecTEN network that will allow those charges to be removed from its discount requests. We expect the Bureau to actively monitor these activities to ensure that our decision is implemented expeditiously, and in no case should implementation, by way of an Administrator's Decision Letter, be delayed longer than 10 working days from receipt of the information necessary to be provided by Tennessee to implement our decision. In addition, we wish to make clear that the Bureau may waive any rules if, and, to the extent necessary, to effectuate our decision herein.

## V. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED that, pursuant to 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, 54.504, 54.507(f), 54.511, 54.518, and 54.719, 47 C.F.R. §§ 1.3, 54.504, 54.507(f), 54.511, 54.518, and 54.719, the requests for review filed by the Department of Education of the State of Tennessee and Education Networks of America ARE DENIED IN PART and GRANTED IN PART as described *supra*, and the request for review filed by Integrated Systems and Internet Solutions, Inc, IS DENIED as described *supra*.

50. IT IS FURTHER ORDERED that the Objection to Application/Request for Expedited Declaratory Ruling filed by Integrated Systems and Internet Solutions, Inc., IS DISMISSED as moot.

51. IT IS FURTHER ORDERED that the Bureau, through its oversight role, work with the Administrator and Tennessee to implement this decision.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

**CHRONOLOGY OF, AND LIST OF PLEADINGS FILED IN, THE TENNESSEE PROCEEDING**[1]

| DATE | PARTY | PLEADING |
|---|---|---|
| April 3, 1998 | ISIS 2000 | Objection to Application/Request for Expedited Declaratory Ruling (ISIS 2000 1998 Objection) |
| April 20, 1998 | ENA | Opposition of ENA (ENA 1998 Opposition) |
| April 21, 1998 | Tennessee | Opposition (Tennessee 1998 Opposition) |
| April 21, 1998 | ISIS 2000 | Supplement to Objection to Application/Request for Expedited Declaratory Ruling (ISIS 2000 1st Supplement to 1998 Objection) |
| April 27, 19998 | ISIS 2000 | Reply to Opposition (ISIS 2000 1998 Reply) |
| May 1, 1998 | ISIS 2000 | ISIS 2000 1998 Supplement to Reply |
| June 12, 1998 | ISIS 2000 | ISIS 2000 1998 Second Supplement to Reply |
| July 15, 1998 | ISIS 2000 | Third Supplement to Reply |
| July 21, 1998 | Tennessee | Consolidated Response (Tennessee 1998 Consolidated Response |

[1] This Appendix does not include a list of all *ex parte* filings.

| | | |
|---|---|---|
| August 7, 1998 | ISIS 2000 | Reply to Consolidated Response and Renewed Request for Expedited Declaratory Ruling (ISIS 2000 1998 Reply to Consolidated Response) |
| March 29, 1999 | Tennessee | Request for Review of the Administrator's Decision Letter (Tennessee Request for Review) |
| March 29, 1999 | ENA | Request for Review of the Administrator's Decision Letter (ENA Request for Review |
| March 29, 1999 | ISIS 2000 | Request for Review in Part of Fund Administrator's Explanation of Funding Commitment Decisions (ISIS 2000 Request for Review) |
| April 13, 1999 | Tennessee | Opposition to Request for Review of ISIS 2000 (Tennessee 1999 Opposition) |
| April 13, 1999 | ENA | Opposition of ENA (ENA 1999 Opposition) |
| April 13, 1999 | ISIS 2000 | Opposition to Requests for Review filed by the Sate of Tennessee and Education Networks of America (ISIS 2000 1999 Opposition) |
| April 26, 1999 | Tennessee | Reply to Opposition (Tennessee 1999 Reply) |
| April 26, 1999 | ENA | Reply of ENA (ENA 1999 Reply |

| | | |
|---|---|---|
| April 26, 1999 | ISIS 2000 | Reply to Oppositions of State of Tennessee Department of Education and education Networks of America (ISIS 2000 1999 Reply) |