the Technology Plan. YISD retained and exercised exclusive control over developing or modifying the Technology Plan. YISD also controlled the process of completing its Application for Program funding. YISD has a great need to complete certain projects as identified in the Technology Plan, but has limited funds even for its pro rata contribution. Consequently, YISD wants a large "bang for its bucks", and does not want to waste any of its pro rata contribution on Projects that are not consistent with the Technology Plan.

YISD categorically denies that its Application was based upon a Technology Plandeveloped in whole or part by IBM. This is not a situation where a service provider created a technology plan for a district.

B. ***In the Decision, the SLD erroneously contends that the IBM Response improperly seeks to maximize E-rate finding.***

In the Decision, the SLD also focuses upon acomment in the IBM Response that IBM could help YISD in maximizing Program funding.

In the first place, YISD did not request such services in the Request for Proposal or Form 470, YISD never requested such services from IBM, and the Contract and Application do not include any such services to be performed by IBM. The IBM Response, as noted above, is not part of the Contract.

Second, it should also be noted that this is not a situation where, once a particular service provider became involved, the district's funding requests escalated substantially. YISD's Application sought $22.2 million in Program funding, which does represent an increase over the past year. On the other hand, YISD has had a particular pattern of Program funding requests, whereby a year of large funding requests is followed by a year of small funding requests, followed by a large year about

$3-$5 million higher than the prior large year, followed by a low year about $3-$5 million higher than the prior low year, etc. Specifically, in Year 1 of the Program, YISD requested approximately $11.7 million in Program funding. In Year 2 of the Program, YISD requested about $4.5 million in Program funding. In Year 3 of the Program, YISD requested approximately $16.7 million in Program funding. In Year 4 of the Program, YISD requested about $8.3 million in Program funding. For Funding Year 2002, YISD requested about $22.2 million in Program funding. As one can readily see, the Program request for Funding Year 2002 by YISD is consistent with its pattern from prior years, where IBM was not the service provider. Again, as noted above, during negotiations with IBM over the Contract and incorporated statements of work, YISD negotiated a significant reduction in pricing from IBM, which caused the funding request to be consistent with past practice.

Moreover, in any event and contrary to the SLD's contentions, there is nothing wrong with YISD seeking to maximize its funding to be received from the Program, so long as YISD needs the services in question, the services are consistent with the Technology Plan, and the services are eligible. Here, the requested items by YISD are all needed by it, and are consistent with its pre-existing Technology Plan. YISD is a very poor district, and has major needs in the technology area. In addition, the items requested in the Application are eligible under the Program. Of course, YISD does not simply want to maximize the Program funding, but wants to maximize the number of eligible projects which it can complete consistent with its Technology Plan and consistent with its conflicting calls upon the monies representing its pro rata contribution. For instance, it makes no sense for YISD to seek $10 million in Program funding for a project worth only $5 million, since it simply means the unnecessary expenditure of $500,000 by YISD. On the other hand, in such case, YISD would be legitimately permitted to seek, and would wish to seek, $10 million in Program funding if the project

in question is worth that amount and is consistent with its needs as expressed in the Technology Plan. To reiterate, YISD has limited funds available for technology projects and cannot afford to waste any part of its pro rata contribution.

The funding requests by YISD in the Application were reasonable and consistent with past practice. This is not a situation where a service provider caused a district to seek maximize funding from the Program, particularly for projects not required by the district or not consistent with its pre-existing technology plan.

3. In the Decision. the SLD erroneously contends that IBM was improperly involved in YISD's selection process regarding the Program.

In the Decision, the SLD notes that the Request for Proposal is substantially similar to requests for proposal issued by a number of districts nationwide who selected IBM as service provider, suggesting improper involvement by the service provider in the selection process.

YISD concedes that the Request for Proposal is essentially identical to that which the El Paso Independent School District ("EPISD") issued for Year 4 Program funding. YISD has no direct knowledge about how other districts using a similar form obtained such form. On the other hand, YISD denies that it received such request for proposal form from IBM. Instead, YISD received the RFP directly from EPISD. YISD is a sister district to EPISD, and is located within the same metropolitan area. YISD and EPISD are the two major school districts in El Paso County, Texas. YISD was well aware of the large Program funding award to EPISD for Year 4 of the Program, through the local media and conversations with EPISD officials. Consequently, YISD was under the impression that EPISD's model of selection of aservice provider was a more effective method in light of the large award, and that YISD had been unduly restrictive on its requests. YISD had no reason

to believe that there was any actual or alleged problem with EPISD's methodology, since the SLD had approved the EPISD model for large Year 4 funding. YISD requested the form of the request for proposal directly from EPISD, and made appropriate changes thereon, culminating in the Request for Proposal.

It is very common for districts nationwide, in light of time pressures on limited staffing and money limitations, to obtain request for proposal or similar forms from other districts, especially when seeking to acquire particular goods or services that are not commonly acquired by the district. The forms received at times are modified substantially by the recipient, but not infrequently are used almost verbatim. As sister districts within the same locality, and with central offices located only a few miles from each other, YISD and EPISD officials routinely share information, forms, materials, etc. about a wide variety of issues. YISD and EPISD are also parties to various interlocal contracts, as permitted by Texas law. There is nothing improper or illegal with this sort of process or procedure, especially where the contact is district-to-district.

IBM was not involved in providing the Request for Proposal form to YISD, in drafting the Request for Proposal, or in YISD's process of evaluating and selecting a service provider. Again, IBM did not drive YISD's service-provider selection or funding request process. YISD retained and exercised control over these matters. As discussed before, YISD was very concerned about pricing for the Projects, for its own sake.

It should also be pointed out that YISD insisted upon and received only a one-year contract with IBM, not a multi-year contract. In that manner, YISD had in place a further incentive for IBM to deal fairly with YISD on pricing and other issues, or face problems in obtaining further contracts in the future. In addition, YISD insisted upon and obtained the Special Procurement Provisions in

the Contract, which granted YISD substantial rights over pricing, procurement, and other issues in the future under the Projects. Those distinctions are additional evidence of YISD's independent handling of this entire process.

IBM was not improperly involved in YISD's handling of the service-provider selection process for Funding Year 2002, contrary to the SLD's implications to the contrary. YISD renders no comment upon implications from similarities between the EPISD request for proposal and those in other districts, but is adamant that its special relationship with EPISD and its strong conditions upon IBM supports its position that improper involvement by IBM was not present with respect to YISD.

YISD also notes that any vendor who believed that there was any impropriety as to the Request for Proposal or selection process had numerous and adequate opportunities to address those concerns to the YISD or other authorities, similar to the methods described in Section IV(C) above, at page 20. No such efforts were undertaken.

V. CONCLUSION

1. The focus should be upon YISD's good faith efforts to comply with the rules of the Program and upon the Application's consistency with the goals of the Program.

YISD made a good faith attempt at compliance with Commission requirements relating to completion of the Form 470, specificity, and procurement. In this regard, the Form 470 for Funding Year 2002 was generally consistent in level of detail as opposed approved by the SLD in prior years. YISD also had no reason to believe that the level of detail in its Form 470 or Request for Proposal was problematic due to the SLD's approval of similar ones for its sister district, EPISD, in Year 4. Moreover, YISD believes that the SLD has approved, during each funding year, funding applications

by districts who used similar levels of description and used similar pricing models

It cannot be emphasized enough that, unlike other districts nationwide [except EPISD] to YISD's knowledge, YISD insisted upon and obtain the Special Procurement Provisions in the Contract, and also provided for a variety of other conditions placing extra requirements on IBM. The Special Procurement Provisions, and the additional continuing review of pricing and other issues, were intended and designed to ensure the most "bang for the buck", with respect to YISD's own funds and thus the Program funds as well. YISD went the "extra mile" in trying to protect itself and the Program from any excessive pricing. YISD went to great effort to compare IBM's pricing to other vendors and to that approved by the SLD to another local district where IBM was the service provider, and to review and evaluate that the IBM pricing in light of its own experience and expertise in pricing. YISD was in charge of the process of determining the scope of the Projects and in determining agreed-upon pricing for those Projects, not IBM. Many other districts who did not make any such effort have received Program funding. YISD should not be penalized for taking these extra steps. YISD, not IBM, controlled the process here and YISD insisted upon and received numerous conditions and restrictions upon IBM.

YISD is a poor district with many poor students, and each have many needs, especially in the technology area. Currently, 86% of YISD's students are eligible for "free and reduced lunches" under federal law. The 2000 Profile of Selected Economic Characteristics issued by the United States Census Bureau estimates the per capita income for 1999 in the El Paso, Texas at $14,388 per year.* For comparison, according to the same survey, the annual per capita income for 1999 in the United

[8] It should be noted that **YISD's** boundaries do not include the areas generally recognized as being the most affluent of the El Paso, so the figures for census tracts within **YISD's** boundaries would probably be lower.

States was $21,587, for the State of Texas was $19,617, and for the Washington D.C. was $28,659. As one can readily see, YISD students are extremely poor, and in great need of the benefits from the Projects to be completed using Program funding.

YISD believes that the SLD is essentially "changing the rules" at the last-minute, and thereby depriving its needy and deserving students from a fair opportunity to learn and attempt to escape the poverty and circumstances in which so many have been born and raised. After substantial review and investigation, YISD believes that the scope and pricing for the Projects is fair and reasonable, and YISD will continue such review even if funding is granted.

The Decision itself implies, without presenting evidence, that IBM may have acted improperly with respect to various districts participating in the Program. In considering this Request for Review, however, the Commission should review the unique and specific YISD-based facts, and not to infer inappropriate conduct to YISD based upon alleged conduct that is irrelevant to this appeal. YISD believes that it complied with all Program rules, and that IBM did likewise with respect to its dealings with YISD. In the unlikely event the Commission nevertheless believes that IBM has acted improperly under Program rules, the Commission should not penalize YISD by denying the Application. To be clear, YISD does not believe that IBM acted improperly with respect to YISD's own participation in the Program, and notes that IBM categorically denies any improper conduct whatsoever with respect to the Program, including conduct relating to other districts.

2. <u>The Decision should be reversed</u>.

Based upon the foregoing, additionally and in the alternative, the Decision is erroneous, and the Commission should reverse the Decision and award full funding to YISD under the Application, at least consistent with the funding levels granted to other recipients with a similar "free and reduced

lunch" proportion of their school populace.

SIGNED this 28th day of January, 2003.

Respectfully submitted,

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