

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
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| Request for Review of the Decision of the Universal Service Administrator by |) | |
| |) | |
| International Business Machines Corporation |) | |
| |) | |
| Federal-State Joint Board on Universal Service |) | CC Docket No. 96-45 |
| |) | |
| Changes to the Board of Directors of the National Exchange Carrier Association, Inc. |) | CC Docket No. 97-21 |
| |) | |

**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY**

**INTERNATIONAL BUSINESS MACHINES CORPORATION
REGARDING THE FUNDING REQUEST OF
THE ALBUQUERQUE SCHOOL DISTRICT**

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May 23, 2003

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SUMMARY

IBM requests Commission review of a March 24, 2003, Funding Commitment Decision Letter issued by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”). The SLD denied funding under the Schools and Libraries Funding Mechanism (the “E-rate program”) to the Albuquerque Public School District (“APS”) of Albuquerque, New Mexico.

SLD denied funding because it claimed APS’ Form 470 had failed to identify the specific services APS sought. In fact, APS’ Form 470 provided a specific description of the services and functions it was seeking. SLD has repeatedly granted in the past funding applications whose underlying 470s were virtually identical to or less specific than that used by APS. SLD’s disparate treatment of APS’ application was therefore arbitrary and capricious.

Moreover, SLD’s action was inconsistent with the Commission’s established rules and policies regarding the level of specificity required in Form 470s. APS met the requirements established by the Commission. SLD cannot create a new rule regarding the information applicants must provide on their Form 470s because SLD has no rulemaking authority.

Finally, the precedent cited by SLD in support of its action is inaposite and irrelevant to the concerns raised by SLD’s action.

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**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
INTERNATIONAL BUSINESS MACHINES CORPORATION**

International Business Machines Corporation (“IBM”), pursuant to Section 54.719 of the Commission’s rules,¹ hereby requests the Commission’s review of the Universal Service Administrator’s March 24, 2003 decision denying funds under the Schools and Libraries Funding Mechanism (the “E-rate program”) to the Albuquerque Public School District (“APS”). For the reasons detailed below, the Commission should reverse the SLD’s decision and grant APS’ funding request.

I. FACTUAL BACKGROUND

The Albuquerque Public School district (“APS”) has described the facts underlying its Year 2002 E-rate funding request in its Request for Review (“APS

¹ 47 C.F.R. § 54.719.

Request”), which it is filing contemporaneously with the instant request. The APS Request makes clear that APS conducted a competitive procurement of the internal connections services and functions for which it sought and was denied E-rate funding. IBM will not belabor those facts with a duplicative statement of them in the instant Request but instead incorporates by reference the statement of facts and supporting evidence in the APS Request. IBM has an interest in the matter under review because it is one of the service providers selected by APS to provide internal connections during USAC Funding Year 5 pursuant to FRNs 856741, 856765, 856797 on APS’ Form 471 (No. 320461).

II. DISCUSSION

The APS Request demonstrates that APS used a competitive bidding process that complied with the Commission’s requirements and selected the most cost-effective provider to implement the next step in its technology plan during Funding Year 2002. As discussed below, SLD’s denial of certain APS funding requests arbitrarily deviated from established SLD practice and violated existing Commission rules and policies. Because SLD has no authority to promulgate rules or make policy for the E-rate program, SLD’s creation and arbitrary imposition of new Form 470 standards and requirements cannot provide a lawful basis for denying APS’ funding application.

A. SLD’s Disparate Treatment Of APS’ Application Was Arbitrary and Capricious

SLD denied APS’ application for certain internal connections funding because APS “did not identify the specific services sought--either clearly on the 470 or in the RFP--to encourage full competition on major new initiatives.” This

premise for SLD's denial is factually wrong; APS' Form 470 provided a specific description of the services and functions it was seeking which tracked the level of detail that SLD has accepted repeatedly in the past for applications it has granted. SLD's reference to an "RFP" is inexplicable; APS did not issue an RFP for this procurement. SLD's inconsistent and confused treatment of APS' funding requests was therefore arbitrary and capricious, and must be reversed.

SLD has repeatedly granted funding applications in the past that used service descriptions in their underlying Form 470s which were virtually identical to those used by APS. For example, SLD granted millions of dollars in internal connections funding to the Houston Independent School District² in Year 2002 pursuant to a Form 470³ which requested as a "Service or Function" in Block 10 "wiring (Cat3, Cat5, Coax, fiber conduit, wiring accessories," specifying a quantity of "for 350 buildings." APS requested as a "Service or Function" in Block 10 of its Form 470⁴ "wiring (Cat3, Cat5, Coax, fiber conduit, wiring accessories" for "130 buildings." Houston requested "routers, servers, switches, hubs, and upgrades" for "350 buildings"; APS requested "routers, servers, switches, hubs, and upgrades" for "130 buildings." Comparable similarities exist for every line item on the two 470s. Indeed, the items listed in the two applications are identical but for

² See entries for Houston Independent School District, Form 471 No. 295389, FRN No. 791022, SLD Funding Request Data Retrieval Tool at <http://www.sl.universalservice.org/funding/OpenDataSearch>, last visited May 22, 2003.

³ The Houston Form 470 appears in the APS Request as Attachment O.

⁴ The APS Form 470 appears in the APS Request as Attachment E.

a handful of entries within individual line items that differ only slightly.⁵ Yet SLD granted Houston's funding request while denying APS'.

Similarly, SLD has granted funding to schools who used 470 descriptions that were less specific than APS' 470. For example, the Los Angeles Unified School District ("LAUSD") was granted millions of dollars in internal connections funding in Year 5.⁶ In its Form 470, which appears as Attachment T to the APS Request, LAUSD simply repeats in alphabetical order generic entries from SLD's eligible services list (e.g., "Wiring, internal," "LAN," "Wireless Wan [sic]"). Even the Form 470 itself instructs applicants to use descriptions that are less detailed than many used by APS. Block 10 of the Form directs applicants to "[s]pecify each service or function" they seek and offers as an example "local area network." Yet SLD rejected APS' more detailed Form 470.

The arbitrary nature of SLD's action is most starkly revealed by its treatment of Year 2002 funding requests by APS for internal connections using five other providers. SLD granted funding for those services despite the fact that the contracts were awarded pursuant to the very same Form 470 that SLD now rejects in the instant case.⁷

⁵ For example, Houston's Form 470 specifies "wireless (LAN, WAN)." APS specifies "wireless service, LAN" in the corresponding line item on its Form 470.

⁶ See, e.g., entry for Los Angeles Unified School District, Form 471 No. 289090, FRN No. 759443, SLD Funding Request Data Retrieval Tool at <http://www.sl.universalservice.org/funding/OpenDataSearch>, last visited May 22, 2003.

⁷ See entries for Albuquerque School District, Form 471 No. 323082, FRN Nos. 862013, 864069, 864164, 864206, and 864259, SLD Funding Request Data Retrieval Tool at <http://www.sl.universalservice.org/funding/OpenDataSearch>, last visited May 22, 2003.

SLD's rejection of APS' 470 in the instant case and acceptance of the same or similar 470s when used by Houston, LAUSD, similarly situated schools,⁸ and for other APS funding requests, epitomizes arbitrary and capricious decision-making. SLD has violated fundamental principles of fairness and administrative procedure, which the Commission cannot permit. "An agency action that constitutes an unexplained departure from precedent must be reversed as arbitrary and capricious within the meaning of § 706 of the [Administrative Procedure Act]."⁹

The courts have repeatedly emphasized that administrative agencies cannot engage in the kind of arbitrary and capricious behavior exhibited by SLD in this case:

Courts reviewing administrative action require consistency from the government—whether the context be the denial of a regulatory exemption, the denial of a license, or the issuance of a cease and desist order ... In every context, the overriding principle of fairness is always the same: the government must govern with an even hand.¹⁰

Agencies thus cannot engage in disparate treatment of similarly situated entities.

As the U.S. Court of Appeals for the Fourth Circuit has observed,

[T]he scope of judicial review under the arbitrary and capricious standard is narrow. There must be, however, a rational basis for the agency's action. Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary.¹¹

⁸ See Attachments O through T of the APS Request.

⁹ Kenneth Culp Davis and Richard Pierce, *Administrative Law Treatise* § 11.5 (3rd Ed. 1994).

¹⁰ *United States of America v. Undetermined Quantities of an Article of Drug Labeled as "Exachol,"* 716 F. Supp. 787, 795 (S.D.N.Y. 1989), citing, *inter alia*, *Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976); *Frozen Food Express Inc. v. United States*, 535 F. 2d 877 (5th Cir. 1977).

¹¹ *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (citations omitted, emphasis added).

Though the courts recognize that “absolute consistency” or “perfect symmetry” in administrative decision-making is impossible to achieve, the law nevertheless “does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, and another for Tuesday, a rule for general application, but denied outright in a specific case.”¹²

SLD’s disparate treatment of APS’ funding application cannot be squared with the requirements of fairness and due process that apply to administrative decision-making. To vindicate APS’ right to rational and even-handed treatment by SLD, the Commission must reverse SLD’s denial of APS’ application.

B. SLD’s Imposition Of A New 470 Standard Usurps Rulemaking Authority Reserved Exclusively To The Commission

SLD’s denial of APS’ application for failing to provide more detail and specificity than SLD has required in the past is not only arbitrary and capricious but inconsistent with the Commission’s established rules and policies regarding the level of specificity required in Form 470s.

The Commission established the Form 470 posting requirement to “provide a minimally burdensome means”¹³ for schools and libraries to alert potential vendors to their procurement activities and thereby ensure a

¹² *Frozen Food Express Inc. v. United States*, 535 F. 2d 877, 880 (5th Cir. 1977), quoting *Mary Carter Paint Co. v. Federal Trade Commission*, 333 F.2d 654, 660 (5th Cir. 1964), rev’d on other grounds, 382 U.S. 46 (1965).

¹³ *Federal-State Joint Board on Universal Service* (Order), 15 FCC Rcd 6732, 6733, ¶ 3 (1999).

competitive selection process, consistent with state and local rules. The Commission declared that

enabling schools and libraries to post relatively simple requests on a website would provide a minimally burdensome means for them to get competing providers to approach them, so that schools and libraries could then select the best service packages subject to their state and local rules. The Commission, therefore, require[s] that the administrator of the schools and libraries support mechanism establish and maintain a website that would be known and accessible to all providers to allow them to identify potential customers quickly and easily.¹⁴

The Commission later emphasized that, “[i]n submitting its FCC Form 470, an applicant is required to provide only general information about the services for which it seeks discounts.”¹⁵

APS provided a breadth and depth of information on its Form 470 – like the many schools before it whose applications have been granted – which exceeded the “relatively simple” and “minimally burdensome” information contemplated by the Commission. As the Commission’s decisions have made clear, the purpose of the Form 470 is not to replace the more detailed specifications of terms, conditions, and services that may be required as part of the state or local procurement process. Rather, the form must only “include information sufficient to enable service providers to identify potential customers. ...[A]ny additional information contained in an RFP that is not submitted for

¹⁴ *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 6732, 6733, para. 3 (1999).

¹⁵ *Request for Review of the Decision of the Universal Service Administrator by Brooklyn Public Library, Brooklyn, New York; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 15 FCC Rcd 18598, 18599 at n. 4 (2000) (emphasis added) (“*Brooklyn Public Library*”).

posting on the website under FCC Form[] 470 ... can be made available to interested service providers at the election of the school [or] library.”¹⁶

APS’ competitive bidding process, described more fully in the APS Request for Review, was consistent with this purpose and satisfied the standard established in the Commission’s rules and orders. The information provided by APS’ posted Form 470 alerted potential service providers to the services and functions it was seeking and provided sufficient information regarding the requested services to enable service providers to approach APS as a potential customer and pursue the process required under state and local law.

SLD cannot ignore the standard established by the Commission for the information that applicants must provide in their Form 470s and substitute a new standard of its own making. The Commission has emphasized that SLD (as a division of USAC) can perform only the administrative functions associated with processing applications for E-rate funding, as required by a Congressional directive that USAC’s functions be limited to implementation of rules adopted by the Commission.¹⁷ SLD may not “make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”¹⁸ Indeed, SLD is “prohibited from making decisions of law or policy” and must limit its activities “to implementing existing rules and policies established by the Commission.”¹⁹

Accordingly, SLD cannot create a new rule regarding the information applicants

¹⁶ *Federal-State Joint Board on Universal Service (Fourth Order on Reconsideration)*, 13 FCC Rcd 5318, 5412, ¶ 162 (1997) (“*Fourth Reconsideration Order*”).

¹⁷ See Conference Report on H.R. 3579, H.R. Rept. No. 105-504, 105th Cong., 2d Sess.

¹⁸ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 13 FCC Rcd 25058, 25067 (1998).

must provide on their Form 470s responses and deny funding to applicants who fail to comply with it.

C. The Precedent Cited By SLD Provides No Support For Its Decision

SLD cited no authority for its rejection of the APS application in the funding commitment denial letter sent to APS.²⁰ However, SLD verbally informed APS staff that its rejection of the APS application was supported by the Commission's decision in *Brooklyn Public Library*.²¹

In that case, the Brooklyn Public Library entered into a multi-year contract with Bell Atlantic for telecommunications services. In order to provide the services, Bell Atlantic concluded that it would be required to make an extensive capital investment in equipment and infrastructure. Bell Atlantic therefore required the library to agree to a substantial one-time charge in the first year of the contract to cover the costs of that investment. Because the Commission does not allow "advance payments" for equipment and infrastructure that will be used to provide service over the life of a multi-year agreement, SLD denied the library's application.

The library filed a Letter of Appeal with the Commission in which it argued that the first year payment was not an impermissible "advance payment" but a one-time charge for services that would be delivered and installed in the first funding year. The Commission rejected this argument and concluded that the first year payment was an impermissible advance payment. The Commission

¹⁹ *Id.*

²⁰ See APS Request, Attachment A.

also concluded that the library could properly receive funding in the first year for a *pro rata* portion of the charges associated with the multi-year contract.

The analysis and holding in the *Brooklyn Public Library* decision appears to be wholly irrelevant to SLD's rationale for rejecting the APS application. The APS agreement with IBM does not include any impermissible "advance payment" nor do the parties contemplate an initial one-time payment in lieu of recurring charges for telecommunications infrastructure that will be used over many years.

SLD personnel have asserted that the case authorizes SLD to apply a higher standard when evaluating E-rate funding applications that involve a significant jump in a school's funding from the previous year. That proposition appears nowhere in the case. The case does mention the Commission's concern that unrestricted up-front payments for multiple years of telecommunications service could create a "critical drain" upon the universal service fund.²² But if that is SLD's concern, and it rejected APS' application in an effort to impose a dollar cap on the fund's payments for internal connections projects like APS', SLD would be, once again, usurping the Commission's rulemaking authority. No such cap has been imposed or authorized by the Commission, nor could it be without a notice and comment rulemaking to revise the Commission's current rules. Indeed, since similar or related issues have been raised by parties in CC Docket No. 02-6, the Commission's pending rulemaking on the E-rate funding mechanism, any attempt by SLD to impose a

²¹ See note 15, *supra*.

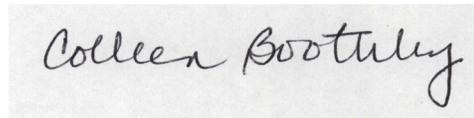
²² *Brooklyn Public Library*, 15 FCC Rcd at 18606, ¶ 19.

de facto cap by rejecting applications like APS' would be a patently unlawful attempt to circumvent and prejudice that rulemaking.

III. CONCLUSION

For the aforesated reasons, the Commission should reverse the SLD's decision to deny the application for E-rate funding filed by the Albuquerque Public School District.

Respectfully submitted,



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May 23, 2003

Certificate of Service

I, Michaeleen I. Williams, hereby certify that true and correct copies of the preceding Request for Review of International Business Machines Corporation ("IBM") was filed electronically with the FCC and served this May 23, 2003 by hand delivery upon the following parties:

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