

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of: §  
Request for Review of the Decision of the §  
Universal Service Administrator by §  
El Paso Independent School District §  
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§  
Federal-State Joint Board on Universal Service §  
Changes to the Board of Directors of the §  
National Exchange Carrier Association, Inc. §

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 96-45

CC Docket No. 97-21

**REQUEST FOR REVIEW**  
**OF EL PASO INDEPENDENT SCHOOL DISTRICT**

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May 6, 2003.

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**Appendix to Request for Review (separate volumes)**

- Exhibit "1" - Decision No. 1
- Exhibit "2" - Decision No. 2
- Exhibit "3" - IC/IA Form 471
- Exhibit "4" - Telco Form 471
- Exhibit "5" - Technology Plan
- Exhibit "6" - 2001 Request for Proposal
- Exhibit "7" - IBM Response to Request for Proposal
- Exhibit "8" - 2001 Contract
- Exhibit "9" - 2002 Form 470
- Exhibit "10" - 2002 Contract
- Exhibit "11" - Excerpt from Director of Information Resources Website
- Exhibit "12" - Affidavit of Jack Johnston
- Exhibit "13" - Excerpt from Form 470 Instructions

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**REQUEST FOR REVIEW  
OF EL PASO INDEPENDENT SCHOOL DISTRICT**

***I. INTRODUCTION***

El Paso Independent School District ("EPISD"), by its attorneys, hereby requests review of the Funding Commitment Decision Letter issued by the Universal Service Administrative Company, Schools and Libraries Division dated March 10, 2003 for Funding Year 2002-2003 of the E-Rate Program of the Federal Communications Commission, for Form 471 Application No. 318522 (the "Decision No. 1"), as well as the Funding Commitment Decision Letter issued by the Universal Service Administrative Company, Schools and Libraries Division dated March 10, 2003 for Funding Year 2002-2003 of the E-Rate Program of the Federal Communications Commission, for Form 471 Application No. 318768 (the "Decision No. 2"). True and correct copies of Decision No. 1 and Decision No. 2 are set forth as Exhibits "1" and "2" respectively to the accompanying Appendix, and

are incorporated herein. This Request for Review is made by EPISD pursuant to 47 C.F.R. §54.719.

By Decision No. 1, the Universal Service Administrative Company, Schools and Libraries Division (collectively, the "SLD") refused funding for EPISD for Funding Year 2002-2003 (the "Funding Year 2002") of the E-Rate Program (the "Program") under EPISD's Form 471 Application No. 318522 (the "IC/IA Form 471"). The IC/IA Form 471 related to internal connections and Internet access. A true and correct copy of the IC/IA Form 471 is set forth as Exhibit "3" to the accompanying Appendix, and is incorporated herein. IBM Corporation ("IBM") is the service provider for EPISD under the IC/IA Form 471, with respect to the projects at issue in Decision No. 1.

By Decision No. 2, the SLD refused funding for EPISD for Funding Year 2002 of the Program under EPISD's Form 471 Application No. 315768 (the "Telco Form 471"). The Telco Form 471 related to local telephone service and long-distance service.<sup>1</sup> A true and correct copy of the Telco Form 471 is set forth as Exhibit "4" to the accompanying Appendix, and is incorporated herein. AT&T is the service provider for EPISD under the Telco Form 471, with respect to the denied project at issue in Decision No. 2.

In the Decisions, the SLD essentially contends that EPISD failed to properly comply with requirements of the Federal Communications Commission (the "Commission") under the Program.

For the reasons set forth below, each of the Decisions is erroneous, and the Commission should reverse the Decisions and award full funding to EPISD under the IC/IA Form 471, at least

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<sup>1</sup> EPISD's application for Program funding for local telephone services, under this same Telco Form 471, was approved, and is not the subject of any request for review.

consistent with the funding levels granted to other recipients with a similar "free and reduced lunch" proportion of their school populace.

## **II. SUMMARY**

In each of the Decisions, the SLD contends that EPISD failed to comply with the Commission's requirements under the Program on the following grounds:

- a. *"vendor selected by RFP, not 470";*
- b. *"470 said no RFP";*
- c. *"services for which funding sought not defined when vendor selected";*
- d. *"price of services not a factor in vendor selection"; and*
- e. *"price of services set after vendor selection".*

These contentions are without merit.

In connection with its requests under Funding Year 2002, the allegations of the SLD are incorrect in their entirety. For Funding Year 2002, EPISD properly procured services from AT&T in accordance with Program rules and state procurement laws. For Funding Year 2002, EPISD renewed an existing contract with IBM.

To the extent the SLD is complaining of how EPISD acquired services from IBM for Funding Year 2001, the Decisions represent an improper collateral attack on such acquisitions. In any event, for Funding Year 2001, EPISD properly used both the Form 470 and its request for proposal in its selection process, properly detailed the goods and services being sought under the Program, properly complied with state competitive procurement laws, and properly considered price in its selection process. EPISD, not IBM, controlled the process of development of its Program

funding request and the selection of the service provider. Along these lines, EPISD insisted upon and obtained substantial contractual concessions from IBM permitting EPISD additional, continuing rights to review and evaluate Program matters and to either modify or eliminate projects, terminate the contract, and/or perform additional post-award procurement of suppliers and subcontractors under state law in order to further save monies.

### ***III. FACTUAL BACKGROUND***

EPISD is an independent school district under Texas law located in El Paso County, Texas. EPISD participated in Year 1 through Year 4 of the Program, and sought to continue that participation during Funding Year 2002.<sup>2</sup> EPISD has had a longstanding technology plan, as modified (the "Technology Plan"), upon which its Program participation has been based. A true and correct copy of the current Technology Plan is attached to the Appendix as Exhibit "5", and is incorporated herein.

For Funding Year 2002 [as done with Funding Year 2001], EPISD sought Program funding for internal connections and Internet Access services (the "IC/IA Services"), and separately for long-distance service and local telephone service (the "Telco Services"). For the Telco Services, EPISD acquired such services from AT&T as permitted by state law through the catalogue purchase program of the State of Texas's Department of Information Resources (the "DIR"). For the IC/IA Services, EPISD renewed its contract with the service provider it had selected and contracted with for similar services under the Program for Funding Year 2001. That renewal, though, was only made

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<sup>2</sup> The SLD used to refer to funding years as Year 1, Year 2, etc., but changed the terminology of the Year 5 funding year to Year 2002.

after EPISD had posted a Form 470 for IC/IA Services for Funding Year 2002, even though such a posting was not necessarily required under Program rules. No responses or inquiries from vendors were received by EPISD to that posting sufficient to convince EPISD not to renew the existing contract.

Due to the renewal for the contract for the IC/IA Services in Funding Year 2002, consequently, a review of the Funding Year 2001 process is in order.

In December 2000, EPISD posted a Form 470 for Funding Year 2001 (the "2001 Form 470"), in accordance with Program requirements. The 2001 Form 470 was posted through the SLD web-site. A hard-copy of the 2001 Form 470 was signed by EPISD and forwarded to the SLD.

In December 2000, EPISD also issued its Request for Proposal No. 101-00 entitled "Strategic Technology Solution Provider" (the "Request for Proposal"). The first page of the Request for Proposal stated in relevant part as follows:

*... This Strategic Technology Partnership agreement will include, but not be limited to, E-rate funded projects. The selected vendor should be prepared to assist the District with all aspects of the E-rate process and should demonstrate knowledge and experience in dealing with E-rate funded projects. All E-rate applications will be submitted using the successor bidder's single SPIN number. Vendors must provide their SPIN number as part of their response ...*

A true and correct copy of the Request for Proposal is attached to the Appendix as Exhibit "6", and is incorporated herein.

The Request for Proposal was noticed by EPISD in newspaper notices, and placed upon its web-site. EPISD provided copies of its Request for Proposal to eleven different companies who requested a copy, not all ones who ultimately bid.

The deadline for submitting responses to the Request for Proposal was December 19, 2000, and responses were thereafter opened. Eight vendors [IBM, Amherst Computer, Diversified Technical Services, Kent Data Communications, ESEI, Southwestern Bell, Time Warner Cable, and Cervantes CC] responded to the Request for Proposal in some form or fashion. The Form 2001 470 did not generate any responses. A true and correct copy of the IBM response to the Request for Proposal (the "IBM Response") is attached to the Appendix as Exhibit "7", and is incorporated herein.

An evaluation committee composed of EPISD Technology and Finance Department officials reviewed the responses and recommended IBM to the Board of Trustees of EPISD. At a Board meeting on January 9, 2001, the Board of Trustees of EPISD selected IBM as the putative awardee under the Request for Proposal, and thus, if a final contract [including pricing] was successfully negotiated and finalized, as the service provider for the EPISD projects for which a Funding Year 2001 application was to be made.

Thereafter, IBM and EPISD entered into an IBM Customer Agreement dated as of January 2001, with incorporated Statements of Work dated January 2001, as well as an Addendum to Customer Agreement for January 2001 SOWs (collectively, the "2001 Contract"). A true and correct copy of the 2001 Contract is attached to the Appendix as Exhibit "8", and is incorporated herein. The 2001 Contract had a one-year term, with an option by EPISD to renew for two additional one-year terms.

EPISD later received a substantial award of funding from the SLD for Funding Year 2001 for IC/IA Services and Telco Services. EPISD accepted such funding, and the projects thereunder

have been completed.

For Funding Year 2002, EPISD filed a Form 470 for IC/IA Services and Telco Services (the "2002 Form 470"). A true and correct copy of the 2002 Form 470 is attached to the Appendix as Exhibit "9", and is incorporated herein.

With respect to Telco Services for Funding Year 2002, EPISD acquired services from AT&T for long-distance service and local telephone service. The former is at issue in this Request for Review, not the latter. Section 44.031(b)(4) of the Texas Education Code authorizes school districts to acquire goods or services under the catalogue purchase system under Section 2157.001 et. seq. of the Texas Government Code. Under this catalogue purchase program, the DIR [being a Texas state agency] creates a list of approved statewide vendors for specified goods and services, after a process involving review of different pricing factors, among others. This process essentially forces interested vendors to offer specially discounted prices on a statewide-basis, in order to be listed as an approved vendor, in order to be able to make sales to local governments across the state. The DIR itself advises vendors on its website:

*DIR expects to receive the vendors' best pricing, since all state agencies, cities, counties, and other local governments, public school districts, and public colleges and universities can buy through the DIR contracts. Based on the state's anticipated volume, vendors need to offer DIR deep discounts from their list price. Those discounts must apply to all DIR customers, regardless of their size, which means that a small agency would receive the same base discounts that a large agency would receive, although entities buying large quantities should be able to negotiate deeper discounts through the DIR contracts.*

The catalogue purchasing program, under state law, supersedes any requirement for a local district to perform a second competitive procurement [insofar as the DIR has already done a competitive procurement previously]. AT&T was/is an approved vendor on the DIR catalogue. The Telco

Services of AT&T as offered in the DIR catalogue were tariffed services. Attached to the Appendix as Exhibit "10" is a true and correct copy of an excerpt from the DIR website, indicating such services and vendor as being approved by DIR. EPISD approved AT&T as the provider of the Telco Services for Funding Year 2002, based upon procurement under the DIR catalogue.

With respect to IC/IA Services for Funding Year 2002, after review and analysis by staff and approval by the Board of Trustees at a meeting on January 8, 2002, EPISD decided to renew its relationship with IBM as service provider for Funding Year 2002. As noted above, EPISD posted the 2002 Form 470, though not required to do so under Program rules due to the renewal. Nevertheless, EPISD wanted to inquire as to interest from other possible vendors, in an effort to determine whether or not renewal was cost-effective and should take place. No responses or inquiries were received by EPISD from vendors to the 2002 Form 470 for IC/IA Services sufficient to convince EPISD not to renew its existing contract with IBM; EPISD invited further responses from any such inquiring vendor, but substantive information or materials were not received on a timely basis, if at all. During an internal process, EPISD itself reduced the funding levels it would seek from the Program for Funding Year 2002 for the IC/IA Services, due to EPISD's desire to reduce the scope of the IC/IA Projects thereunder. No request for proposal was issued by EPISD for IC/IA Services for Funding Year 2002.

Thereafter, EPISD, in consultation with IBM, finalized the specifications for the specific goods and services necessary for completion of the IC/IA Projects for Funding Year 2002. Such process involved negotiation of the specifications and pricing for the IC/IA Projects. The funding requested for the IC/IA Projects for Funding Year 2002 represented a significant reduction in

amounts as requested by EPISD, and as awarded by SLD, for Funding Year 2001.

After further negotiations with IBM, EPISD and IBM entered into Statements of Work dated January 2002, as well as an Addendum to Customer Agreement for January 2002 SOWs (collectively, the "2002 Contract"). A true and correct copy of the 2002 Contract is attached to the Appendix as Exhibit "11", and is incorporated herein. The 2002 Contract contained special provisions whereby EPISD retained the right to select the ultimate providers of many services and products, through use of procurement requirements of Texas state-law (the "Special Procurement Provisions"). The Special Procurement Provisions are found within the Addendum to the Customer Agreement for January 2002 SOWs, being part of the 2002 Contract. In this way, EPISD intended to minimize the costs for such services and products, and thereby minimize the amounts of Program funding, and thus EPISD's pro rata<sup>3</sup> contribution, ultimately required to perform the IC/IA Projects. Similar provisions were included in the 2001 Contract. The 2002 Contract represented the renewal and extension of the IBM Customer Agreement, to cover Funding Year 2002 Projects and new Statements of Work.

Promptly after entry into the 2002 Contract, EPISD submitted the IC/IA Form 471 to the SLD on January 17, 2002. The IC/IA Form 471 described the particular goods and services required for the IC/IA Projects. On or about the same date, EPISD also submitted its Telco Form 471 for the Telco Services.

On or about May 13, 2002, EPISD received an E-Rate Selective Review Information Request

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<sup>3</sup> The contribution from districts may differ, depending upon the funding commitment made by the SLD, often based upon its "free and reduced lunch" proportion of the district's populace. EPISD overall has an approximately 68% "free and reduced lunch" proportion, but has many schools at the "90%" level.

from the SLD, more commonly known as the Item 25 Selective Review (the "Selective Review"). EPISD timely and comprehensively responded to the Selective Review. EPISD also had numerous discussions with SLD staff or contractors regarding Program issues. EPISD's high level of cooperation and assistance to the SLD was complimented and acknowledged.

After March 10, 2003, EPISD received each of the Decisions. The Decisions represent the final decision of the SLD on the IC/IA Form 471 and the Telco Form 471. This Request for Review before the Commission is being timely made within 60 days of the date of the Decisions.

In support of this Request of Review, EPISD also incorporates by reference the affidavit set forth on Exhibit "12" of the Appendix, and the other exhibits in such Appendix.

#### ***IV. DISCUSSION***

Insofar as two different Decisions for Funding Year 2002 are at issue in this Request for Review [though the SLD rationale is identical for each], for convenience of the reader, EPISD will first address in total the issues relating to Decision No. 1 [as to IC/IA Projects where IBM is the service provider] and only then to the issues relating to Decision No. 2 [as to IC/IA Projects where AT&T is the service provider].

1. ***In Decision No. 1, the SLD erroneously contends that EPISD failed to comply with the Commission's rules under the Program.***

*A. In Decision No. 1, the SLD erroneously contends that EPISD failed to properly complete the Form 470 since it failed to mark that there was a request for proposal.*

The SLD alleges that the 2002 Form 470, with respect to IC/IA Services, failed to indicate that there was a request for proposal issued by EPISD for Funding Year 2002, and that such failure was misleading. The SLD's position is meritless.

Items 9 and 10 of the standard Form 470 of the SLD have boxes to be checked depending upon whether or not the applicant has a request for proposal. Specifically, each item states as follows:

*Do you have a Request for Proposal (RFP) that specifies the services you are seeking?*

*YES, I have an RFP. Choose one of the following: It is available on the Web at \_\_\_\_\_ or via \_\_\_\_\_ the Contact Person in Item 6 or \_\_\_\_\_ the contact listed in Item 11.*

*NO, I do not have an RFP for these services.*

*If you answered NO, you must list below the [Internet Access/Internal Connections] Services you seek....*

In its 2002 Form 470, EPISD checked "no" in the boxes for Items 9 and 10. EPISD then listed descriptions of the particular services or functions being requested, for a particular number of locations.

EPISD did not issue a request for proposal for Funding Year 2002 for IC/IA Services. EPISD instead renewed its pre-existing contract with IBM as service provider. EPISD truthfully answered in its Form 470 that there was not a request for proposal for the services requested, insofar as there was in fact no such request for proposal. EPISD complied with the express terms of the Form 470 in this regard.

EPISD has complied with requirements of completion of the Form 470, and Decision No. 1 is erroneous to the extent it contends otherwise.

*B. In Decision No. 1, the SLD erroneously contends that EPISD did not use the Form 470 to make its decision, but instead relied upon a request for proposal.*

The SLD argues that EPISD selected IBM as service provider for Funding Year 2002 under

a request for proposal, rather than under a Form 470. The SLD is wrong.

As pointed out before, EPISD posted the 2002 Form 470, even though not legally required to do so under Program rules [see *Federal-State Joint Board on Universal Service*, 15 FCC Rcd. 6732 (1999)], but did not issue a request for proposal for Funding Year 2002. IBM was not selected by EPISD as service provider for Funding Year 2002 based upon any such request for proposal, since there was none. Instead, IBM was selected under the 2002 Form 470 as well as renewal of the existing contract with IBM. Consequently, Decision No. 1 is incorrect in this respect.

Furthermore, to the extent the SLD is actually addressing EPISD's procurement for Funding Year 2001, that effort is an improper collateral attack. In any event, even in such a case, the SLD's position is in error.

The SLD misinterprets the procurement rules under the Program. The Commission's requirements under the Program for selection of a service provider actually consist of merely the following elements: (a) the applicant's posting of a Form 470 on the SLD web-site; (b) the applicant's compliance with applicable state and local procurement laws; (c) the applicant's waiting at least 28 days after posting the Form 470 before entering into a contract with a service provider; and (d) possibly, price should be the primary consideration amongst the factors reviewed by the applicant in selecting a service provider.<sup>4</sup>

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<sup>4</sup> In this regard, this final element is not set forth in the regulations issued by the Commission. Instead, it is merely found in the Report and Order in Docket No. 96-45. Moreover, this element appears to be inconsistent with the regulations found at 47 C.F.R. §54.504 and §54.111, and is subject to challenge on that ground as well. EPISD also objects to the SLD's own adoption of rules and policies without a formal rulemaking as provided by law.

Of these elements, item (b) is the most important. If a vendor responds to a particular applicant after seeing the posted Form 470, the applicant still needs to comply with state and local procurement laws. Few, if any, districts nationwide [and none in Texas] would be able to acquire those goods and services without separate use of a state law procurement method; the Form 470 alone would not be enough. Those procurement laws are generally very detailed, and involve procedures and requirements for some sort of competitive selection process. Consequently, the state/local procurement method is the most important element. Even without a notation about a request for proposal in existence on the Form 470, any vendor would recognize that state procurement laws would likely require a request for proposal or similar competitive procurement method.

It must be initially recognized that the Form 470 alone is not a procurement method. Instead, it is simply a notice to potential vendors that a particular district is interested in obtaining eligible goods and services under the Program. As a practical matter, the Form 470 is effectively a nationwide "legal notice", giving notice of a proposed acquisition.

If a vendor had contacted EPISD after seeing the posted Year 2001 Form 470, EPISD would have advised the vendor of the subsequent existence of the Request for Proposal and sent a copy to the vendor. Although this did not occur in actuality [since the vendors responded to the newspaper notice or sources other than the Form 470], it would have occurred. Any alleged deficiency in EPISD's Form 470 was insufficient to prevent an interested vendor from responding to either the Form 470 or the Request for Proposal. In this regard, current EPISD staff with knowledge of these issues are unaware of EPISD ever being contacted by a vendor based simply upon EPISD's Forms

470 for Years 1 through Years 4, or Funding Year 2002. In light of the same, one wonders why the SLD is insisting upon such strict compliance with the SLD's peculiar interpretation of the Form 470 process. Since no vendor responded to the Form 470 such that EPISD could make such a disclosure, it simply shows that the Form 470 does not necessarily play as important a role in advising vendors of proposed acquisitions as the SLD now contends, because no vendors learned of EPISD's interest through that process sufficient to cause a call to EPISD to be made. EPISD did, however, get interested vendors through its Request for Proposal process.

The Request for Proposal specifically describes the Program and EPISD's intent to use the successful vendor as the service provider for Funding Year 2001. A vendor looking at the Form 470 would recognize that further procurement, such as through the Request for Proposal, would occur, since the Form 470 format does not permit the applicant to provide enough information therein to both meet state law procurement requirements and to enable a potential vendor to prepare a responsive bid under such law. Such vendor would also be aware of the existence of a Request for Proposal through the posting of notice in the newspaper. Likewise, a vendor looking at the Request for Proposal [especially with its E-Rate references] would recognize that a Form 470 was on file. Either way, the vendor would be readily able to obtain and review both documents.

The 2001 Form 470 and the Request for Proposal are consistent, and intertwined. The SLD is erroneously seeking to completely separate the two.

The Request for Proposal satisfies element (b) of the Commission's competitive procurement requirement. The posting of the 2001 Form 470 by EPISD satisfies element (a). The 2001 Form 470 and the Request for Proposal are intertwined, and resulted in eight responses being received by

EPISD. That is a significant number of respondents, and probably greater than experienced by many districts who were granted Program funding. Incidentally, there is no dispute that element (c) [i.e.- 28-day wait] was fulfilled by EPISD.

EPISD has complied with competitive procurement requirements of the Commission and Decision No. 1 is erroneous in that regard.

*C. In Decision No. 1, the SLD erroneously contends that EPISD did not adequately describe and define the specific goods and services being requested before IBM was selected.*

In Decision No. 1, the SLD argues that EPISD selected IBM as service provider without first having sufficient detail and description of the services to be provided. That is incorrect.

EPISD in fact defined the Year 2002 IC/IA Projects before the selection of IBM as service provider for Funding Year 2002. EPISD conducted an extensive internal review to determine the identity and scope of such projects. Those Funding Year 2002 projects were set prior to EPISD's renewal of its contract with IBM. The renewal was not effective until the effective date of the 2002 Contract. Indeed, the IC/IA Projects for Funding Year 2002 were sufficiently determined and described before such renewal that the terms thereof were included in the statements of work incorporated in the 2002 Contract.

Accordingly, Decision No. 1 is in error in its argument that the projects for Funding Year 2002 were not defined at time of selection of IBM as service provider.

Furthermore, to the extent the SLD is actually addressing EPISD's procurement for Funding Year 2001, that effort is an improper collateral attack. In any event, even in such a case, the SLD's position is in error.

At minimum, it is ludicrous for SLD to contend that EPISD failed to define its IC/IA Projects for Funding Year 2002, at the time IBM was selected as service provider for Funding Year 2001. Indeed, EPISD cannot be expected to now define all projects for which Program funding will be sought in future funding years.

In that regard, it is not entirely clear whether the SLD is asserting that such insufficient detail is within the 2001 Form 470 or the Request for Proposal. To the extent SLD is complaining about lack of specificity in the 2001 Form 470, EPISD believes that its 2001 Form 470 is sufficiently detailed. EPISD describes the services sought by category, and the number of locations for which they are being requested.

There is ambiguity as to how much information is needed in the 2001 Form 470 itself. Again, the Form 470 is akin to a newspaper notice, and such notices do not contain much detail; both the Form 470 and the newspaper notice identify a contact person from which more detail, such as in the Request for Proposal, could be obtained. The Form 470 instructions [see Exhibit "13" to the Appendix] give examples of how to complete the form, but themselves have limited detail. The Decision is inconsistent with SLD's expressed policies on this issue.

It is also the belief of EPISD that the SLD has in past funding years, and in Funding Year 2002 [though perhaps not as to applications with IBM as service provider], routinely approved Program applications involving Form 470s with similar level of detail as that in the 2001 Form 470 posted by EPISD [e.g.- Denver (470 #113130000372027), San Francisco (470 #669180000401176), Kansas City (470 #233480000378235), St. Louis (470 #788860000378260), Houston (470 #528460000367226), and Los Angeles (470 #417590000373638)]. EPISD must challenge any

disparate treatment by the SLD in this regard.

To the extent the SLD is complaining that there is lack of specificity in the Request for Proposal, that is also denied by EPISD. EPISD believes that the Request for Proposal, especially taken in context with the 2001 Form 470, contains sufficient detail to comply with Texas state law, to provide adequate notice to vendors, and to thus comply with the Commission's procurement rules.

In this regard, the Commission and the SLD should not put themselves into the position of reviewing, analyzing, and determining whether state procurement law has been met in a particular circumstance. The Commission and the SLD do not have the time, staffing, or monies to expend efforts on this point<sup>5</sup>, and do not have the expertise to make accurate review and determination of the procurement laws of all fifty states as well as the procurement policies of all districts applying for Program funding. If there is a violation of state or local procurement laws by a Program applicant, those violations can be challenged under state-law rules and procedures.

Furthermore, as noted above, a vendor knowing of the Request for Proposal would know of the 2001 Form 470, and vice-versa, and especially taken together, have a clear idea of what EPISD was seeking to acquire in terms of goods and services. It should also be pointed out that the projects set forth in the 2001 Form 471 are consistent with the Technology Plan prepared by EPISD long before the Request for Proposal was issued or 2001 Form 470 was posted. The Technology Plan is a public record, and available upon request to any vendor or other person. Any vendor was

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<sup>5</sup> One notes that, in Year 4 and Funding Year 2002, the SLD is making awards of Program funds from 3 to 5 months after the start of the particular funding year. If the SLD cannot timely award the Program funds at the present time, why should it take on this additional duty of reviewing compliance with state and local procurement requirements?

furthermore on inquiry notice of EPISD's needs based upon its Technology Plan.

If a vendor believes that a particular request for proposal from a Texas school district does not have sufficient information or detail, the vendor has multiple options under which to obtain more information or to challenge the procurement, including the following: (a) the vendor may contact the purchasing office issuing the request for proposal to seek further detail; (b) the vendor may contact the technology department to seek further detail; (c) the vendor may send written notice to the district complaining of lack of details or other problems; (d) under a., b., or c., if the district realized there was a problem [even if not a legal one], it is common to issue a supplement to the request for proposal to all vendors who requested or received the original request for proposal; (e) under a., b., or c., and sometimes in any event, a district may hold a bidder's conference open to all vendors to discuss issues about the request for proposal; (f) the vendor may complain about problems in one's response to the request for proposal; (g) the vendor may contact the superintendent or other senior administration officials to complain about lack of details or other problems [before or after response is due or recommendation is made]; (h) the vendor may contact one or more individual Board trustees to complain about lack of details or other problems [before or after response is due or recommendation is made]; (i) the vendor may attend a board meeting and outline one's concerns at "public forum"; (j) the vendor may attend a board meeting and outline one's concerns in the discussion of the particular agenda item; (k) under i. or j., a vendor can also complain about alleged illegality of the process and threaten a lawsuit if there is not a re-bidding, even using one's attorneys to do so; (l) the vendor may file a public grievance before the board; (m) the vendor may file a protest; (n) the vendor may file suit against district prior to award, seeking injunction; (o)

the vendor file suit against district after award, seeking injunction and/or damages; (p) the vendor may complain to board trustees after the award is made, but before the contract is signed, to seek reconsideration; (q) the vendor may seek a Texas Attorney General's Office investigation and prosecution; (r) the vendor may seek local County or District Attorney investigation and prosecution; and (s) the vendor may seek a local United States Attorney investigation and prosecution. Each of these steps may be taken by a vendor, and items a. through k. are very commonly done by vendors [not necessarily with any merit] with respect to many procurements, including those at EPISD.

It is also very important to note that the Special Procurement Provisions found in the 2002 Contract and 2001 Contract permitted involvement of EPISD in selection of many goods and services after the Program award is made, which would be done using Texas procurement laws. As such, even if there was a problem originally in the level of detail or otherwise [which is denied], vendors would have an extra opportunity to bid to supply goods or services to the IC/IA Projects after being provided with much more detail and specificity as to the specifications required.

Additionally, any vendor having any concern about lack of detail or any other problems with the 2001 Form 470 or the Request for Proposal could have lodged a complaint with the SLD or the Commission at that time. A vendor who had a problem with the Request for Proposal had the opportunity to take numerous steps to solve the problem then and there.

The SLD's position on the level of detail required in a Form 470 or a request for proposal is also inconsistent with the actual capabilities of districts. It is unrealistic for the SLD to expect school districts to have in-house expertise to understand, plan, and identify the specific plans,

specifications, and other details of projects at the time of posting the Form 470 or issuing any request for proposal. Districts rarely have expertise to do so. The districts generally understand only what projects need to be done and the basic scope and outline of those projects, but do not often know ahead of time the particular plans and specifications for those projects [especially in the technology area where new technologies and techniques come into play very quickly]. This is a very complicated field, and hard for a district to keep track of state-of-the-art goods and services. If a district tried to design a technology project completely on its own, including all plans and specifications, it would not necessarily design the most cost-effective project, and its design would likely include inefficiencies, waste, and obsolete items. Accordingly, it makes sense for a district to seek systems integration expertise from a third party.

By way of example, one should keep in mind the analogy of an individual building an addition to a house. In theory, a person could build the addition himself, but that is very rare indeed since individuals almost never have the necessary expertise and experience to do so. Instead, individuals generally do have in mind their basic needs and desires for the addition [no. of bedrooms, no. of baths, approx. square footage, one or two-story, exterior facing, style, etc.], but do not know all of the details [depth of foundation slab, location of plumbing and electrical conduit, framing details and techniques, etc.]. In addition, the homeowner generally does not know exactly how the framing, plumbing, HVAC, electrical, and other systems of the addition can be made compatible with those in the existing portion of the house. Of course, the homeowner rarely creates the blueprints on his/her own. The homeowner instead generally retains an architect and/or a homebuilder to prepare the blueprints, based upon the homeowner's basic needs and desires. Those

blueprints are not completed, however, by the architect/contractor without significant input from the homeowner. The homeowner usually reviews those plans and specifications with the architect/contractor and suggests many changes. In that regard, price is an important consideration, and changes are made to the blueprints accordingly. The price of the project is negotiated between the parties. The homeowner retains final control over the plans and specifications, and the price, especially since the homeowner has the right to end negotiations and seek a new builder, if necessary.

As applied to the Program, the homeowner is akin to a district seeking Program funding, the addition is akin to the new projects desired to the existing technology at the district, the homeowner's basic needs and desires of the homeowner are akin to the technology plan adopted by district seeking Program funding, the plans and specifications as set forth in the blueprints are akin to the details contained in the Form 471 filed by such district, and the architect and contractor are akin to the service provider for the district. The Commission should keep this analogy in mind when analyzing the compliance of districts with Program requirements.

The SLD's position as expressed in Decision No. 1 with respect to the level of detail required in the Form 470 and/or the request for proposal is also inconsistent with what occurs in reality. In the first place, it is well-recognized that, in the technology area, many goods and services become obsolete very quickly. Consequently, it is difficult for a district to realize and identify, when posting the Form 470, exactly what goods or services will be required by the district some 12 to 18 months later, after the SLD approval in fall of the following year and when the district is ready to acquire the same for the approved project. If there were great detail in the original request for proposal or