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

In the Matter of)
)
)
Request for Review of Decisions of the)
Universal Service Administrative or)
Request for Waiver)
)
Florida Department of Education,)
Tallahassee)



SLD Nos. 338600-352390, 346659

CC Docket No. 02-6

REQUEST FOR REVIEW OF DECISIONS OF THE
UNIVERSAL SERVICE ADMINISTRATIVE OR
REQUEST FOR WAIVER

Billed Entity Number: 167435
471 Application Numbers: 338600, 352390, 346659
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I. SUMMARY OF ARGUMENT

The Universal Service Administrative Company (Administrator) of the Schools & Libraries Division (SLD) denied in full the Florida Department of Education's (Department) applications for e-rate discounts primarily because it found that "it was clear that price was not *the primary factor* in the vendor selection process." Administrator Decisions, Ex. A, at 2. This conclusion depends on a flawed construction both of Commission precedent and the sealed, competitive procurement tool provided for by Florida law and utilized by the Department. The procurement vehicle treated price as of primary importance consistent with prevailing Commission precedent, although not in a manner familiar to SLD. The Administrator denied the Department's appeal based on an outmoded presumption that only Requests for Proposals (RFP) satisfy the Commission's goals and that scoring of price must be divorced from overall project concept and design.

For complex procurement, Florida procurement law provides for use of the Invitation to Negotiate (ITN), a unique, sealed competitive procurement mechanism complementary to Commission precedent, values and rules. At all stages, the ITN required evaluators to weight price more than other factors, yet the ITN did not dictate in command-and-control fashion only one method for resolving Florida's complex needs and did not divorce consideration of price from evaluation of overall project concept and design. The philosophy undergirding the ITN is that in a complex procurement environment, bidders should have liberty to choose among myriad alternatives to engineer a solution in the most cost-effective way, rather than respond to a one-size-fits-all specification more likely to cause waste and to procure clunker technology.

Evaluators of the ITN continuously compared cost to the technical proposal in a manner that treated price consistent with the standard actually applied by SLD and elaborated in *Ysleta*,¹ and, even more so, the standard SLD and the Administrator should have applied set forth in *Tennessee Order*.² Concededly, cost, which accounted for 35% of the ITN evaluation, ultimately did not drive the contract award. Evaluators scored three bid proposals similarly in the cost category, meaning that other factors were ultimately decisive. Hayes' bid prevailed because it proposed an obviously superior technical solution for the money or, in other words, was the most cost-effective.

The Department's choice of Hayes is totally consistent with the *Universal Service Order*,³ *Ysleta* and certainly the controlling standard for price elaborated in *Tennessee Order* that SLD should have applied: price as a primary factor. *Tennessee Order* governs this case because it was controlling precedent at the time the Department applied for e-rate discounts, issued its ITN, received responses and appealed, and because even according to *Ysleta*, *Tennessee Order* governs when the competitive procurement process leads to wide differences in services bid.

The SLD and Administrator reached the wrong decisions even accepting their mistaken assumptions about the ITN and standard for price. Had the Department

¹ In the Matter of Request for Review by Ysleta Independent School District and International Business Machines of the Decision of the Universal Service Administrator, 2003 WL 22888847 (FCC) (December 8, 2003) (also available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-313A1.doc) [hereinafter *Ysleta* with page citations to opinion on FCC website].

² In the Matter of Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, 1999 WL 604160 (FCC), CC Docket No. 97-21, 14 FCC Rcd 13,734 (August 11, 1999) [hereinafter *Tennessee Order*].

³ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, 12 FCC Rcd 8776, 9029-30 ¶ 481 (1997) [hereinafter *Universal Service Order*].

structured its application exactly as SLD preferred, the outcome would have been the same: Hayes' bid was the most cost-effective.

When equitable, this Commission has the authority to waive its rules for good cause shown. The Department satisfied this standard, because (1) Florida's students and library patrons, especially those in rural and underprivileged areas, are dependent upon e-rate discounts; (2) Florida law reasonably provides for an ITN to avoid waste in complex procurement; (3) the Department reasonably relied upon prevailing Commission precedent; (4) conflicts of law should be avoided; and (5) Hayes would have received the contract even utilizing SLD's preferred procurement model.

II. BACKGROUND

Each year the Department depends upon the availability of federal e-rate discounts to help provide internet connectivity to approximately 2.7 million Florida students, over 3,700 Florida schools and countless library patrons at a cost of roughly \$1.25 per consumer, so that they can have access to a plethora of digital resources including, for example, something as simple as a library catalog or as sophisticated as the on-line course curriculum at the Florida Virtual School (www.flvs.net).

Rural schools and schools in underprivileged areas are especially dependent on e-rate discounts to gain internet access, for example, to advanced placement (AP) curriculum and examination preparation materials. Through FIRN, students can connect to www.fcatexplorer.com to prepare for the FCAT, the mandatory state assessment test necessary for third graders to pass on to fourth grade and seniors to receive diplomas. Students may also apply through FIRN for financial aid (www.Floridastudentfinancialaid.org).

The Florida Information Resource Network (FIRN), administered by the Department, has been the primary data communications transport vehicle for all of these purposes for the Florida Education System for over two decades. FIRN has served Florida well, notwithstanding the explosion in the student population due to immigration and other reasons. Between 1993 and 2003, the demand for bandwidth grew from approximately 300 megabits to well over 1 gigabit of bandwidth.

Demand for services outpaced the Department's ability to expand and modernize FIRN during a period of budget shortfalls while unfunded federal mandates such as the requirement for comprehensive internet content filtering for grades K-12 has demanded

more sophisticated infrastructure. Consequently, until the Department-Hayes contract awarded as discussed below (*see infra* at 9), FIRN lacked sufficient capacity and complexity and was aging, leading to recurring problems like system outages. Transport bandwidth was insufficient, software improvements were essential, and network management and support for a 24/7 platform was critical.

To help address FIRN's shortcomings, on or about November 1, 2002, the Department in consultation with the State Technology Office posted its Form 470 Application Number 824980000424435 for the funding year July 1, 2003 until June 30, 2004 ("Form 470"), a copy of which is attached as Exhibit B. Then the Department prepared an ITN as provided for by Florida law when an agency determines in writing that the use of alternative procurement mechanisms "will not result in the *best value* to the state." Section 287.057(3)(a), Fla. Stat. (emphasis added). A copy of the Department's written determination to this effect is attached as Exhibit C, along with the State Technology Office's memorialization of it. On November 1, 2002, the Department made available the ITN for bundled internet access services and required sealed replies by December 2, 2002. The ITN is attached as Exhibit D.

On December 2, 2002, FIRN received bid proposals setting forth prices for proposed services from four parties: (1) ITC Deltacom, (2) Hayes E-Government Resources, Inc. (Hayes), (3) Fujitsu/Worldcom, and (4) AT&T. Section 287.057(3)(b), Fla. Stat., required the Department to "evaluate and rank responsive replies against all evaluation criteria set forth in the invitation to negotiate and ... select, based on the ranking, one or more vendors with which to commence negotiations." A copy of these

rankings against evaluation criteria is set forth as Exhibit E. Scores were close for three of the bidders.

As required by Florida law, the Department announced on December 18, 2002, its intent to award the contract (contingent on federal funding) to Hayes, “the responsible and responsive vendor” offering “the best value to the state.” Section 287.057(3)(b), Fla. Stat. The Department received no bid protests. Therefore, on January 16, 2003, the Department and Hayes entered into the contract for bundled internet access services, which is attached as Exhibit F (Department-Hayes contract). On January 31, 2003, the Department filed its Form 471 Application Number 338600 with the SLD, then responded to requests for information on May 7, 2003 during the select review process.

On June 23, 2003, SLD denied the Department’s 2003 E-rate Applications on the ground that allegedly “price was not the primary factor in selecting this service provider’s proposal.” A copy of SLD’s erroneous denials are attached as Exhibit G. On August 21, 2003, the Department and Hayes appealed SLD’s decisions to the Administrator. A copy of the Department’s appeal and supporting affidavit are attached as Exhibit H. On November 19, 2003, the Administrator upheld the SLD’s decisions and denied in full the Department’s appeal. A copy of the Administrator’s decisions are attached as Exhibit A. The Department filed this Request for Review within 60 days of the date the Administrator issued its Decisions on Appeal. 47 C.F.R. § 54.719.

III. JURISDICTION AND STANDARD OF REVIEW

The Commission has jurisdiction, pursuant to 47 C.F.R. § 54.723, to review decisions by the Administrator that involve novel questions of fact, law, or policy utilizing a *de novo* standard of review. The instant appeal involves all three. This appeal involves novel questions of fact because it hinges on a mistaken understanding of the use of price in the Department's Invitation to Negotiate (ITN). The SLD has erroneously presumed that price must be divorced from overall project design when scoring bid proposals to achieve the Commission's goals.

This appeal also raises a novel question of law because it not only unnecessarily pits the ITN against a Request for Proposal (RFP), but also juxtaposed Florida's emphasis on "best value" against the FCC's emphasis on "cost-effectiveness." Different terms of art, they nevertheless import the same legal meaning. Second, the SLD and the Administrator have applied a higher standard for price similar to that set forth in *Ysleta* than controlling precedent requires.

Last, this appeal raises novel questions of policy due to (1) the dependency of Florida's students, especially those in rural and underprivileged areas, on federal e-rate discounts; (2) the superiority of the ITN to other procurement mechanisms under the circumstances to prevent waste, fraud and abuse; (3) the Department's reasonable reliance upon prevailing FCC authority; (4) the constitutional preference in favor of avoiding conflicts of law; and (5) the immateriality of SLD's objections, because Hayes would have received the contract even utilizing SLD's preferred procurement model.

IV. ARGUMENT

A. SLD and The Administrator Misinterpreted the ITN and Misapplied Commission Precedent, But Under Even the SLD's Mistaken Assumptions the Administrator Erroneously Denied the Appeal.

1. The Department Treated Price as *of Primary Importance*.

The Department's Application and ITN treated price as *of primary importance*, consistent with prevailing authority, although not in the manner the Commission expected. ITN, Ex. D. The Department allocated 35% of the points to Category B of the ITN, 15 more points than for any other category. The Commission's directions for completing the present Form 470 explain that if price receives a 30% weighting, an applicant has certainly complied with the Commission's expectations post-*Ysleta*. See Form 470 Reminders, at <http://www.sl.universalservice.org/whatsnew/reminders-F470.asp>.

The Administrator mistakenly interpreted the ITN to render cost merely one criterion within Category B, so that "a proposal that [] cost more than the others could receive the highest score in this category if the evaluator determined that the project concept and overall design provided the 'best value' notwithstanding the higher cost." Administrator Decisions, Ex. A, at 4. Yet, as its very name implies the entire Category B hinges upon cost as a factor. Bidders were not aware of the sub-criteria, only that their proposal would be subject to review for *Overall Project Concept, Design and Cost*, and that this category would be super-weighted. See ITN, Ex. D, at 11 of 13.

For evaluators, too, price was their predominant consideration. As SLD acknowledged, "The evaluators were instructed to ... address each question as it relates to price, *i.e.*, an offeror may go above and beyond, scoring high technically . . . but, is the

higher cost worth the extra features?” Administrator Decisions, Ex. A, at 3. If an evaluator determined that features of a proposal contributed to the overall cost of the project and those features were not worth the increased cost, that proposal received a lower score in Category B. *See* Ex. E. As set forth below, members of the ITN review team shared a common understanding about the primary importance of price:

- *Melinda Crowley*: “Each member was given a copy of the ITN and instructed to use the ITN to evaluate the elements in all of the proposals. Each proposal was to be evaluated based upon *the most-cost effective proposal* as required by state law.... An overview of the evaluation sheet, specifically sections “B” and “C,” was delivered with instructions to *use the cost model* and the contents to determine which was *the best proposal*.” Ex. H (Attachment 1).
- *Ron McCord*: “Pursuant to the directions given and written materials, it was my understanding that cost was the primary factor to be evaluated in Category B – Overall Project Concept, Design and Cost. This was true for each of the sub-criteria in Category B. Practically speaking, I did not score higher any bid proposal due to technical merits without reference to cost.... [P]ursuant to my evaluation, no bid proposal costing more than another received a higher score in Category B due solely to project concept and overall design.” Ex. I.

Affiants’ understanding of price as of primary importance to their scoring in Category B is objective proof that the ITN weighted price even more heavily than the Commission requires: 35% instead of 30%. The close total scores in Category B of the three most responsible bidders is likewise convincing evidence that the State’s contract award to Hayes was not wasteful, abusive or cost insensitive, but based on important technical differences between the bid proposals. Yet the decisions of SLD and the Administrator erroneously suppose that Commission rules require divorcing consideration of price from overall project concept and design. Commission rules require only that price be of primary importance.

Although it is standard in an RFP to divorce consideration of price and technical specifications, the two are considered jointly in an ITN without in any manner detracting from the primary importance of price. The RFP presents a binary model, whereas the ITN a more sophisticated one. Neither has a corner on deeming price primary. Evaluators of the ITN continuously compare cost to the technical proposal to determine if the proposed solution is worth the enhancement. Evaluators of the RFP check price and independently evaluate technical merit. Both approaches permit treating price as of primary importance, but Florida considers one more suited to complex procurement.

2. Florida's *Best Value* and the FCC's *Cost-Effectiveness* Are Complementary.

Just as the SLD and Administrator erroneously juxtaposed treatment of price in RFPs and ITNs, they wrongly construed as utterly inconsistent Florida's "best value" and the FCC's "cost-effectiveness." Administrator Decision, Ex. A, at 3 ("Best value' is not ... equivalent to the FCC requirement that the bid selected be the most cost-effective, with price being the primary factor.") Both are false dichotomies especially in the context of complex procurement. Neither the State of Florida nor federal government endorses this outmoded view of procurement and the Commission should certainly not favor it.

Procuring bundled internet services serving thousands of schools statewide utilizing multiple routers, servers, connections, and work stations is not like procuring discrete network components. There are myriad imaginative ways companies can balance features, quality, and price to provide bundled internet services, but just a few technically acceptable ways of building, for example, a router. A comparison of prices for procuring routers is relatively straightforward and merits use of the RFP. Due to the

sheer complexity of the services sought here, however, the State Technology Office and Department reasonably concluded that Florida law provided for use of an ITN. *See* Determinations, Ex. C.

Requiring states only to utilize RFPs when applying for e-rate discounts as did the SLD in this case would be a mistake. It would not only risk frequent conflicts of law, but also chain the Commission to a method of procurement that actually ensures waste in complex procurement. With a traditional RFP, state government must *a priori* delineate both the scope of the problem and the solution. Rather than encourage bidders -- the experts in the field -- to suggest lowest cost, best engineered, market friendly solutions to problems, the RFP forces agencies to dictate in command-and-control fashion project design. This works fine when the solution to a problem is obvious and discreet, but use of an RFP in this case would have seriously disserved Florida by compelling the Department to stray from its core competence and design one solution to a problem with many answers.

Florida procurement law precludes the Department from making this mistake. It requires agencies to seek “best value” and choose among competitive procurement models to avoid procuring (even at a good price) obsolete technologies. “Best value” means “the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship.” Section 287.012(4), Fla. Stat. This renders “best value” no less or more inclusive than the Commission’s “cost-effectiveness.”

“Cost-effectiveness” involves consideration of price and “relevant factors other than the pre-discount prices submitted by providers.” 47 C.F.R. § 54.511(a). The latter

may include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” Universal Service Order, *supra*, at 9029-30 ¶ 481. *Accord* Administrator Decision, Ex. A, at 3.

In *Ysleta*, the Commission recognized that “[t]his view of price as the primary factor, where other factors are taken into consideration as well and balanced to determine cost-effectiveness, appears generally consistent with the “best value” concept cited in the Federal Acquisition Regulations.” *Ysleta, supra*, at 48 n.134. FAR defines “best value” as “the expected outcome of an acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement.” FAR § 2.101.

Commentators have described the federal concept as follows:

The tradeoff between cost/price and technical factors made by the selection official must still be based on the established criteria, but, *whatever the stated relative importance of the factors*, the ultimate decision will be based on an assessment of whether the difference in technical or management merit of the proposals is worth the difference in price.

JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 932 (3d ed. 1998) (emphasis added).

This is entirely consistent with Florida’s understanding of “best value” and the basis upon which Florida procurement law directs resort to different competitive procurement mechanisms depending upon the nature of the project. A better model for the Commission to adopt to avoid waste, fraud, and abuse in complex procurement than a dichotomy between price and technical merit is the FAR model and Florida’s continuum of competitive procurement tools for different projects: invitations to bid, RFPs, and ITNs. Section 287.057, Fla. Stat.

In this case, Florida law provided for the use of an ITN without any conflict with “cost-effectiveness.” Indeed, the instant ITN’s specifications conform exactly with the assessment factors identified in the *Universal Service Order*; for example, corporate experience (Category G); cost (Category B); qualifications of staff and technical expertise (Category D); quality design (Category B); security (Category B), and minority contribution (Category H). *See* Ex. E. Perhaps most importantly, the ITN seeks to expand and improve internet connectivity for Floridians, especially those in rural and underprivileged areas.

3. SLD and the Administrator Applied a Higher Standard for Price Than Controlling Precedent Mandated and the Department Met.

Even if the Commission accepted the SLD’s and Administrator’s discounting of price in the ITN and presumed against “best value,” this appeal should be granted because a higher standard for price was applied than controlling precedent required. Properly viewed, the ITN met the standard in fact applied, which is quite similar to *Ysleta*’s. But under any view of the Department’s use of price in the ITN, the Department satisfied the standard for price that should have been applied set forth in *Tennessee Order*.

Tennessee Order controls this case because (1) *Ysleta* was not yet decided when the Department submitted its applications and received bids and (2) *Ysleta* conceded that *Tennessee Order* controls in circumstances where, following a competitive procurement process, differences in the services bid “were such that the applicant could reasonably prefer one offering over another.” *Ysleta, supra*, at 24, n.137.

a. *Tennessee Order* Controls This Appeal Because the Department Made Application and Received Bids Prior to *Ysleta*.

When the Department posted its application and received replies to its bids, *Tennessee Order* controlled; *Ysleta* was not yet decided. *Ysleta's* treatment of price “depart[ed] from past Commission decisions to the contrary.” *Ysleta, supra*, at 24 n.137, ¶ 50. *Tennessee Order* referred to price as *a primary factor*, whereas *Ysleta* and the Administrator referred to it as *the primary factor*. See Administrator Decisions, Ex. A, at 2-4. The Commission conceded “that the Commission’s use of varying phraseology” prior to *Ysleta* “created some ambiguity on this issue.” *Ysleta, supra*, at 24.

Under *Ysleta*, “[a]pplicants may ... take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor.” *Id.* at 24-25, ¶ 50. In *Tennessee Order*, the Commission held that “[p]rice cannot be properly evaluated without consideration of what is being offered.” Focusing on the goal of flexibility discussed in the *Universal Service Order*, the Commission explained:

[A] school should have the flexibility to select different levels of services, 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, 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.

Tennessee Order, supra, at 13739, ¶ 9.

As set forth above, ITNs (in contrast to RFPs) are uniquely suited to ensure flexibility, along with price in procurement, to maximize technical excellence in resolving complex procurement challenges. The State Technology Office’s memorialization of the ITN itself stated the Department’s understanding of the importance of price in the evaluation process as follows: “[T]he evaluation established

that the single most significant aspect of the award was to be based on a combination of project concept and overall design as they related to cost.” Determinations, Ex. C.

Beyond this, as set forth above (*see supra* at 11-12), the Department assigned 35% of points to Category B, the “Overall Project Concept, Design and Cost.” The Department and evaluators strongly dispute that consideration of cost was restricted to any sub-criterion within Category B, but, assuming SLD’s contrary view was more persuasive than the Department’s uncontradicted sworn testimony, cost still received 10 points. *See* Ex. E, at 1. Only one other sub-criterion in any category (and it happens to be in the same category) received an equal amount. Furthermore, Hayes received the highest (best) score in the cost sub-criterion upon which SLD focused: 7 points to 6.8 and 4.2 points (twice). *Id.* Therefore, under even SLD’s mistaken interpretation of the ITN, price is a primary factor and Hayes’ bid was the most cost-effective.

- b. *Tennessee Order Controls This Appeal Because the Department Reasonably Preferred Hayes’ Bid Over Others’ Due to Differences in Services Competitively Bid and Priced.*

The Department’s reasonable reliance upon *Tennessee Order* was not contradicted in *Ysleta*, but reaffirmed. *Ysleta* indicates that the lesser standard for price set forth in *Tennessee Order* binds in this case where the Department reasonably preferred Hayes’ bid over others’ due to differences in services competitively bid and priced. *Ysleta, supra*, at 24 n.137.

Hayes provided the most cost-effective solution for the level of service and offerings provided. For example, Hayes is the only company that reengineered the antiquated FIRN network by relocating and increasing the internet gateways, which increased the quality of services offered. In so doing, Hayes was able to minimize cost

by routing traffic intralata, thereby minimizing interlata access charges. Moreover, by increasing the number of internet gateways, Hayes was able to provide multiple paths to the internet and system failsafe redundancy.

Hayes' overall design and competitively-bid services far surpassed its competitors' for the money. In circumstances like these, *Ysleta* explained *Tennessee Order* controls and the Department acted properly:

The Commission stated that a comparison of price was not determinative of a cost-effective bid in the factual scenario presented in the *Tennessee Order* only because it found that the differences in the services that were bid were such that the applicant could reasonably prefer one offering over another.... Here, the petitioners failed to demonstrate that the price of E-rate eligible services was a consideration at all in the first stage of the procurement process, much less the primary factor.

Ysleta, supra, at 24, n.137.

The disapproval the Commission reserved for the procurement process utilized by Ysleta Independent School District has no parallel to this case. The facts here are much closer to *Tennessee Order*. Most importantly, the Department oversaw a sealed and competitive bid process where at all stages cost was a primary competitive variable. By contrast, "Ysleta never received a single competing bid" for the products and services it sought. *Ysleta, supra*, at 12 ¶ 23. Ysleta "sought competitive bids for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism." *Id.*

Additionally, the ITN was carefully considered, unlike the procurement process reviewed in *Ysleta*. There, the Commission stated it was "troubled" by an insufficiently considered technology plan failing to specify "in sufficient detail to enable potential providers to formulate bids." *Id.* at 14 ¶ 27. But in this case, none of the bidders

complained about insufficient detail in the products and services requested. To the contrary, three of the four bids were scored closely, demonstrating that the bidders had a common understanding of the scope of the project.⁴

4. Hayes' Bid Was the Most Cost-Effective Even Applying SLD's and the Administrator's Erroneous Standard of Price and Interpretation of the ITN.

Taking one step further back and accepting for purposes of argument both SLD's erroneous standard of price and interpretation of the ITN's treatment of price, Hayes was the most cost-effective bidder. Pursuant to SLD's rationale, price would have been the primary factor if 11 points were allocated to cost in the second sub-criterion of Category B. *Accord Ysleta, supra*, at 25 n.138. This additional point would not have affected the final ranking of the proposals, nor would it have resulted in a more cost-effective solution. Although two of the alternative proposals were cheaper, Fujitsu/Worldcom's and ITC Deltacom's, all three were deficient at meeting the needs of the Department.

ITC Deltacom and Fujitsu/Worldcom received the least total points, because they failed to price all the services required by the ITN and more importantly failed to identify the cost of the local loop. Fujitsu/Worldcom specifically conditioned its price proposal by stating, "This [good faith pricing] estimate does not constitute an offer and is for evaluation and discussion purposes only." Fujitsu/Worldcom Proposal, Ex. J, at 159. Consistent with Commission rules, the Department evaluated this bid price as not firm enough. Both ITC Deltacom and Fujitsu/Worldcom's technical proposals were also grossly deficient by comparison to Hayes' and AT&T's. Last, the Department had

⁴ Differences between the facts in *Tennessee Order* and this case are immaterial. The ITN, for example, is concededly a two-step procurement mechanism. *Ysleta* emphasized the Commission's displeasure with the two-step procurement process implemented by the school district, but it was because price was not a factor in the first stage, whereas it was a primary competitive variable in this case.

serious concern about both ITC Deltacom's and Fujitsu/Worldcom's viability as a going concern.⁵

AT&T's proposal was the most expensive. It garnered fewer points than Hayes' for this reason and because it proposed "to create a Next Generation FIRN virtual private network (VPN)," which is not e-rate eligible and would have resulted in greater cost to the State. AT&T Proposal, Ex. L. In addition, it proposed the use of interlata transport technology to connect schools and libraries to the internet, rather than intralata transport technology.

Therefore, had the Department structured its application exactly as SLD preferred by, for example, divorcing consideration of price from project concept and assigning 11 or even 30 points to a separate category called "price," with instructions to treat it as "the primary factor," the outcome would have been the same. The SLD's mistaken objections to the ITN and its evaluation are ultimately academic and not properly the basis for penalizing the Department. No harm, no foul.

B. To the Extent the Commission Finds Any Violation of Its Rules, The Commission Should Waive Them for Good Cause Shown.

To the extent the Commission disagrees with the Department that it has complied with both state procurement law and Commission rules, the Commission may waive its rules for good cause shown when the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on

⁵ See ITC Deltacom Proposal, Ex. K, Form 10-K, at 1 (April 1, 2002) ("Our independent public accountants have stated in their report on our 2002 audited consolidated financial statements included elsewhere in this report that our recurring losses from operations and negative cash flows from operations and limited access to additional capital raise substantial doubt about our ability to continue as a going concern.")

an individual basis. Five reasons support waiver in this instance: (1) the dependency of Florida's students, especially those in rural and underprivileged areas, on federal e-rate discounts; (2) the superiority of the ITN to other procurement mechanisms under the circumstances to prevent waste, fraud and abuse; (3) the Department's reasonable reliance upon prevailing FCC authority; (4) the constitutional preference in favor of avoiding conflicts of law; and (5) the immateriality of SLD's objections, because Hayes would have received the contract even utilizing SLD's preferred procurement model.

1. Florida's Students and Library Patrons Are Dependent Upon E-Rate Discounts.

As set forth in the introduction, FIRN is the primary means by which the Department offers connectivity to approximately 2.7 million Florida students, roughly 3,700 Florida schools and countless library patrons. Without e-rate discounts, thousands of Floridians could lose access to digital resources including services as simple as the library catalog or as sophisticated as the online course curriculum at the Florida Virtual School (www.flvs.net), FCAT test preparation materials (www.fcatexplorer.com), and scholarship information and applications (www.Floridastudentfinancialaid.org).

Rural schools and schools in underprivileged areas will be impacted most as children from wealthier families more frequently have independent access to the Internet. In the Telecommunications Act of 1996, Congress directed the Commission and states to take steps to ensure the delivery of affordable telecommunications services to all Americans, including low-income consumers and eligible schools and libraries. State budget shortages potentially mean that without e-rate discounts, Florida and the Commission will not serve the Act's objectives and fewer students will have access to AP

courses, exam preparation materials, and, ultimately, students could receive a lesser quality of education.

2. Florida Law Reasonably Provides for an ITN to Prevent Waste in Complex Procurement.

The *Universal Service Order* requires schools and libraries, *inter alia*, “to seek competitive bids for all services” and to select the most “cost-effective bids.” *Universal Service Order, supra*, at 8794 ¶ 29; *id.* at 9029-30, ¶ 481. *Accord* 47 C.F.R. § 54.504(a). Implementing the *Universal Service Order*, the Commission has sought to ensure effective, efficient, and equitable distribution of universal service support to eligible schools and libraries, and directed applicants to take full advantage of the competitive market to obtain cost-effective services and to minimize waste, fraud, and abuse. *Ysleta, supra*, at 29, ¶ 59.

There is no dispute that the Department has sought to achieve the same goals, utilizing a sealed competitive procurement process, although not the one to which SLD is accustomed. Florida law reasonably treats the ITN as more market-friendly and better suited to avoid waste by virtue of, for example, procuring clunker technologies. Like the federal government, the Department seeks state-of-the-art technology at the best price. Moreover, the Department is convinced bidders are often better equipped to identify the most cost-effective and best-engineered solution to its complex procurement requirements.

3. The Department Reasonably Relied Upon Prevailing Commission Precedent.

The Department reasonably relied upon *Tennessee Order* when scoring price. The Department’s procurement process, the SLD’s funding commitment decisions, and the

Administrator's denials all occurred prior to the issuance of *Ysleta*. Under these circumstances, it was erroneous for SLD to impose a higher standard than *Tennessee Order* mandated and certainly inequitable to deny the Department's appeal for e-rate discounts critical to Florida's students and library patrons.

"Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed [] and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." *Boston Edison Co. v. FPC*, 557 F.2d 845, 849 (D.C.Cir.), cert. denied sub nom. *Towns of Norwood, Concord and Wellesley, Mass. v. Boston Edison Co.*, 434 U.S. 956, 98 S.Ct. 482, 54 L.Ed.2d 314 (1977); see also *Health Insurance Assn. of America v. Shalala*, 23 F.3d 412 (D.C. Cir. 1994) (holding that interpretive rules have prospective effect).

4. Conflicts of Law Should Be Avoided.

The Commission reiterated in *Ysleta* that it would "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." *Ysleta, supra*, at 21 ¶ 44 (quoting *Tennessee Order, supra* (emphasis in original)). This presumption may be rebutted only in extreme circumstances such as in *Ysleta* itself where the school district failed to consider price at all during the first stage of its procurement process. Because the instant facts are quite different, the Commission should adhere to the presumption against causing conflicts of law and undermining federalism.

5. Hayes Would Have Received the Contract Anyway.

The Commission should also grant a waiver even if it agrees with SLD and the Administrator because their objections to the Department's E-rate Applications are ultimately academic. Had the Department implemented the conventional procurement model SLD prefers, Hayes would have received the contract anyway. In these circumstances, not involving waste, fraud or abuse or any substantive violation of Commission rules, it is unreasonable to penalize the Department based on process or minor purported technical deficiencies (which the Department and affiants strongly deny).

V. Conclusion

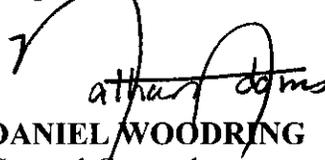
The Department has complied with Commission rules by treating price as of primary importance in its evaluation of ITN responses. SLD and the Administrator improperly discounted this emphasis by unnecessarily presuming evaluation of price must be divorced from consideration of project design and concept as in an RFP. SLD and the Administrator also drew a false dichotomy between the requirement in Florida procurement law to seek "best value," and the Commission's requirement that applicants for e-rate discounts demonstrate "cost-effectiveness." Different terms, they import identical legal content.

Although properly understood the ITN satisfied the *Yselta* and SLD's standard for price, the controlling standard for price that SLD and the Administrator should have applied is set forth in *Tennessee Order*. The latter governs this case because it was controlling precedent at the time the Department applied for e-rate discounts, issued its ITN, received responses and appealed, and because even according to *Ysleta, Tennessee*

Order applies when the competitive procurement process leads to substantial differences in services bid. Thus, the ITN satisfied controlling precedent even if viewed through SLD and the Administrator's jaded lenses.

Taking one step further back, were the Commission to accept all of the SLD's and Administrator's mistaken assumptions and to apply their alternative model for competitive procurement, the Department would still have awarded the contract to Hayes. Accordingly, the Commission should reverse the decisions of the Administrator and award full funding for Year 2003. In the alternative, if the Commission upholds the Administrator's decisions, the Commission should nevertheless grant a waiver of its rules, so that Florida's students and library patrons, especially those in rural and underprivileged areas, can continue to access the Internet and its resources.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel Woodring", is written over the typed name and title.

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