

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

In the matter of	)	
	)	
Request for Review of the Decision of the	)	
Universal Service Administrator by	)	CC Docket No. 02-6
International Business Machines Corporation	)	
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	)	

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

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January 18, 2005

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**I. INTRODUCTION**

Pursuant to section 54.719(c) of the rules of the Federal Communications Commission (“FCC” or “Commission”),<sup>1</sup> International Business Machines Corporation (“IBM” or “Company”) hereby seeks the Commission’s review of two decisions of the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC” or “Administrator”). The SLD decisions at issue are: (1) SLD’s transmission of a notice of *Recovery of Erroneously Disbursed Funds* to IBM concerning an Internal Connections project<sup>2</sup> undertaken by Ysleta Independent School District (“Ysleta”) in Funding Year 3 (“FY3,” Funding Year 2000-2001) of the Schools and Libraries Universal Service Support Mechanism (“E-Rate”); and (2) SLD’s denial of IBM’s appeal of that notice. IBM has an interest in these SLD

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<sup>1</sup> 47 C.F.R. § 54.719(c).

<sup>2</sup> See Funding Request Number 379524, Form 471 Application Number 179273.

determinations because SLD is attempting to recover the allegedly erroneously distributed funds from IBM, which was the service provider in the relevant E-Rate project.<sup>3</sup>

SLD has not demonstrated that Ysleta's FY3 Internal Connections project violated any FCC rule or SLD guidance. Consequently, the FCC should order the SLD not to seek funds recovery in this case. In the alternative, even if were appropriate to recover E-Rate funds from Ysleta, SLD has not demonstrated that IBM is in any way responsible for Ysleta's alleged acts that underpin SLD's funds recovery attempt. Accordingly, in any case, the FCC should order the SLD to take no further steps in this matter to recover E-Rate funds from IBM.<sup>4</sup>

## II. STATEMENT OF FACTS

In FY3, Ysleta received an Internal Connections funding commitment to install, among other things, network routers at 37 sites. Ysleta selected IBM as the service provider for this project. Between October 22, 2001 and November 30, 2001, IBM installed 37 routers at these sites ("FY3 Routers"), as required by its contract with Ysleta.<sup>5</sup> There is no assertion by SLD that IBM's original installation of the FY3 Routers violated E-Rate rules in any way.

On May 13, 2004, IBM received from SLD a notice of *Recovery of Erroneously Disbursed Funds* ("Recovery Notice") concerning the Ysleta FY3 Internal Connections project. SLD stated that funds recovery was necessary because a USAC audit of Ysleta found that the

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<sup>3</sup> See 47 C.F.R. § 54.721(b)(1).

<sup>4</sup> See 47 C.F.R. § 54.721(b)(3)-(4).

<sup>5</sup> See Letter from David B. Brown, IBM Staff Counsel, to SLD (July 12, 2004) ("IBM Appeal"), attached at Appendix A. The delay beyond June 30, 2001 in installing these routers was due to the necessity of receiving SLD approval for an equipment substitution. See IBM, Project Status Report for Period November 1 – November 30, 2001 (redacted), attached at Appendix B.

FY3 Routers were “in storage” and “not being used for educational purposes.”<sup>6</sup> In the Recovery Notice, SLD declared its intention to recover \$208,990.80, the value of the FY3 Routers as per SLD estimates. SLD did not clarify whether it would seek to recover this amount from IBM or Ysleta.

IBM was not the subject of the USAC audit of Ysleta. Thus, IBM has only indirect knowledge of the audit’s findings and was not given an opportunity to respond directly to the audit. IBM understands that the audit found that: (a) Ysleta had replaced the FY3 Routers in Funding Year 4 (“FY4,” Funding Year 2001-2002) with improved technological components; and (b) Ysleta had intended to redeploy the FY3 Routers in Funding Year 5 but had not done so because SLD denied E-Rate funds critical to the redeployment. The audit apparently concluded that, although using routers for “a limited time would tend to indicate poor controls” and “could also be viewed as a waste of USAC funds,” there was no FCC rule or SLD guidance in force in FY4 that dictated how long products purchased with E-Rate funds must be used.<sup>7</sup>

IBM appealed the Recovery Notice to the SLD on July 12, 2004 (“IBM Appeal”).<sup>8</sup> IBM explained that it had installed and configured the FY3 Routers in October-November 2001 in accordance with its valid contract with Ysleta and the E-Rate rules. Moreover, neither FCC rules nor the findings of the USAC auditors supported the Recovery Notice. As acknowledged by the auditors, no FCC rule in effect in FY4 barred Ysleta from removing the FY3 Routers. Accordingly, IBM explained, the audit did not find a violation of program rules on which a

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<sup>6</sup> See Letter from SLD to John Policastro, International Business Machines Corporation (May 13, 2004) (“Recovery Notice”). A copy appears in Appendix C.

<sup>7</sup> IBM’s understanding of the SLD audit and Ysleta’s response is based on information shared by Ysleta. IBM was not involved in the USAC audit.

<sup>8</sup> See IBM Appeal in Appendix A.

Recovery Notice could be based. A mere statement that Ysleta's actions would "tend to indicate poor controls" or "could also be viewed as a waste of USAC funds" is insufficient.

SLD denied the IBM Appeal on November 16, 2004 ("SLD Denial"). The Administrator determined that Ysleta, in its response to USAC's audit findings, had not stated that "routers were ever connected and in use for educational purposes."<sup>9</sup> Thus, according to SLD, Ysleta violated its certification that it intended to use all equipment purchased with E-Rate funds solely for educational purposes.<sup>10</sup> This new theory of the violation of E-Rate rules did not appear in the Recovery Notice or, to IBM's knowledge, in the original USAC audit findings, and first appeared in the SLD Denial. In the SLD Denial, the Administrator again did not clarify whether it would seek funds recovery from Ysleta or IBM.

Further, in the SLD Denial, the Administrator acknowledged IBM's statement that it had installed the FY3 Routers in 2001, but said that it "can not accept [this] new information on appeal."<sup>11</sup> In fact, IBM relayed this information about its installation of the FY3 Routers in the Company's first and only response to the SLD in this matter – the IBM Appeal. IBM did not have the opportunity to respond previously to USAC's original audit findings, which were directed to Ysleta, not IBM. In addition, contrary to SLD's conclusion, Ysleta's response to the USAC audit actually did state that the Routers were in use, as it explained that "the timeframe for the use of the routers was short."

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<sup>9</sup> See Letter from SLD to David B. Brown, IBM Americas – Southern & Southwestern Regions (Nov. 16, 2004) ("SLD Denial"), attached at Appendix D.

<sup>10</sup> See 47 C.F.R. § 54.504(b)(2)(v).

<sup>11</sup> SLD Denial at 3.

### **III. THE FCC SHOULD ORDER SLD NOT SEEK FUNDS RECOVERY IN THIS CASE.**

SLD has not demonstrated that Ysleta's FY3 Internal Connections project violated any FCC rule or SLD guidance. Accordingly, the SLD should be barred from seeking funds recovery from Ysleta or IBM.

#### **A. No FCC rule or policy in effect in Funding Year 4 required Ysleta to use routers at their original location for a minimum period of time.**

In Funding Year 2001-2002, no FCC rule or SLD guidance prohibited Ysleta from removing the FY3 Routers. Even USAC's auditors apparently acknowledged that SLD did not provide specific guidance at the time regarding the duration that products purchased with E-Rate funds must be used. It is true that, since March 13, 2004, the FCC generally has required E-Rate beneficiaries like Ysleta to maintain their Internal Connections equipment at the location of their original installation for a period of three years.<sup>12</sup> Yet, this 2004 clarification cannot be applied retroactively to Ysleta's actions in 2001-2002.

Further, Ysleta's decision to remove the FY3 Routers and redeploy them is consistent with the general E-Rate requirement to use USAC funds in an "economically reasonable" manner.<sup>13</sup> Ysleta has strenuously contested the assertions of USAC auditors that Ysleta's actions "tend[ed] to indicate poor controls over the implementation of technology" and "could also be viewed as a waste of USAC funds." IBM understands that, in accordance with Ysleta's long-term technology plan, the school district planned to use the FY3 Routers for one E-Rate eligible task, and then redeploy them for another E-Rate eligible task as more sophisticated components came online to help with the first task. Accordingly, Ysleta would avoid the cost of purchasing

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<sup>12</sup> See *Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26923 (¶ 25) (2003).

<sup>13</sup> 47 U.S.C. § 254(h)(2)(A).

additional routers as it rolled-out network upgrades by using the same routers strategically at different times for different purposes. Consequently, there is no waste, fraud or abuse in this case that would oblige FCC or SLD action.

**B. The conclusions of the USAC audit do not identify a violation of E-Rate rules and cannot alone underpin a recovery of E-Rate funds.**

The SLD’s conclusion in the Recovery Notice that an error occurred in disbursing E-Rate funds rests on the conclusions of the USAC audit.<sup>14</sup> Yet, it is IBM’s understanding that, with respect to the FY3 Routers, the USAC audit does not identify any specific violation by Ysleta of either an FCC rule or SLD guidance. Instead, the USAC audit states only that Ysleta’s removal of these Routers “would tend to indicate poor controls” and “could also be viewed as a waste of USAC funds.”<sup>15</sup> These subjunctive statements and non-findings do not negate Ysleta’s assertion that its actions were part of a carefully planned, efficient roll-out of eligible E-Rate services. Only a specific finding of a rule violation, not conditional statements, should be the basis for an E-Rate funds recovery.

**C. Funds recovery cannot proceed on the basis of SLD’s new theory of violation, which has no basis in fact.**

In its denial of the IBM Appeal, SLD offers a new rationale as to why funds recovery is appropriate. Specifically, SLD asserts that Ysleta violated its certification that equipment purchased with E-Rate funds would be used solely for educational purposes. SLD grounds this assertion in the alleged *absence* of a statement by Ysleta, when the school district originally

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<sup>14</sup> See Recovery Notice at 5.

<sup>15</sup> See IBM Appeal at 2 (emphasis added).

responded to the USAC audit, that the FY3 Routers were “*ever* connected and in use for educational purposes.”<sup>16</sup>

Basic due process requires SLD not to move forward with funds recovery until Ysleta and IBM have an opportunity to respond to this new allegation. IBM understands that the USAC auditors did not raise the issue of whether the FY3 Routers had *ever* been installed, and accordingly, Ysleta did not respond to the issue. Further, SLD’s Recovery Notice was based on routers “not being used for educational purposes,” not routers that had *never been used* for such purposes.<sup>17</sup> Accordingly, IBM did not attempt to contradict this assertion in the IBM Appeal.

In fact, there is ample evidence that the FY3 Routers were connected and used for educational purposes. First, in the IBM Appeal, the Company attests that it installed the FY3 Routers in October-November 2001 at thirty-seven locations. Apparently, even the USAC auditors acknowledged that the Routers were in use “for a limited time.” Finally, contrary to the SLD’s assertion, Ysleta stated, albeit implicitly, in its response to the USAC audit that the Routers were once in use – Ysleta apparently acknowledged that the duration of the routers’ “use” was short. In sum, the FCC must instruct SLD to abandon this funds recovery proceeding because no theory of a violation of E-Rate rules can be supported.

**IV. IN THE ALTERNATIVE, EVEN IF FUNDS RECOVERY IS PROPER AGAINST YSLETA, THE FCC SHOULD ORDER SLD NOT TO SEEK FUNDS RECOVERY FROM IBM.**

Even if SLD could marshal evidence of a violation of E-Rate rules, such a violation would have been committed by Ysleta, not IBM. IBM did not participate in and was not responsible for Ysleta’s removal of the FY3 Routers in FY4, and SLD has never asserted

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<sup>16</sup> SLD Denial at 3 (emphasis added).

<sup>17</sup> See Recovery Notice at 5.

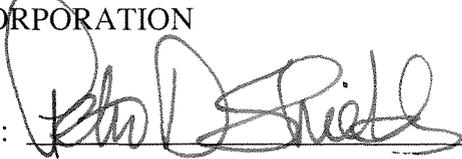
otherwise. Rather, IBM turned over the management of these Routers to Ysleta shortly after their installation in October-November 2001. As a service provider, the Company has no control over the disposition of equipment after it is installed at an applicant's facilities. IBM was not a subject of USAC's audit of Ysleta, and the auditors did not find any wrongdoing on IBM's part. IBM appealed the Recovery Notice to SLD only because the Administrator had not clarified that IBM would not be liable for funds recovery. Thus, the FCC should order SLD to take no further steps in this matter to recover E-Rate funds from IBM.<sup>18</sup>

## V. CONCLUSION

For the foregoing reasons, IBM respectfully requests that the FCC instruct the SLD either to rescind its notice of *Recovery of Erroneously Disbursed Funds*, or in the alternative, instruct the SLD to take no further action in this case against IBM.

Respectfully submitted,

INTERNATIONAL BUSINESS MACHINES  
CORPORATION

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January 18, 2005

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<sup>18</sup> See 47 C.F.R. § 54.721(b)(3)-(4).

## CERTIFICATE OF SERVICE

I, Amy E. Worlton, hereby declare that copies of the foregoing request for review were delivered by hand or by U.S. mail, this day, January 18, 2005, to the following, as required by section 54.721(c) of the Commission's rules:

D. Scott Barash  
Vice President and General Counsel  
Universal Service Administrative Company  
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Washington, D.C. 20037

A handwritten signature in cursive script, appearing to read "Amy E. Worlton", written over a horizontal line.

Amy E. Worlton

January 18, 2004