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ORIGINAL

May 17, 2005

Via Courier

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB 204
Washington, DC 20554

RECEIVED

MAY 17 2005

Federal Communications Commission
Office of Secretary

Re: Request for Review of Kalamazoo Public Schools; CC Docket No. 02-6
Form 471 Application Number: 164612
Billed Entity Number: 131284
Applicant's Form Identifier: KPS01
Funding Request Number: 320712
SPIN: 143001727
Funding Year: Funding Year 2000 (July 1, 2000 - June 30, 2001)

Dear Ms. Dortch:

Yesterday, May 16, 2005, Kalamazoo Public Schools submitted a substantially identical filing as the attached filing. The filing made yesterday, however, contained typographical errors. Please replace the filing made yesterday with the attached filing.

Very truly yours,



Kemal Hawa

KH/khh

Enclosures

No. of Copies rec'd 014
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May 17, 2005

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Ms. Marlene H. Dortch
Secretary
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445 12th Street, S.W.
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Re: Request for Review of Kalamazoo Public Schools; CC Docket No. 02-6
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Funding Year: Funding Year 2000 (July 1, 2000 - June 30, 2001)

Dear Ms. Dortch:

Kalamazoo Public Schools ("Kalamazoo"), by undersigned counsel (who are authorized to make this filing on behalf of Kalamazoo, and who are the contact persons for this filing), hereby submits this Request for Review appealing the March 22, 2005 decision of the Universal Service Administrative Company's Schools and Libraries Division (the "SLD"), denying Kalamazoo's appeal to the SLD (the "*Denial Decision*").¹ This Request for Review is being submitted in accordance with the Appeals Procedures set forth on the SLD's website.

By way of background, on November 18, 2004, the SLD issued a decision denying Kalamazoo e-rate funding for Funding Year 2000 (the "*Initial Denial*"). Kalamazoo timely submitted an appeal of that decision on January 17, 2005 (the "Appeal"). On March 22, 2005, the SLD issued the *Denial Decision* in which it denied Kalamazoo's Appeal.

¹ A copy of the *Denial Decision* is attached hereto as Attachment A. Note that the *Denial Decision* contains an erroneous date. It is dated March 22, 2004, when in fact it was issued on March 22, 2005. We have not yet received a corrected version of the *Denial Decision*.

CHADBOURNE
& PARKE LLP

Ms. Marlene Dortch
Federal Communications Commission
May 17, 2004
Page 2

In the *Initial Denial*, the SLD issued a letter denying Kalamazoo e-rate funding for Funding Year 2000, since the SLD believed that Kalamazoo impermissibly considered termination fees in its competitive bidding analysis, in which it found in favor of Ameritech-Michigan and not in favor of CTS Telecom.

In its Appeal, Kalamazoo demonstrated that it did not impermissibly consider termination fees in its competitive bidding analysis. To the contrary, Kalamazoo's competitive bidding analysis was based on price alone (exclusive of termination fees), as well as certain other factors (such as quality, prior course of dealing, etc.) that the Commission has expressly stated are legitimate considerations. Further, in its Appeal, Kalamazoo demonstrated that there were no factors which supported the bid of CTS Telecom. The *Denial Decision*, in summary fashion, denied the Appeal without ever addressing Kalamazoo's core factual and legal arguments.

All legal bases for this *Request for Review* are set forth in the Appeal, a copy of which is attached hereto as Attachment B. Please treat the attached Appeal, including all factual and legal arguments raised in the Appeal, as a new request for Commission review.

An original and four (4) copies of this filing are enclosed. Please date-stamp and return the enclosed additional copy of this filing via courier.

Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



Dana Frix
Kemal Hawa

Chadbourne & Parke LLP
1200 New Hampshire Ave, NW, S. 300
Washington, DC 20036
(202) 974-5600 (phone)
(202) 974-5602 (fax)

Dated: May 17, 2005

ATTACHMENT A

THE DENIAL DECISION



Universal Service Administrative Company
Schools & Libraries Division

Administrator's Decision on Appeal
Funding Year 2000-2001

March 22, 2004

Dana Frix
Kemal Hawa
Chadbourne & Parke LLP
1200 New Hampshire Avenue, NW,
Suite 300
Washington, D.C. 20036

Re: Applicant Name: Kalamazoo Public School District
 Billed Entity Number: 131284
 Form 471 Application Number: 164612
 Funding Request Number(s): 320712
 Your Correspondence Dated: January 17, 2005

After thorough review and investigation of all relevant facts, the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has made its decision in regard to your appeal of SLD's Funding Year 2000 Revised Funding Commitment Decision Letter (FCDL) for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission (FCC). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number: 320712
Decision on Appeal: **Denied**
Explanation:

- On appeal, you affirm that the SLD misinterpreted the Kalamazoo Public Schools' bid evaluation process response. As such you seek reversal of the SLD decision based on violation of competitive bidding rules. In support of your argument you assert that the SLD's conclusion is factually erroneous in considering the contract termination fees as ineligible service since those fees were not identified as "ineligible services" until October 18, 2002, which is after the Kalamazoo's competitive bidding process was undertaken.

- Upon review of your appeal letter and the relevant supporting documentation, it has been determined that during the selective review process, Kalamazoo Public School District was requested to provide the SLD documentation on their competitive bidding process. In the response to the SLD, Kalamazoo Public School District clearly stated that the inclusion of the termination penalties of \$500,000 in the pricing consideration rendered the CTS Telecom bid inferior to the Ameritech contract. Per program guidelines, contract termination penalties are considered to be ineligible services and thus can not be considered in conjunction with the price of eligible services. On appeal, you failed to provide evidence that SLD erred in its decision.
- The Eligible Services List (ESL) is intended as a guide to help applicants determine potential eligibility of products and services for a given Funding Year. The ESL is not an all encompassing list of ineligible products and services.
- FCC rules require that applicants select the most cost-effective product and/or service offering with price being the primary factor. 47 C.F.R. § 54.511(a). Applicants may take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. 47 C.F.R. § 54.511(a); *Request for Review by Ysleta Independent School District, et. al., Federal State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, Order, FCC 03-313 ¶ 50 (rel. Dec. 8, 2003). Ineligible products and services may not be factored into the cost-effective evaluation. *See Common Carrier Bureau Reiterates Services Eligible for Discounts to Schools and Libraries*, CC Docket No. 96-45, *Public Notice*, 13 FCC Rcd. 16,570, DA 98-1110 (rel. Jun. 11, 1998).
- SLD's review of your Form 471 application determined that price was not the primary factor when you selected your service provider. You did not demonstrate in your appeal that price was the primary factor when you selected your service provider. Consequently, SLD denies your appeal.

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either the SLD or the Federal Communications Commission (FCC). For appeals that have been denied in full, partially approved, dismissed, or cancelled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Chris Williams
Kalamazoo Public School District
1220 Howard Street
Kalamazoo, MI 49008

ATTACHMENT B

THE APPEAL

January 17, 2005

Via Electronic Mail

Letter of Appeal
Schools and Libraries Division
Box 125 - Correspondence Unit
80 South Jefferson Road
Whippany, NY 07981

Re: Letter of Appeal of Kalamazoo Public Schools
Form 471 Application Number: 164612
Billed Entity Number: 131284
Applicant's Form Identifier: KPS01
Funding Request Number: 320712
SPIN: 143001727
Funding Year: Funding Year 2000 (July 1, 2000 - June 30, 2001)

To Appeals Division:

Kalamazoo Public Schools ("Kalamazoo"), by its counsel, hereby submits this appeal of the November 18, 2004 decision of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") denying Kalamazoo e-rate funding for Funding Year 2000 (the "*Denial Decision*").

I. Summary

The SLD denied Kalamazoo e-rate funding based on its determination that Kalamazoo included ineligible termination fees in its competitive bidding analysis. This decision must be reversed for two reasons. First, the conclusion is factually erroneous. Second, even if Kalamazoo were deemed to have considered termination fees in its core analysis, then Kalamazoo was not on reasonable notice that such consideration was proscribed, since contract termination fees were not identified as "ineligible services" until October 18, 2002 – nearly four years after Kalamazoo's competitive bidding process was undertaken.

II. Background and Procedural History

On January 5, 1998, Kalamazoo executed an agreement with Ameritech-Michigan governing the provision of telecommunications services during the ensuing five (5) years (the "Agreement").

Under Section 54.511(c) (1) of the Commission's rules, if eligible schools and libraries entered into contracts between July 10, 1997 and January 30, 1998 (as Kalamazoo did), such contracts were exempt from competitive bidding requirements through June 30, 1999 (the end of Funding Year 1998), but thereafter were required to comply with the Commission's competitive bidding rules.

Kalamazoo timely submitted to the SLD (on December 10, 1998) a Form 470 identifying the services on which it sought competitive bids. After complying with the Commission's 28-day waiting period requirement and after careful consideration, Kalamazoo made a determination to continue to receive service under its existing Agreement with Ameritech, and on March 26, 1999, Kalamazoo submitted to the SLD a Form 471 to receive e-rate funding for those services. The SLD approved e-rate funding for the first two years of the Agreement.

On January 10, 2000, Kalamazoo submitted its Form 471 to receive e-rate funding for Funding Year 2000. On July 21, 2000, the SLD denied Kalamazoo's e-rate request for Funding Year 2000, stating that Kalamazoo had violated the 28-day waiting period requirement. On November 4, 2002, the Wireline Competition Bureau (the "Bureau") reversed the SLD decision, finding that Kalamazoo did not in fact violate the 28-day waiting period requirement (the "Reversal Order").¹

On remand, the SLD issued Kalamazoo an "E-rate Selective Review Information Request," which Kalamazoo responded to on or about November 12, 2002 (the "Selective Review Response," incorporated herein by reference). The *Denial Decision* denies funding to Kalamazoo for Funding Year 2000 on the basis that the "[d]ocumentation provided demonstrates that the cost of ineligible termination fees was included in the evaluation of the most cost-effective proposal when selecting your service provider." According to discussions with SLD staff, the SLD issued the *Denial Decision* based on information obtained in the Selective Review Response. As explained herein, the *Denial Decision's* determination is factually erroneous, and thus Kalamazoo submits this appeal.²

¹ *Request for Review of the Decision of the Universal Service Administrator by Kalamazoo Public Schools*, Order on Reconsideration, File No. SLD-164612, (Nov. 4, 2002) (the "Reversal Order").

² Kalamazoo notes that both the *Denial Decision* and SLD staff (in telephone conversations) indicate that the sole basis for the SLD's decision to deny Kalamazoo e-rate funding for Funding Year 2000 was SLD's factual determination that Kalamazoo included ineligible termination fees in its competitive bidding analysis. Accordingly, this appeal is limited to responding to such specific factual

III. Basis for Appeal

A. **The Denial Decision is Factually Erroneous – Kalamazoo Did Not Choose Ameritech Over CTS Due to Contract Termination Charges – And Ameritech Service was Not More Expensive than CTS Service**

Contrary to SLD's conclusion that Kalamazoo considered ineligible contract termination fees in its competitive bidding analysis, the controlling factor that Kalamazoo considered in selecting its service provider was price (exclusive of contract termination fees). The only competing bidder, Van Belkum Voice and Data Services d/b/a CTS Telecom ("CTS"), presented a non-conforming proposal which made it likely that it would be considerably more expensive to use CTS' service than it would be to use Ameritech's. *As the analysis below demonstrates, if each local call were just 2 minutes longer than estimated by CTS, it would increase Kalamazoo's local service charges by 38%.*

As noted above, Kalamazoo posted its Form 470 in accordance with the SLD's rules. In response to an inquiry from CTS, Kalamazoo went to the effort of providing CTS with an actual copy of a recent Ameritech invoice³ so that CTS could provide a competitive quote to Kalamazoo.⁴ CTS refused to provide a conforming response – one that would allow Kalamazoo to make an apples-to-apples comparison of charges.

Very simply, Kalamazoo had requested quotes for local service for 837 local telephone lines. Ameritech was charging Kalamazoo \$12,971.74 for the local lines and \$0.0842 cents per local call.

CTS declined to match or better those rates. Instead, CTS offered to provide fixed local service for the 837 lines for \$16,339.63 – a 21 % increase amounting to \$3,367.26 per month. In addition, instead of quoting a flat *per-call rate*, CTS offered a *per minute rate* of 4 cents. This was troubling because neither Kalamazoo nor CTS knew the number of local minutes used by Kalamazoo – for the period of the October 1998 invoice, or for any other period. Graphically CTS' offer can be compared to Ameritech's October 1998 Invoice as follows:

determination. Kalamazoo expressly reserves the right to raise any additional factual, legal or equitable arguments in the future should other issues properly arise.

³ See Selective Review Response at Exhibit 9 (providing a copy of the October 1, 1998 invoice which Kalamazoo provided to CTS for purposes of soliciting an offer from CTS).

⁴ See Selective Review Response at Exhibit 9.

	Ameritech	CTS
Local Line Charges	\$12,971.74	\$16,339.00
Local Call Charges	\$8,905.31 (priced at \$0.0842 per call) (equates to 105,768 calls)	[??Unknown??] (4 cents per minute above 600 minutes per line; or 502,200 minutes for 837 lines)

As this chart shows, the difference in local charges is \$3,367.26 per month – with CTS being more expensive. If you subtract \$3,367.26 from \$8,905.31 you get \$5,538.05. If Kalamazoo were to spend more than \$5,538.05 in local minutes of use, then CTS would be more expensive than Ameritech.

CTS allotted Kalamazoo 600 minutes per month per line without charge. 600 times 837 equals 502,200. This is the number of minutes Kalamazoo could use before CTS would begin assessing a \$0.04 minute charge for each minute of use.

\$5,538.05 divided by \$0.04 equals 138,451.25. This is the number of minutes above 502,200 that represents the break even point. In other words, Kalamazoo could use 502,200 minutes each month (which is allotted by CTS), plus it could purchase 138,451.25 minutes (at \$0.04 per minute) and pay the same to either Ameritech or CTS. In short, if Kalamazoo used more than 640,651.25 minutes of local use,⁵ then CTS would be more expensive than Ameritech.

To put this in perspective, Kalamazoo made 105,768 calls in the month. This means that each of those calls could not exceed, on average, more than 6.057 minutes before CTS becomes more expensive than Ameritech for local service.⁶

Neither CTS nor Kalamazoo had information on the average length of local calls. If, for example, local calls averaged 8.057 minutes (2 minutes longer than CTS estimated), then CTS would charge Kalamazoo an additional \$8,461.44 per month,⁷ which would make CTS' total charges \$30,338.49 per month for local lines and usage. This is compared to Ameritech's total monthly charges of \$21,877.05 for local lines and usage.⁸ *In short, if local calls were 2 minutes longer than CTS expected them to be, it would increase Kalamazoo's overall charges for local services by 38%.*

⁵ 502,200 MOU plus 138,451.25 MOU equals 640,651.24.

⁶ 640,651.25 divided by 105,768 equal 6.057.

⁷ 105,768 times 2 (cents) equal 211,536 times \$0.04 equals \$8,461.44.

⁸ \$12,971.74 plus \$8,905.31 equals \$21,877.05

In short, due to its non-conforming bid, and since neither Kalamazoo nor CTS had any information about the number of minutes of local minutes used in a month, neither Kalamazoo nor CTS could be certain that CTS' offer was less costly than Ameritech's – *and simple logic says that if CTS thought it could provide service cheaper than Ameritech, that it would do so by beating Ameritech's stated price.* In other words, CTS' offer introduced significant risk that CTS would be substantially more expensive than Ameritech.

Kalamazoo also considered various other factors that the Commission has identified as proper to consider,⁹ and decided that it was satisfied with the services it receives from and its prior course of dealing with Ameritech. Since there was no basis for Kalamazoo to change service providers (either due to price or any other factor), Kalamazoo decided to continue to receive service from Ameritech.

B. The SLD Ignored Kalamazoo's Core Analysis and Improperly Focused on Superfluous Language in the Selective Review Response

The SLD apparently relied on Section 4(b) of Kalamazoo's Selective Review Response in reaching the conclusion that Kalamazoo included termination fees in its competitive bidding analysis. The Selective Review Response, however, does not support the SLD's conclusion.

In making its determination, the SLD seems to have ignored the detailed competitive bidding analysis Kalamazoo discussed in its Selective Review Response (the discussion is largely the same as the one set forth above in this Appeal). Because of the importance of the language of the substantive portion of Section 4(b) of Kalamazoo's Selective Review Response, substantial portions of it are reproduced below:

⁹ See *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776,0929 (1997), (*"Universal Service Order"*), as corrected by *Universal Service Order, Errata* (rd. June 4, 1997) Additional factors that an applicant should consider - when permitted by state and local procurement rules - include "prior experience, including past performance, personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives." *Id.*

The notice that Kalamazoo sent out to potential bidders (which is attached to the Selective Review Response) mirrored the Commission's factors. It stated: "In awarding purchases or contracts for services, [Kalamazoo] may consider the following: a) price; b) quality of product; c) service delivery and maintenance of product; d) conformance to specifications; e) past performance to the school district; f) vendor reliability, availability and delivery timelines; g) locality."

Given that CTS Telecom's bid was in many ways different from the Contract, a direct comparison of the two yielded imprecise results. CTS Telecom supplied Kalamazoo with a piece of marketing material that ostensibly compared its pricing versus Ameritech's pricing (the "Comparison")

In the Comparison, Ameritech's Centrex service and Federally Mandated End User Line Charges were combined under the heading "Local Service." Local Service from Ameritech in October 1998 was \$12,971.74. Under CTS Telecom's proposed pricing, the same service would have cost Kalamazoo \$16,339.63. These figures were based on the provision of 837 lines, the number of lines that Kalamazoo had purchased from Ameritech at the time of the October 1998 bill. Thus, for basic local service, *CTS Telecom stated that its services would cost approximately 21% more than Ameritech's services.*

But the Comparison then proceeded to build in certain assumptions that were favorable to CTS Telecom, the most notable of which was the assumption that Kalamazoo would not exceed CTS Telecom's allotted usage limits, and accordingly that Kalamazoo would not occur any usage fees if it were to use CTS Telecom's services. This assumption resulted in a swing of nearly 50%, with CTS Telecom purporting to be able to offer Kalamazoo approximately a 30% savings per month as opposed to the 21% shortfall in its pricing discussed above. Specifically, based on its assumptions, CTS Telecom estimated its charges for services comparable to Ameritech's at \$16739.45 for October 1998, while Ameritech's total charges for October 1998 were \$24,377.94.

By way of background, under the Contract, Ameritech assesses Kalamazoo usage charges on a *per call basis*. In the October 1998 bill, (the bill on which the Comparison is based), these charges amounted to \$.0842 cents per call for 105,689 calls, for a total of \$8,899.01. CTS Telecom assigned a value of \$0 to the line item associated with its usage charges, assuming that Kalamazoo's usage would not exceed allotted limits (it is not clear whether this would have in fact been the case). Under CTS Telecom's proposal, if Kalamazoo exceeded its usage limits, CTS Telecom would assess usage charges on the excess on a *per minute basis* of \$.04 per minute. In sum, not only was CTS Telecom's Comparison not an "apples-to-apples" comparison, *i.e.* it compared Ameritech's *per call* charges against its *per minute* charges, but it was also based on certain assumptions that could easily be skewed, *i.e.* it compared Ameritech's usage fees which were ascertainable from an actual bill against CTS Telecom's hypothetical usage charges, which CTS Telecom factored in at \$0.¹⁰

¹⁰ Selective Review Response at Section 4(b) (emphasis in original)

Kalamazoo further noted that a variety of other factors weighed into its analysis, some of which were favorable to CTS:

It should be noted that Kalamazoo's remaining bidding criteria were also considered during the bid comparison. As an incumbent LEC in the areas of Michigan where its school district is located, Kalamazoo is very familiar with Ameritech and its reputation for providing high-quality and reliable telecommunications services. Indeed, Ameritech provided basic local service to the school district in the past. Kalamazoo further found that either bidder could likely comply with its service delivery and maintenance requirements, as well as conform to any specifications needed by Kalamazoo, thus these issues were negated. Locality was also not an issue, as both providers were prepared to offer service throughout the school district.

The SLD appears to have ignored this entire discussion, and focused on an independent clause in Kalamazoo's conclusory statement:

On balance, and considering the possibility that a \$500,000 termination penalty would apply, or, in the alternative, the costs associated with mounting a successful legal challenge to the validity of the termination penalties, Kalamazoo determined that continuation of its Contract with Ameritech was in its best interests.

Under the basic principles of grammar, this sentence must be construed to stand on its own, exclusive of the independent clause. Accordingly, the sentence should properly be read to say that "On balance, Kalamazoo determined that continuation of its Contract with Ameritech was in its best interests," based on the pricing discussion above. The independent clause also reveals that potential termination charges, or the inconvenience associated with challenging them, loomed as an additional consideration in Kalamazoo's analysis – after Kalamazoo had already decided that Ameritech's bid was superior on balance.

Kalamazoo never intended for the surplus language it included about termination fees to be viewed as determinative in its analysis. Rather, it included the language solely in an effort to be comprehensive in its response. The best evidence of this fact is that Kalamazoo could have omitted such language and still justified its selection of Ameritech based on the remainder of the pricing discussion. Moreover, there was a significant possibility that termination charges would never have been assessed in the first place, since for public relations reasons alone it may not have been in Ameritech's best interest to assess them. For the SLD to single out a specific sentence in an otherwise lengthy response is not only inappropriate in this instance (since the sentence on which the SLD relies is independent of Kalamazoo's core competitive bidding analysis), but it would also create a perverse incentive for school districts to omit language and facts that the school district believes may be harmful to it, rather than providing the SLD with a fulsome response.

C. Even if Kalamazoo Were Deemed to Have Considered Termination Fees in its Analysis, Kalamazoo Was Not On Reasonable Notice That Such Consideration Was Proscribed

As stated previously, the *Denial Decision* states the basis for its decision was that Kalamazoo included termination fees in its competitive bidding analysis, and termination fees are identified as “Not Eligible” for reimbursement in the SLD’s Eligible Services List, which is updated annually (typically in October of each year). Termination fees, however, appeared in the Eligible Services List for the first time in the list dated October 18, 2002 – nearly four years after Kalamazoo submitted its Form 470 and underwent a competitive bidding process. It would be inequitable and contrary to law to retroactively enforce SLD’s October 18, 2002 determination that termination fees are not eligible for reimbursement against Kalamazoo.

The D.C. Circuit examined the so-called Retroactivity Doctrine in its *Verizon* decision.¹¹ In *Verizon*, the D.C. Circuit stated that the Retroactivity Doctrine “is a robust doctrinal mechanism for alleviating the hardships that may befall regulated parties who rely on ‘quasi-judicial’ determinations that are altered by subsequent agency action.”¹² In analyzing these potential hardships, the D.C. Circuit discussed a series of cases addressing retroactive application of agency actions: “the governing principle is that when there is a substitution of new law for old law that was reasonably clear, the new rule may justifiably be given prospectively-only effect in order to protect the settled expectations of those who had relied on the preexisting rule.”¹³

For the SLD to overcome the Retroactivity Doctrine, it must satisfy the doctrine’s exceedingly high hurdle, which has most often taken the form of a five prong test.¹⁴ Specifically, the SLD must demonstrate that: 1) this is a case of first impression; 2) that the new rule does not represent an abrupt departure from well established practice; 3) that Kalamazoo did not rely on the former rule; 4) that retroactive imposition of the rule will not impose a hardship on Kalamazoo; and 5) that there is a compelling statutory interest in applying a new rule despite Kalamazoo’s reliance on the old standard.¹⁵

If the SLD attempted to retroactively enforce its “termination fee” determination against Kalamazoo, it would fail most, if not all, prongs of the test. Most importantly, in undertaking its competitive bidding analysis in 1998, Kalamazoo certainly relied on the rules then in effect.

¹¹ See *Verizon Telephone Companies, et al. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (“*Verizon*”).

¹² See *id.*

¹³ See *id.* See also *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

¹⁴ See *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

¹⁵ *Id.*

Thus, even if Kalamazoo considered termination fees in its core competitive bidding analysis (which it did not), the SLD's 2002 determination that such fees are ineligible cannot lawfully be imposed retroactively against Kalamazoo's 1998 decision. Such retroactive application would be particularly onerous in this instance, since the Commission has repeatedly declared since 1997 that price should be the most important factor in a competitive bidding analysis.¹⁶ While the SLD may have determined in October, 2002 that termination fees are not "prices" within the meaning of the Commission's rules, that decision has no bearing in December 1998.

IV. Conclusion

As noted above, in analyzing Ameritech's and CTS' competing bids, Kalamazoo considered price and service quality. On both counts Ameritech came out ahead. SLD's conclusion that Kalamazoo chose Ameritech over CTS due to possible contract termination fees is unfounded and contrary to logic. For the foregoing reasons, Kalamazoo respectfully submits that the Denial Decision should be reversed, and Kalamazoo's e-rate funding for Funding Year 2000 should be granted without additional delay.

Questions regarding this appeal may be directed to undersigned counsel. We are authorized to file this appeal on behalf of Kalamazoo.

Respectfully submitted,



Dana Frix
Kernal Hawa

Chadbourne & Parke LLP
1200 New Hampshire Avenue, NW, Suite 300
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January 17, 2005

¹⁶ See *Universal Service Order* at ¶ 481.