

In light of the fact that the Routers would not be needed for the YISD computer network if the high-speed wide area network was established, YISD investigated alternative uses for the Routers for eligible projects at eligible facilities. In other words, even though the original use of the Routers became obsolete, YISD looked for new uses for the Routers that were consistent with the intent, scope, and eligibility requirements of the Program. YISD wanted any new use to be an eligible use at eligible facilities. As part of this, the Router serial numbers were inventoried and catalogued to the specific eligible site location to which they had been assigned; in other words, YISD kept track of exactly which Router went to which eligible location. It was not a situation where the Routers were to be transferred from eligible locations to ineligible locations relatively shortly after installation. In short, YISD did not want the Routers to go to waste.<sup>4</sup>

In Year 4 of the Program, YISD sought funding for a high-speed wide area network as part of its telecommunications request. YISD posted its Form 470 for Year 4 of the Program (the "Year 4 Form 470"). A true and correct copy of the Year 4 Form 470 is attached to the Prior Letter of Appeal as Exhibit "7" and is incorporated herein. After a procurement process, and subsequent award and signing of a contract for such project, YISD filed its Form 470 for Year 4 on January 16, 2001 (the "Year 4 Form 471"). A true and correct copy of the Year 4 Form 471 is attached to the Prior Letter of Appeal as Exhibit "8" and is incorporated herein. The SLD approved the Year 4 Form 471 by means of a Funding Commitment Decision Letter dated December 4, 2001 (the "Year 4 Funding Letter"). A true and correct copy of the Year 4 Funding Letter is attached to the Prior Letter of Appeal as Exhibit "9" and is incorporated herein. Attached to the Prior Letter of Appeal as Exhibit "10" is a true and correct copy of an illustration of the YISD high-speed wide area network and is incorporated herein.

Previously, due to the proposed establishment of the high-speed wide area network, YISD decided that the Routers should be used in connection with a Voice Over Internet Protocol a/k/a Voice Over IP a/k/a VOIP project for which funding was sought under Year 4 of the Program. A Voice Over IP project would allow YISD to consolidate its voice and data networks. YISD has a voice network and a separate data network [being the high-speed wide area network]. This project permits voices to travel over the data network lines, thereby allowing YISD to terminate at least one T-1 line per each of the sixty-odd campuses. Such T-1 lines are eligible for Priority 1 Program funding; through use of the Voice Over IP project, YISD could then eliminate Program funding requests for the terminated T-1 lines, saving Program funds. In addition, the Voice Over IP project also permitted a much greater capacity of voice to be carried than under the voice-only

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<sup>4</sup> It is also important to remember that YISD had also acquired over 20 similar routers using its own funds, which were similarly unnecessary for the high speed wide area network. Therefore, in addition to the share paid under the Program by YISD for the Routers [between 10%-19%], YISD also had a significant financial incentive to ensure that it received the benefit of the entire cost incurred by YISD for these other self-purchased routers. In other words, YISD had invested in 20 routers using its own money, as compared to 37 routers under the Program.

network. Importantly, the Voice Over IP project in Year 4 of the Program could utilize the Routers, since the equipment to be placed into the Nortel option 11 switches under that project would require routing [and thus routers] instead of layer 3 distribution. The use of the Routers on hand would therefore obviate the need to acquire new routers as part of that Voice Over IP project. The Voice Over IP project sought to utilize the Routers for eligible purposes at eligible locations. Unfortunately, Year 4 funding was denied by the SLD for such project for that year.

Thereafter, YISD reviewed extensively whether to re-seek such funding for the Voice Over IP project for Year 5 of the Program. Again, YISD proposed use of the Routers in connection with that project. A true and correct copy of some planning documentation is attached to the Prior Letter of Appeal as Exhibit "11" and is incorporated herein. Ultimately, though, such project was not included in the final Form 471 for Year 5 of the Program. YISD, though, planned to continue with that project in future Program years.

The high-speed wide area network was constructed by YISD during June and July, 2002. As noted above, YISD used its own funds and other non-Program sources for the original implementation of that WAN project. During that time period, since the Routers were no longer being utilized for network purposes and YISD desired to ensure the safety of the Routers for the proposed future use, YISD removed the Routers from their initial sites in the summer of 2002 and placed them in a secure storage area pending subsequent use as planned.

In any event, even if the Voice Over IP project had been included in YISD's request for Year 5 funding, such funding would have been denied. Indeed, YISD was denied all internal connections funding by the SLD sought by its Form 471 for Year 5 of the Program.

YISD appealed the decision of the SLD in the Year 5 Funding Letter to the Federal Communication Commission (the "FCC"). By FCC Order 03-313 dated December 8, 2003 in *Matter of Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et. al.*, CC Docket Nos. 96-45 and 97-21 (the "Ysleta Order"), the FCC effectively upheld the denial of Year 5 funding, but granted a waiver of Program rules to permit YISD to re-file its application for Year 5 funding under certain conditions.

Pursuant to the Ysleta Order, YISD in early 2004 did re-file for Year 5 funding. Unfortunately, by that time, due to changes in technology over the preceding 3 to 4 years, the Routers were now obsolete in terms of their use in the proposed Voice Over IP Project. In addition, since the Voice Over IP Project had been sought for Year 6 funding, the same funding was not sought with the Year 5 re-filing.

Shortly beforehand, YISD was already working on its proposed projects for Year 6 of the Program. In other words, YISD was required to plan for Year 6 projects before any final decision was made on its Year 5 projects. For Year 6 of the Program, YISD planned to utilize the Routers

for the Voice Over IP project. Again, YISD wanted to re-use the Routers for an eligible project at eligible locations. On or about November 4, 2002, YISD posted its Form 470 for Year 6 of the Program (the "Year 6 Form 470"). A true and correct copy of the Year 6 Form 470 is attached to the Prior Letter of Appeal as Exhibit "12" and is incorporated herein. After a procurement process, and subsequent award and signing of a contract for such project, YISD filed its Form 470 for Year 6 on January February 5, 2002 (the "Year 6 Form 471"). A true and correct copy of the Year 6 Form 471 is attached to the Prior Letter of Appeal as Exhibit "13" and is incorporated herein.

Once again, there was a significant delay by the SLD in making a decision on YISD request for funding, here under the Year 6 Form 471. In fact, the SLD did not make such a determination until almost 11 months after the beginning of Year 6. The SLD approved the Year 6 Form 471 by means of a Funding Commitment Decision Letter dated April 20, 2004 (the "Year 6 Funding Letter"). A true and correct copy of the Year 6 Funding Letter is attached hereto as Exhibit "14" and is incorporated herein. Again, due to the delays since the Year 6 Form 471 was filed [not to mention the Year 4 and Year 5 efforts to fund the Voice Over IP project], and the accompanying changes in technology, the Routers can no longer be reasonably utilized for the Voice Over IP project at this time.

Nevertheless, despite its numerous tries to date, YISD did not give up on its effort to re-utilize the Routers for an eligible project at eligible locations. Specifically, in May 2003, YISD began planning to use undertake a proposed dynamic host configuration protocol a/k/a DHCP project, which could use the Routers. "Dynamic host configuration protocol" is a protocol for assigning dynamic IP addresses to devices on a network. This assignment can be done by either a DHCP server or an appliance such as the Routers. This method of addressing devices on a network makes it easier for adding and moving devices throughout the network. At YISD, computers and printers are constantly being added or moved at the campuses or between campuses. By setting up the computer or printer to accept a DHCP address, the DHCP appliance [here, the Routers] dynamically assigns an IP address to the device, keeps track of the IP addresses assigned, and frees up YISD staff from having to manually assign and manage IP addresses. YISD at the time had DHCP IP addresses, maintained by servers. Those servers began to reach the end of their lifespans and began to become unusable and [due to their age and obsolescence] unrepairable. YISD had the choice of acquiring new servers for the DHCP IP addresses under the Program, which were eligible for funding under the Program, or instead moving to the DHCP project.

Rather than seek the Program funding, and for the benefits described above, YISD decided to undertake the DHCP project. Importantly, even though YISD believes the DHCP project was eligible was Program funding, YISD did not seek or use Program funding for the DHCP project. YISD used its own or other resources for the DHCP project. The DHCP project was commenced in October 2003 by YISD and was completed some time ago. The DHCP Project remains in

effect, and the Routers continue to be used for that purpose. To be clear, the DHCP project was first discussed before the Audit [as defined below] was concluded, and was begun almost twenty months before the Decision was issued. Under the DHCP project, each Router was returned for use in the exact same eligible school at which such Router had been initially installed for the upgrade of the initial project. The useful life of the Routers under the DHCP project is expected to be similar to that the Routers would have had if the old network had remained in place.

It is extremely important to point out that, at this time [being almost two years since the Audit was completed], all of the Routers are actually in place and in use, at the same eligible schools, for an otherwise eligible project [even though YISD used its own funds for the DHCP project].

In 2003, USAC conducted an audit of the Year 3 funding under the Program at YISD, investigating a variety of projects and issues (the "Audit"). The Audit included a finding that the Routers were not used properly. Specifically, Finding 5 of the Audit stated as follows:

*Finding 5 - Unused routers purchased with E-rate funds*

*Condition:*

*The 37 routers purchased with E-rate funds during FY 2000 are currently being unused in storage at the ACAC building. The routers were replaced during Year 4 with improved technology products. The beneficiary had intended to use the routers in connection with funding from Year 5, but USAC denied the beneficiary's Year 5 funding request. The beneficiary has appealed this decision, and the outcome is still unknown.*

*We were unable to determine the total dollar value of the 37 routers purchased with E-rate funds due to the lack of adequate descriptions on the service provider (IBM) invoices. The fixed asset listing prepared by the Accounting Department places a value of \$6,276 for each router – which would total \$232,212 for the 37 routers.*

*Criteria:*

*USAC does not provide specific guidance regarding the timeframe that products purchased with E-rate funds must be used. However, using the routers for such a limited time would tend to indicate poor controls over the implementation of technology products purchased with E-rate funds, and could also be viewed as a waste of USAC funds.*

YISD responded to that finding. A true and correct copy of an excerpt of the YISD Audit response, relative to such finding, is attached to the Prior Letter of Appeal as Exhibit "15" and is incorporated herein.

The Decision was issued on April 19, 2005, pursuant to the Audit. The Decision states in relevant part:

*After a thorough investigation, it has been determined that SLD will seek recovery for items not being used for educational purposes. During an audit it was noted that 37 routers were in storage and not being used. The routers cost is \$6,276 each. As a result, \$208,999.80 will need to be recovered.*

YISD disputes that contention, and hereby appeals the Decision in accordance with the Appeal Procedures of the SLD.

Attached to the Prior Letter of Appeal as Exhibit "16" and is incorporated herein is an Affidavit of Richard Duncan.

#### **Arguments and Authorities**

The replacement of the Routers by YISD did not violate any rule or policy in place during the relevant time period.

There was no specific FCC rule in place at the time of the procurement of the Routers, the installation of the Routers, or the removal of the Routers, which required the Routers to be in place at an eligible school for a minimum period of time or which prohibited removal or transfer of the Routers [except for transfers for compensation]. Neither USAC nor the SLD had any published policy in place regarding such issue at such times, either. Indeed, the Audit admits that "USAC does not provide specific guidance regarding the timeframe that products purchased with E-rate funds must be used."

It is also important to note that FCC Order No. 02-08 dated January 16, 2002, entitled "Notice of Proposed Rule Making and Order" states in relevant part, in paragraph 37, as follows:

*Our rules provide that eligible services purchased at a discount "shall not be sold, resold, or transferred in consideration for money or any other thing of value."<sup>5</sup> Nothing in our rules, however, prevents transferring equipment obtained with universal service discounts from the eligible recipient to another entity without consideration for money or anything of value. We have received reports from state authorities, schools and libraries, and the Administrator that some recipients are replacing, on a yearly or almost-yearly basis, equipment obtained with universal service discounts, and transferring that equipment to other schools or libraries in the same district that may not have been eligible for such*

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<sup>5</sup> 47 C.F.R. § 54.617.

equipment.<sup>6</sup>

*Although we recognize that schools and libraries may legitimately desire to upgrade their equipment frequently as a result of the rapid pace of technological change, we seek comment on whether it is appropriate to balance this desire against the impact of such action on other parties seeking discounts under the program. We seek comment on whether the program's goals would be improved by requiring that schools and libraries make significant use of the discounted equipment that they receive, before seeking to substitute new discounted equipment. In particular, we seek comment on whether there may be insufficient incentives in the schools and libraries mechanism to prevent wasteful or fraudulent behavior, without imposing restrictions on these transfers of equipment. We specifically seek comment on whether, as a condition of receipt of universal service discounts, we should adopt measures to ensure that discounted internal connections are used at the location and for the use specified in the application process for a certain period of time.*

In short, the FCC itself recognized that there was no rule in place preventing transfers or replacement of items purchased with Program funds between facilities or entities, so long as no consideration of value passed. Indeed, the FCC states that “[n]othing in our rule” prohibits such conduct. The FCC therefore sought comments from the public on whether or not such a rule should be adopted, and if so, what sort of restrictions should be included in such rule. Importantly, the FCC did not indicate in such Order that even annual replacement of goods using Program funds violated of any other Program rules or necessarily constituted “waste, fraud, or abuse”.

It should also be pointed out that the Semiannual Report to Congress [October 1, 2003 - March 31, 2004] of the Office of the Inspector General of the FCC provides during a description of the OIG's own audits of certain districts under the Program, at page 18 of such report in relevant part as follows:

*Equipment not being installed or operational. Program rules require that nonrecurring services be installed by a specified date. However, there is no specific FCC rule requiring beneficiaries to use equipment in a particular way, or for a specified period of*

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<sup>6</sup> For example, in Funding Year 3, schools that were not eligible for at least an 82 percent discount did not receive discounts for internal connections due to limited program funds. However, a school eligible for a 90 percent discount in Funding Year 3 that received internal connections could have transferred that equipment to another school in the same school district that was ineligible for Funding Year 3 discounts for internal connections due to its lower discount rate. See 47 C.F.R. § 54.507(g) (describing rules of priority); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 01-143 (rel. April 30, 2001) (describing funding priorities for Funding Year 3).

*time, or to full efficiency. Commission staff have provided guidance stating that if the equipment was uninstalled (i.e. - still in a box) that would represent a rule violation. However, Commission staff have also provided guidance stating that the rules do not require beneficiaries effectively utilize the services provided or that the beneficiaries maintain continuous network or Internet connectivity once internal connections are installed.*

The Office of Inspector General of the FCC does not indicate that removal of equipment violates Program rules. Indeed, according to that FCC report, even inefficient, incomplete, or improper use of the equipment is not in violation of Program rules.

In FCC Order 03-323 dated December 23, 2003, entitled "Third Report and Order and Second Further Notice of Proposed Rulemaking", the FCC adopted new rules governing a number of Program areas. In such Order, the FCC noted in relevant part, in paragraph 9, as follows:

*[N]othing in our current rules expressly preclude entities with 90 percent discounts from replacing, on a yearly or almost-yearly basis, equipment obtained with universal service discounts, and transferring that equipment to other entities with lower discount percentages that otherwise would not receive funding for such equipment due to the exhaustion of the capped amount.<sup>7</sup> The Act and our existing rules provide only that equipment purchased with universal service discounts "shall not be sold, resold, or transferred in consideration for money or any other thing of value."<sup>8</sup>*

Again, the FCC admitted that even annual replacement and transfer of equipment acquired with Program funds did not violate Program rules.

Pursuant to such December 2003 Order, however, the FCC decided to adopt the following new rule, found at 47 C.F.R. §54.513(c), reading as follows (the "New FCC Rule"):

*Eligible services and equipment components of eligible services purchased at a discount under this subpart shall not be transferred, with or without consideration of money or any other thing of value, for a period of three years after purchase, except that eligible services and equipment components of eligible services may be transferred to another eligible school or library in the event that the particular location where the service originally was received is permanently or temporarily closed. If an eligible service or equipment component of a service is transferred due to the permanent or temporary closure of a school or library, the transferor must notify the Administrator of the transfer,*

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<sup>7</sup> See 47 C.F.R. § 54.617.

<sup>8</sup> 47 U.S.C. § 254(h)(3); 47 C.F.R. § 54.513.

*and both the transferor and recipient must maintain detailed records documenting the transfer and the reason for the transfer for a period of five years.*

This FCC Order involved a matter of rule changes, as well as proposed rulemaking, but the New FCC Rule relating to equipment transfers is the only actual rule change relevant to this discussion.

This FCC Order provides that its rule changes, including the New FCC Rule, would not be effective until a later date, indicating at paragraph 147:

*IT IS FURTHER ORDERED that Part 54 of the Commission's rules, 47 C.F.R. Part 54, IS AMENDED as set forth in Appendix A attached hereto, effective thirty (30) days after the publication of this Third Report and Order in the Federal Register.*

Such FCC Order was published in the Federal Register on February 10, 2004. In paragraph 67 of the Federal Register notice, the FCC provides as follows:

*Part 54 of the Commission's rules, is amended as set forth, effective March 11, 2004 except for §54.513(c) which contains information collection requirements that have not been approved by the Office of Management Budget (OMB). The Commission will publish a document in the Federal Register announcing the effective date of that section.*

Consequently, the New FCC Rule was not made effective on March 11, 2004 along with the rest of the rule changes. Instead, its effective date would occur on an indefinite date in the future after the OMB approval was obtained. The New FCC Rule ultimately only became effective on September 10, 2004.

In any event, it is clear the New FCC Rule was not intended to be retroactive, by its terms and the FCC orders.

Nevertheless, USAC is essentially treating the New FCC Rule as retroactive. Effectively, the Decision is wrongfully imposing the New FCC Rule retroactively upon YISD with respect to the Routers. It is generally impermissible for a law to be used to punish or sanction someone for conduct occurring prior to the adoption of the law. Indeed, in Landgraf v. USI Film Products, 511 U.S. 244, 265-267, 114 S.Ct. 1483 (1994), the United States Supreme Court, in denying the retroactive effect of a federal law, pointed out in relevant part:

*... the presumption against retroactive legislation is deeply rooted in our jurisprudence,*

*and embodies a legal doctrine centuries older than our Republic.<sup>9</sup> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.<sup>10</sup> For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Kaiser, 494 U.S., at 855, 110 S.Ct., at 1586 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.*

*It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. ... These provisions demonstrate that retroactive statutes raise particular concerns.*

In certain circumstances, retroactive legislation may be permissible, but the intent to make the law retroactive must be clear. Landgraf, 511 U.S. 268-271. Here, the FCC certainly did not intend to make the New FCC Rule retroactive, so such exception is inapplicable. Accordingly, it is a violation of the constitutional and other rights of YISD for the Decision to effectively apply the New FCC Rule retroactively.

Here, the New FCC Rule was adopted several years after the conduct in question of the YISD, well before YISD would have been on notice. The New FCC Rule also was clearly not intended by the FCC to be retroactive.

In its orders discussed above, the FCC did not indicate that even serial, annual replacement of items acquired using Program funds and their transfer to ineligible locations violated any FCC rules or Program requirements. Instead, the FCC stated that nothing in its rules prohibited such conduct. The FCC's Office of Inspector General also found no violations for similar actions. If the FCC did not find violations with that sort of conduct, which is much, much

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<sup>9</sup> See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 842-844, 855-856, 110 S.Ct. 1570, 1579-1581, 1586-1587, 108 L.Ed.2d 842 (1990) (SCALIA, J., concurring). See also, e.g., Dash v. Van Kleeck, 7 Johns. \*477, \*503 (N.Y.1811) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C.J.); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn.L.Rev. 775 (1936).

<sup>10</sup> See General Motors Corp. v. Romein, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, *A Theory of Retroactive Legislation*, 61 Texas L.Rev. 425, 471 (1982) ("The rule of law ... is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"). See also L. Fuller, *The Morality of Law* 51-62 (1964) (hereinafter Fuller).

more egregious than anything USAC alleges YISD is to have done with respect to the Routers, it is clear that YISD's conduct with regard to the Routers does not violate any Program rules.

It is very important to remember that the replacement of the Routers was not part of serial, annual replacement by YISD [as apparently occurred at other districts], but instead part of a major re-configuration of the entire computer network of YISD into a wide area network. This was a one-time change, not a annual event. Such re-configuration was itself the result of changed circumstances required in order to serve the educational requirements of YISD faculty and students. Moreover, rather than simply move the Routers to ineligible locations [as apparently occurred at other districts], YISD continually sought for years [and continued to seek] a functional and compatible use of the Routers at eligible locations for an eligible project.

YISD did not wish the Routers to go un-used; indeed, YISD paid for a portion of the costs of the Routers and also paid substantial amounts for 20 similar routers for ineligible schools. Of course, it also needs to be made clear that, under the DHCP project beginning in October 2003, all of the Routers are in fact now in use at each of the eligible locations to which they had been originally assigned.

Quite simply, there was no contemporaneous rule or policy in place prohibiting YISD from engaging in the complained-of conduct, which YISD could have violated at the time. YISD's conduct was also reasonable and justifiable in the circumstances. In any event, the Routers are now in use at the eligible sites.

Under these circumstances, YISD's replacement of the Routers did not constitute "waste, fraud, or abuse".

There was no waste, fraud, or abuse involved in the removal of the Routers by YISD. YISD made reasonable business decisions on the acquisition of the Routers, the wide area network installation, the removal of the Routers, and the proposed re-uses of the Routers. YISD also took great care to try to re-use the Routers for other projects under the Program, and continued to seek to do so.

The Audit states in this regard, after noting that there is no USAC authority on the issue:

*...using the routers for such a limited time would tend to indicate poor controls over the implementation of technology products purchased with E-rate funds, and could also be viewed as a waste of USAC funds".*

Please note that the Audit conclusion does not state that there is in fact a waste of Program funds, but instead one could possibly view it as a waste. The auditors' language recognizes that the issue is not conclusive.

YISD acted reasonably throughout this process. Its decision to conduct a network upgrade under Year 3 of the Program was reasonable, based at minimum upon its 1998 Technology Plan and its then-current anticipated needs. It was also reasonable for YISD not to acquire and install a high-speed wide area network during Year 3 of the Program, but instead do the upgrade, in light of the lesser needs at the time and the much higher costs for such WAN service at the time. There was no intent by YISD to not use or to replace the Routers when they were sought for Year 3 funding. Indeed, YISD concurrently acquired similar routers at a large number of ineligible locations at the same time using its own funds; that acquisition is further evidence of YISD's intentions at that time. YISD's subsequent decision to change its computer network to a high-speed wide area network was also reasonable in light of, among other things, the 2001 Technology Plan, the changed instructional and other needs of YISD, and the reduced costs of WAN service in the interim. Since the Routers could not be used with the wide area network, it was reasonable for YISD to not use the Routers for its network. YISD also did not take such step lightly, among other things, due to its own direct financial investment in the similar routers for ineligible campuses. Because there might be a risk of loss or damage to the Routers if kept in place unused, it was reasonable for YISD to remove the Routers and place them in a centralized, secure location, pending re-use. It was also reasonable for YISD to seek to re-use the Routers for its Year 4 Voice Over IP project and for its Year 6 Voice Over IP project. YISD was also being reasonable in seeking to re-use, and in fact now using, the Routers for the DHCP project.

YISD's conduct is and has been both reasonable and justifiable. YISD did not try to abuse the system. YISD made reasonable determinations and decisions, which ultimately led to the Routers no longer being needed for their original purpose. Even so, rather than have the Routers go un-used, YISD actively sought to use the Routers for other eligible projects at eligible facilities, in order to give effect to YISD's original intent to use the Routers for Program projects. It might be noted that, if the SLD had more timely approved Year 6 funding [delayed almost 11 months after the beginning of that Program year], the Routers likely could have been used for the Voice Over IP project some time ago.

Of course, in any event, the Routers are actually now in use at the eligible schools. In fact, each Router is in place and being used at the same eligible school at which it was originally located. The Routers have not been "wasted". They are being used for an eligible project [albeit such project was put in place using YISD's own funds] at the same eligible locations. There is no "waste" here.

Once again, this is not a situation where YISD upgraded the same system every year using Program funds, which was a problem that apparently occurred at a number of locations nationwide as indicated by the above-quoted FCC orders. The FCC orders and OIG report did not state that such conduct represented "waste, fraud, or abuse" under the Program. The FCC orders and report in fact admit that such conduct did not violate any Program rules. If the FCC

did not find that such egregious conduct constituted “waste, fraud, or abuse”, there are no grounds for the Decision to essentially find that YISD conduct as to the Routers constituted “waste, fraud, or abuse”, either.

Consequently, there was no “waste, fraud, or abuse” by YISD concerning the Routers which would be grounds for requiring return of the Disputed Funds.

The Decision was arbitrary and capricious, and is not justified.

YISD believes that the Decision is arbitrary and capricious.

In the first place, as noted by the FCC Orders described above, there appears to have been a significant number of situations where the district involved would engage in serial, annual replacement of equipment acquired with Program funds, and either cease use of such equipment or move such equipment to an ineligible location. YISD is not alleged to have engaged in such conduct. Based upon review of the FCC website, media, and other sources, it does not appear that USAC/SLD has taken any action against those districts engaging in such egregious conduct. It is unreasonable for YISD to be the subject of proceedings to recover the Disputed Funds under circumstances what were much less of concern than the conduct of these other districts.

The Decision is also arbitrary and capricious since it may represent apparent improper bias or retaliation by USAC against YISD arising out of the incidents giving rise to the Ysleta Order and/or the rulings therein. YISD vigorously challenged USAC and SLD decisions in those proceedings, and ultimately received what was in effect a partial victory. YISD still wonders why it was selected as the first school district nationwide to be denied Year 5 funding by USAC /SLD for such issues, even though its situation was less egregious than many other districts. Now, YISD questions why it is being singled-out for recovery of funds even though other districts apparently engaged in much more egregious conduct without sanction or penalty. That is not fair, and does not seem reasonable. An issue necessarily arises as to whether inappropriate motivations are present.

### **Conclusion**

Based upon the foregoing, additionally and in the alternative, the Decision should be reversed in its entirety. Under these circumstances, there are no legitimate grounds for the SLD to seek demand and recovery of the Disputed Funds from YISD.

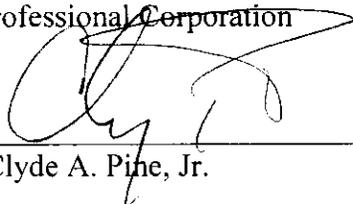
If you need to contact a representative of YISD regarding this matter, you may direct that inquiry to:

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Phone: (915) 532-2000  
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My signature below constitutes the signature of YISD's authorized representative. Thank you for your consideration and anticipated cooperation with respect to the foregoing. Please contact me immediately if you have any questions, comments, or objections with regard to the foregoing, or if you need additional information.

Very truly yours,

MOUNCE, GREEN, MYERS, SAFI & GALATZAN  
A Professional Corporation

By: 

\_\_\_\_\_  
Clyde A. Pine, Jr.

cc: Ysleta Independent School District

**INDEX OF EXHIBITS**  
(incorporated from Prior Letter of Appeal)

<u>Item</u>	<u>Ex. No.</u>
1998 Technology Plan	1
2001 Technology Plan	2
Year 3 Form 470	3
Year 3 Contract	4
Year 3 Form 471	5
Year 3 Funding Letter	6
illustration of YISD wide area network	7
Year 4 Form 470	8
Year 4 Form 471	9
Year 4 Funding Letter	10
planning documentation for possible Year 5 Voice Over IP project	11
Year 6 Form 470	12
Year 6 Form 471	13
Year 6 Funding Letter	14
excerpt of the YISD Audit response	15
Affidavit of Richard Duncan	16



**Universal Service Administrative Company**  
Schools & Libraries Division

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**Administrator's Decision on Appeal - Funding Year 2000-2001**

October 18, 2005

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Mounce, Green, Myers, Safi & Galatzan  
100 North Stanton  
Suite 1700  
El Paso, TX 79901

Re:      Applicant Name:                      Ysleta Independent School District  
         Billed Entity Number:                142115  
         471 Application Number:              179273  
         Funding Request Number(s):        379524  
         Your Correspondence Dated:        July 6, 2004 and May 12, 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 Year 2000 Recovery of Erroneously Disbursed Funds Letter and Demand Payment Letter 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 for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number:            379524  
Decision on Appeal:                **Denied**  
Explanation:

- On appeal, you request reversal of SLD's decision to seek recovery of \$208,990.80 for items not being used for educational purposes. In support of your request, you state that there are no specific procedures from USAC or FCC that require the routers to be in place at an eligible school for a minimum period of time or which prohibit removal or transfer of the routers. You further state that Ysleta Independent School District (YISD) did not commit any "waste, fraud, or abuse" in the replacement of the routers, and actively sought to use the routers for other eligible projects.
- Upon thorough review of the appeal and all relevant documentation, it was determined that 37 routers purchased through the aid of E-Rate funds were in storage and not being used for educational purposes. This was discovered during a KPMG audit site visit to YISD. The routers cost \$6,276.00 each.

- On two separate appeals, one dated July 6, 2004 and the other dated May 12, 2005, you state that YISD needed to upgrade their existing obsolete and insufficient computer network to meet the educational needs of the students and the goals of the 1998 Technology Plan. YISD sought funding in Funding Year 2000 for various goods and services for the network upgrade. You state that YISD's high-speed WAN service would not have been fundable under Program guidelines at that time, therefore the decision to upgrade the old routers was the only available and reasonable solution. The routers were installed between October 25, 2000 and November 5, 2000. YISD later determined that their existing computer network, including the routers, was still insufficient to satisfy the constantly changing needs of their students. YISD changed to a high-speed WAN for the upgrade. YISD argued that even though the original use of the routers became obsolete, they looked for new uses for the routers that were consistent with the intent, scope, and eligibility requirement of the program. YISD tried to put the routers in use during Funding Year 2001 for a Voice Over IP (VOIP) project, but funding was denied for this project. You state that the high-speed wide area network was constructed during June and July 2002. The routers were removed from their initial sites and moved to a secure storage area pending subsequent use as planned by YISD. YISD was able to put the routers in use in a DHCP project that commenced in October 2003.
- According to the program's procedures concerning the applicant and service provider certification that all equipment purchased with e-rate funds is solely intended to be used for educational purposes to bring information to the classroom. According to the *Universal Service Order (FCC 97-157)*, applicants require technology plans that are based "on the reasonable needs and resources of the applicant and are consistent with the goals of the program" (par. 574). Also, "schools and libraries must prepare specific plans for using these technologies, both over the near term and into the future, and how they plan to integrate the use of these technologies into their curriculum" (par. 573). Therefore, the applicants are accountable for carefully developing their technology plan, and utilizing the equipment requested and obtained with E-rate support properly and efficiently. Consequently, the appeal is denied.

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either the SLD or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, 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: Richard L. Duncan  
Ysleta Independent School District  
9600 Sims Drive  
El Paso, TX 79925-7200





**Administrator's Decision on Appeal - Funding Year 2000-2001**

October 18, 2005

Clyde A. Pine, Jr.  
Mounce, Green, Myers, Safi & Galatzan  
100 North Stanton  
Suite 1700  
El Paso, TX 79901

Re:      Applicant Name:                      Ysleta Independent School District  
         Billed Entity Number:                142115  
         471 Application Number:              179273  
         Funding Request Number(s):        379524  
         Your Correspondence Dated:        July 6, 2004 and May 12, 2005

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Funding Request Number:                379524  
Decision on Appeal:                      **Denied**  
Explanation:

- On appeal, you request reversal of SLD's decision to seek recovery of \$208,990.80 for items not being used for educational purposes. In support of your request, you state that there are no specific procedures from USAC or FCC that require the routers to be in place at an eligible school for a minimum period of time or which prohibit removal or transfer of the routers. You further state that Ysleta Independent School District (YISD) did not commit any "waste, fraud, or abuse" in the replacement of the routers, and actively sought to use the routers for other eligible projects.
- Upon thorough review of the appeal and all relevant documentation, it was determined that 37 routers purchased through the aid of E-Rate funds were in storage and not being used for educational purposes. This was discovered during a KPMG audit site visit to YISD. The routers cost \$6,276.00 each.



- On two separate appeals, one dated July 6, 2004 and the other dated May 12, 2005, you state that YISD needed to upgrade their existing obsolete and insufficient computer network to meet the educational needs of the students and the goals of the 1998 Technology Plan. YISD sought funding in Funding Year 2000 for various goods and services for the network upgrade. You state that YISD's high-speed WAN service would not have been fundable under Program guidelines at that time, therefore the decision to upgrade the old routers was the only available and reasonable solution. The routers were installed between October 25, 2000 and November 5, 2000. YISD later determined that their existing computer network, including the routers, was still insufficient to satisfy the constantly changing needs of their students. YISD changed to a high-speed WAN for the upgrade. YISD argued that even though the original use of the routers became obsolete, they looked for new uses for the routers that were consistent with the intent, scope, and eligibility requirement of the program. YISD tried to put the routers in use during Funding Year 2001 for a Voice Over IP (VOIP) project, but funding was denied for this project. You state that the high-speed wide area network was constructed during June and July 2002. The routers were removed from their initial sites and moved to a secure storage area pending subsequent use as planned by YISD. YISD was able to put the routers in use in a DHCP project that commenced in October 2003.
- According to the program's procedures concerning the applicant and service provider certification that all equipment purchased with e-rate funds is solely intended to be used for educational purposes to bring information to the classroom. According to the Universal Service Order (FCC 97-157), applicants require technology plans that are based "on the reasonable needs and resources of the applicant and are consistent with the goals of the program" (par. 574). Also, "schools and libraries must prepare specific plans for using these technologies, both over the near term and into the future, and how they plan to integrate the use of these technologies into their curriculum" (par. 573). Therefore, the applicants are accountable for carefully developing their technology plan, and utilizing the equipment requested and obtained with E-rate support properly and efficiently. Consequently, the appeal is denied.

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either the SLD or the FCC. For appeals that have been denied in full, partially approved, dismissed, or canceled, 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: Richard L. Duncan  
Ysleta Independent School District  
9600 Sims Drive  
El Paso, TX 79925-7200



**SUPPLEMENTAL AFFIDAVIT OF RICHARD DUNCAN**  
**IN SUPPORT OF LETTER OF APPEAL OF**  
**YSLETA INDEPENDENT SCHOOL DISTRICT**

STATE OF TEXAS            )  
  )  
COUNTY OF EL PASO        )

BEFORE ME, the undersigned authority, on this day personally appeared Richard Duncan, known to me to be the person whose name is subscribed below, who after being by me duly sworn, upon his oath, deposed and stated as follows:

"My name is Richard Duncan. I am over the age of eighteen years, am of sound mind, and am otherwise competent and able to testify herein. I am employed by the Ysleta Independent School District ("YISD") and am authorized to make this affidavit.

I am currently in the position of Systems/Database Administration in the Technology Department of YISD. I have over 27 years of experience in my field, and have been employed by YISD for almost 16 years. I am personally familiar with transactions and dealings of YISD relating to the matters set forth below. As such, among other things, I have personal knowledge of facts and statements stated herein. I am able to swear, and do swear, the facts and statements contained herein are true and correct. The capitalized terms herein have the same meaning as in the Letter of Appeal of YISD.

I am familiar with the Request for Review of Ysleta ISD, to which this Affidavit is attended as part of an Appendix. The capitalized terms herein have the same meaning as in the Request for Review, except as otherwise defined herein. This Affidavit supplements, but does not amend the Affidavit included as Exhibit "16" to the Appendix of the Request for Review .

YISD adopted the 1998 Technology Plan, which contemplated that YISD would acquire the necessary technology to establish and maintain an adequate computer network at YISD. The following process was used in creating the 1998 Technology Plan. The 1998 Technology Plan was developed by a *Technology Planning Task Force* representing a diverse cross-section of YISD staff, facilitated by an outside consultant, Gilberto Moreno of INOVA International Services Group. At least 61 staff members of YISD, from a wide variety of instructional, administrative, technical, and other areas, participated in the Task Force. The mission of the Task Force was to review, analyze, and evaluate YISD's then-current technology strategy in relation to and congruence with YISD's District Improvement Plan and the Texas State Board of Education's Long-Range Technology Plan 1996-2010. The initiative included a comprehensive strategic thinking and planning process focused on "The Four R's Planning Process®". The strategic thinking approach used by the Task Force was based on reaching consensus on a new direction based on reflecting, reviewing, refining, and resolving a prioritized set of new initiatives that would enhance its technology plan. Fundamental to the success of the planning process was the development of a new strategic profile that focused on a finite specific set of initiatives, which would be both manageable and with a high value



potential. Using the aforementioned framework for strategic thinking, the Task Force focused on the following components: (a) organizational technology assessment survey; (b) reflection questions; (c) driving forces; (d) critical success factors; (e) goals and objectives; and (f) areas of excellence.

The 1998 Technology Plan was later superseded by the 2001 Technology Plan, which also contemplated the acquisition and maintenance of a sufficient computer network at YISD facilities. The 2001 Technology Plan was developed using a similar, though admittedly less exhaustive process.

The 1998 Technology Plan and the 2001 Technology Plan each was based upon the reasonable needs and resources of YISD. Specifically, each were concerned about network access and bandwidth issues. In addition, the 1998 Technology Plan and the 2001 Technology Plan each were consistent with the goals of the Program. The Program contemplated that funds thereunder would be used to acquire and maintain computer networks, and to upgrade the same; indeed, a significant part of Program funding has been granted and used for such purposes.

In 1999, YISD had a limited computer network in place. As discussed earlier, such network of YISD, however, was obsolete and was insufficient to meet the educational needs of YISD students and the goals of the 1998 Technology Plan. YISD then decide to upgrade aspects of its existing computer network. Pursuant to the 1998 Technology Plan, YISD decided to seek funding under Year 3 of the Program for various goods and services related to such network upgrade. The Routers were acquired using Program funds as a result. Between October 25, 2000 and November 5, 2000, the Routers were installed at the various YISD facilities, in accordance with the terms and conditions of the Year 3 Contract. All of the Routers were in fact installed at eligible facilities, at such locations and in such numbers as described in the Year 3 Form 471. The Routers were thereafter in fact used for the network operations at YISD.

Upon further review and reflection, and additional research and investigation, YISD determined that its existing computer network, even with the upgrades including the Routers, was insufficient to satisfy the ever-changing needs of its students and the ever-increasing demands for network capacity and speed. Changed circumstances required YISD to explore alternative methodologies of configuring its computer network, in order to meet instructional and related needs. After extensive review, YISD decided that a "High-speed wide area network that utilized layer 3 switching" or "High-speed WAN" should be established as the network methodology for YISD facilities. The chief benefits of a high-speed wide area network over the old network were improved performance, additional bandwidth available for future projects such as Voice Over IP, streaming video, point to point video, or video on demand as well as other bandwidth intensive applications that were listed in the then-current Technology Plan. Numerous problems with the existing network were encountered by teachers and students at the classroom level, and the high speed wide area network was designed and intended to address those problems. The old network had become a serious detriment to the education of YISD students.

Once the high speed wide area network offering became reasonable and YISD could justify the expense in alignment with the updated version of the Technology Plan, YISD recognized that, if it chose to install a high-speed wide area network solution, it would no longer need the Routers for its network. The Routers were no longer required under such high-speed wide area network, so YISD investigated alternative uses for the Routers for eligible projects at eligible facilities.

It is not unusual for any user of technology to learn that a prior technology project, especially a computer network, no longer is adequate to meet its original goals. Technology changes quickly, as do the demands upon technological systems. YISD worked diligently and prudently on its Technology Plans, and carefully developed the same in a reasonable fashion. It is unreasonable for the SLD to seek to penalize YISD simply because of unanticipated changes in network demands and in available technology. It would have been unreasonable for YISD to continue with the old network, simply to use the Routers, in light of the serious problems at the classroom level caused by the old network. YISD acted carefully reasonably in its original decision to acquire the Routers. Once the Routers were no longer usable for their initial purpose, YISD acted reasonably in searching for and ultimately finding an alternative, eligible use of the Routers.

#### YISD carefully developed its Technology Plans

Between October 25, 2000 and November 5, 2000, the Routers were installed at the various YISD facilities, in accordance with the terms and conditions of the Year 3 Contract. All of the Routers were in fact installed at eligible facilities, at such locations and in such numbers as described in the Year 3 Form 471. The Routers were thereafter in fact used for the network operations at YISD. In other words, the Routers were in fact used for the intended purpose.

Admittedly, though, the Routers were not used as long as expected for the intended purpose, due to the overwhelming need for YISD to create a high speed wide area network in order to address classroom-level problems with the then-existing network. As part of the change-over to the new network, the Routers were no longer needed.

Since the Routers would not be needed for the YISD computer network if the high-speed wide area network was established, YISD investigated alternative uses for the Routers for eligible projects at eligible facilities. In short, even though the intended purpose of the Routers became obsolete, YISD investigated new uses for the Routers that were consistent with the intent, scope, and eligibility requirements of the Program. YISD wanted any new use to be an eligible use at eligible facilities. As part of this desire, the Router serial numbers were inventoried and catalogued to the specific eligible site location to which they had been assigned. In other words, YISD kept track of exactly which Router went to which eligible location. YISD had also acquired 20 similar routers using its own funds, which were also rendered obsolete due to the change in networks.

The Routers were used for their original purpose until the high speed wide area network was put in place. At that time, since the Routers were no longer being utilized for network purposes and YISD desired to ensure the safety of the Routers for the proposed future use, YISD removed the

Routers from their initial sites in the summer of 2002 and placed them in a secure storage area pending subsequent use as planned.

YISD initially decided that the Routers should be used in connection with the Voice Over IP Project for which funding was sought under Year 4 of the Program. Voice Over IP Project would allow YISD to consolidate its voice and data networks, and this would allow YISD to terminate at least one Program-eligible T-1 line per each of the sixty-odd campuses, saving Program funds. In addition, the Voice Over IP Project also permitted a much greater capacity. The use of the Routers on hand would therefore eliminate the requirement to purchase new routers as part of the Voice Over IP Project. The Voice Over IP Project sought to utilize the Routers for eligible purposes at eligible locations. Unfortunately, Year 4 funding was denied by the SLD for such project for that year.

Thereafter, after extensive review, YISD considered re-seeking such funding for the Voice Over IP Project for Year 5 of the Program, using the Routers. Ultimately, though, such project was not included in the final Form 471 for Year 5 of the Program. YISD, though, planned to continue with that project in future Program years. In any event, even if the Voice Over IP project had been included in YISD's request for Year 5 funding, such funding would have been denied along with the rest of YISD's Year 5 request.

For Year 6 of the Program, YISD planned to utilize the Routers for the Voice Over IP Project. Again, YISD wanted to re-use the Routers for an eligible project at eligible locations. After a procurement process, and subsequent award and signing of a contract for such project, YISD filed its Form 470 for Year 6 on February 5, 2002. Once again, there was a significant delay by the SLD in making a decision on YISD request for funding, here under the Year 6 Form 471. In fact, the SLD did not make such a determination until almost 11 months after the beginning of Year 6. Unfortunately, due to the continuing SLD delays since the Year 6 Form 471 was filed [not to mention the Year 4 and Year 5 efforts to fund the Voice Over IP Project], and the accompanying changes in technology, the Routers could no longer be reasonably utilized for the Voice Over IP Project at that time.

Nevertheless, despite its repeated, unsuccessful efforts, YISD did not give up on its attempt to re-utilize the Routers for an eligible project at eligible locations. Therefore, YISD planned to undertake the DHCP Project, which could use the Routers. The DHCP Project allowed an IP address to be dynamically assigned by the Routers a computer or printer, kept track of the IP addresses assigned, freed up YISD staff from having to manually assign and manage IP addresses, and eliminated the need for additional replacement servers. YISD had the choice of acquiring new servers for the DHCP IP addresses, which were eligible for funding under the Program, or instead moving to the DHCP Project. In an effort to save Program funds, YISD decided to undertake the DHCP Project. Importantly, even though YISD believes the DHCP Project was eligible was Program funding, YISD did not seek or use Program funding for the DHCP Project. YISD used its own or other resources for the DHCP Project. The Routers were used for the DHCP Project.

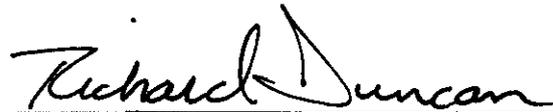
The DHCP Project remains in effect, and the Routers continue to be used for that purpose. To be clear, the DHCP Project was first discussed before the Audit [as defined below] was concluded, and was begun many months before the Recovery Letter, Demand Letter, and Decision were issued. Under the DHCP Project, each Router was returned for use in the exact same eligible school at which such Router had been initially installed for the upgrade of the initial project. The useful life of the Routers under the DHCP Project is expected to be similar to that the Routers would have had if the old network had remained in place.

It is extremely important to point out that, at this time [being several years since the Audit was completed], all of the Routers are actually in place and in use, at the same eligible schools, for an otherwise eligible project [even though YISD used its own funds for the DHCP Project].

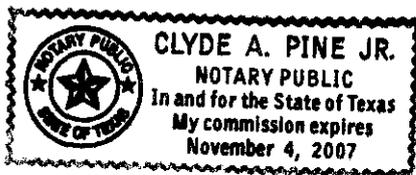
This is not a situation where YISD engaged in serial, annual replacement of equipment acquired with Program funds, and either ceased use of such equipment or moved such equipment to an ineligible location.

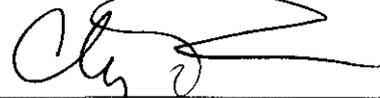
YISD's efforts with respect to these matters are reasonable and prudent, and were made in a manner consistent with then-rules of the Program. YISD in fact installed and used the Routers for their intended purpose. Thereafter, once the Routers were no longer needed due to the required network change, YISD continued to seek alternative uses of the Routers at eligible locations for Program-eligible purposes. YISD persisted in this efforts despite multiple failures, and has already been using the Routers for the eligible DHCP project at eligible locations for over two years. The Routers have been efficiently used, and efficiently re-used. The Routers were also used in accordance with Program rules at the time, and re-used in compliance with Program rules. Indeed, as noted above, even the Commission acknowledged that Program rules at the time did not forbid serial, annual replacement of items acquired using Program funds and their transfer to ineligible locations. If that sort of behavior did not violate Program rules, YISD's conduct in this instance clearly did not violate Program rules, and represented a proper use of the Routers.

Further affiant sayeth not."

  
Richard Duncan

SUBSCRIBED TO AND SWORN TO before me on this 17<sup>th</sup> day of Nov, 2005,  
to certify which witness my hand and seal.



  
Notary Public in and for the  
State of Texas