COUDERT BROTHERS LLP

ATTORNEYS AT LAW

1627 I STREET, N.W.
WASHINGTON, D.C. 20006-4007
TEL: (202) 775-5100
FAX: (202) 775-1168
WWW.COUDERT.COM

NORTH AMERICA
DENVER, LOS ANGELES. MONTREAL,
NEW YORK, PALO ALTO, SAN FRANCISCO,
SAN JOSE, WASHINGTON

EUROPE
ANTWERP, BERLIN, BRUSSELS, FRANKFURT,
GHENT, LONDON, MILAN, MOSCOW, MUNICH,
PARIS, ST. PETERSBURG

ASIA/PACIFIC
ALMATY, BANGKOK, BEIJING, HONG KONG,
JAKARTA, SINGAPORE, SYDNEY, TOKYO

ASSOCIATED OFFICES
BUDAPEST, MEXICO CITY, PRAGUE, ROME,
SHANGHAI, STOCKHOLM

April 17, 2003

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Schools and Libraries Universal Support Mechanism, CC Docket No. 02-6 and In the Matter of Federal Joint Board on Universal Service, CC Docket No. 96-45

Subject: Request for Immediate Relief by the State of Tennessee[1]

Dear Mr. Maher:

The State of Tennessee (hereinafter the "State") hereby submits this Request for Immediate Relief ("Request") that will permit the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company to approve of the State's request for a change in its service provider for funding under Year 2002 (July 1, 2002 - June 30, 2003) of the federal support mechanism for schools and libraries ("E-Rate Program"). We are submitting this proposal to expedite the review and approval of the State's Year 2002 funding request by the SLD and to avoid a "cut-off" of the State's K-12 Internet services just prior to year-end for 900,000 students, 100,000 educators and 1,900 schools (representing virtually all of the K-12 schools in the state). In Tennessee, grading systems, advanced placement exams for seniors, year-end testing, teacher and student e-mail, and required teaching programs to remote schools are all reliant on the Internet. In many case, classes in remote areas are "paperless" and "professor-less" exacerbating the dire and urgent nature of this Request.

Under the State's Request, a common carrier will step into the shoes of the State's Year 2002 service provider, Education Networks of America, Inc. ("ENA"), for the purpose of

---

[1] Year 2002 E-Rate Funding Application: Form 471 Application Number: 329193; Applicant's Form Identifier: ENA 0001-02; Billed Entity Number: 128260.

receiving the USF funding and distributing payments to all underlying providers and subcontractors, with the exception of ENA, and any affiliates, for the full funding Year 2002.[2]

The State is open and flexible to any remedy the Federal Communications Commission ("FCC" or the "Commission") or the Wireline Competition Bureau ("Bureau") deems appropriate to allow the State to pass the USF funding to a substitute carrier and, thereby, to prevent a "shut-down" of critical educational Internet services. To that end, the State respectfully requests that the Bureau consider this Request as either a traditional SPIN change request; as a request for a change in service provider in the spirit of the SLD's "Good Samaritan" policy; or any other mechanism it determines to be suitable under its internal practices to honor the State's Request.[3]

I. Background

The State's Application for funding (FCC Form 471) for Year 2002 was filed with the SLD on January 16, 2002 and on April 26, 2002, the State subsequently received a "471 Acknowledgement Letter" reflecting the successful receipt and data entry of the Application.[4] Between April 2002 and January 2003, the State worked closely with SLD staff as SLD conducted its Program Integrity Assurance ("PIA") review phase of the funding process. In January 2003, the State received an e-mail from USAC, which read: "You are at the tail end of the Selective Review. You should not be receiving any more requests for information pertaining to your Selective Review and you should be receiving a funding commitment decision letter ["FCDL"] soon."[5] However, to date, a FCDL has not been received by the State and, as a result, the State's Year 2002 service provider, ENA, has not been able to apply for its federal reimbursement for the discounted services it provided to Tennessee's schools, despite the fact that the funding year is closing.

It appears that the reason for the delay in releasing the FCDL is related solely to the ongoing and publicized investigation regarding the relationship between the former Governor of Tennessee and a number of individuals in Tennessee. The State is cooperating fully with the investigation and will take appropriate action upon its conclusion. Without prejudging the investigation, we note that there has not been any evidence presented to the State related to any State or ENA misconduct related to the State's procurement process or its selection of ENA as its service provider. Further, there were no appeals filed with the State or petitions for review filed with the FCC regarding ENA's selection as the winning bidder. In addition, there has been no

---

[2] The State has contacted BellSouth Telecommunications, Inc. ("BellSouth") about serving in this role. BellSouth has agreed, in concept, subject to the preparation of appropriate agreements to implement this solution.

[3] Under the SLD's operating procedures, a SPIN change is typically issued only after the applicant receives its funding commitment decision letter ("FCDL"). Because there are no apparent criteria for asking for a relief from such SLD's operating procedures, the State requests the Commission to consider this Request as a "waiver" of SLD's SPIN change process, if necessary.

[4] *See* Letter dated April 26, 2002 from USAC to TN State Department of Education.

[5] *See* January 7, 2003 e-mail to the State from Michael Deusinger of USAC.

evidence related to any fraud, abuse or misconduct rendered by the State or ENA. Indeed, ENA has provided effective services and the State, after a review, continues to fund ENA services.

II. Proposed Option for Resolution: Change in Service Provider

Recognizing that the investigation, like all broad investigations, may continue for several years, the State is filing this Request for a change in service provider so that the State may substitute a common carrier for ENA as its service provider for Year 2002.[6] The State intends to insert a substitute carrier so that it can continue to receive the critical Internet services to prevent irreparable harm to its students, teachers, and education community.

Concurrent with the State's Request and in light of the FCC's concerns about the ongoing investigation regarding ENA, the State and the substitute common carrier are prepared to make all requested certifications that will ensure that none of the released federal funding will go to ENA. As stated above, pursuant to this Request, the substitute common carrier will step into the shoes of ENA for the purpose of receiving the USF funding and distributing federal payments to all underlying providers and subcontractors that are required to keep the system operating, with the exception of ENA, and any affiliates, for the full funding Year 2002. Thus, all payments would be made to a common carrier currently receiving USF funding and under FCC and state regulation as to the "fairness" and "levels" of its USF rates and services. Under this approach, no federal payments would reach ENA.

In addition, and if found acceptable by the Commission, the substitute common carrier will be prepared to request funding to cover the direct salaries for certain critical ENA employees. These employees would be paid directly[7] and are required to keep the network operating until year-end.

Consistent with this approach, the State certifies that:

- no payments would be made to ENA related to the release of the federal funding;
- the State has complied fully with its state procurement rules in selecting ENA as its service provider for Year 2002;
- the State through its new Governor and his new administration, and the new Commissioner of Education, has re-reviewed the selection of ENA as the winning

[6] BellSouth, of course, is a "common carrier" regulated by the Commission, is a service provider for other applicants, and is not involved in this investigation.

[7] Under this approach, still no payments would be made to ENA, but would be made either to the employees directly or to a Payroll Distribution Company, such as ADP, or to the substitute common carrier, which, in turn would make payments directly to employees and subcontractors, which include more than 20 telecommunications companies.

bidder under its procurement process[8] and affirms that ENA was the best evaluated bidder;[9]

- the State has complied fully with the FCC's competitive bidding requirements; and[10]

- the State has complied fully with SLD application and program requirements.

Noting the State's certifications, principally that no federal funding will go to ENA, an entity reported to be under investigation, the Commission may be assured that the integrity of the schools and libraries support mechanism will not be compromised nor will it jeopardize the FCC's goal of reducing waste, fraud, and abuse in the E-Rate Program.

As noted above, it matters not which remedy the Bureau deems appropriate to approve the State's Request to change its service provider. Should the Bureau determine that a traditional SPIN change is the most suitable option, the State certifies that: (1) a change in service provider as contemplated herein is allowed under its state procurement rules; (2) a change in service provider as contemplated herein is allowable under the terms of the contract between the State and ENA; and (3) the State has notified ENA of its intent to make the changes described in this Request.[11] In fact, ENA has affirmatively agreed to support these changes in the interests of maintaining services for the affected students and teachers.

The State notes that the SLD's SPIN change criteria apply to applicants that seek to change their service provider after receipt of a FCDL. However, in establishing these criteria, the Commission adopted a "principle of flexibility"[12] to afford schools and libraries the "maximum flexibility to choose the offering that meets their needs most effectively and efficiently."[13] More importantly, the Commission concluded that it "[could] not anticipate the variety of circumstances under which it may be reasonable for an applicant to substitute service

---

[8] It is important to note that, once the winning bidder is selected, the State's contract review process requires approval by three separate entities: the Department of Education, the Department of Finance and Administration, and the Office of the Comptroller of the Treasury. The first two entities are part of the Executive Branch, while the Office of the Comptroller is part of the Legislative Branch. The Legislative Branch was/is not under the control of the former Governor. The Department of Finance and Administration is not part of the entity that awards the contract, but is part of budget and administrative oversight activity for independent contract review and scrutiny.

[9] *See* T.C.A. § 12-4-109(a)(1)(A)(ii). Under Tennessee's procurement rules, losing bidders may file a protest under a three-step process, two levels of which are not controlled by the administration. However, no losing bidders opposed or protested the selection of ENA.

[10] The FCC relies on compliance with state and local procurement processes to ensure compliance with its competitive bid requirements. *See* In the Matter of Request for Review by the Department of Education of the State of Tennessee, *Order*, 14 FCC Rcd 13734 (1999).

[11] *See* Request for Review of Decision of the Universal Administrator by Copan Public Schools, Copan, Oklahoma, Order, File No. SLD-26231, 15 FCC Rcd 5498, 5501 (2000) ("*Copan Order*").

[12] *See* In the Matter of Request of Los Angeles Unified School District Los Angeles California, *Order*, 16 FCC Rcd 3496, 3498 (2001).

[13] *See Copan Order* at 5502.

providers."[14] To that end, the State asserts that, allowing the State to assign the receipt and distributions of the E-Rate funds under the contract, represents precisely a situation or circumstance the Commission may not have "anticipated" in terms of determining whether a service provider change is appropriate. The State therefore urges the Bureau to consider the Commission's overall "principle of flexibility" in reviewing the State's Request.

In the alternative, the Bureau may opt to implement a process similar to SLD's "Good Samaritan" Policy to grant the State's Request. Under that policy, the SLD created a mechanism under which a substitute service provider could receive federal universal service funding in place of a bankrupt or out-of-business original service provider.[15] Although the situation at hand does not involve a bankrupt or out-of-business carrier, the Good Samaritan remedy may fit the State's Request more appropriately. Effectively, the State is requesting that a "good samaritan" provider be permitted to act as a conduit to funnel the federal funds to the critical entities that can keep the essential services in operation in the State of Tennessee. This approach also may be appropriate because SLD has noted that a "good samaritan" may need to step in where the "original service provider is unwilling or unable to process"[16] the reimbursement payment. In the situation at hand, ENA is unable to file for its reimbursement. As a result, subcontractors cannot be paid and service to the State and its schools is imperiled.

III. Need for Immediate Relief

The lack of federal funding is having an immediate and devastating impact on a statewide network and 900,000 students and 100,000 educators and administrators' Internet access throughout the entire state. The issue facing the Bureau and the SLD is unique in that it does not involve a small number of schools or school districts. In fact, because more than half of the State's students do not have Internet access at home, without federal funding of Internet services at school, these students will have zero access to the Internet. These students represent the poorest of the State's communities, affecting the state's ability to bring students and schools to minimum performance standards. In addition, the Internet-based programs that assist students with Gateway exams and advanced placement courses (both necessary for graduation) would be lost, along with critical Internet-based staff/teacher development programs. Simply put, without a resolution to this matter, the State's students would be placed at a severe disadvantage, as the Internet is not just a teaching tool in Tennessee, it is the universal teaching medium.[17]

The sheer volume of students and teachers that will be affected absent Commission relief requires the Bureau's immediate attention. Without federal funding, Internet services will cease to be provided to Tennessee's school children, as there are no alternatives to fund the critical services. This is not a situation where state or local intervention can save the day. The Bureau must not ignore a request that will prevent the delivery of critical Internet services to almost one

---

[14] *See id.* at 5501-5502.

[15] *See* http://www.sl.universalservice.org/reference/goodsam.asp.

[16] *Id.*

[17] This information was provided to the FCC by the Commissioner of Education, Lana Seivers, and is supported in full by members of Tennessee's Congressional delegation.

million students. To do so would be in contravention of the very premise of the E-Rate Program: to assist schools and libraries to obtain affordable telecommunications and Internet access.

In addition, granting the request for relief will serve the public interest. The Commission has stated that it would be contrary to the public interest if applicants are unable to receive universal service support that they may otherwise have received had "their service provider not possibly engaged in the allegedly unlawful conduct."[18] The Commission's public interest remedy is even more appropriate in this case as there has not been any evidence presented to the State with regard to any State or ENA misconduct related to the State's procurement process or its selection of ENA as its service provider.

IV. Conclusion

Without grant of its Request for Immediate Relief, the State of Tennessee will suffer irrevocable and enormous harm to its students and teachers. Because of the unique and extraordinary circumstances that it faces, the State believes that the relief is based on demonstrated good cause. In addition, the State contends that grant of such relief will have limited ramifications for the Bureau and SLD's operating procedures. To that end, the relief will be conditioned appropriately to ensure the integrity of the schools and libraries support mechanism and will not jeopardize the FCC's goal of reducing waste, fraud, and abuse in the E-Rate Program.

We look forward to discussing these matters with you personally. In the meantime, please let us know if you have any questions.

Regards,

William K. Coulter

William K. Coulter
Counsel for the State of Tennessee

WKC: clz

Cc: Mr. Robert E. Cooper, Jr.
Legal Counsel to the Governor
State of Tennessee
Governor Bredesen's Office
G-10 State Capitol
Nashville, TN 37243-0001

[18] *See* In the Matter of Edumaster.net, dba Mastermind Learning Center, or Mastermind Internet Services, *Order,* FCC 00-260 (2000).