

SETTLEMENT AGREEMENT

This **Settlement Agreement** (“Agreement”) is entered into this 22nd day of December, 2020 by and among the Federal Communications Commission (“FCC” or the “Commission”), and International Business Machines Corporation, a New York corporation (“IBM,” together with the FCC, the “Parties”), through their authorized representatives.

RECITALS

WHEREAS, the Schools and Libraries Program of the Universal Service Fund (the “USF”), commonly known as the “E-Rate Program” (“E-Rate”), is a federal program created by Congress in the Telecommunications Act of 1996 and administered by the Universal Service Administrative Company (“USAC”) for the FCC, and under the E-Rate Program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible Internet access, internal connections, basic maintenance of internal connections, telecommunications, and telecommunications services;

WHEREAS, applicants for E-Rate funding are required to seek competitive bids from prospective service providers, and are required to treat the price of E-Rate eligible goods and services as the primary factor when selecting among competing service providers, and subsequent to competitive bidding, only eligible services and equipment may be submitted to the E-Rate Program for payment;

WHEREAS, IBM, a multinational technology and consulting company headquartered in New York, was a participant in the E-Rate Program from 1998 to the present;

WHEREAS, IBM provided services and equipment in public school buildings to (i) the New York City Department of Education (“NYC DOE”) through an initiative known as “Project Connect” and (ii) the El Paso Independent School District in Texas (“El Paso ISD”);

WHEREAS, IBM knew that funds from the E-Rate Program were used in part to reimburse it for certain services and equipment provided to NYC DOE and El Paso ISD;

NEW YORK

WHEREAS, the NYC DOE is the largest school district in the United States, serving approximately 1.1 million students in over 1,800 schools and between 1998 and 2013, NYC DOE received approximately \$1.3 billion in E-Rate Program disbursements;

WHEREAS, IBM provided certain services and equipment to the NYC DOE during the relevant period, including as part of Project Connect;

WHEREAS, IBM served as a primary vendor on Project Connect during the relevant time period, and, following bidding processes, was one of a few companies that entered into E-

Rate-related contracts with NYC DOE for work on Project Connect, while also subcontracting some of the work to other companies;

WHEREAS, beginning in 2006, the provision of services to the NYC DOE was investigated by the Special Commissioner of Investigation for the New York City School District (“Special Commissioner”), the United States Department of Justice, Civil Division, the United States Attorney’s Office for the Southern District of New York, the FCC, and USAC, including IBM’s provision of services and equipment to NYC DOE through Project Connect;

WHEREAS, on April 28, 2011, the Special Commissioner released a report alleging fraudulent contracting processes involving Project Connect and one of NYC DOE’s consultants, Willard “Ross” Lanham (“Lanham”), and upon release of the Special Commissioner’s report, USAC placed funding holds on NYC DOE and two of its vendors, including IBM, to pause funding commitments and payments for Project Connect while USAC investigated whether NYC DOE or its vendors had violated the E-Rate Program’s governing rules;

WHEREAS, the Special Commissioner, among other things, concluded that (i) IBM learned in 2002 that Lanham, a consultant who was the NYC DOE’s Project Manager on Project Connect, was being paid by the NYC DOE in connection with the work of two consultants whom he had placed with a subcontractor to IBM; (ii) IBM accepted Lanham’s representation that a DOE official had approved the use of such subcontractors by IBM, but did not ask anyone at NYC DOE if this was approved by NYC DOE; and (iii) IBM, from 2002 through 2009, “profited more than \$400,000.00 from these consultants”;

WHEREAS, on December 4, 2003, the FCC unanimously adopted an order in *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District El Paso, Texas*, CC Docket Nos. 96-45 and 97-21, 18 FCC Rcd 26407 (2003) (“*Ysleta*”), in which the Commission determined, among other things, that the use by a participating school district of a two-stage bidding process involving a first stage selection of a contractor without seeking bids on prices of specific E-Rate funded services and equipment, and a second stage negotiation with the contractor over the scope and price of E-Rate eligible services and equipment without seeking competing bids, violates FCC rules governing competitive bidding under the E-Rate Program;

WHEREAS, in November 2004, NYC DOE issued Minibid 21, seeking bids to become the systems integrator contractor for portions of Project Connect for Funding Years 2005-2008;

WHEREAS, the FCC contends that the process by which IBM was selected as the systems integrator contractor and subsequently provided services and equipment to NYC DOE violated the E-Rate competitive bidding requirements as confirmed in *Ysleta*, in that: IBM’s response to Minibid 21 proposed that IBM be hired as the systems integrator contractor and work, with NYC DOE to define E-Rate services and equipment which IBM would then provide; IBM’s response also did not include any prices, descriptions, or quantities of E-Rate eligible services or equipment, but included hourly rates for systems integrator functions; and IBM

negotiated the scope of services, equipment, and prices with NYC DOE only after IBM was awarded Minibid 21;

WHEREAS, the FCC's investigation ultimately concluded that IBM's actions in connection with Project Connect for Funding Years 2005 through 2008 violated the FCC's competitive bidding rules because IBM had engaged in an improper two-step bidding process that the FCC had previously determined in *Ysleta* violated E-Rate rules, and that as a result IBM received improper payments from the USF;¹

WHEREAS, in its FCC Form 471 certifications relating to Project Connect, NYC DOE certified that: (1) its contractors, including IBM, "have complied with all applicable state and local laws regarding procurement of services for which support is being sought" and (2) the data submitted "is based on actual bills for eligible services" provided by IBM and as a result of submitting its FCC Form 471 certifications, NYC DOE received E-Rate funds, including funds that NYC DOE used to pay IBM in part for products and services provided by IBM; and the FCC contends that IBM's conduct was inconsistent with these NYC DOE certifications;

WHEREAS, IBM denies that it acted improperly in any manner at any time in connection with the services and equipment it provided under Project Connect, including Minibid 21, and maintains that it transparently invoiced all such services and equipment to NYC DOE;

WHEREAS, IBM contends that in a criminal jury trial of Lanham, the Department of Justice explained in summation that Lanham "was lying to IBM;" that IBM's billing to DOE of these two consultants was transparent; that IBM submitted time sheets relating to the hours of these consultants that were signed by NYC DOE supervisors; and that NYC DOE knew "how much it was paying" for the services of the consultants;

WHEREAS, IBM denies the FCC's allegations concerning Minibid 21 and Project Connect and maintains that its bid in response to Minibid 21 was in substantial compliance with *Ysleta*, that the NYC DOE procurement process complied with the NYC DOE certifications, that IBM supplied representative service packages with which NYC DOE could reasonably estimate the costs to compare with other bidders, in addition to hourly rates, that IBM supplied equipment outside of the Minibid 21 contract, and that all payments it received from NYC DOE for E-Rate eligible services and equipment were properly paid;

EL PASO

WHEREAS, El Paso ISD participated in the E-Rate Program during the first three years of the program's existence, receiving \$2.6 million, \$6.4 million, and \$1.4 million in funding, respectively in Funding Years 1998, 1999, and 2000, and in Funding Year 2001, selected IBM as its systems integrator contractor (including for E-Rate-funded technology) throughout the school

¹ The funding requests related to the Funding Year 2005-2008 period that are a part of Covered Conduct as hereinafter defined are listed at Appendix A.

district, and its E-Rate funding request increased to more than \$65 million, over \$55 million of which was approved;

WHEREAS, in 2004, USAC initiated a formal review of the El Paso ISD E-Rate project, requesting information and documentation from IBM and the school district to confirm that they had used the E-Rate funding received for eligible products and services; in 2007, at the conclusion of this investigation, USAC issued a commitment adjustment order seeking recovery of \$19,448,146.54 from IBM (along with a partial recovery from the school district) based on five funding requests (Funding Request Numbers 648646, 648729, 648758, 648793, and 648960) previously approved for this project for Funding Year 2001, and finding that these funding requests, in part, had been used to provide ineligible products and services, had been allocated for products and services that were never actually provided, or had been otherwise unlawfully disbursed;

WHEREAS, IBM filed an appeal of USAC's commitment adjustment order regarding El Paso ISD with the FCC raising various challenges to USAC's recovery actions, including that they were untimely, factually incorrect and incorrectly determined under the law applicable to the period when the actions occurred, and El Paso ISD filed a related request for a waiver;²

CONCLUSION

WHEREAS, the FCC has asserted its claims arising from the foregoing conduct investigated by the FCC, the United States, the USAC, and the Special Commissioner based upon allegations that with respect to the NYC DOE for Funding Years 2002 through 2013 and/or El Paso ISD for Funding Year 2001, IBM violated FCC competitive bidding rules, billed the E-Rate Program for ineligible products and services, including those Funding Request Numbers ("FRNs") and related amounts set forth in Appendices A and B to this Agreement, allocated disbursed funds for products and services that were never actually provided, and knew about or facilitated the allegedly fraudulent conduct of consultant Lanham, and as a result of these and related activities received unlawfully disbursed funds from the E-Rate Program;

WHEREAS, IBM disputes the validity of any claims asserted by the FCC, the United States and USAC related to the matters subject to the investigations, including but not limited to as described in the WHEREAS clauses above, and contends that it complied with all applicable E-Rate rules in effect at the time;

WHEREAS, to avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the claims arising from the aforementioned investigations, the Parties wish to reach a full and final settlement with respect to all FRNs and claims arising from IBM's provision of E-

² IBM Request for Review of a Decision of the Universal Service Administrator by IBM Corporation, regarding Services Provided to El Paso Independent School District during Funding Year 2001, CC Docket No. 02-6 (filed Mar. 19, 2012), <https://ecfsapi.fcc.gov/file/7021902007.pdf> (IBM Request for Review); Request for Waiver in connection with the Universal Service Administrator's Demand for Payment by El Paso Independent School District, El Paso, Texas, CC Docket No. 02-6 (filed Feb. 15, 2012), <https://ecfsapi.fcc.gov/file/7021860435.pdf> (the District Request for Waiver).

rate services or equipment to the NYC DOE through the Effective Date, and all FRNs and claims arising from IBM's provision of E-rate services or equipment to the El Paso ISD through the Effective Date (collectively, the "Covered Conduct"), pursuant to the terms and conditions below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. This Agreement shall constitute a final settlement between the Parties with respect to the Covered Conduct. This Agreement is neither an admission of liability by IBM nor a concession by the FCC or USAC that any claims arising from the Covered Conduct are not well-founded.

2. The FCC (on behalf of itself, its officers, employees, and agents, including USAC) agrees to release IBM and any affiliates, subsidiaries, or parent corporations, and their predecessors, successors, and assigns, and any of their present or former directors, officers, and employees, agents and servants from any administrative monetary claims the FCC has or may have arising from the Covered Conduct, including any administrative and/or civil claims for setoff, recovery, and/or reimbursement and any claims pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. §§ 3701 et. seq., as amended, the Communications of 1934, 47 U.S.C. §§ 151 et seq., as amended, and FCC regulations. This release shall not apply to any liability based upon obligations created by this Agreement.

3. IBM shall pay to the USAC, no later than fourteen (14) days after the Effective Date (as defined in Paragraph 11 of this Agreement), the sum of twenty-four million, two hundred and fifty thousand dollars and zero cents (\$24,250,000.00) (the "Settlement Amount") as repayment to the Schools and Libraries Program of the Universal Service Fund, known as E-Rate, via the following link: www.usac.org/pay.

4. IBM shall be in default under this Agreement if IBM fails to make the required payment set forth in Paragraph 3 above on or before the due date for such payment, or if it, or any of its affiliates, subsidiaries, or parent corporations, fails to comply materially with any other term of this Agreement ("Default").

- a. The FCC shall provide written notice of any Default in the manner set forth in Paragraph 10 below. IBM shall then have an opportunity to cure the Default within ten (10) calendar days from the date of delivery of the notice of Default.
- b. In the event that a Default is not fully cured within ten (10) calendar days of the date of delivery of the notice of Default ("Uncured Default"), interest shall accrue at the rate of 12% per annum compounded daily on the remaining unpaid balance of the Settlement Amount, beginning ten (10) calendar days after mailing the notice of Default. In the event of an Uncured Default, IBM

further agrees that the FCC, at its option, may (i) only with respect to a Default under Paragraph 3, rescind this Agreement and reinstate any claims the FCC has against IBM related to the Covered Conduct; (ii) seek specific performance of this Agreement; or (iii) exercise any other rights granted by law, or under the terms of this Agreement, or cognizable at common law or in equity.

- c. In the event that under Paragraph 4.b.(i) the FCC opts to rescind this Agreement and reinstate any claims the FCC has against IBM related to the Covered Conduct pursuant to this Paragraph, IBM shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that relate to the Covered Conduct, except to the extent that these defenses were available before the Effective Date of this Agreement.

5. IBM (on behalf of itself, its affiliates, subsidiaries, and parent corporations, their officers, employees, and agents) fully and finally releases the FCC, USAC, and their officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that it has asserted, could have asserted, or may assert in the future against the FCC, USAC, or their officers, agents, employees, and servants, related to the Covered Conduct and/or the FCC's, USAC's, or the United States' investigation and prosecution thereof, including any claims for amounts allegedly due IBM in connection with the Covered Conduct.

6. IBM represents that in connection with the E-Rate program it does not now, nor will it ever in the future, engage in a two-step bidding process as described in *Ysleta*, specifically the use by a participating school district of a two-stage bidding process involving a first stage selection of a contractor without seeking bids on prices of specific E-Rate funded services and equipment, and a second stage negotiation with the contractor over the scope and price of E-Rate eligible services and equipment without seeking competing bids. Additionally to ensure compliance with *Ysleta* and other program rules, IBM commits to provide training to its employees concerning the Commission's competitive bidding and eligibility requirements prior to submitting future bids in response to Form 470s in the E-Rate Program. IBM further waives any and all rights or claims for any funds from the USF related to the Covered Conduct to the extent that any requests for such funds remain pending or have otherwise been unpaid.

7. This Agreement is intended to be for the benefit of the Parties only. With the exception of the entities and individuals identified in Paragraphs 2 and 5, *supra*, the Parties do not release any claims against any other person or entity.

8. IBM warrants that it has reviewed its financial situation and that it is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the FCC of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual

promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to IBM, within the meaning of 11 U.S.C. § 547(c)(1), and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which IBM is or becomes indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1). Finally, the Parties agree that the payment of the Settlement Amount shall be nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and 1141(d)(6).

9. If, within 91 days of the Effective Date of this Agreement or of any payment made under this Agreement, IBM commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of IBM's debts, or seeking to adjudicate the IBM as bankrupt or insolvent; or (b) seeking the appointment of a receiver, trustee, custodian, or other similar official for IBM's assets, IBM agrees as follows:

- a. IBM's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547 and IBM shall not argue or otherwise take the position in any such case, proceeding, or action that (i) IBM's obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) IBM was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to the FCC; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to IBM.
- b. If IBM's obligations under this Agreement are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under Title 11 of the United States Code, the United States, at its sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action, or proceeding against IBM for the claims that would otherwise be covered by the releases provided in Paragraph 2 above. IBM agrees that (i) any such claims, actions, or proceedings brought by the United States are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and shall not argue or otherwise contend that the United States' claims, actions, or proceedings are subject to an automatic stay; (ii) IBM shall not plead, argue, or otherwise raise any defense under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding that are brought by the United States within 180 calendar days of written notification to IBM that the releases have been rescinded pursuant to this Paragraph, except to the extent that such defenses were available on the Effective Date; and (iii) the United States has a valid claim against IBM in the amount of twenty-four

million, two hundred and fifty thousand dollars and zero cents (\$24,250,000.00), and the United States may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

- c. IBM acknowledges that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

10. Any notice pursuant to this Agreement shall be in writing and shall, unless expressly provided otherwise herein, be delivered by hand, express courier, or e-mail transmission followed by postage-prepaid mail, and shall be addressed as follows:

To the FCC:

Via USPS or Express Courier
Thomas M. Johnson, Jr., Esq., General Counsel
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
E-mail: thomas.johnson@fcc.gov

Via Hand Delivery
Thomas M. Johnson, Jr., Esq., General Counsel
Federal Communications Commission
9050 Junction Drive
Annapolis Junction, MD 20701
E-mail: thomas.johnson@fcc.gov

To IBM:

John Nakahata, Esq.
Harris, Wiltshire & Grannis LLP
1919 M Street NW, Eighth Floor
Washington, DC 20036-3537
E-mail: jnakahata@hwglaw.com

And

Guy Petrillo, Esq.
Petrillo Klein & Boxer LLP
655 Third Avenue, 22nd Floor
New York, NY 10017
E-mail: gpetrillo@pkbllp.com

11. The Effective Date of this Agreement shall be on the date of signature of the last signatory to the Agreement.

12. Ten business days after receipt of the Settlement Amount, the tolling agreement between the FCC and IBM shall expire.

13. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

14. Each Party to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

15. This Agreement is governed by the federal laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of the District of Columbia. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

16. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

17. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

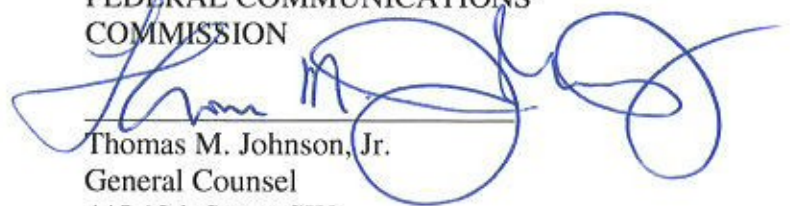
18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

19. This Agreement is binding on IBM's successors, transferees, heirs, and assigns.

FOR THE FEDERAL COMMUNICATIONS COMMISSION

Dated: December ²³____, 2020
Washington, D.C.

FEDERAL COMMUNICATIONS
COMMISSION



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FOR INTERNATIONAL BUSINESS MACHINES CORPORATION

Dated: December 22, 2020
Washington, D.C.

HARRIS, WILTSHIRE & GRANNIS LLP



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Counsel for IBM

Appendix A

NYC DOE Funding Request Numbers (FRNs) FY 2005-2008

Funding Year	FCC Forms 471	FRNs	Committed Funding	Disbursed Funding
2005	488427, 488450, 488509, 488510	1354455, 1354457, 1353367, 1354468, 1354469, 1354470, 1354472, 1354473, 1354474, 1354475, 1354476, 1354545, 1354546, 1354555, 1354556, 1354561, 1354564, 1354565, 1354568	\$24,233,566	\$24,223,566
2006	526524, 533944, 534034, 538388, 538399	1451051, 1451121, 1475729, 1476050, 1491057, 1491058, 1491061, 1491062, 1491065, 1491066, 1491067, 1491071, 1491072, 1491073, 1491077, 1491078, 1491079, 1491080, 1491081, 1491082, 1491095, 1491096, 1491097, 1491140, 1491141	\$10,558,871	\$10,558,871
2007	586655, 586656, 586657, 586734, 586743, 586921	1628226, 1628231, 1628240, 1628423, 1628424, 1628425, 1628426, 1628429, 1628430, 1628431, 1628433, 1628438, 1628439, 1628440, 1628456, 1628457, 1628458, 1628459, 1628460, 1628461, 1628462, 1628463, 1628464, 1628465, 1628466, 1628480, 1628481, 1628482, 1628483, 1628484, 1628485, 1628486, 1628487, 1628488, 1628489, 1628493, 1628494, 1628495, 1628496, 1628497, 1628498, 1628499, 1628500, 1628501, 1629075, 1629076, 1629077, 1629082, 1629083, 1629084, 1629085, 1629087, 1629088, 1629089	\$71,469,278	\$71,469,278
2008	629342, 629436, 629501, 630050,	1736947, 1736948, 1736949, 1736950, 1736951, 1737242, 1737430, 1739042, 1739043, 1739044, 1739045, 1739046,	\$26,875,570	\$26,875,570

	630422, 630537, 637619	1739047, 1739048, 1739049, 1730950, 1739051, 1739052, 1739053, 1740198, 1740545, 1765624, 1765625, 1765626, 1765627, 1765628, 1765629, 1765630, 1765631, 1765632, 1765633		
Total:			133,127,285	\$133,127,285

Appendix B

El Paso ISD 2001 FRNs

FRN	Description	Disbursement	Recovery Amount
648793	Maintenance	\$24,409,530.00	\$16,402,072.35
648758	Web access	\$2,457,027.00	\$1,279,631.59
648729	Video	\$3,324,008.12	\$742,075.13
648960	File servers	\$3,374,300.00	\$843,575.00
648646	E-mail	\$3,229,025.65	\$180,792.47
Total Recovery Amount:			\$19,448,146.50