

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Application for Review of a Decision of the Wireline Competition Bureau by Henrico School District, Richmond, Virginia, File No. SLD-607894, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6.*

I agree with my colleagues that Henrico School District's application for review must be denied because Henrico did not treat price as the primary factor when evaluating bids from four vendors for high-speed Internet access. Specifically, Henrico gave two factors ("functional requirements" and "implementation services") greater weight (25 percent each) than it gave to "price" (20 percent) when evaluating bids. I write separately to explain why the E-Rate program's increasingly byzantine rules and precedents primarily serve the interests of E-Rate consultants and those that can afford to hire them rather than the small, poor, and/or rural schools and libraries that need E-Rate funding most.

The price-is-the-primary-factor rule is case in point.¹ Although the Commission hoped it would ensure that applicants choose the "most cost-effective supplier of access,"² in practice the rule does nothing of the sort. The rule does not require applicants to select the lowest-priced offerings that meet their needs.³ Nor does it, as one might expect, demand that price be the majority factor (*i.e.*, weighted at 51 percent) or even a major factor in selecting a bid. Instead, all the rule requires is that applicants give "price . . . more weight than any other single factor."⁴ So if an applicant considers ten factors, price could be weighted as little as 11 percent.⁵

As a result, the price-is-the-primary-factor rule is nothing more than a paperwork exercise; it elevates form over substance. In Henrico's case, the evaluation matrix mistakenly gave two factors greater weight than price. But each of these factors themselves contained multiple subfactors according to the bidding sheet,⁶ and so, had Henrico been savvy enough to game the system, it could have used effectively the same bidding matrix had it just subdivided these two factors into their constituent parts. Failing to do so technically violated the price-is-the-primary-factor rule, but it did not change the evaluation process one whit.

The penalty for such paperwork mistakes is harsh. Here, Henrico forfeited \$118,210.36 in E-Rate funding even though the savings to E-Rate had Henrico chosen a lower-priced bid would have been only \$41,664.⁷ And that almost-treble penalty comes in a case where treating price as the primary factor would have made no difference—had price been the primary factor (decreasing the weights of all other factors proportionately), Henrico would have selected the same vendor that it did.

¹ See 47 C.F.R. §§ 54.504, 54.511 (2008); 47 C.F.R. §§ 54.503, 54.511 (2011); 47 C.F.R. §§ 54.503(c)(2)(ii)(B), 54.511(a) (2014).

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (subsequent history omitted).

³ *Id.*

⁴ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26407, 26429, para. 50 (2003).

⁵ *Id.* at 26429, n.138 (noting that other factors would have to have weights of 10 or less).

⁶ See Henrico Request for Review, CC Docket No. 02-6, Ex. B (Mar. 12, 2009). The "functional requirements" factor incorporated three separate subfactors: "extent to which the proposal meets the RFP's functional requirements," "compliance with the RFP's technical requirements," and "extent of modifications required to meet requirements." The "implementation services" factor incorporated five separate subfactors.

⁷ Had Henrico chosen the second-best bid (from TelCove), its eligible E-Rate expenses would have been \$12,267 per month, resulting in E-Rate funding of \$76,546.08 for the year. See *Order* at note 39.

I admire Henrico’s tenacity in slogging through the six-year administrative process to get to this point. But nothing in E-Rate’s rules, either as they were written back in 2008 or as they stand now, can save Henrico’s funding request from this largely capricious result. Indeed, we had an opportunity to fix this very problem this summer, but the Commission decided to take a pass on real reform.⁸ I can only hope that the Commission will at some point recognize that specialized federal procurement rules—like the price-is-the-primary-factor rule—only hurt the students and library patrons that E-Rate is meant to serve.

⁸ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-99, at 170–71 (rel. July 23, 2014) (Dissenting Statement of Commissioner Ajit Pai) (noting the “myriad . . . ‘rules’ [including the price-is-the-primary-factor rule] that have crept into E-Rate’s specialized procurement process” and the resulting hardship for schools and libraries).