

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Schools and Libraries Universal Support Mechanism)	CC Docket No. 02-6
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.)	CC Docket No. 97-21
)	

**COMMENTS IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING
TO SIMPLIFY THE E-RATE PROGRAM FOR TRIBAL AND OTHER APPLICANTS**

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I. Introduction and Summary

The State E-rate Coordinators' Alliance ("SECA"), the Schools, Health & Libraries Broadband Coalition ("SHLB"), the Consortium for School Networking ("CoSN") and the State Educational Technology Directors Association ("SETDA"), together referred to as the "Joint Commenters," recommend numerous streamlining measures to simplify the E-rate application process for Tribal libraries and other applicants. The Joint Commenters commend the Federal Communications Commission ("FCC" or "Commission") for modifying the definition of E-rate eligible entities to include Tribal libraries. This underserved population hopefully will be able to access broadband connectivity more easily and affordably through E-rate but only if they are able to navigate the maze of rules and regulations.

This Notice of Proposed Rulemaking ("NPRM")¹ invites comment on specific proposed reforms and also invites other recommendations to simplify the E-rate program. The Commission acknowledged the comments of library representatives that noted that Tribal library participation has been historically low due to the perceived complexity of the process, and "further simplifying the E-Rate Forms and processes could help to increase Tribal library participation in the program."² The same holds true for all other applicants. All applicants – both current and prospective new ones – surely will benefit from a simpler filing experience, and the public interest will be served by administering the E-rate program more efficiently.

¹ *Schools and Libraries Support Mechanism*, Notice of Proposed Rulemaking, WC Docket No. 02-6 *et al.*, FCC 23-10 (Released February 17, 2023)("NPRM")

² *Id.* at ¶14.

Nine years ago in 2014, the Commission issued two landmark reform Orders that modernized E-rate including a series of changes intended to simplify E-rate and improve its efficiency. These updates were designed to help achieve the performance goal of “making the E-rate application process and other E-rate processes fast, simple, and efficient.”³ Additionally, the Commission directed USAC to survey applicants and service providers about their experiences with the program in order to identify areas in need of improvement.⁴ This directive acknowledged ongoing assessment of the performance goal is useful for determining future improvements and establishing reforms is not necessarily “once and done.” While the Joint Commenters are not aware of any such survey having been conducted, the current NPRM offers an important opportunity to implement other improvements to make E-rate processes faster, simpler and more efficient for not only Tribal libraries, but all existing and prospective applicants.

Most applicants that encounter adverse results with E-rate – for example, funding denials, invoice denials, rescission of funding and repayment of funds disbursed in error - earnestly have tried to comply with program rules but find themselves unknowingly tripped up by a complex rule. Many simply are confounded and overwhelmed. There are so many requirements, exceptions, steps, and deadlines, which leave open many possibilities for inadvertent ministerial errors. The Joint Commenters hope to persuade the Commission

³ *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC 8870, paras. 55-62 (2014) (*First 2014 E-rate Order*); see also *Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538 (2014) (*Second 2014 E-Rate Order*).

⁴ *First 2014 E-rate Order*, ¶ 61.

to remove those obstacles that are not integral to preserving program integrity so that the Tribal libraries as well as other applicants will have a greater chance of E-rate success.

The best solutions to improve the successful participation of Tribal libraries and other E-rate applicants is to institute these measures uniformly and not create special “carve-out” benefits exclusively for the Tribal libraries. All the proposals advanced by the Joint Commenters, indeed, would greatly benefit Tribal libraries as well as all other E-rate applicants.

The Joint Commenters agree with the proposed eligibility of dual use Tribal college academic libraries that also serve as community libraries. The other option – to allow the community library to apply but require cost allocation to remove ineligible usage – would likely produce ancillary reductions and would not be in the public interest. Similarly, we encourage the Commission to remove other cost allocation requirements for ancillary ineligible use whenever possible. There are numerous examples of usage of E-rate funded services and equipment within schools, particularly rural schools, that currently require cost allocation, such as health clinics located in schools, classes for non-K12 students within vocational technical schools, and day-care centers and other pre-k students within existing schools.

Off campus internet usage when schools are not in session and libraries are not open to the public should be designated as ancillary. Such usage should not be required to be cost allocated subject to meeting certain conditions to ensure that additional funding is not being requested for internet services used when schools and libraries are open. This is especially important for Tribal lands where there may be no other viable broadband source of internet access other than from the school or library.

There are updates to the Eligible Services List that should also be implemented to simplify the program. First, all communications cabling inside eligible entities should be deemed eligible and should not require cost allocation regardless of the kind of device that is attached to the cabling since the FCC's educational purpose definition includes all activities occurring on library and school property. Second, the regulatory treatment of prepaid multi-year eligible support under the basic maintenance category should be the same as internal connections licenses and applicants should be permitted to receive funding for the entire cost of the multi-year service up front in the first year. Paying a vendor upfront for multi-year BMIC licenses and receiving only one year of E-rate support is a financial burden for all applicants, but may especially be burdensome for Tribal Libraries.

Revisions of the Form 470 to remove unnecessary Category 2 subcategories are also needed to eliminate the potential for technical competitive bidding mistakes leading to funding denials and rescissions. Long overdue clarifications of the competitive bidding requirements are also requested, so that applicants do not risk funding denials from ambiguities in those rules and are not precluded from obtaining additional broadband connectivity as needed throughout the year.

II. Tribal College Libraries That Also Serve As Public Libraries Open To Community Members Should Be Eligible For E-Rate Funding.

The Joint Commenters concur that Tribal college libraries serving a dual role of operating as a public library open to the community should be eligible for E-Rate support.⁵ This implementation can be done either by reversing and reconsidering the 1997 *Universal Service Report and Order*, or by eliminating the cost allocation for these libraries.⁶

The Joint Commenters recommend the Commission opt to clarify that publicly accessible Tribal libraries are eligible without requiring cost allocation of the services and equipment used by college students and faculty. In other words, the Tribal college library would be considered a public library for E-rate purposes since the entire community – which includes college students, faculty, and other members of the public – are able to use the facility. This approach would not require the Commission to reconsider and reverse its 1997 decision since it would not requiring further changes to the definition of an eligible library.

Regardless of the approach chosen, there are three conditions that should govern Tribal college dual use libraries' E-rate participation to ensure that the funds are used only by the library and not by the rest of the college. First, the services requested for funding cannot be increased in quantity beyond the amount needed to meet the needs of the library. Second, Category 2 equipment must be installed inside the library's physical structure and cannot be used or shared with the rest of the college. Third, the remaining

⁵ *NPRM*, para. 11.

⁶ *Universal Service First Report and Order*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9070, paras. 557-59 (1997) (*Universal Service First Report and Order*).

college facilities are not allowed to connect to the library's internet and must obtain their own internet connectivity. This will further ensure that only the quantity of internet needed for the library is funded through E-rate. These guardrails are consistent with the existing community use provision⁷ and are essential to ensuring that the services and equipment will be used for the benefit of the library and not used to fund the technology needs of the college, and will help to ensure that the equipment and services are right-sized for the library, and therefore cost-effective.

Next, the Commission asked what evidence is sufficient to verify the Tribal college library is serving as a public library in the community.⁸ As a starting point, first, USAC should request this information from each state's and territory's central library agency to see if it is available. For example, in South Dakota, the State Library website has a list of these libraries. See <https://libguides.library.sd.gov/services/combos>. State identification of these Tribal college libraries as community libraries should be conclusive for those entities without requiring any further validation. Second, for dual use libraries that may not have been identified as such by the state, a Tribal college library that has received an IMLS grant from a program designed to benefit public libraries should also be dispositive. Some qualifying libraries may not have previously applied for and received an IMLS grant. Third, for libraries not identified by the state or an IMLS grant recipient, USAC should ask the library for additional information to prove it is open to the community. For example, the Oglala Lakota College's library web site states, "Oglala Lakota College's Woksape Tipi

⁷ *Schools and Libraries Universal Service Support Mechanism*, Sixth Report and Order, WC Docket No. 02-6, 25 FCC Rcd 18762, 18775-76, paras. 25-26 (2010) (*E-Rate Sixth Report and Order*). Additionally, schools that choose to allow the community to use their E-Rate funded services "may not request funding for more services than are necessary for educational purposes to serve their current student population." *Id.* at 18775, para. 24.

⁸ *NPRM*, para. 13.

Library and Archives serves as the academic library for Oglala Lakota College and *is the public library for the Pine Ridge Reservation.*⁹ (emphasis added).

Branches of a Tribal college library that also serves as a public library should be allowed provided they meet the conditions listed above. Lastly, Tribal college/public library combination libraries should be eligible for E-rate funding only when there is no other Tribal public library accessible to the community. This is necessary to preserve the primary purpose of E-rate to fund public libraries and not higher education libraries.

III. Tribal Libraries' Participation in E-rate Should Be Encouraged By Reducing Program Complexity.

The Commission also sought comment on specific measures to streamline FCC forms or change parts of the application process that may be burdensome to Tribal libraries including, but not limited, to: adding a competitive bidding exemption for Category 2 purchases under \$3,600¹⁰; implementing “safe harbor” prices for services that would be exempt from competitive bidding¹¹; increasing the amount of Category 2 funding by raising the maximum discount to 90% and/or increasing the funding floor per entity¹²; and, establishing a separate longer filing window for Tribal libraries.¹³

In general, the Joint Commenters believe the most effective way to increase the participation of Tribal entities in the E-rate program is to simplify the application process and clarify the program rules and requirements. These improvements will benefit these entities as well as other prospective new entrants to E-rate. Experience has shown that

⁹ <https://www.olec.edu/current-students/woksape-tipi-library-archives/> (last visited April 8, 2023).

¹⁰ *NPRM*, ¶ 15,

¹¹ *Id.*

¹² *Id.*, ¶ 19.

¹³ *Id.*, ¶ 16.

program simplification works best when the same rules and procedures apply across the board to all applicants. Increasing the maximum amount of available funding or changing the competitive bidding requirements may have initial appeal but will inevitably raise a myriad of implementation issues for the Administrator and the Tribal entities. Rather than expend effort implementing these exceptions, the Joint Commenters encourage the FCC to apply its limited resources to adopting simplification measures that will benefit all applicants and lower the obstacles to successful E-rate participation.

IV. Cost Allocation Relief Will Significantly Reduce The Confusion And Difficulty Of Applying For E-Rate.

A. The Current Regulation Provides An Ancillary Cost Exception To Cost Allocation Which Should Be Clarified And Should Govern The Administrator's Review Of Form 471 Applications And Audits.

In the *NPRM*, the Commission acknowledges, "Cost allocation is a part of the E-Rate process that can be confusing for all applicants, but especially for Tribal libraries." The Joint Commenters wholeheartedly concur that cost allocations are in fact confusing for not only applicants, but for service providers and the Administrator. Many of the questions posed concerning Tribal libraries' cost allocation requirements are equally applicable to many other applicants: sharing internet with ineligible entities; when a library is housed in a larger building such as a chapter building or local government building used for ineligible functions, for example. Additionally, there are numerous instances where services or equipment have ineligible integral components. It is typically very time consuming and burdensome to calculate amounts to be cost-allocated.

In prescribing the cost allocation regulation codified at 47 C.F.R. §54.504(e), the Commission explicitly stated that “ancillary” costs are not required to be deducted. “Ancillary” is defined as “if a price for the ineligible component cannot be determined separately and independently from the price of the eligible components, and the specific package remains the most cost-effective means of receiving the eligible services, without regard to the value of the ineligible functionality.”

Whenever program integrity assurance (“PIA”) questions are sent to applicants concerning mixed eligibility usage, PIA insists that the applicant must perform a cost allocation to remove the ineligible costs, even if those costs are bundled as part of the base price of the equipment or service, and even if the service or component cannot be purchased without those ineligible components. Cost allocation is always required without regard for whether the cost of the equipment or service is the most cost-effective solution to obtain the eligible component functionality. In other words, there is no option to claim that the ineligible costs are not separately quantified and the component is the most cost effective option.

One of the most time consuming and burdensome examples of cost allocation arises when just a handful of “ineligible” students such as pre-k or adult learners in an otherwise eligible school use an Internet funded transport circuit or Internet. The cost of these services is for a specific bandwidth and is the same regardless of the number of students, eligible users, or ineligible users. Cost allocation should not be required in these circumstances because there is no additional cost and the service is the most cost-effective option.

The Joint Commenters urge the Commission to explicitly clarify that when a service or equipment is not available to be sold without the ineligible features and the total cost of the service/equipment is the most cost-effective solution, the ineligible features are ancillary and do not require cost allocation. This clarification is consistent with the existing regulation and will reduce the instances where cost allocation is being required even though the ineligible costs are ancillary, and therefore, should not be required to be deducted from the funding request.

B. Cost Allocation Of Non-Instructional Facilities' Use Of Shared Equipment Should Not Be Required.

The current program requirements mandate cost allocation when network equipment is used by or shared with non-instructional facility buildings (“NIFs”). The elimination of this outdated and unnecessary requirement would greatly simplify the application process for all entities especially those new to E-rate such as Tribal libraries.

The original restriction precluding NIFs from benefiting from Category 2 funding was established by the Commission in 1998 on its own motion under vastly different circumstances than the current E-rate regulatory framework.¹⁴ Then, the program was regularly oversubscribed for internal connections and maintenance (then called “Priority 2”) and only the highest discount applicants could access these funds. One measure to conserve the Priority 2 funds and help reach more applicants was to restrict the use of

¹⁴ *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration in CC Docket No. 96- 45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 63 FR 2094, 2110 (1998). “We take this opportunity to make clear, *on our own motion*, that the Order limits support for internal connections to those essential to providing connections within instructional buildings.” (emphasis added).

these funds for school and library buildings and not allow them to be used for non-instructional facilities (“NIFs”).

This oversubscription pattern was prior to the establishment of the Category 2 budgets, an increase to the overall E-rate funding cap and a reduction of the maximum discount to 85% for Category 2 funding. It also pre-dated the Commission’s adoption of the “educational purpose” definition that presumes all activities that occur in any school or library building (including NIFs) are presumed to have an educational purpose. Last, beginning in FY 2021, the Category 2 budgets are administered at the billed entity level, and not at the individual building level, which was a further simplification measure.

Despite these considerations, the Commission chose to continue to require cost allocation of NIFs’ use of shared equipment for the solitary reasons that it was not persuaded that the administrative burden associated with deducting the cost of the non-instructional building’s use of shared network equipment warrants eliminating a rule designed to ensure that E-Rate support is only provided to eligible schools and libraries for eligible purposes.

SECA petitioned for reconsideration on January 21, 2020, as noted in the current NPRM, and provided legal and factual reasons why the Commission should grant relief and eliminate this onerous and unnecessary cost allocation requirement.¹⁵

Most importantly the Commission’s rationale that the use of Category 2 funds by NIFs would not have an eligible purpose is in direct conflict with its definition of “educational purpose,” which states:

¹⁵ SECA Petition for Reconsideration, WC Docket No. 13-184, at 4-8 (filed Jan. 21, 2020). SECA also petitioned for reconsideration

Educational Purposes. For purposes of this subpart, activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate and proximate to the provision of library services to library patrons, qualify as “educational purposes.” Activities that occur on library or school property are presumed to be integral, immediate, and proximate to the education of students or the provision of library services to library patrons.¹⁶

Since NIFs are on library or school property, the activities that occur in them clearly qualify as educational purposes. As stated in the SECA Petition for Reconsideration the issue raised there was not to request Category 2 funding for site-specific equipment in NIFs; rather it was the limited cost allocation issue that the Commission raised in the present NPRM: cost allocation should not be required for shared Category 2 equipment whose usage includes a NIF among other eligible schools or libraries under an applicant’s Billed Entity.

Multiple benefits will inure to applicants, service providers and the E-rate Administrator by removing the tedious and complex cost allocation requirement for NIFs’ use of shared equipment without compromising any protections against waste, fraud or abuse of program resources. Elimination of the cost allocation requirement will clarify and streamline the Form 471 application process, the application review process, as well as the invoicing review process. It also will ensure that applicants that are not aware of this byzantine requirement are not inadvertently violating E-rate rules.

¹⁶ 47 C.F.R. §54.500, *Basic Terms and Definitions*

C. Eligibility Of Internal Connections Communications Cabling And Other Equipment Should Not Be Dependent Upon The Equipment Attached To The Cabling.

The eligibility of Category 2 equipment and services is limited to “internal connections necessary to bring broadband into, and provide it throughout, schools and libraries.” These are broadband connections used for educational purposes within, between, or among instructional buildings that comprise a school campus (as defined below in the section titled “Eligibility Explanations for Certain Category One and Category Two Services”) or library branch, and basic maintenance of these connections, as well as services that manage and operate owned or leased broadband internal connections (e.g., managed internal broadband services or managed Wi-Fi).” The list of “Eligible Broadband Internal Connections” states “cabling” is eligible without any qualifying language. However, USAC’s inquiry procedures suggest that only cabling installed for switches and access points is eligible.

Applicants regularly seek funding support for two types of cabling projects. One common project is the installation and configuration of network cables between data closets. For these projects, cabling can be installed as either multi-mode or single-mode fiber and enable the switches in each data closet to communicate with one another.

The other type of cabling project is the procurement and installation of low-voltage, copper-based cables. These are generally classified as Category 5 or Category 6 cables and provide data transmission to specific points located in the ceilings or in walls of a school or library building, thus creating a “drop” or “jack” for various types of equipment to connect to, and then gain access to the communications network.

In both situations, USAC and/or auditors' inquiries ask what types of equipment are connected to the cabling and designate that certain devices may be connected, therefore deeming the drop or jack to be eligible. For example, if a security camera or voice phone handset will be connected, USAC or the auditor have concluded on multiple occasions that the costs of that drop or jack is not eligible for E-rate funding. These cable runs are used to distribute broadband to many different types of devices, all of which are used specifically for an "educational purpose" pursuant to the definition of "educational purpose" in the CFR. All activities that occur on school and library property have an educational purpose.

This line of inquiry should be ended and any cost allocation currently required should be eliminated. It should not matter what the purpose or function of the device is that is connected to the network since all of these devices have an educational purpose.¹⁷

Notably, the only E-rate eligible equipment that can feasibly be connected to these types of cables are switches and access points. If the FCC seeks to parse the eligibility classification of cabling such that certain types of cabling deployments are entirely or partially ineligible regardless of their indisputable "educational purpose," then it must clearly define for applicants which specific types of equipment cannot be connected to cabling funded by the program. To limit the eligibility of cabling projects by requiring that all "drops" service only eligible equipment precludes the use of this cabling for computer

¹⁷ SECA filed an *ex parte* on July 17, 2020 request for clarification of the cost allocation requirement for communications cabling and data distribution equipment because of concerns that the E-rate Administrator was misapplying FCC regulations and orders. Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, *Ex Parte Notice and Submission Requesting Educational Purposes Test to Govern Cabling and Data Distribution Equipment Eligibility* (filed July 17, 2020).
<https://www.fcc.gov/ecfs/filing/107172910708979>

labs or to interactive whiteboards, both of which are clearly used for the sole purpose of educating students.

As such, the Joint Commenters request that the FCC eliminate the current ambiguities and clarify that all copper-based cabling within an instructional facility is eligible when it connects to a broadband-enabled device. This approach furthers the spirit and mission of the Program by providing funding support necessary to provide a robust educational experience to all pupils and library patrons.

D. Cost Allocation Of Firewall Features That The FCC Designated As “Next Generation” In 2014 Should Not Be Required.

The Commission should also remove the current restriction that certain features of firewall equipment characterized as “advanced” or “next-generation” must be cost allocated and deducted from applicants’ funding requests.¹⁸ The Joint Commenters acknowledge this issue is under review in a different proceeding and encourage the Commission to act swiftly to grant relief beginning in Funding Year 2024.¹⁹ Like other applicants, Tribal libraries would benefit greatly from being able to use E-rate funding to pay for the data network protection needed to fend off cyberattacks. Numerous Tribal government entities have experienced the paralyzing impacts of a cyberattack on vital functions:

- The United States Department of Justice reports that cybersecurity is an evolving risk to Tribal economic development. Tribes reported to DOJ that cyber threats have increasingly become a major risk to Tribal government operations and to Tribally

¹⁸ See also *Wireline Competition Bureau Seeks Comment on Requests to Allow the Use of E-rate Funds for Advanced or Next-Generation Firewalls and Other Network Security Devices*, WC Docket No. 13-184, Public Notice DA 22-1315 (rel. December 14, 2022); Initial Comments Filed by Consortium for School Networking, *et al*, submitted February 13, 2023.

¹⁹ *Id.*

owned enterprises, and during DOJ's Tribal consultations, cybersecurity risks received the most attention of the identified risks discussed.²⁰

- On April 28, 2021, Three Affiliated North Dakota Tribes—the Mandan, Hidatsa & Arikara Nation—announced to its staff and employees that its server was hacked and believe it was by malicious software called ransomware. They were unable to use their computers and access the internet.²¹
- Eastern Band of Cherokee Indians in North Carolina experienced a debilitating ransomware attack in in December 2019.²²
- The Oklahoma City Indian Clinic experienced a cyberattack that disabled certain pharmacy services for an extended period.²³ The clinic serves over 20,000 patients from 200 Native American tribes in Oklahoma.

Tribal libraries would greatly benefit from the opportunity to purchase firewall equipment that includes all the features necessary to protect their network against malicious attacks.

E. Cost Allocation Of Usage Of E-Rate Services And Equipment By Health Clinics, Child Care Centers, And Non-K-12 Student Career Classes Located Inside Eligible School And Library Buildings Should Not Be Required.

Several examples have been brought to the attention of the Joint Commenters where health clinics open to the community (not just for the use of students and faculty) may be located inside an eligible school or library. The question has arisen whether the use of E-rate supported services by the clinic would need to be cost allocated since the service may not meet the “educational purpose” test – particularly when a third party is operating the clinic. SECA members have conservatively advised applicants that the health care clinic’s use of E-rate supported services must be deducted and not funded by E-rate.

²⁰ United States Department of Justice Tribal Risk Management Consultation Report, March 2022, page 4. <https://www.justice.gov/d9/fieldable-panel-panes/basic-panes/attachments/2022/06/08/risk-management-tribal-consultation-final-report-march-2022.pdf>

²¹ <https://nativenewsonline.net/currents/three-affiliated-tribes-hit-by-ransomware-attack-holding-tribal-information-hostag>

²² <https://www.charlotteobserver.com/news/state/north-carolina/article238221444.html>

²³ <https://healthitsecurity.com/news/oklahoma-city-indian-clinic-cyberattack-causes-pharmacy-disruptions>.

The Joint Commenters believe that the health care clinics' use of E-rate supported services when on school or library property should not have to be cost allocated. The health care services should be viewed as having an educational purpose since they are provided as part of the school or library mission. It should not matter whether the services are being provided by members of the community or specifically to a student or library patron.

Similarly, in efforts to recruit and retain teachers, many schools are offering in-building childcare services. Currently, children under the age of 3 are not considered eligible to use E-rate supported services and as such, although minimal, schools would be required to cost allocate the Internet usage of these children and the staff that care for them.

Likewise, vocational technical schools are providing vital career education classes within their buildings, during the school day, to non-k-12 community members. These classes are typically electrical, plumbing, masonry, carpentry and automotive classes that use little Internet, yet what services are used through these classes are required to be cost allocated from an E-rate request or reimbursement. According to Associated Builders and Contractors, the construction industry alone will need to attract an estimated 546,000 additional workers on top of the normal pace of hiring in 2023 to meet the demand for labor.²⁴ And according to the American Welding Society, the United States will be faced with a shortage of more than 400,000 professional welders by the year 2025.²⁵

²⁴ <https://www.abc.org/News-Media/News-Releases/entryid/19777/construction-workforce-shortage-tops-half-a-million-in-2023-says-abc>

²⁵ <https://penncommercial.edu/welding-skilled-trades/#:~:text=There's%20a%20big%20shortage%20of,such%20as%20roads%20and%20bridges.>

These programs and functions, whether health-based centers, child-care classrooms, or adult career and technical education classes, are part of the core mission of the school or library as a community anchor institution, and should not be restricted from using E-rate supported internet services.

V. Competitive Bidding Procedures Should Be Clarified In Several Areas To Simplify The Application Process.

A. Introduction

There are numerous clarifications of the competitive bidding requirements that would simplify the E-rate application process and would improve, and not hamper, program integrity, by setting forth clear guidelines to resolve numerous ambiguities and to remove certain ministerial error traps that deny funding to good faith applicants trying to comply with program rules. These areas already pose challenges to existing, experienced applicants, let alone new applicants such as Tribal libraries and others who are new to the E-rate program. Nearly all of these measures could be addressed by the FCC directing USAC to modify the manner in which they process applications, and do not require rule changes or reconsideration of policies adopted in FCC orders.

B. The Filing Process For Small Public Libraries Should Be Simplified.

Small rural libraries often are part of the local government and may have their own budget, but the local government is the entity that pays the bills to vendors. These libraries must have the local government file for E-rate on behalf of the library – as the billed entity

– or the library may obtain permission from the local government to file for E-rate and serve as the billed entity. Tribal libraries may likewise be part of a local government entity and may also need to navigate how these relationships must fit within the E-rate program filing process.

USAC should provide outreach support to these libraries and their local government representatives and provide guidance on how to complete E-rate forms and documents such as:

- Should the library’s billed entity name include a reference to both the library and local government so as to try to minimize confusion?
- Should the library or the local government be the contracting party with vendors for E-rate services and equipment? If the local government is the signatory, PIA should be trained to accept the contract even though the billed entity may not be named as a contracting party.
- Should the FCC Form 498 be completed in the name of the local government entity or the library? May the banking information for the local government be used if the Form 470 is completed by the library? Similarly, must the library have its own FCC RN and UEI or may the library rely on the local government’s information?

C. The Form 470 Should Be Modified To Resolve Confusing Sections.

The Form 470 should be modified to remove two confusing sections that regularly trip up applicants and increase the risk of funding denials or non-payment of reimbursement requests. Initially, the current version of the Form 470 expires November 30, 2024,²⁶ and therefore, this is an opportune time for the Commission to direct these

²⁶ The OMB Information Collection website, [reginfo.gov](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202203-3060-026#) lists the approval date and expiration date of the Form 470 (and Form 471) in the Notice of Action for the associated information collection. https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202203-3060-026#

changes to be made. This would provide sufficient lead time for USAC to implement any systems changes to prepare for the new version of the Form.

The separate subcategories/service types for Category 2 should be eliminated. With the implementation of the EPC system, applying for equipment and services in the proper “Service Type” or “Function” has become critically important. If an applicant inadvertently does not make the proper selection to ensure that their Form 470 matches the products or services in their Form 471, their funding request(s) will be denied during the PIA review process as a competitive bidding violation. If the mistake is not detected during pre-funding review and is approved, then reimbursements are denied or rescinded when the category of service issue is discovered. There is no cure for this ministerial mistake.

Prior to EPC, applicants were not required to select individual categories of internal connections equipment on the Form 470 and then ensure that they matched exactly to their Form 471 funding requests. Applicants could simply provide a narrative of the equipment and services in their Form 470 that described their requests for price quotes. Since FY 2015, hundreds of funding requests have been denied or cancelled, despite applicants’ attempts to select the correct category that described the service or equipment they were seeking on both the Forms 470 and 471. Any time the Form 470 did not explicitly request the service or equipment that is listed on the Form 471, the funding request is denied. This occurs even when applicants clearly articulate their requested services in the narrative text box section of the Form. Such errors are still made, despite the 2021 revision to the Form 470 to allow a BMIC checkbox at the bottom of the IC service request. Further, service providers bidding on Category 2 products, such as license renewals, often are unaware of whether the license will be deemed “internal connections”

or whether it is “basic maintenance of internal connections.” The arbitrary distinction between service types is confusing to both applicants and service providers.

Second, the Category 1 description of internet services continues to be confusing to applicants. The Commission should establish an option for bundled internet service over fiber facilities, which currently is not a clearcut option. Applicants seeking internet delivered over fiber are required to select an option that includes “any combination of transmission medium including fiber, fiber/non-fiber hybrid, or non-fiber networks such as cable, DSL, copper, satellite or microwave.” In the narrative description, the applicant is allowed to explicitly limit their service request to fiber transmission medium. If they are allowed to do so in the narrative, applicants should also be permitted to select such a request in the drop down or radio button menu.

Likewise, applicants seeking data transmission service delivered over fiber do not have this specific option to select. They must select “seek bids to purchase data transmission service only (i.e., that does not include internet access service).” Then they are given two additional confusing options:

- Option 1 -- I seek data transmission service without internet access service.
- Option 2 -- I seek to lease capacity, e.g., a specific number of dark fiber strands or capacity over a leased lit network, which will be used for data transmission service.

Applicants are not provided explicit guidance on which selection to make in official USAC guidance.²⁷ This is unnecessarily confusing. The solution is to identify a third option:

²⁷ Neither the FY2022-FY2023 FCC Form 470 Services Guiding Statements Table or the FCC Form 470 EPC address this issue. https://www.usac.org/wp-content/uploads/erate/documents/Webinars/2023/FCC_Form_470_Guiding_Statements_Table_FY22-FY23.pdf See also USAC FAQs on Eligible Fiber Services, FAQ 18 which states: “If an applicant is only interested in seeking bids for leased lit fiber, they may do so by posting an FCC Form 470 in EPC. They would request Internet Access and Data Transmission Service on their FCC Form 470 and utilize the narrative field on the FCC Form 470 and/or

“I seek leased lit fiber data transmission service without internet access service.” This change should be implemented in order to make the Form 470 easier for applicants to understand.

D. The Same Regulatory Treatment For Technical Support Services And Software Updates for Internal Connections And Internal Connections Licenses Should Be Adopted.

Multi-year prepaid technical support, software upgrades and patches, including bug fixes and security patches (together referred to as “Technical Support Services”), is a specific subgroup of basic maintenance of internal connections that is as vital to the operation of internal connections equipment as the right-to-use software and client access licenses. But because technical support is categorized as basic maintenance of internal connections, whereas licenses are classified as internal connections, there is a confusing and unnecessary dichotomy in the E-rate funding rules for these costs.

Internal connections multi-year prepaid licenses currently are eligible for E-rate in the first year of purchase, for the entire multi-year purchase, with which the Joint Commenters fully concur. This approach allows the applicant to obtain funding for the entire cost of the license in the year the cost is incurred.

In contrast, E-rate funding for prepaid multi-year Technical Support Services is restricted to the annual costs of the prepaid amount. Applicants, however, must pay the

their RFP, if applicable, to provide additional details regarding their service need requirements.” [https://www.usac.org/e-rate/learn/faqs/eligible-fiber-services/#Requesting-Bids-for-Fiber-Services-%E2%80%93-FCC-Form-470-&-Requests-for-Proposal-\(RFPs\)](https://www.usac.org/e-rate/learn/faqs/eligible-fiber-services/#Requesting-Bids-for-Fiber-Services-%E2%80%93-FCC-Form-470-&-Requests-for-Proposal-(RFPs))

Note that the answer does not designate whether the applicant should select Option 1 or Option 2 as listed above.

service provider upfront for the entire cost of the multi-year Technical Support Services, resulting in a financial and administrative burden on applicants. Rather than filing one Form 471 to recoup E-rate funding in the year that the Technical Support Service is purchased, the applicant must divide the costs into annual increments and file for E-rate in each year.

The prepaid Technical Support Services are similar to a license in that both are essential for the operation of the equipment. The Eligible Services List also explains that unlike traditional maintenance which is reimbursed for the actual work performed under the agreement or contract, funding for these Technical Support Services – such as bug fixes, security patches, and technical support -- does not have this restriction. Accordingly, there is no policy reason that would preclude affording the same regulatory treatment to multi-year prepaid Technical Support Services that is provided for multi-year internal connections licenses.

Last, the different regulatory treatment is confusing to applicants and service providers alike. Service providers may be unaware of the difference in regulatory treatment and may not even know whether the multi-year prepaid service is a license or Technical Support Services, or possibly have elements of both. For all these reasons, aligning the regulatory treatment of prepaid multi-year Technical Support Services with the prepaid multi-year licenses would definitely contribute toward program simplification.

E. Applicants Should Be Permitted To Use Their Category 2 Funds To Pay For Cabling Between Two Different Buildings On The Same Campus.

When the eligible services in Category 1 were modified to include self-provisioned fiber, the classification of connections between two different buildings on the same campus was changed from Category 2 internal connections to Category 1 data transmission service. This means that applicants seeking to purchase and install these short-distance connections must write and issue an RFP to procure this connection.

Historically, these connections were defined as internal connections if the schools were located on the same campus and did not cross a right of way.²⁸ E-rate applicants have found that installing and owning the facility rather than leasing it as a data transmission circuit such as a wide area network is cost effective.

In order to streamline the application process and allow applicants to forego the RFP requirement for Category 1 self-provisioned network facilities, the FCC should allow applicants the choice to competitively bid these connections and seeking funding through Category 1 or Category 2 support. These connections are internal to the school campus and to the public right of way, which has traditionally been the demarcation point between wide area network and internal connections facilities.

The FCC should continue to rely on the public right of way standard as delineating the difference between internal connections and data transmission services to establish parameters for exercising this option. Since the applicant's funding is capped for Category 2, it should be up to the applicant to decide whether they want to pursue Category 1 or

²⁸*Federal -State Joint Board on Universal Service*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95,72, FCC 97-320, 13 FCC Rcd 5318 (8), 5430-5431, ¶193 (1997).

Category 2 funding for this service. Allowing applicants to make this determination does not affect the overall program cap since applicants' Category 2 expenditures are capped.

F. The Procurement Process For Leased Dark Fiber And Self-Provisioned Networks Should Be Simplified.

Beginning in FY 2016, applicants have been permitted to obtain E-rate funding for dark fiber circuits and to purchase and install their own network facilities when these two options are the most cost-effective solution.

The competitive bidding regulation requires applicants to issue a request for proposal and post a Form 470 to be able to use E-rate funding for dark fiber or self-provisioned networks. 47 C.F.R. §54.503.

The request for proposal requirement made sense when these options were first introduced to the E-rate eligible services list, but the services are now mature, and should no longer be singled out to require applicants to issue an RFP. The narrative description text box in the Form 470 provides sufficient room for applicants to describe their needs and to provide service providers with sufficient information to prepare a response.

The RFP requirement is especially daunting for new and small applicants who have no other experience with writing RFPs. Mastering the Form 470 is a sufficient challenge without adding on the RFP requirement. Vendors that may need more information can readily communicate with the Form 470 contact person(s) listed on the Form. For small and rural applicants including Tribal libraries -- that would be fortunate to receive even a single bid -- the RFP requirement is particularly onerous and unnecessary. Additionally, the RFP requirement contains nuanced requirements that are not recorded in FCC orders or

regulations and are applied by the Administrator to deny funding, as explained in the next recommendation.

G. The Cardinal Change Bidding Procedure Is Not Based In FCC Regulation Or Order And Should Be Eliminated Or Clearly Explained So That Applicants Are Not Denied Funding.

The cardinal change doctrine has been adopted by the FCC to specify when a contract must be rebid because a proposed amendment is beyond the scope of the original contract.²⁹ There are no known instances of the FCC stating the requirement that this doctrine be applied to E-rate *procurements* (as opposed to contracts).³⁰

Yes, the Administrator – limited by regulation from establishing policy – has established that the principle of a cardinal change in a *procurement* requires that the deadline for bids must be extended at least 28 days from the date that the cardinal change occurred.³¹ In addition to funding denials, this doctrine has been applied by BCAP auditors to conclude there was a competitive bidding violation that should result in repayment of more than \$20,000 for an applicant.³²

²⁹ *Id.* at 5449-5451; ¶¶ 226-229.

³⁰ The requirement was announced by the *Administrator* (not the FCC) following the 2014 *Modernization Orders* and introduction of the EPC online filing platform. A review of FCC orders and regulations since then did not find any instance of the agency's directive that this doctrine must be applied during the procurement phase.

³¹ *See, e.g.*, September 18, 2015, October 9, 2015, December 18, 2015, January 26, 2018, February 16, 2018, April 14, 2017, February 9, 2018, September 4, 2015, December 11, 2015, August 4, 2017, July 17, 2015, February 1, 2019, January 10, 2020, February 2, 2018, March 10, 2017 News Briefs – Schools and Libraries. The “Cardinal Change” procurement requirement is also contained in USAC training materials. *See, e.g., Applicant Advanced Program Compliance*, page <https://www.usac.org/applicant-advanced-program-compliance/>

³² January 24, 2022 SL-Audit-Briefing Book, Audit of Sonoma County Office of Education, Schools Connect Consortium. “The Beneficiary selected Comcast as its service provider even though the Beneficiary did not request speeds higher than maximum 50 Mbps requested on its FCC Form 470 and the RFP” The beneficiary chose a vendor that offered service at a higher speed than 50 Mbps because it was the only responsive bid. Citing to the

Applicants not only are concerned about compliance with this policy articulated by USAC and never mentioned by the FCC, they are befuddled because there has been no clear guidance provided of the types of modifications that are considered “cardinal changes” and require the bidding process to be extended.³³ If experienced applicants familiar with E-rate program requirements do not know what constitutes a “cardinal change,” new applicants such as Tribal libraries undoubtedly may be unaware of this requirement and be at risk for funding denials.

The FCC should direct USAC to refrain from denying funding or determining audit violations based on cardinal changes during the bidding process unless and until the FCC establishes the parameters for cardinal changes during bidding, after providing notice and opportunity for comment to interested parties.

H. Automated Bids Submitted In Response To A Form 470 That Do Not Address The Requirements Of The Form 470 And Do Not Contain Firm Price Proposals Should Be Disqualified And Excluded From The Bid Evaluation.

The FCC Form 470 contains narrative spaces for applicants to describe their service requests and another text box to set forth the state or local procurement requirements. In these sections, applicants often prescribe the requirements for submission of a valid bid and identify the grounds for disqualification of a bid.

general competitive bidding regulation (which mentions nothing about cardinal changes) the audit found the applicant violated the bidding regulation. USAC agreed with the audit and issued a Commitment Adjustment Order to rescind \$20,146.00 in funding and will seek recovery of this amount.

³³ The USAC guidance on its web site states, “Changes to the FCC Form 470 beyond the allowable changes require applicants to restart the 28 days waiting period from the date of the *substantial change* before selecting a service provider, signing a contract, or certifying an FCC Form 471.” <https://www.usac.org/e-rate/applicant-process/competitive-bidding/> (emphasis added). There is no mention of “cardinal change” whatsoever in that guidance. The term “substantial change” also is not defined.

Applicants are increasingly subject to automated responses from vendors whenever the applicant posts a Form 470. Particularly for Category 1 service requests, the automated response does not contain the required information set forth in the Form 470, such as verification of available service or facilities to the locations that need service, and simply contain a price list for a range of services many of which were not listed on the applicant's Form 470. Further these 'robo-responses' may be contingent upon on-site surveys and additional special construction charges if facilities are not in place to provide the requested services.

The response is typically sent within 24 hours of the posting of the Form 470, and often the identical response will be sent to an applicant multiple times – one for each service request listed on the Form 470.

These robo-responses do not meet the requirements of a genuine bid, since they do not specify that the vendor is in fact able to provide the requested services and do not contain firm prices. Yet, USAC requires applicants to process these robo-responses as bids on their bid evaluation. The February 16, 2023 E-rate News Brief states:

Unresponsive Bids, “SPAM” Bids and “Robobids.” All bids received should be acknowledged. Disqualification factors can be used to apply to the bids received that do not meet minimum bid requirements, do not include site- or project-specific details, and/or are not responsive to the applicant's requests. Applicants may include language in their FCC Form 470 narrative or request for proposal (RFP), such as, “SPAM and/or robotic responses will not be considered valid bid responses and will be disqualified from consideration.” By doing this, applicants can acknowledge the response(s) were received but were disqualified, based on this factor. The decision to disqualify any non-responsive bids should also be memorialized and retained to demonstrate compliance with the competitive bidding rules.³⁴

³⁴ <https://apps.usac.org/sl/tools/news-briefs/preview.aspx?id=1060>

These requirements are onerous, unfair, and may be used to deny or rescind funding during pre-commitment and post-commitment reviews. They unfairly require applicants to proactively respond to these emails even though the service provider has not prepared a firm price proposal as required in a genuine bid. The balance of responsibility between the applicant and the service provider during the procurement process must be re-allocated and this guidance should be rescinded.

First, the sentence, “All bids received should be acknowledged” is ambiguous. What does “should” mean? What does “acknowledge” mean? Is the applicant required to email the sender to acknowledge receipt of the bid, even though there is no such requirement for receipt of any bids specified in the regulations and doing so may trigger another spam bid to be sent to the applicant? Second, it is unclear why these responses are even deemed a bid when the document does not contain firm prices. Third, this guidance puts applicants at risk for competitive bidding violations if the bid is not retained or identified in the bid evaluation either during pre-funding commitment or post-commitment reviews.

The FCC must clarify that “SPAM” bids and “Robobids” do not meet the definition of an authentic bid in response to an FCC Form 470 and applicants may but are not required to include or count these responses as part of their bid evaluation and they are not required to retain these documents. The FCC must impose some minimal responsibility onto the E-rate service provider to submit a genuine bid that is responsive to the particular service requests listed on the applicant’s Form 470 application, and not allow these responses to be potential reasons for applicants to be denied funding.

I. Bids Received After The Latter Of The Deadline For Bids Identified In The Form 470 Or The Allowable Contract Date Should Not Be Required To Be Considered Or Evaluated Unless Otherwise Stated In The FCC Form 470 And/Or RFP.

Another important competitive bidding requirement imposed on applicants is to specify a due date for receipt of proposals in response to a Form 470 in order to close out the bidding period. Otherwise, the applicant is now required to consider all proposals received even after the 28-day waiting period expires, up until the date that the applicant evaluates all bids. This is yet another new requirement imposed by auditors³⁵ based on their interpretation of the competitive bidding regulation, even though this requirement is not explicitly articulated or in an FCC order or even on USAC's website.³⁶

This audit finding has now created yet another hurdle for applicants to comply with the competitive bidding requirements. If the applicant does not include language in the Form 470 stating that late bids will be disqualified then such late bids must now be considered if received before the bid evaluation is done. This contradicts all the informational materials that USAC sends to an applicant once the 28-day waiting period ends. Applicants receive the following email from USAC:

The Allowable Contract Date for FCC Form 470 # {number} has been reached. *You may now close your competitive bidding process* unless state and local procurement laws require you to keep the bidding open longer. *Your*

³⁵ See, e.g., *Loudoun County Public Schools, VA*, Application No. 161047809, Request for Review and/or Waiver, CC Docket No. 02-6 (filed June 4, 2020); <https://www.fcc.gov/ecfs/search/search-filings/filing/106042343125318>. The appeal was approved by the FCC on the basis that the two late filed bids did not alter the outcome of the bid evaluation since the applicant had selected the lowest cost option. The FCC stated, "For Loudoun County Public Schools, we waive section 54.511(a) finding that the applicant still selected the lowest-priced even if it had not disqualified the two bids." *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, Public Notice, CC 02-6, WC Docket No. 06-122, DA 21-1457 (November 30, 2021) at note 10.

³⁶ The USAC web site simply states, "Applicants must wait at least 28 days from the date the FCC Form 470 is certified before closing the competitive bidding process." <https://www.usac.org/e-rate/applicant-process/competitive-bidding/>

next step is to evaluate the bids received, select the winning service provider, and then enter into a legally binding agreement or sign a contract.

This language clearly advises that applicants may rely on the 28-day allowable contract date as the due dates for bids. The FCC should affirm this guidance and should confirm there is no requirement for applicants to consider any bid received after the 28 day deadline when the Form 470 is silent on the due date for bids. USAC should be directed to update its website and News Briefs disseminated to stakeholders.

J. *The Macomb Decision* Interpretation Should Be Clarified to Allow Applicants To Contract With Multiple Providers To Obtain The Bandwidths They Need To Support Their Education And Library Functions As Long As All Services Are Needed, Will Be Used And The Funding Requests Are Cost-Effective.

The Joint Commenters believe that the *Macomb Decision*³⁷ is not being applied accurately by the Administrator, and consequently funding is being denied on the basis that the services are duplicative when in fact the services are supported by the *Macomb Decision*. The standard denial comment is “Program rules prohibit USAC from funding the same products and services to the same location in the same funding year.”

Internet service delivered to an applicant from two different vendors is not *per se* prohibited, which appears to be the manner in which the Administrator interprets the *Macomb Decision*. But a careful reading of that decision reveals that when the same type of service is *needed* and is *cost-effective*, funding for *both* services may be approved:

We do not find fault with Macomb ISD’s request for multiple T3 lines, provided that the services are needed. Commission rules, however, do not permit applicants to seek T3 lines from multiple service providers when the

³⁷ *Macomb Intermediate Unit Technology Consortium* Request for Review, File No. SLD-441910, CC Docket No. 02-6, Order FCC 07-64 (released May 8, 2007) at ¶¶8, 9 (“*Macomb Decision*”)

additional service providers' bids were not the most cost-effective. Macomb ISD did not provide any evidence that the lowest-cost bidder was unable to provide the additional services requested. We find, therefore, that Macomb ISD violated section 54.511 of the Commission's rules and deny its request for review.

We also find, however, that in this case the 30 percent rule should not have been applied because the services themselves were not ineligible, just not the most cost-effective. Furthermore, we do not find any evidence of fraud or abuse. Therefore, we find that in this particular case, Macomb ISD should be entitled to E-rate funding for its Internet connections at a rate associated with the least expensive of the duplicative services.³⁸

The *Macomb Decision* has several important nuances that do not appear to be considered by the Administrator, namely:

1. The applicant has chosen to contract with two different vendors for the same type of service as part of the same procurement.
2. The applicant needs both services.
3. The vendor with the lower price could have provided all the needed services.
4. The applicant's funding requests must be based on the pre-discount price of the least expensive service.

Consistent with the *Macomb Decision*, the FCC should clarify that if an applicant wishes to purchase needed services from two different vendors as part of the same procurement, the applicant is limited to E-rate funding based on the least expensive service when that vendor could have met all the applicant's needs. The Administrator should be directed to apply the four factors listed above in examining applicants with two different funding requests for the same service and should be prohibited from summary denials without engaging in this analysis.

³⁸ *Id.*

K. The E-Rate Rules Should Be Updated To Reflect That Technology And Broadband Needs Are Growing At A Much Faster Pace Than The E-Rate Application Cycle Can Accommodate And Thus Should Permit Applicants To Upgrade Bandwidth In Real-Time.

The E-rate framework is based on the pre-planning and advance procurement of services months or even years before the service period begins. Services delivered beginning July 1, 2023 may have been bid as early as July 1, 2022 or even earlier in some instances of complex procurements. Applicants thus must project the internet and circuit bandwidth needs when entering into contracts and when completing their Form 471 applications.

The current program allows for mid-year increases in bandwidth only if the increase is supported by both the establishing Form 470 and the parties' contract. Such changes meet the service substitution parameters provided that the E-rate program will not pay for any additional costs, if there are any, for increased capacity. Applicants that cannot meet these requirements, however, are not allowed to increase their bandwidth mid-year and obtain a service substitution. These applicants risk invoice reimbursement denials since the service approved on the Form 471 will not match the service on the invoice, and the change does not meet the current service substitution parameters.

To rectify this problem and to ensure that applicants can increase their bandwidth during the year and not risk a funding denial, the program should allow for bandwidth increases mid-year with the existing service provider even if the Form 470 and existing contract do not include the additional bandwidth as a limited competitive bidding exemption. These service substitutions should be approved so that the applicant can receive their E-rate funding. In these situations where a competitive bidding exemption is

being applied to allow the service substitution, the applicant should not be permitted to extend the term of the agreement beyond its current end date without posting a Form 470 in the future.

VI. Form 471 Simplification Will Reduce Complexity.

There are several measures that should be implemented to simplify the Form 471 application process that could lower the barriers for Tribal libraries and other E-rate applicants to participate successfully in the E-rate program while preserving program integrity and guarding against waste, fraud and abuse.

A. The 2014 E-rate Order Provisions Regarding Acceptable Proof Of A Legally Binding Commitment for E-rate Purchases Should Be Fully Implemented by the Administrator.

In the *First 2014 E-rate Order*, the Commission eased the signed contract requirement to allow applicants to seek E-rate support once they have entered into a legally binding agreement with a service provider.³⁹ Unfortunately, the Administrator has continued to insist that a communication signed either electronically or on paper by the applicant must be provided to meet the contract requirement.

The Commission explicitly stated, "...there are many instances where applicants have an agreement in place with their service provider or are already receiving services, but have difficulty obtaining signatures prior to the submission of their FCC Forms 471." Further, the Commission stated:

³⁹ 2014 *First E-rate Order*, ¶¶ 190, 203-204.

[I]n determining whether a legally binding agreement is in place, we direct USAC to consider the existence of a written offer from the service provider containing all the material terms and conditions and a written acceptance of that offer as evidence of the existence of a legally binding agreement. For example, a bid for the services that includes all material terms and conditions provided in response to an FCC Form 470 would be sufficient evidence of an offer and an email from the applicant telling the service provider the bid was selected would suffice as evidence of acceptance. In addition, after a commitment of funding, an applicant's receipt of services consistent with the offer and with the applicant's request for E-rate support will also constitute evidence of the existence of a sufficient offer and acceptance.

In some instances, applicants may obtain the prerequisite approval of their governing board at a public board meeting that accepts the service provider's proposal prior to filing the Form 471, and relies on the written board agenda and the board minutes which record the board's approval to verify the existence of the legally binding agreement. There is no distinction between this fact pattern and an applicant's email accepting the service provider's proposal. Both situations clearly document the applicant's legally binding commitment to purchase the equipment or service.

When the Administrator determines during PIA review that the applicant does not provide them with a signed contract, the Administrator should be directed to inquire whether the applicant can provide other evidence of a legally binding commitment including, but not limited to, any of the examples that are listed in the 2014 Order or board approval of an award to the lowest responsible vendor.

B. Applicants Should Have The Option To Certify CIPA Compliance And Service Start Date On Form 471.

One quite simple, yet effective way to streamline the program for all applicants and the Administrator, but particularly for small and new applicants, is to eliminate an entire E-

rate form. For applicants in compliance with CIPA when they file their Form 471 application, the CIPA certification should be added as an option to the Form 471 application certifications and allow the applicants to forego having to file the Form 486. The other purpose of the Form 486, to notify USAC that services have started for the recipients of service included on one or more funded Funding Request Numbers (FRNs), likewise could be added to the Form 471 certifications for each FRN on the application. Applicants could confirm their intention to purchase the services and confirm they authorize the Administrator to disburse funds on the FRNs.

Applicants that do not wish to or are unable to certify their CIPA compliance and confirmation of purchase of services on the Form 471 could continue to file Form 486 once they receive their funding commitment decision letter.

This modification will reduce the number of late filed Forms 486 and reduce funding rescissions for applicants that commit this ministerial error. The associated appeals and waiver requests will also be reduced.

VII. The Commission Should Relax Its Stringent Enforcement Of The Invoice Deadline Which Has A Punitive Result When Applicants Or Service Providers Fail To Comply With This Ministerial Deadline.

The *First 2014 E-rate Order* the prior practice of establishing a 120-day deadline after the service delivery deadline to require invoices to be submitted unless a 120-day one-time extension was obtained on or before the original invoice deadline.⁴⁰ Additionally,

⁴⁰ *First 2014 E-rate Order*, ¶ 238-242.

the Commission announced that waivers of the invoice deadline should be granted only in extraordinary circumstances.⁴¹

Since the adoption of the regulation, the FCC amended the regulation to allow applicants and service providers to submit invoices for payment up to 120 days after USAC issues a Revised Funding Commitment Decision Letter approving a post-commitment request or granting an appeal of a previously denied FRN.⁴² The Commission stated, “We find that the Commission did not fully consider all of the potential scenarios that might affect an applicant or service provider’s ability to invoice when it codified the invoicing deadline in 2014.”⁴³

The Joint Commenters respect the need for prompt invoice submission and efficient program administration. But the current manner of the FCC’s stringent enforcement of the invoice deadline has been harsh and punitive. In nearly all other program areas, failure to meet a ministerial deadline has some limited remedy, except for the invoice deadline where stakeholders finally are allowed to receive the financial benefit of their E-rate discount funding.

When the Form 470 or 471 deadline is missed, the Commission has established a two-week grace period to allow late filed Form 471 applications to be waived into the Form 471 filing window. When the Form 486 deadline is missed, the Commission has directed the Administrator to issue an “urgent reminder” letter to the applicant and provide a 15-day grace period within which to file the Form 486 which will be considered timely filed.

⁴¹ *Id.* at ¶ 240.

⁴² *Modernizing the E-rate Program for Schools and Libraries*, Order, WC Docket 13-184, FCC 20-178 (Released December 10, 2020), ¶ 11.

⁴³ *Id.*

Even when applicants miss the 15-day grace period, there is an opportunity to promptly appeal to USAC and avoid an adjusted service start date, and associated rescission of funding. Also, the FCC routinely grants waivers of the Form 486 deadline.

The invoice deadline seems to be the only area of the program that has no flexibility whatsoever. When applicants or service providers miss the initial deadline and fail to request a 120-day extension by the original deadline, there is no recourse available. The FCC has refused to grant hundreds of waiver requests since the effective date of the invoice deadline regulation which has resulted in forfeiture of the funding associated with each denied waiver request. Very rarely has a waiver been granted unless the petitioner can prove the truly extraordinary circumstances giving rise to the waiver request.⁴⁴

There are many reasons why an applicant may not timely request invoice deadline extensions or file an invoice by the deadline. There frequently is a change in personnel responsible for E-rate filings and the new person is unaware of the impending deadline. In other instances, the applicant's contact person forgot to keep track of the deadline and became aware of the deadline after it was missed. Given that there is no advance reminder of the deadline issued by the Administrator to each affected applicant, it is easy to see how the deadline is missed. The invoices due in October are for services received and paid for in the year that ended four months before the deadline. By then applicants are steeped in

⁴⁴See, e.g., *Request for Waiver of a Decision by the Universal Service Administrator by Byte Networking, LLC*, File No. SLD-161029839, et.al., DA 19-838, (Order released August 27, 2019), ¶ 5: "In this instance, we find that the sudden death of the service provider's owner combined with the small size of the business and the absence of a successor involved in the daily operations of the company were extraordinary circumstances that warrant a deviation from the general rule." See also *Petition for Reconsideration of a Decision of the Wireline Competition Bureau by Sunesys, LLC (Montibello School District)*, File No. SLD-1045399, CC Docket No. 02-6, DA 19-387, ¶6 (Order released August 27, 2019): "Specifically, we find that the combination of USAC's issuance of the associated funding commitment decision letter near the end of the funding year and the acquisition by a new company occurring just after USAC issued the funding commitment are extraordinary circumstances that merit a waiver of our rule."

their procurements for the upcoming funding year and potentially responding to PIA questions about the current funding year's application, or buying ordering and installing new equipment based on approved Category 2 funding for the then current year.

The FCC should direct the Administrator to email a reminder to all the registered users in each EPC portal that has one or more FRNs for which no invoicing has been done at least 3 weeks before the invoice deadline. The reminder email should also include instructions on how to obtain an invoice deadline extension.

Additionally, the FCC should allow applicants to seek an extension of the original invoice deadline from the Administrator when the request is made within 15 days of the original deadline. The extension would be automatically granted in the same manner as extension requests submitted on or before the original due date. This would be similar to the manner in which the FCC administers the Form 486 deadline whereby applicants have a 15-day grace period to file their Form 486 and have it considered timely submitted.

For applicants submitting an invoice extension request within 15 days of the original deadline, the revised invoice deadline would be based on 120 days from the *original* deadline and not the date on which the applicant requested the extension. This will enable all extended FRNs to have the same due date of February 28 and will not reward applicants that requested their invoice extensions late, after the original deadline.

Further, the FCC should clarify explicitly that applicants and service providers who file timely invoices that are rejected in whole or part with a zero authorized disbursement or reduced disbursement, have a 30-day grace period within which they may resubmit their invoice. The stakeholder should not be required to file an appeal that has to be reviewed and processed by the Administrator. The online filing system should be capable

of accepting the new invoice within 30 days of the zero paid or reduced authorized payment.

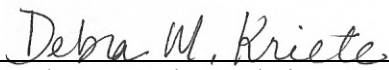
These initiatives will greatly improve applicants' success in the E-rate program, particularly small applicants that do not have a deep bench on which to rely in the event their only E-rate contact is no longer with the organization. Often there is so much focus and attention on the Form 471 application process that the invoice process, where disbursements of E-rate funding occur, is not as prominently featured in the program as a priority. By directing the Administrator to issue personalized email reminders of upcoming invoice deadlines to all authorized users in EPC, the chances of an applicant missing the deadline are minimized. And providing the 15-day grace period after the deadline will enable the Commission to continue to efficiently operate the program and at the same time provide some much-needed flexibility to applicants.

VIII. Conclusion

The Joint Commenters respectfully request the Federal Communications Commission to adopt a Report and Order consistent with the recommendations set forth above.

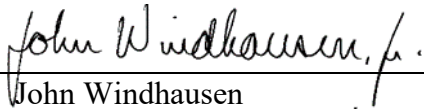
Respectfully submitted

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