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In the Matter of)	
)	CC Docket No. 02-6
Schools and Libraries)	
Universal Service Support Mechanism)	DA 17-1192

COMMENTS OF FUNDS FOR LEARNING, LLC

in support of the

CALIFORNIA DEPARTMENT OF EDUCATION REQUEST FOR WAIVER

The California Department of Forestry and Fire Protection reports that a total of 8,176 fires have burned over one million acres in Northern California, destroying or severely damaging several schools. Because of this, many students have had to transfer to other schools, placing additional financial pressure on those schools' resources. Accordingly, the California State Department of Education (CDE) has asked the FCC to help the schools and libraries adversely impacted by the fires by waiving the September 30, 2017 service delivery deadline, Form 486 deadlines, payment deadlines, and deadlines for filing appeals. CDE is also seeking additional category two E-rate support for certain FEMA designated disaster area affected schools.

On December 11, 2017, the FCC released a Public Notice requesting comments on CDE's requests for waiver and additional E-rate funding. We fully support CDE's requests and urge the FCC to do everything it possibly can, as quickly as it can, to help.

Recently, the FCC provided emergency relief to schools and libraries impacted by Hurricanes Harvey, Irma, and Maria. The emergency relief includes: (1) targeted support to schools and libraries located in the most severely impacted areas to help them restore services and replace equipment damaged by the hurricanes; (2) increased flexibility to request service substitutions; (3) support for schools incurring additional costs for eligible services because they are serving students displaced by the hurricanes; (4) extensions of program deadlines; and (5) a limited waiver of recordkeeping requirements for records

destroyed by the hurricanes. There is no good reason for the FCC not to provide the same broad relief here.

In addition, we urge the FCC to seriously consider the following with respect to post-window E-rate applications for FY 2017, not only because it applies to the affected schools and libraries, but also because it is of tremendous importance to the E-rate community at large.

E-rate Program Rules Permit the California Schools and Libraries Affected By the Fires -- As Well As Every Other Eligible School and Library -- To Apply Today For FY 2017 Funding and Require USAC to Process and Fund Those Post-Window Requests Until No Further FY 2017 Funding Remains to Be Committed.

A. Grant Priority to Schools and Libraries Affected by the Fires

As we will discuss in more detail below, there is no need for the FCC to establish another FY 2017 window period exclusively for schools and libraries impacted by the fires, because any eligible school or library may file an application for the FY 2017 funds that remain to be committed. Instead what the FCC should do, in our opinion, is grant priority to the post-window applications that those schools and libraries file. In other words, instruct USAC to first process and fund for 60 days after the FCC's decision in this matter only the requests from the affected applicants and, after that, to process and fund, in the order in which USAC received them -- and until USAC has no further FY 2017 funding left to commit -- the applications received from other applicants.

B. Regulatory History Supports Post-Window Application Filing

The E-rate program has always operated, and continues to operate, on a first come, first served basis -- the FCC's decision to adopt a window application period notwithstanding. What's more, but what appears to have been forgotten, is that the FCC never intended to prohibit post-window application filing on a first come, first served basis if and when funds remain to be committed for a funding year. The program's regulatory history supports this, as does the program's current rules, which we will get to shortly.

To begin, we need to go way back to the beginning, to 1997 and the original E-

rate Order, where the FCC established a first come, first served application process and a calendar-year funding year.¹ To facilitate this process, the FCC instructed the program's Administrator to post, on at least a weekly basis, how much funding remained to be committed for the following funding year and to put priority rules into effect when \$250 million remained for distribution.²

Shortly thereafter, the FCC changed the dates of the funding year from a calendar year to a fiscal year and established a window application period.³ Because this happened such a long time ago, we have a tendency to forget why, exactly, the FCC decided to adopt a window period in the first place, which, the FCC said, was this:⁴

We are adopting a window primarily to allow applicants sufficient time to negotiate contracts properly and submit complete filings.

Obviously, the FCC did not decide to carve out a few months of the year for application filing just to make life easier for the Administrator. Nor, and this is important, did the FCC intend this to diminish in any way its commitment to first come, first served funding or to prohibit post-window filing for a funding year – if and when funds for that year remained to be committed. Keep in mind that at this point in the program's history, the FCC had no idea what the demand for E-rate funds would even be.

Of primary concern to the FCC at that time was that, without a window, applicants would be under too much pressure to rush their applications, which could lead, in turn, to shoddy contracting and sloppy applications. On the other hand, the advent of the “window” gave the FCC some concerns about applicants becoming too complacent about accomplishing what needed to be accomplished. Therefore, the FCC instructed the program's then administrator as follows:⁵

¹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, (June 1997) (*Universal Service Order*) (<http://www.universalservice.org/res/documents/about/pdf/fcc-orders/1997-fcc-orders/FCC-97-157.pdf>), at para. 535.

² *Universal Service Order* at para. 540.

³ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Third Report and Order* (October 1997) (*Third Report and Order*) (<http://www.universalservice.org/res/documents/about/pdf/fcc-orders/1997-fcc-orders/FCC-97-380-corrected-version-with-erratum.pdf>) at para. 2 (... *all applications filed during the window will be treated as if simultaneously received*).

⁴ *Third Report and Order* at para. 4.

⁵ *Third Report and Order* at para. 5.

We remain committed to the general principle that funds will be allocated to applicants on a first-come first-served basis. Consistent with this principle, we direct the corporations to adopt a reasonable window period that is of sufficient duration to effectuate the administrative purposes of the window, as set forth above, but is short enough to ensure that funds are allocated without unnecessary delay and to encourage applicants to file requests for support without undue delay.

With respect to the window application period, the multi-million dollar question, is this: did the FCC, by adopting it, intend to prohibit post-window funding on a first come, first served basis, if and when funding for the year remained to be committed? It absolutely did not.⁶

The reason the FCC adopted the window application period was not to prohibit applicants from filing applications at other times of the year, but rather, to give assurance to applicants that every application filed during the window period would be assigned the same, #1 position in the program's first come, first served system of funding. As a consequence of this, the rules require applications filed after the window closes to be numbered in the order in which USAC receives them -- #2, #3, #4, and so on.

At the close of the very first funding year, reality hit as the FCC found itself face to face with another, more complicated, problem: sky high demand for E-rate funds. Before day one of the E-rate program, there had been a great deal of speculation over how much demand there actually would be for E-rate funds. It did not take long for the FCC to find out. Demand for the program's first year of funding blasted through the \$2.25 billion cap and, except for a brief second year blip, continued to do so year after year thereafter.

To address the exceedingly high demand for funds, the FCC adopted priority-funding rules to ensure that funds would be directed first toward the most economically disadvantaged schools and libraries and to schools and libraries located in rural areas.⁷ The FCC took the time to make it plain, however, that the rules applied only during a

⁶ See n.7 below and related discussion.

⁷ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Fifth Order on Reconsideration and Fourth Report and Order (June 1998) (Fifth Order on Reconsideration)* at para 34. (https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98120.pdf)

window application period and not at other times of the year, when there was no window in effect:⁸

Therefore, we adopt new rules of priority that will operate when a filing window is in effect. We do not, however, alter the rules of priority for applicants that request support when a filing window is not in effect. Although, in this initial 18-month funding period, only the applications filed during the initial 75-day filing window will receive support, it is possible that in future funding years support could be provided for applications filed outside of a filing window period.

(Emphasis added)

The FCC anticipated post-window applications being filed and the possibility of funding being available for them, which is precisely why it took the time to make it clear that the priority-funding rules would not apply to them. If the FCC had intended to prohibit schools and libraries from filing post-window applications, it never would have said: “it is possible that in future funding years support could be provided for applications filed outside of a filing window period.”

One of the principal tenets of statutory construction is that statutes are not to be interpreted in any manner that would create an absurd result that the legislature clearly never intended. The same, we assume, holds true where FCC rule interpretations are concerned. It is evident, therefore, that E-rate program rules permit and indeed anticipate post-window application filing. Any other interpretation would be absurd. It follows logically of course that if those kinds of applications may be filed, then USAC must process and fund them on a first come, first served basis until it has no more funding left to commit. Any other interpretation would be similarly absurd.

C. The FCC Has Never Amended Its Rules to Prohibit Post-Window Application Filing.

As we have already discussed, the FCC anticipated that in the future there very well could be funding years in which funding remained to be committed after the initial funding window closed. Thus the FCC made it unambiguously clear that, were that to happen, USAC should accept and process those applications on a first come, first served

⁸ *Fifth Order on Reconsideration* at para. 34.

basis and/or, if it deemed necessary, establish one or more additional window filing periods. It could choose what to do, but it had to something.

That the FCC's rules give USAC the authority to "implement such additional filing periods as it deems necessary," does not mean that post-window application filing simply disappears if USAC decides not to implement a second or third filing period. Rather, it simply means that USAC has three choices for how to process and fund post-window applications: (1) first come, first served; (2) window period; or (3) both.

USAC's job is to commit funds up to the cap. That is what the FCC has directed USAC to do. If the cap has not been reached, and so long as there are applications in USAC's hopper, USAC's job is to review and fund those applications in the order in which it received them. This is not discretionary. Longstanding and well-accepted policies have always required it, and the rules continue to require it.

Indeed, if this is not the case, then the FCC will soon have to tackle this thorny issue – i.e., all of the leftover, uncommitted funding from FY 2017 (and in the future), which everyone assumes will be carried over to following funding years, will not be, and this is why: uncommitted funds are not "unused funds" for carryover purposes:

- § 54.507(a)(5): "Amount of unused funds. All funds collected that are unused shall be carried forward into subsequent funding years ..."
- § 54.507(a)(6): "Application of unused funds. ... all funds that are collected and that are unused from prior years shall be available for use in the next full funding year"
- The funds that USAC commits to applicants, which those applicants do not use, are "unused" funds.
- If USAC has funds to commit, but fails or refuses to commit them, then no applicant will ever receive the opportunity to "use" them.
- If no applicant has the opportunity to use them, then those funds cannot for purposes of §§ 54.507(a)(5) and (6) be defined as "unused funds." They are simply uncommitted funds, which applicants never got an opportunity to use.
- Since post-window, uncommitted funds cannot be defined as "unused funds," they are not (at least ostensibly) funds that §§ 54.507(a)(5) and

(6) state may be carried forward to subsequent funding years.

We are confident, however, that this will not become an issue, because we are equally confident that USAC is required, by the rules, to fund to the cap.

For fourteen straight funding years (FY 2000 through FY 2014), the demand for E-rate funding from applications filed inside the window application period exceeded the amount of funding available to support them. So naturally and not surprisingly, USAC lost over time whatever little institutional “muscle memory” it had for funding requests submitted after the initial filing window had closed.

Over the years, the FCC has molded, bent, and retooled the E-rate program’s rules as necessary to address a continual flow of issues. Throughout these difficult times and despite numerous changes in membership, the FCC’s characterization of the program as a first come, first served program of funding has never once waived. If the program has a North Star, this is it: applicants who file their applications during the initial window filing period continue to get served first; those who file after the initial filing period get served next.⁹

In terms of funding and funding requests, the post-Modernization era represents a departure from the past. There is a new reality, and this is it: FY 2017 funds remain to be committed; therefore, any applicant may file an application for those funds, and USAC must continue to commit funds to them until they reach the FY 2017 cap. USAC’s only option is with respect to methodology: first come/first served, window period(s), or both. In a process that continually raises questions, this much is clear.

Respectfully submitted,

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January 11, 2018

⁹ See § 54.507(c).