STATE E-RATE COORDINATORS ALLIANCE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting against National Security Threats	)	WC Docket No. 18-89
to the Communications Supply Chain through	)	
FCC Programs	)	
	)	

COMMENTS ON NOTICE OF PROPOSED RULEMAKING REGARDING PROTECTING AGAINST NATIONAL SECURITY THREATS TO THE COMMUNICATIONS SUPPLY CHAIN THROUGH THE FCC'S E-RATE PROGRAM
(WC Docket 18-89; FCC 18-42)

The State E-Rate Coordinators' Alliance ("SECA") submits these Comments in response to the FCC's Notice of Public Rulemaking ("NPRM") released April 18, 2018 (WC Docket 18-89; FCC 18-42) seeking comment on rules to restrict Universal Service Fund ("USF") payments to any equipment and/or service providers deemed to be posing a national security risk to U.S. communications networks or supply chains. These Comments address those NPRM concerns most directly related to E-rate applicant issues.

At the outset, SECA acknowledges and applauds the Commission's concern, expressed as a rhetorical question,[1] that "special considerations" need be given to schools and libraries (and rural health care providers) "which may not be as well-positioned as a carrier receiving USF support to know whether the services and/or equipment they purchase with USF support are being provided by an entity that poses a supply chain integrity risk." SECA believes that similar consideration must be given to schools and libraries with respect to non-carriers, who do not receive USF support directly, but who benefit indirectly through the discounted sale of E-rate services and/or equipment.

Most importantly, E-rate applicant compliance should be based on the assurances and certifications of its service providers.

More specifically regarding the issues raised in this NPRM, SECA recommends the following:

Queen of Peace and Bid Disqualification Relief

The FCC's *Queen of Peace* decision[2] requires applicants to accept and consider proposals from all equivalent manufacturer product lines, even if the district has standardized on a specific manufacturer. Specifically, the decision states:

> *"We therefore clarify that, for Form 470s or RFPs posted for Funding Year 2013 or thereafter, applicants must not include the manufacturer's name or brand on their FCC Form 470 or in their RFPs unless they also use the words 'or equivalent' to describe the requested product or service."* Failure to state "or equivalent" violates the competitive bidding process*."*

In light of the conflict that exists between the *Queen of Peace* rules and the Commission's intentions with regard to this NPRM, SECA believes that the *Queen of Peace* rule should be amended to add that, "unless such equivalent product lines include any prohibited companies or their products."

[1] Paragraphs 10 and 17.

[2] DA 11-1991 (adopted December 7, 2011).

Further, current E-rate rules require applicants seeking to disqualify a bid response to have had specifically indicated any disqualification reasons in their RFP and/or FCC Form 470. To further address the Commission's question(s) in this NPRM related to whether "special considerations" need be given to schools and libraries, SECA believes these rules and USAC guidance must be updated at the earliest possible date to specifically allow for the automatic disqualification of bids that include any prohibited products or services, regardless of whether the applicant's RFP or procurement documents included this specific disqualification reason.

Effective Date and Treatment of Multi-Year Contracts[3]

The NPRM makes clear that proposed rules or any alternative restrictions "would apply only prospectively." For E-rate purposes, "prospectively" should refer to the first E-rate funding year occurring at least one full year after the effective date of any new security requirements governing the use of the USF's E-rate program by schools and libraries. A one-year grace period would allow time for E-rate applicants to be trained to include service provider security compliance as a necessary factor in the selection of providers for the forthcoming funding year.[4]

The provision of ongoing service under a multi-year E-rate contract should be governed by whatever rules and/or timetable that Commission adopts requiring service providers to bring existing equipment and services into compliance. To the extent a service provider cannot or does not comply, the affected E-rate applicants should be granted authority to request Operational SPIN Changes to compliant providers.

We urge the Commission to be mindful that applicants who wish to invoke restrictions sooner rather than later should be given this latitude in the rules, but the ***requirement*** to do so should be one funding year later.

[3] Paragraphs 17 and 18.

[4] To the extent that competitive procurement cycle for more complex bids, including state master contracts, may require more than a one-year lead time, SECA believes that prospective service provider compliance can be handled as a contingent factor within larger, longer, and more sophisticated procurement practices.

Identification of Prohibited Companies[5]

For E-rate purposes, the responsibility for identifying prohibited companies falling within the scope of the Commission's proposed rule must rest with the E-rate service providers — carriers and non-carriers (including manufacturers and/or resellers) alike. As specialists in their respective industries, these suppliers are best equipped — certainly far more so than schools and libraries — to identify the origin of components provided and/or incorporated in their proposals for eligible E-rate products and services. At a minimum, E-rate service providers should be required to certify via an additional certification on existing FCC Forms 473 and/or Form 498 that the products and/or services they are proposing to applicants are fully compliant with the Commission's national security rules. In turn, E-rate applicants should be able to rely upon the certifications of their service providers to demonstrate the applicants' own compliance with such rules.

By relying on service provider certifications, it should not matter whether the E-rate applicants are seeking USF support for products and/or services provided by third parties, or are simply purchasing equipment and installing it themselves. In either case, purchases would be made from certifying suppliers.[6] SECA again urges the Commission to incorporate service provider certifications to comprehensively include attestation(s) assuring compliance with the national security concerns related to supply chain integrity risks for each service provider and their affiliates, including manufacturers and subcontractors who may be part of any service or project involving E-rate support.

To the extent a service provider cannot or can no longer certify compliance, the affected E-rate applicants should be granted authority to request an Operational SPIN Change to a compliant provider. In the FCC's 6th Report and Order, the Commission clarified and codified its rule(s) governing allowable reasons for an Operational SPIN Change request for FY 2011 and beyond.[7] One reason for a SPIN change is when "There is a legitimate reason to change providers." We ask

[5] Paragraphs 24, 27, and 29.

[6] Presumably, prohibited companies could not certify their own compliance (nor would USAC accept such certifications if proffered).

[7] FCC 10-175 (adopted September 23, 2010) at para 91.

the Commission to confirm that a provider's failure to certify compliance constitutes "a legitimate reason to change providers."

Liability for Recovery of Funds[8]

SECA believes that E-rate applicants should always exercise due diligence in their selection of vendors, equipment, and services. Once national security rules are established for the purchase of USF-funded products and services, if not before, the Commission should expect applicant adoption of "best practice" procurement policies consistent with such rules and the underlying security threats. In the absence of clear evidence to the contrary, however, applicant reliance on certifications of its service providers should place the presumptive burden for the recovery of disbursed funds on such providers in all instances involving violations of the proposed rules contemplated in this proceeding. To the extent rule violations may be attributed, not to those suppliers directly, but to other firms further up or further down the supply chain, it will be incumbent on the E-rate providers to have covered themselves contractually with their own suppliers.

Conclusions

The Commission's NPRM to protect the U.S. communications supply chain against national security threats represents the first step in an important, but complex, proceeding. With specific regard to E-rate, however, the Commission should start with the simple and fair presumption — implicit in several of the Commission's questions throughout the NPRM — that **E-rate applicant compliance should be based on the assurances and certifications of its service providers, not the applicants themselves.** SECA fully supports this position.

[8] Paragraph 27.

Respectfully Submitted by:

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