

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

In the Matter of)

Schools and Libraries Universal Service)
Support Mechanism)

WC Docket No. 13-184

**EX PARTE COMMENTS ON THE JULY 26, 2018, APPEAL BY THE
NEW YORK CITY DEPARTMENT OF EDUCATION REGARDING
NON-DUPPLICATIVE, MULTI-VENDOR NETWORKS**

The Schools, Health & Libraries Broadband Coalition (“SHLB”) submits these *ex parte* comments in support of an appeal by the New York City Department of Education (“NYCDOE”) dated July 26, 2018. The [NYCDOE appeal](#) asks the Commission to reverse USAC’s denial of funding for FY 2014, Form 471# 992007, FRN 2707394. We believe that USAC’s denial in this case, and in other similar cases, is based on an incorrect reading of the Commission’s 2007 *Macomb Order*¹ dealing with an applicant’s selection of more than one supplier of non-duplicative telecommunications and/or Internet access services during the same procurement cycle.

SHLB urges the Commission to grant the NYCDOE appeal. More broadly, SHLB encourages the Commission to explicitly recognize the importance of broadband network sustainability to schools and libraries nationwide. Specifically, SHLB suggests that the Commission direct USAC to implement the principle of cost-effective funding for non-duplicative, multi-vendor networks and Internet bandwidth as initially set forth in the *Macomb Order*.

Competitive Bidding and the *Macomb Order*

Two key issues in this discussion are competitive bidding — specifically “cost-effectiveness” — and “duplicative” services. Both issues trace back to the *Second Report and Order*² in which the

¹ *Requests for Review by Macomb Intermediate School District Technology Consortium of a Decision of the Universal Service Administrator*, File No. SLD-441910, CC Docket No. 02-6, FCC 07-64 (2007); <https://docs.fcc.gov/public/attachments/FCC-07-64A1.pdf>.

² *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 02-6, FCC 03-301 (2003). <https://docs.fcc.gov/public/attachments/FCC-03-101A1.pdf>

Commission explained that the funding of duplicative services is prohibited for two reasons: (1) the services are not cost-effective; and (2) the services do not meet the provision in the original 1997 Universal Service Order that E-rate funding should be provided in accordance with the “reasonable needs and resources of applicants.” In the *Second Report and Order*, the Commission also defined duplicative services as “services that deliver the same functionality to the same population in the same location during the same period of time.”³

These issues were again addressed in the 2007 *Macomb Order* when an applicant appealed a funding denial of T-3 circuits that would be used during the funding year, but which would be purchased from different vendors. In granting the appeal and reinstating funding in part, the Commission recognized the legitimacy of the district’s need for multiple T-3 circuits.⁴ Specifically, the Commission noted that it did “not find fault with Macomb ISD’s request for multiple T3 lines, provided that the services are needed.”⁵ but criticized the district’s choice of selecting higher-priced services from two of the carriers.⁶ The criticism was directed not at the district’s decision to select multiple carriers to maximize network reliability, but at the failure of the district to meet a core E-rate competitive bidding rule. How, questioned the Commission, could three bids, at different prices by different carriers, all be considered the most “cost-effective?”⁷

The Commission did not find that Macomb had purchased duplicative services simply because it purchased services from multiple carriers; it remanded that determination back to USAC for further review based on whether the amount of broadband was necessary to meet the district’s needs.⁸ Instead, the Commission approved funding for all three carrier circuits, as long as the services were needed by the district, but limited funding for each at the lowest, competitively determined, and most cost-effective level set by the winning bidder.⁹ This maintained the integrity of E-rate’s competitive bidding rule without unduly preventing the district from diversifying its carrier base for maximum network reliability. All-in-all, this was a reasonable trade-off of competing program objectives and available E-rate resources. It is a model solution equally applicable today — as requested in NYCDOE’s appeal — but one that has not been incorporated in USAC’s application review process.

USAC appears to have implemented a too-broad read of the *Macomb Order*, presuming that any time an applicant applies for funding for the same services from two different providers, one of the two services is “duplicative” and must be denied, regardless of the bandwidth required by the applicant. It was this precise circumstance that gave rise to the NYCDOE instant appeal. As NYCDOE explains, NYCDOE was using services from two vendors but needed the aggregate

³ *Id.* at para. 22.

⁴ *Macomb Order* at paras. 1, 8.

⁵ *Macomb Order* at para. 8.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at para. 9.

⁹ *Id.*

amount of service being purchased. Simply because NYCDOE chose to diversify its purchase of service among two vendors, USAC denied NYCDOE funding for half of its needed service. Just as the Commission decided in the *Macomb Order*, SHLB believes that E-rate applicants should be allowed to select multiple service providers to provide the same services (for example, telecommunications or Internet access) as long as (1) the bandwidth is necessary to meet their needs; and (2) the E-rate program only reimburses the applicant at the rate charged by the least expensive of the carriers, if the carriers' rates are different.¹⁰

Importance of Network Resilience

E-rate should not — and cannot afford to — fund redundant, back-up broadband capacity. On the other hand, SHLB believes E-rate should, must, and can support the intelligent design of resilient, sustainable networks minimizing single points of network failure. For statewide, regional, or large school district networks, resilience may logically involve alternate Internet connections from separate Internet providers. This precisely the reason New York City selected two Internet providers in FY 2014. This decision was understandable, especially given that the network operations center (NOC) of the NYCDOE's service provider was devastated during the Sept. 11, 2001 terrorist attack on New York City.

E-rate applicants could be similarly left without service in the event of a flood or other natural disaster, or simply because of accidental fiber cut.¹¹ Due in large part to the E-rate efforts of the Commission, broadband has become a pervasive and necessary resource for our nation's schools and libraries. It has fundamentally changed — and continues to change — the way our schools operate, communicate, perform administrative tasks, and educate our children. Particularly for schools, network reliability has become absolutely essential. Loss of Internet capability, especially during periods of intensive online testing, can leave schools without a “plan B” and waste valuable instructional time.

Further, loss of services can be a school safety issue as well. Many schools and libraries now may rely on the same lines and Internet access to receive VoIP telephone service. If the Internet is down, so are the phones, limiting a school's ability to contact first responders in the event of an emergency.

As a policy matter, the Commission should not prohibit applicants from selecting multiple service providers, as long as the capacity is needed to meet the applicant's needs.

¹⁰ This directive to USAC should not change the Commission's long-standing rule that applicants do not have to select the least expensive bidders while making a determination of cost-effectiveness. Instead, for the winning bidders, the applicant could use the price charged by the least expensive of the bidders to seek reimbursement for all of the services of that type from the program.

¹¹ See, e.g., <http://www2.ljworld.com/news/2016/jun/05/ku-still-tallying-total-cost-massive-internet-fibe/>.

Unnecessary Services Should Be Prohibited

The use of the word “duplicative” in the E-rate lexicon may not be the best description of the issue in these cases. Better terms to distinguish between ineligible and eligible services might be “redundant” and “non-redundant.” Multiple Internet circuits, for example, should be eligible if the capacity of both circuits is necessary to meet the applicant’s full bandwidth requirements. Conversely, a second circuit provided only for backup — thus “redundant” — would be ineligible.

SHLB believes that a prohibition of “duplicative” services, as the term is currently being used, is being too broadly construed by USAC to preclude valid funding of similar, needed, “non-redundant” services. We urge the Commission to grant the NYCDOE’s appeal. We ask the Commission to direct USAC to determine whether services provided by multiple carriers are “redundant”— that is, the bandwidth is not necessary for the applicant—before denying any funding, instead of assuming that applicants using multiple carriers are purchasing redundant services. We ask the Commission to clarify that bandwidths meeting the targets established in the Commission’s *First Modernization Order* are not redundant.¹²

Conclusion

SHLB recognizes the importance of the cost-effectiveness criteria but urges the Commission to consider that the “effectiveness” of a school and library broadband network is increasingly tied to its reliability, resilience, and sustainability. We request the Commission to reaffirm its decision in the *Macomb Order*, approve the NYCDOE appeal on the same basis, and provide related application review and approval direction to USAC.

Respectfully Submitted by:



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¹² *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870 (2014) (*July 2014 Modernization Order*).