

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
Schools and Libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	
Connect America Fund)	WC Docket No. 10-90
)	
Modernizing the E-rate Program for Schools and Libraries)	WC Docket No. 13-184
)	
Petitions Regarding Off-Campus Use of Existing E-rate Supported Connectivity)	
)	
)	

**COMMENTS OF
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES**

**Genevieve Morelli
Michael J. Jacobs
ITTA
1101 Vermont Ave., NW
Suite 501
Washington, D.C. 20005**

November 3, 2016

Table of Contents

I.	INTRODUCTION AND SUMMARY	1
II.	THE PETITIONS FAIL ON SUBSTANTIVE AND PROCEDURAL GROUNDS, AND SHOULD BE DENIED	4
	A. The Petitions Frustrate the Universal Service Statutory Scheme	4
	B. Petitioners' Proposed Projects Do Not Sufficiently Safeguard the E-rate Program	10
	C. If the Commission Does Not Deny the Petitions Outright, They Should Only Be Considered in the Context of a Full-Fledged Rulemaking Proceeding	13
III.	CONCLUSION.....	16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
Schools and Libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	
Connect America Fund)	WC Docket No. 10-90
)	
Modernizing the E-rate Program for Schools and Libraries)	WC Docket No. 13-184
)	
Petitions Regarding Off-Campus Use of Existing E-rate Supported Connectivity)	
)	

**COMMENTS OF
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES**

ITTA – The Voice of Mid-Size Communications Companies (ITTA) hereby submits its comments opposing two petitions requesting that the Commission allow E-rate subsidized broadband networks to be accessed by students at home, without an obligation on the E-rate applicant to cost allocate the portion of the traffic attributable to off-campus use.¹

I. INTRODUCTION AND SUMMARY

Section 254(h) of the Communications Act of 1934, as amended (the Act) provides that E-rate supported services are services “to elementary schools, secondary schools, and libraries for educational purposes,” and advanced services are “to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school *classrooms*, health care

¹ See *Wireline Competition Bureau Seeks Comment on Petitions Regarding Off-Campus Use of Existing E-rate Supported Connectivity*, Public Notice, DA 16-1051 (WCB Sept. 19, 2016) (*Public Notice*).

providers, and *libraries*.”² Schools and libraries seeking E-rate funding are required to certify, among other things, that the services they purchase at discounts will be used primarily for educational purposes.³ Where E-rate funding is requested for a product or service that includes both eligible and ineligible components, the ineligible component(s) must be cost allocated out of applicant funding requests.⁴ The E-rate Eligible Services List specifically requires that off-campus use be cost allocated out of a funding request.⁵

The two subject petitions seek to allow schools and school districts to extend existing E-rate supported services to the homes of students in and around those schools for educational purposes, without creating an obligation on the applicant to cost allocate out the portion of traffic attributable to off-campus use. In the Microsoft Petition,⁶ the petitioners propose to extend E-rate covered Internet access service of 18 schools in rural Charlotte and Halifax counties, Virginia to the homes of eligible students via wireless transmission using TV White Spaces technology (TVWS). The Microsoft Petitioners maintain that the area encompassing the participating schools is low-income, lacking in widespread fixed broadband connectivity, and costly to serve.⁷ They claim that the cost of implementing the TVWS connections between students’ homes and schools in the area will not require E-rate funding, and that there will be no

² 47 U.S.C. § 254(h)(1)(B), (2)(A) (emphasis added).

³ See 47 CFR § 54.504(a)(1)(v).

⁴ See *id.* § 54.504(e).

⁵ *Public Notice* at 2 n.13 (citing *Modernizing the E-rate Program for Schools and Libraries*, Order, 30 FCC Rcd 9923, 9936, Appx. B (WCB 2015)); see also *Modernizing the E-rate Program for Schools and Libraries*, Order, 31 FCC Rcd 9767, 9780, Appx. C (WCB 2016).

⁶ Joint Petition for Clarification or, in the Alternative, Waiver of Microsoft Corporation, Mid-Atlantic Broadband Communities Corporation, Charlotte County Public Schools, Halifax County Public Schools, GCR Company, and Kinex Telecom, WC Docket No, 13-184 (filed June 7, 2016) (Microsoft Petition).

⁷ *Id.* at 8.

increase in charges for the non-metered use of the schools' E-rate discounted bandwidth.⁸ They seek clarification that the schools' E-rate funded Internet access service "may be used in conjunction with their project" without the project having to cost allocate out any funding.⁹

In the Boulder Valley Petition,¹⁰ the petitioners seek waiver of the cost allocation rule "to allow school districts to provide Internet access to students at home using E-rate subsidized broadband networks in cases where student families do not already have Internet access at home and the service imposes no additional cost" to the E-rate program.¹¹ The Boulder Valley Petitioners allege that, by partnering with local housing authorities or other entities willing to purchase the equipment needed to connect school districts' networks to affordable housing complexes, districts could extend service to students residing in those complexes with no need for additional E-rate funding.¹² Thus, the Boulder Valley Petitioners seek relief from school districts having to cost-allocate out of their districts' E-rate funding requests the portion of the network that serves these complexes where "(1) the school has not requested more services than are necessary for on-campus educational purposes; (2) no additional costs will be incurred by the Universal Service Fund (USF); and (3) the majority of at-home use will be during hours in which classes are not in session."¹³

The Commission should deny the petitions. The petitioners seek to use E-rate supported services essentially to deploy broadband to households that purportedly do not currently have

⁸ *See id.* at 11, 13, 16.

⁹ *Id.* at 14. In the alternative, they seek a waiver of the Commission's definition of "educational purposes" to the extent such definition precludes off-campus use of E-rate supported services. *See id.* at 3, 17.

¹⁰ Petition for Waiver on Behalf of Boulder Valley School District, WC Docket Nos. 13-184 and 10-90 (filed May 16, 2016) (Boulder Valley Petition).

¹¹ *Id.* at 1.

¹² *See id.* at 2-3.

¹³ *Id.* at i.

affordable access to it. The petitioners' proposals are problematic under the statutory scheme of Section 254 and are unnecessary in light of alternative approaches they can employ that do not involve usage of E-rate funding.

The petitioners' proposals also fail to safeguard the E-rate program. In light of Commission precedent regarding limiting E-rate supported services to those on-campus, with one extremely limited set of exceptions that do not apply here, the measures depicted by the petitioners hardly qualify as safeguards that the connectivity will only be used for educational purposes.

If the Commission does not deny the petitions altogether, at most it should consider them in a notice and comment rulemaking proceeding. The public notice released by the Wireline Competition Bureau seeking comment on the petitions without an Initial Regulatory Flexibility Analysis satisfies the requirements of neither the APA nor the Regulatory Flexibility Act. Furthermore, there are absolutely no grounds for the Bureau to address the petitions on delegated authority.

II. THE PETITIONS FAIL ON SUBSTANTIVE AND PROCEDURAL GROUNDS, AND SHOULD BE DENIED

To paraphrase the well-known aphorism, the slope to trouble is iced over with good intentions. While the petitioners are to be lauded for attempting to find creative solutions to the “homework gap,” their petitions suffer multiple substantive and procedural infirmities.

A. The Petitions Frustrate the Universal Service Statutory Scheme

Section 254(b)(5) of the Act provides that there should be “*specific, predictable* and sufficient Federal and State mechanisms to preserve and advance universal service.”¹⁴ Section 254(e) further provides that “only an eligible telecommunications carrier [ETC] designated under section 214(e) shall be eligible to receive specific Federal universal service support. . . . Any

¹⁴ 47 U.S.C. § 254(b)(5) (emphasis added)..

such support should be *explicit*¹⁵ For decades after passage of the Act, the Commission and the states used rate regulation to establish a complex system of implicit subsidies that achieved near-universal availability of voice service even in the most expensive areas to serve. This system was unsustainable, however, in the competitive environment stimulated by the Telecommunications Act of 1996. As a result, Congress directed the Commission to replace the system of implicit subsidies with explicit ones, both via the “specific, predictable, and sufficient” mechanisms provisions of Section 254(b)(5), and the provisions of Section 254(e) requiring “explicit” payments to ETCs serving high-cost areas, as designated by state utility commissions or by the Commission.¹⁶

The Commission recognizes that different considerations may go into how services are supported pursuant to the different USF funding programs.¹⁷ As the Commission explained in the *Qwest II Remand Order*:

The Commission developed four universal service support programs to implement all of the statutory requirements set forth in section 254 of the Act. . . . [E]ach support program necessarily addresses some of the principles more directly than others. While the Commission kept the larger statutory goals in mind as it developed the four support programs, it did not attempt to fully address each universal service principle in section 254(b) through each support mechanism. Nor is there any indication that Congress intended each principle to be fully addressed by each separate support mechanism. . . . The four universal service programs work in tandem to accomplish the principles set forth in section 254(b).¹⁸

¹⁵ 47 U.S.C. § 254(e) (emphasis added).

¹⁶ See *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1085 (D.C. Cir. 2012); Brief for the Federal Respondents in Opposition at 3-4, *United States Cellular Corp. v. FCC*, Nos. 14-610, 14-898, 14-900, and 14-901 (U.S. Mar. 31, 2015).

¹⁷ See, e.g., *Modernizing the E-rate Program for Schools and Libraries*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8897, paras. 72-73 (2014).

¹⁸ *High Cost Universal Service Support; Federal-State Joint Board on Universal Service; Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming’s Non-Rural Incumbent Local Exchange Carrier*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, 4086-87, paras. 26-27 (2010) (*Qwest II Remand Order*).

There have been numerous instances of the Commission declining to use one of the USF support programs in furtherance of the goals of another. For instance, in rebuffing arguments against establishing a “rate floor” in order to ensure that high-cost program funds were not used to perpetuate artificially low local service rates, the Commission asserted that the high-cost program “has not been designed to provide differing amounts of high-cost support for areas with lower incomes. Rather, other Commission mechanisms – specifically, the Lifeline program – are the primary means by which the Commission seeks to ensure that rates are affordable for low-income households.”¹⁹

Against this backdrop, the Microsoft and Boulder Valley Petitioners seek to use E-rate supported services essentially to deploy broadband to households that purportedly do not currently have affordable access to it. However, the petitioners’ proposals are problematic under the statutory scheme of Section 254.

The Microsoft Petitioners state that, with respect to the two counties that would be involved in its proposed project, “the low population density in the two counties – among the lowest in Virginia – renders them costly to serve with new wireline broadband deployments,” and there is an “almost total absence of fixed broadband coverage outside of each county’s

¹⁹ *Connect America Fund et al.*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7077, para. 77 (2014) (citing *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 4136, 4156-58, paras. 34-35 (2010) (finding that the low-income support program – *not* high-cost support – is the program best suited to address issues of affordability and subscribership in Puerto Rico)). *See also Qwest II Remand Order*, 25 FCC Rcd at 4087, para. 27 (“[W]hile the basic purpose of high-cost support is to ensure that telephone service is not prohibitively expensive for consumers in rural, insular, and high-cost areas, some consumers in those areas will still need additional assistance due to their low household income. Low-income support, provided through the Lifeline and Link-up programs, supplements high-cost support in those circumstances to remove the additional affordability barriers . . .”).

largest town”²⁰ If these areas are eligible for high-cost/CAF support, using E-rate supported services to accomplish high-cost program/CAF goals threatens to undermine the specificity, predictability, and explicitness of USF support. Likewise, insofar as the Boulder Valley Petitioners seek to use E-rate supported services to provide Internet access to “low-income students,”²¹ – presumably most of whom live in households that would qualify for Lifeline support -- using E-rate supported services to accomplish Lifeline program goals threatens to undermine the specificity and predictability of USF support.

The use of E-rate funding to achieve both E-rate and high-cost program/CAF goals, or E-rate and Lifeline goals, would compromise the explicitness of high-cost support and the specificity and predictability of the program would be undermined. Citing *Alenco*, the Commission, in the *USF/ICC Transformation Order*, explained that the term “predictable” modifies “Federal and State mechanisms” under Section 254(b)(5).²² Thus, under *Alenco*, the Fifth Circuit Court of Appeals found that the Commission reasonably construed that the predictability principle governs the distribution of subsidies.²³ Under the petitioners’ proposals, the predictability of the E-rate support mechanism would be diluted if that support is also used in furtherance of high-cost program/CAF or Lifeline program goals.²⁴

²⁰ Microsoft Petition at 8-9.

²¹ Boulder Valley Petition at 5.

²² *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17776, para. 310 (2011) (*USF/ICC Transformation Order*), *aff’d sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (citing *Alenco Communications v. FCC*, 201 F.3d 608 (5th Cir. 2000)).

²³ *See id.* at 17776-77, para 310 (citing *Alenco*, 201 F.3d at 622, 623); *see also Connect America Fund; High-Cost Universal Service Support*, Order, 27 FCC Rcd 7158, 7162, para. 13 (WCB 2012) (the Commission can satisfy the statutory mandate via predictable rules that govern distribution of subsidies, not be ensuring predictable outcomes) (citing *Alenco*, 201 F.3d at 622).

²⁴ It also bears noting that under Sections 214 and 254 of the Act, 47 U.S.C. § 214, 254, only ETCs are authorized to receive USF support for deploying broadband to high-cost areas or

(continued...)

Notably, the Commission’s E-rate funding rules do not prohibit the use of E-rate supported infrastructure as part of petitioners’ described projects; rather, they merely require that the E-rate recipients cost-allocate the portion of the traffic attributable to off-campus use. If the incremental costs of using E-rate supported services as advocated by the petitioners are as *de minimis* (or non-existent) as the petitioners would have the Commission believe,²⁵ there is no reason the petitioners cannot structure these projects in a manner such that the subject school districts can cover, or receive private or other public assistance in covering, cost-allocated portions of the traffic attributable to off-campus use.²⁶ Nowhere does either petition address, for instance, why the petitioners cannot partner with private entities, including local ETCs, to accomplish the stated purposes of the projects. Rather than asking the Commission to contort the statutory scheme and potentially start down a slippery regulatory slope in the process, the creative forces underlying the Microsoft Petitioners’ and Boulder Valley Petitioners’ projects would be better applied towards figuring out how best to make them work within the parameters of the Commission’s policies and rules.²⁷

(Continued from previous page) _____
supporting broadband for low-income consumers through the Lifeline program. There is no indication in either petition that any of the petitioners is an ETC.

²⁵ See, e.g., Boulder Valley Petition at 3-4.

²⁶ See Microsoft Petition at 13 n.30 (“Because the pilot project is being developed jointly by well-financed entities, resources will exist for any unanticipated additional funding needs.”); Boulder Valley Petition at 7 (“Public housing authorities as well as state and local entities will have incentives to invest in build-out and equipment when assured that regular service for such projects is available.”).

²⁷ The harms that the Boulder Valley Petitioners allege would result from denial of their petition are particularly speculative and avoidable: “Even if a school district could determine what portion of its service is allocated to off-campus use, a school district may choose not to serve students at home in fear that if it makes a mistake, it would jeopardize E-rate funding. Even perfect compliance with the cost allocation requirements may raise the risk of [USAC] auditing and the resulting additional cost and delay.” Boulder Valley Petition at 4. To paraphrase a common pedagogical maxim, an ounce of applicant diligence is worth a ton of unnecessary regulatory difficulty.

In fact, just this past Spring – approximately three weeks prior to the filing of the Boulder Valley Petition – the Commission required Lifeline providers that provide supported broadband service and devices to their consumers to provide devices that are Wi-Fi enabled and equipped with hotspot functionality, in particular recognition of the needs of students (and others) to access the Internet on multiple platforms and in various ways.²⁸ The Commission adopted these requirements “because the hotspot requirement will help to ensure that households without fixed Internet access will be able to share their access to the Internet among multiple members if so desired.”²⁹ In so doing, the Commission described how its action would fulfill the very low-income student off-campus connectivity goals sought to be achieved by the Boulder Valley Petitioners, but as a complement to the E-rate program, neither using its funding nor subject to its restrictions.³⁰ The Commission also reported that “various initiatives have improved broadband access to underserved groups, some of which contain low-income student populations,”³¹ and concluded that “[t]hese innovative approaches to improving broadband access for low-income students and other groups are to be applauded and they highlight the fact that there are numerous paths to connectivity for low-income individuals.”³² In light of all these actions and findings, the Boulder Valley Petition is unnecessary.

²⁸ See *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4095, para. 367 (2016) (*Third Lifeline Modernization Order*).

²⁹ *Id.*

³⁰ See *id.* at para. 368 (“[W]e recognize the valuable role that the Lifeline program can play in the lives of elementary and secondary students living in low-income households beyond the school day. Lifeline can help to extend broadband access beyond the school walls and the school day to ensure that low-income students do not become digitally disconnected once they leave the school building.”).

³¹ *Id.* at 4098, para. 372.

³² *Id.* at para. 373.

For all of the foregoing reasons, the Commission should find that the projects described in the Microsoft and Boulder Valley petitions contravene the structure and application of Section 254.

B. Petitioners' Proposed Projects Do Not Sufficiently Safeguard the E-rate Program

E-rate program policy and precedent draws a wide line in the sandbox based on the physical location of the services being provided, with the presumption that a service is eligible for E-rate support only when it is provided on-campus or at the library, and extremely narrow exceptions considering off-campus use eligible for support. This is largely because of the difficulties of monitoring compliance with the E-rate program's bedrock "educational purpose" requirements outside of the physical environment of a school or library.

For instance, in 2003, the Commission established a standard that activities that are "integral, immediate, and proximate" to the education of students in the case of schools, or to the provision of library services to library patrons in the case of libraries, qualify as educational purposes under the E-rate program.³³ In implementing this standard, the Commission "further establish[ed] a presumption that activities that occur *in a library or classroom or on library or school property* are integral, immediate, and proximate to the education of students or the provision of library services to library patrons" and found that this presumption "is consistent with statutory mandates that the purpose for which support is provided be for educational purposes *in a place of instruction.*"³⁴ Even when the Commission amended its rules to allow

³³ *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, 9208, para. 17 (2003) (*Schools and Libraries Second Report and Order*).

³⁴ *Id.* at 9208, para. 17, 9209, para. 20 (emphases added). See also, e.g., *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, Sixth Report and Order, 25 FCC Rcd 18762, 18783, para.41, 18784, para. 43 (2010) (*E-rate Sixth Report and Order*).

community use of E-rate supported services to potentially include some non-educational usage, it was only *at school facilities*, where they would still primarily be used for educational purposes, and where those facilities would only be available to the public during non-school hours.³⁵ In the *Schools and Libraries Second Report and Order*, the Commission concluded that in certain limited instances, the use of telecommunications off-campus would also be integral, immediate, and proximate to the education of students or the provision of library services to library patrons, and thus would be considered to be an educational purpose; these limited enumerated instances, however, all involved use of E-rate supported services by *employees* of the school or library.³⁶

Concerns about accountability of the E-rate program and waste, fraud and abuse in the program have played prominently in the policies and rules underlying the program since its inception, and continue today.³⁷ And for good reason – too often the Commission is forced to pursue enforcement actions against bad actors seeking to seize upon the institutional difficulties of ensuring compliance with the Commission’s rules in order to defraud the program of millions of dollars at the expense of consumers.³⁸

In 2010, when presented with a proposal to use E-rate funds to connect students off-campus via wireless services, the Commission acknowledged the multiple compliance challenges in ensuring that the services would be used for educational purposes. The Commission

³⁵ *E-rate Sixth Report and Order*, 25 FCC Rcd at 18774, paras. 21-22.

³⁶ *See Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9208-09, para. 19 & n.28.

³⁷ *See, e.g., Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9076, para. 570 (1997); *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9209, para. 21; *Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004); *E-rate Sixth Report and Order*, 25 FCC Rcd at 18775, para. 24.

³⁸ *See, e.g., New York City Department of Education*, Order, 30 FCC Rcd 14223, 14226, Attach., Consent Decree at para. 5 (EB 2015) (New York City Department of Education pays a settlement amount of \$3 million following a “massive fraud” perpetrated over 12 years by Project Manager of its E-rate project).

determined that these concerns warranted further inquiry and consideration, and ultimately approved the proposal as a pilot project. The Commission cited comments identifying possible challenges in administration and oversight, and in ensuring compliance with existing program rules, including requirements under the Children’s Internet Protection Act (CIPA) and the program’s definition of educational purposes, as well as raising the potential for waste, fraud, and abuse.³⁹

These same concerns exist with respect to the Microsoft and Boulder Valley Petitioners’ projects. For instance, as to the prospects that the E-rate funded connectivity will be used for non-educational purposes, the Microsoft Petitioners merely state that “the project’s design minimizes the potential for such use,” pointing to Internet access at home under the project only being technically possible with a “specialized . . . access point” that can only be accessed via authentication with unique credentials issued to participating students.⁴⁰ In addition, in one paragraph contending that its project will not impose additional costs on the E-rate program, the only safeguard the Microsoft Petitioners conjures is that the participating schools’ E-rate supported Internet access services are not usage-metered.⁴¹

The Boulder Valley Petition presents an even thinner description of safeguards. It suggests that “the majority of at-home use will be during hours in which classes are not in session.”⁴² It then elaborates that “most use” will be after school hours since students are generally not home during the school day, but that a student who is absent for any reason would still have access to the network while at home during the day.⁴³ The only other safeguard it touts

³⁹ See *E-rate Sixth Report and Order*, 25 FCC Rcd at 18784, para. 43.

⁴⁰ Microsoft Petition at 10.

⁴¹ See *id.* at 13.

⁴² Boulder Valley Petition at i.

⁴³ See *id.* at n.1.

is that “the school has not requested more services than are necessary for on-campus educational purposes.”⁴⁴ Nowhere does it mention CIPA compliance.

In light of Commission precedent regarding limiting E-rate supported services to those on-campus, with one extremely limited set of exceptions that do not apply here, the measures depicted by the petitioners hardly qualify as safeguards that the connectivity will only be used for educational purposes. Importantly, while both petitions contend that their proposals will entail no additional costs to the USF, neither petition mentions any safeguards against the school districts over-provisioning service to account for increased demand on the network. Neither describes any mechanism to monitor use to ensure it is for educational purposes. In a program where the Commission is continually adjusting its rules in an effort to shut the door on the waste, fraud and abuse that beleaguers the program, granting the subject petitions would be tantamount to an open admissions policy to let them back in.

C. If the Commission Does Not Deny the Petitions Outright, They Should Only Be Considered in the Context of a Full-Fledged Rulemaking Proceeding

The very existence of these petitions, as well as the vexing statutory issues they raise, illustrates why granting them is impermissible. Aside from being infirm vis-à-vis Section 254 of the Act, and failing to proffer necessary safeguards to ensure that E-rate supported services will be used for educational purposes, granting them would violate the APA.

The Microsoft and Boulder Valley Petitions do not seek to refresh the record of a currently pending notice of proposed rulemaking; rather, they seek comment on new and novel uses of E-rate funding which implicate the structure of Section 254 of the Act. Given the concerns they raise, they are analogous to the off-campus connectivity via wireless services pilot project that the Commission initiated in 2010.⁴⁵ That pilot project was adopted by Commission

⁴⁴ *Id.* at i.

⁴⁵ *See supra* Sec. II.B.

action in a rulemaking proceeding. Among the information the Commission hoped to glean from the pilot project was how it would “ensure compliance with the statute and Commission rules.”⁴⁶ Notably, in three places on the same page the Commission made clear that it was evaluating the project *in order to determine whether rule changes were appropriate*;⁴⁷ it did not issue any declaratory ruling nor grant any waiver relief. As the Commission indicated with respect to the 2010 pilot project, the proper procedural vehicle for considering the Microsoft and Boulder Valley Petitioners’ proposals – if the Commission does not, as it should, deny them outright -- is through a formal notice and comment rulemaking proceeding.

Section 503 of the APA⁴⁸ requires the Commission to publish a notice of proposed rulemaking in the Federal Register, seeking comment on the notice. Moreover, the Regulatory Flexibility Act of 1980⁴⁹ requires that the Commission prepare an Initial Regulatory Flexibility Analysis (IRFA). Here, the Wireline Competition Bureau (Bureau) merely released a public notice seeking comment on the petitions, without an IRFA. This does not satisfy the requirements of either the APA or the Regulatory Flexibility Act.

Furthermore, even if the Commission somehow was to determine that it could dispense with compliance with the APA and Regulatory Flexibility Act, the Boulder Valley Petitioners’ suggestion that their self-styled Petition for Waiver could be acted upon by the Bureau is simply

⁴⁶ *E-rate Sixth Report and Order*, 25 FCC Rcd at 18785, para. 45.

⁴⁷ “We believe these concerns warrant *further inquiry and consideration before such services should be eligible for support on a program-wide basis*. . . . *To assist us in our inquiry and program development, we establish a trial program to investigate the merits and challenges of wireless off-premises connectivity services, and to help us determine whether they should ultimately be eligible for E-rate support*. . . . Finally, we hope to gain insight . . . that will *assist us in crafting effective permanent rules in the area should we decide to support offsite wireless services*.” *Id.* at paras. 43-45 (emphases added). The Commission has not taken any further action other than receiving reports on pilot project results.

⁴⁸ 5 U.S.C. § 553.

⁴⁹ 5 U.S.C. § 603.

preposterous.⁵⁰ For one thing, notwithstanding their styling their pleading as a “Petition for Waiver,” in reality it is seeking wide relief. Nowhere do the Boulder Valley Petitioners explain how circumstances particular to the Boulder Valley School District merit relief. In fact, their petition makes clear that they are seeking relief on behalf of all school districts anywhere that comply with their few conditions.⁵¹ Thus, at a minimum, the Commission must treat the Boulder Valley Petition as a petition for declaratory ruling. In any event, given the “new and novel” issues it raises, the Bureau does not possess the delegated authority to act on it itself.⁵²

As support for its contention that the circumstances here are not “new and novel” and therefore may be resolved by the Bureau pursuant to Section 0.91(b) of the Commission’s rules,⁵³ the Boulder Valley Petitioners rely on a 15-year-old waiver granted by the Commission to the State of Alaska.⁵⁴ There, the Commission granted a limited waiver allowing members of rural remote communities in Alaska to use excess service obtained through the E-rate support mechanism, when the services were not in use by the schools and libraries. Of the five conditions of that waiver, there is no evidence that the Boulder Valley Petition satisfies three. First, there, the waiver applied where there was no local or toll-free Internet access available in the community; here, the Boulder Valley Petitioners do not allege that any particular community

⁵⁰ See Boulder Valley Petition at 8-9.

⁵¹ See *id.* at 1 (“We request a waiver of the cost allocation rule in 47 C.F.R. § 54.504(e) to allow school districts to provide Internet access to students at home using E-rate subsidized broadband networks in cases where student families do not already have Internet access at home and the service imposes no additional cost to the Universal Service Fund (USF).”); see also, e.g., *id.* at i, 4, 5, 6, 7.

⁵² See 47 CFR § 0.291(a)(2) (Bureau does not have authority “to act on any . . . requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines”).

⁵³ 47 CFR § 0.91(b) (the Bureau may “[a]ct on requests for interpretation or waiver of rules.”).

⁵⁴ *Federal-State Joint Board on Universal Service; Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, Order, 16 FCC Rcd 21511 (2001).

that a school district would seek to serve is lacking in broadband access. Second, there, the waiver applied where no additional costs would be incurred by the E-rate program; here, as discussed above, the Boulder Valley Petition provides nothing more than an unsubstantiated sweeping statement to that effect. Third, there, any use for non-educational purposes had to be limited to hours in which the school or library was not open; here, as discussed above, the Boulder Valley Petitioners concede that the E-rate supported services would be used by students who are at home during school hours for whatever reason.

III. CONCLUSION

For the foregoing reasons, the Bureau or Commission should summarily deny the Microsoft and Boulder Valley Petitions. They do not comport with Section 254's statutory scheme or Commission precedent. They also provide wholly inadequate explanations of the critical safeguards required to ensure the projects are utilized for educational purposes, and do not otherwise present any compelling reasons why they should be granted. At most, the Commission should seek further comment on them in the course of an APA-compliant notice and comment rulemaking proceeding.

Respectfully submitted,

By: /s/ Michael J. Jacobs

Genevieve Morelli
Michael J. Jacobs
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, DC 20005
(202) 898-1520
gmorelli@itta.us
mjacobs@itta.us

November 3, 2016